STATE OF MICHIGAN

COURT OF APPEALS

CRAWFORD COUNTY ROAD COMMISSION,

Plaintiff/Counterdefendant-Appellant/Cross-Appellee,

v

CARRICK GRAVEL & CRUSHING,

Defendant/Counterplaintiff-Appellee/Cross-Appellant.

UNPUBLISHED
December 3, 1999

No. 203099
Crawford Circuit Court
LC No. 95-003710 CL

CRAWFORD COUNTY ROAD COMMISSION,

Plaintiff/Counterdefendant-Appellant,

v

CARRICK GRAVEL & CRUSHING,

Defendant/Counterplaintiff-Appellee.

No. 214422
Crawford Circuit Court
LC No. 95-003710 CL

Before: Sawyer, P.J., and Hood and Whitbeck, JJ.

PER CURIAM.

In Docket No. 203099, plaintiff[1] appeals and defendant cross-appeals as of right from a judgment, following a jury trial, in favor of defendant and an award of attorney fees for defendant as incidental damages. In Docket No. 214422, plaintiff appeals by leave granted from an order awarding defendant the contract price for the gravel. We affirm in part and reverse in part.

Plaintiff entered into a tri-party agreement with Frederic Township, the State of Michigan and "Road Commission Public Funds" for the purpose of road improvements. It was plaintiff's responsibility to obtain a contractor to "produce" gravel to be used as a sub-base for roads and drains.

The gravel consisted of a mixture of rock, sand, clay, water and air and was known as "MDOT 22A Gravel." Plaintiff obtained a mineral permit from the State of Michigan Department of Natural Resources (hereinafter "DNR"). This permit allowed plaintiff to remove gravel, sand, fill dirt, clay, marl, and other minerals from the Kolka Creek Gravel Pit for use in county road maintenance and repair. There was no fee charged for removal of minerals taken from the Kolka Creek Gravel Pit by public units of government because the materials were utilized for the public good. However, all commercial entities were charged royalty fees when purchasing minerals from the Kolka Creek Gravel Pit.

Plaintiff solicited and received two bids for the production of 25,000 tons of MDOT 22A Gravel. Defendant's bid offered to provide the requested gravel at the rate of $1.83 per ton. The only other bid, from Clifton Halliday, proposed to supply the gravel for $2.62 per ton. Plaintiff requested information concerning the bids. Specifically, plaintiff inquired whether the bids included the importing of any materials necessary to produce the MDOT 22A specification gravel, the proposed schedule for completion of the project, the average production rate, any prior experience in producing MDOT 22A material and a description of quality control methods. In response to these questions, defendant represented that it would be able to produce the 25,000 tons of gravel required for the project in a three to four day period with quality testing after production of each 1,000 tons. Defendant also indicated that it had inspected the gravel pit and would not be required to import any materials for the production of MDOT 22A Gravel. Defendant was awarded the contract.

Initially, plaintiff was satisfied that the gravel produced by defendant complied with MDOT 22A specifications based on tests performed at the gravel pit site. Later, plaintiff expressed concerns about the quantity of gravel produced and sought to verify defendant's belt scale, but defendant's representative refused the request. Additionally, Randy Jagielo, of the Reith Riley Asphalt Paving Company, notified plaintiff that the gravel was not performing as expected. Tests were performed on the gravel, which failed to meet MDOT 22A specifications. The failure to meet MDOT 22A specifications was attributed to improper stockpiling methods, such as stacking the gravel in a cone shape, causing "segregation." Segregation causes stone and fine particles to separate, and the process does not occur when the layers of gravel are flattened.

Plaintiff put 4,697 tons of gravel to use in the road maintenance project. However, it had to expend additional monies to correct the problems with the gravel produced by defendant. Accordingly, plaintiff did not use the remaining gravel produced by defendant, but rather, filed suit against defendant for breach of contract and misrepresentation. Defendant filed a countercomplaint alleging breach of contract, estoppel, and quantum meruit.

