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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-002405-MR

GRASSHOPPERS LAWN CARE
& LANDSCAPING, INC. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 09-CI-004446

TARGET CORPORATION;
HAGAN DEVELOPMENT CO.;
TEXAS GAS TRANSMISSION, LLC;
AND MIDDLETOWN PARTNERS, LLC APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; STUMBO, JUDGE; LAMBERT,[1] SENIOR JUDGE.

[1] Senior Judge Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

TAYLOR, CHIEF JUDGE: Grasshoppers Lawn Care & Landscaping, Inc., (Grasshoppers) brings this appeal from an August 26, 2009, summary judgment of the Jefferson Circuit Court rendered in favor of Target Corporation (Target), Hagan Development Co. (Hagan), and Middletown Partners, LLC (Middletown), (collectively referred to as appellees) dismissing Grasshoppers' complaint for breach of contract. We affirm.

Hagan was the general contractor on a project to construct a new Target store in Jefferson County, Kentucky. The construction project called for demolition of an existing structure on the site, and Hagan sought bids from subcontractors to perform the demolition. Grasshoppers submitted a bid on the demolition with a "Guaranteed Maximum Price" of $219,250. Hagan eventually accepted Grasshoppers' bid.

On September 8, 2008, the parties entered into an "Agreement Between Hagan Development, General Contractor and Grasshoppers Landscaping and Tree Service, Inc., Contractor" (September 8, 2008, agreement). The work to be performed by Grasshoppers consisted of demolishing and disposing of approximately 112,000 square feet of concrete floor slab foundation from the existing structure. The September 8, 2008, agreement did not identify the method Grasshoppers would employ to dispose of the concrete. In submitting the bid, Grasshoppers calculated demolishing the concrete into 5' x 5' slabs and hauling it offsite.

After the parties entered into the September 8, 2008, agreement, Hagan decided to operate an onsite concrete crushing operation so as to utilize the concrete foundation at the site as backfill for the new construction. Grasshoppers was informed and complied with Hagan's request by preparing the concrete for onsite crushing rather than hauling the concrete offsite. On September 23, 2008, the parties agreed that Hagan was entitled to a credit of $11,100, as Grasshoppers would no longer incur the expense of hauling the concrete offsite. The parties failed to execute any documentation reflecting the $11,100 credit.

Grasshoppers completed the demolition work on November 24, 2008. As of this date, Hagan had paid Grasshoppers $197,325 under the original contract, in exchange for a partial lien release. The release states there were no approved changes as of November 12, 2008. On February 27, 2009, Grasshoppers tendered a "Request for Change" order to Hagan and sought additional compensation of $51,361. Grasshoppers claimed to have incurred increased costs due to Hagan's requirement that the concrete be demolished in a manner suitable for onsite crushing. The onsite crushing operation apparently required Grasshoppers to demolish the concrete in 2' x 2' slabs rather than 5' x 5' slabs as Grasshoppers had originally anticipated in submitting its bid. Hagan refused to pay the additional sums, and Grasshoppers sent a Notice of Intent to File Mechanic's Lien against the real property.

On May 4, 2009, Grasshoppers filed its complaint against Hagan, Target, Middletown, and Texas Gas Transmission, LLC (Texas Gas).[2] Therein, Grasshoppers alleged breached of contract and sought damages. Appellees filed a motion for summary judgment on June 29, 2009. By order entered August 26, 2009, the circuit court granted appellees' motion for summary judgment and dismissed Grasshoppers' complaint. This appeal follows.

Grasshoppers contends that the circuit court erred by granting summary judgment dismissing its breach of contract claim against appellees. In particular, Grasshoppers asserts that the circuit court erroneously determined that Hagan did not modify the September 8, 2008, agreement by requiring onsite crushing of the concrete.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). When considering a motion for summary judgment, all facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Id.*

Resolution of this appeal involves interpretation and application of the September 8, 2008, agreement. The interpretation of a contract is a matter of law

[2] In the circuit court action, Grasshoppers Lawn Care & Landscaping, Inc., named Texas Gas Transmission, LLC, (Texas Gas) as a defendant. Texas Gas had recorded an "Encroachment and Cut Agreement" in Deed Book 9297, Page 207, in the Jefferson County Clerk's Office upon the subject property. Texas Gas filed an answer to Grasshoppers' complaint but did not join in the motion for summary judgment filed by Target Corporation, Hagan Development Co., and Middletown Partners, LLC.

for the court, and we review the circuit court's interpretation *de novo*. *See Cumberland Valley Contractors, Inc. v. Bell Co. Coal Corp.*, 238 S.W.3d 644 (Ky. 2007). Generally, a contractual term or phrase is given its ordinary meaning. *See Larkins v. Miller*, 239 S.W.3d 112 (Ky. App. 2007). Our review proceeds accordingly.

