

STATE OF MICHIGAN
COURT OF APPEALS

GREAT LAKES CONTRACTING COMPANY,
INC., and GREAT LAKES BRIDGE AND
UNDERGROUND, INC.,

UNPUBLISHED
February 26, 2002

Plaintiffs-Appellants,

v

THE DRAINAGE BOARD FOR THE 17 MILE
ROAD DRAIN AND BRANCHES,

No. 224934
Macomb Circuit Court
LC No. 98-001092-CZ

Defendant-Appellee.

GREAT LAKES CONTRACTING COMPANY.,
INC., and GREAT LAKES BRIDGE AND
UNDERGROUND, INC.,

Plaintiffs-Appellants,

v

THE DRAINAGE BOARD FOR THE 17 MILE
ROAD DRAIN AND BRANCHES,

No. 226061
Macomb Circuit Court
LC No. 98-001092-CZ

Defendant-Appellee.

Before: O’Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

In these consolidated appeals arising out of a breach of contract action, plaintiff appeals as of right the circuit court’s grant of summary disposition to defendant (No. 224934), and challenges the constitutionality of the mediation process (now called “case evaluation”) under MCR 2.403 (No. 226061). We affirm in both cases.

Great Lakes Contracting Company, Inc., and Great Lakes Bridge and Underground, Inc., (collectively referred to as plaintiff) are a joint venture of Great Lakes companies, engaged in the business of underground construction. Defendant Drainage Board is the statutorily created

governing body for the designated drainage district containing the 17 Mile Road Drain and Branches. The Macomb County Public Works Commissioner is the administrator of the drainage project. Hubbel, Roth and Clark, Inc. (HRC), is the engineering firm that designed, and served as project engineer on, the instant project.

In 1992, defendant resolved to enclose the 17 Mile Road Drain by the excavation and installation of concrete storm drains. HRC was retained as project engineer to develop plans and specifications for the project. Bids were solicited by advertisement. Plaintiff was the low-bidder and, on January 21, 1993, the parties entered into a contract. Plaintiff began work in early 1993 and completed its work in early 1994. During the course of performance plaintiff experienced difficulties because of extensive water flow into the drain from a retention pond belonging to Ford Motor Company. The cost to plaintiff was significant and, in June of 1993, plaintiff notified defendant that it would seek additional payment. In August 1995, plaintiff submitted a detailed list of additional costs it had incurred totaling over \$202,450,000. The parties' negotiations broke down, and plaintiff filed a complaint alleging breach of contract.

Defendant filed a motion for summary disposition under MCR 2.116(C)(10), arguing principally that it owed no contractual duty to prevent or control the flow of Ford Motor Company's discharge into the 17 Mile Road Drain during construction.

The circuit court granted defendant summary disposition, and later awarded defendant mediation sanctions. These appeals ensued.

I

No. 224934

This Court reviews de novo the circuit court's grant of summary disposition under MCR 2.116(C)(10). *Smith v Globe Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). A motion under this subrule tests the factual support for a claim. The circuit court must consider affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the nonmovant. *Id.* The adverse party must set forth specific facts at the time of the motion showing that a genuine issue exists for trial. *Id.* at 455. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

The essence of plaintiff's claim is that Ford often did not apprise plaintiff of when the discharges would occur and plaintiff was thus taken by surprise, that plaintiff incurred additional cost and delays as a result, and that defendant did not do enough to compel Ford to cooperate, i.e., give plaintiff prior notice of discharges.

We assume for purposes of argument that defendant had an implied duty not to hinder plaintiff's performance of the contract, and also assume, as plaintiff further argues on appeal, that its claim for additional compensation was timely. Plaintiff's challenge to the grant of summary disposition nonetheless fails.

It was undisputed that defendant itself fully cooperated with plaintiff and neither hindered or delayed plaintiff's performance. There was no evidence that defendant was in any way

responsible for Ford's lack of cooperation. Plaintiff argues that defendant nevertheless had a duty to control Ford's water discharges into the 17 Mile Drain. However, the statutes relied on by plaintiff do not support this authority.¹ Further, the parties' contract sufficiently alerted plaintiff to Ford's discharge activity,² and specified that the contractor was responsible for

¹ Plaintiff argues that the Drain Commissioner and defendant Drain Board had the statutory power to control use of the drains under their jurisdiction, and when, after commencing work, plaintiff complained that Ford was discharging large quantities of water in an uncontrolled and uncooperative manner, without notice, the Drain Board should have acted under its statutory authority. Plaintiff argues that, as a last resort, defendant could have brought suit to compel Ford to delay pumping and cooperate with plaintiff contractor.

