STATE OF MICHIGAN

COURT OF APPEALS

T. R. PIEPRZAK COMPANY, INC.,	UNPUBLISHED June 24, 2014
Plaintiff-Appellant,	
v	No. 314451 Oakland Circuit Court
CITY OF TROY,	LC No. 2011-118046-CK
Defendant-Appellee.	

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

In this contract dispute involving a water main replacement project, plaintiff, T.R. Pieprzak Company, Inc., appeals by right the trial court's order granting summary disposition in favor of defendant, City of Troy. Because we conclude there were no errors warranting relief, we affirm.

T.R. Pieprzak first argues that the trial court erred when it determined that T.R. Pieprzak could not recover on its claim because it did not follow the reimbursement procedures set forth in the parties' first contract modification. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of agreements and statutes. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 526; 791 NW2d 724 (2010); *Stabley v Huron–Clinton Metro Park Auth*, 228 Mich App 363, 366; 579 NW2d 374 (1998). To the extent this issue implicates the trial court's ruling on reconsideration, however, our review is for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

"The goal of contract construction is to determine and enforce the parties' intent on the basis of the plain language of the contract itself." *St Clair Med, PC v Borgiel*, 270 Mich App 260, 264; 715 NW2d 914 (2006). "If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce the language as written, unless the contract is contrary to law or public policy." *Harbor Park Mkt, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007).

In their first contract modification, the parties agreed that the original agreement's compensation scheme contemplated excavation work to verify the location and elevation of existing underground house services. The parties also agreed that T.R. Pieprzak would be entitled to additional payments for time and materials involved in excavation for utilities other than house service, but only if the claim was first submitted to and approved by the City's engineer:

> 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. Payments 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.

Because the parties agreed that verification of all existing underground house services was included in the original contract price, T.R. Pieprzak cannot recover additional compensation for those costs. With regard to the additional compensation for excavation work unrelated to house services, it is undisputed that T.R. Pieprzak did not obtain approval from the City's engineer for the excavation work. Notwithstanding that fact, T.R. Pieprzak contends that the cost recovery procedure applied only to costs associated with locating "existing" services at the time the modification was adopted and not to costs related to the "new" services the City installed afterward. T.R. Pieprzak further argues that, at the very least, the first contract modification is ambiguous on this point.

The term "existing" refers to things that have actual being. *Random House Webster's Unabridged Dictionary* (1998). It is evident from the parties' use of the term that the underground services must have come into existence before some defined moment in time. However, the parties chose not to define this moment by placing an explicit temporal qualification on the term "existing." And T.R. Pieprzak's preferred understanding—that existing refers to services already in existence on the date the parties' executed the first modification—is not the most natural reading. Rather, because the contract modification concerns future excavation work and outlines the procedure by which T.R. Pieprzak may obtain additional compensation for that future excavation work, the most natural reading is that the underground services need only exist prior to the excavation work for which T.R. Pieprzak seeks the additional compensation.

T.R. Pieprzak counters that this Court must conclude that the term "existing" is ambiguous in order to avoid the absurd result that the parties agreed to allow the City to increase T.R. Pieprzak's expenses by adding service, as long as it succeeded in doing so before T.R. Pieprzak reached that point where the new service was added. But a result is not absurd simply because it allocates a potential financial burden to one of the parties. The parties plainly agreed to allocate the burden of excavating existing house services to T.R. Pieprzak and made compensation for excavation involving other services contingent on prior approval. Because this

provision is unambiguous, courts must enforce it as written. *Gronda*, 277 Mich App at 130-131. In addition, the parties' first contract modification does not require T.R. Pieprzak to absorb the costs of the City's unfettered "interference"; rather, it specifically allows T.R. Pieprzak to recover for additional excavation expenses for such "interference," but subject to prior approval. T.R. Pieprzak simply failed to get prior approval for its additional excavations and, for that reason, was not entitled to additional compensation. And this remains true regardless of T.R. Pieprzak's claim that the City's witnesses agreed with its understanding of the provision at issue. It is for the courts—not witnesses—to interpret unambiguous agreements. See *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 698 n 4; 818 NW2d 410 (2012).[1]

