

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002028-MR

WHITTENBERG CONSTRUCTION
COMPANY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SAM G. McNAMARA, JUDGE
ACTION NO. 05-CI-01296

THE UNIVERSITY OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: THOMPSON AND WINE, JUDGES; HENRY,¹ SENIOR JUDGE.

WINE, JUDGE: Whittenberg Construction Company (“WCC”) appeals from an order entered September 5, 2006, by the Franklin Circuit Court granting The University of Kentucky’s (“UK”) motion for summary judgment. WCC sued UK for breach of contract, but the action was barred by the statute of limitations found in KRS 45A.260.

On December 20, 1999, UK awarded a contract to WCC to construct a mechanical engineering building on UK’s Lexington campus. The contract provided that

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

WCC would begin working when it received a specific work order from UK. (Contract, Article No. 2). The contract further provided, “Substantial Completion shall be 730 calendar days after the stipulated commencement date with Final Completion being 30 calendar days after the date of Substantial Completion.” *Id.* UK issued a work order to WCC stipulating the commencement of the project would be January 6, 2000. (Work Order 1/6/00). The work order further specified that “substantial completion shall be seven hundred thirty (730) calendar days or no later than January 6, 2002 and final completion shall be thirty (30) days thereafter or February 6, 2002.” *Id.*

While WCC requested a series of changes relating to the project, UK only approved two of WCC’s requests for extensions of time. (Change Order No. 37, 9/19/01 and Change Order No. 51, 2/1/02). These change orders collectively provided for an extension of fourteen days for the completion of the project. *Id.* Thus, the change orders resulted in the new substantial completion date of January 22, 2002, and the new final completion date of February 22, 2002. It is undisputed that these were the only change orders that were actually executed between the parties.

A number of delays occurred from the start of the project, including an issue concerning the project’s site work. UK wanted a new design of the area surrounding the engineering building, including all utilities servicing the project, mechanicals, parking, and roads. WCC submitted a change proposal but Paul Cable (“Cable”), project manager for UK’s Capital Construction Procurement Section (“CCP”), rejected WCC’s proposal via email on June 12, 2002. Cable ordered WCC to proceed

with the site work under Article 18 of the contract even though the parties could not agree on the scope or pricing of the site work and UK had not approved any of the change orders that WCC had sent to it pursuant to the contract. WCC proceeded with the site work changes as they were identified by UK.

WCC maintained that it was delayed in its achievement of substantial completion due to UK's changes to the project. WCC claims it requested a total of 1,136 days extension of time but UK did not respond to WCC's requests. Instead, UK issued a deduct change order for WCC's failure to meet the substantial completion date and assessed liquidated damages totaling \$163,500.00 on February 3, 2003. WCC continued work on the project through the summer of 2003, even though the parties were still in discussion about the unfinalized change orders. UK also issued another deduct change order on October 7, 2003, in the amount of \$91,356.67 for site utilities that the parties disagreed as to who was responsible for paying. In November of 2003, Cable notified project consulting architect Jerry Taylor ("Taylor") that some issues had been resolved between UK and WCC, but the change orders for these items were never issued, specifically for the project site changes.

While the parties continued to negotiate the change orders throughout the winter of 2003 and into 2004, UK made payments to WCC. Beginning in February 2003, UK paid a total of \$1,259,818.26 to WCC or its subcontractors. Subsequently, on December 9, 2004, WCC asked Jack Miller ("Miller") of UK's CCP to release the retainage funds held in escrow while Miller continued to evaluate WCC's change order

requests. Miller refused to release the funds. The parties continued to negotiate until April 12, 2005, when Miller issued his final response to WCC denying its claims and refusing to pay the outstanding retainage amount. WCC failed to meet the deadlines and did not substantially complete construction until August 28, 2002. On September 15, 2005, WCC filed this action against UK in the Franklin Circuit Court. UK moved to dismiss the case based upon the one-year statute of limitations in KRS 45A.260(2). The trial court granted summary judgment and dismissed the action on September 5, 2006, finding that the statute of limitations started running from the date of completion specified in the contract, or February 22, 2002. The court further held that UK was entitled to sovereign immunity as a state agency. This appeal followed.

In reviewing a motion for summary judgment, a trial court must consider all stipulations and admissions on file. CR 56.03. Summary judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991), *citing Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). “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*, 916 S.W.2d 779, 780 (Ky.App. 1996), *citing* CR 56.03. “There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.” *Id.*, *citing Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992).

WCC argues the trial court erred in holding that some of its claims are barred by the doctrine of sovereign immunity as incorporated in the Kentucky Constitution. WCC argues the relationship between WCC and UK was created in contract leaving the doctrine of sovereign immunity inapplicable to this case. Specifically, WCC claims unjust enrichment and interference with performance of the contract. However, the doctrine of unjust enrichment is one found in equity. *Haeberle v. St. Paul Fire and Marine Ins. Co.*, 769 S.W.2d 64 (Ky.App. 1989). Further, interference with performance of a contract is considered a tort claim.

Claims in contract against an agency of the Commonwealth are exempt from sovereign immunity if they fall under the statute of limitations in KRS 45A.245. However, no claims for damages in tort or equity may be pursued against an agency of the Commonwealth while it is acting in its official capacity. KRS 44.073(12). UK is considered an agency of the state. KRS 44.073(1). Thus, we agree with the trial court that claims against UK in tort or equity, not subject to KRS 45A.245, are barred by sovereign immunity.

