

STATE OF MICHIGAN
COURT OF APPEALS

PCL CIVIL CONSTRUCTORS, INC.,
MCCARTHY BUILDING COMPANIES, INC.,
and PCL MCCARTHY,

UNPUBLISHED
November 18, 2003

Plaintiffs-Appellants,

v

No. 237184
Court of Claims
LC No. 99-017413-CM

DEPARTMENT OF TRANSPORTATION,

Defendant/Third Party Plaintiff-
Appellee,

and

MODJESKI & MASTERS, INC., BUCKLAND &
TAYLOR, LTD., and MODJESKI & MASTERS,
INC/BUCKLAND & TAYLOR, LTD.,

Third Party Defendants-Appellees.

Before: Neff, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant Michigan Department of Transportation's (MDOT) motion for summary disposition. We affirm.

This litigation arises out of the construction of the second Blue Water Bridge linking Port Huron, Michigan to Point Edward, Canada. Defendant retained third party defendants to design the bridge and act as project engineer, supervising the construction of the bridge. Plaintiffs were the successful bidders of the contract and began construction. However, plaintiffs brought a claim for additional compensation, contending that the terms of the construction contract were ambiguous and material modifications were made to the contract. Defendant filed a motion for summary disposition, alleging that the terms of the contract were plain and unambiguous and

that plaintiffs had failed to comply with the contractual provisions necessary to obtain relief. The trial court granted defendant's motion.

Plaintiff¹ first alleges that the trial court erred in concluding that the notice provision in the parties' contract had not been invoked. We disagree. Our review of the grant or denial of summary disposition is de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). The goal of contract construction is to determine and enforce the parties' intent from the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). If contract language is clear and unambiguous, its meaning presents a question of law for the court to determine. *UAW-GM Human Resource Center v KSL Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). On the other hand, where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. *Id.* Where a contract is not ambiguous, evidence of custom and practice is inadmissible. *Independence Twp v Reliance Building Co*, 175 Mich App 48, 54; 437 NW2d 22 (1989). Furthermore, the duty to interpret and apply the law is allocated to the courts, not the parties' witnesses. See *Hottman v Hottman*, 226 Mich App 171, 179; 572 NW2d 259 (1997).

As an initial matter, we note that plaintiffs repeatedly allege that the contract was ambiguous such that the parties' intent becomes relevant, creating questions of fact, and the construction of the contract is construed against defendant as the drafter. However, we note that the contract in the present case expressly delegated the authority to determine the intent of the plans to the project engineer.² Thus, any question regarding the performance testing of the welds and the visual, radiographic, and ultrasonic test inspections should have been directed to the project engineer to determine the degree of time and monetary expenditure for this aspect of the contract. There is no indication that plaintiffs raised such an issue with the project engineer before submission of the bid or before commencement of this work.³ Furthermore, plaintiffs' contention that the construction of the contract should consider common practice and procedure and testimony from plaintiffs' witnesses is without merit. *Hottman, supra*; *Independence Twp, supra*. Therefore, applying the plain language of the contract, plaintiffs' allegation that their intention regarding the specifications governs is without merit. *Old Kent, supra*.

¹ Plaintiff has subdivided the trial court's ruling into eighteen different claims of error. For ease of reference, we will address the issues as presented and ruled upon in the lower court.

² The contract provided that the bidder had inspected the proposal forms, plans, and specifications, and submission of a bid was prima facie evidence that the bidder was satisfied as to the "conditions to be encountered in performing the work." Additionally, regarding the authority of the engineer, it provided: "The Engineer will decide the intent of the plans and specifications when an inconsistency, omission, conflict or uncertainty is discovered."

³ Thus, where the request for extra compensation was governed by the specifications of the contract, the request was specious at best.

Furthermore, review of the construction contract at issue reveals that the contractor had to provide notice in writing before commencing work in order to seek extra compensation, and the failure to comply with this requirement resulted in waiver of the claim. *Old Kent, supra*. The purported notice proffered by plaintiffs failed to comply with this requirement, and thus, the trial court properly granted summary disposition of this claim. See *Reynolds v Allstate Ins Co*, 123 Mich App 488, 490-491; 332 NW2d 583 (1983). Additionally, the contention that defendant cannot demonstrate prejudice from any deficiency in the notice is without merit. There is no such conditional requirement imposed within the plain language of the contract. *Old Kent, supra*.

Finally, we conclude that there is no merit to plaintiffs' contention, that the closure of the weld access holes was a constructive change to the contract, in light of the plans submitted by plaintiffs and the discretion afforded the project engineer pursuant to the terms of the contract.

Affirmed.

/s/ Janet T. Neff
/s/ Karen M. Fort Hood
/s/ Stephen L. Borello