In rendering summary judgment, the circuit court focused upon Article 4.3 of the September 8, 2008, agreement. By relying upon Article 4.3, the circuit court concluded that Hagan's requirement of onsite concrete crushing did not constitute a "change in work" under the meaning of that Article and that Grasshoppers was not entitled to any additional compensation under the agreement. However, we believe the circuit court erred by its reliance upon Article 4.3. Article 4.3 reads:

> 4.3 The following unit prices are to be used only for computation of compensation for change in scope of work: N/A.
>
> Contractors total lump sum price will be increased or decreased for changes in the work at unit price schedule as provided by Sub-contractors Exhibit "B" bid form plus additional general condition if required and a ten percent (10%) mark-up by Contractor.

In the September 8, 2008, agreement, Article 4.3 is clearly marked "N/A." "N/A" is generally understood as meaning "not applicable." By utilizing such ordinary meaning, we believe that Article 4.3 was intended not to be applicable to the parties' agreement. As such, we interpret Article 4.3 as

ineffectual and believe the circuit court erred by relying upon same. Nonetheless, our analysis of the September 8, 2008, agreement does not end here.

The September 8, 2008, agreement incorporated by reference other agreements and documents. Specifically, Article 1 of the September 8, 2008, agreement provides:

> ARTICLE I
> THE CONTRACT DOCUMENTS
>
> The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement; these form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than Modifications, appears in Article 8.

As set forth in Article 1, the Conditions of the Contract (General, Supplementary and other Conditions) and specifically the General Conditions of the Contract for Construction (General Conditions Contract) were incorporated by reference into the September 8, 2008, agreement. Pivotal to our resolution of this appeal is the General Conditions Contract.

The General Conditions Contract was originally entered into between Target and Hagan. Under the terms of the contract, Target was denoted as "Owner," and Hagan as "Contractor." Article 5 of the General Conditions

Contract is entitled "Subcontractors," and Article 5.1.1 defines a Subcontractor as an "entity who has a direct contract with the Contractor to perform any of the work at the site." Under this definition, Grasshoppers qualifies as a Subcontractor under the General Conditions Contract.

Importantly, the General Conditions Contract also delineates supplemental contractual duties between Hagan and Grasshoppers. We begin with Article 5.3.1, which reads:

> 5.3.1 By an appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner. Said agreement shall preserve and protect the rights of the Owner under the Contract Documents with respect to the Work to be performed by the Subcontractor so that the subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the Contractor-Subcontractor Agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by these Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with their Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the Subcontract, copies of the Contract Document to which the Subcontractor will be bound by this Paragraph 5.3, and identify to the Subcontractor any terms and conditions of the proposed Subcontractor which may be at variance with the Contract Documents. Each Subcontractor shall similarly make copies of such Documents available to their Sub-subcontractors.

Under its plain language, Article 5.3.1 mandates that the Contractor provide the Subcontractor "the benefit of all rights, remedies and redress against the Contractor that the Contractor, by these Documents, has against the Owner." By the same token, Article 5.3.1 mandates that the Subcontractor "be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assume toward the Owner." Taken together, Article 5.3.1 places the Subcontractor in the shoes of the Contractor and the Contractor in the shoes of the Owner as to each party's respective rights, remedies, redress, responsibilities or obligations under the General Conditions Contract. Stated simply, the term Contractor may be substituted for Owner and the term Subcontractor for Contractor under relevant Articles of the General Conditions Contract. Therewith, relevant duties and remedies imposed upon and enjoyed by the Owner and Contractor are juxtaposed onto the Contractor and Subcontractor.

