STATE OF MICHIGAN

COURT OF APPEALS

WOODLAND PAVING COMPANY, LLC.,

Plaintiff/Counterdefendant-Appellant,

v

JAMES LEDFORD, Individually and d/b/a MID MICHIGAN MOTORPLEX,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
April 21, 2000

No. 212442
Montcalm Circuit Court
LC No. 96-000756

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

In this breach of contract action, plaintiff appeals of right from a judgment entered following a bench trial awarding it $11,280 and providing that there would be no interest on the judgment if it was paid within sixty days. We vacate the judgment entered by the trial court and remand for entry of judgment in favor of plaintiff in the amount of $38,362.50, plus statutory prejudgment and postjudgment interest consistent with this opinion.

This case arose from a dispute involving the quantity of asphalt used to pave a dragstrip owned by defendant. The original estimate for the job called for approximately 3,200 tons of asphalt at $23 per ton, for a total of $73,600. Plaintiff's records reflect that 4,813.38 tons of asphalt were used to complete the job. Plaintiff billed defendant for 4,813.38 tons at the agreed upon price of $23 per ton for a total of $110, 707.74. Plaintiff sent defendant an invoice reflecting the total price minus $66,000 that defendant already paid, leaving a balance of $44,707.74.

Shortly after receiving the invoice, defendant called and spoke to someone employed by plaintiff and complained about the quantity of asphalt used and the quality of the paving project. The parties had no further contact until two years later when plaintiff filed the instant action to recover the balance due from defendant plus interest. Defendant filed a counter-claim alleging defects in plaintiff's workmanship and that plaintiff applied more asphalt than the 1 ½inch layer called for in the contract. The trial court ruled that plaintiff had a duty to inform defendant of the cost overrun before proceeding with the project since plaintiff was the only one with knowledge of the amount of asphalt used each day. However, the court found that plaintiff was entitled to five percent over the contract estimate, and awarded $11,280

to plaintiff. The court declined to award interest prior to filing the complaint and ordered that statutory post complaint interest would not be applied if the judgment was paid by defendant within sixty days.

Plaintiff first contends that the trial court erred in reading into the paving contract a duty on plaintiff's part to notify defendant when the amount of asphalt applied to the dragstrip exceeded the amount in the original estimate. This issue involves a question of contract interpretation. The question of whether contract language is ambiguous is a question of law, which we review de novo. *Port Huron Ed Ass'n v Port Huron Area School Dist,* 452 Mich 309, 323; 550 NW2d 228 (1996); *Cardinal Mooney High School v Michigan High School Athletic Ass'n,* 437 Mich 75, 80; 467 NW2d 21 (1991). "The cardinal rule in the interpreting of contracts is to ascertain the intention of the parties. To this rule all others are subordinate. To arrive at a proper interpretation of particular language, the entire contract must be considered." *McIntosh v Groomes,* 227 Mich 215, 218; 198 NW 954 (1924). "Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." *Amtower v Roney & Co (On Remand),* 223 Mich App 226, 234; 590 NW2d 580 (1998).

Defendant argues that the parties intended to limit the contract to resurfacing the designated area using no more than the estimate of 3,200 tons of paving material. Contrary to defendant's assertion, the contract specifically described the job as follows:

> Furnish and place bituminous surface to widen and resurface dragstrip, return roads and drives accessible to double bottom flowboy trucks as directed by owner or owner's representative. The finished pavement surface on the dragstrip will be placed equal to or better than smoothness tolerance as specified by MDOT 1990 Standard Specifications Section 4.00.12.

Nowhere in the contract does it state that the parties intended to limit the contract to no more than 3,200 tons of asphalt. In fact, defendant's witness, Vance Johnson, testified that the contract language "anticipated the possibility that more than 3,200 tons would be necessary" to complete the job. The contract specifically stated:

> The price quoted is based upon approximately 3,200 tons of paving. *This quantity was furnished by the owner. Woodland Paving makes no representation as to the area that can be paved with this quantity of material. It is agreed that all bituminous mixture furnished and placed will be paid for at the unit price quoted.* (emphasis added.)

In similar circumstances, the courts in *Bennet-Waltman & Co v Smith,* 241 Mich 673, 674-675; 217 NW2d 760 (1928), and *Washtenaw Asphalt Co v Michigan,* 42 Mich App 132; 201 NW2d 277 (1972), both concluded that the contracts were intended to provide for completion of the filling or paving projects even when the initial estimates of the amount of material necessary were exceeded.