T.R. Pieprzak's interpretation also runs afoul of the fundamental canon of contract construction requiring courts to "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). Several sections of the contract address T.R. Pieprzak's responsibility for exploratory excavation and therefore must be read in harmony with the first contract modification. Specifically, section 9J of the General Conditions provides that "[a]ll exploratory work required in locating existing water mains and utilities required for underground construction will be incidental to the project." Section 3D similarly requires T.R. Pieprzak to "bear all losses resulting to him because . . . the conditions under which the work is done are different." And finally, page 7 of the Water Main Specifications provides that "[a]ny unforeseen obstacles such as . . . abandoned utilities . . . shall be removed as work included to the water main construction unless otherwise provided for in the Supplemental Specifications."

These provisions make it clear that the parties agreed that the cost of T.R. Pieprzak's exploratory excavation was generally included in the contract price and that T.R. Pieprzak would bear the expense if conditions are different. To interpret the first modification to permit T.R. Pieprzak to recover for additional expenses contrary to the original agreement and without the prior approval contemplated under the first modification, as T.R. Pieprzak urges, would do violence to the plain language of these other provisions, which otherwise preclude recovery. Because we are obligated to interpret the agreements as a whole, we must conclude that, with the first modification, the parties agreed to a limited framework by which T.R. Pieprzak would be entitled to additional compensation despite the allocation of expenses provided in the original agreement. Because T.R. Pieprzak did not meet the requirements of this limited framework, it was responsible for any additional expenses as originally contemplated. *Klapp*, 468 Mich at 468.[2]

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[1] We also reject T.R. Pieprzak's contention that the modification at issue is unenforceable for lack of consideration, because T.R. Pieprzak did not properly develop this claim before the trial court and on appeal. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

[2] Further, because the contract is unambiguous, the rule of contra proferentem, does not apply. *Klapp*, 468 Mich at 470-471.

T.R. Pieprzak also argues that the City waived the reimbursement procedure provided under the first modification. In support, T.R. Pieprzak points to letters from its president to the City's project engineer and manager where it noted that it "will request additional compensation" for work pertaining to "new" water services. But T.R. Pieprzak's "notice" of its intent to seek additional compensation is not evidence that it complied with the requirements stated under the first modification and does not establish how the City purportedly waived the approval requirement. T.R. Pieprzak failed to establish that the parties' "course of conduct" trumped the approval requirements. "[W]aiver is a voluntary and intentional abandonment of a known right." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). For a course of conduct to constitute a waiver, it is insufficient that a party was aware of the other's activity that was inconsistent with the contract; rather, there must be clear and convincing evidence the other party "affirmatively accepted" the inconsistent activity. *Id*. at 377.

T.R. Pieprzak's reference to its "ongoing contact" with the City falls short of this standard. While the evidence that the City tracked T.R. Pieprzak's "additional work" suggests that the City was aware that T.R. Pieprzak performed additional excavations, it does not show, clearly and convincingly, that the City agreed to compensate T.R. Pieprzak for the additional work even though T.R. Pieprzak failed to get prior approval. Indeed, the City may have tracked this work in order to have a record in the event of a future dispute—that is, the records may be evidence that the City did not waive the approval requirement.

T.R. Pieprzak next asserts that the trial court erred when it interpreted Section 9J and Section 3D as bars to its recovery. Regarding Section 9J, T.R. Pieprzak argues that the trial court applied the wrong paragraph. The trial court relied on the paragraph in Section 9J, which provides that T.R. Pieprzak "shall be responsible for verifying the location of all underground utilities, by magnetic or other type instruments and hand digging, before beginning excavation work." However, as noted, Section 9J also provides that "[a]ll exploratory work required in locating existing water mains and utilities required for underground construction will be incidental to the project[.]"

