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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-916

Contractors Edge, Inc.,
Appellant,

vs.

City of Mankato,
Respondent.

Filed January 17, 2012
Affirmed in part and remanded
Stauber, Judge

Blue Earth County District Court
File No. 07CV102311

Aaron A. Dean, Jesse R. Orman, Jeffrey A. Wieland, Fabyanske, Westra, Hart & Thomson, P.A., Minneapolis, Minnesota; and

Jane L. Volz, Volz Law Firm, Ltd., Prior Lake, Minnesota (for appellant)

James M. Strommen, James J. Thomson, Kennedy & Graven, Chtd., Minneapolis, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Larkin, Judge; and Stauber, Judge.

U N P U B L I S H E D   O P I N I O N

STAUBER, Judge

On appeal from summary judgment, appellant Contractor's Edge, Inc. (CEI) argues that: (1) respondent City of Mankato (the city) should be equitably estopped from

disputing a construction contract change order and refusing to pay for extra work performed, because the city's project engineer executed the change order knowing that the city would not honor it; (2) in the alternative, CEI is entitled to full recovery under the contract's claim procedures, and the district court failed to analyze this issue; and (3) CEI is also entitled to recovery under Minn. Stat. § 471.425 (2010), the Minnesota Prompt Payment of Local Government Bills Act (the Prompt Payment Act), which was also not addressed by the district court. We affirm the district court's decision that CEI was not entitled to relief under an equitable estoppel theory. But because the district court failed to consider whether CEI could recover for extra work performed under the contract's claim procedures and under the Prompt Payment Act, we remand for consideration of these issues.

FACTS

On July 6, 2009, the city advertised for bids for City Project No. 08059, Eastwood Energy Industrial Park-Power Drive Extension (the project). The primary contact person listed on the advertisement for bids was Jeff Johnson, the city engineer. CEI submitted a bid of $476,102.17, which was the lowest of 15 bids. On August 11, 2009, the city and CEI entered into a written contract to complete the project. The contract described the project as "[c]onstruction of 1350 linear feet of aggregate based street with sanitary sewer, watermain, and storm sewer" and "excavation of 2300 linear feet of bioswales."[1] The project site was divided into three areas: Power Drive, the West Bioswale, and the East Bioswale. The contract provided that some of the excavated soil, referred to as

[1] A bioswale is a type of drainage ditch that conveys, treats, and stores storm water.

"material" in the contract, could be used "to construct embankments," and that "[c]ommon excavation material shall be brought to and stockpiled at a location within 0.5-miles of the site as directed by the Engineer." The contract required that CEI complete work on the project by October 30, 2009.

John Brindley, owner and president of CEI, testified at his deposition that he understood the language of the contract to mean that the stockpile location would be within 0.5 miles of the work site in terms of vehicle haul distance, rather than straight-line distance from the site. Brindley calculated the haul routes based on an average distance of 0.25 miles one way from the site to the stockpile, since at the time of the bid the parties did not know the location of the stockpile.

A pre-construction meeting was held on August 19, 2009. At the meeting, the city identified Mike McCarty as the project engineer, but did not describe his duties. Brindley testified at deposition that it was his understanding that McCarty had "full authority" over the project. The pre-construction meeting agenda stated "Project Engineer (1509)" under the heading of "Key Personnel." Brindley testified that he interpreted "1509" as a reference to section 1509 of the Minnesota Department of Transportation Standard Specifications for Construction, 2005 edition (MnDOT Specs), which were incorporated by reference into the contract. Section 1509(3) provides that the project engineer has "[a]uthority commensurate with the duties delegated to the Engineer." Brindley

interpreted the language of section 1509 to mean that McCarty had the authority to produce a change order[2] that would be binding on the city.

