

STATE OF MICHIGAN
COURT OF APPEALS

MONTE CARLO CONSTRUCTION, INC.
and ANTONIO EVANGELISTA, INC.,

UNPUBLISHED
March 4, 1997

Plaintiffs, Counterdefendants,
Appellants, Cross Appellees,

v

No. 172298
Wayne Circuit
LC No. 92220247 CK

CITY OF LINCOLN PARK,
L.N. HAYDEN, INC., a Michigan
corporation, and AL BENKER, jointly
and severally,

Defendants, Counterplaintiffs,
Appellees, Cross Appellants.

Before: Gribbs, P.J., and Marilyn Kelly and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a grant of summary disposition to defendants pursuant to MCR 2.116(C)(5), (C)(7) and (C)(10), in this action arising out of a public project construction contract.

They argue that defendant Lincoln Park is not immune from liability for plaintiffs' claims of gross negligence, fraud and negligent misrepresentation. They assert that they stated a valid cause of action for ultra vires activity as a result of a conflict of interest between defendant Lincoln Park and defendants L. N. Hayden, Inc. and Al Benker. They claim that a signed release does not bar their claims. They argue that the trial judge had jurisdiction over a claim for interest and that it was improperly submitted to an arbitrator. Finally, they assert that L. N. Hayden, Inc. and Benker were improperly granted summary disposition.

On cross-appeal, Lincoln Park argues that the trial judge improperly dismissed its counterclaim. It asserts that the language of the release is not mutually binding so as to release its claims. We affirm in part, reverse in part and remand.

I

Plaintiffs, joint venturers, submitted the lowest per-unit bid on a water main construction job for Lincoln Park and were awarded the contract. Some time after construction began, they realized that the project was smaller than defendants had led them to believe. As a result, plaintiffs' per-unit bid was too low, as they were unable to take advantage of the economies that a larger project provide.

Plaintiffs filed a sixteen count complaint against Lincoln Park and engineers L.N. Hayden, Inc. and Al Benker. Lincoln Park filed a counterclaim for failure to complete the project on time and for false statements made on the contractor's declaration. The trial court dismissed counts II through XIV of plaintiffs' complaint pursuant to MCR 2.116(C)(7), because plaintiffs signed a release of claims. It also dismissed counts VIII, XI and XII based on governmental immunity and counts III and XIII, because plaintiff did not establish that defendant's actions were ultra vires or lacking a public purpose. It dismissed Count XV for lack of jurisdiction. MCR 2.116(C)(4)¹. It also dismissed Lincoln Park's counterclaim.²

II

Plaintiffs argue that they did not release all claims by signing the release of claims. As with other contracts, the validity of a release turns on the intent of the parties. *Paterek v 6600 LTD*, 186 Mich App 445, 449; 465 NW2d 342 (1990). Where the language of a release provision is unambiguous, its scope is governed by the intent of the parties as expressed in the release. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994).

Here, the release stated:

The undersigned, for a valuable consideration, the receipt of which is hereby acknowledged, does further hereby waive, release and relinquish any and all claims or right of lien which the undersigned now has or may hereafter acquire upon the subject premises for labor and materials used in accomplishing said project owned by the Owner.

We find that the release is ambiguous. It is unclear from the release whether the parties intended to release all claims or only those relating to labor and materials used in the project. This release is further complicated by the fact that the parties agree that liens cannot be placed on public projects. Therefore, part of the release is devoid of any meaning. Where a contract is ambiguous, it is construed against the drafter which in this case is Lincoln Park. *Lichnovsky v Ziebart International Corp*, 414 Mich 228, 239; 324 NW2d 732 (1982). Therefore, the trial court erred in ruling that the release encompassed those claims not involving labor and materials used in the project.³

III

Even though plaintiffs' claims were improperly dismissed by the trial judge on the basis of the release, the judge properly dismissed counts VIII, XI and XII against Lincoln Park based on

governmental immunity. Counts VIII, XI and XII alleged gross negligence, fraud and negligent misrepresentation. All three counts alleged that the plans and specifications upon which plaintiffs formulated their low bids were false. Plaintiffs alleged that they relied to their detriment on those misrepresentations and suffered damages as a result.

Plaintiffs cite *Kensington Corp v Dept' of State Highways*⁴ for the proposition that factual inaccuracies in the governmental entity's plans and specifications for a proposed project may give rise to a cause of action for misrepresentation. A more recent case involving the same principle is *Midwest Bridge Co v Dep't of Transportation*. 134 Mich App 611; 350 NW2d 913 (1984). Both rely on *Hersey Gravel Co v State Hwy Dep't*,⁵ which explains that specifications and plans upon which bids are solicited are in the nature of a warranty. These cases do not support plaintiffs' argument that governmental immunity does not apply to tort actions if they arise from contractual contexts.

MCL 691.1407; MSA 3.996(107) provides in part:

(1) Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function.

Plaintiffs have not provided evidence that an exception in the act applies to their situation. They have failed to allege facts to support their argument that Lincoln Park was engaged in a proprietary function. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 608; 528 NW2d 835 (1995). There was no evidence that the primary purpose of the activity was to produce a pecuniary profit and that the activity was not normally supported by taxes or fees. *Id.* Therefore, the trial judge properly dismissed counts VIII, XI and XII based on governmental immunity.

