

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BUENA VISTA CHARTER TOWNSHIP,

Plaintiff/Third-Party Plaintiff-  
Appellee,

v

ANKLAM CONSTRUCTION, INC.,

Defendant-Third-Party Plaintiff-  
Appellant,

and

RC ASSOCIATES-ENGINEERING-  
ARCHITECTURAL-ENVIRONMENTAL-  
SURVEYING-CONSTRUCTION TESTING-  
GEOTECHNICAL, INC.,

Third-Party Defendant.

UNPUBLISHED  
February 15, 2002

No. 224052  
Saginaw Circuit Court  
LC No. 96-016609-CZ

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Before: Fitzgerald, P.J., and Bandstra and K. F. Kelly, JJ.

PER CURIAM.

Following a bench trial, the trial court entered a judgment finding in favor of plaintiff Buena Vista Charter Township (hereinafter “Buena Vista,”) in the amount of \$14,610.40 and finding no cause of action on defendant Anklam Construction, Inc.’s, (hereinafter “Anklam,”) counter/cross-claims against Buena Vista and third-party defendant RC Associates. Anklam appeals as of right. We affirm in part, reverse in part and remand for further factual findings.

**I. Basic Facts and Procedural Background**

RC Associates is a professional engineering firm engaged in planning and managing construction projects. Buena Vista contracted with RC Associates to design and manage the construction of a water main on Portsmouth Road. When RC Associates designed the project, it placed the water main directly in the right-of-way controlled by the Saginaw County Road Commission.

As a result of a bidding process, Anklam was selected as the subcontractor for purposes of digging and laying the pipeline. However, when Saginaw County Road Commission declined to grant a permit for this construction, the pipe line had to be moved eight feet and the design altered. Because Anklam determined that it would incur additional costs due to the alternate location, it submitted a request for change order to RC Associates. When RC Associates did not issue the requested change order, Anklam did not proceed with the construction. According to Anklam, RC Associates threatened that if Anklam did not complete the project, it would award the contract to another company. Anklam maintains that because of this threat and the fear that Buena Vista would seek to collect on the contractor's bond that Anklam posted, it proceeded with the project and completed performance.

After the project was completed, Buena Vista sued Anklam for \$14,641.60, contending that this sum had been erroneously paid as a second progress payment to Anklam. In response, Anklam admitted that it was overpaid this amount, but counterclaimed against Buena Vista and filed a cross-claim against RC Associates. Anklam alleged it was entitled to increased costs caused primarily by RC Associates failing to obtain the right-of-way from the road commission.<sup>1</sup> Anklam's counter-complaint against Buena Vista charged that Buena Vista owed it \$16,080 for the third progress payment that was never paid to Anklam as well as \$4,470 for the retainage fee that was never paid. In addition to the progress payment and retainage fee, Anklam claimed that Buena Vista owed it \$67,869.60 for required construction changes that put it above the \$170,470 contract price.

Following a bench trial, the trial court, in a written opinion, made specific factual findings. The trial court found that Anklam was awarded the contract and that in accord therewith, Anklam had to begin construction on June 26, 1995. RC Associates' design provided for the main to be laid twenty-eight feet from the centerline of Portsmouth Road, which was within the right-of-way controlled by Saginaw County Road Commission. Because the road commission would not grant a permit for construction in its right of way, the original design had to be altered and the main laid twenty feet from the centerline. It was clear to Anklam by July 5, 1995, that because of the alterations, the contract could not be performed as originally bid. Accordingly, Anklam requested change orders from RC Associates. RC Associates acknowledged that Anklam would incur additional costs but only granted one change order. The trial court found that at this juncture, Anklam had a number of different options and elected to proceed and complete performance.

After making these factual findings, the trial court held that as a result of the road commission's actions refusal to grant the permit to construct in its right of way, the original contract was void. The trial court then reasoned that Anklam's request for a change order from RC Associates in light of the alterations in the original contract constituted a new offer. The trial court further reasoned that RC Associates' response that it would approve only a part of Anklam's request for change constituted a counteroffer, which Anklam accepted by continuing with the project and completing performance. Accordingly, the trial court found in favor of Buena Vista in the amount of \$14,610.40 and found no cause of action on Anklam's claims.