In support of its argument that defendant had a statutory grant of power to control Ford Motor Company and sue Ford if necessary, plaintiff relies principally on MCL 280.85, which provides:

The owner of any land over, through or across which a district has acquired a right of way for the construction and maintenance of an open or covered drain by grant, dedication, condemnation or otherwise, may use the land occupied by such right of way in any manner not inconsistent with the easement of the district. Any use of the right of way which will interfere with the operation of the drain or will increase the costs to the district of performing its work thereon is deemed to be inconsistent with the district's easement. Any landowner who violates any of the above provisions shall be subject to the penalties provided in section 421.

MCL 280.421 provides:

Whenever any person shall obstruct any established drain, it shall be the duty of the commissioner to cause such obstruction to be removed. Any lessening of the area of a drain, which area shall be a cross section of the drain, shall be deemed to be an obstruction. The person causing such obstruction shall be liable for the expense attendant upon the removal thereof, together with the charges of the commissioner, and the same shall be a lien upon the lands of the party causing or permitting such obstruction, and all of the expense shall by the commissioner be reported to the board of supervisors Nothing contained in this section shall in any way impede or bar the right of any person to make criminal complaint under any existing law for any obstruction of a drain.

Defendant argues that these provisions are inapplicable because the 17 Mile Road Drain did not run over, through or across the land of Ford Motor Company. See MCL 280.85. Plaintiff presented no evidence to the contrary. Further, defendant notes that Ford simply discharged water from its retention basin into the 17 Mile Drain, "an activity wholly consistent with the operations of the Drain." On this record, MCL 280.421 does not apply.

² The "Supplemental Specifications" to the parties' agreement included:

6. EXISTING STORM WATER RETENTION PONDS

There are five (5) storm water retention ponds (maintained by the City of Sterling Heights) which discharge to this drain. Discharge is by pumps, gravity or both.

(continued...)

maintaining the existing flow.³ Thus, we find no legal basis for plaintiff's position that defendant breached the contract by failing to somehow compel Ford's cooperation. The circuit court did not err in granting summary disposition to defendant.

(...continued)

For information or scheduling on turning these pumps on or off, the contractor shall contact the Sterling Heights DPW, 7200 18 Mile Road, Sterling Heights, Michigan, Mr. James Ternes or Mr. Gary Bozinowski (Phone No. 268-3110).

There is also a retention pond owned and operated by Ford Motor Co. (17 Mile & Mound Plant) with pumped discharge to the drain (24'-80' west of Conrail). Contact Mr. Dave Britan (Phone No. 826-5718).

Discharge from these ponds may have an impact on the contractor's operations. [Emphasis added.]

While it can be argued that this provision did not sufficiently alert plaintiff that Ford's retention pond was more than a storm water retention pond, plaintiff has made it clear that the issue here is not any lack of notice, because plaintiff would not have proceeded differently, but, rather, Ford's lack of cooperation, and defendant's failure to compel that cooperation.

³ The blueprint plans made available to potential bidders, stated in pertinent part:

CONSTRUCTION NOTES

* * *

11. THE EXISTING DRAINAGE DITCHES VARY AND FLUCTUATE IN DEPTH OF FLOW **DURING BOTH STORM AND DRY WEATHER CONDITIONS.** THE CONTRACTOR SHALL CONSIDER THIS AS INHERENT TO CONSTRUCTION AND ALL COSTS ATTENDANT THERETO SHALL BE CONSIDERED INCIDENTAL TO THE PROJECT.

The "General Construction Specifications" section of the Contract Book made available to all potential bidders, provided in pertinent part:

2.33 – MAINTENANCE OF EXISTING DRAINAGE

If it is necessary in the execution of the work to interrupt existing surface drainage, temporary drainage facilities shall be provided until the existing drainage facilities are restored. The construction of all temporary drainage facilities shall be considered as incidental to the construction of the project.

