

STATE OF MICHIGAN
COURT OF APPEALS

ANGELO IAFRATE CONSTRUCTION CO.,

Plaintiff-Appellant,

v

STATE OF MICHIGAN, DEPARTMENT OF
TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED

September 13, 2002

No. 232796

Court of Claims

LC No. 99-017418-CM

Before: Markey, P.J., and Cavanagh and R. P. Griffin*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order entered by the Court of Claims granting summary disposition in defendant's favor regarding this payment dispute. We affirm.

In 1992, the Michigan Department of Transportation (MDOT) contracted with C.A. Hull Co., Inc. (Hull) regarding the M-5 road construction project. Thereafter, Hull entered into a subcontract with plaintiff to perform construction services, particularly earthwork that included the construction of embankments to establish foundational support for bridges. Generally, there are two types of embankments—structure embankments, which are constructed of a granular class III material like sand, and embankments, which are constructed of sound earth material like clay or dirt. The subcontract between Hull and plaintiff provided that Hull would pay plaintiff fifty cents a cubic yard for “Embankment (CIP)”¹ and \$7 a cubic yard for “Structure Embankment (CIP).”

During this project, the MDOT 1990 Standard Specifications for Construction were in effect. In particular, Section 2.08.11(b)(1) pertained to structure embankments under footings supported by piling and provided that they be “constructed of Granular Material Class III within the limits as shown on the plans except sound earth will be permitted as an alternate material for such embankments placed between April 1 and November 15.” Consistent with this directive,

¹ CIP apparently means “compacted in place” and designates the pay item, i.e., the material used to construct the embankment.

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

notes on the bridge plans (hereinafter “plan notes”) for the project provided that “Embankment (CIP) may be substituted for Structure Embankment (CIP) in accordance with standard specification 2.08.11.” In addition, Section 2.08.17 provided that “[s]ound earth when used as structure embankment under pile-supported footings will be measured and paid for as Embankment (CIP).”

This action arose as a consequence of plaintiff’s interpretation of the plan notes which permit the substitution of Embankment (CIP) [sound earth material like clay or dirt] for Structure Embankment (CIP) [granular class III material like sand]. Plaintiff allegedly understood that the plan notes “specifically altered the contract provisions and allowed a direct substitution of sound earth for sand without regard to price. . . .” and provided that plaintiff “would be paid the same rate whether it used sound earth or sand when placing structure embankment.” Plaintiff used almost 72,000 square yards of sound earth constructing structure embankments, with MDOT’s knowledge. During construction, MDOT inspectors were advised by plaintiff’s superintendent about the quantities and the associated pay items, which included Structure Embankment (CIP) at a rate of \$7 per cubic yard. The MDOT inspector reports were then used to generate biweekly payments to Hull. However, about two years after the project was completed, MDOT notified plaintiff that it was only entitled to be paid the Embankment (CIP) rate of fifty cents per cubic yard for construction of the structure embankments because Structure Embankment (CIP) was not used. Thereafter, MDOT withheld \$446,397 from plaintiff.

In September of 1999, after efforts to resolve its claim against MDOT failed, including an alleged oral agreement to settle plaintiff’s claim for \$458,706, plaintiff commenced this action alleging breach of oral contract, promissory estoppel, estoppel by laches, estoppel by silence, estoppel by payment, and ratification. Defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10), alleging that: (1) any alleged oral agreement to settle plaintiff’s claim was unenforceable under MCL 17.3 because it was not approved by the State Administrative Board, and (2) equitable theories were not available to plaintiff because defendant did not deceive or mislead plaintiff which had equal access to the Standard Specifications and was obligated to seek clarification of any unclear terms.

In response to defendant’s motion, plaintiff argued that (1) an oral agreement to settle plaintiff’s claim for \$458,706 was reached and did not require approval from the State Administrative Board because payment at a rate of \$7 per cubic yard for structure embankment had already been approved before the project began, (2) plaintiff reasonably relied on the plan notes which indicated that Structure Embankment (CIP) and Embankment (CIP) would be paid at the same rate and defendant paid plaintiff that rate, therefore, plaintiff was entitled to an equitable remedy, and (3) plaintiff was a third-party beneficiary of the contract between Hull and defendant.

