STATE OF MICHIGAN

COURT OF APPEALS

CITY OF FERNDALE,

Plaintiff-Appellant,

v

FLORENCE CEMENT COMPANY and HARTFORD CASUALTY INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
July 10, 2008

No. 277610
Oakland Circuit Court
LC No. 2003-046556-CK

Before: Owens, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment of no cause of action, following a bench trial. We reverse and remand for additional proceedings consistent with this opinion.

Plaintiff entered into a contract with defendant Florence Cement Company (Florence) to install new concrete for a roadway in the city. Defendant Hartford Casualty Insurance Company (Hartford) provided a maintenance and guarantee bond on the work performed by Florence. The work was completed in 1999. In 2001, plaintiff, through the project engineer, requested Florence to completely replace a defective portion of the concrete. Florence believed that only a partial repair of the concrete was necessary, so it refused to perform the requested work. Plaintiff then hired another contractor to replace the concrete and brought this breach of contract action to recover the cost of repair. The trial court initially dismissed the action, finding that it was time-barred by the one-year limitations period applicable to arbitration awards, MCR 3.602(I). This Court reversed that decision and remanded for further proceedings. *City of Ferndale v Florence Cement Co*, 269 Mich App 452; 712 NW2d 522 (2006). On remand, plaintiff brought a renewed motion for summary disposition, which the trial court denied. Following a bench trial, the trial court found that the partial-depth repair proposed by Florence would have fully addressed the alleged defects and that plaintiff's insistence on a full-depth repair was not commercially reasonable. Accordingly, the court concluded that plaintiff was responsible for the costs of its decision to hire another contractor and was not entitled to collect that amount from defendants.

On appeal, plaintiff first argues that the trial court erred in denying its motion for summary disposition based on paragraph 9.11 of the parties' agreement. We conclude that the trial court erred in denying plaintiff's motion for summary disposition, but not based on

paragraph 9.11. We review de novo the grant or denial of a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition pursuant to MCR 2.116(C)(10) is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

We also review de novo issues of contract interpretation. See *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). When construing a contract, the first goal is to determine, and then enforce, the parties' intent based on the plain language of the agreement. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007). "If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce the language as written, unless the contract is contrary to law or public policy." *Id.* Courts may not rewrite plain and unambiguous language because parties must abide by the terms of their agreement. *Id.* at 130-131.

In the present case, the trial court erroneously relied on the requirements in Article 9 of the contract. We note the language of paragraph 9.12 which states, "The rendering of a decision by ENGINEER pursuant to paragraph 9.10 or 9.11 with respect to any such claim, dispute or other matter . . . will be a condition precedent to any exercise by OWNER or CONTRACTOR of such rights and remedies as either may otherwise have under the Contract Documents . . . ." This language does not, however, mean that every claim must be determined under paragraph 9.10 or 9.11 before a claim may proceed under a different provision of the contract. The contract does not say "any claim," but "any such claim." Use of the term "such" is clearly a reference to a claim brought by one of the parties under paragraphs 9.10 or 9.11. The provision is a prohibition on Florence and plaintiff of seeking another remedy under the contract while a decision by the engineer is still outstanding, or the time for appeal has not concluded. To read the provision otherwise would improperly construe the provision so as to render the term "such" nugatory. See *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005).

As noted by the trial court, "none of the communications from either the Engineer or the City in any way indicated that the City sought to invoke the dispute procedure in Section 9.11." Therefore, the present claim was not "any such claim" that required a final decision by the engineer before plaintiff was entitled to enforce its rights under other provisions of the contract. Accordingly, the trial court's analysis of whether plaintiff followed the provisions contained in paragraph 9.11 is irrelevant. Moreover, Article 9 is titled "Engineer's Status During Construction." As defendants note in their brief, Article 9 is inapplicable to the present situation because the project was completed in 1999 and this dispute arose in 2001 and, therefore, was not "during construction."[1]

[1] Accordingly, we need not consider plaintiff's argument that the engineer was acting impartially by writing correspondence "on behalf of Ferndale," because the requirement that the engineer be impartial is under paragraph 9.12 and by its terms relates only to disputes brought under
(continued…)

We conclude that the appropriate provisions for the present case are contained in Article 13, "Tests and Inspections: Correction, Removal, or Acceptance of *Defective* Work."[2] Specifically, sections 13.11 and 13.14 provide in pertinent part:

> *Correction or Removal of Defective Work:*
>
> 13.11 If required by ENGINEER, CONTRACTOR shall promptly, as directed, either correct all *defective* work, whether or not fabricated, installed or completed, or, if the Work has been rejected by ENGINEER, remove it from the site and replace it with Work that is not *defective*. CONTRACTOR shall pay all claims, costs, losses and damages caused by or resulting from such correction or removal (including but not limited to all costs of repair or replacement of work of others).
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> * * *
>
> *OWNER May Correct Defective Work:*
>
> 13.14 If CONTRACTOR fails within a reasonable time after written notice from ENGINEER to correct *defective* Work or to remove and replace rejected WORK as required by ENGINEER in accordance with paragraph 13.11,[3] or if CONTRACTOR fails to perform the Work in accordance with the Contract Documents, or if CONTRACTOR fails to comply with any other provision of the Contract Documents, OWNER may, after seven days' written notice to CONTRACTOR, correct and remedy any such deficiency. . . . All claims, costs, losses and damages incurred or sustained by OWNER in exercising such rights and remedies will be charged against CONTRACTOR . . . . Such claims, costs, losses and damages will include but not be limited to all costs of repair or replacement of work of others destroyed or damages by correction, removal or replacement of CONTRACTOR'S *defective* Work. . . .