The flow in all existing drains and sanitary sewers which interfere with construction, whether shown on the drawings or not, shall be adequately maintained by the contractor at his own expense. [Emphasis added.]

II

Plaintiff also asserts that defendant agreed in a letter to plaintiff dated February 7, 1996 to pay \$68,263.00 for the negotiated contract work item claims, and plaintiff accepted that assessment.

The evidence presented in opposition to a motion for summary disposition must be admissible at trial. *Maiden*, 461 Mich at 121, 124 n 5. Under MRE 408, evidence of offering or accepting a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for the claim or its amount. The letters plaintiff relies on to establish that it is owed \$68,263 are inadmissible for the purpose plaintiff asserts. MRE 408. Plaintiff's claim fails.

III - No. 226061

Plaintiff argues that the Supreme Court is without authority to create court-annexed mediation (now called "case evaluation") under which mediators have the same or more power than did masters in chancery, an office specifically prohibited under Art VI, § 5 of the Michigan Constitution.

Mediators are not the equivalent of masters in chancery. Mediators cannot exercise the powers in equity historically attributed to masters as they cannot render a mediation award that includes equitable relief. See *R N West Const Co v Barra Corp*, 148 Mich App 115, 117-118; 384 NW2d 96 (1986). Plaintiff's argument fails.

Plaintiff also argues that the Supreme Court has no authority to delegate by rule to three-lawyer mediation panels some portion of the jurisdiction and power of the judicial branch, i.e., to decide the measure of damages, where the unavoidable consequence to a party rejecting the evaluation should the final judgment lie outside the limits of the mediators' determination, is severe financial penalty. Plaintiff alternatively argues that even if there is constitutional authority for the Court to authorize mediators to have powers now delegated by rule, there is no statute allowing for mediation of contract cases, and the instant case is a contract case with no tort component.

The Supreme Court has the exclusive authority to determine rules of practice and procedure under Art 6, § 5, of the Michigan Constitution. *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999). The mediation rule is "procedural and does not represent substantive law lacking legislative approval." *Giannetti Bros Const v Pontiac*, 152 Mich App 648, 658; 394 NW2d 59 (1986). The procedural nature of mediation undermines the argument that the selection of mediators is an impermissible exercise of the appointment power to public judicial office in violation of Const 1963, Art VI, § 27.

We also reject plaintiff's argument that this contract action was improperly submitted to mediation. MCR 2.403(A)(1) provides that "[a] court may submit to mediation any civil action in which the relief sought is primarily money damages or division of property." "Any request for monetary damages puts the action within the scope of the rule, and the parties are free to object to mediation if it is not appropriate for a particular case." Dean & Longhofer, Michigan Court Rules Practice, § 2403.1, p 511, citing MCR 2.403(C).

Plaintiff's remaining constitutional challenges also fail. "MCR 2.403 . . . does not infringe on a party's right to a jury trial because the rule ensures that a party may obtain a jury determination of disputed issues if the party so chooses." *Great Lakes Gas Trans v Markel*, 226 Mich App 127, 133; 573 NW2d 61 (1997).

Without citation to authority, plaintiff argues that MCR 2.403 denies the right to procedural due process in the sense that the parties are not afforded "a hearing with any of the traditional concerns for a full exposition of the parties' positions." In *Haberkorn v Chrysler Corp*, 210 Mich App 354, 381-382; 533 NW2d 373 (1995), this Court noted in response to a constitutional challenge to the mediation court rule:

The test to determine whether legislation and court rules comport with due process and equal protection is essentially the same. *Shavers v Attorney General*, 402 Mich 554, 612-613; 267 NW2d 72 (1978). Where no suspect classification is involved, legislation must be sustained if it is rationally related to a legitimate governmental purpose. *Id.* at 613. Here, no suspect classification is involved, a legitimate government purpose exists (expediting litigation), and the court rule is rationally related to that purpose. The court rule placed both plaintiffs and defendant at risk when they rejected the mediation evaluation.

In the instant case, plaintiff does not argue that a suspect classification is involved, or that the mediation court rule is not rationally related to a legitimate governmental purpose. Plaintiff's argument fails.

Affirmed.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Jessica R. Cooper