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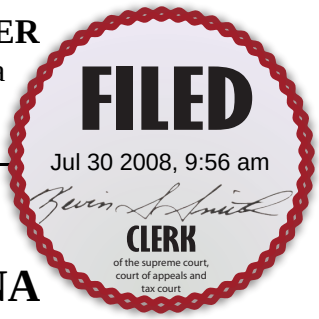

IN THE COURT OF APPEALS OF INDIANA

AMERICAN CONTRACTING & SERVICES, INC.,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 10A01-0711-CV-493
CITY OF JEFFERSONVILLE, INDIANA, AND JEFFERSONVILLE DRAINAGE BOARD OF THE CITY OF JEFFERSONVILLE, INDIANA,	)	
Appellees-Defendants.	)	

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Cecile A. Blau, Judge
Cause No. 10D02-0412-PL-224

July 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Plaintiff American Contracting and Services, Inc. ("American") appeals the trial court's denial of its motion for summary judgment and, following a bench trial, its award of judgment in the amount of $1045, in American's action against Appellees-Defendants the City of Jeffersonville and the Jeffersonville Drainage Board (collectively, "the City") for damages arising out of the parties' construction contract. Upon appeal, American argues that the trial court erred by concluding that a genuine issue of material fact existed with respect to the question of whether the City breached its contract with American by failing to pay for certain materials and services. In addition, American challenges the trial court's judgment following trial by claiming that it misinterpreted the contract. We affirm.

FACTS AND PROCEDURAL HISTORY

In an effort to address severe storm water runoff problems, on December 22, 2003, the City initiated the Bonenberger's Oak Grove Subdivision Drainage Project. The project involved, among other things, installing sanitary sewers, new and wider asphalt streets bordered by concrete curbs, and gutters throughout the subdivision. The City hired the engineering firm of Jacobi, Toombs and Lanz, Inc. to manage the project, and the firm drafted a contract with specifications for bids. The contract was a "unit price" contract which listed forty-nine separate work items and, for most of the items, the estimated quantities of each item. Bidders were required to submit a per-unit price as well as a total bid for each of these items. Certain items, including crushed limestone, did not have an approximate quantity listed. The contract specified that, with respect to these items, the bidder was to provide a unit price only and not include the item or price in the total bid price.

The unit price was to include "all necessary costs for the installation of these items." Exh. 2 p. A-301. These items were only to be used "where unanticipated extra or deleted work [was] called for by job conditions and authorized by change order." Exh. 2, p. A-301.

Although the contract provided that certain "unanticipated extra" work might call for items such as crushed limestone, it also provided that the contractor was responsible for informing itself about the work site and structure of the ground, that it was responsible for any subsurface conditions, and that it would receive no extra payment for removal and replacement of unsuitable material encountered "below subgrade." Exh. 2. pp. A-301; 2-D-1.

American's bid included a unit price for crushed limestone of $28 per ton. American submitted a total bid of $1,445,963.50. American's bid was lowest, and it was subsequently awarded the contract for the project. American was given notice to proceed with the project by January 15, 2004.

American proceeded with the project, part of which involved lowering a majority of the road in the subdivision. Upon removing the existing road, American found patchy areas of "bad soil" which would not reliably support the road. Tr. p. 46. Pursuant to instructions from the firm with respect to each patch of problem soil, American replaced the soil with a total of 10,121.32 tons of crushed limestone. Tr. p. 46. Exh. 10. American sought reimbursement from the City for this limestone in the amount of $283,388. In addition, American sought reimbursement for additional costs arising out of the project, including $27,816 for excavation, $79,840 for replacement stone under curbs, $34,992 for removal of

concrete under subbase, $2552.11 for lime stabilization, and $1045 for staking costs due to a disruption in the project by certain utility companies.

