City of Troy

CITY COUNCIL AGENDA ITEM

Date: April 11, 2012

To: Troy City Council Members

From: Lori Grigg Bluhm, City Attorney LGB
Allan T. Motzny, Assistant City Attorney ATM

Subject: T.R. Pieprzak Company v City of Troy

Plaintiff T.R. Pieprzak Company filed a lawsuit against the City, seeking to recoup money over and above its bid for the Section 9 Water Main Replacement Project. City Council awarded that contract to Plaintiff on October 6, 2008, which required the replacement of the deteriorating water main and the installation of edge drains in ditches on eight different streets located within the City. The City agreed to some contract modifications as the project progressed, and prior to the filing of this lawsuit, the City also agreed to pay Plaintiff an additional $86,612.06 for unanticipated but necessary work, plus release the $50,000 retainer upon the receipt of final lien waivers from the subcontractors. Thus, the City agreed to make a final payment to Plaintiff in the amount of $136,612.06. However, Plaintiff claimed they were entitled to the $136,612.06 as a partial payment only and claimed they were entitled to compensation for time and material spent in 717 alleged exploratory excavations to locate underground utilities. Ultimately, Plaintiff was seeking more than $1,200,000 in damages from the City.

On November 17, 2011, this case was evaluated by three independent attorneys, who entered a case evaluation award of $415,000. Since the Plaintiff rejected this award, the case was scheduled to proceed to trial. At the close of discovery, the City filed a Motion for Summary Disposition seeking a dismissal of the case. The Plaintiff filed a Motion for Partial Summary Disposition seeking an Order requiring the City to immediately pay $136,612.06, but allowing the case to proceed to trial on Plaintiff's remaining damage claims. In response to Plaintiff's Motion for Partial Summary Disposition, the City agreed it would pay Plaintiff the $136,612.06, but only if that payment was deemed a "final" payment, and only if the Plaintiff submitted its contractor's affidavit verifying it paid all claims related to the project.

Judge Rudy J. Nichols of the Oakland County Circuit Court agreed with the City's position and entered an Order Granting Summary Disposition specifically ruling that the City is only required to pay Plaintiff $136,612.06 as a "final" payment and only after receipt of the required affidavit. A copy of Judge Nichols Opinion and Order is attached. Plaintiff has filed a Motion for Reconsideration, which generally indicates an intention to appeal. We will keep you advised of the status.

Let us know if you should have any questions.

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

T.R. PIEPRZAK COMPANY, INC.,

Plaintiff,

-vs-

Case No.: 11-118046-CK
Hon. Rudy J. Nichols

CITY OF TROY,

Defendant.

/

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/

AMENDED (TO CORRECT CLERICAL MISTAKES)
OPINION AND ORDER
GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION
&
GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION

This matter is before the Court on cross-motions for summary disposition under MCR 2.116(C)(10). The case arises out of a contract for the Section 9 Water Main Replacement Project in the City of Troy. The project was to do the work necessary to abandon and replace the existing water main and for the installation of edge drains in ditches on eight different streets located within the City of Troy. Plaintiff was the successful bidder with a price of $2,369,317.10 and a contract, which included the bid, was entered into between the parties. The parties entered into a modification of the contract which, among other items, eliminated the exploratory excavation provision and was replaced with language that all costs associated with verifying the location of all existing underground house services was included in the contract. That modification also provided additional compensation to be paid to Plaintiff in the amount of $76,728.00.

During the construction, Plaintiff submitted various claims and also payment requests in which the City of Troy Engineering Department would decide to approve,

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deny, or approve in part. At the time of completion on the project, Plaintiff sought compensation for several hundred exploratory excavations and other claims. The parties agreed to a final payment in the amount of $86,612.06 which covered all outstanding claims by Plaintiff except the exploratory excavations. This was reflected in additional contract modifications labeled numbers 6, 7 and 8. The City is requiring a final Affidavit of Plaintiff's representative and waiver of liens in order to issue the final payment. It is undisputed that the City also holds a $50,000.00 retainage on the contract.

Plaintiff's complaint alleges that shortly after commencement of Plaintiff's work on the project, Plaintiff began to run into a series of obstacles and interferences by the City of Troy, that Plaintiff submitted several change orders to reflect additional amounts incurred by Plaintiff on the project, and that Plaintiff is owed $862,991.67 for additional compensation. Plaintiff has alleged six claims arising out of this contractual dispute.

