STATE OF MICHIGAN

COURT OF APPEALS

CERTIFIED ABATEMENT SERVICES, INC., Plaintiff-Appellant,	UNPUBLISHED January 27, 2004
V	No. 245307 Court of Claims
DEPARTMENT OF MANAGEMENT AND BUDGET, Defendant-Appellee.	LC No. 01-018014-CM

Before: O'Connell, P.J., and Wilder and Murray, JJ.

PER CURIAM.

In this breach of contract action, plaintiff, Certified Abatement Services, Inc., (CASI) appeals by right the Court of Claims' order granting defendant's motion for summary disposition. We affirm.

I. Facts and Proceedings

In August 1999, defendant solicited bids from several contractors, including plaintiff, for an asbestos removal project at the Clinton Valley Center, a state-owned mental health facility consisting of several buildings in Pontiac, in anticipation of demolishing the buildings. Before inviting the contractors to bid on the project, defendant hired Materials Testing Consultants, Inc., (MTC) to survey the project and supervise the contaminant abatement process. As part of the services MTC provided during May through August 1999, it measured the amount of asbestos in the complex to provide bidders a basis for calculating their bids. Because of the magnitude of the project, however, defendant required bidders to provide a base price and a unit price for completing the project. Defendant instructed bidders to include in their base price the charge for removing up to fifteen percent more asbestos than the quantities MTC estimated the complex contained.[1] If the actual quantities exceeded MTC's measurements by more than fifteen percent, defendant indicated that it would pay the contractor an additional sum based on the unit price the contractor provided.

[1] Defendant indicated that the base price would also be paid if the contractor removed up to fifteen percent less asbestos than MTC estimated.

Plaintiff received the information MTC prepared, participated in a mandatory pre-bid tour of the complex, and submitted a bid based on MTC's estimates. Defendant accepted plaintiff's bid on September 10, 1999. The resulting contract provided:

> The base proposal sum indicated shall be based on the quantities listed within the documents and subsequent addenda. Quantities of piping or other materials (slated for abatement) of up to ± 15% of the original quantity estimated within the documents shall be completed by the Contractor at the cost indicated within the original contract bid submittal, as approved by the Owner and Materials Testing Consultants, Inc. If the total quantities of materials vary from quantities indicated within the specifications for individual proposal items, the Contractor and MTC representatives shall agree on the additional quantities and the Contractor shall accept payment for quantities in excess of 15% of the indicated quantity based on the unit rate provided within the bid submittal. If the Contractor is required to address quantities less than 85% of the original indicated quantities, the Contractor and MTC representatives shall agree on the appropriate quantities and a credit based on the unit rate indicated within the original bid submittal will be issued to the Owner. [Emphasis in original.]
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> Owner and [MTC] are not responsible for the accuracy of the quantities and/or their locations given. The Contractor shall be fully responsible for all measurements, and any items found, not identified in this document, shall become the contractor's responsibility as far as asbestos cleaning, removal, decontamination, storage, transportation, and disposal, and any other items at the Clinton Valley Center complex located in Pontiac, Michigan. The contractor is responsible for the cleaning, removal, decontamination, storage, transportation and disposal of all "true unknowns" within each "work area" and/or "containment" . . . .

Plaintiff began work on the project in October 1999. As work progressed, plaintiff discovered and removed substantially more asbestos than MTC estimated would be found. Defendant paid plaintiff the contracted base price and the unit price for the quantities that exceeded fifteen percent more than MTC estimated. In July 2001, plaintiff sued defendant in the Court of Claims to receive compensation for removing the first fifteen percent of asbestos above MTC's estimate. Plaintiff alleged claims of "breach of contract (express)," "breach of contract (covenant of good faith and fail dealing)," innocent misrepresentation, quantum meruit, and unjust enrichment based on the underestimated measurements.

Defendant subsequently moved for summary disposition pursuant to MCR 2.116(C)(10), and plaintiff opposed defendant's motion. The Court of Claims, however, granted defendant's motion, stating that plaintiff entered the contract "with [its] eyes open,"; that the contract was not

unconscionable; that the parties knew that certain "unknowns" existed; and that the facts did not support plaintiff's claims.[2] This appeal ensued.