Although the latter provision is more specific and therefore controls here, *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367 n 22; 817 NW2d 504 (2012), this does not afford T.R. Pieprzak the relief it seeks given the plain meaning of the term "existing." Nor does this conclusion render the term "existing" mere surplusage given that the term must be construed in the context of the entire agreement, including the first modification. The trial court properly held that Section 9J applies to bar T.R. Pieprzak claims, albeit for the wrong reason. See *Tipton v William Beaumont Hosp*, 266 Mich App 27, 37; 697 NW2d 552 (2005).[3]

[3] The City argues that the warning in Section 9J that other contactors may be working in the area put T.R. Pieprzak on notice that it would receive no additional compensation for exploratory excavation. However, that provision makes no reference to compensation.

Equally unavailing is T.R. Pieprzak claim that Section 3D contravenes MCL 125.1592 and the Differing Site Conditions clause incorporating that statute. Under MCL 125.1592, contracts like the one at issue must contain a clause permitting a contractor to notify a governmental entity of physical conditions differing materially from those indicated in the contract before disturbing those conditions and to recover an equitable adjustment if the governmental entity subsequently verifies the contractor's claim.

While it is undisputed that the contract contains the required Differing Site Conditions clause, T.R. Pieprzak contends the provision of Section 3D requiring it to "bear all losses . . . resulting because the conditions under which the work is done are different" flies in the face of MCL 125.1592. As the City points out, however, Section 2B expressly permitted T.R. Pieprzak to notify the City's engineer of such differing site conditions and requires the engineer to direct changes, if necessary:

> **B. Errors and Corrections:** If the Contractor finds any discrepancies between the Drawings and Specifications and site conditions, any error or omissions in the Drawings or Specifications or if he wishes to question the materials or procedures prescribed, the Contractor shall stop work and immediately notify the Engineer. The Engineer shall review these conditions and if he may deem it necessary, he shall direct changes to be made before the work is to continue. The Contractor shall not be allowed to take advantage of any such error, omission, or discrepancy, as full instructions will be furnished by the Engineer, and the Contractor shall carry out such instructions as if originally specified. In no case shall the Contractor proceed with the work in uncertainty, and any work done by the Contractor after the discovery of any error, omission, or discrepancy, until authorized, will be at the Contractor's risk and responsibility.

This language clearly sets forth T.R. Pieprzak's recourse for "discrepancies" when it encountered different site conditions. Specifically, it was to stop work and immediately notify the City's engineer, who would then verify the claims. This is also exactly what MCL 125.1592 requires. See MCL 125.1592(a) (requiring the contractor to notify the governmental entity in writing of a differing condition before disturbing the physical condition of the site), (b) (requiring the governmental entity to investigate a contractor's claim), and (c) (requiring the governmental entity to equitably adjust the contract if necessary). Reading Sections 2B and 3D in harmony, then, reveals that Section 3D is not overly broad and does not violate MCL 125.1592.

T.R. Pieprzak argues at length that, because a party may not hinder another's performance of a contract, it is improper to interpret Section 3D's purpose as permitting the City to actively "interfere" with T.R. Pieprzak's work. While it is improper for one contracting party to hinder the other contracting party's performance of its contractual obligations, see, e.g., *Adams v Edward M Burke Homes, Inc*, 14 Mich App 578, 590; 166 NW2d 34 (1968) (Levin, J., concurring), quoting 3 Corbin on Contracts, § 571, p 349, T.R. Pieprzak's argument suffers from the same flaw as before: T.R. Pieprzak failed to read Section 3D in harmony with the rest of the contract.

