

IN THE COURT OF APPEALS 03/12/96
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-00418 COA

RONNIE O. RICHARDSON

APPELLANT

v.

LARRY STOKES

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: COUNTY COURT JUDGE BEVERLY MITCHELL FRANKLIN

COURT FROM WHICH APPEALED: HON. JOHN M. MONTGOMERY

LOWNDES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

J. JOSHUA STEVENS, JR.

ATTORNEY FOR APPELLEE:

JIM FRAISER

NATURE OF THE CASE: CONTRACT

TRIAL COURT DISPOSITION: JUDGMENT IN THE AMOUNT OF \$7,518.11 IN FAVOR OF
LARRY STOKES

BEFORE THOMAS, P.J., COLEMAN, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

This case involves a contract dispute between the owner of land being developed for a subdivision (Richardson) and a contractor (Stokes) engaged to construct the access road to the various lots being developed. A portion of the access road was over an already-existing county road; however, Stokes' duties involved upgrading that portion to certain specified standards. On a diagram of the development layout introduced into evidence, the roadway was shown and contained three points marked A, B, and C. The portion from point A to point B was intended to indicate that portion of the roadway which encompassed the existing county road, and the portion from point B to point C was over previously undeveloped land. It was envisioned by the contracting parties that construction of the portion of the roadway from B to C involved more effort. The contract specified a \$9.00 per linear foot price for the portion from B to C, whereas the work in improving and upgrading the existing county road from point A to point B was contracted at \$8.00 per foot. Stokes agreed, under the contract, to "furnish all materials . . . necessary to complete the said project . . ." However, that general provision was amended by an addendum to the contract that stated that "[a]ny fill material required for road construction will be hauled in at \$2.50 per yard, placed and compacted. Fill material shall not exceed a total of \$1,000.00." The contract further specified that Stokes would complete the job within twenty working days after receiving a written work order. The contract was on a form provided by the property owner's supervising engineer and contained a blank for the amount of liquidated damages agreed upon for each extra working day required for completion of the work. The word "None" was inserted in this blank.

Stokes first moved equipment to the job site on August 25, 1988, and actually commenced work on the job on August 27. On or about October 15, Richardson delivered written notice to Stokes that, according to his calculations, thirty-three working days had passed since the contract had been entered into, and that, if the job was not completed within five additional working days, Richardson was reserving the right to proceed in some other manner to obtain completion of the work. Diaries introduced on behalf of Stokes indicated that he continued to work on the Richardson job on October 17, 20, and 25. However, by letter dated November 3, 1988, Richardson formally notified Stokes that he was canceling the contract for failure to perform. Richardson then proceeded to contract with another party for the completion of the roadway.

I.

Discussion

There is a dispute as to whether Richardson ever issued a work order to Stokes. The trial judge found, as a matter of fact, that no such order was issued. We have concluded that this is irrelevant to the proper result to be reached in this case and will not, therefore, consider this issue further.

We are persuaded by argument of Stokes' counsel that, in the sense that Stokes contracted at his peril to complete the contract within twenty working days or be in such breach of the contract that immediate termination was warranted, time was not of the essence in this contract. Even were we to

accept the proposition that time was of the essence, as advanced by Richardson's counsel, there is simply insufficient evidence in the record to compute the number of actual working days, within the commonly accepted meaning of that phrase, that transpired either from the time Richardson claims to have issued a work order or from the time Stokes admitted he started work on the project. It takes something more than a calendar to compute working days for construction projects such as this. Matters such as the weather, job site conditions, and unavoidable interruptions play an integral part in making these computations. This conclusion is bolstered by the fact that the contract neither specified any liquidated damages for failure to complete within the twenty allotted days, nor did it provide any specific alternative remedy to Richardson upon Stokes' failure to timely complete the project. In addition, it is beyond dispute based upon the record that Richardson, at times by silent acquiescence and at times by admitted oral extensions of additional time to Stokes, waived any right to rely upon a strict enforcement of the twenty-working-day completion provision. Therefore, we conclude that Richardson's reliance upon the expiration of twenty working days on the calendar from any particular date as ground to escape any liability under the contract is misplaced.

