RENDERED: JUNE 3, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001903-MR

THE CITY OF SCIENCE HILL, KENTUCKY — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE ROBERT E. GILLUM, JUDGE
ACTION NO. 96-CI-00122

MAYES, SUDDERTH & ETHEREDGE, INC.
AND KAY & KAY CONTRACTING, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellant, The City of Science Hill, Kentucky (the City), appeals from an order granting summary judgment to the appellees and the court's subsequent denial of the City's motion to alter, amend, or vacate. The trial court found that the City's claims against Mayes, Sudderth & Etheredge, Inc. (Mayes) were barred by the one-year statute of limitations contained in KRS 413.245 and that its claim for breach of contract against Kay & Kay Contracting, LLC (Kay & Kay) had been waived. For the reasons set forth below, we affirm.

On August 8, 1988 the City entered into a contract with Mayes for the design of a sewage collection system.[1] On February 25, 1992 the City entered into a separate contract with Kay & Kay to construct the sewage collection system in accordance with the plans of Mayes. Mayes is a professional engineering firm and served as the engineer overseeing the project.

The contract between the City and Kay & Kay provided that Kay & Kay was to complete the project for a total price of $932,650.80 within 300 calendar days of beginning. In order to deviate from this price and schedule the contract required written change orders be signed by the City and the Farmers Home Administration within a certain time from when the need for the change was known. Once a change order was signed it essentially altered or amended the terms of the contract to which it applied.

Kay & Kay was also required to submit partial payment applications at regular intervals. However, the contract provides that no application for partial payment can be made for those items addressed in a change order until the change order is approved. The responsibility for presenting a change order to the City rested upon Mayes. Change orders were submitted to

[1] The Farmers Home Administration, part of the United States Department of Agriculture, was also a necessary signatory to the contract because it assisted with the funding, but is not named as a party in this appeal.

the City on the project and involved, among other things, extension of time to complete the project, additional work, and an increase in price. The City (and the Farmers Home Administration) signed off on the change orders. In the end the City paid Kay & Kay $125,509.80 more than the original price called for by the contract.

The City also claims the sewage collection system is defective – numerous problems with it have had to be addressed beginning in October 1993.[2] It claims Mayes was negligent in the performance of its duties and breached its contract with the City. The City also claims Kay & Kay breached its contract because the system was not built or constructed in accordance with the "contract documents" as required by the contract. Finally, the City has made claims against both Mayes and Kay & Kay based on fraud.

According to the City, final inspection was done in August 1993 and the City made its final payment to Kay & Kay on February 21, 1995. On May 27, 1994 the City received an opinion from a professional engineer that Mayes had been negligent with respect to the project. However, the City did not file suit against Mayes until February 12, 1996. In its original complaint the City named only Mayes as a defendant and alleged a

[2] In another point in its brief the City claims that the defective work appeared from 1997 to 2000. It is worth noting though that the City obtained an opinion in 1994 from a professional engineer that there were problems with the sewage collection system.

claim for professional negligence. More than five years later, on April 4, 2001, the City moved for leave to file an amended complaint to assert a cause of action against Mayes for breach of contract and fraud. It also sought to add Kay & Kay as a defendant and assert claims of breach of contract and fraud against it.

The court allowed the City to amend its complaint and add its claims against Mayes. It also allowed Kay & Kay to be added as a party defendant, but only with respect to the breach of contract claim. In the court's opinion the fraud claim against Kay & Kay was stale under KRS 413.120(12) and the amended complaint did not relate back to the filing of the original complaint per CR 15.03. Thereafter all parties filed motions for summary judgment.

The court ruled that Mayes was entitled to summary judgment because the one-year statute of limitations for professional negligence applied to the City's claims against it. The court also found the City had waived any breach of contract complaints it may have had against Kay & Kay. A provision of the contract between the City and Kay & Kay states that all claims against Kay & Kay are waived upon final payment except for a narrow class of exceptions. The court found that none of the claimed breaches fell within those exceptions.

On appeal the City maintains that the court's rulings are in error and also that the fraud claim against Kay & Kay was not untimely because the amended complaint should relate back under CR 15.03 to the time of filing of the original complaint.