Defendant argues that all of Plaintiff's damage claims are barred by the terms of the contract, and its modifications, including Plaintiff's claims for exploratory excavation, gas conflicts, and/or repairs of city water mains. Defendant further argues that any claims, other than those related to exploratory excavation, were resolved by the parties when they agreed to contract modifications 6, 7, and 8. Finally, Defendant contends that Plaintiff is not entitled to be paid the $86,612.06 pursuant to contract modifications 6, 7, and 8 because Plaintiff has failed to provide a final Affidavit verifying that all claims and liens related to the project were paid as required by the contract.

Defendant also seeks an order in limine precluding use of a February 2, 2010 letter in support of Plaintiff's claim that it is entitled to compensation in the amount of $862,001.67 arguing it is inadmissible.

Defendant's final argument is that no authority exists that would allow Plaintiff to recover for damages described as "extended home office overhead damages."

Plaintiff's response and arguments are noted for the record and incorporated within this opinion where necessary. Plaintiff also filed a motion for partial summary disposition arguing that that there is no genuine issue of any material fact that Plaintiff is owed at least $136,612.06 from Defendant. That figure includes the $50,000.00 retainage. Plaintiff also argues that the parties expressly agreed not to negotiate the outstanding claims until a later time and, therefore, no waiver of liens is yet due. Alternatively, Plaintiff argues it is entitled to payment of the $86,612.06, and the City can

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withhold the $50,000.00 retainage. Plaintiff relies on the Account Stated principles and cited case law which the Court incorporates herein as necessary.

Defendant's response and arguments to Plaintiff's motion is also included in this opinion where necessary. Defendant also seeks summary disposition under MCR 2.116(I)(2) and entry of an order that upon payment of the $136,612.06 by Defendant to Plaintiff, all of Plaintiff's claims for additional damages shall be dismissed; that upon making the payment, all obligations by Defendant are deemed satisfied; and, that any claims of third parties such as Consumers Energy Company shall be the obligation of Plaintiff.

A motion under MCR 2.116(C)(10) tests the factual support for a claim and may be granted when except to the amount of damages there is no genuine issue as to any material fact. The Court must review all documentary evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999).

When interpreting a contract, a Court applies the plain and unambiguous language of a contract such that the document reflects the parties' intent as a matter of law. *Hastings Mutual Insurance Co. v Safety King, Inc.*, 286 Mich App 287; 778 NW2d 275 (2009).

I.

(Exploratory Excavation Claims)
(Newly Installed Water Services Conflicts Claims)
(Repair of City Water Mains)

Defendant argues that these claims are barred by the express terms of the contract. Specifically, under the General Conditions, Section 9J of the contract, the Plaintiff was responsible for protecting utilities and verifying their location before beginning excavation work. Furthermore, the contract modification number 1 expressly eliminated this provision for exploratory excavation. Additionally, under that modification the Plaintiff may only be compensated for such exploratory excavations if it involves locations denoted on the plans, or as directed by the Engineer, and then only if labor rates for personnel anticipated to be involved in the work were **approved by the Engineer prior to conducting the work**.

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Plaintiff responds and argues that the contract modification number 1 did not apply to **excavation for new services** and that Defendant's City Engineer, Vandette, testified that excavation for main line utilities could be grounds for extra compensation. (Plaintiff's Exhibit 1, Vandette dep. at pg. 88) Plaintiff argues that the majority of Plaintiff's claim arises from the City of Troy's interference with Plaintiff's performance when the **Water Department installed new water services directly in the path of Plaintiff's subsequent work** and that the City of Troy failed to warn of utility conflicts of which it alone was uniquely aware. As a result, Plaintiff had to locate and move the new water services and the new gas main and services out of Plaintiff's way.

The contract modification number 1 states:

> "Contract Item #3, Exploratory Excavation (If Necessary) --- this item is hereby eliminated. All costs associated with verifying the location and elevation of all existing underground house services, including but not limited to gas, water and sanitary services shall be considered included with the water main and/or edge drain construction. Excavation to verify the alignment and elevation of existing underground utilities, excluding house services, shall be conducted at locations denoted on the plans or as directed by the Engineer prior to water main and/or edge drain construction. Payment for this work shall be made on a time and material basis. Labor rates for personnel anticipated to be involved with this work and rates for anticipated equipment shall be submitted to the Engineer and approved prior to conducting this work on time and materials." (Defendant's Exhibit M, pg. 1 of 3)