On August 27, 2009, CEI began work on the project. On September 2, 2009, the city issued a plan modification and McCarty drafted Change Order 1 to memorialize the changes, which included a reduction in the size of the West Bioswale berm. McCarty signed Change Order 1 on October 12, 2009. Change Order 1 was also signed by Brindley, Johnson, and the city manager, Pat Hentges. Brindley testified that he called Johnson about Change Order 1, but McCarty returned Brindley's call to Johnson and told Brindley that he would be dealing with him on the project.

The city provided the location of the "common excavation material" stockpile to CEI at the pre-construction meeting in August 2009, but the stockpile location was not available for CEI to use until October 2009. Due to the stockpile location's temporary unavailability, the city allowed CEI to store material that was excavated from Power Drive at the site for use in the construction of the bioretention swale or the West Bioswale berm. Brindley testified that the material from Power Drive and the East Bioswale was originally to be transported to the stockpile, and the West Bioswale excavation material was to be used in the construction of the berm. As a result of the

[2] The contract between the city and CEI incorporated the Engineers Joint Contract Documents Committee Standard General Conditions of the Construction Contract (the EJCDC General Conditions), which define "change order" as "[a] document recommended by Engineer which is signed by Contractor and Owner and authorizes an addition, deletion, or revision in the Work or an adjustment in the Contract Price or the Contract Times, issued on or after the Effective Date of the Agreement." The General Conditions provide that: "Without invalidating the Contract and without notice to any surety, Owner may, at any time or from time to time, order additions, deletions, or revisions in the Work by a Change Order, or a Work Change Directive."

changes memorialized in Change Order 1, CEI was required to haul the excavated material from the West Bioswale rather than use it to construct the berm, because the berm was being constructed using the Power Drive excavated material. Brindley testified that the haul distances to the stockpile were further than he had anticipated and the changes resulted in an increased cost to CEI.

On or about September 18, 2009, Brindley met with McCarty and the city inspector, Brian Bentdahl, to request additional compensation for the increased hauling distance. Brindley repeated this request at meetings with McCarty on or about September 22 and October 6 or 7, 2009. Brindley testified that he told CEI's project superintendent, Marv Hose, not to begin work on the West Bioswale until he received a change order for extra compensation.

McCarty then prepared and signed Change Order 3 on October 19, 2009.[3] Change Order 3 provided for an increase in price of $160,722 and a 40-day time extension to account for the plan modification and the resulting increased haul distance.[4] McCarty testified at deposition that he prepared and signed Change Order 3 at Brindley's insistence. McCarty testified that he *believed* that he told Brindley that the city would not approve a change order in the amount CEI was requesting, but he prepared and signed the change order anyway because he felt "pressured." McCarty felt he was at an "impasse"

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[3] Change Order 2 is not at issue in this appeal. It increased the contract amount by $3,302.61 and was signed by all of the parties on October 8, 2009.

[4] The version of Change Order 3 that was signed by McCarty on October 19, 2009, provided for an increase in price of $233,198. However, that amount was the total cost (the original cost plus the net increase in cost) rather than just the net increase of $160,722 that CEI was requesting.

in negotiating with Brindley and he "was referring it to [his] superior for resolution." Nonetheless, McCarty testified that he did not speak to Johnson, his supervisior, about the change order at the time he prepared it, but he knew Johnson, "would not be interested in approving this change order." In a written statement, McCarty stated that:

> After attempting to reject the verbal request for price change and getting rebuffed, I deferred to generate the change order and have it denied at signatory authority level and preserve a positive working relationship with the contractor.

McCarty stated that this was a "management style" that had worked for him "many times." McCarty stated that it was standard procedure for a change order to be signed by the contractor before it was given to the city engineer and the owner (the city) for review. The city's written change order procedure required that the person preparing a change order sign it and then send two copies to the contractor. Once the contractor signed and returned the change order to the city engineer, the city engineer and city manager were required to approve and sign it. According to the city's procedure, a change order was "considered fully executed" after it was signed by the city engineer and the city manager.