Given the fact that defendant wanted the paving completed quickly for a race the following weekend, and based on the express language of the written contract, we conclude that the purpose of the contract was to have the dragstrip and associated roads paved in accordance with the applicable MDOT standards. The clear language of the contract imposes no duty to stop the job at 3,200 tons of asphalt or to notify defendant when the estimated quantity had been exceeded. If either of the parties had wished to include such a requirement, they were free to insert it into the contract. Therefore, we find that the trial court erred by concluding that plaintiff owed defendant a duty under the contract to notify defendant when the amount of paving material supplied exceeded the estimated amount.

Plaintiff next argues that the trial court erred in determining that plaintiff was only entitled to a judgment amount that represented five percent over the amount estimated in the contract. This Court reviews the factual findings of the trial court sitting without a jury for clear error. MCR 2.613(C); *Giordano v Markovitz*, 209 Mich App 676, 678-679; 531 NW2d 815 (1995). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976), quoting *United States v United States Gypsum Co*, 333 US 364, 395; 685 S Ct 525; 92 L Ed 746 (1948)

The trial court found that much of the excess tonnage was a result of unnecessary overlay contrary to the terms of the contract, which called for 1 ½inches. Initially, we note that the trial court's finding was based on a factual error. The trial court erroneously stated in its findings that "the engineering reports . . . indicated some thicknesses to 4 inches while the contract required only 1 ½ inches paving . . . ." Our review of the engineering reports reveals that the thickest sample of pavement taken by defendant's experts was approximately 2.6 inches thick. Thus, the trial court's factual basis for its finding of unnecessary overlay was incorrect.

Moreover, there was no evidence to dispute testimony presented by plaintiff that the excess overlay was necessary to properly pave the area in accordance with MDOT standards. Although defendant's witness, Vance Johnson, testified that plaintiff should have been able to complete the repaving job within five percent of the original estimate, he based that figure on repaving solid surfaces. Mr. Johnson further testified that if the base on which the resurfacing was applied varied, then the amount of material put down would vary also. It is undisputed that the existing pavement on the grounds was in a state of disrepair and that, due to the constant rain and the condition of the existing surface, the ground was soft. In fact, the ground was so soft that the trucks hauling asphalt broke through the surface of certain areas of the track. In addition, defendant admitted that a portion of the paving completed by plaintiff was new pavement placed over gravel, which required an extra layer of asphalt to pave it properly.

Because defendant failed to present evidence to dispute plaintiff's contention that any overlay was necessary due to the ground condition, and because the court relied upon inaccurate information as a factual basis for its decision, we find that the trial court clearly erred in finding that the excess tonnage was due to unnecessary overlay. Therefore, we find that plaintiff is entitled to payment for all of the asphalt that was substantiated by evidence presented at trial.

Defendant's engineering experts determined that plaintiff actually applied 3,846.9 tons of asphalt based on the average core thickness and average density of the twelve core samples that were taken from various areas that plaintiff paved for defendant. However, the engineers testified that they had never used this method to calculated the amount of asphalt actually poured on a job. They both testified that the best way to determine the amount of asphalt used was to add up the weigh tickets collected by the supervisor from the truck drivers. Moreover, we note that twelve samples out of an area that measures 342,580.22 square feet does not lend itself to an accurate calculation, particularly where, as here, the ground beneath was deteriorated and uneven. Therefore, we find that the experts' calculations were unreliable compared to the total tonnage that plaintiff was able to substantiate with weigh tickets that were collected by plaintiff's supervisor, Dennis Kiel.

Mr. Kiel testified that truck drivers would receive a weigh ticket from the plant that indicates the weight of the truck both before and after the asphalt is loaded and then the net weight of the asphalt being hauled by that truck. Mr. Kiel further testified that part of his job was to collect the weigh tickets from the truck drivers when they delivered the asphalt to the job site. Mr. Kiel presented the trial court with daily job material reports generated from the plant computer showing the trucks that were loaded for defendant's job and the weigh tickets that he collected from the truck drivers at the job site. Although some of the weigh tickets were missing, Mr. Kiel presented original weigh tickets collected at the job site that totaled 4,537.5 tons. [1]

Based on the quantity that was substantiated by the weigh tickets, we find that defendant owes plaintiff a total of $104,362.50 (4,537.5 x $23), minus the $66,000 that defendant paid to plaintiff previously. Therefore, plaintiff is entitled to judgment in the amount of $38,362.50.