The City refused to reimburse American. It was the City's position that, pursuant to the terms of the contract, it was American's responsibility to investigate the structure of the ground and to build into its bid price any costs associated with completing the project according to specifications. The contract included, *inter alia*, the following relevant provisions:

> All bidders shall fully inform themselves of the conditions under which the work is to be performed, the site of the work, the structure of the ground, the obstacles which may be encountered, and other relevant matters concerning the work to be performed. Section A-2, 3.2.
>
> The Contractor shall be responsible for whatever subsurface conditions he encounters. Section 1-A, 8.1.
>
> Soil borings were not taken for this project, however, information from earlier sewer plans is shown on the plans. Section 2-A, 3.1.
>
> The CONTRACTOR may dig test holes on easements or on the right-of-way, but need[s] to make prior arrangements with the ENGINEER. Section 2-A, 3.2
>
> If unsuitable material is encountered below subgrade, this material shall be removed and replaced with good material, compacted as specified. Removal and replacement of such material is the responsibility of the CONTRACTOR and no extra pay will be made for this item. Section 2-D, 2.4.

Plaintiff's Exh. 2, pp. A-201, 1-A-2, 2-A-1, 2-D-1.

American did not test the soil, either through soil borings or other means, prior to submitting its bid. According to American, it anticipated that it would need crushed limestone for certain bid items, which it built into the bid price for these items, but it did not

factor into its bid price the cost for replacing problem soil, because this was unanticipated work for which the contract provided that it would receive the bid amount of $28 per ton. In addition, American argued that the problem soil and work to replace it occurred within the subgrade rather than below it, entitling American to compensation under Section 2-D, 2.4.

Following the City's refusal of reimbursement, American filed an action on December 13, 2004. On April 5, 2005, the City filed a motion for summary judgment. On June 13, 2005, American filed a cross-motion for summary judgment. Following a June 14, 2006 hearing, on July 3, 2006, the trial court denied the parties' motions for summary judgment. Following a bench trial, on October 9, 2007, the trial court entered judgment in favor of American in the amount of $1045 for the staking costs and denied any additional relief. This appeal follows.

DISCUSSION AND DECISION

I. Summary Judgment

On appeal, American first challenges the trial court's entry of summary judgment. Generally, an order denying summary judgment is not a final appealable judgment. *Keith v. Mendus*, 661 N.E.2d 26, 35 (Ind. Ct. App. 1996), *trans. denied*. Such a denial does not irretrievably dispose of one or more issues between the parties; neither does it determine nor foreclose the rights of the parties. *Id.* Rather, the denial of a motion for summary judgment merely places the parties' rights in abeyance pending ultimate determination by the trier of fact. *Id.* This court has long addressed appeals from denials of motions for summary judgment following entry of a final judgment or order. *Id.* Therefore, a denial of a motion

for summary judgment is reviewable on appeal following a final judgment entered after trial on the merits. *Id.*

Under Indiana Trial Rule 56(C) summary judgment is appropriate when the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In reviewing summary judgment, this court applies the same standard as the trial court and construes all facts and reasonable inferences to be drawn from those facts in favor of the non-moving party. *Payton v. Hadley*, 819 N.E.2d 432, 437 (Ind. Ct. App. 2004). Where material facts conflict, or undisputed facts lead to conflicting material inferences, summary judgment is inappropriate. *Id*. at 438. The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of law. *Id*. The trial court is not required to enter specific findings and conclusions. *U-Haul Int'l, Inc. v. Nulls Mach. & Mfg. Shop*, 736 N.E.2d 271, 275 (Ind. Ct. App. 2000), *trans. denied*. We are not limited to granting or denying summary judgment upon the same basis that the trial court made its decision. *Id*. This court will affirm a grant of summary judgment if it can be sustained on any theory supported by the designated materials. *Id*.

In challenging the trial court's denial of summary judgment, American points to what it claims were undisputed facts demonstrating that it was entitled to judgment as a matter of law. The City responds by arguing that that the designated evidence, at the very least, created conflicting material inferences, rendering summary judgment in favor of American inappropriate.

We agree with the City. Section 2-D, subsection 2.4 of the contract provided that a contractor was required to fund the removal and replacement of unsuitable material encountered "below subgrade." The designated evidence demonstrated, however, that the term "subgrade," and more specifically, what was "below subgrade," created conflicting inferences.