Brindley testified that Change Order 3 was acceptable to him and that it was his understanding that "[o]nce I signed it it was good to go I figured." Brindley noticed that there was a blank signature line for the city engineer on Change Order 3 but concluded that "[t]hat's been on all of them and we've never had that come back until after the job is over." Brindley further stated: "[McCarty] is the engineer for this project so I don't know what more I needed." Brindley believed he had a valid change order and therefore could proceed to perform the extra work. Brindley was asked several times at his deposition if

McCarty verbally told him that Change Order 3 would be approved. Brindley never directly answered the question, but stated "I guess the only way he told me was through his actions." Brindley denied that McCarty told him that he did not know if Change Order 3 would be approved or that McCarty indicated that Change Order 3 was not valid.

CEI did not return the change order to the city, however, and on or about November 24 or 25, 2009, the city inspector, Bentdahl, picked up Change Order 3—which had been signed by Brindley—and brought it to Johnson and McCarty. Johnson directed McCarty to revise Change Order 3 to accurately reflect only the net contract increase of $160,722. McCarty made the revisions, but then Johnson rejected the change order.

On November 25, 2009, McCarty wrote a letter to Brindley and stated: "Based on a re-analysis of the contract documents, the unit price change granted in Change Order No. 3 is being rescinded at this time. However, the increase in contract time is still being allowed." McCarty testified that Hose, CEI's project superintendent, and Brindley called him shortly thereafter, and they had a heated exchange. Brindley testified that during the conversation McCarty told him, "we're f---ing you." McCarty testified that he did not remember making that statement and could not remember what specific words were used, but he remembered that "it was a heated conversation, it was not polite." Hose met with McCarty and Johnson on November 30, 2009, and on December 1, 2009, Hose sent a letter to the city requesting payment under Change Order 3. On the same day, Johnson responded and denied CEI additional payment. On December 3, 2009, counsel for CEI

sent a notice of claim to Johnson. CEI continued to work on the project during the dispute, essentially completing its work in December 2009.

On June 3, 2010, the city manager, Patrick Hentges, sent a letter to Brindley and enclosed a revised Change Order 3, signed by Hentges and Johnson, and a check in the amount of $67,325.30. CEI returned the check to the city. On July 1, 2010, CEI filed a complaint against the city alleging breach of contract and violation of the Prompt Payment Act.

The contract provided that the city was entitled to withhold five percent of each payment to CEI as retainage[5] until the project was substantially completed.[6] McCarty testified that the project was substantially completed in December 2009. On September 17, 2010, counsel for CEI submitted a written demand to the city for payment of the retainage. On October 4, 2010, the city sent a letter to CEI with an enclosed estimate and stated that final payment to CEI would not be processed until the signed estimate was returned to the city and CEI submitted the required tax forms. On November 12, 2010, the city finally paid $25,365.60 in retainage to CEI, which was all but $100 of the retainage owed to CEI.

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[5] Retainage is defined as "[a] percentage of what a landowner pays a contractor, withheld until the construction has been satisfactorily completed and all mechanic's liens are released or have expired." *Black's Law Dictionary* 1430 (9th ed. 2009).

[6] Section 14.04 of the EJCDC General Conditions requires that "[w]hen Contractor considers the entire Work ready for its intended use Contractor shall notify Owner and Engineer in writing that the entire Work is substantially complete . . . and request that Engineer issue a certificate of Substantial Completion."

In December 2010, both parties filed motions for summary judgment. The district court granted the city's motion for summary judgment and denied CEI's motion, and judgment was entered. This appeal follows.

D E C I S I O N

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from an award of summary judgment, this court considers de novo whether there is a genuine issue of material fact and whether the district court erred when it applied the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76–77 (Minn. 2002). This court must "view the evidence in the light most favorable to the party against whom summary judgment was granted." *Id.* We will affirm an award of summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

I.