Plaintiff next contends that the trial court erred by providing in the judgment order that any interest on the judgment would be waived if the judgment was paid within sixty days. The trial court explained this decision by noting that plaintiff had delayed bringing the action. This Court reviews a trial court's ruling regarding the award of interest pursuant to MCL 600.6013; MSA 27A.6013 de novo. *Beach v State Farm Mutual Automobile Ins,* 216 Mich App 612, 623-624; 550 NW2d 580 (1996). Imposition of interest under this statute is mandatory. *Phinney v Perlmutter,* 222 Mich App 513, 540; 564 NW2d 532 (1997). MCL 600.6013(1); MSA 27A.6013(1) provides that "[i]nterest *shall* be allowed on a money judgment recovered in a civil action as provided in this section" (emphasis supplied). MCL 600.6013(5); MSA 27A.6013(5) further provides:

> For complaints filed on or after January 1, 1987, if a judgment is rendered on a written instrument, interest *shall* be calculated from the date of filing the complaint to the date of satisfaction of the judgment at a rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. *In that case interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed.* The rate shall not exceed 13% per year compounded annually after the date judgment is entered. (emphasis added.)

In this case, the complaint was filed after January 1, 1987 and the judgment is rendered on a written instrument, i.e. the estimate, which was signed by both parties on April 27, 1993. Just above defendant's signature on the estimate, it states:

ACCEPTANCE

> We hereby accept this proposal. The specifications and prices are approved and satisfactory. The general conditions are understood and accepted. Payment will be made in accordance with the terms offered. I further represent that I am authorized to sign this contract.

On the back of the estimate, the general conditions are set forth in pertinent part:

> TIMELY PAYMENT: As stated above, payment in full is due and payable upon completion of the job. Interim billings for partial performance are due and payable thirty (30) days after presentment of said billings. *The purchaser agrees to pay interest at a rate of 1 ½% per month on any amount due the contractor with said interest to start accruing thirty (30) days after presentation to the Purchaser of a billing for work performed and/or expenses incurred by the contractor. This interest is at an annual rater [sic] of 18%. . . .*(emphasis added.)

However, at the time the estimate was executed on April 23, 1993, the interest rate of 18% violated the usury laws of this state. MCL 438.61; MSA 19.15(71) governs credit transactions between business entities. Prior to the amendments in 1996, this statute provided in pertinent part:

> (3) Notwithstanding the provisions of Act No. 326 of the Public Acts of 1966, it is lawful in connection with an extension of credit to a business entity by any person other than a state or nationally chartered bank, insurance carrier, or finance subsidiary of a manufacturing corporation for the parties to agree in writing to any rate of interest not exceeding 15% per year. [MCL 438.61(3); MSA 19.15(71)(3).]

Because the 18% interest rate was not legal at the time the estimate was executed, MCL 600.6013(5); MSA 27A.6013(5) mandates that interest shall be calculated from the date of the filing of the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually. Therefore, we conclude that the trial court erred by failing to award statutory interest to plaintiff from the filing of the complaint to the satisfaction of judgment at a rate of 12% per year compounded annually.

Plaintiff also argues that the trial court erred by failing to award interest prior to the filing of the complaint as an element of damages.

> Michigan has long recognized the common-law doctrine of awarding interest as an element of damages. The doctrine recognizes that money has a "use value" and interest is a legitimate element of damages used to compensate the prevailing party for the lost use of its funds. Furthermore, the decision whether to award interest as an element of damages is not dependent upon a contractual promise to pay interest. . . . [T]he pivotal

> factor in awarding such interest is whether it is necessary to allow full compensation. [*Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 499; 475 NW2d 704 (1991) (citations omitted).]

Whether to award precomplaint interest as an element of damages is a discretionary decision to be made by the trier of fact. In this case, the trial court declined to award any interest "due to plaintiff's delay in bringing [this] action." Although the court had no discretion regarding interest after the date the complaint was filed, we find no abuse of discretion in the denial of precomplaint interest as an element of damages, particularly when plaintiff delayed in filing suit for almost two years.

Conclusion

For the reasons stated in this opinion, we vacate the judgment entered by the trial court and remand for entry of judgment in favor of plaintiff in the amount of $38,362.50, plus statutory prejudgment and postjudgment interest calculated at a rate of twelve percent per year compounded annually from the date the complaint was filed until the date the judgment is satisfied. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael J. Kelly
/s/ Gary R. McDonald

[1] The missing tickets only totaled 275.88 tons. Mr. Kiel testified that sometimes the truck drivers left without giving him the weigh tickets and it was possible that some of them may have been burned in a fire at the office. Regardless of the reason, without the tickets, there is no proof that those loads were received at the job site. It was Mr. Kiel's job to collect the weigh tickets and reconcile them against the job material report. This is an important check and balance procedure to ensure that customers are not billed for materials used elsewhere.