Here, Plaintiff submits an Affidavit of James Theodore Pieprzak attesting that Plaintiff recorded all of the additional costs and put the City on notice of its intent to submit claims for change orders or contract modification. (See Plaintiff's Exhibit 8). **However, Plaintiff fails to submit any documentation regarding work and rates that were submitted to the Engineer and approved prior to the work being performed**. Defendant submits an Affidavit of Antonio Cicchetti, City Civil Engineer attesting that Plaintiff submitted some claims that were reviewed and approved under contract modification number 1 but **Plaintiff never submitted any documentation that it is entitled to the sum of $862,991.67 based on exploratory excavation to locate utilities** for locations denoted on the plans or directed by the Engineer or for which the labor rates for personnel anticipated to be involved with the work were approved prior to the work. (Defendant's Reply Exhibit A)

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The court also observes that the General Condition provisions at Section 3D, Section 9J, and page 7 of the Water Main Specifications provide that **the contractor shall bear all losses resulting because the conditions under which the work is done are different**, that the contractor is responsible for protecting utilities and verifying their location before beginning excavation work, and that the contractor is responsible for removing any unforeseen obstacles, including abandoned utilities. (Defendant's Exhibits E, F & I)

Based on the plain language of the contract, the modification number 1 and the evidence submitted the Court finds that no question of any material fact exists regarding Plaintiff's claim for exploratory excavation damages, newly installed water service and repair of city water main claims. For these reasons and those further stated by Defendant these arguments and parts of Defendant's motion is granted.

II.

(Gas Conflicts Claims)
(Maintenance Aggregate Claims)
(Home Office Overhead Damages)

Defendant argues that Plaintiff was obligated to locate all existing gas mains prior to construction and repair or replace any damage caused through Plaintiff's operations. Additionally, that Plaintiff agreed to indemnify Defendant for all damages or allege damages as a result of Plaintiff's work. (Defendant's Exhibit F) As such, Defendant argues that Plaintiff's claim for damages that include a Consumer's Energy bill for damages caused to gas lines during the course of construction should fail.

Defendant further argues that any maintenance aggregate claims were resolved through the parties' negotiations that resulted in the construction pay estimate dated December 16, 2010 and signed by the City and Project Engineers. (Plaintiff's Motion for Partial Summary Disposition Exhibit 6) Michael Babel, Plaintiff's Project Estimator, testified that the amount for this claim was deducted because Plaintiff reused stone in six inch driveways. Babel also testified that this claim was included in Plaintiff's exploratory excavation claims. (Defendant's Exhibit L, Babel dep. at pg. 56 - 57)

Finally, Defendant contends that no Michigan authority exists allowing Plaintiff to recover extended home office overhead damages.

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Plaintiff fails to specifically address these arguments and for the reasons stated by Defendant these arguments and parts of Defendant's motion is also granted.

III.

(Account Stated Claim of $86,612.06)

Both parties concede that they negotiated a final payment to be made to Plaintiff in the amount of $86,612.06 to cover all outstanding claims **except for** those related to exploratory excavation. Defendant argues that under the contract, Plaintiff is required to submit a final Affidavit verifying that all claims relating to the project are paid but that Plaintiff cannot satisfy this requirement because of an outstanding Consumer's Energy invoice for damage to its gas lines.

Section 7Q of the General Conditions provides that final payment on the contract by the City will **only be made after the contractor provides an affidavit that it has paid all claims under the contract**. (Defendant's Exhibit J)

Plaintiff filed a motion for partial summary disposition on this claim arguing that no genuine issue of any fact exists that Plaintiff is owed at least the $86,612.06 plus the $50,000.00 retainage but should be paid immediately. Because the court finds that Plaintiff's claims for exploratory excavation were excluded and/or otherwise not shown to have been submitted to Defendant, the Court finds, by stipulation of the parties, that the $136,612.06 agreed to by the parties is the final payment on the contract, subject to an affidavit that all claims under the contract have been paid and grants Plaintiff's motion for partial summary disposition.

The court finds Defendant's motion in limine to be moot.

To conclude, Defendant's motion for summary disposition is granted. Plaintiff's motion for summary disposition is also granted subject to the Affidavit.

IT IS SO ORDERED.

This order resolves the last pending claim and closes the case.

Dated: March 9, 2012

/s/ Judge Rudy J. Nichols

Hon. Rudy J. Nichols
Circuit Court Judge

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