Nevertheless, it is clear from the terms of the contract and the evidence produced at trial that, in a more general sense, the time of completion of the roadway was a significant factor in the dealings of the parties. Richardson testified that his aim was to attempt to complete the road project before the onset of winter weather, which generally either severely impacts or entirely halts road construction projects for extended periods of time. On the whole, then, we conclude that a proper interpretation of the contract would be that Stokes had an obligation to proceed with some reasonable measure of diligence to complete the contract within or, at least substantially within, the general time frame of four workweeks of suitable weather. *See, e.g., Wright v. Stevens*, 445 So. 2d 791, 794 (Miss. 1984). Therefore, the proper issue that should have been decided by the trial court was whether, at the time Richardson issued his cancellation notice, Stokes had violated the provisions implicit in the contract to proceed with reasonable diligence to perform the contract in a timely manner. Simply to determine that time was not of the essence in the sense of strict enforcement of the twenty-working-day limit is not the equivalent of granting to Stokes the privilege of completing the contract at his leisure. The twenty-day limit, in this context, is helpful in determining what degree of diligence was required, but it was not an absolute rule upon which breach could be measured.

In that light, we conclude that, absent some affirmative justification, Stokes's failure to complete a twenty-working-day construction contract more than forty-one working days after entering into the contract and more than thirty-one working days after moving equipment to the job site in anticipation of performance, would constitute a breach of Stokes's duty to perform his obligations under the contract with reasonable diligence. In such case, Richardson would have been within his rights in terminating the contract for failure to perform, and the termination notice would not have constituted a contractual breach. Conversely, if Stokes, despite being ready and willing to perform, had been prevented from performing for such an extended period by circumstances beyond his control, including such factors as inclement weather or interference from Richardson in performing the contract, then his failure to complete the contract in that time would not be a breach by Stokes. In such case, though Richardson certainly had the unqualified right to order Stokes to cease performing under the contract, such an order would constitute a contractual breach entitling Stokes to damages for the breach.

It is in addressing these issues that there is substantial conflict in the positions asserted by the two

parties at trial. Richardson basically asserts that Stokes was simply not devoting adequate resources to the project and that he was, instead, involved in completing various other unrelated projects. Stokes claims that he was prevented from completion for two reasons, both of which are attributable solely to Richardson: (a) that Stokes required additional fill dirt to complete the road base for the point B to point C portion, and that Richardson refused Stokes authority to obtain such dirt, thereby stymying completion of that portion; and (b) that Richardson ordered him not to work on the point A to point B section because he did not have the necessary easements from adjoining property owners to complete the widening and other improvements contemplated for this already-existing county roadway.

The trial court essentially found in Richardson's favor on both of these issues of contested fact. It awarded Stokes compensation for the value of all work done by him and additional compensation for his lost profits on the contract. For reasons that appear in more detail below, we conclude that these findings of fact were manifestly in error, and that the trial court's judgment must be reversed and remanded.

II.

Scope of Review

We note that this is the second review of this record on appeal. The Circuit Court of Lowndes County, upon consideration of the matter on appeal from the County Court of Lowndes County pursuant to section 11-51-79 of the Mississippi Code of 1972, affirmed the judgment of the county court. Our task is to review the record anew, applying the same standard as that applicable to the circuit court acting as an intermediate appellate court. *W.H. Hopper & Assocs, Inc. v. De Soto County*, 475 So. 2d 1149, 1152 (Miss. 1985).