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<sup>1</sup> The lower court referred to Anklam's claim as a cross-claim only; however, Anklam brought a counter-claim against Buena Vista and a third-party claim against RC Associates.

Anklam appeals as of right.

## II. Standard of Review

This Court reviews findings of fact by a trial court sitting without a jury under the clearly erroneous standard. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). A finding is clearly erroneous when, although there may be evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. *Id.* In contrast, this Court reviews a trial court's conclusions of law de novo. *Id.* Where the trial court's factual findings may have been influenced by an incorrect view of the law, this Court's review of those findings is not limited to clear error. *Id.*

## III. The Complaint and Counterclaim

Anklam argues that the trial court clearly erred in finding no cause of action on its counterclaim against Buena Vista for the third unpaid progress payment. We agree.

On appeal, the parties do not dispute that the third progress payment in the amount of \$16,080 and the retainage fee in the amount of \$4,470 was never paid to Anklam. Indeed, Buena Vista admits these amounts are due and owing and further states that it will treat the loss as an offset for the remaining judgment. Accordingly, we reverse the trial court's judgment finding no cause of action and find in favor of Anklam in the amount of \$20,550. We further affirm the trial court's finding in favor of Buena Vista in the amount of \$14,610.40; the amount paid to Anklam in error.

## IV. Validity of the Contract

Next, Anklam argues that the trial court erred in finding that the contract was void. We agree.

We first note that neither party argues the original contract was void. Yet the trial court nevertheless determined that because the location of the water main changed, the contract was void. The trial court further determined that Anklam's request for change orders constituted a new offer and RC Associates indication that it would only approve a portion of those changes constituted a counter-offer. Thus, the trial court held Anklam accepted the counter-offer by completing performance on the contract.

MCR 2.517(1) requires the trial court, when acting without a jury, to find the facts specifically and state separately its conclusions of law. Indeed, clear and complete findings are essential to this Court for the proper discharge of our appellate function. *Cacavas v Zack*, 43 Mich App 222, 226; 203 NW2d 913 (1972). (Citation omitted.)

On this record, we are unable to discern the rationale underlying the trial court's ruling. A review of the trial court's opinion reveals its internal inconsistency. The court found that the conditions underlying the initial contract changed which presupposes the existence of a valid contract. From this, the trial court determined that the contract was completely void; i.e. not valid at all. Moreover, the trial court did not provide a factual basis to support its conclusion that the original contract was void. Equally unclear is whether the trial court considered the

possibility that the inability to secure a permit from the Saginaw Road Commission to construct in its right-of-way and reconfiguring the placement of the water main were modifications to the original contract upon which there was a meeting of the minds and for which Anklaam provided additional consideration by completing performance. See generally *Port Huron Ed v Port Huron Area Sch Dist*, 452 Mich 309; 550 NW2d 228 (1996) (discussing the requisites for modification of an existing contract.) Because the trial court did not explain the basis upon which it concluded that the contract was void or any of its additional findings flowing from that determination, we remand to the trial court for further explanation and development of the record.

#### V. Anklaam's Cross-claim

Finally, with regard to Anklaam's claim for costs in excess of the contract amount,<sup>2</sup> although the trial court dismissed this claim, it did not make factual findings on the record. We therefore remand this issue to the trial court as well.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald  
/s/ Richard A Bandstra  
/s/ Kirsten Frank Kelly

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<sup>2</sup> We note that on appeal Buena Vista claims that Const 1963 art 11, § 3 insulates it from additional payments arising from a "work directive change" issued by RC Associates after the parties entered into the original contract. We do not agree. The record reveals that Anklaam submitted its request for change order because of a contemplated increase in construction costs arising from the relocation of the main. In response, RC Associates agreed to approve some of the requested changes and indicated that a change order would be granted when construction was completed. Therefore, authorization for the changes occurred before the end of construction and thus became part of the contract. See *E C Nolan Co v Highway Dept*, 45 Mich App 364, 367; 206 NW2d 472 (1973). The prohibition contained in art 11 § 3 applies to prevent additional payments after the service is completed. Accordingly, on the facts presented in the case at bar, art 11 § 3 does not apply.