

STATE OF MICHIGAN
COURT OF APPEALS

L. LOYER CONSTRUCTION COMPANY,

Plaintiff-Appellant,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED

September 23, 2010

No. 294067

Court of Claims

LC No. 06-000078-MM

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

PER CURIAM.

Plaintiff L. Loyer Construction Company appeals as of right the trial court's order granting defendant's motion for summary disposition and dismissing plaintiff's remaining claims pursuant to MCR 2.116(C)(7), (8), and (10). We affirm.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Plaintiff was awarded a contract to upgrade storm sewers in the city of Ann Arbor pursuant to a competitive bidding process with defendant Michigan Department of Transportation. The contract incorporated by reference the Michigan Department of Transportation's 1996 Standard Specifications for Construction. Those standard specifications allow the project engineer, at any time, to "direct changes in quantities and alterations in the work as are necessary to satisfactorily complete the project," and further provide that such changes "shall not invalidate the contract nor release the surety, and the Contractor shall perform work as altered." The standard specifications provide a method for additionally compensating a contractor where extra work is necessary to complete the contract.

After beginning work on the project, plaintiff discovered that undocumented underground utility ducts owned by SBC Ameritech were situated in the path of the planned pipeline. Defendant was unable to make satisfactory arrangements for Ameritech to move the ducts and ultimately it modified the project to allow it to be completed without moving or disturbing the utility ducts. Plaintiff submitted several claims for additional compensation through defendant's administrative review process and was awarded additional compensation for many of the claims.

In June 2006, plaintiff, apparently dissatisfied with the results of the administrative review process, filed this action against defendant in the court of claims, alleging that the project modifications were so substantial that defendant was required to rebid the project, but that

instead of doing so, defendant had improperly modified the project for the benefit of Ameritech, resulting in significant financial losses to plaintiff and damage to its business reputation. Plaintiff's complaint contained 23 counts that included claims for breach of contract and various tort-related claims, and claims alleging various statutory and constitutional violations. In October 2008, the trial court granted defendant's motion for partial summary disposition and dismissed 13 of plaintiff's claims. Later, in August 2009, the trial court granted defendant's second motion for summary disposition and dismissed plaintiff's remaining claims, for abandonment and termination, breach of contract, violation of "statutory due process," taking without due process and without compensation, cardinal change, constitutional violations, illegal agency, and a claim for damages, pursuant to MCR 2.116(C)(7) (governmental immunity), (C)(8) (failure to state a claim for which relief could be granted) and (C)(10) (no genuine issue of material fact).

II. ANALYSIS

On appeal, plaintiff challenges the trial court's second order granting summary disposition to defendant on plaintiff's remaining claims. Plaintiff argues that the trial court erred by concluding that its due process claims were barred by governmental or sovereign immunity, that several of its counts failed to state cognizable claims for relief, and that several claims were subject to dismissal for failure to establish a genuine issue of material fact for trial.¹

This Court reviews a trial court's summary disposition decision de novo. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). Defendant moved for summary disposition under MCR 2.116(C)(7), (8), and (10), and the trial court relied in part on each of these grounds as bases for dismissing plaintiff's various claims.

Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). In reviewing a motion under MCR 2.116(C)(7), a court is required to consider "all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Id.*

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Adair v Mich*, 470 Mich 105, 119; 680 NW2d 386 (2004). All well-pleaded factual allegations must be accepted as true and construed in a light most favorable to the non-moving party. *Id.* The motion may be granted only when the claim alleged is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). When considering a motion under MCR 2.116(C)(10), a court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in a light most favorable to

¹ Plaintiff does not challenge the trial court's dismissal of its claims for "illegal agency" and "abandonment and termination."

the nonmoving party to determine whether there is a genuine issue of material fact for trial and whether the moving party is entitled to judgment as a matter of law. *Id.*

We do not fully agree with the trial court's conclusion that governmental immunity bars claims against the state or its agencies for monetary damages arising from alleged constitutional violations. Governmental immunity is not available in a state court action alleging that a state governmental agency, by custom or policy, violated a right conferred by the Michigan Constitution. *Jones v Powell*, 462 Mich 329, 336; 612 NW2d 423 (2000); *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), *aff'd sub nom Will v Mich Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). "A claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Jones*, 462 Mich at 336, quoting *Smith*, 428 Mich at 544 (emphasis added by *Jones*).