CEI argues that the district court erred when it determined that the city could not be equitably estopped from refusing to pay $160,722 to CEI in accordance with Change Order 3. Equitable estoppel is a doctrine that is "intended to prevent a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights." *Brown v. Minn. Dep't of Pub. Welfare*, 368 N.W.2d 906, 910 (Minn. 1985) (quoting *N. Petrochemical Co. v. U.S. Fire Ins. Co.*, 277 N.W.2d 408, 410 (Minn. 1979)). A party

asserting equitable estoppel against the government has a "heavy burden of proof," and must establish four elements. *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011) (quotation omitted). First, there must be "wrongful conduct" by "an authorized government agent." *Id.* (quotation omitted). Second, the party asserting equitable estoppel must have reasonably relied on the authorized government agent's wrongful conduct. *Id.* Third, the party asserting equitable estoppel must have incurred a "unique expenditure." *Id.* Fourth, "the balance of the equities must weigh in favor of estoppel." *Id.*

A. Wrongful conduct

The wrongful conduct element of equitable estoppel requires some degree of malfeasance. *Kmart Corp. v. Cnty. of Stearns*, 710 N.W.2d 761, 771 (Minn. 2006). In the context of a government official, malfeasance "has reference to evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful." *Jacobsen v. Nagel*, 255 Minn. 300, 304, 96 N.W.2d 569, 573 (1959) (quotation omitted). A mistake does not constitute wrongful conduct. *Sarpal*, 797 N.W.2d at 25–26; *Bond v. Comm'r of Revenue*, 691 N.W.2d 831, 838 (Minn. 2005) ("Affirmative misconduct is not simple inadvertence, mistake, or imperfect conduct.").

Here, the district court found that McCarty "was at worst overzealous" but did not commit actionable wrongful conduct. While the district court may have understated the city's conduct, it did not err in its conclusion. Viewing the evidence in the light most favorable to CEI, McCarty's actions did not rise to the level of malfeasance or illegal

conduct. McCarty testified that he prepared and signed Change Order 3 in order to preserve a good relationship with CEI by referring the issue to the city engineer to make a decision, although he knew it would not be approved. McCarty was following the city's change order procedure, which directed the person who prepared the form to sign it before presenting it to the contractor. The city's change order procedure provided that a change order did not become effective until it had been approved and executed by the city engineer and the city manager. While, according to CEI, McCarty did not indicate to Brindley that Change Order 3 needed to be approved by the city engineer and the city manager before becoming effective, McCarty did not need to provide such information to Brindley because Brindley was presumed to know the limited extent of McCarty's authority. *See Jewell Belting Co. v. City of Bertha*, 91 Minn. 9, 12, 97 N.W. 424, 425 (1903) ("All persons contracting with municipal corporations are conclusively presumed to know the extent of authority possessed by the officers with whom they are dealing.").

Brindley testified that he assumed McCarty could bind the city based on Brindley's experience working with the city and his understanding of McCarty's apparent authority. However, there is no evidence that McCarty misrepresented his authority to bind the city to the change order. CEI further argues that Johnson "directed" Brindley to deal only with McCarty. But this argument was based solely on McCarty returning an earlier phone call that Brindley made to Johnson and McCarty telling Brindley, during the phone call, that he would be dealing with him on the project. CEI also argues that McCarty and Johnson had equivalent authority because in the pre-construction meeting McCarty was identified as the project engineer pursuant to section 1509 of the MnDOT

Specs. However, there is nothing in section 1509 that permits the project engineer to bind the city to a contract.

Brindley also should have known from the face of Change Order 3 that it needed to be approved by the city engineer and a representative of the city as the owner. Change Order 3 included signature lines for the project engineer, the city engineer, the owner/developer (the city) and the contractor. Above the signature line for the city engineer were the words "[a]pproved by." After McCarty prepared Change Order 3 he signed it on the signature line for the project engineer and then gave it to Brindley, but the signature lines for the city engineer and the owner/developer (the city) remained blank.

