COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 98-2345

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

JAMES CAPE & SONS COMPANY,

PLAINTIFF-RESPONDENT,

V.

PAUL H. SCHWENDENER, INC., SOUTHPORT PLAZA, L.P., RFI CORPORATION, DAYTON HUDSON CORPORATION AND BANK ONE, CHICAGO, N.A.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. This appeal arises from a contract executed between Paul H. Schwendener, Inc., as general contractor, and James Cape & Sons Company, as subcontractor, for the excavation and grading of the site for a new shopping center. Cape sued Schwendener for damages based on breach of

contract, unjust enrichment, quantum meruit, breach of warranty and negligent misrepresentation. Cape also sued Southport Plaza, L.P., and Dayton Hudson Corporation, each of whom had an ownership interest in certain portions of the real estate; RFI Corporation, the general partner of Southport; and Bank One, Chicago, N.A., which held a mortgage on the property. Following a lengthy trial to the court, judgment totaling $389,952 was entered in favor of Cape, including damages from Schwendener, Southport and RFI, and prejudgment interest. In addition, the trial court awarded Cape double taxable costs and interest pursuant to WIS. STAT. § 807.01(3) and (4) (1997-98).[1] The judgment also awarded Cape a lien foreclosure against Southport, RFI and Dayton Hudson (the owners). We affirm the judgment.

¶2 Bids for the excavation of the project were solicited by Southport in the summer of 1993. The bid package distributed to potential bidders called for the removal and stockpiling of all topsoil from the site, and the cutting and filling of clay substrate to conform to certain specified contours. Among the documents included in the package given to potential bidders was a report by Schleede Hampton Associates, a soils engineer. That report included the results of approximately fifty soil borings made at various locations across the site, showing topsoil depths ranging from a few inches to over twenty-two inches.

¶3 Schwendener subsequently became the general contractor on the project and on September 23, 1993, sent Cape a letter of intent to enter into a subcontractor agreement with it. Cape commenced excavating on or about September 24, 1993. However, a written subcontract agreement was not signed

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

until November 10, 1993. The written subcontract agreement was dated September 24, 1993, and provided that Cape was to furnish all labor, material, equipment, supplies and supervision necessary to properly perform and fully complete the work described in the contract for the lump sum of $339,250. The work included clearing the site of vegetation and debris, stripping and stockpiling existing topsoil, cutting and filling areas with clay as needed to meet the geotechnical soil requirements and to provide the required elevations for the buildings and parking lots, grading the sites to the final grades for those structures, and constructing curbs and gutters in the parking areas. The contract documents expressly included a schedule of unit pricing and material portions of Schwendener's contract with the owners. The contract documents also included the plans and specifications prepared by Joseph A. Schudt & Associates (JAS), the project engineer, which incorporated the soil boring report and a site construction plan depicting topsoil stockpiles of 105,000 cubic yards.

¶4 Shortly after it commenced excavation, Cape discovered that the site contained substantially more topsoil than it had anticipated in making its bid. Because more topsoil had to be excavated, more clay work to fill the excavated areas was also required. Ultimately, Cape commenced this action. It sought payment for the unpaid balance on the contract and for what it alleged was additional work under the contract, including additional topsoil stripping, additional clay cutting and fill work, additional clearing and grubbing work, additional engineering work, and additional grading for curbs and gutters.

¶5 In their respective appellants' briefs, Schwendener and the owners raise some of the same issues and some separate issues. We will address them seriatim.

¶6 They both contend that Cape is not entitled to damages beyond the unpaid balance of the contract because the contract between Cape and Schwendener was a lump sum contract. They contend that Cape assumed the risk of determining the amount of topsoil when it made its bid and failed to act as a reasonable and prudent contractor in investigating the amount of topsoil prior to bidding. They also contend that Cape signed the written contract after most of the excavation work had been completed and therefore cannot complain that any topsoil and clay work was extra work not contemplated at the time the contract was entered into.

¶7 In contrast, while agreeing that it entered into a contract for a fixed price for performance of the work as delineated in the contract documents, Cape contends that the actual site conditions differed from those set forth in the contract documents. It also contends that the owners changed some of the plans after it commenced work and that it therefore was entitled to additional compensation under the contract.

¶8 A differing site conditions clause was incorporated in Cape's contract with Schwendener. It provided that if subsurface or latent physical conditions were encountered at the site differing materially from those indicated in the contract, an adjustment in the contract price would be made, provided the owner was timely notified and approval for the work was obtained. The applicability of a differing site conditions clause depends upon a comparison of the actual encountered conditions with the conditions as indicated in the bid and contract documents. *See* ***Metropolitan Sewerage Comm'n v. R.W. Constr., Inc.***, 72 Wis. 2d 365, 372-73, 241 N.W.2d 371 (1976). "Contract 'indications' need not be explicit or specific, but only enough to impress or lull a reasonable bidder not to expect the adverse conditions actually encountered." ***Id.*** at 374.