The trial court gave the following explanation in holding that plaintiff's claims were barred by governmental immunity:

The Michigan Supreme Court has construed the limits of the state's sovereign immunity, stating that, "the state, as sovereign, is immune from suit unless it consents, and that any relinquishment of sovereign immunity must be strictly interpreted. Sovereign immunity exists in Michigan because the state created the courts and so is not subject to them." *Pohutski v City of Allen Park*, 465 Mich 675, 681-682 (2002). Historically, the state of Michigan has never agreed to be sued for damages in a claim such as this one, stating violations of due process. Although there are some caveats to the state's sovereign immunity (a damage remedy against the state may be granted only where the violations of the Michigan constitution were part of a "custom or policy" of the state and where other remedies did not exist), *Smith v State Dep't of Public Health*, neither the Michigan courts nor its legislature have ever found an exception to sovereign immunity for damages in private suits brought under a state's violation of due process. 428 Mich 540, 649-652 (1987). As this suit is brought in state court, and the State of Michigan has not agreed to waive its immunity nor has this cause of action stemmed from a violation of custom or policy, then claim XI is barred through sovereign immunity, given that other damage remedies to exist. Under the Government Tort Liability Act, MDOT is considered a "governmental agency." MCL 691.1401(d).

Furthermore, this claim of Taking Without Due Process and Without Adequate Compensation, Count XI, as well as Plaintiff's claim of Constitutional Violations, Count XVI, are barred by governmental immunity. Because both claims contain declarations of tortuous [sic] conduct (conspiracy to defraud and fraud in Count XI and fraud in Count XVI), and because MDOT is a governmental agency, Loyer's claims are barred pursuant to MCL 691.1401(1). As MDOT was engaged in a governmental function when through which Loyer's claims arise, MDOT is protected by MCL 691.1401.

The trial court's application of the law on governmental or sovereign immunity to plaintiff's claims is not entirely accurate. Plaintiff's due process claims, Counts XI and XVI, are

based on conduct that is not subject to governmental immunity. In Count XI, plaintiff alleged that defendant forced plaintiff to complete the modified contract without due process and without compensation for the additional work. In Count XVI, plaintiff alleged that defendant violated plaintiff's due process rights by making secret arrangements with Ameritech to plaintiff's detriment. Although these claims are related to plaintiff's allegations that defendant made secret arrangements for Ameritech's benefit and to plaintiff's detriment, the underlying claims that defendant deprived plaintiff of valuable property (i.e., its contractual rights and the value of its work on the project), are traditional due process claims that are not barred by governmental immunity. See *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 526; 705 NW2d 365 (2005) (discussing causes of action for physical and regulatory takings of property). Plaintiff's breach of contract claims also are cognizable claims against the state, which has conferred jurisdiction on the court of claims to hear such claims. MCL 600.6419; see also *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 770-772; 664 NW2d 185 (2003) (discussing the court of claim's exclusive jurisdiction over complaints seeking monetary damages against the state).

Nonetheless, any error in relying on governmental immunity as a basis for dismissal was harmless, because, for the reasons hereafter set forth, the trial court properly found that plaintiff's claims were subject to dismissal under MCR 2.116(C)(8) and (10). This Court will not reverse a trial court's judgment where it reached the right result for the wrong reason. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001).

Initially, we reject plaintiff's argument that the trial court erroneously accepted Attachment A to defendant's brief in support of its motion for summary disposition. Contrary to plaintiff's argument, Attachment A was not offered as an affidavit or as documentary evidence to factually support defendant's claimed bases for summary disposition. Rather, it was a summary of relevant background facts, which defendant believed were undisputed, describing the sewer construction project, the initial bidding process, the formation of the parties' contract, the discovery of the Ameritech ducts and the modifications to the project, and plaintiff's pursuit of additional compensation through defendant's administrative review process. The trial court gave plaintiff the opportunity to identify any facts listed in Attachment A that it believed were disputed. Further, the trial court relied on the attachment only as "factual background." We also note that plaintiff does not challenge the factual content of Attachment A on appeal. Rather, the substance of plaintiff's argument is directed at the legal conclusions to be drawn from the facts identified in Attachment A. Considering the limited purpose for which Attachment A was intended and used, we find no error.

