

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000097-MR

M&D GENERAL CONTRACTORS, INC.

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 00-CI-00355

CITY OF WHITESBURG

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER and BUCKINGHAM, JUDGES.

BUCKINGHAM, JUDGE: M&D General Contractors, Inc., appeals from a summary judgment entered by the Letcher Circuit Court in favor of the City of Whitesburg. We affirm.

The City of Whitesburg received a grant from the Abandoned Mines Land Division (AML) for the Cowan Creek Waterline Extension Project. The project was to be completed in two phases, Phase I and Phase II. M&D was the low bidder to be general contractor for the project.

Phase I was completely funded by the grant, but the completion of Phase II was contingent upon any funds remaining under the grant after the completion of Phase I. After Phase I was completed, it appeared that not enough money remained under the grant to complete construction of Phase II. Nevertheless, M&D and the city entered into an agreement, Change Order No. 3, for the completion of Phase II. Change Order No. 3, signed by both parties, stated that the contract amount would be \$590,873.75. It contained an attachment, Attachment Two, which stated that "the Contractor agrees that the Work can be performed within the sum set forth as the 'Not to Exceed' sum for the Change Order. In no event shall the Contractor be entitled to payment in excess of such 'Not to Exceed' amount."

After construction on Phase II began, M&D realized that the amount agreed upon in Change Order No. 3 was insufficient to complete that phase. It then approached the city, through the city's engineer for the project, Connie Allen of Nesbitt Engineering, and inquired about the availability of additional funds for the project. According to M&D, Allen said that it was "possible" that additional funds could be procured. No additional funds were forthcoming.

M&D completed Phase II of the project and then filed a civil complaint in the Letcher Circuit Court against the city for extra labor and materials, over and above the contract

price, that it furnished in order to complete the project.¹ The circuit court awarded the city summary judgment on the ground that M&D "can not produce any evidence at trial which would overcome their contractual obligation under change order #3." This appeal by M&D followed.

First, M&D argues that summary judgment should not have been granted because discovery had not been completed. In support of its argument, it cites Welch v. American Publishing Co. of Kentucky, Ky., 3 S.W.3d 724 (1999). Therein, the Kentucky Supreme Court stated that trial courts "are to review the record after discovery has been completed to determine whether the trier of fact could find a verdict for the non-moving party." Id. at 730. In its response to the city's summary judgment motion, M&D did not object to submitting the motion to the court for ruling on the ground that discovery had not been completed. Because M&D did not object to the motion being submitted and did not argue that discovery had not been completed, we conclude that M&D did not preserve any error in this regard. Thus, we decline to review this alleged error. See Skaggs v. Assad, By and Through Assad, Ky., 712 S.W.2d 947, 950 (1986).

M&D's main argument is that "the circumstances were that the estimates provided were grossly inadequate, Appellee's

¹ The cost overrun claimed by M&D was in excess of \$17,000.

supervisor, Allen, ordered the work to be done, and Appellant expected to be paid for these 'extras' because Allen supervisor assured them that application for additional funds would be made." Further, M&D argues that Allen "grossly mislead Appellant with the provisions of specific unit amounts that were grossly inadequate." Based on these arguments, M&D asserts that there were genuine issues of material fact to be decided and that the court erred in granting summary judgment to the city.

Attachment Two to Change Order No. 3 stated in the third paragraph that the contract sum allocated to do the work under the change order exhausted the availability of funds to the city. Further, it stated that the contractor committed to perform the work "at a sum not to exceed the sum stated in the change order." Furthermore, the second paragraph of Attachment Two stated that "the estimate of quantities are reasonable and of such accuracy as to allow the Contractor, relying upon its own independent judgment of such quantities and of the total cost for the performance of all Work associated with the change order" to complete the project. That paragraph also refers to M&D's "own review and examination of the quantities estimated as the basis of this Change Order No. 3."

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR² 56.03. "The record must be viewed in light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991). "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

M&D claims that it was required to do "extra work" in connection with the project and that Allen had order it to do such work. Specifically, M&D refers in its brief to additional quantities of tubing, PVC pipe, PE service tubing, copper static line, and ductal iron lock-joint pipe that were required to complete the project. The second paragraph of Attachment Two states that the contractor (M&D) was relying on "its own independent judgment of such quantities and of the total cost for the performance of all Work associated with the change order." Pursuant to that language in Change Order No. 3 and pursuant to the language in paragraphs 1 and 3 of Change Order No. 3, M&D is not entitled to additional funds and costs that

² Kentucky Rules of Civil Procedure.

may have been expended over and above the contract price of \$590,873.75. Furthermore, because M&D relied upon its own independent judgment in connection with the quantities and total cost of the project, it cannot now claim that Allen fraudulently misrepresented the figures in the contract.

M&D also argues that Allen represented to it that the payment of additional funds from AML was possible. Thus, they assert that they did the work based upon Allen's misrepresentation that they would be paid for the cost overrun. Allen acknowledged in her deposition that she probably indicated to M&D that she would try to procure "contingency funds" from AML. Representing that additional funds were possible is different from representing that additional funds would be procured to pay for the overrun. We fail to see where there was any misrepresentation in this regard.

We conclude that M&D was bound to complete the project for the amount stated in Change Order No. 3. According to Attachment Two, it exercised its independent judgment concerning the quantities and total cost of the project. Summary judgment in favor of the city was appropriate.

The judgment of the Letcher Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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