¶9 Schwendener and the owners contend that the contract documents did not contain representations as to the amount of topsoil, and that the differing site conditions clause therefore does not come into play. However, the plans provided by JAS identified two areas for stockpiling the excavated topsoil and specified the size of the stockpiles, which together totaled 105,000 cubic yards of topsoil. Additionally, Cape was provided with the soil boring data collected by Schleede Hampton. After reviewing that material, Christopher Cape testified that he directed one of his employees to seek clarification of the estimated amounts of topsoil from an engineer at JAS and was told that Cape could use the 105,000 cubic yards figure in making its bid.[2] This claim was corroborated by the minutes from an owners' meeting held on November 2, 1993, which discussed the amount of topsoil being excavated as measured on site by JAS and stated "Black Dirt Estimated 105,000 c.y. w/o outlots." Based upon this evidence, the trial court determined that the bid and contract documents contemplated the excavation of 105,000 cubic yards of topsoil.

¶10 Schwendener and the owners also contend that Cape failed to act as a reasonable and prudent contractor when it failed to conduct its own investigation to verify the topsoil depths prior to making its bid. A bidder on a construction project is held to the standard of what a reasonable contractor should have anticipated on the project. *See* ***id.*** at 377. What a reasonable contractor should have anticipated is derived from the contractor's past experience, the customs and

[2] While Schwendener and the owners dispute whether Cape was told it could use the figure of 105,000 cubic yards in making its bid, the trial court found this to be true. The credibility of the witnesses is a matter to be decided by the trial court. *See* ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983). Because the trial court's finding is not clearly erroneous, it cannot be disturbed by this court. *See* ***id.***

general knowledge of contractors in the area and the information conveyed by the contract. *See* ***id.*** at 378.

¶11 A contractor has the right to rely on representations in the plans even when the contract places a duty of investigation upon him or her. *See* ***Thomsen-Abbott Constr. Co. v. City of Wausau***, 9 Wis. 2d 225, 233, 100 N.W.2d 921 (1960). A contractor is not required "to make a 'scientifically educated and skeptical analysis' of the contract documents and the general situation." ***Metropolitan Sewerage Comm'n***, 72 Wis. 2d at 378. Moreover, nothing in the record provides a basis to conclude that Cape could not reasonably rely on the oral representations of the JAS engineer.

¶12 As found by the trial court, Cape's ability to conduct an on-site investigation was also restricted. Christopher Cape testified that during the bidding process, he requested access to the site to dig with a backhoe, primarily for the purpose of identifying the characteristics of the underlying soil, as was a common practice among potential bidders. He testified that while such an investigation would not be an attempt to redo or verify the work of the engineers who did the soils report, if a gross error or problem was encountered, it would be reported back. He further testified that he was told he could not take a backhoe onto the property because it would damage the soybean crop growing on the land.

¶13 Although the appellants dispute the accuracy of the testimony, the trial court found that limitations were placed on Cape's ability to disturb the soil. This finding is not clearly erroneous and cannot be disturbed. *See* ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983). In addition, evidence in the record indicates that it was not common practice among contractors to attempt to verify soil depths, particularly on such a large site, with

hand tools as propounded by the appellants. No basis therefore exists to disturb the trial court's determination that Cape was not reasonably required to conduct an on-site investigation to determine soil depths.

¶14 The evidence indicated that Cape ultimately excavated an additional 63,612 cubic yards of topsoil, an increase of approximately 60% over the 105,000 cubic yards relied on by it. Because it encountered materially different circumstances, the broad exculpatory and admonitory clauses in the contract do not render the differing site conditions clause inapplicable or relieve the appellants of liability. *See* ***Metropolitan Sewerage Comm'n***, 72 Wis. 2d at 385.

¶15 We also reject the appellants' argument that Cape cannot recover under the differing site conditions clause because it was aware of the topsoil and clay problems at the time it signed the written contract. The appellants suggest that if Cape believed it was entitled to additional compensation based upon the amount of topsoil it was encountering during its excavation, it should have refused to sign the contract without modifications.