This was a bench trial with the trial court acting as fact-finder. In that circumstance, we are prevented by established precedent from disturbing the findings of fact of the trial court unless we determine that it was manifestly in error. *Patel v. Telerent Leasing Corp.*, 574 So. 2d 3, 6 (Miss. 1990). As to errors of law committed by the trial court, our standard of review is *de novo*. *UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc.*, 525 So. 2d 746, 754 (Miss. 1987).

III.

The Issue of Procurement of Additional Fill Dirt

In order to properly establish the roadbed, especially considering that a portion of it went through a low-lying area, it became necessary to build up the bed above the level of the adjoining terrain. A portion of the necessary fill dirt to accomplish this purpose was obtained, as is customary, from dirt produced by reshaping the land for the roadway and by dirt excavated when the roadside drainage ditches were cut. Nevertheless, all parties agree that these sources did not provide adequate fill material to properly construct the new roadbed along its entire length from Point B to Point C.

It is also undisputed that the parties, at the time of contracting, contemplated that additional fill material might be required, since the addendum to the contract stated as follows:

Any fill material required for road construction will be hauled in at \$2.50 per yard, placed and compacted. Fill material shall not exceed a total of \$1,000.00.

Stokes attempted to prove at trial that the real meaning of this provision, as understood by the parties, was that there was a specific location near the construction site owned by Richardson that was available for excavation to obtain the fill material, and that the agreement was that Stokes would be paid at the contract rate of \$2.50 per yard for relocating this material. He further asserted at trial that, at the time it became evident that the extra fill material would unquestionably be necessary, Richardson refused him permission to obtain the dirt from the agreed-upon location because he did not have the authority of his "investors" to authorize the expenditure of any part of the extra \$1,000.00. Stokes asserts on this appeal that, under those circumstances, he was authorized to suspend work until such time as Richardson provided him a written change order confirming that the \$1,000.00 (or so much thereof as was necessary) would, in fact, be paid. Richardson denied that the written provision contemplated such a situation. Proof was offered by Richardson that fill dirt was available for purchase in the area at \$.25 per yard, and that the primary purpose of the provision was simply to provide an agreed-upon extra compensation to Stokes in the event he had to obtain fill material elsewhere, a contingency not altogether certain at the time of contracting, but to also provide an upper limit protection to Richardson to prevent unlimited importation of fill material, thereby driving up total construction costs.

The trial court found, as a matter of fact, that the contract was ambiguous by comparing the provision of the contract document itself which provided that Stokes would "furnish all materials" with the addendum paragraph cited above. The trial judge then, in reliance upon established case law, invoked her authority to consider parole or extrinsic evidence to resolve this "ambiguity," and resolved the ambiguity by determining that it was, in fact, Richardson's responsibility to furnish the fill dirt from his own property. Her opinion based this conclusion upon Stokes's testimony and upon a finding that:

Richardson, during direct examination by Stokes' counsel, admitted that Stokes ran out of dirt and that he told Stokes that he could get extra dirt from some of his other property. However, Richardson further on in his testimony admitted he refused to provide Stokes with any more dirt asserting that under the contract Stokes was responsible for providing all the dirt.

We conclude this finding to be manifestly in error, and contrary to the weight of the evidence, in that it appears to be a misinterpretation of the pertinent portion of Richardson's testimony. Richardson was called as an adverse witness by Stokes as the first witness at trial. During direct examination by Stokes' counsel, Richardson testified that, during the clearing work that necessarily preceded the establishment of the road base, Stokes was "having trouble getting his trucks stuck and getting his dozers stuck and--uh--needed some more dirt." Richardson was specifically asked if he recalled

Stokes asking for "any more dirt to do sub-base work around October twentieth or so." Richardson's response was that Stokes was not doing base preparation work at that time, but was still involved in clearing work, and that he offered, at that time, to permit Stokes to obtain some dirt from another area of the property to establish a turn-around area for his equipment. At that point, the following exchange took place:

Q. Would you not say under the contract it was your obligation to provide sufficient dirt to do the work?

A. No, sir, under the contract, it . . . said that he would furnish all materials, all equipment and I questioned him that I did not want any extra charges or random invoicing and he, at that point, put a max that if he had to pull in any dirt, then he would put a limit on it which was in the contract.

