RENDERED: March 26, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000294-MR

MIKE DENNISTON, INC., a/k/a
MICHAEL DENNISTON, INC. APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 99-CI-01465

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KNOPF, and McANULTY, Judges.

COMBS, JUDGE. Mike Denniston, Inc. (“Denniston”) appeals from a judgment entered by the Franklin Circuit Court adjudicating a dispute that involved several service contracts awarded to Denniston by the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways. Dennison claims that the court erred by concluding that it was not entitled to compensation

exceeding that which was provided under the terms of the contracts. We affirm.

Denniston is a mowing contractor. His company mows right-of-way areas for the Transportation Cabinet. The annual mowing contracts are awarded following a competitive bidding process. The Cabinet advertises for bids and prepares specific, uniform bid packages pertaining to the mowing contracts to be awarded in various counties. After the bid packages are circulated among interested contractors, they are submitted to the Cabinet by the contractors on a per-acre pricing basis. The bids are reviewed and the contracts are awarded in the early months of the contract year. The Cabinet holds pre-season mowing meetings to review the work to be completed during the season. These meetings occur soon after the contracts are awarded each year.

After submitting numerous bid packages in 1996, Denniston was awarded service contracts for right-of-way mowing operations in several counties. One contract provided for right-of-way mowing in Pike County. Another combined Floyd, Johnson, and Martin Counties. The right-of-way mowing in Pike County was to be compensated at $41.75 per acre. The right-of-

way mowing in Floyd, Johnson, and Martin Counties was to be compensated at $39.24 per acre.[1]

During a pre-season mowing meeting held by the Cabinet in April 1996, a representative of Swartz Mowing, Inc., ("Swartz Mowing") questioned the Cabinet as to whether it was obligated by the terms of the agreements to complete "slope mowing" in the designated right-of-ways. Swartz was a competitor of Denniston and had been awarded contracts in Knott, Letcher, Johnson, and Lawrence Counties. Pursuant to the specific terms of the agreements, the Cabinet advised the contractors that they were expected to mow all the vegetation and steep slopes in the designated right-of-way areas -- even if such mowing required the use of specialized equipment.

Invoking the provisions of the Kentucky Model Procurement Code, KRS[2] Chapter 45A, Denniston filed a complaint on December 22, 1999, against the Cabinet in Franklin Circuit Court. Denniston alleged that the Cabinet had erred in concluding that the contracts provided for "slope mowing" within the designated right-of-ways. Denniston claimed that "slope mowing" typically requires more time and the use of specialized equipment not customarily used in regular right-of–way mowing contracts. According to industry practice, Denniston contended

[1] Both contracts were renewed by the parties in 1997 and again in 1998. The contracts expired on December 31, 1998.

[2] Kentucky Revised Statutes.

that bids for right-of-way mowing contracts are customarily interpreted to include the mowing of grass along the shoulders of the road and grass backslopes whereas "slope mowing" is understood to include the mowing of brush, trees, and steep slope areas. Denniston reported that slope mowing is typically compensated at a much higher rate: $150.00 - $200.00 per acre. Denniston also contended that if it had "been on notice that 'slope mowing' was included in the two (2) right of way mowing contracts, it would have substantially increased the amount of its bid on both jobs." Complaint at 3. As a result of the unanticipated additional mowing, Denniston claimed that its company was due additional compensation at a substantially higher rate per acre than that which was provided for in the written contracts.

The trial court dismissed this action based on Denniston's failure to exhaust available administrative remedies. However, on appeal, we vacated the dismissal and remanded the matter for additional proceedings. (See Mike Denniston, Inc. v. Commonwealth of Kentucky, Transportation Cabinet, Department of Highways, 2000-CA-1239-MR (rendered April 6, 2001)).

Upon remand and following a period of discovery, the parties filed cross-motions for summary judgment. On November 21, 2002, the Franklin Circuit Court granted the Cabinet's

motion and ordered that Denniston's complaint be dismissed. The court agreed with the Cabinet that the contracts had contemplated and included the disputed work. It also found that Denniston had failed to make a proper claim for additional compensation before beginning the work or after payment was tendered as required by the terms of the contract. The trial court made the following observations:

