STATE OF MICHIGAN

COURT OF APPEALS

MARK A. REENDERS CONSTRUCTION, INC.,

Plaintiff-Counterdefendant-Appellant,

v

GOLDSWORTHY REAL ESTATE, L.L.C., ROBERT GOLDSWORTHY, and KAREN GOLDSWORTHY,

Defendants-Counterplaintiffs-Appellees,

and

MARTY G. CAPOROSSI, d/b/a CAPOROSSI ASPHALT, INC., and NATIONAL BANK OF HASTINGS,

Defendants.

UNPUBLISHED
January 29, 2004

No. 242533
Barry Circuit Court
LC No. 01-000194-CZ

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the judgment entered, following a bench trial, in favor of plaintiff and against defendants Robert and Karen Goldsworthy and Goldsworthy Real Estate, L.L.C.,[1] in the amount of $30,824, together with court costs and interest at the judgment rate from the date of filing the complaint until the judgment is paid in full. We affirm.

Plaintiff contracted to build a gas station/convenience store for the Goldsworthy defendants. When those defendants refused to pay for "extras" or "additions" made during the construction of the building, most of which involved construction of a Blimpie's franchise restaurant within the store, plaintiff filed a construction lien and subsequently filed a complaint

[1] The remaining defendants are not involved in this appeal.

for foreclosure of the lien and breach of contract. Defendants filed a counter-complaint, alleging that plaintiff failed to perform certain tasks during the construction of the gas station/convenience store, that plaintiff violated consumer protection laws when it engaged in unconscionable or deceptive trade practices, and that plaintiff failed to perform work in a good and "workmanlike" manner. We note that defendants withdrew their consumer protection claim.

Plaintiff first contends that the trial court abused its discretion by arbitrarily reducing the amount claimed by plaintiff for extra labor and material, as set forth in change orders, and by making arbitrary monetary reductions for alleged deficiencies not supported by the pleadings and the record. We review the trial court's findings of fact in a bench trial for clear error. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001), citing MCR 2.613(C) and *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). We also review the trial court's determination of damages following a bench trial for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002), citing *Meek v Dep't of Transportation*, 240 Mich App 105, 121; 610 NW2d 250 (2000). "Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Marshall Lasser, supra* at 110.

Plaintiff argues that the trial court arbitrarily made adjustments in the amounts claimed in the change orders regarding the wastewater lagoon system, the Blimpie work, the concrete for the sign base, and the cooler allowance. Regarding the lagoon system, the trial court stated:

> The lagoon's capacity was increased by one-third. That would lead someone to conclude, well, maybe we would add one-third to $8,000. Maybe that doesn't make sense, but it doesn't make sense to me you double the price of it, which is basically what happened with the two change orders. So the original allowance was $8,000.00. I'm allowing an additional $4,000.00 so that the two items together there -- there was a claim for 10,400 extra, so basically I'm reducing that by $6400.00.

Plaintiff testified that after defendants presented the plan containing the Blimpie's to the health department for its review, the Barry/Eaton County Health Department wrote a letter to the Michigan Department of Environmental Quality (DEQ) stating that it believed that the lagoon system, which was approved at 36,000 gallons per year, would have to be increased. Plaintiff testified that he told defendants about Lakeshore Environmental because it would work with them on getting the lagoon system approved by the State. According to plaintiff, Lakeshore Environmental sent a letter to the DEQ that included an updated drawing relating to the wastewater lagoon.

Plaintiff testified that change order number 2 was for the additional pumps for the lagoon at a cost of $1,985. There was testimony by defendant Robert Goldsworthy that he paid the amount of this change order, and this is acknowledged by plaintiff. In addition, the application for payment #3 states that change orders, including change order #2, were approved. Plaintiff also testified that change order #9 was for the additional sand filter and materials for the lagoon system. Plaintiff stated that this change order was in addition to change order #2 and was for $9,150. Regarding this change order, defendant Robert Goldsworthy testified that he has already paid the excavation subcontractor for the work done pursuant to change order #9.

Plaintiff concedes and asserted below that the amount it sought in the complaint, $81,727, had to be reduced by the amounts already paid by defendants directly to subcontractors. Indeed, the trial court reduced plaintiff's monetary claim by $9,150, which the court found represented defendants' payment to a subcontractor for excavation services.[2] Plaintiff asserts that this payment related to change order #9 for additional lagoon work. Although not pertinent for purposes of this appeal, the trial court further reduced plaintiff's claim by $12,230 for a payment made by defendants to subcontractor Lakeland Asphalt, and plaintiff acknowledges that it was proper for its claim to be reduced to reflect this payment.