It was only in the context of the preceding statement that the following exchange immediately followed:

Q. So are you saying that based upon your view of the contract that you refused to provide him with any more dirt?

A. That's correct.

We find that it was manifest error to conclude that this offer by Richardson to provide access to a certain portion of the property to obtain enough dirt to build a turn-around for equipment was the equivalent of "telling Stokes that he could get extra dirt from some of his other property" within the context of providing access for up to four hundred yards of fill material for preparation of the entire point B to point C roadbed. (\$2.50 per yard times four hundred yards equals the \$1,000 maximum specified in the contract.)

The only possible ambiguity arising between the provisions of the contract itself and the addendum, at least insofar as the first four hundred yards of fill material was concerned, was whether Stokes would have to absorb the cost under the provision requiring him to "furnish all material" or whether he would be entitled to some additional compensation for furnishing the first four hundred yards of fill material, if it became necessary to obtain it. That limited ambiguity, if it can be called one, certainly does not permit a complete disregard of the plain language of the contract to substantially alter the obligations of the parties based upon one party's self-serving testimony and a misconstruction of the testimony of the other party.

The conclusion that Stokes' failure to timely perform based upon Richardson's failure to provide fill

material is not warranted on the record of this case.

IV.

Non-Performance of Improvements to Existing County Road

Stokes claims that he was ordered by Richardson to refrain from doing any work on the contracted-for improvements to the existing county road (point A to point B) for the reason that Richardson did not have the necessary permission or easements from the adjoining property owners. Stokes offered no proof on this point other than his own testimony and that of his former wife, who had been associated with him in the business at the relevant times. Her testimony is confusing on this point, in that she interjects some testimony concerning a possible change in the route of the road as being a reason for not proceeding on this portion.

Richardson denied the necessity of obtaining any additional permission before commencing work on that portion of the project. The evidence is uncontradicted that the contractor hired to complete the job after Stokes was removed completed the job along its entire length without any objection or hindrance from any third-party property owners, nor was there any evidence submitted that Richardson had resolved any alleged difficulties with any property owners after Stokes was removed from the job.

The only testimony from Richardson touching on this subject was his affirmative testimony that he urgently needed Stokes to complete the point B to point C stretch before bad weather so that he could use it to show the property to prospective purchasers during the approaching winter months. He indicated that the point A to point B stretch was simply not that crucial since it was already a passable county road that could be used for access to the property whether or not the contemplated improvements had been accomplished.

In concluding that "the more credible evidence indicated, and the Court so finds, that Richardson refused to let Stokes work on Section A to B," the trial court relied upon two premises: (a) that "the undisputed testimony reveals that Section B to C was the most important section . . ." and (b) "Richardson was negotiating with Burns Dirt Construction Company to take over construction of the road at least six weeks before Richardson terminated Stokes." Even assuming the absolute truth of these two propositions, they simply do not serve as evidence, credible or otherwise, of Richardson's improper refusal to permit Stokes to proceed to accomplish the purposes of the contract. In fact, the contrary seems to be most clearly demonstrated by the fact that on October 15, 1988, Richardson delivered a letter to Stokes that in effect constituted a fair warning that he must proceed with diligence to complete the contract and demanded completion within five working days, together with

the uncontradicted proof that Richardson, even after the expiration of that period, continued to forbear termination for an additional period. Noticeably absent from the proof is any evidence that, upon receipt of the five-day demand letter, Stokes proceeded in any way to raise with Richardson the point that he was stymied on both phases of the project by the actions of Richardson, and that a demand letter in those circumstances was ludicrous unless Richardson was prepared to remove these impediments.

We, therefore, conclude that the trial court was also manifestly in error in concluding that Richardson prevented Stokes from performing his contractual duties on the portion of the road denoted as point A to point B.