¶16 This argument ignores the fact that even though Schwendener and Cape did not sign the written contract until November 1993, they had a meeting of minds in September 1993 concerning the contract's material terms. A contract derives from a mutual meeting of minds as to terms, manifested by mutual assent. *See* ***Goossen v. Estate of Standaert***, 189 Wis. 2d 237, 246, 525 N.W.2d 314 (Ct. App. 1994). Parties are not bound by the agreed-upon terms of a contract if they understand that the execution of a formal document is a prerequisite to being bound. *See* ***Lambert Corp. v. Evans***, 575 F.2d 132, 135 (7th Cir. 1978). However, if it is agreed that a formal document will be prepared to memorialize a bargain that the parties have already made, the bargain is enforceable though the

document has not been executed. *See* ***id.*** (citing ***Peninsular Carpets, Inc. v. Bradley Homes, Inc.***, 58 Wis. 2d 405, 206 N.W.2d 408 (1973)).

¶17 In this case, bids were solicited, Cape responded and on September 23, 1993, Schwendener sent Cape a letter of intent to accept its bid. At that time, Schwendener and Cape had a meeting of minds as to the amount of topsoil to be excavated and clay fill required, and expected Cape to immediately commence work pursuant to that agreement. Although some negotiations may have continued after that date, the essential terms of the agreement were established when Cape commenced work and discovered the true scope of the topsoil to be excavated. Because it was protected by the differing site conditions clause, its right to recovery is not affected by the delay in executing the written memorialization of the agreement.[3] The trial court therefore properly determined that Cape was entitled to recover for additional topsoil excavation.

¶18 Schwendener's next argument is that the trial court erred when it used the contractual unit price in calculating the amount to be awarded to Cape for the additional topsoil. It contends in its appellant's brief that the appropriate measure of damages under the differing site conditions clause is a pay adjustment, excluding loss of anticipated profits. However, Cape contends, and Schwendener does not dispute, that Schwendener never raised this issue in the trial court. Cape alleges that the only calculation presented to the trial court was Cape's calculation based on the contractual unit price, and Schwendener did not contest that calculation. Because the issue was not raised in the trial court, we decline to

[3] Because we conclude that a meeting of minds as to the essential terms of the contract occurred in September 1993, and that the November 1993 written contract merely memorialized the agreement, the appellants' claim that parole evidence cannot be used to establish an understanding at variance with the terms of a written contract is irrelevant.

address it on appeal. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992).

¶19 The owners also argue that Cape waived its lien for the value of the topsoil excavation when it signed a lien waiver on October 31, 1993. Initially, we note that a lien waiver waives only the right to a lien against the property and therefore did not constitute a waiver of Cape's right to damages. *See* WIS. STAT. § 779.05(1). Moreover, the lien waiver signed by Cape waived lien rights for labor, material or machinery "furnished to this date." Although the owners argued in their trial brief that Cape had no valid claim for a lien arising from labor or materials furnished on or before October 31, 1993, testimony at trial indicated only that "most" of the topsoil and clay fill was performed by that date. Because the owners did not present more specific evidence on the subject or pursue fact-finding from the trial court on the issue, they failed to establish that they are entitled to relief on appeal on this issue.

¶20 Schwendener and the owners next contend that Cape was not entitled to additional compensation for clay cut and fill because the work was within the scope of the contract. However, because the topsoil excavation was more extensive than anticipated at the time Cape's bid was accepted and work began, more clay cutting and filling was also required to bring the site to proper grade. As determined by the trial court, Cape was entitled to compensation for that additional clay work for the same reasons that it was required to compensation for the additional topsoil excavation. In addition, at the time of the bid the parties contemplated that "sewer spoils" would be available to Cape for use as clay fill. However, because of delays in the sewer work these spoils were not available, requiring Cape to obtain additional clay from a borrow pit. Based upon this evidence and evidence indicating that the owners directed Schwendener to obtain

additional clay from a borrow pit and submit the cost for this work at the contractual unit price, the trial court's award of damages for the clay work at the contractual unit price must be sustained.[4]

¶21 Schwendener also objects to the trial court's award of $1523 in "extra engineering" costs. Evidence indicates that these costs were incurred to measure the topsoil stockpiles and retention ponds. The trial court found that this extra work was required because of the initial underestimation of topsoil quantities by Schwendener and the owners. Because its finding is not clearly erroneous, it cannot be disturbed and the award is sustained.

¶22 Schwendener and the owners also object to the award of additional compensation for curb and gutter work, contending that it was within the scope of the contract and could have been avoided. However, the trial court found that Cape was in the process of bringing the site to final grade in May 1994 when it was first informed that the elevations for final grading had been altered. It found that although final grading was incomplete at the time Cape was given the revised plans, the revisions were sufficiently extensive and the notice sufficiently late as to cause Cape to incur additional costs. Its findings are not clearly erroneous, nor has

[4] Schwendener and the owners point out that the minutes of the owners' meeting indicated only that the clay borrow could be treated as an "add" by Schwendener under its contract with the owners. However, the trial court could treat this as evidence that the additional clay borrow also constituted additional work under the contract between Cape and Schwendener.