The City's contention that it should have been allowed to maintain a cause of action against Kay & Kay for fraud is not well taken. CR 15.03 allows amended complaints to relate back in time to the filing of the original complaint under certain circumstances. The Rule provides:

> (1) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.
>
> (2) An amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The City does not dispute that any claim for fraud against Kay & Kay is barred pursuant to the five year statute of limitations contained in KRS 413.120(12) unless the relation back rule of CR 15.03 is held to apply.

Thus, the City must show that the amended complaint seeking to add Kay & Kay and a claim of fraud (1) arises out of the same conduct, transaction, or occurrence as pled in the original complaint; (2) that Kay & Kay received notice of the suit within the limitations period; and, (3) within the statutory limitations period, Kay & Kay knew, or should have known, that but for the City's mistake as to its identity, it would have been named as a defendant.

Kay & Kay argue that the City has not even met the first requirement of the Rule because a claim for fraud is not the same as a claim for professional negligence. Assuming that the City's claim for fraud does meet this requirement, since the facts do arise out of the construction of the sewage collection system, the City clearly cannot meet the other requirements of the Rule.

The City cannot show that Kay & Kay received notice of the suit within the limitations period nor that Kay & Kay should have known that it would have been named as a defendant except for a mistake of identity. The City points to letters it claims show Kay & Kay was aware of problems with the system and the City's ability to pay exchanged in 1994 as being evidence of Kay & Kay's knowledge of the suit. The City also argues Kay & Kay had an ongoing business relationship with Mayes so that the

identity of interest exception should apply and Mayes' knowledge imputed to Kay & Kay.

The letters the City relies on for imparting knowledge to Kay & Kay cannot be construed as giving Kay & Kay notice of the action against Mayes. Those letters were all exchanged well in advance of the suit filed by the City against Mayes.

Likewise, there is no identity of interest between Mayes and Kay & Kay. The identity of interest exception under CR 15.03 has arisen from cases such as Halderman v. Sanderson Forklifts Co., Ltd., 818 S.W.2d 270 (Ky.App. 1991) and Funk v. Wagner Machinery, Inc., 710 S.W.2d 860 (Ky.App. 1986) where, because of the relationship of the parties, notice to the original defendant has been imputed to the defendant sought to be added at a later time. In Halderman the relationship was one of parent and subsidiary corporation, and in Funk it was of a sales agent and the principal/manufacturer.

The case at bar is more akin to the situation in Reese v. Gen. Am. Door Co., 6 S.W.3d 380 (Ky.App. 1999), where the plaintiffs sought to add the manufacturer of an overhead garage door as a defendant and have the amendment relate back to the complaint filed against the supplier and seller of the door. Id. at 381. This Court held CR 15.03 was not appropriately applied to allow relation back since there was no basis for a

presumption that notice to the original defendants was notice to the defendant sought to be added. Id. at 382-383.

Here, Mayes and Kay & Kay each had separate contracts with the City. There was no contract or any other relation between Mayes and Kay & Kay upon which it could be assumed that notice to Mayes is notice to Kay & Kay. And the interests of Mayes and Kay & Kay are not aligned. Further, the City has not made a mistake in identity. That is, it has not mistakenly sued the wrong party. Therefore, the identity of interest exception does not apply. Schwindel v. Meade County, 113 S.W.3d 159, 170 (Ky. 2003). As stated in Reese, supra, the mere failure of a plaintiff to identify all potential defendants within the statutory period does not excuse untimeliness. Reese, supra 6 S.W.3d at 383.

The City next argues Kay & Kay was not entitled to summary judgment on the claim it breached its contract with the City. The City maintains that, even though it made final payment to Kay & Kay, its claims are for ones that fall within the exceptions to waiver noted in the contract. The contract provision is as follows:

> The making and acceptance of final payment shall constitute:
>
> a. A waiver of all claims by Owner [the City] against Contractor [Kay & Kay] other than those arising from unsettled Liens, from defective Work appearing after final

> inspection or from failure to comply with the requirements of the Contract Documents or the terms of special guarantees specified therein, and. . . .
>
> * * *
>
> Contractor's obligation to perform the Work and complete the Project in accordance with the Contract Documents shall be absolute. Neither approval of any progress or final payment by Engineer [Mayes], nor the issuance of a certificate of Substantial Completion, nor any payment by Owner to Contractor under the Contract Documents, nor any use or occupancy of the Project or any part thereof by Owner, nor any act of acceptance by Owner nor any failure to do so, nor any correction of defective Work by Owner shall constitute an acceptance of Work not in accordance with the Contract Documents.