For the reasons given, we determine that the judgment of the trial court must be reversed. The court was manifestly in error in determining that Richardson breached the contract by his November 3, 1988, termination letter to Stokes. The evidence is substantially in support of the proposition that Stokes was, without justification, not pursuing his obligations under the contract with the degree of diligence that Richardson was entitled to expect, and that, in those circumstances, especially after extending to Stokes a reasonable opportunity to step up his level of performance, Richardson was within his rights in terminating the contract.

This Court does not overlook the fact, however, that, prior to termination, Stokes had performed services that were beneficial to Richardson in completing the project. Textbook contract law suggests in this situation that Stokes is entitled to compensation for those services performed pursuant to the contract diminished by such damage as Richardson may have suffered as being proximately caused by Stokes's lack of diligence. This principle has been generally defined as "restitution." In the *Restatement (Second) of Contracts*, we find the following:

§ 370. Requirement That Benefit Be Conferred.

A party is entitled to restitution under the rules stated in this Restatement only to the extent that he has conferred a benefit on the other party by way of part performance or reliance.

....

§ 374. Restitution in Favor of Party in Breach.

(1) Subject to the rule stated in Subsection (2) [which has no application to this case], if a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party's breach, the party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance in

excess of the loss he has caused by his own breach.

Restatement (Second) of Contracts, §§ 370, 374 (1981).

Professor Williston, in his treatise on contracts, states that "the weight of authority strongly supports the statement that a builder, whose breach of contract is merely negligent, can recover the value of his work less the damages caused by his default." 12 Samuel Williston, *Williston on Contracts* § 1475 (3d. ed. 1970).

Professor Corbin states the rule as follows:

A building contractor who has failed in some essential respect to complete the work as agreed cannot maintain an action against the other party for refusing payment; the latter has not committed a breach of his contractual duty because a condition precedent thereto has not occurred. But if the benefit conferred upon the defendant by the plaintiff's part performance is greater than the injury caused by the breach, the plaintiff has in great numbers of cases been given judgment for quantum meruit, this rule being applied in all kinds of cases involving construction work

5A Arthur Linton Corbin, *Corbin on Contracts* § 1125 (1964).

While some of the proof introduced at the trial bore on these issues, certain other elements of damages allowed, such as lost profits, were improper. Further, since the trial court incorrectly concluded that Richardson improperly breached the contract, it failed to consider any diminution in the value of the work actually performed by Stokes brought on by his untimely performance and the necessity of Richardson having to contract elsewhere to complete the project.

In view of this state of the record, we find it appropriate to reverse the present judgment and remand for a redetermination of damages, with damages being limited solely to the compensation due to Stokes for work actually performed in furtherance of the contract, but as diminished by such damages as Richardson can properly demonstrate he suffered by virtue of Stokes' untimely performance. Of course, the amount shall also be diminished by the amount that Stokes has already received as partial payment under the contract.

Under the direction of section 11-51-79 of the Mississippi Code of 1972, we determine that the rehearing on the matter of damages must be conducted by the Circuit Court of Lowndes County, and we remand accordingly. Miss. Code Ann. § 11-51-79 (1972); see *McIntosh v. Munson Road Mach. Co.*, 167 Miss. 546, 145 So. 731, 735 (1933).

THE JUDGMENT OF THE CIRCUIT COURT OF LOWNDES COUNTY IS REVERSED AND THIS CAUSE IS REMANDED TO THE CIRCUIT COURT OF LOWNDES COUNTY FOR A NEW TRIAL AS TO DAMAGES ONLY, SUCH DAMAGES

TO BE ASSESSED CONSISTENT WITH THIS OPINION. COSTS OF THE APPEAL ARE ASSESSED TO THE APPELLEE.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE AND SOUTHWICK, JJ., CONCUR.

FRAISER, C.J., NOT PARTICIPATING.