

STATE OF MICHIGAN
COURT OF APPEALS

GREG CONSTRUCTION CO.,
a Michigan corporation,

Plaintiff-Appellee,

v

MITCHELL BUICK SALES, INC.,
a Michigan corporation,

Defendant-Appellant.

UNPUBLISHED
September 10, 1996

No. 177632
LC No. 91000945 CK

Before: Marilyn Kelly, P.J., and Gribbs and W.E. Collette,* JJ.

PER CURIAM.

Defendant, Mitchell Buick Sales, Inc., appeals as of right from a judgment in favor of plaintiff, Greg Construction Co. The trial judge affirmed an arbitration award to plaintiff in the amount of \$44,828 plus interest.

Defendant argues that the award should be vacated, because plaintiff assumed the risk that Clinton Township would not approve the project as originally planned. It asserts that it should be completely excused from performance under the contract as performance became impossible. It claims that restitution is not an appropriate remedy. Finally, it argues that the judge erred in awarding statutory interest. We affirm.

I

Plaintiff contracted to replace a small building on defendant's used car lot, upgrade lighting and electrical systems and patch and resurface asphalt. Plaintiff ordered \$39,998.40 in equipment that was delivered to the job site. To keep costs down, plaintiff hired an engineer who attempted to obtain variances from Clinton Township. Those requests were denied. After further site plan review, the Township approved a plan containing additional on and off site requirements. Plaintiff then submitted a revised contract to defendant that increased the total contract price from \$162,000, with \$35,000 in

*Circuit judge, sitting on the Court of Appeals by assignment.

variables, to \$283,818.24. Defendant would not accept the new price and refused to pay plaintiff's invoice. Plaintiff recorded two claims of lien totaling \$55,109.50.

Plaintiff commenced this action to foreclose on its construction lien and recover for breach of contract. The parties agreed to binding arbitration. The arbitrator determined that the parties had not anticipated the additional on and off site improvements. Therefore, performance was found impracticable. He found that performance under the contract terminated at the point when the Township refused requests for variances from the approved site plan. He awarded \$44,828 to plaintiff for the cost of the electrical equipment, a permit and engineering plans. Defendant received the equipment and engineering plans. The arbitrator also awarded statutory interest to plaintiff pursuant to MCL 600.6013; MSA 27A.6013. The trial judge affirmed the decision.

II

We find that the trial judge did not err in declining to vacate the arbitrator's award. An arbitration award must be vacated where an arbitrator exceeds his or her powers. MCR 3.602(J)(1)(c). Arbitrators exceed their powers when they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law. *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982).

Defendant claims that plaintiff assumed the risk of failure to obtain Township approval for the project. We note that defendant did not raise the issue of assumption of risk until its motion for reconsideration in the trial court. Instead, throughout the proceedings, it took the position that it was excused from performing the contract because of impracticability. To allow a party to change its defense theory after completion of arbitration would be contrary to public policy favoring arbitration to avoid protracted litigation. *NuVision v Dunscombe*, 163 Mich App 674, 684; 415 NW2d 234 (1987). Accordingly, we decline to address the merits of this issue.

Defendant argues, also, that it is insulated from damages because performance of the contract had become impossible. Assuming performance was impracticable, the arbitrator properly awarded a recovery to plaintiff for the portion of the contract it had already performed. *Bissell v L W Edison Co*, 9 Mich App 276, 286; 156 NW2d 623 (1967).

III

Next, defendant argues that restitution was an improper remedy. Restitution is awarded under an equitable theory of implied contract or quasi contract to prevent unjust enrichment at the expense of another party. *Hofmann v Auto Club Ins Ass'n*, 162 Mich App 424, 429; 413 NW2d 455 (1987). It is an appropriate remedy in cases of impracticability and frustration of purpose. 3 Restatement Contract 2d, 377 (1979). The essential element is a receipt of a benefit under circumstances where it is inequitable to permit the party to retain it. *In re McCallum Estate*, 153 Mich App 328, 335; 395 NW2d 258 (1986).

Here, the expenditures on engineering and architectural services were made in preparation for the construction work. They may be characterized as conferring a benefit on defendant because they are tailored to its property and can be used at a later date. However, the electrical materials were purchased by plaintiff in order to be able to start construction when the permits were obtained. They do not confer any benefit on defendant. As such, the arbitrator should not have forced defendant to in effect purchase those items.

Even though the remedy afforded here could not be granted by a court of law or equity we will not reverse the decision of the arbitrator. MCL 3.602(J)(1) states that the fact that a court could not grant the relief is not a ground for vacating the arbitrator's award. Therefore, even though the form of relief is contrary to the principles of restitution, we will not vacate the arbitrator's award. MCR 3.602(J)(1).

IV

Finally, we find that the award of statutory prejudgment interest was proper. Where parties file an action in court and later stipulate to arbitrate their dispute, statutory interest may be awarded on the judgment from the date of the filing of the complaint until the judgment is satisfied. MCL 600.6013; MSA 27A.6013; *Old Orchard By The Bay Associates v Hamilton Mutual Ins Co*, 434 Mich 244; 454 NW2d 73 (1990), overruled in part on other grounds *Holloway Construction Co v Oakland County Bd of County Road Comm'rs*, 450 Mich 608; 543 NW2d 923 (1996).

Defendant argues that *Old Orchard* is inapplicable because the arbitrator awarded equitable relief. MCL 600.6013(1); MSA 27A.6013(1) provides that interest is awardable on a money judgment recoverable in a civil action. A money judgment is one which adjudges the payment of a sum of money as distinguished from directing an act to be done. *Dep't of Treasury v Central Wayne Co Sanitation Authority*, 186 Mich App 58, 61; 463 NW2d 120 (1990).

Here, even if the remedy is properly characterized as equitable, the arbitration resulted in a money judgment. Therefore, the judge did not err in awarding interest on the judgment.

Affirmed.

/s/ Marilyn Kelly
/s/ Roman S. Gribbs
/s/ William E. Collette