The only two exceptions to final payment constituting waiver that the City argues apply to this case are defective work appearing after final inspection and/or failure to comply with the requirements of the contract documents. After examining the briefs, the record, the applicable law, and the court's order, we believe the trial court's opinion more than adequately addresses this issue, and so adopt that portion of the circuit court's order as follows:

> [The] exceptions provide that the making of final payment by the City does not constitute acceptance and waiver for: 1) claims arising from defective work which appears after the final inspections; or, 2) claims arising from failure to comply with the requirements of the Contract Document.

The City asserts that its claims arise from both exceptions. [Kay & Kay] asserts that the City's claims arise from neither, and thus are deemed to be waived. The issue is resolved by an examination of the specific claims. When pressed by discovery requests, and by the pending motion for summary judgment to specify particular defects, the City relies on the affidavit of Darcy Stewart. . . . Darcy specifies defects consisting of the following:

1) 2 under-sized house connections on Copper Drive
2) No manhole on Cooper Drive
3) misplacement of the ladder installed at the Park Street lift station
4) inaccessible valves at the Park Street lift station
5) the inside diameter of a duplex pump station being 3'8" instead of 4'
6) substantial infiltration problems and leaks in the sewerage collection system since right after construction, as well as maintenance problems described elsewhere by Dallas Blanton.

Darcy also states that the project was not completed on time and several change orders were needed. Dallas Blanton submitted a log of repairs made to the system from December 1997 to 2000.

The City also relies upon answers to interrogatories wherein it cited a number of cost overruns and delays as being evidence to prove the failure of the contractor to comply with the contract documents.

. . . The survival of the City's claim against [Kay & Kay] depends upon its ability to present facts that constitute at least one of the exceptions to the acceptance and waiver provision. It is unable to do so. All of the items specified by Darcy Stewart are items that are apparent upon and were

apparent prior to, the final inspection. If those items constitute non-compliance with the design or the contract, they were visible before the final inspection. The [City] seems to argue that the costs (sic) "overruns" and numerous change orders evidence of (sic) a failure to comply with contract documents. That is not the case because the change orders that support each of those deviations are formal amendments to the contract, and are themselves a part of the contract document. Change orders are not indicative of defective construction or design. For example, one change order was made because the City decided that electric service to the pump station should be provided by electric lines of the City, not property owners, as originally planned. That change resulted in extra work and extra expense.

The [City] points out that on some occasions [Kay & Kay] began change order work before obtaining a change order, conduct which the City alleges to constitute a failure to comply with the contract documents because the original contract prohibits such work until a change order is obtained. This is not the kind of non-compliance that triggers the exception relied upon. What the contract excepts from the waiver provision is the failure to construct the project in compliance with the contract requirements. At most, all that [Kay & Kay] did, if it commenced work on a change prior to obtaining a change order, was to run the risk that the change order would not be signed by the City in which case [Kay & Kay] would not be entitled to be paid for the change, and may have to undo at its own expense the work it had done. In each instance, however, a change order was eventually signed by all parties, thereby ratifying the change. The change order itself is a written amendment to the contract and is a contract document. Compliance with a change order is, *ipso*

facto compliance with the contract documents.

Further, we believe even if the change orders are not viewed as amendments to the contract, the fact that all parties approved the change orders ratified the changes and waived any claims the City may have had with respect to those issues. See e.g. S.J. Bates v. Grain Dealers Nat. Mut. Fire Ins. Co., 283 S.W.2d 3, 5 (Ky. 1955) (waiver); Barker v. Stearns Coal & Lumber Co., 291 Ky. 184, 163 S.W.2d 466, 470 (1942) (waiver); Cox v. Venters, 887 S.W.2d 563, 567 (Ky.App. 1994) (ratification).