The Court of Claims granted defendant’s motion for summary disposition, holding: (1) the alleged oral settlement contract was not enforceable pursuant to MCL 17.3 because it was not approved by the State Administrative Board, (2) plaintiff was not deceived by defendant because the plan notes on which plaintiff allegedly relied did not reference the rate of pay for the substitution of dirt for sand and plaintiff was obligated by Standard Specification Section 1.05.05 to seek any necessary clarification of terms; consequently, plaintiff’s estoppel theories failed, (3) the doctrine of ratification was inapplicable because there was no contract between plaintiff and defendant, and (4) plaintiff was not a third-party beneficiary to the Hull-MDOT contract because

the contract was not undertaken to directly benefit plaintiff. Thereafter, the trial court entered an order summarily dismissing the case and this appeal followed.

On appeal, plaintiff argues that the Court of Claims improperly dismissed its equitable claims because defendant's conduct led plaintiff to reasonably expect to be paid \$7 per cubic yard for the structure embankment work it performed regardless of whether it used sound earth or sand in the structure embankment construction. We disagree. This Court reviews the grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Because the lower court looked beyond the pleadings in reaching its decision, we will consider the motion granted under MCR 2.116(C)(10). See *Ottaco, Inc v Gauze*, 226 Mich App 646, 650; 574 NW2d 393 (1997).

First, plaintiff claims that the plan notes, which superceded the Standard Specifications, "specifically allowed for Embankment (CIP) to be substituted as if it were Structure Embankment (CIP)" without any change in payment terms since it did not provide that the substitution was subject to the payment provisions of Standard Specification Section 2.08.17. Further, plaintiff argues, any ambiguity regarding the pay rate must be construed against defendant, the drafter of the contract. However, there was neither a conflict between, nor an ambiguity created by, the plan notes and the Standard Specifications; therefore, plaintiff's argument fails.

Standard Specification Section 2.08.11(b)(1) provided that structure embankments under footings supported by piling "be constructed of Granular Material Class III within the limits as shown on the plans except sound earth will be permitted as an alternate material for such embankments placed between April 1 and November 15." Consistent with this directive, the bridge plans included notes which provided that "Embankment (CIP) may be substituted for Structure Embankment (CIP) in accordance with Standard Specification 2.08.11. If Structure Embankment (CIP) is used, foundation underdrain 4" and the outlet ending are not required." In addition, Standard Specification Section 2.08.17 provided that "[s]ound earth when used as structure embankment under pile-supported footings will be measured and paid for as Embankment (CIP)."

Contrary to plaintiff's argument, the plan notes plainly pertained to and modified only the construction method, i.e., permitted the use of *either* sound earth or sand as construction *material*, and did not reference or modify the rate of pay for the material as prescribed by Standard Specification Section 2.08.17 and plaintiff's subcontract with Hull. Plaintiff misinterprets Standard Specification Section 1.04.01² as not permitting the plan notes and Section 2.08.17 to be harmonized, arguing that supplemental specifications "are only to be used for construction items not already covered in the Standard Specs." However, Section 1.04.01 does not limit the use of supplemental specifications to items not contained in the Standard Specifications. As in this case, supplemental specifications may be used to add or further clarify project-specific directives, e.g., "[i]f Structure Embankment (CIP) is used, foundation underdrain

² Section 1.04.01 provides that "[p]roposed construction or requirements not covered by the Standard Specifications will be covered by Supplemental Specifications and Special Provisions contained in the proposal or on the plans."

4” and the outlet ending are not required,” an instruction which was not contained in the Standard Specifications. The bridge plan notes, which were construction provisions, cannot be construed to nullify payment provisions, including Section 2.08.17.

Plaintiff relies on several estoppel theories in support of its position that defendant could not, two years later, rescind payment for work plaintiff performed. In particular, plaintiff argues that the promissory estoppel, estoppel by silence, and estoppel by payment doctrines apply because defendant made biweekly payments at the rate of \$7 per cubic yard for structure embankment construction using sound earth, consistent with plaintiff’s interpretation of the plan notes, which caused plaintiff’s reliance and continued work.

To establish a promissory estoppel claim, plaintiff must prove that “(1) there was a promise, (2) the promisor reasonably should have expected the promise to cause the promisee to act in a definite and substantial manner, (3) the promisee did in fact rely on the promise by acting in accordance with its terms, and (4) the promise must be enforced to avoid injustice.” *Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538, 548-549; 619 NW2d 66 (2000). Here, viewing the words, actions, and circumstances surrounding the situation objectively, including the relationship of the parties, no definite and clear promise was made by defendant to pay plaintiff \$7 per cubic yard for sound earth plaintiff used to construct structure embankments. See *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999); *Schmidt v Bretzlaff*, 208 Mich App 376, 379; 528 NW2d 760 (1995).

