

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001514-MR

CONTROLLED BLASTING, INC.

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, SPECIAL JUDGE
ACTION NO. 08-CI-00840

CEDAR CREST, INC.

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, STUMBO AND TAYLOR, JUDGES.

CLAYTON, JUDGE: This is an appeal from an action involving two contracts.

The Appellant, Controlled Blasting, Inc. (CBI), brought an action in the Oldham Circuit Court to collect a debt it alleged was owed on the contracts. The Appellee, Cedar Crest, Inc., filed a counterclaim for breach of contract. The trial court

conducted a bench trial and found in favor of Cedar Crest, dismissed the complaint and entered judgment in favor of the counterclaim. CBI then brought this appeal.

BACKGROUND INFORMATION

The parties entered into a contract in November of 2007, pursuant to which CBI would provide labor, materials, and/or services for the excavation of mass rock. Cedar Crest's property on Pristine Point is located in Oldham County. The work was priced at \$62,110.65. The parties later entered into a second agreement on May 21, 2008, which was an amendment to their original contract. This amendment expanded the scope of the work that would be provided to include blasting of trench rock in the areas of the installation of utilities plus mass rock as required. The work was priced at \$29,615.00.

The contract set forth that debris produced from the blasting would be used as "fill" rock. An issue arose in April of 2008 as to the size of the debris and how it would be resolved. While both parties explored remedial avenues, there was no resolution to the problem. Eventually, the inability of Cedar Crest's contractor, Bowen Excavating (Bowen), to use the rock as fill as originally anticipated, led to additional cost as they had to develop alternative uses for the rock.

Terry Powell (the head of Cedar Crest); Mike Balance (representing CBI); and Barry Bowen (of Bowen Excavating) had a meeting to discuss "cover" and the size of the rock fragments generated by the blasting. "Cover" refers to dirt cover which might be needed for blasting safety. As a result of their meeting, the

second contract was entered into which revised the original contract. This action arose after Cedar Crest stopped making payments on the contract.

After a trial, the circuit court found that Cedar Crest's requirement to "cover" was not a material term in its contract with CBI. The court relied upon the second agreement which was entered into in May of 2008, which was after the issues arose and was for additional blasting. The trial court then made the following conclusions:

3. Both CBI and Cedar Crest substantially performed their contractual obligations arising out of the agreements for completion of a portion of the sitework attendant to the Pristine Point Project.
4. The failure of CBI to conduct its blasting operations in compliance with the standard established by the Project Engineer and the agreement between the parties for the mass rock excavation on the site was a material deficiency in its performance.
5. As a direct and proximate result of the deficiencies in the performance by CBI, Cedar Crest has sustained damages in the form of increased site development costs to reduce the size of the rock to render it usable as fill, as well as to relocate the quantities of rock on the site to avoid conflict with the site development and construction of improvements to portions of the site.
6. The measure of damages for breach of a construction contract is the lesser of the cost of repair, or the diminution of value of the project[.]
7. The damages sustained by Cedar Crest exceed any additional contract proceeds earned by CBI for its performance, and Cedar Crest is entitled to Judgment against CBI for its costs of remediation to the extent they exceed the balance of the unpaid invoices of CBI.

After judgment was rendered, CBI brought this appeal.

STANDARD OF REVIEW

Kentucky Rules of Civil Procedure (CR) 52.01 provides that “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”

Findings are considered to be “clearly erroneous only if they are manifestly against the weight of the evidence.” *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008); *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). Interpretation of a contract is a matter of law and, as such, is subject to de novo review. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

DISCUSSION

CBI first contends that it did not breach the contract. It asserts that the special information section of the original contract requires the contractor to provide dirt cover. It points to page one, to Item (a) which provides that the “Contractor will be expected to provide dirt cover as necessary for blasting safety and as required by Controlled Blasting.” CBI asserts that the trial court did not rely on this requirement of “cover” and, instead, relied solely on the fourth bullet item located on Attachment “A” which provides:

Drilling and blasting design will be applied to produce material sizing to be used on site for fill, however, geological conditions encountered does [sic] guarantee material sizing can be produced.

A contract must be enforced as it is written if there is no ambiguity. *McMullin v. McMullin*, 338 S.W.3d 315, 320 (Ky. App. 2011). “Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible.” *City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986). Here, the contract and Attachment “A” indicate that the issue was known to CBI and Cedar Crest, and that was, in fact, the reason for the Attachment. Once the issue was known, the parties continued with the blasting and filling, but at significant additional costs to Cedar Crest. While Cedar Crest did stop making payments, this was subsequent to the proper fill material not being provided. In this way, CBI breached the contract.

In this case, the record provides substantial evidence in the form of testimony for the contractor and the principals of Bowen Excavating that CBI breached the contract in not providing sufficient fill material. The testimony at trial indicated that cover was provided by Cedar Crest when it was requested.

Next, CBI contends that the award of damages to Cedar Crest by the trial court was not supported by the evidence presented at trial. We disagree. “[T]he real measure of damages for defective performance of a construction contract is the cost of remedying the defect, so long as it is reasonable.” *State Property and Buildings Commission of Dept. of Finance v. H.W. Miller Const. Co.*, 385 S.W.2d 211, 214 (Ky. 1964). In this action, the trial court held that Bowen Excavating’s inability to use the rock provided by CBI as fill required Cedar Crest to expand its operational contract to hoe, ram, separate, relocate and develop

alternative uses for the debris, which caused an additional cost. The trial court took the unpaid invoices of CBI and offset the additional costs of \$165,370, for a total in damages of \$71,618.59. We find this judgment to be based upon substantial evidence and, thus, affirm the trial court's judgment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joseph A. Hammer
Louisville, Kentucky

BRIEF FOR APPELLEE:

David B. Blandford
Jeremy J. Beck
Louisville, Kentucky