Plaintiff argues that the trial court erred by dismissing its claims that defendant violated MCL 247.661c and 23 CFR 635.104 by not reinitiating the bidding procedure when it became necessary to modify the project after the discovery of the Ameritech ducts. We disagree.

Questions involving the construction or application of a statute are reviewed de novo as a question of law. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). MCL 247.661c provides:

All federal aid construction projects, all other projects of the department concerning highways, streets, roads, and bridges, whose cost exceeds \$100,000.00 for construction or preservation as defined in section 10c, shall be performed by

contract awarded by competitive bidding unless the department shall affirmatively find that under the circumstances relating to those projects, some other method is in the public interest. All of those findings shall be reported to the state transportation commission 90 days before work is commenced and promptly in writing to the appropriations committees of the senate and house of representatives. However, in a case in which the department determines emergency action is required, the reports need not be filed before work is commenced but shall be promptly filed. Local road agencies that make a decision not to perform construction or preservation projects exceeding \$100,000.00 shall contract for this work through competitive bidding.

In addition, 23 CFR 635.104, which is applicable because the sewer project was partly funded by the federal government, provides, in pertinent part:

(a) Actual construction work shall be performed by contract awarded by competitive bidding; unless, as provided in § 635.104(b), the STD demonstrates to the satisfaction of the Division Administrator that some other method is more cost effective or that an emergency exists. The STD shall assure opportunity for free, open, and competitive bidding, including adequate publicity of the advertisements or calls for bids. The advertising or calling for bids and the award of contracts shall comply with the procedures and requirements set forth in §§ 635.112 and 635.114.

(b) Approval by the Division Administrator for construction by a method other than competitive bidding shall be requested by the State in accordance with subpart B of part 635 of this chapter. Before such finding is made, the STD shall determine that the organization to undertake the work is so staffed and equipped as to perform such work satisfactorily and cost effectively.

(c) In the case of a design-build project, the requirements of 23 CFR part 636 and the appropriate provisions pertaining to design-build contracting in this part will apply. However, no justification of cost effectiveness is necessary in selecting projects for the design-build delivery method.

It is undisputed that plaintiff was awarded a contract for the storm sewer upgrade project pursuant to a competitive bidding process, as required by MCL 247.661c and 23 CFR 635.104. Neither the statute nor the regulation address project modifications pursuant to a contract obtained and approved through the bidding process. However, the parties' contract incorporates the Michigan Department of Transportation's 1996 Standard Specifications for Construction, which provides, in pertinent part:

103.02 Changes in the Work. The Engineer may, at any time, direct changes in quantities and alterations in the work as are necessary to satisfactorily complete the project. Such changes in quantities and alterations shall not invalidate the contract nor release the surety, and the Contractor shall perform work as altered.

103.04 Extra Work. The Engineer may, at any time during the progress of the contract, order extra work necessary to complete the contract. The Engineer shall furnish the Contractor a work order stating the location, kind and estimated quantity of the extra work to be performed. The Contractor shall propose, in writing, unit or lump sum price(s) for which extra work will be performed. In the event the parties are unable to reach agreement on unit or lump sum prices, the Engineer may order the work to be performed on a force account basis according to Subsection 109.07. When the extra work is authorized by the Engineer of Construction, or a duly authorized representative, the authorization shall become part of the contract.

109.07 Extra and Force Account Work. When extra work is required, it shall be performed according to the requirements and provisions of Subsection 103.04. Payment for the work will be on the following basis as directed by the Engineer in the Authorization:

- A. Unit prices agreed upon in the written order authorizing the work;
- B. Lump sum amount agreed upon in the work order; and/or
- C. If an agreement cannot be reached, the work shall be done on a force account basis to be compensated in the following manner:

The Engineer will order the work, including any required offsite work, to be done by force account. Prior to starting the force account work, the Contractor and the Engineer will work together to develop a work plan. The work plan shall include, to the extent possible, a progress schedule of controlling items and their duration, equipment to be used (Contractor owned and rented), labor to be used (number of people and crafts) and a listing of material. From the work plan the Engineer will prepare a budget recommended for the force account work. If the conditions relative to the force account change or if the progress of the work becomes inconsistent with the original work plan, the Contractor and the Engineer shall jointly revise the work plan.

The compensation provided in this subsection shall be accepted by the Contractor as payment for extra work done by force account, and the percentages shall cover profit, superintendence, general expense, overhead, miscellaneous unforeseen costs, and the use of small tools and equipment.