Defendant moved for partial summary disposition, arguing that plaintiff had accepted the "goods" and had not properly rejected the goods pursuant to the Uniform Commercial Code (hereinafter "UCC"). Plaintiff, in response, argued that the case law cited by defendant was distinguishable. The trial court denied defendant's motion for partial summary disposition, holding that a decision regarding the timeliness and reasonableness of plaintiff's actions was premature at that time. The trial court did not analyze whether the provisions of the UCC were applicable to the contract executed between plaintiff and defendant. Following trial, the jury concluded that defendant had partially complied with the contract and suffered damages in the amount of $9,150.[2]

Defendant first argues that the gravel could not be rejected when, pursuant to the UCC, plaintiff accepted the gravel, failed to revoke its acceptance and used the gravel in a manner inconsistent with defendant's ownership. We disagree. As an initial matter, we note that defendant assumes that the UCC governs this transaction. However, Article 2 of the Code governs the relationship between parties involved in "transactions in goods." *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 519; 486 NW2d 612 (1992). In the present case, defendant did not merely turn over gravel to plaintiff, but rather, defendant was also required to perform a service, that is, the mixing of the materials that comprised MDOT 22A Gravel. Our Supreme Court adopted the following test for determining whether contracts involving mixed goods and services are governed by the UCC:

> The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved . . . . [*Id*. at 534, quoting *Bonebrake v Cox*, 499 F2d 951, 960 (CA 8, 1974).]

Whether goods or services predominate in a hybrid contract is one of fact. *Frommert v Bobson Construction Co*, 219 Mich App 735, 738; 558 NW2d 239 (1996). However, where the factual provisions of a contract are undisputed, a court may decide the issue as a matter of law. *Id.* In the present case, the predominant nature of the parties' transaction was the service of mixing goods, in this case the minerals required to create MDOT 22A Gravel. Any goods involved in this process were incidentally involved. Plaintiff essentially provided all the necessary materials for creating the MDOT 22A specification gravel when it obtained the mineral permit allowing for the removal of gravel, sand, fill dirt, clay, marl and other minerals from the Kolka Creek Gravel Pit. Plaintiff entered into the contract with defendant for the performance of a service, specifically, the mixing of the materials to create the specific grade of gravel required for road maintenance. Defendant performed the service of mixing these minerals by moving its equipment into the pit and using the materials made available through plaintiff's mineral permit. Because the predominant nature of the parties' transaction involved the performance of a service with goods incidentally involved, the UCC rules governing acceptance do not apply.[3] Accordingly, defendant's contention that plaintiff accepted the "goods" pursuant to the UCC is without merit.

Both parties next argue that the trial court's award of attorney fees was erroneous. Specifically, the trial court awarded attorney fees as incidental damages pursuant to MCL 440.2710; MSA 19.2710, but concluded that defendant was only entitled to a portion of the requested attorney fees because it had prevailed only in part. Plaintiff asserts that defendant was not entitled to any attorney fees because plaintiff was the prevailing party when the jury concluded that defendant had only provided twenty percent of the gravel required under the parties' agreement. Defendant asserts that plaintiff was not the prevailing party because it failed to defeat the countercomplaint. While an award of attorney fees is reviewed for an abuse of discretion, *B & B Investment Group v Gitler*, 229 Mich App 1, 15; 581 NW2d 17 (1998), we review questions of law de novo. *Herald Co, Inc v Kalamazoo*, 229 Mich App 376, 380; 581 NW2d 295 (1998). As previously stated, the UCC does not apply to this

transaction. Accordingly, defendant is not entitled to attorney fees as incidental damages pursuant to the provisions of the UCC, and the trial court erred in awarding attorney fees to defendant.