Without regard to whether the City "interfered" by providing new service, both Section 2B and the Differing Site Conditions clause clearly provided T.R. Pieprzak with recourse to recover its costs. Thus, it is irrelevant whether one characterizes this as "interference" because T.R. Pieprzak failed to follow the proper notification procedure. T.R. Pieprzak's letters to the engineer and manager clearly indicate that it intended to proceed rather than stop work. And this is dispositive here considering that Section 2B expressly required it to stop work and the Differing Site Conditions clause required it to give notice "before disturbing the physical condition [at the improvement site]." Consequently, even if the City's interactions with T.R. Pieprzak were sufficient to constitute constructive notice, T.R. Pieprzak's failure to comply with the appropriate procedure bars its recovery.[4]

We likewise reject T.R. Pieprzak's argument that the City's failure to disclose its alleged superior knowledge of the location of gas mains and services amounted to a breach where the City otherwise represented that those utilities would not interfere with T.R. Pieprzak's work. At the outset, it bears emphasis that the City does not contest whether it withheld its alleged superior knowledge of the location of utilities. Thus, resolution of this issue centers on whether the City had a duty to disclose any knowledge it may have had.

In *Hersey Gravel Co v State Hwy Dep't*, 305 Mich 333, 340-342; 9 NW2d 567 (1943), our Supreme Court held that the Highway Department had a duty to disclose information in its possession about soil conditions that was more detailed than the blueprint submitted to the contractors submitting bids on the project. The Court reached this conclusion even though the blueprints required bidders "to satisfy themselves by examining the site of the proposed work as to the actual soil conditions." *Id*. at 340; see also *Valentini v City of Adrian*, 347 Mich 530, 534; 79 NW2d 885 (1956) (stating that the "withholding by the city of its knowledge of the known conditions, resulting in excessive cost of construction" can serve as a basis for additional recovery); *W H Knapp Co v State Hwy Dep't*, 311 Mich 186, 188; 18 NW2d 421 (1945). Applying the decision in *Hersey*, this Court has held:

> It is well settled that the bidder on a proposal for public work may, when acting in good faith, rely on advertised specifications and estimates when there is nothing in those estimates to indicate that they are made merely by way of suggestion. If reliance is made on the estimates, the bidder is not required to bear increased cost resulting from the errors and miscalculations merely by reason of the fact that he was unable to or did not test their accuracy. [*Midwest Bridge Co v Dep't of Transp*, 134 Mich App 611, 615-616; 350 NW2d 913 (1984).]

Thus a governmental entity generally has a duty to disclose any superior knowledge it may have regarding soil conditions differing from those represented to a contractor at the bidding stage. However, the key difference between this case and those cited is that the contract involved here provided for T.R. Pieprzak's recovery of additional costs when it encountered conditions differing from those in the plans or those represented by the City. Indeed, the parties

[4] Because it failed to properly support its argument that the trial court's application of Section 3D violates public policy, we decline to address that claim of error. *Mudge*, 458 Mich at 105.

specifically contemplated that T.R. Pieprzak would verify the location of certain utilities and then provided it with recourse should it encounter conditions differing from the plans.

It was not, therefore, merely T.R. Pieprzak's responsibility to verify the City's representations as in *Hersey*, nor was its verification a matter of ability or willingness as in *Midwest Bridge Co*. Further, T.R. Pieprzak cannot claim it is seeking damages "over and above the amount allowed by contract" as in *W H Knapp Co*, given that the contract expressly contemplated a procedure for its recovery of potential increased costs. By the same token, any failure to disclose could not "result[] in excessive cost of construction" as in *Valentini* because, again, the contract provided a cost recovery mechanism. T.R. Pieprzak's superior knowledge argument is therefore unavailing.[5]

T.R. Pieprzak next contends there is a genuine issue of material fact regarding whether the City's accountant's signature appearing on an Audit Letter constituted an acknowledgement or admission by the City that it owes T.R. Pieprzak the total damages sought in this case. The language of the Audit Letter belies this claim.

