

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-000691-MR

R&R, INC. OF LOUISVILLE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NOS. 00-CI-00100 & 00-CI-00296

COMMONWEALTH OF KENTUCKY,
FINANCE AND ADMINISTRATION CABINET

APPELLEE

AND: NO. 2004-CA-000723-MR

APEX INDUSTRIES, INC.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NOS. 00-CI-00100 & 00-CI-00296

COMMONWEALTH OF KENTUCKY,
FINANCE AND ADMINISTRATION CABINET

APPELLEE

OPINION

AFFIRMING

** ** * * * * * * * * * *

BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: R&R, Inc. of Louisville (R&R) and Apex Industries (Apex) appeal from an opinion and order of the Franklin Circuit Court granting summary judgment to the Commonwealth of Kentucky, Finance and Administration Cabinet (Cabinet), in a contract dispute in which R&R and Apex seek compensation for delays in a construction project. Because compensation to the appellants for such delays are explicitly excluded under their contract with the Cabinet, we affirm.

This action arises from a contractual dispute related to the construction of the Commonwealth Convention Center Expansion Project in Louisville, Kentucky (Expansion Project). The Expansion Project entailed the use of multiple contractors. To expedite the bidding process, the Project was slated for "fast track" bidding - a practice in which the separate components of the Project would be submitted for bids in "Bid Packages." This bidding methodology allowed specific portions of the project to be awarded while others were still in earlier stages.

On October 31, 1997, Apex entered into a contract with the Cabinet for the installation of a "fire sprinkler system" in

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

the Convention Center Expansion Project. On November 7, 1997, R&R entered into a contract with the Cabinet to provide "labor and material" for Phase I construction of the Expansion Project. Both contracts established an initial project completion date for Apex's and R&R's work of March 14, 1999.

Service Fabrication, Inc. was awarded the contract for erection of the structural steel for the Project. Pursuant to its contract with the Cabinet, it was to complete its work on or before July 31, 1998. Unfortunately, Service Fabrication fell substantially behind schedule. Without the structural steel in place, neither Apex nor R&R could carry out its required work.

On December 3, 1998, the Cabinet issued an "Advice of Change" order advising the appellants that the Phase I completion date had been extended until June 25, 1999, in order to allow Service Fabrication to "catch up" with its work. The Change Order stated that the revised completion date would not result in any increase to the contract amount for the contractors, such as the appellants, who were affected by the delay. As a result of the delays, the actual contract final completion date for Apex did not occur until August 14, 1999, and the final completion date for R&R did not occur until November 30, 1999.

As a result of the delays, Apex and R&R requested additional compensation from the Cabinet, which was denied. The

appellants subsequently filed actions in Franklin Circuit Court seeking damages for the delays. The appellants claimed damages related to extended job site costs, added labor costs, lost productivity, acceleration costs, and forfeiture of other business opportunities. On January 15, 2004, the circuit court entered an order granting summary judgment to the Cabinet.

The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Palmer v. International Ass'n of Machinists, 882 S.W.2d 117, 120 (Ky. 1994); Stewart v. University of Louisville, 65 S.W.3d 536, 540 (Ky. App. 2001); Kentucky Rules of Civil Procedure (CR) 56.03. The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 482 (Ky. 1991); see also City of Florence, Kentucky v. Chipman, 38 S.W.3d 387, 390 (Ky. 2001). "The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." Wymer v. JH Properties, Inc., 50 S.W.3d 195,

199 (Ky. 2001)(citing Harker v. Federal Land Bank of Louisville, 679 S.W.2d 226 (Ky. 1984)). The court must view the record in the light most favorable to the non-movant and resolve all doubts in his favor. Commonwealth v. Whitworth, 74 S.W.3d 695, 698 (Ky. 2002); Lipsteuer v. CSX Transportation, Inc., 37 S.W.3d 732, 736 (Ky. 2000). "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the nonmoving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999); see also Murphy v. Second Street Corp., 48 S.W.3d 571, 573 (Ky. App. 2001). An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions are involved. See Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001); Barnette v. Hospital of Louisa, Inc., 64 S.W.3d 828, 829 (Ky. App. 2002); Hallahan v. The Courier Journal, 138 S.W.3d 699, 704-705 (Ky. App. 2004).

The construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court. Hibbitts v. Cumberland Valley National Bank & Trust Company, 977 S.W.2d 252, 254 (Ky. App. 1998); First Commonwealth Bank of Prestonsburg v. West, 55 S.W.3d 829, 835 (Ky. App. 2000). The cardinal rule of contract interpretation

is that all words and phrases in the contract are to be given their ordinary meanings. O'Bryan v. Massey-Ferguson, Inc., 413 S.W.2d 891 (Ky. 1966); Fay E. Sams Money Purchase Pension Plan v. Jansen, 3 S.W.3d 753, 757 (Ky. App. 1999). Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible. The legal interpretation of a contract should be made in such a way as to make the promises mutually binding on all parties unless such a construction is wholly negated by the language used. See Association of Army & Navy Stores v. Young, 296 Ky. 61, 176 S.W.2d 136 (Ky. 1944); City of Louisa v. Newland, 705 S.W.2d 916, 919 (Ky. 1986). In the absence of ambiguity a written instrument will be enforced strictly according to its terms, and a "court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." Frear v. P.T.A. Industries, Inc., Ky., 103 S.W.3d 106 (Ky. 2003).

The appellants' principal argument is that Article 14 of their contract with the Cabinet, rather than Article 16, applies in the present situation. Article 16, the provision of the appellants' contract with the Cabinet which directly addresses issues of delays and extensions of time, states as follows:

Article 16 - Delays and Extensions of Time

It is agreed that time is of essence for each and every portion of this contract and where under the contract an additional time is allowed for the completion of any work, the new time limit fixed by such extension shall be of the essence of this contract. Provided, the Contractor shall not be charged with liquidated damages or any access cost when the delay in completion of the work is due to:

(1) any preference, priority, or allocation order duly issued by the government;

(2) unforeseeable cause beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, or of the public enemy, acts of the Owner, acts of another Contractor in the performance of a contract with the Owner, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather; or

(3) any delays of subcontractors or suppliers occasioned by any of the causes specified in subsection (1) and (2) of this article:

on condition that the Contractor shall, within fifteen (15) calendar days of the occurrence of the event, notify the Architect in writing. The Architect shall ascertain the facts and extent of the delay and notify the Contractor within a reasonable time of its decision in the matter. Any change in the contract time resulting from any such claim shall be incorporated in a change order. **An extension of time shall not be construed as cause for extra compensation under the contract.** Extensions of time relating to concealed conditions as defined in Article 15 shall be governed by the provisions of that article. (Emphasis added).

We believe the provision "[a]n extension of time shall not be construed as cause for extra compensation under the contract" is dispositive in this case. Application of the normal meaning of these words produces an interpretation that contractors such as Apex and R&R are not entitled to additional payment in the event of mere delays in the completion of work schedule. We believe the circuit court correctly analyzed the distinction between Articles 14 and 16 of the contract, and therefore adopt its reasoning:

In this [Article 16] and other articles, the Owner means the [Cabinet] and the Contractor means R&R and Apex. The [Cabinet] issued change orders to R&R and Apex that extended their contract completion dates. The [Cabinet] maintains that R&R and Apex are not entitled to additional compensation because Article 16 states that "[a]n extension of time shall not be construed as cause for extra compensation." The [Cabinet] interprets this sentence to be a "no damages for delay" clause. These clauses, though harsh, are generally enforced. See Humphreys v. J.B. Michael & Co., 341 S.W.2d 229, 233 (Ky. 1960); Green Plumbing & Heating Co. v. Turner Constr. Co., 742 F.2d 965, 966 (6th Cir. 1984).

R&R and Apex assert that the sentence in Article 16 is not a "no damages for delay" provision. Apex reads the sentence to mean that "if an extension of time is granted to a particular contractor, then the extension is not *automatically deemed* to warrant additional compensation. [] Apex believes that the sentence refers to situations where a contractor needs extra time and when extensions will not alter a critical contract date or a completion date. [] R&R

refers to decisions in other jurisdictions that strictly construe "no damage for delay" clauses. See, e.g., E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex., 551 F.2d 1026, 1026 (5th Cir. 1977). Both parties argue that since Article 16 does not clearly prohibit damage claims for delays, they can recover delay-related damages from the [Cabinet].

R&R and Apex also believe that Article 14 of the contract mandates that the [Cabinet] adjust their contract prices for the delay. Article 14 is titled "Changes in the Work," and states in relevant part that:

The Owner, without invalidating the contract, may as the need arises, unilaterally order changes in the work in the form of additions, deletions or other revisions. Such changes in the work shall be authorized by Change Order signed by the Owner and Architect. The Contract Sum and the Contract Completion Time will be adjusted accordingly.