In his deposition, which was designated evidence by American, John Toombs Jr. stated that "subgrade" was defined as the soil portion of the road, below the asphalt and gravel subbase, and that it had an "unlimited depth" if it was made of dirt. App. p. 733, p. 67. Presumably, if this layer of soil were "subgrade," a contractor would be responsible for necessary soil replacement only in the layer of soil below it. Yet in that same deposition, Toombs also used the term "subgrade" in referring to "subgrade elevation," which was a "line" indicating the elevation of the road below the asphalt and gravel. App. p. 736, pp. 79-80. Under this "elevation" conception of "subgrade," the portion of the road qualifying as "below subgrade" also included the soil immediately below the asphalt and gravel subbase. Because according to Toombs the "connotation" of the phrase "below subgrade," like "subgrade" referred to the soil immediately below the asphalt and gravel, there were, at the very least, conflicting inferences regarding crucial definitions in the contract. App. p. 735, p. 74. Given the conflicting inferences from the designated evidence, we affirm the trial court's denial of American's motion for summary judgment.

II. Judgment Following Trial

American also challenges the trial court's judgment awarding American $1045 and

denying any additional relief. Pursuant to Trial Rule 52, the trial court entered findings of fact and conclusions thereon in support of its judgment. Our standard of review with respect to these findings and conclusions is well-settled:

> First, we determine whether the evidence supports the findings and second, whether the findings support the judgment. In deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. Challengers must establish that the trial court's findings are clearly erroneous. Findings are clearly erroneous when a review of the record leaves us firmly convinced a mistake has been made. However, while we defer substantially to findings of fact, we do not do so to conclusions of law. Additionally, a judgment is clearly erroneous under Indiana Trial Rule 52 if it relies on an incorrect legal standard. We evaluate questions of law *de novo* and owe no deference to a trial court's determination of such questions.

Carmichael v. Siegel, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001) (citations omitted).

To the extent that American's claim is one of contract interpretation, however, our review is *de novo*. *Oxford Fin. Group, Ltd. v. Evans*, 795 N.E.2d 1135, 1142 (Ind. Ct. App. 2003). Unless the terms of the contract are ambiguous, they will be given their plain and ordinary meaning. *Shorter v. Shorter*, 851 N.E.2d 378, 383 (Ind. Ct. App. 2006). Clear and unambiguous terms in the contract are deemed conclusive, and when they are present we will not construe the contract or look to extrinsic evidence but will merely apply the contractual provisions. *Id*. A document is not ambiguous merely because the parties disagree about a term's meaning. *Univ. of S. Indiana Found. v. Baker*, 843 N.E.2d 528, 532 (Ind. 2006). Rather, language is ambiguous if reasonable people could come to different conclusions as to its meaning. *Id*.

If a contract is ambiguous or uncertain and its meaning is to be determined by

extrinsic evidence, its construction is a matter for the factfinder. *Bicknell Minerals, Inc. v. Tilly*, 570 N.E.2d 1307, 1310 (Ind. Ct. App. 1991), *trans. denied*. Rules of contract construction and extrinsic evidence may be employed in giving effect to the parties' reasonable expectations. *Id*. If the ambiguity arises because of the language used in the contract and not because of extrinsic facts, its construction is purely a question of law to be determined by the trial court. *Id.* When reviewing the trial court's interpretation of a contract, we view the contract in the same manner as the trial court. *Id.*

A. Contractual Ambiguity

We first address whether there was an ambiguity in the contract. While the trial court, in its conclusions, determined that the contract language was unambiguous, its denial of summary judgment and reliance upon extrinsic evidence belie that assertion. In any event, the determination of whether a contract is ambiguous is a question of law. *Bernstein v. Glavin*, 725 N.E.2d 455, 459 (Ind. Ct. App. 2000), *trans. denied*.