This case is much like those presented in Willey v. Terry & Wright of Kentucky, Inc., 421 S.W.2d 362 (Ky. 1967), and, Wehr Constructors, Inc. v. Steel Fabricators, Inc., 769 S.W.2d 51 (Ky.App. 1988), where it was held that provisions in contracts requiring any changes to be in writing can be altered by the parties' course of dealing or waiver. Willey, supra 421 S.W.2d at 363; Wehr Constructors, Inc., supra 769 S.W.2d at 53-54.

The City's reliance on the contract principle of the measure of damages when there has been substantial performance is misplaced. Substantial performance allows the contractor to recover the contract price while reserving to the owner the ability to recover damages for any defective work. Meador v. Robinson, 263 S.W.2d 118, 118 (Ky. 1953); Shreve v. Biggerstaff,

777 S.W.2d 616, 618 (Ky.App. 1989). However, principles of waiver still apply. Id. at 617. By making final payment and signing off on the change orders, the City waived any claims it may have had and the doctrine of substantial performance is not applicable.

With respect to Mayes, the City argues the court erred when it granted summary judgment to Mayes on the basis that the one-year statute of limitations for professional negligence barred the City's claims. We disagree.

KRS 413.245 prescribes a one-year statute of limitations for civil actions "whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others. . . ." There is no dispute that Mayes is a professional engineering firm and qualifies to claim the statute of limitations contained in KRS 413.245.

The City does, however, contend that the accrual of its causes of action did not occur until February 16, 1995 when it borrowed the money to make the final payment on the project. Until that time, it maintains that the damages were not fixed and non-speculative.

A cause of action subject to the limitations period of KRS 413.245 must be brought within one year of the date of occurrence or the date of discovery. Faris v. Stone, 103 S.W.3d

1, 1 (Ky. 2003). The City's position that its damages were not fixed and non-speculative until a sum certain was known is not supportable. The law is that "a cause of action does not exist until the conduct causes injury that produces loss or damage." Alagia, Day, Trautwein & Smith v. Broadbent, 882 S.W.2d 121, 126 (Ky. 1994) (quoting Saylor v. Hall, 497 S.W.2d 218, 225 (1972)).

Loss or damage becomes fixed and non-speculative in the law when the "plaintiff is certain that damages will indeed flow from the defendant's negligent act." Board of Educ. of Estill County, Kentucky v. Zurich Ins. Co., 180 F.Supp.2d 890, 894 (E.D.Ky. 2002). Full extent of the damage in terms of a quantifiable amount is not required before a cause of action will accrue. Id.

The City knew long before it borrowed the money to make final payment of any damages it may have incurred. At least by September 1993 it was aware of the increase in price being claimed and no later than May 1994 it had an opinion from a professional engineer that the sewage collection system had problems that could be attributed at least to Mayes. Filing of the suit in 1996 was clearly beyond the applicable statute of limitations in KRS 413.245 and the circuit court correctly found that the City's actions against Mayes were barred.

The City also argues even if the professional negligence claim against Mayes was correctly dismissed under KRS

413.245, its claims for breach of contract and fraud fall outside the scope of the statute. Since the trial court did not address this issue, the City contends the court's order is not final and the case should be remanded.

There is no merit to this argument. KRS 413.245 plainly states that it applies to any civil action, "whether brought in tort or contract." A breach of contract claim is a cause of action arising out of contract and a claim for fraud, an intentional tort, is a claim brought in tort. By its terms KRS 413.245 applies a one-year statute of limitations to those claims. Scearse v. Lewis, 43 S.W.3d 287 (Ky.App. 2001), does not hold differently. That case did not involve professional negligence. Rather, it involved whether the plaintiffs could make a claim against their former attorneys for fraud in settling a prior lawsuit between them and their former attorneys. Id. at 289.

Given our disposition of the issues in the case, the City is not entitled to summary judgment on its claims as it asserts in its final argument.

The order granting summary judgment to Mayes and Kay & Kay is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Linda B. Sullivan
Lexington, Kentucky

BRIEF FOR APPELLEE:

Buckner Hinkle, Jr.
Ryan R. Loghry
Lexington, Kentucky