II. Standards of Review

This Court reviews de novo decisions on motions for summary disposition. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003), citing *First Public Corp v Parfet*, 468 Mich 101, 104; 658 NW2d 477 (2003). We also review de novo questions concerning the proper interpretation of a contract. *Schmalfeldt*, *supra* at 426, citing *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

III. Analysis

Plaintiff first argues that the Court of Claims erroneously granted defendant summary disposition on plaintiff's breach of contract claim based on the covenant of good faith and fair dealing.[3] We disagree. Plaintiff cites *Burkhardt v City National Bank of Detroit*, 57 Mich App 649,652; 226 NW2d 678 (1975), for the proposition that when a contracting party "makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." In this case, however, defendant's manner of performance was not discretionary. The contract clearly described defendant's payment obligations. The discretionary nature of estimating the amount of asbestos did not relate to defendant's performance of the contract. More importantly, "Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 476; 666 NW2d 271 (2003), citing *Ulrich v Federal Land Bank of St. Paul*, 192 Mich App 194, 197; 480 NW2d 910 (1991).

Plaintiff also claims that the provision of the contract imposing responsibility for the measurements on the contractor is unconscionable. According to plaintiff, because bids were due less than ten days after the bid announcement, contractors had only a few days to take measurements, an endeavor that took MTC months. We apply a two-pronged test to determine whether a contract is unconscionable:

> "(1) What is the relative bargaining power of the parties, their relative economic strength, the alternate sources of supply, in a word, what are their options?; (2) Is the challenged term substantively reasonable?" [*Hubscher & Son, Inc v Storey*, 228 Mich App 478, 481; 578 NW2d 701 (1998), quoting *Northwest Acceptance*

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[2] Although the Court of Claims' order does not indicate the grounds on which it granted defendant's motion, defendant requested summary disposition based on MCR 2.116(C)(10) only.

[3] Plaintiff's statement of questions presented states that the Court of Claims erred by dismissing its claim of breach of contract, but does not distinguish between plaintiff's two breach of contract claims. Plaintiff's argument, however, addresses the implied covenant of good faith and fair dealing to the exclusion of asserting that defendant failed to abide by the contract terms. Accordingly, we presume that plaintiff's argument is limited to its breach of contract claim based on the implied covenant of good faith and fair dealing.

> *Corp v Almont Gravel, Inc*, 162 Mich App 294, 302; 412 NW2d 719 (1987), citing *Allen v Michigan Bell Telephone Co*, 18 Mich App 632, 637-638; 171 NW2d 689 (1969).]

Plaintiff argues that the Court of Claims focused only on the first inquiry without examining whether the provision was substantively reasonable. Significantly, however, plaintiff agrees with the Court of Claims' answer to the first question: plaintiff had the option to refrain from bidding on the contract. Because substantive unreasonableness alone does not provide a basis for invalidating a contract term, *Allen, supra* at 638; *Hubscher & Son, supra* at 481, citing *Northwest Acceptance Corp, supra* at 302, plaintiff has conceded that the contract provision is enforceable.

Plaintiff next argues that the trial court erred by granting defendant summary disposition on plaintiff's claim of innocent misrepresentation. We disagree.

> Michigan recognizes the doctrine of "innocent misrepresentation" in the making of a contract whereby a false statement of fact, made without knowledge of its falsity or intent to deceive, is actionable if relied upon by the other party to the contract to their detriment and the party that made the false statement is unjustly enriched. [*Alibri v Detroit/Wayne Co Stadium Authority*, 254 Mich App 545, 563-564; 658 NW2d 167 (2002), citing *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 115-118; 313 NW2d 77 (1981).]

Nevertheless, "[a] misrepresentation claim requires reasonable reliance on a false representation. . . . [t]here can be no fraud where a person has the means to determine that a representation is not true." *Nieves v Bell Industries*, 204 Mich App 459, 464; 517 NW2d 235 (1994); see also *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999), citing *Nieves, supra* and *Webb v First of Michigan Corp*, 195 Mich App 470, 474-475; 491 NW2d 851 (1992). Here, plaintiff had access to the complex, albeit for a shorter period of time than MTC, but chose not to take independent measurements. Plaintiff admittedly assumed that MTC's measurements were accurate, despite the fact that the contract described the measurements as estimates. We conclude that the trial court appropriately granted defendant summary disposition on this claim.

Finally, plaintiff argues that the trial court improperly dismissed its claims of unjust enrichment and quantum meruit. We disagree. Plaintiff concedes that if this Court determines that the contract terms are not unconscionable, it cannot recover on these claims. When a plaintiff has fully performed its services under a valid express contract, the law will not imply a contract covering the same subject matter. *Barber v SMH, Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993); *Cascade Electric Co v Rice*, 70 Mich App 420, 426; 245 NW2d 774 (1976). Because the terms of the contract are not unconscionable, as discussed above, the trial court

properly granted defendant summary disposition on plaintiff's equitable claims of unjust enrichment and quantum meruit.[4]

Affirmed.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray

[4] In light of our resolution of plaintiff's issues on appeal, we do not need to discuss defendant's alternate argument that an accord and satisfaction precludes plaintiff's claims.