The use of the term "shall" in paragraph 13.11 indicates that if the engineer required correction, repair or replacement of the work, both Florence's correction, repair or replacement

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(…continued)

paragraphs 9.10 and 9.11.

[2] This position is consistent with this Court's holding from the previous appeal. In *City of Ferndale*, *supra*, this Court discussed paragraph 13.14 in relation to plaintiff's argument that the trial court should have granted summary disposition in its favor and held that, "[b]ecause the record on appeal d[id] not address the question of whether plaintiff provided adequate notice to Florence before hiring another company to perform full-depth repairs, we find no error in the trial court's failure to grant summary disposition in favor of plaintiff." *Id.* at 462-463. Plaintiff brought its renewed motion on remand evidencing Florence's receipt of notice. Accordingly, the provisions of Article 13, not Article 9, were the appropriate place for the trial court to begin its analysis.

[3] This paragraph was quoted in *City of Ferndale*, *supra* at 462, as 13.13. The record provided in the present appeal shows the provision as referencing paragraph 13.11.

and their payment of all claims resulting therefrom was mandatory. See *Liggett v City of Pontiac*, 260 Mich App 127, 138; 676 NW2d 633 (2003). On September 26, 2001, the engineer wrote to Florence and stated:

> We have reviewed the petrographic analysis performed in July of 1999 and find that the testing strongly points to low air content and microcracking resulting from finishing procedures.
>
> It is our opinion that patching will be a temporary repair and the City of Ferndale will be faced with future maintenance expenses.

On October 9, 2001, the engineer wrote to Florence again, advising that, "[i]t is obvious that either the materials or workmanship was inferior in this area." It is clear that the engineer was requiring Florence to replace defective work. However, Florence did not do so. Thus, on October 29, 2001, plaintiff gave Florence notice as required by paragraph 13.14:

> [N]otice is hereby issued to Florence to remove and replace at its cost approximately 300 square yards of 11-inch concrete in the intersection of West Nine Mile Road and Allen. Florence shall proceed with the removal/replacement by November 12, 2001. It shall notify [the engineer] of the date and time Florence will proceed with the removal/replacement, and shall provide him with at least five days' notice.
>
> If Florence does not proceed by November 12, the City of Ferndale and/or its contractor will perform the work, and charge the expense to the Surety, [Hartford].

Florence again failed to comply. Having provided notice on October 29, 2001, plaintiff was well beyond the seven-day notice requirement of paragraph 13.14 when plaintiff finally had another contractor fix the work around late November or early December 2002. Because plaintiff's motion for summary disposition requested relief based on the provisions of paragraphs 13.11 and 13.14, and set forth Florence's failure to perform the mandatory repairs when required by the engineer, as well as their notice to Florence in October 2001 of their intent to have another contractor perform the work, plaintiff was entitled to summary disposition. There were no genuine issues of material fact as to whether plaintiff had complied with the terms of the contract, thereby entitling it to reimbursement from defendants.

Florence argues that the trial court did not find its work defective. We disagree. The trial court's opinion states that "Florence never disputed that repairs were necessary, but rather maintained that the problems could be addressed with only a partial depth repair." Indeed, the trial court's analysis focused only on whether the repair requested by the engineer was "commercially reasonable" and noted that "[i]f it was, then the City was entitled to proceed under Article 13, and hire another contractor to complete the work." Such a position presupposes that the work is defective under the terms of the contract.

We are also unpersuaded by defendants' claims that the engineer's authority to reject work ended with the final payment. Paragraph 14.15, "Waiver of Claims," provides in relevant part:

14.15. The making and acceptance of final payment will constitute:

> 14.15.1 a waiver of all claims by OWNER against CONTRACTOR, except claims arising . . . from *defective* Work appearing after final inspection pursuant to paragraph 14.11, from failure to comply with the Contract Documents or the terms of any special guarantees specified therein, or from CONTRACTOR's continuing obligations under the Contract Documents; . . . .

The dispute in this case arises from a claim specifically exempted from the waiver—defective work appearing after final inspection. Contrary to defendants' assertion, the language "pursuant to paragraph 14.11" does not mean that claims for defective work arising after final inspection are expressly limited to the provisions provided in paragraph 14.11. Rather, looking at the plain language of the contract, "pursuant to paragraph 14.11" merely modifies "final inspection" to indicate that the term "final inspection" means that process set forth in paragraph 14.11. Put another way, this paragraph's limitation expresses that plaintiff has waived any claims for defective work that appeared *prior* to the final inspection. That is not the case here, as this claim involves defective work that arose in 2001, long after the final inspection.

Finally, we conclude that the trial court erred in reading a "commercially reasonable" standard into the contract. There is no provision that expressly limits the engineer's authority under paragraph 13.11 to repairs which are "commercially reasonable," and courts may not read into an agreement terms that have not been placed there by the parties. *Cottrill v Michigan Hosp Service*, 359 Mich 472, 476; 102 NW2d 179 (1960); *Trimble v Metropolitan Life Ins Co*, 305 Mich 172, 175; 9 NW2d 49 (1943). The sole requirement under paragraph 13.11 that triggered mandatory repairs by Florence was that the engineer required them. Thus, the issue of whether the engineer's requirement of "full-depth" repair was better or more reasonable that Florence's offer to perform "partial-depth" repair was completely irrelevant to the case.

We reverse the trial court's finding of no cause of action in the case and the trial court's denial of plaintiff's motion for summary disposition. We remand this case back to the trial court for entry of an order granting plaintiff's motion for summary disposition and for a determination by the trial court on the issue of damages. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Alton T. Davis