Thus, the 1996 specifications expressly allow for alterations to a project as are necessary to satisfactorily complete the project, and provide that such changes will not invalidate the contract or release the surety, and that the contractor shall perform work as altered. The specifications also provide a means for adjusting contract obligations to compensate a contractor for additional or extra work without starting the bidding process anew. Because it is undisputed that plaintiff was awarded the contract for the sewer construction project pursuant to a competitive bidding process and that the contract expressly allows for modifications to the contract as necessary to complete the project, and because neither MCL 247.661c nor 23 CFR 635.104 address

modifications to existing contracts, there is no merit to plaintiff's argument that either the statute or regulation was violated.

Plaintiff also argues that defendant violated the Department of Transportation's 1979 Administrative Board Resolution, which provides that the Department of Transportation "without obtaining the approval of this Board, in connection with any construction or maintenance contract, may contract for extra work, or labor, or both . . . except that each job for extra or additional work or labor, or both, in excess of \$100,000.00 shall require approval of the State Administrative Board." The terms of this resolution were incorporated into the parties' contract. Plaintiff argues that defendant violated the resolution by failing to obtain the approval of the State Administrative Board for the modifications to the project, which plaintiff contends involved additional work and labor in excess of \$100,000. However, plaintiff did not raise the issue of defendant's compliance with the resolution in the trial court. Therefore, this issue is not preserved. Accordingly, our review is limited to plain error affecting plaintiff's substantial rights. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001). Because this issue was not raised below, it was not addressed by the trial court or the parties, and it is not clear from the available record whether the project changes required administrative board approval. Thus, plaintiff has not shown that appellate relief is warranted.

Plaintiff next argues that the modifications to the project constitute a "cardinal change" to the original contract, rendering all contractual remedies inadequate. Plaintiff relies on federal case law recognizing that a cardinal change "occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for." *Rumsfeld v Freedom NY, Inc*, 329 F3d 1320, 1332 (DC 2003) (citations omitted). "By definition . . . a cardinal change is so profound that it is not redressable under the contract, and thus renders the government in breach." *Allied Materials & Equip Co v United States*, 569 F2d 562, 564 (1978).

The doctrine of cardinal change in a government contract has not been recognized by the courts of this state. Even were we inclined to recognize it, it is not applicable here. Although plaintiff asserts that the project modifications were so substantial as to constitute a "cardinal change," thereby rendering the administrative process inadequate, the objective evidence does not support that characterization. The summary of extra work does not qualitatively or quantitatively amount to a drastic change from the original contract. In *Rumsfeld*, 329 F3d at 1332-1333, the court found that there was no cardinal change where the government improperly delayed making progress payments to the contractor, interfered with the contractor's ability to obtain financing, delayed delivery of items it was contractually obligated to deliver, and imposed improper inspections and testing requirements. The court concluded that "the Board could properly find that these breaches did not constitute 'an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for.'" *Id.* at 1333 (citation omitted). Here, defendant modified the project to accommodate the Ameritech ducts, but it did not deliberately interfere with plaintiff's performance of the contract. More significantly, the parties' contract anticipated the possibility of project modifications and provided a method for compensating plaintiff for extra and additional work necessary to complete the project. Thus, the project modifications were redressable under the parties' contract. The circumstances of this case are less compelling than those in *Rumsfeld*, which were insufficient to establish a cardinal change. Accordingly, the trial

court properly granted summary disposition for defendant with respect to plaintiff's "cardinal change" claim.

Plaintiff also argues that defendant's conduct violated the statutes governing construction performance bonds, MCL 129.201 *et seq.* Plaintiff appears to argue that by modifying the project to accommodate the Ameritech ducts, defendant conditioned the bond on performance by plaintiff that was not based on the terms of the contract, and that defendant used the bond for Ameritech's benefit instead of its own protection. We disagree.

MCL 129.202 required plaintiff to provide a performance bond in an amount no less than 25 percent of the contract amount, "conditioned upon the faithful performance of the contract in accordance with the plans, specifications and terms thereof." The statute further provides that the bond "shall be solely for the protection of the governmental unit awarding the contract." We fail to see how defendant's alleged conduct establishes a violation of the bond statute. As previously indicated, the parties' contract allowed the project engineer to modify the project as necessary to complete the work. Thus, defendant was entitled to rely on the performance bond to assure plaintiff's faithful performance in accordance with the contemplated modifications. Further, even if Ameritech may have incidentally benefited by not having to move its ducts, that benefit did not arise by virtue of the performance bond. Accordingly, we find no merit to plaintiff's argument.