> The right-of-way mowing contracts at issue in this case were advertised for bid by sending bid proposals to several interested mowing contractors. The bid proposals set forth the terms under which the work was to be completed for each individual contract in detail. The proposals included "Special Notes" which further defined a contractor's duties and included drawings reflecting the areas to be mowed.
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> [Denniston] had held mowing contracts with the Transportation Cabinet since 1992. Denniston requested and received bid proposals for 1996 from the Transportation Cabinet, one for the Pike County contract, and one for the Various Counties contract. These bid proposals allowed the parties to renew the contracts for 1997 and 1998.
>
> The language of the bid proposals was revised for 1996 by including a more detailed explanation of the mowing to be done than in previous years. This language included the backslope that was contained in the ten foot (10') mowing are of the right-of-way. The Special Notes also contained drawing reflecting that the slopes within the mowing areas were to be mowed.
>
> Denniston certified that it had examined the site of proposed work, project plans, specifications, special provisions and notes

as a part of its bid. As well, all the mowing contractors attended a pre-mowing meeting in April 1996 at which the contractors were advised that the slopes within the right-of-ways were included in the required mowing.

In addition to the changes in the bid proposal language, the acreage on the Pike County contract was nearly double that which Denniston had mowed under prior years' contracts. This change in the new bid proposals was to account for the additional acres of the slopes. The Transportation Cabinet failed to make the necessary increase of acreage on the Various Counties contract, and issued a change order in May 1996 to compensate Denniston for the additional acres to be mowed under the contract. Denniston was informed of the change in acreage at the pre-mowing meeting and signed the change order after it was issued.

* * * * *

This Court holds that the terms of the contract are not ambiguous and will therefore be given their ordinary meaning. (Citation omitted). A review of the bid proposals and subject contracts reflects that there are no ambiguities contained therein. The Special Notes also reference attached drawings to ensure a clear understanding of the requirements of the mowing contracts. As well, the contracts make note of potential difficulties of mowing slopes and indicate that the contractor may have to utilize specialized equipment on slope areas. [Denniston] indicated that it had reviewed the proposals and notes, and was therefore aware of the requirements of the contract.

Denniston is charged with knowing the terms of the contracts as agreed upon, which do not include the limitations which [it]

> claims give it the right to additional compensation. The change order that was issued only corrected the amount of acres [Denniston] was obligated to mow, not the type of mowing required.
>
> [Denniston] did not make a claim for additional compensation before beginning the work as required by the Standard Specifications for Road and Bridge Construction, nor did it submit a letter of disagreement as required after the final estimate of payment was sent to it. [Denniston] signed the change order regarding the additional acreage on the Various Counties contract. By performing on the contract, and acting in a manner which this Court finds indicates acceptance of the terms of the contracts, [Denniston] has waived its right to challenge its compensation on these contracts. [Denniston] submitted bids according to the specifications that [it] was given, and these bids were accepted.

Order at 1-4. This appeal followed.

On appeal, Denniston contends that the trial court erred by failing to conclude that the Cabinet was collaterally estopped from relitigating the issue of whether the contracts required "slope mowing." In the alternative, Denniston argues that the trial court erred by failing to apply the doctrine of equitable estoppel; by failing to apply the doctrine of *quantum meruit*; or by failing to determine that the contracts simply did not require "slope mowing." Having carefully considered these arguments, we cannot conclude that the trial court erred by awarding summary judgment to the Cabinet.

When a trial court grants a motion for summary judgment, the standard for review on appeal is whether the trial court correctly determined that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. With no factual matters in dispute, summary judgment concerns only legal questions; therefore, we do not defer to the trial court's decision and our review of the issue is *de novo*. Lewis v. B & R Corp., Ky. App., 56 S.W.3d 432 (2001).

Denniston contends that the trial court erred by failing to find that the Cabinet was bound by the conclusions reached in an earlier administrative proceeding involving his competitor and that the Cabinet was not at liberty to contest his demand for greater compensation based on the substantially different work –- "slope mowing" -- that he was required to undertake. Denniston argues that the doctrine of collateral estoppel determined the proper resolution of this matter. We disagree.

The following elements must be present for the offensive use of collateral estoppel: (1) a final decision on the merits; (2) identity of issues; (3) issues actually litigated and determined; (4) a necessary issue; (5) a litigant who had lost in a previous proceeding; and (6) a full and fair

opportunity to litigate. May v. Oldfield, 698 F.Supp. 124(E.D. Ky., 1988). The general rule is that a judgment in a previous action operates as an estoppel only as to matters which were necessarily involved and determined in that former action. It is not conclusive as to matters which were immaterial or non-essential to the determination of the action or which were not necessary to uphold the judgment. Sedley v. City of West Buechel, Ky., 461 S.W.2d 556 (1970).