WCC further argues that the statute of limitations did not begin to run until the project was completed and, further, the literal interpretation of KRS 45A.260 results in an unreasonable outcome. WCC maintains that its cause of action has yet to accrue because the Owner's Design Professionals' Certification was never completed by UK pursuant to the contract. WCC submits that the contract work is "complete" as identified in KRS 45A.260(2), when a certificate of completion has been issued "by the Consultant

for the project, and acceptance by the Owner” (Contract, Article No. 6), not when there has been substantial completion. Thus, WCC argues the limitations period has not begun to run because UK has never issued the certificate of final completion. However, while Article 6 mentions the final completion date in order to establish payment, it does not establish the final completion date.

Moreover, this argument is at odds with the plain meaning of KRS 45A.260(2), which specifically provides that a claim arising from a construction contract with a state agency (other than a contract executed and administered by the Transportation Cabinet), “shall be commenced in Franklin Circuit Court within one (1) year from the date of completion specified in the contract.”

We will not stray from the literal interpretation of the statute. Thus, pursuant to the contract, the “date of completion” was February 22, 2002, as modified by the change orders approved by UK. The question then becomes whether WCC and UK extended the completion date even further so as to make WCC’s complaint, filed September 15, 2005, timely.

The trial court correctly held, pursuant to *Jasper Contracting Co., Inc. v. Commonwealth*, 890 S.W.2d 296 (Ky.App. 1994), that the date of completion specified in the contract was the final completion date noted in Article 2 of the contract. In *Jasper*, a contractor agreed via written contract to repair river locks for the Finance and Administration Cabinet, a state agency. The contract in *Jasper* specified the work was to be completed by October 1991. This date was modified to extend the completion date to

January 1992 due to a change order executed by the parties. Jasper argued, as does WCC, that the statute of limitations does not begin to run until all the work on the project is completed. However, this Court held that the one-year limitation period in KRS 45A.260(2) began to run from the date specified in the contract plus the modification of the change order, or January 1992. In the current case, the contract required the construction to be completed by February 6, 2002. Change orders that were signed and agreed to by the parties then extended this date to February 22, 2002. WCC completed construction in August of 2002 and did not file this action until September 15, 2005. Thus, even if the statute began to run in August 2002, the actual completion date, WCC did not file suit until well over a year from that date.

WCC argues that *Jasper* is distinguishable because change orders in that case were governed by 200 KAR 5:311 § 2. In contrast, WCC points out that KRS 164.580 controls and authorizes UK to manage capital construction. Regardless, 200 KAR 5:311 § 2 and KRS 164.580, read together, indicate that UK had the authority to execute change orders. The contract provided that changes to the project would only be accepted if they were first authorized via change orders. But in this case, UK only signed two change orders that extended the deadline to February 22, 2002. WCC knew the deadline was February 22, 2002. WCC knew or should have known that its requests for extensions of time were not valid because they were never approved by UK. Thus, WCC's argument is without merit.

WCC further argues that *Jasper* is not applicable to this case because the words “substantial completion” do not occur in the Court’s decision. However, in this case, the trial court merely held that the date of completion specified in the contract was the final completion date in Article 2, not that the substantial completion date in Article 2 of the contract controls for purposes of KRS 45A.260(2). As suggested by the trial court, citing *Jasper*, WCC should have sued to rescind the contract, before the statute of limitations ran, when UK refused to grant the change orders.

WCC next submits that under the trial court’s literal interpretation of KRS 45A.260(2), its claims were barred before they ever accrued. Specifically, WCC contends that UK’s delay in transmitting the change orders results in WCC not being able to bring suit to enforce UK’s admitted obligations under the contract. We are not persuaded by WCC’s argument. WCC knew that the original final completion date was February 6, 2002, pursuant to the contract and the work order issued by UK. WCC also knew that UK had only approved two extensions of this date, to February 22, 2002. None of WCC’s other requests for extensions of time were ever authorized by UK. At this point, WCC could have filed suit against UK to rescind the contract.

WCC next argues that UK should be estopped from relying on the statute of limitations. We disagree, finding the Kentucky Supreme Court’s decision in *Gailor v. Alsabi*, 990 S.W.2d 597 (Ky. 1999) to be on point. In *Gailor*, the Supreme Court held that in order to assert estoppel, a party must prove, “some act or conduct which in point of fact misleads or deceives the plaintiff and obstructs or prevents him from instituting

his suit while he may do so.” *Id.* at 603, *quoting Adams v. Ison*, 249 S.W.2d 791, 792 (Ky. 1952). WCC asserts that UK refused to approve the change orders for extensions of time, continued to negotiate with WCC after February 2002, and still continued to pay for work completed. However, none of these acts constitute conduct that misleads. WCC should have known to file suit when UK would not sign the change orders. Moreover, it was still within a year on February 3, 2003, when UK issued the first deduct change order subtracting \$163,500.00 from the contract price for WCC’s failure to meet the substantial completion date.

We also cannot agree with WCC that UK’s negotiations can reasonably be construed as tolling the statute of limitations. “Mere negotiations looking toward amicable settlement do not afford a basis for estoppel to plead limitations.” *Gailor*, 990 S.W.2d at 603. Therefore, the correspondence between WCC and UK had no effect in tolling the statute of limitations.

Finding no error, we affirm the order of the Franklin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Robert J. Schumacher
Louisville, Kentucky

BRIEF FOR APPELLEE:

Lynn C. Stidham
Richard J. Dieffenbach
Lexington, Kentucky