Finally, plaintiff argues that defendant violated its constitutional right to due process by denying it notice and an opportunity to be heard at the time defendant modified the project. The question whether a party has been afforded due process is a question of law that this Court reviews de novo. *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009).

The United States and Michigan Constitutions guarantee that no person shall be deprived of property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. Due process is a flexible concept, the essence of which requires fundamental fairness. Plaintiff contends that defendant deprived it of its property interest in the original contract and its property interest in the performance bond (which was secured by plaintiff's assets), by modifying the project without allowing plaintiff notice and an opportunity to be heard.

In *Whispering Pines AFC, Home, Inc v Dep't of Treasury*, 212 Mich App 545; 538 NW2d 452 (1995), the plaintiff operated an adult foster care home that provided services pursuant to a contract with the state Department of Mental Health ("DMH"). The plaintiff's contract authorized the DMH to conduct annual audits and cost settlements of the plaintiff's accounts. *Id.* at 547. The plaintiff had the right to seek review of the audit and cost settlement in a three-level administrative review process. The agency's final decision was subject to review under the Revised Judicature Act (RJA), MCL 600.631, which only permitted review of the issue whether the DMH was authorized by law to make its decision. *Id.* at 547-548. The issue was whether these procedures deprived plaintiff of its property without due process when the Department of Treasury withheld payments from the plaintiff's contract as reimbursement of a \$55,180 overpayment uncovered by the audit. The plaintiff argued that the contractual procedures deprived it of its due process right to an evidentiary hearing before deprivation of its property interest. *Id.* at 549. This Court disagreed, holding:

Petitioner entered into a contractual relationship with the DMH in which petitioner agreed to provide adult foster care in exchange for payments of certain amounts of money for certain services. Petitioner also agreed to have those payments audited and to have an administrative agency determine whether any overpayment was made. Further, by entering into the agreement, petitioner acknowledged that these contractual undertakings were subject to a construction incorporating related statutory requirements. As a result, the RJA must be read into the contract and is controlling. Accordingly, the parties' relationship is controlled by the contract, which incorporates the RJA. However, petitioner argues that this understanding of the contract ignores its constitutionally protected right not to be deprived of property without an evidentiary hearing. We disagree for the fundamental reason that this right, if it exists, can be waived. [*Id.*]

The Court held that the plaintiff contracted to waive any constitutional rights that might exist in contested case administrative proceedings by agreeing to the audit process as provided by the contract. The Court stated:

Further, it has long been recognized that a government contract may validly provide that a designated officer's decision regarding charges or payment obligations under the contract shall be final and conclusive, both on the parties and a court before which the parties have brought their dispute, and that this in itself creates no Fourteenth Amendment problem. If the parties are competent to make the contract in the first instance, they are competent to include such a dispute resolution clause. *United States v Moorman*, 338 US 457; 70 S Ct 288; 94 L Ed 256 (1950). The sole limitation would be the implied proviso, derived from contract law and not as a by-product of constitutional doctrine, that the officer's decision not be the product of fraud or tainted with equivalent bad faith. *Ripley v United States*, 223 US 695; 32 S Ct 352; 56 L Ed 614 (1912). Because petitioner has made no claim of fraud or bad faith that would vitiate the contractual audit process, the limitation is irrelevant to this case. In sum, there is no limitation under either contract law or the United States Constitution on the parties proceeding under the contract. [*Id.* at 551.]

Here, plaintiff similarly entered into a contract that provided a means for defendant to modify the project that plaintiff contracted to perform and a means for compensating plaintiff for extra and additional work necessary to complete the project. The contract effectively waives any right plaintiff might have had to an evidentiary hearing or other due process procedure at the stage when defendant's project engineer decided upon the modifications. Accordingly, the trial court properly dismissed plaintiff's due process claims.

For the foregoing reasons, we conclude that plaintiff's challenged claims were properly dismissed under MCR 2.116(C)(8) and (10). The trial court did not err in granting defendant's motion for summary disposition.

We affirm. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Richard A. Bandstra