As the basis for its estoppel argument, Denniston relies on the administrative resolution of a substantially similar disagreement between Swartz Mowing and the Cabinet. Swartz Mowing argued at an earlier administrative hearing before the Cabinet that the disputed contracts did not require the mowing of brush, trees, woody vegetation, and slopes with the use of specialized equipment and that it was, therefore, entitled to additional compensation at a higher rate for the specialized mowing that the Cabinet required in the right-of-way areas. After considering the matter, the hearing officer agreed and concluded that Swartz Mowing had indeed proven that it was entitled to the additional compensation that it sought. Denniston argues that the Cabinet is bound in this proceeding by the hearing officer's previous findings of fact and conclusions of law.

We are asked to assume that under appropriate circumstances an administrative decision may be given collateral estoppel effect in a later civil action. Nevertheless, the traditional requirements for the application of collateral estoppel must still be satisfied. See 46 Am.Jur.2d Judgments § 580 (1994). In this case, those requirements have not been met.

Some of issues necessarily involved and determined in the Swartz Mowing matter are not identical to issues that are material to this proceeding. As the Cabinet notes, Swartz Mowing claimed in the administrative proceeding that it was not aware that the disputed "slope mowing" was required since the amount of acreage described in the 1996 mowing contracts was incorrectly stated as being identical to the acreage for the 1995 contract. When the Transportation Cabinet submitted a change order to reflect the increased acreage, Swartz protested. The hearing officer observed as follows:

> Swartz testified if the correct acreage had been included in the bid proposals when the two projects were first advertised, he would have called the Transportation Cabinet to inquire what was included in the increased acreage. If he had had any questions, he would have looked at the acreage and then submitted a higher bid. As it turned out, [Swartz] claims he could not anticipate the type of work required because of the incorrect acreage stated in the bid proposals.

Denniston, however, was on notice from the outset that the specific requirements of the contracts had changed and that the acreage, too, had increased dramatically. There are other factors necessarily involved and determined in the Swartz Mowing matter that materially differ from the issues involved in this litigation, including: (1) Swartz Mowing's representation that it had previous experience with Cabinet contracts that required slope mowing in more specific terms; (2) Swartz Mowing's refusal to agree to the Cabinet's proposed change order reflecting a change from the acreage originally listed to the correct acreage along with the inclusion of slopes in the area to be mowed; and (3) Swartz Mowing's decision to dispute the extra work immediately and to submit a claim for additional compensation to the Cabinet in accord with the Standard Specifications for Road and Bridge Construction. Since the Swartz Mowing proceeding included findings and conclusions on issues materially different from those considered in this litigation, the trial court did not err by refusing to apply the doctrine of collateral estoppel against the Cabinet.

Next, Denniston claims that it is entitled to recover damages against the Cabinet in the amount of the additional compensation it seeks under the doctrines of either equitable estoppel or *quantum meruit*. We disagree.

The doctrine of equitable estoppel incorporates the following elements:

> (1) conduct which amounts to false representation or concealment of material facts or at least which is calculated to convey the impression the circumstances are in a particular state that is inconsistent with the party's subsequent position; (2) the intention or expectation that such conduct shall influence the other party to act; and (3) knowledge, constructive or actual, of the true facts. The party claiming the estoppel must show: (1) lack of knowledge and of the means of knowledge of the true facts; (2) a good faith reliance on the words or conduct of the party to be estopped; and (3) a detrimental change in position or status by the party claiming estoppel due to such reliance.

See City of Shelbyville v. Commonwealth, Ky.App., 706 S.W.2d 426, 429 (1986), citing Electric and Water Plant Board of the City of Frankfort v. Suburban Acres Development, Inc., Ky., 513 S.W.2d 489, 491 (1974). Because of an overriding public policy in favor of protection of public resources, the doctrine is applied to governmental agencies only in exceptional circumstances. J. Branham Erecting v. Kentucky Unemployment Insur. Comm'n., Ky. App., 880 S.W.2d 896 (1994).

The exceptional circumstances deemed sufficient to invoke the doctrine against the government were set forth in Laughead v. Commonwealth, Dep't. of Transp., Ky., 657 S.W.2d 228 (1983). Laughead involved an intentional course of conduct by

the governmental agency that "'lulled' the opposing party into inaction," followed by its decision later "to take an inconsistent position to the other party's detriment." J. Branham Erecting 880 S.W.2d at 898. "[E]quity will not allow a party to benefit from its own intentional, inconsistent conduct." Id.

We cannot conclude that the trial court erred in finding no intentionally offensive or inconsistent conduct on the part of the Cabinet in this case. The Cabinet re-worked its mowing contracts to take into account the intermittent need for more extensive right-of-way mowing. In so doing, it specifically expressed its position that contractors were required by the terms of the contracts to mow vegetation and areas that involved hard-to-access slopes even if the use of specialized equipment was necessary to complete the work. The circumstances involved in this case do not support recourse to the use of the doctrine of equitable estoppel against the Cabinet.