The Audit Letter by its own terms seeks the City's confirmation of specific information: namely the amount of T.R. Pieprzak's "total unpaid progress *billings*." (Emphasis added.) This is manifestly different than requesting the City to confirm, much less admit *owing* the amount stated. Put differently, the City may acknowledge that T.R. Pieprzak claims a certain amount without agreeing that it, in fact, owes it that amount. Even T.R. Pieprzak concedes that "the Audit Request was not a payment request under the contract." Thus, the Audit Letter on its face establishes *only* the City's acknowledgement regarding the amount T.R. Pieprzak sought, and not the amount the City believes it owes. It therefore cannot create an issue of fact regarding the City's liability. As we have held, the contract imposed certain duties on T.R. Pieprzak before it could recover the costs it now seeks. T.R. Pieprzak did not comply with those duties and cannot now rely on the Audit Letter to circumvent the agreement's plain language.[6] The trial court did not abuse its discretion in denying T.R. Pieprzak's motion for reconsideration on this ground.

T.R. Pieprzak next argues that it was entitled to recover its "home-office overhead damages" allegedly incurred by the City's delay during the project. In making this argument, T.R. Pieprzak urges this Court to adopt the so-called "*Eichleay* formula" devised in 1960 by the Army Services Board of Contract Appeals and remand for consideration of those damages in light of that formula. We review a trial court's decision on a motion in limine for an abuse of

[5] In light of this conclusion, the City's governmental immunity argument is moot and we decline to address it.

[6] Although not directly argued, the City is correct that the Audit Letter would be insufficient to constitute a judicial admission on the issue of liability since it was not offered "for the express purposes of dispensing with formal proof of a particular fact." *Macke Laundry Serv Co v Overgaard*, 173 Mich App 250, 253; 433 NW2d 813 (1988).

discretion. *Bellevue Ventures, Inc v Morang-Kelly Inv, Inc*, 302 Mich App 59, 63; 836 NW2d 898 (2013).[7]

While no Michigan court has addressed the *Eichleay* formula, the Virginia Supreme Court has observed that this formula "is not a legal standard that must be formally approved or adopted; rather, it is merely a mathematical method of prorating a contractor's total overhead expenses for a particular contract." *Fairfax Co Redevelopment & Housing Auth v Worcester Bros Co, Inc*, 257 Va 382, 389; 514 SE2d 147 (1999). Thus, the issue is not whether this Court should adopt the *Eichleay* formula, per se, but whether T.R. Pieprzak may present evidence of its "home-office overhead damages" in the first place.

Courts generally determine whether overhead damages are recoverable by looking to the contract. See, e.g., *Capital Elec Co v United States*, 729 F2d 743, 744 (CA Fed, 1984) (determining whether the contractor was entitled to recover damages for extended overhead under "the suspension of work clause of its contract with the Government" and whether to "*calculate* those damages according to the so-called *Eichleay* formula") (emphasis supplied). But T.R. Pieprzak has neither cited nor attached any provision in the contract—either below or on appeal—that would entitle its recovery of "home office overhead damages." Accordingly, the trial court did not err in granting summary disposition of this portion of the City's motion.

Finally, we decline T.R. Pieprzak's alternative request to remand this case for amendment of the complaint to reflect a claim of *quantum meruit.* As we have already concluded, the contract contemplated the damages T.R. Pieprzak now seeks. Therefore, *quantum meruit* does not apply. See *Hayman Co v Brady Mech, Inc*, 139 Mich App 185, 191; 362 NW2d 243 (1984). For this reason, any amendment would be futile. *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 696; 588 NW2d 715 (1998).

There were no errors warranting relief.

Affirmed.

/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

[7] In ruling on this issue, the trial court expressly noted it was granting "these . . . parts of Defendant's Motion." Since the City argued this issue in the context of its motion in limine, the trial court did not grant the City's motion as part of its summary disposition ruling as T.R. Pieprzak argues.