Relevant hereto is Article 12 of the General Conditions Contract. It is entitled "Changes In The Work." In general, Article 12 provides the parties a paradigm for changing the parameters of work to be performed under the contract and for determining the corresponding compensation for such a change in work. Article 12.1.1 specifically sets forth the definition of a "change order." A change order is the primary tool by which an Owner/Contractor may effectuate a change in the work to be performed by the Contractor/Subcontractor. Article 12.1.3 outlines four methods of fixing the additional cost or credit owed a party due to a change

order. And, when a change in work occurs, Article 12.3.1 governs the method by which a claim may be made by a Contractor/Subcontractor for an increase in contractual payment or compensation. The provision reads:

> 12.3 CLAIMS FOR ADDITIONAL COST
>
> 12.3.1 If the Contractor wishes to make a claim for an increase in the Contract Sum, the **Contractor shall give the Owner written notice thereof within twenty (20) days after the occurrence of the event giving rise to such claim. This notice shall be given by the Contractor before proceeding to execute the Work**, except in an emergency endangering life or property in which case the Contractor shall proceed in accordance with Paragraph 10.3. No such claim shall be valid unless so made. **Any change in the Contract Sum resulting from such claim shall be authorized by Change Order.** (Emphasis added.)
>
> 12.3.2 If the Contractor claims that additional work is involved because of, but not limited to, (1) any order by the Owner to stop the Work pursuant to Paragraph 3.3 where the Contractor was not at fault, (2) any written order for a minor change in the Work issued pursuant to Paragraph 12.4, or (3) failure of payment by the Owner pursuant to Paragraph 9.6, the Contractor shall make such claim as provided in Subparagraph 12.3.1.

To submit a valid claim for additional payment or compensation due to a change in the scope of work, Article 12.3.1 and 12.3.2 require the Contractor/Subcontractor to submit written notice to the Owner/Contractor within twenty days after the event necessitating the work takes place and also requires that the written notice precede the work. Significantly, Article 12.3.1 plainly provides that a claim for additional payment or compensation by the Contractor/ Subcontractor must comply with the notice requirements of that Article in order to

be valid. We view Article 12.3.1 and 12.3.2 as plainly written and as needing no interpretation by this Court. *See Elmore v. Com.*, 236 S.W.3d 623 (Ky. App. 2007).

Considering the facts most favorable to Grasshoppers, it appears that Hagan effectually changed the scope of the work to be performed under the agreement by requiring Grasshoppers to demolish the concrete in a manner appropriate for crushing onsite.[3] Instead of hauling 5' x 5' concrete slabs from the worksite, Grasshoppers was required to further demolish the concrete into smaller 2' x 2' slabs in order to fit the onsite crusher's requirement. To comply with this change, Grasshoppers alleges to have incurred additional costs of $51,361. However, Grasshoppers did not submit a written change order to Hagan until February 27, 2009, seeking those additional costs. The change order was submitted more than three months after Grasshoppers had completed work at the work site.

Article 12.3.1 of the General Conditions Contract requires Grasshoppers to give Hagan "written notice" of any claim for an increase in

[3] Hagan has essentially admitted that the onsite concrete crushing constituted a change in the scope of work to be performed by Grasshoppers under the September 8, 2008, agreement. In its brief and throughout the proceedings below, Hagan argued that it was due a "credit" of $11,100 from Grasshoppers. Hagan points out that Grasshoppers' original bid and the ultimate contract price included the costs for hauling the concrete offsite. Because Hagan required onsite crushing of concrete, Grasshoppers was not required to haul the concrete offsite, thus resulting in a savings to Grasshoppers. As the scope of the work to be performed by Grasshoppers was changed by Hagan's onsite concrete crusher, Hagan sought an offset in the contract price owing under the September 8, 2008, agreement. By so doing, Hagan has essentially admitted that a change in the scope of work occurred by the advent of the onsite concrete crusher, albeit in Hagan's advantage. However, a party may not take inconsistent positions in a lawsuit. *See Hisle v. Lexington-Fayette Urban County Gov't*, 258 S.W.3d 422 (Ky. App. 2008).

contract price within "twenty days" of the event giving rise thereto and before proceeding with the work. As it is uncontroverted that Grasshoppers neither gave written notice within twenty days of the occurrence of the event giving rise to the change in work nor gave such notice before proceeding with the work, Grasshoppers failed to submit a timely claim for additional payment or compensation as required by Article 12.3.1.

Generally, a contract will strictly be enforced per its unambiguous terms. *Crouch v. Crouch*, 201 S.W.3d 463 (Ky. 2006). In this case, Grasshoppers failed to comply with the terms of its agreement with Hagan when it failed to submit a written notice regarding the contract changes and additional costs associated with those changes. Grasshoppers has failed to cite any legal authority to this Court that would excuse Grasshoppers from its contractual obligations.

Accordingly, albeit for different reasons, the order of the Jefferson Circuit Court granting summary judgment for appellees is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEES TARGET CORPORATION; HAGAN DEVELOPMENT CO.; AND MIDDLETOWN PARTNERS, LLC:

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