Here, the [Cabinet] unilaterally revised its contracts with R&R and Apex by extending their contract completion dates. Pursuant to Article 14, R&R and Apex argue that the [Cabinet] Commonwealth then needed to adjust the "Contract Sums" for R&R and Apex. The [Cabinet] contends that Article 14 only applies when it orders change orders for extra work. But Article 14 allows change orders for "additions, deletions, or other revisions." One or more of these categories could be interpreted to include extending the contract completion date. R&R and Apex would then be entitled to additional compensation from the [Cabinet].

R&R and Apex fail to convince the Court. Article 16 applies because it is titled "Delays and Extensions of Time" and is the only contractual provision that addresses

these categories. The article addresses delays caused by the [Cabinet] or other contractors, and it states that time extensions do not warrant additional compensation. Since R&R and Apex received time extensions due to delays allegedly caused by the [Cabinet] and Service Fabrication, R&R and Apex are not entitled to extra compensation from the [Cabinet]. See Humphreys, 341 S.W.2d at 233; Green Plumbing, 742 F.2d at 966.

Article 16 would have unequivocally controlled the situation if R&R and Apex initially requested time extensions. The article provides that if a delay is caused by the [Cabinet] or another contractor, such as Service Fabrication, then the other contractors, such as R&R and Apex, can request time extensions if they will be delayed. Although R&R and Apex did not request extensions, the [Cabinet] apparently knew that they would be delayed and consequently extended their contract completion dates. Had the correct Article 16 procedure been followed, R&R and Apex would have learned about the delay and requested time extensions, or they may have been subject to liquidated damages.² Undoubtedly the [Cabinet] would have granted the time extensions since it unilaterally extended their contract deadlines. The Court would be elevating form over substance if it found that because the correct Article procedure was not followed to the letter, Article 16 does not control.

Article 16 is more applicable than Article 14 because the latter does not address

² Another way of interpreting Article 16 is that except for the first sentence, the parties meant the article to solely address when contractors may be subject to liquidated damages if delays occur at no fault of their own. Since the sentence stating that time extensions do not merit extra compensation is embedded in the liquidated damages provision, it could be argued that the parties did not mean the sentence to be a "no damages for delay" clause. The Court, nevertheless, believes that the parties meant Article 16 to address delays and time extensions in situations besides the liquidated damages context for the reasons set forth in the text.

delays and time extensions. Article 14 addresses when the [Cabinet] orders changes in work, such as requesting additional work or equipment changes, not changes in contract completion times. Courts hold that specific contractual provisions control "in cases of ambiguity." See State Auto. Mut. Ins. Co. v. Ellis, 700 S.W.2d 801, 803 (Ky. App. 1985). Article 16 controls because it specifically addresses delays and time extensions. The article also states that the time extensions "shall be incorporated in a change order," and that a time extension does not warrant additional compensation. The article, therefore, authorizes the issuance of change orders that extend contract completion dates without adjusting contract awards.

Apex asserts that the main reason for the Article 16 provision that time extensions do not warrant additional compensation is because Article 14.2, titled Minor Changes, authorizes the Architect to allow minor changes that "do not involve additional cost." The Court disagrees. The Architect may only authorize minor changes under Article 14.2 if the changes "do not involve additional cost or extension of the Contract Completion Date." Since Article 16 authorizes the extension of contract completion dates, the parties meant Article 16 to apply to different situations than the situations that Article 14.2 addresses.

The appellants further contend that the contract interpretation principles that the contract be construed as a whole, that the contract be construed against the drafter, and that the contract be interpreted so as to afford bilateral protection to the parties compels an interpretation that they are entitled to additional compensation as a result of the

delays. However, as the cardinal rule is that contract terms be given their ordinary meaning, and such interpretation of the phrase "**[a]n extension of time shall not be construed as cause for extra compensation**" produces a result that the appellants are not entitled to additional compensation as a result of the delays, these alternative principles are not operative in the present case.

For the foregoing reasons the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Timothy D. Martin
Jason B. Myers
Louisville, Kentucky

Greg E. Mitchell
Robert S. Walker, III
Jan De Beer
Lexington, Kentucky

BRIEF FOR APPELLEE:

Stephen E. Smith
Jennifer Kaelin Luhrs
Louisville, Kentucky