At issue is whether American was entitled to additional compensation for curing certain soil problems by excavating the soil and replacing it with crushed limestone. The plain language of the contract generally provided, in multiple sections, that the contractor was responsible for investigating and working with whatever soil conditions existed and that the contractor would not receive additional compensation for failure to inform itself of the job conditions. The contract also provided, in an addendum, that all "backfill" should be factored into appropriate bid items. Exh. 2, at Addendum 1. Yet the contract contained additional provisions stating that a contractor may need to use crushed limestone and other

bid items for unspecified "unexpected extra" work arising out of "job conditions," and that such additional work, authorized by a change order, was not to be included in the total bid price. Exh. 2, p. A-301. Furthermore, although the contract included a provision stating that contractors would not receive compensation for removal and replacement of material "below subgrade," the definition of "subgrade," as discussed above, is a term of art susceptible to different interpretations. Exh. 2. p. 2-D-1. Given the contract's arguably contradictory provisions, some requiring the contractor to assume the risk for unexpected conditions, and others suggesting that unexpected work would warrant additional compensation, as well as the uncertain definition of "subgrade," reasonable people could arrive at different conclusions regarding the interpretation of the contract and American's entitlement to additional compensation under its terms. Accordingly, we conclude that the contract contained an ambiguity.

B. Contract Interpretation

American challenges the trial court's interpretation of the contract terms to deny its claim for compensation. In resolving an ambiguity in a contract, we examine the contract in its entirety and attempt to determine the intent of the parties at the time the contract was made. *Whitaker v. Brunner*, 814 N.E.2d 288, 294 (Ind. Ct. App. 2004), *trans. denied*. We do this by examining the language used in the instrument to express the parties' rights and duties. *Id*. We must also read the contract as a whole and attempt to construe the contractual language so as not to render any words, phrases, or terms ineffective or meaningless. *Id*. Likewise, we must accept an interpretation of the contract that harmonizes its provisions,

rather than one that places the provisions in conflict. *Id*. Where an instrument is ambiguous, all relevant extrinsic evidence may properly be considered in resolving the ambiguity. *Univ. of S. Indiana Found.*, 843 N.E.2d at 535.

1. Expert Testimony

We first address American's challenge to the trial court's consideration of expert testimony for purposes of construing the contract terms. As stated above, *all* relevant extrinsic evidence may properly be considered in resolving a contractual ambiguity. *Id.* (emphasis supplied); s*ee also Hamilton Airport Adver., Inc. v. Hamilton*, 462 N.E.2d 228, 235 (Ind. Ct. App. 1984) (observing that expert testimony is improper in the absence of an ambiguity in the contract). "Extrinsic evidence is evidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement." *CWE Concrete Constr., Inc. v. First Nat'l Bank*, 814 N.E.2d 720, 724 (Ind. Ct. App. 2004), *trans. denied*. Given our determination that the contract was ambiguous and the necessity to consider extrinsic evidence to interpret it, we find no error in the court's consideration of expert testimony.

To the extent American challenges the expert testimony on the grounds that the trial court improperly relied upon the expert's testimony regarding the legal interpretation of the contract, any error by the trial court on this ground is remedied by our *de novo* review of the contract terms. *Oxford Fin. Group*, 795 N.E.2d at 1142.

2. Contract Terms

In claiming that the trial court misinterpreted the contract, American points to various words and phrases in the contract, among them "subgrade elevation," "subgrade," and "backfill," which it claims have exclusive definitions and require an interpretation entitling it to compensation. Yet the contract, which is approximately one hundred pages long and often refers to terms of art in the construction business, does not contain a definitional section or glossary, and witness Clarence Krebs's testimony, which the trial court found credible, did not interpret the above terms to have the exclusive definitions which American claimed they had.

Krebs, whom the trial court found to be an independent professional with nearly fifty years of engineering experience, testified that "backfill" was generally any material, including crushed limestone, used to fill excavated holes in the ground. Of course, in curing the problem of "bad soil," American was required to excavate and replace the soil with crushed limestone, which Krebs characterized as "backfill." This interpretation was consistent with the trial testimony indicating that American had contacted the Jacobi firm with questions regarding how it would be compensated for "subgrade" treatment, which included excavation, prior to the bids, and that the firm had prepared an addendum in response, stating that the cost of such treatment, which included "backfill," was to be distributed in the appropriate bid items and would not be subject to additional compensation.

With respect to the definitions of "subgrade" and "subgrade elevation," which were relevant because the contract provided that the contractor was responsible for funding the

removal and replacement of unsuitable soil "below subgrade," Krebs testified that "subgrade" often meant "subgrade elevation." Under this interpretation, Section 2-D, 2.4, which required the contractor to pay for unsuitable material "below subgrade," dictated that American was not entitled to compensation it sought for the crushed limestone because the limestone was installed below the subgrade elevation.