Denniston also seeks to recover based on the doctrine of *quantum meruit*. *Quantum meruit* provides an avenue of recovery on a contract or quasi-contract by implying the existence of contract where the parties either had no express contract or had abandoned or rescinded it. We believe that Denniston is barred from invoking *quantum meruit* because of the

explicit nature of the contracts at issue. See 66 Am.Jur.2d Restitution and Implied Contracts § 81 (2001).

> [W]here an express contract is made defining the circumstances under which an obligation may arise with reference to a certain subject matter such contract excludes the possibility of an implied contract concerning the same matter.

Sparks Milling Co. v. Powell, Ky., 283 Ky. 669, 143 S.W.2d 75, 76 (1940)).

The language of the contracts in this case provided that the contractor was required to mow vegetation on the "backslope in all situations . . . where the cut slope areas exist within the ten foot (10') area designated for mowing." (Pike County Contract at 2). Contractors understood and agreed that in order to mow some areas, they might be required to use specialized equipment, including slope mowers, side-mounted articulated mowers, and even the use of hand-held trimming equipment in some instances. Denniston was aware of the Cabinet's expectations. The contracts were never rescinded or abandoned. On the contrary, they were renewed by Denniston annually. Pursuant to the criteria governing the applicability of *quantum meruit,* Denniston has not demonstrated that the Cabinet was unjustly enriched by the mowing operations that it required.

Denniston next argues that the trial court erred by interpreting the contract to require the company to mow all of the vegetation and steep slopes in the right-of-way areas. In light of the clear provisions of the contracts, we disagree.

Additionally, Denniston failed to make a claim for extra compensation prior to beginning work on the contracts –- a specific requirement contained in the contract regarding either extra or extraordinary work. Denniston also failed to submit a letter of disagreement or protest after receiving the Cabinet's final estimate of payment –- another contractual requirement.

Incorporated by reference into the disputed contracts are the 1994 Standard Specifications for Road and Bridge Construction, which contain a provision concerning claims for adjustments and other disputes. Section 105.16 provides as follows:

> When, in any case, the Contractor deems that additional compensation is due him for work or material not clearly covered in the contract . . . the Contractor shall notify the Engineer in writing of his intention to make claim for such additional compensation before he begins the work on which he bases the claim. When such notification is not given . . . then the contractor hereby agrees to waive any claim for such additional compensation. . . . (Emphases added.)

Denniston was required by this provision to notify the Cabinet that it would seek additional compensation for the work that it

claimed was not clearly covered by the terms of the contracts. However, Denniston did not make any claim concerning additional compensation prior to beginning work. Consequently, under the unambiguous terminology of the Standard Specifications, the contractor waived any claim to additional compensation. These omissions, viewed in conjunction with its election to perform the contracts as directed by the Cabinet, indicated Denniston's acceptance of the Cabinet's interpretation of the terms of the contracts.

At the end of the mowing season, Denniston was again given an opportunity to protest. After the work was completed, the Cabinet sent a "Final Estimate" of compensation for the project in accordance with Section 109.06 of the Standard Specifications. That section provides as follows:

> Within a reasonable time after final inspection and acceptance of the work by the Engineer, the Engineer will compile a final estimate for the contract. . . .The final estimate will then be submitted to the Contractor for his review. Within 60 calendar days after the final estimate has been submitted to the Contractor, the Contractor shall submit to the engineer his written approval of the final estimate or a written statement of disagreement with the final estimate. Upon the contractor's approval of the final estimate, or when he makes no acceptable statement of disagreement within the 60 calendar days provided herein, the final estimate will be processed for payment.
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> * * * *

> Upon the Commissioner's approval, and after the total amount of all previous payments, liquidated damages, and other claims, if any, are deducted, the amount of money due the Contractor will be certified for payment to the agencies of the Commonwealth as required by law. The acceptance by the Contractor of payment for the final quantities shall operate as and shall be a release to the Commonwealth and the Commissioner. (Emphases added.)

Each final estimate notified Denniston that it had sixty (60) days either to agree to the estimate or to submit a letter of disagreement. The final estimate provided that the contract would be processed for payment if no reply were forthcoming.

It is undisputed that no response was received from Denniston on either contract and that both contracts were paid in accordance with the Cabinet's final estimates. Denniston accepted the payments. The contracts provide expressly that acceptance of payment under these circumstances operates as a release of claims against the Commonwealth. Thus, the trial court did not err by concluding that Dennison had formally waived its right to seek additional compensation under the contracts.

The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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