The problem that arises is that the trial court, in ruling from the bench, and as indicated above, also reduced plaintiff's claim by an additional $6,400, finding that plaintiff was not entitled to all of the amount related to additional lagoon work. The trial court, while recognizing that a payment was made to a subcontractor for lagoon work and reducing the monetary claim accordingly, made a further reduction by, in essence, giving a credit to defendants in the amount of $6,400 on the basis that plaintiff was not entitled to the full amount of the additional lagoon work. Thus, the trial court was not "double-dipping" as claimed by plaintiff but merely finding that defendants did not have to pay the full amount requested by plaintiff for additional lagoon work. If the trial court had only reduced the monetary claim by the payment already made by defendants to the excavation subcontractor without a further reduction, the court would in fact be concluding that plaintiff was entitled to the full payment for additional lagoon work. The court, however, found that plaintiff was not so entitled, thus an additional reduction was necessary to properly account for the court's findings otherwise defendants would fail to recoup an "overpayment" for additional lagoon work. Therefore, the question that remains is whether the trial court erred in reducing the amount sought by $6,400. We find no error.

Initially, it is important to note that the trial court ruled that the Blimpie's franchise was not included in the original contract between the parties. The trial court also found that there was no agreement with respect to the cost or price of any changes, extras, or additions. Defendants had claimed that any extras were included in the original contract price. The trial court proceeded on the basis that plaintiff was entitled to recover for extras related to Blimpie's but only in a dollar amount that was fair and reasonable.[3] Turning to the additional lagoon work, the trial court found that it would not be fair nor reasonable for plaintiff to recover extras in an amount that more than doubled the original allowance regarding the lagoon, where the lagoon capacity was increased by only a third through the additional work. While we acknowledge that plaintiff provided testimony that the charges for the lagoon extras were reasonable and proper in view of the work performed, we cannot conclude that the court's reasoning in support of a lower amount was unfair or unreasonable. The damage award for extras was within the range of the evidence presented. See *Alan Custom Homes, Inc v Krol,* 256 Mich App 505, 516; 667 NW2d 379 (2003).

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[2] The evidence indicates that the actual payment was closer to $7,500.

[3] We note, by analogy, that under the Uniform Commercial Code – Sales, MCL 440.2101 *et seq.*, a reasonable price is to be applied where the parties intend a contract but leave the price unsettled.

Plaintiff also argues that the trial court erred in reducing the amount claimed for the Blimpie work by $12,840. Plaintiff testified that the health department required additional plumbing in the Blimpie area, so it had to saw-cut the floor, fill in the concrete, and then tile the floor. Plaintiff also testified that it had to remove the ceiling tiles and replace them with vinyl-clad tile. According to plaintiff, the drywall was already installed and painted, so it just had to put the "FRP" panels over the existing walls. Finally, plaintiff testified that lighting fixtures had to be moved and additional plugs added. Defendant Robert Goldsworthy testified that plaintiff had to remove approximately four feet of ceiling tile. He further testified:

> They already had the ceiling tiles in and the lights in. They had to saw-cut the floor and put the plumbing in. They had to build a wall here and a wall in the back that goes over—it's kinda like an L shape—tile the walls to the Blimpie specs. And that's about it.

Plaintiff claimed $23,840 in extras for the work as reflected in change order #5. Because the trial court awarded plaintiff for the work related to Blimpie's, it obviously did not accept defendants' allegation that the work was included in the original contract price. On the other hand, the trial court implicitly concluded that $23,840 was not reasonable. The trial court stated:

> The Blimpie's, I've already indicated that my finding is that that was not—that was an extra. So in looking at the items that were additions, I don't see anything for walls. The—the change order talked about walls, drywall, electrical tile, plumbing and cabinets. I don't see that there was anything extra to do on the walls. I'm allowing $1,000.00 for drywall, $1,000.00 for electrical. The biggest item was the tiling. I'm allow—it looks to me like about 350 square feet of your surface area was tiled on the counter area and the—and in the wall behind the counter. So I'm allowing $3,000.00 for that, $1,000.00 for plumbing, and $5,000.00 for cabinetry. That's $11,000.00. So the claim in Change Order 5 was for $23,840.00. I'm reducing that by $12,840.00.

We conclude that the trial court's award of $11,000 for this extra work was within the range of the evidence presented by the parties. *Krol, supra* at 516. Therefore, we conclude that the trial court did not clearly err in reducing the amount of change order #5 by $12,840.00.

Plaintiff also argues that the trial court erred in reducing the amount claimed by it for the sign base. Regarding change order number #6, the concrete base for the sign, the trial court stated:

> I'm not allowing that as an extra. The blueprint doesn't specify whether the sign base was to be included or not. Oh, no, wait a minute. I take that back. I was originally not going to allow that, but what I am going to do is allow it, and I'm going to provide that Mr. Goldsworthy has the right to collect that from the Davis Oil Company. It sounds to me like it's going to be paid, so nobody's out-of-pocket there.

Plaintiff claims that the trial court adjusted this change order by $1,575.00. However, reviewing the trial court's opinion, it appears to us that the court allowed this extra. Plaintiff has provided no citation to the trial court's opinion or any order showing that it did not allow for this

"extra." Because the trial court allowed this extra, we conclude that the trial court did not err as claimed by plaintiff.