Importantly, the above interpretations of "backfill" and "subgrade" are in harmony with the multiple contractual provisions relegating the risk of unknown soil conditions to the contractor. Under Section A-2, 3.2, bidders are required to familiarize themselves with the work site and ground structure; under Section A-2, 3.3, no bidder shall be allowed extra compensation on account of his failure to fully inform himself, prior to bidding, of all requirements of specifications and circumstances of the construction site; under Section C-104, 8.1, contractors must satisfy themselves as to the conformation of the ground and the character and quality of materials to be encountered; and under Section 1-A-2, 8.1, the contractor is responsible for all "subsurface" conditions he encounters. According to Krebs, "subsurface" meant only below surface, and "surface" was general, with no special definition. American did not dispute that it made no effort to test the soil conditions, either through soil borings or other means, prior to submitting its bid.

American's interpretation of the contract terms, in contrast, would not result in such a harmonious interpretation. As stated above, no fewer than four contract provisions state explicitly that the contractor has the responsibility to ascertain the ground structure and that the contractor will not be rewarded with additional compensation in the event that ground

conditions are unexpected. Here, there is no dispute that American did not test the soil conditions prior to submitting its bid, and it encountered unexpected soil conditions after its bid was accepted. Presumably, testing soil involves time and expense. Under American's interpretation of the contract, it would be rewarded for having forgone these costs, which is contrary to the contract's stated terms.

As for American's claim that the work at issue contained all of the component parts of a change order and *could* have been compensated, this does not establish that, based upon the parties' intentions at the time of the contract, the work *should* have been compensated. Interpretation of a contract is based upon the parties' intentions at the time of the contract. *See Whitaker*, 814 N.E.2d at 294. Based upon the extrinsic evidence and a harmonious interpretation of the terms, we have concluded that the contract did not require additional payment to American. The mere fact that the firm, representing the City, ordered American to excavate and replace the problem soil just as easily establishes the City's effort to enforce the terms of the original contract as it establishes that the City was authorizing some sort of subsequent "change order" for which compensation would be required. Indeed, four change orders were approved in this project, and none of them resembles the firm's instructions in Exhibit 9 regarding the excavation and replacement of the problem soil. Accordingly, we find American's argument on this point unpersuasive.

Finally, we fully recognize the rule of law, as American points out, that an ambiguous contract is generally construed against the drafting party. *See MPACT Constr. Group, LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901, 910 (Ind. 2004) (holding that "[w]hen

there is an ambiguity in a contract, it is construed against its drafter"). Significantly, however, the City did not draft this contract. Instead, it hired the firm to do so, presumably nullifying any incentive to draft a contract with ambiguities which might prove favorable to the City. Further, the rationale behind the above rule of construction, often viewed in the insurance context, is that in general, the drafting party is able to foist its terms upon the other, presumably less powerful, party, and it should therefore be held accountable for them. *See Cincinnati Ins. Co. v. BACT Holdings, Inc.*, 723 N.E.2d 436, 439-40 (Ind. Ct. App. 2000), *trans. denied*. Contrary to the typical insurance scenario, this contract was a much more collaborative effort, with American's inquiries producing an addendum to the contract and its bids constituting the costs involved. We are therefore disinclined to view the above rule of law as dispositive with respect to the instant case, especially in light of the evidence and the contract's terms, which weigh heavily against American's claimed interpretation.

In sum, our interpretation of the contract leads us to conclude that American was not entitled to additional compensation for removing and replacing problem soil with crushed limestone. With respect to American's additional claims for compensation for excavation, stone, concrete removal, and lime, the trial court, in denying American's claim, found that these costs were related to the problem soil replacement. We defer to the trial court's factual determination on this point and, on this record, find no clear error.

III. Conclusion

Having concluded that the trial court did not err in denying American summary judgment and having interpreted the contract's terms to provide that American was entitled to

no additional compensation for costs relating to the excavation and replacement of problem soil, we affirm the trial court's judgment in favor of American in the amount of $1045.

The judgment of the trial court is affirmed.

BARNES, J., and CRONE, J., concur.