any basis been shown to disturb the trial court's finding that the additional costs amounted to $31,220, as claimed by Cape.[5]

¶23 Schwendener also contends that clearing and grubbing work was a job requirement included in the contract which could not be the subject of additional compensation. However, evidence indicated that Schwendener denied Cape's clearing and grubbing subcontractor access to the full site, and thus prevented the completion of all clearing and grubbing work at one time. As a result, the subcontractor had to mobilize its employees and equipment a second time, causing Cape to incur additional costs of $525. The trial court found that under the contract the parties reasonably would have expected that the clearing and grubbing would be completed in one operation. Because the additional costs were not attributable to Cape, it awarded compensation. Because the trial court's findings and conclusions are supported by the record, we sustain the award.

¶24 Schwendener's next argument is that the trial court should have dismissed Cape's claims for negligent misrepresentation, unjust enrichment, quantum meruit and breach of warranty. It also questions how the trial court allocated damages between it and the owners on the claim of negligent misrepresentation. However, the trial court's award against Schwendener was based upon the contract, not these other claims. It made no finding of negligent misrepresentation, nor did it make an award against Schwendener under the other

[5] Schwendener and the owners contend that the cost could have been avoided if Cape had graded the site only to a rough grade in the fall of 1993. However, the trial court specifically rejected Cape's claim that it graded the site to final grade in the fall of 1993, thus rejecting the premise upon which the appellants' argument is based. Moreover, the trial court specifically found that Cape learned of the revisions when engaged in final grading in May 1994. This finding is supported by the evidence and provides a reasonable basis for the trial court's conclusion that the revisions caused Cape additional costs.

claims. Schwendener's objections to the claims therefore provide no basis for awarding relief from the judgment and will not be addressed further.

¶25 The owners' next argument is that the trial court erred in ordering Southport and RFI to pay damages based on the unpaid contract balance and the cost of the haul road. They contend that these elements of the damages award are based solely on the contract between Schwendener and Cape, to which they were not a party. However, the owners did not raise this issue in the trial court and instead stipulated to these amounts at trial. They therefore waived their right to raise this issue on appeal. *See* ***Evjen***, 171 Wis. 2d at 688.[6]

¶26 Schwendener and the owners also challenge the trial court's award of prejudgment interest. Whether a party is entitled to prejudgment interest is a question of law which this court reviews without deference to the trial court. *See* ***Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.***, 176 Wis. 2d 740, 776, 501 N.W.2d 788 (1993). Prejudgment interest may be awarded when damages are liquidated or determinable by a reasonably certain standard of measurement. *See* ***id.*** at 776-77.

¶27 Cape's damages were readily determinable in advance of trial. The unpaid balance of the contract and the value of the haul road extra were known before trial and were undisputed by the appellants. The value of the extra topsoil and clay work was determinable by the contractual unit prices and was delineated

[6] In their reply brief, the owners state that although they may have stipulated that the amounts claimed for the unpaid balance on the contract and the haul road were accurate, they did not stipulate that they were liable for them in contract. However, they do not dispute Cape's claim that they never raised this issue in the trial court. Moreover, they do not argue that the sums could not be awarded against them under Cape's quantum meruit and unjust enrichment claims.

in a change request submitted by Cape in April 1994 and its subsequent payment applications, as were the other extras for which Cape was awarded damages.

¶28 The appellants also argue that the existence of multiple defendants prevented the award of prejudgment interest. They rely on the rule that courts do not grant prejudgment interest when, because of the existence of multiple defendants, no single defendant knows prior to trial the precise amount of his or her ultimate liability. *See* ***id.*** at 777. The basis for the rule is that damages are not determinable until fault is apportioned. *See* ***id.*** at 779.

¶29 In this case, each of the defendants from whom prejudgment interest was awarded was liable for the same sum, regardless of the theory involved. The fact that there were multiple defendants therefore did not prevent them from ascertaining their liability ahead of time, and prejudgment interest was properly awarded.

¶30 The final argument of Schwendener and the owners is that Cape did not serve separate offers of settlement on each defendant, and the trial court therefore erred in awarding double taxable costs and interest pursuant to WIS. STAT. § 807.01(3) and (4). Again, we disagree. Initially, we note that a separate offer was served on Schwendener. Moreover, separate offers of settlement are required when a plaintiff is suing multiple defendants on multiple theories, of which at least one involves several liability. *See* ***Smith v. Keller***, 151 Wis. 2d 264, 276, 444 N.W.2d 396 (Ct. App. 1989). While Cape set forth multiple theories of liability as to the owners, their liability to Cape arose from ownership interests and was alleged to be joint. They could evaluate the offer accordingly. We therefore discern no basis to disturb this portion of the trial court's judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.