STATE OF MICHIGAN

COURT OF APPEALS

DAVEY TREE EXPERT COMPANY, Plaintiff-Counter Defendant-Appellee,	UNPUBLISHED June 10, 2014
v	No. 313971 Oakland Circuit Court
SITE DEVELOPMENT INC., Defendant-Counter Plaintiff-Appellant.	LC No. 2001-121036-CK

Before: WILDER, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

In this breach of contract claim, defendant/counter-plaintiff-appellant, Site Development Inc. (SDI), appeals as of right from an order entered in favor of plaintiff/counter-defendant-appellee, Davey Tree Expert Company (Davey). Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

SDI performed underground utility work for large commercial and municipal projects. In early September 2009, the City of Auburn Hills (Auburn Hills) entered into a general contract with SDI for work on the Galloway Drain Stormwater Project (the project). On September 18, 2009, Davey subcontracted with SDI to perform tree removal and landscaping services for the project.

Davey later sued SDI and its surety, Travelers Casualty and Surety Company of America (Travelers), for breach of contract, unjust enrichment and violation of the bond statute, MCL 129.201. Davey alleged that SDI failed to pay the balance due on the subcontract -- $178,669.21.

SDI filed a counterclaim against Davey for breach of contract and declaratory judgment. SDI argued that it was entitled to a set-off on what it owed Davey under a liquidated damages clause. SDI alleged that it completed its portion of the contract in March 2010, but that Davey did not complete its work until 40 days after the contractual completion date. As a result, Auburn Hills assessed liquidated damages against SDI in the amount of $52,000 ($1,300 x 40 days). SDI further alleged that over $25,000 of Davey's requested compensation was for

"additional work" for which Davey failed to make a request in writing as required under the subcontract.

The parties filed competing motions for summary disposition. The trial court first concluded that Davey's claim for payment as to additional seeding did not trigger the notice provision of the parties' subcontract where the unit price contract clearly contemplated additions and deductions to the total amount. Because Davey was not seeking compensation for "additional work" it was under no obligation to provide written notice to SDI. The trial court further concluded that SDI was not entitled to a set-off for liquidated damages it was required to pay to Auburn Hills. Although SDI had submitted the supplemental instructions to bidders form and a purported prime contract between SDI and Auburn Hills, "neither of these two forms identify the parties to the agreement, the project itself, nor do they show any connection to the present dispute or contain signatures of the parties or their representatives. The origin of these documents is unknown, and therefore, the admissibility of same is questionable." The trial court granted Davey summary disposition as to SDI's counterclaim and dismissed SDI's counterclaim.

Thereafter, the parties then entered into a consent judgment, addressing the only remaining issue – the amount due to Davey for additional costs for seeding. The consent judgment was against SDI, only, in the amount of $52,000, with SDI reserving the right to file a claim of appeal. The parties also agreed to dismiss Travelers with prejudice. SDI now appeals as of right.

II. ANALYSIS

SDI argues that the trial court erred in granting Davey summary disposition on SDI's counterclaims. We disagree.

> We review de novo a circuit court's decision on a motion for summary disposition. Summary disposition is appropriate under MCR 2.116(C)(10) if, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the record which might be developed would leave open an issue upon which reasonable minds might differ. In deciding whether to grant a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider the affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, in the light most favorable to the nonmoving party. [*Bonner v City of Brighton*, ___ Mich ___; ___NW2d ___ (Docket No. 146520, decided April 24, 2014), slip op pp 9-10 (internal quotation marks and footnotes omitted).]

This appeal also requires the Court to interpret the parties' subcontract. "[T]he proper interpretation of contracts and the legal effect of contractual provisions are questions of law subject to review de novo." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 3663-367; 817 NW2d 504 (2012).

At issue in this case is whether the parties' subcontract agreement contains a valid liquidated damages clause. This Court has explained:

> A contractual provision for liquidated damages is nothing more than an agreement by the parties fixing the amount of damages in the case of a breach of that contract.
>
> > It is a well-settled rule in this State that the parties to a contract can agree and stipulate in advance as to the amount to be paid in compensation for loss or injury which may result in the event of a breach of the agreement. Such a stipulation is enforceable, particularly where the damages which would result from a breach are uncertain and difficult to ascertain at the time the contract is executed. If the amount stipulated is reasonable with relation to the possible injury suffered, the courts will sustain such a stipulation. [*Barclae v Zarb*, 300 Mich App 455, 485; 834 NW2d 100 (2013) (internal quotation marks and citations omitted).]

SDI argues that the subcontract clearly contains a liquidated damages provision. Davey argues that it does not. Section 9.3 of the parties' subcontract provides:

> **§ 9.3** The Work of this Subcontract shall be substantially completed not later than per contract documents ( ) days after the Subcontractor's Date of Commencement.
>
> *(Insert the calendar date or number of calendar days after the Subcontractor's date of commencement. Also insert any requirements for earlier substantial completion of certain portions of the Subcontractor's Work, if not stated elsewhere in the Subcontract Documents.)*
>
> **Portion of Work** **Substantial Completion Date**
>
> , subject to adjustments of this Subcontract Time as provided in the Subcontract Documents.
>
> *(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)*
>
> per contract documents

Davey argues that Article 9.3 fails to provide a commencement date, duration for performance, or a calendar date for substantial completion. As such, the parties did not contemplate liquidated damages. In contrast, SDI argues that "per contract documents" clearly refers to not only the subcontract between SDI and Davey, but the prime contract between SDI and Auburn Hills, which contained specific provisions for liquidated damages and time for performance.