Plaintiff also argues that the trial court erred in reducing the amount claimed for the cooler. Regarding change order #7, the cooler allowance, the trial court stated:

> Change order 7 is the cooler allowance, excess of $4,568.00. Well, the change in the cooler was made before the final prints were prepared. So the allowance really should have been recalculated. Thirty-six thousand dollars was allowed. Apparently there was an additional $4568.00 that was claimed. I think both parties are at fault for that. So I'm basically splitting that.

Plaintiff testified that when he was bidding this project, defendants were in a hurry to get a quotation to the bank. Plaintiff continued, "So he went in with a cooler allowance 'cause we hadn't received a -- a bid yet from the cooler companies. And so we put in a number." The cooler allowance was for $36,000 and change order #7 was for $4,568, which was over and above this allowance. This testimony supports the trial court's finding that both parties were at fault in determining the amount of the allowance for this item. Therefore, we conclude that the trial court did not err in reducing the amount of this extra by half.

Plaintiff also argues that the trial court erred in awarding defendants credits for deficiencies in the amount of $6,000. Specifically, plaintiff argues that the trial court erred in granting a $2,000 credit for the omission of the vapor barrier under the concrete floor slabs, in granting a $1,000 credit for the roof, and granting a $3,000 credit for the condensation problem.

We note that the trial court did not grant a $2,000 credit for the omission of the vapor barrier. The trial court did allow a $2,000 credit for the foundation insulation that was not installed as agreed upon, but this is not discussed in plaintiff's appellate brief. Therefore, because we conclude that the trial court did not allow a credit to defendants for the omission of the vapor barrier, we conclude that the trial court did not err as claimed by plaintiff.

Regarding the $1,000 credit for the roof, there was testimony that roof scuppers were not installed as provided for in the plans. Therefore, the trial court did not clearly err in awarding defendants a credit for this deficiency.

Finally, regarding the condensation problem, the trial court stated:

> There is an issue regarding moisture in the stud wall of the sales area. That's the north wall of the sales area. There's clearly a condensation problem there. I'm allowing $3,000.00 for that problem.

According to plaintiff, this alleged deficiency was not identified in defendants' counter-complaint and there was no testimony in the record to support the finding that if the condensation existed, it was caused by plaintiff. Plaintiff further states that this problem was first observed when the trial court viewed the building.

In defendants' counter-complaint, they alleged that they entered into a contract with plaintiff in which he agreed to perform the construction in a "workmanlike" manner pursuant to

the terms and specification and that plaintiff failed to perform in such a manner. In addition, defendants' affirmative defenses included:

> 5. That Plaintiff's claim is subsumed by the right of the Defendant Goldsworthy to a setoff and or recoupment for Plaintiff's incompetent work and failure to follow the prints and specification, breach of contract.

We conclude that the trial court did not clearly err in finding that this defect was pleaded generally and to the extent necessary to give plaintiff notice of this allegation. In addition, after reviewing the record before this Court, we conclude that there was enough testimony and evidence presented on this issue to support the trial court's decision.

Plaintiff also contends that the trial court erred by limiting the interest on the judgment to the judgment rate instead of the rate that was included in the construction agreement. We disagree.

"This Court reviews de novo an award of interest pursuant to MCL 600.6013." *Everett v Nickola*, 234 Mich App 632, 638; 599 NW2d 732 (1999). "Entitlement to interest on a judgment is purely statutory and must be specifically authorized by statute." *Dep't of Transportation v Schultz*, 201 Mich App 605, 610; 506 NW2d 904 (1993). MCL 600.6013 provides the following:

> (1) Interest is allowed on a money judgment recovered in a civil action, as provided in this section. . . .
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> * * *
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> (5) Except as provided in subsection (6), for a complaint filed on or after January 1, 1987, but before July 1, 2002, if a judgment is rendered on a written instrument, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the 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.

This Court has stated that statutes that provide for interest on judgments are in derogation of the common law and therefore must be strictly construed. *Schultz, supra* at 608. "When construing a statute, the primary goal is to ascertain and give effect to the legislative intent." *Everett, supra* at 638. The purpose of a statutory provision that permits interest to accrue on money judgments from the time the complaint is filed is to compensate the prevailing party for expenses incurred in bringing the suit and for any delay in receiving such damages. *Id.*

Assuming that the written contract in this case constituted a written instrument under the statute, the judgment entered by the trial court was not rendered on the contract. The trial court awarded plaintiff damages for "extras" performed. The contract rate cited by plaintiff specifically addresses payment toward the contract sum. Because these "extras" were not part of

the contract sum, the trial court did not err in awarding interest at the judgment rate from the date of filing the complaint until the judgment is paid in full.[4]

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot

[4] In light of our ruling, it is unnecessary to address the arguments regarding usury.