The delay in the city reviewing Change Order 3 was similarly not wrongful conduct. The delay was at least partially due to CEI's failure to timely return the change order to the city. McCarty completed and signed Change Order 3 on October 19, 2009, and then gave it to Brindley. When CEI failed to return Change Order 3, Bentdahl picked it up from CEI on November 24 or 25, 2009, and delivered it to Johnson. Shortly after he received Change Order 3, Johnson made the decision not to approve the change order.

CEI argues that McCarty acted wrongfully because he watched while CEI completed the work in reliance on Change Order 3, despite knowing that it would not be approved. However, McCarty was not required to stop CEI from working. In fact, CEI had a duty under the contract to complete the work despite any contract disputes. CEI further claims that McCarty knew his conduct was wrongful because McCarty told

Brindley and Hose, "we're f---ing you." But it is not clear from the record what McCarty meant by this statement.

B. Authorized government agent

The "wrongful conduct" element requires that the conduct be performed by an "authorized government agent." *Sarpal*, 797 N.W.2d at 25. Pursuant to Minn. Stat. § 412.201 (2010), municipal contracts must be approved by the city council. The Mankato City Code provides an exception to the general requirement: "The City Manager shall have the authority to and may authorize and approve any change order or change orders which, in total, shall not exceed twenty-five thousand dollars ($25,000)." Mankato, Minn., City Code § 2.24, subd. 6.000(B) (2010). In this case, McCarty did not have actual authority to bind the city to Change Order 3.

CEI argues that it relied on McCarty's apparent authority to negotiate Change Order 3. Apparent authority is defined as "authority which a principal holds an agent out as possessing, or knowingly permits an agent to assume." *Foley v. Allard*, 427 N.W.2d 647, 652 (Minn. 1988). However, Minnesota law does not recognize apparent authority of municipal officials, because "[a]ll persons contracting with municipal corporations are conclusively presumed to know the extent of authority possessed by the officers with whom they are dealing." *Jewell Belting Co.*, 91 Minn. at 12, 97 N.W. at 425; *see Plymouth Foam Prods., Inc. v. City of Becker*, 944 F. Supp. 781, 785 (D. Minn. 1996). The city did not hold McCarty out as having authority to bind the city to a contract, and CEI was presumed to know the extent of his authority. McCarty did not have apparent authority to bind the city to Change Order 3.

Because the first element of equitable estoppel was not satisfied, because McCarty was not an authorized government agent and did not commit actionable wrongful conduct, we need not discuss the other elements of equitable estoppel. We conclude that the district court did not err when it determined that the doctrine of equitable estoppel was not available to CEI.

II.

CEI next argues that the district court erred when it failed to address the contract's claim procedures as an alternative basis to award damages to CEI for the extra work it performed, and incorrectly construed Change Order 3 as a separate contract, rather than a contract modification. CEI contends that the contract itself contains mechanisms other than the change order process to require the contractor to perform extra work and to determine any adjustment in price and time after the contractor has completed the work. Specifically, the contract contains a work change directive under the EJCDC General Conditions and a force account provision under the MnDOT Specs.

The contract between the city and CEI incorporated the EJCDC General Conditions and the MnDOT Specs, both of which include the industry standards for resolving price disputes when a contractor completes more work than was contemplated by the original contract. Article 10 of the EJCDC General Conditions explains the process to follow for changes in the work and claims. Paragraph 10.01 provides the following guidance for authorized changes in the work:

> A. Without invalidating the Contract and without notice to any surety, Owner may, at any time or from time to time, order additions, deletions, or revisions in the Work by a

> Change Order, or a Work Change Directive. Upon receipt of any such document, Contractor shall promptly proceed with the Work involved which will be performed under the applicable conditions of the Contract Documents (except as otherwise specifically provided).
>
> B. If Owner and Contractor are unable to agree on entitlement to, or on the amount or extent, if any, of an adjustment in the Contract Price or Contract Times, or both, that should be allowed as a result of a Work Change Directive, a Claim may be made therefor as provided in Paragraph 10.05.