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. . . . If the language is unambiguous, it must be construed, as a whole, according to its plain and ordinary meaning." *Radu v Herndon & Herndon Investigations, Inc*, 302 Mich App

363, 374; 838 NW2d 720 (2013) (internal quotation marks omitted). Contract provisions that are capable of conflicting interpretations are considered ambiguous. *Pioneer State Mutual Ins Co v Dells*, 301 Mich App 368, 378; 836 NW2d 257 (2013). Interpretation then becomes "a question of fact, and the trial court may consider extrinsic evidence to determine the intent of the parties. But courts are not to create ambiguity where none exists." *Sal-Mar Royal Village, LLC v. Macomb County Treasurer*, 301 Mich App 234, 245; 836 NW2d 236 (2013) (internal quotation marks and citations omitted). In addition, "[w]here one writing references another instrument for additional contract terms, the two writings should be read together," and the parties are bound by those additional terms. *Forge v Smith*, 458 Mich 198, 207 n 21; 580 NW2d 876 (1998); *Whittlesey v Herbrand Co*, 217 Mich 625, 628-629; 187 NW 279 (1922).

This case is less about contractual interpretation and more about civil procedure. SDI failed to produce evidence to combat Davey's motion for summary disposition. On a motion for summary disposition, the moving party has the burden of supporting its position with documentary evidence and, having done so, the burden then shifts to the non-moving party to establish a disputed issue of fact with its own documentary evidence. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Coblentz v City of Novi*, 475 Mich 558, 568-569; 719 NW2d 73 (2006). Critical to this appeal, "documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)--(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6). "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Here, although SDI relies on the phrase "per contract documents" in Article 9.3, it failed to present the trial court with admissible evidence of those other contract documents. In response to Davey's motion for summary disposition, SDI included the supplemental instructions to bidder's form and a purported agreement between SDI and Auburn Hills. However, as the trial court aptly noted, neither document identifies "the parties to the agreement, the project itself, nor do they show any connection to the present dispute or contain signatures of the parties or their representatives. The origin of these documents is unknown, and therefore, the admissibility of same is questionable." Therefore, SDI failed to submit admissible evidence in response to Davey's motion for summary disposition.

Moreover, even if a valid liquidated damages provision existed by incorporation of the prime contract, SDI failed to present evidence that Davey was the *sole* cause of the delay. "[W]here the delay is due to the fault of both parties the court will not attempt to apportion [liquidated] damages." *Grand Rapids Asphalt Paving Co v City of Wyoming*, 29 Mich App 474, 483; 185 NW2d 591 (1971). The contract completion date was allegedly April 30, 2010, and the project was not completed until July 17, 2010. The record reveals that SDI requested numerous extensions for performance from Auburn Hills necessitated by additional scope of work and weather conditions. Auburn Hills granted some, but not all, of these requests. Although SDI completed its portion of work in March 2010 and allowed Davey unfettered access to the worksite, the fact remains that Davey was never provided with a start date or completion date

and could only begin its part of the contract after SDI completed its portion. SDI fails to submit evidence that Davey's work could have and should have been completed prior to the July 17th date.

Finally, Davey argues that this Court lacks jurisdiction over the trial court's ruling on the unit price contract because SDI did not properly reserve its right to raise the issue in the parties' consent judgment. Assuming, without deciding, that SDI properly reserved its right to appeal the issue, we conclude that additional seeding did not constitute additional work under the subcontract. SDI points to Article 5.3 of the parties' subcontract:

> **§ 5.3** The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

However, under this unit price contract, quantities under the base contract term were not "additional" or "extra work" subject to the subcontract's notice requirements. Article 10.1 of the subcontract provides that "The Contractor shall pay the Subcontractor in current funds for performance of the Subcontract the Subcontract Sum of Five Hundred Five Thousand Seven Hundred Forty-three Dollars and Zero Cents ($505,743.00), subject to additions and deductions as provided in the Subcontract Documents." Article 10.3 then provides for unit pricing. For purposes of this appeal, the issue is additional seeding, which was specifically priced by acre. Various seed mixes were priced at $14,866.00 per acre. As the trial court aptly noted, "Davey did not make a claim for additional work but rather payment for the excess quantity of its work performed on the unit priced contract. . . .The unit price of the seeding was specified by acre in the subcontract with no limitation on the quantities for which plaintiff would be paid. Therefore, notice is not required and plaintiff is entitled to recover that portion of its claim."

In conclusion, the trial court did not err in granting Davey summary disposition on SDI's counterclaims. There was no enforceable liquidated damages provision and SDI was not entitled to a set-off for the liquidated damages assessed against it by Auburn Hills. Even if there was an enforceable liquidated damages provision, SDI failed to set forth evidence that Davey was the sole cause of the delay. Finally, SDI was not entitled to a set-off for alleged "additional work" performed by Davey because quantities for seeding were not additional work.

Affirmed. As the prevailing party, Davey may tax costs. MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Kirsten Frank Kelly