To establish estoppel by silence a party must have “knowingly permitted the opposite party to act to its own disadvantage.” *Commercial Union Ins Co v Liberty Mut Ins Co*, 137 Mich App 381, 387; 357 NW2d 861 (1984), quoting *Commercial Union Ins Co v Medical Protective Co*, 136 Mich App 412, 422; 356 NW2d 648 (1984). In other words, “[i]f one maintain[s] silence when in conscience he ought to speak, the equity of the law will debar him from speaking when in conscience he ought to remain silent.” *Detroit Hilton Ltd Partnership v Dep’t of Treasury*, 422 Mich 422, 430-431; 373 NW2d 586 (1985), quoting *Michigan Paneling Machine & Mfg Co v Parsell*, 38 Mich 475, 480 (1878). Here, plaintiff has failed to establish that defendant knowingly permitted plaintiff to operate under and rely on a mistaken interpretation of provisions contained in the contract between defendant and Hull.

Finally, as the Court of Claims recognized, plaintiff’s “estoppel by payment” claim fails because the contract between defendant and Hull expressly prohibited reliance on partial payments. In particular, Standard Specification Section 1.09.08(a) provided that partial payments made biweekly would be based on “estimates prepared by the Engineer of the value of the work performed and materials complete in place in accordance with the contract” and were subject to final balancing; therefore, “the Engineer’s estimates may not be relied upon by a Contractor as a basis to make payment to a Subcontractor.” Here, the estimates prepared by defendant’s Engineer were based on plaintiff’s superintendent’s representation that plaintiff constructed structure embankment payable as Structure Embankment (CIP) at a rate of \$7 per cubic yard. However, pursuant to the clear and express terms of the contract, the structure embankment was payable as Embankment (CIP) at a rate of fifty cents per cubic yard. Therefore, defendant is not estopped from rescinding the resulting overpayments once discovered.

Plaintiff also argues that defendant “lulled [it] into a false belief and subsequent reliance that it would be paid at the rate of \$7.00 per c.y. for the placement of sound earth as structure embankment” and, thus, ratified the unauthorized act, i.e., the change in payment terms. Plaintiff relies on *Schliess v Grand Rapids*, 131 Mich 52; 90 NW 700 (1902) in support of its ratification theory; however, that case is factually distinguishable. There, the defendant claimed that the plaintiff failed to fulfill the contract consistent with its specifications after the plaintiff had fully performed his obligations under the defendant’s supervision. Here, there was no contract between the parties and defendant did not reject, or refuse to pay the contract price for, plaintiff’s completed construction work after accepting it. Further, as discussed above, plaintiff has failed to establish that defendant knew of all the material facts relating to the unauthorized act, including that plaintiff had misinterpreted the payment terms of the contract. See *Old Mortgage & Finance Co v Pasadena Land Co*, 241 Mich 426, 436; 216 NW 922 (1928).

Finally, plaintiff argues that the Court of Claims improperly dismissed its breach of oral contract claim because defendant eventually agreed to pay plaintiff \$458,706, after previously withholding \$446,397, in payment for the structure embankment work plaintiff performed. Plaintiff argues that this agreement did not require State Administrative Board approval and that defendant breached that oral contract. However, as the Court of Claims noted, the State Administrative Board, through its supervisory powers granted by MCL 17.3, adopted a resolution that required that “all State contracts and grants of \$250,000 or more, and contract or grant amendments of \$125,000 or more, for the purchase of materials or services shall be approved by the State Administrative Board prior to execution.” Here, it is undisputed that the State Administrative Board did not approve of any contract between plaintiff and defendant with regard to this project. The contract between defendant and Hull provided that sound earth used as structure embankment would be paid as Embankment (CIP) at a rate of fifty cents per cubic yard. Plaintiff, a subcontractor, sought to be paid \$7 per cubic yard instead, which gave rise to the alleged negotiations with defendant that plaintiff claims resulted in an oral contract for \$458,706. This alleged contract “for the purchase of materials or services” required approval by the State Administrative Board to be enforceable. Since the State Administrative Board did not approve the oral agreement, the Court of Claims properly dismissed plaintiff’s breach of oral contract claim.

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Robert P. Griffin