In addition, article 12 includes the procedure to follow for changes in the contract price. Paragraph 12.01(A) provides:

> The Contract Price may only be changed by a Change Order. Any Claim for an adjustment in the Contract Price shall be based on written notice submitted by the party making the Claim to the Engineer and the other party to the Contract in accordance with the provisions of Paragraph 10.05.

Both paragraphs 10.01(A) and (B) and 12.01(A) refer to paragraph 10.05 for the procedure to resolve claims regarding work or price disputes. Paragraph 10.05 sets forth the EJCDC General Conditions claim procedure. The MnDOT Specs also provide a claim process when a contractor performs extra work and the parties do not agree on a price.

The city argues that CEI did not raise or argue this theory before the district court and so it cannot raise it on appeal. But CEI's complaint against the city clearly included a claim for breach of contract and the city's answer admitted the contractual relationship. In the summary judgment proceedings, both parties primarily argued the issues of whether Change Order 3 was a binding agreement between CEI and the city and the

equitable estoppel theory. As a result, the parties, and therefore the district court, did not address any alternative contractual recovery theories. Because CEI pleaded breach of contract but an alternative contractual theory was not addressed by the district court, we remand to the district court for consideration of CEI's damages under the various claims procedures of the contract.

CEI further argues that the district court erred when it determined that Change Order 3 was a new contract and not an amendment to the original contract. We agree that Change Order 3 was not a new contract, but simply an industry standard change order to the August 11, 2009, contract, as the parties fully intended. But because neither the city manager nor the city council approved Change Order 3 the district court did not err when it concluded that Change Order 3 was not approved by all of the parties.

III.

Finally, CEI argues that the district court erred when it did not address CEI's claim that the city violated the Prompt Payment Act. The Prompt Payment Act requires that municipalities timely pay their obligations according to the terms of their contracts, and imposes penalties if they fail to do so. Minn. Stat. § 471.425, subds. 2, 4. The municipality must pay interest to the vendor if the municipality has not made payments according to the contract terms, unless there is a "good faith dispute." *Id.*, subd. 4(c). If the delay is not in good faith, the vendor can recover costs and attorney's fees in addition to interest. *Id.*

CEI makes two arguments for recovery under the Prompt Payment Act. First, CEI argues that if this court reverses the district court's decision that CEI was not entitled to

relief under an equitable estoppel theory, then it is entitled to recover interest, costs and attorney's fees under the Prompt Payment Act. As previously discussed, we conclude that the district court did not err when it found that CEI could not recover under an equitable estoppel theory. Thus, CEI cannot recover interest, costs and attorney's fees under this theory.

Second, CEI argues that the district court erred in not finding that CEI was entitled to recover under the Prompt Payment Act because the city did not timely and fully pay retainage to CEI. CEI contends that the city held $25,365.60 in retainage for almost a year after the project was substantially completed and that it continues to hold $100 in retainage. The city argues that this issue was not addressed by the district court and that it has a good faith defense.

In its complaint, CEI included a claim of violation of the Prompt Payment Act. In CEI's motion for summary judgment, it argued that CEI was entitled to recover interest and attorney's fees under the Prompt Payment Act. The district court concluded that CEI could not recover under the Prompt Payment Act because it found, as a matter of law, that Change Order 3 was not a binding and enforceable contract. While the district court did not specifically discuss retainage in its order for summary judgment, it did discuss the applicability of the Prompt Payment Act.

There is a genuine issue of material fact regarding when CEI "substantially completed" the project. CEI argued that it notified the city that the project was substantially completed in December 2009, while the city argued that the CEI did not complete the requirements for final payment under the contract until November 12, 2010.

We conclude that the district court erred when it did not consider whether CEI could recover interest, costs, and attorney's fees under the Prompt Payment Act for withholding retainage and we reverse and remand for consideration of this issue.

Affirmed in part and remanded.