IV

The trial court properly dismissed counts III and XIII, because plaintiffs failed to establish that Lincoln Park's actions were ultra vires or lacking a public purpose. Plaintiffs alleged in count III that Lincoln Park failed to follow city charter mandated procedures. Therefore, its actions were ultra vires. In count XIII, plaintiffs alleged that the contract was outside Lincoln Park's authority and did not serve a public purpose.

Ultra vires activities are those which are beyond the legal power or authority of a statute. See, e.g., *Berlin v Superintendent of Public Instruction*, 181 Mich App 154, 161; 448 NW2d 764 (1989). Generally, a lack of action is not sufficient to elevate even intentional omissions of a duty to an ultra vires intentional tort. The commission of an act, rather than an omission, is required. *Epperson v Crawford County Road Commission*, 196 Mich App 164, 167; 492 NW2d 455 (1992). Because omissions are the subject of plaintiffs' complaint, they do not rise to the level of ultra vires acts. The trial court properly dismissed count III.

Moreover, the contract itself was not outside the authority of Lincoln Park, and its purpose, to maintain and/or improve the water mains, is a proper, authorized purpose. Therefore, count XIII was properly dismissed as well.

V

Next, plaintiffs argue that the judge erred in dismissing their claim for additional interest due on the retainage based on lack of jurisdiction. The statutes regarding public agency construction contracts allow for funds to be withheld from progress payments due the contractor to guarantee proper performance of the contract. MCL 125.1561 *et seq.*; MSA 5.2949(101) *et seq.* MCL 125.1563(1); MSA 5.2949(103) provides in part:

The retained funds . . . shall not be commingled with other funds of the public agency and shall be deposited in an interest bearing account in a regulated financial institution in this state wherein all such retained funds are kept by the public agency which shall account for both retainage and interest on each construction contract separately. . . .

Plaintiffs alleged that Lincoln Park failed to comply with this statutory mandate, because the retained funds were not deposited in a separate interest-bearing account. Plaintiffs claim they were entitled to additional interest on the retainage.

MCL 125.1564; MSA 5.2949 (104), provides:

(1) The construction contract shall contain an agreement to submit those matters described in subsection (3) to the decision of an agent at the option of the public agency.

* * *

(4) This dispute resolution process shall be used only for the purpose of determining the rights of the parties to retain funds and interest earned on retained funds and is not intended to alter, abrogate, or limit any rights with respect to remedies that are available to enforce or compel performance of the terms of the contract by either party.

The dispute in the instant case is not of the type that falls within the parameters of the statute. Therefore, plaintiffs' proper forum is the circuit court. See *Spaccarotella & Fontana Cement Contractors, Inc v Detroit*, 184 Mich App 85; 457 NW2d 100 (1990). The trial court erred in ruling that it has only appellate jurisdiction once an arbitration award is entered.

VI

Finally, we must determine whether the trial court properly dismissed counts VIII, XI and XII against defendants L. N. Hayden, Inc. and Al Benker based on governmental immunity.

We conclude that a question of fact exists as to whether L. N. Hayden, Inc. and Benker could qualify as the city engineer and thus become city employees entitled to governmental immunity. MCL 691.1407; MSA 3.996(107). According to the Lincoln Park city charter, the city engineer receives a salary and must be a surveyor. Moreover, the language of the charter suggests that the city engineer must be a person, rather than a corporation, and must have an office provided by the city. The city can hire persons other than the city engineer to design improvements for Lincoln Park. Therefore, the language of the charter suggests that L. N. Hayden, Inc. and Benker were not properly the city engineers. Because there is a factual issue in dispute, L. N. Hayden, Inc. and Benker were not entitled to summary disposition. *Paterek, supra*.

Only if the trier of fact determines that L. N. Hayden, Inc. and Benker were employees of the city would they be entitled to governmental immunity respecting plaintiffs' tort claims. Governmental immunity from tort actions extends to governmental employees while acting within the scope of their authority. MCL 691.1407; MSA 3.996(107).

VII

On cross-appeal, Lincoln Park argues that the judge erred in determining that its claims should be dismissed based on mutuality of the release. We agree. The release evinces no intent to be mutually binding on plaintiffs and Lincoln Park. *Gramer, supra*. The counterclaim was erroneously dismissed.

In sum, we reverse the grant of summary disposition and reinstate counts IV, V, VI, VII, XIV and XV against defendant Lincoln Park. We reverse the grant of summary disposition and reinstate counts VIII through XII with respect to defendants L. N. Hayden, Inc. and Al Benker. We reverse the grant of summary disposition with respect to the counterclaim.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ Roman S. Gribbs

/s/ Marilyn Kelly

¹ Plaintiffs stipulated to dismiss count I which was based on the Freedom of Information Act.

² Count XVI alleged that the waivers plaintiffs signed were unenforceable. It does not state a cause of action against defendant.

³ Because we find the release to be ambiguous, we decline to address plaintiffs' additional argument that the release is void for lack of consideration and because of economic duress.

⁴ 74 Mich App 417, 424; 253 NW2d 781 (1977).

⁵ 305 Mich 333; 9 NW2d 567 (1943).