Finally, the issue of the ownership of the remaining gravel was not submitted to the jury. Following the jury's verdict, defendant moved to have the remaining unused gravel "returned," and the trial court granted defendant's motion. When it was determined that the gravel could not be retrieved by defendant without paying a royalty fee to the DNR, the trial court awarded the value of the gravel to defendant. Plaintiff contends that the trial court erred in awarding the value of the gravel to defendant. We agree.[4] While defendant contends that it is seeking "return" of the gravel, defendant did not own the materials that were used to create MDOT 22A Gravel. Rather, defendant was able to enter the gravel pit with its equipment based upon a permit issued to plaintiff which allowed defendant to mix minerals made available by the DNR. The DNR issued this permit only because the gravel would be used for the benefit of the public. Accordingly, defendant was not entitled to return of the gravel when it did not hold any legal title to the minerals used in the mixing of MDOT 22A Gravel. Furthermore, the monetary award in lieu of the gravel would effectively grant defendant a windfall when it did not own the materials used to mix MDOT 22A Gravel and merely produced the gravel from the various materials provided by the state operated gravel pit. Accordingly, we reverse the trial court's award of the gravel and, in lieu of the gravel, the monetary award of the contract price of the gravel.[5]

Affirmed in part, reversed in part. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Harold Hood
/s/ William C. Whitbeck

[1] For purposes of clarity, we will refer to plaintiff/counterdefendant Crawford County Road Commission as "plaintiff" and defendant/counterplaintiff Carrick Gravel and Crushing as "defendant."

[2] Count one of the verdict form required the jury to consider plaintiff's claim for breach of contract and defendant's counterclaim for payment of the purchase price simultaneously. The jury concluded that defendant had only partially complied with the contract and awarded monetary damages for the approximately 5,000 tons utilized by plaintiff for road maintenance. Accordingly, the judgment in favor of defendant actually indicates that both parties prevailed, in part, upon their respective claims for breach of contract.

[3] We must note that defendant did not place its statement of the issue in context. That is, defendant failed to specify whether the error regarding acceptance occurred when the trial court denied defendant's motion for summary disposition and allowed the issue to proceed to the jury or whether the jury erred in failing to conclude that plaintiff had accepted the entire amount of gravel produced by defendant. Defendant's brief on appeal states that the jury found, as an initial matter, that only 5,000 tons of gravel conformed to the contract. However, defendant argues that this was the wrong initial question to ask. Instead, the initial inquiry should have been whether plaintiff accepted the gravel. A special verdict form was submitted to the jury. MCR 2.514 requires that a special verdict form be settled in advance of argument and outside the presence of the jury. There is no evidence in the record

that defendant objected to the special verdict form. Therefore, defendant waived review of any issue involving the special verdict form. *Dedes v Asch*, 233 Mich App 329, 334-335; 590 NW2d 605 (1998).

[4] We note that plaintiff takes issue with the authority of the trial court to enter this order following the filing of the claim of appeal. In *Vallance v Brewbaker*, 161 Mich App 642, 647-648; 411 NW2d 808 (1987), we held that the filing of a claim of appeal divests the circuit court of its jurisdiction. However, the remedy for the violation of this rule was reversal of the trial court's order without prejudice to the moving party's right to renew the motion on remand. For reasons of finality and judicial economy, we will address this issue because the record is sufficiently developed to resolve it. *Avery v Demetropoulos*, 209 Mich App 500, 502; 531 NW2d 720 (1995). The trial court's conclusion that it retained jurisdiction pursuant to MCR 7.208(D) was erroneous because the judgment did not address the conservation or management of the unused gravel.

[5] Finally, we note that defendant failed to identify any legal right or entitlement to the rejected gravel. Even assuming that defendant was an intended third-party beneficiary of the permit issued between plaintiff and the DNR, review of the permit reveals that defendant would have been on notice that it could not retain any unused gravel. The permit expressly provides that "[n]o material taken under a Free permit shall be sold." The permit also provides that "[t]he permittee shall relinquish all right, title and claim to materials remaining stock-piled or otherwise in the pit or permit area" when the permit expired two months after being issued. Accordingly, defendant's claim to the unused gravel is without merit.