STATE OF MICHIGAN

COURT OF APPEALS

SUNSET EXCAVATING, INC.,

Plaintiff-Appellant,

v

CITY OF NOVI,

Defendant-Appellee.

UNPUBLISHED
March 7, 1997

No. 187390
Oakland Circuit Court
LC No. 94-481389 CK

Before: Hoekstra, P.J., and Marilyn Kelly and J.B. Sullivan,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an Oakland Circuit Court order granting summary disposition in favor of defendant in this construction contract action. We affirm.

Defendant set forth an advertisement seeking sealed bids from companies to install a water main and sanitary sewer extension for a project located in Novi Township. The advertisement contained specifications for the project and included soil boring reports prepared by defendant. Based in part upon the soil boring reports furnished by defendant, plaintiff submitted a bid which was accepted by defendant. Toward the end of completing the project, plaintiff encountered unexpected groundwater due to unforeseen changes in the ground subsoil which forced plaintiff to expend an additional $114,000 to complete the project. Plaintiff brought a claim against defendant seeking payment for the additional work that the changed conditions caused. Defendant brought a motion for summary disposition arguing that the contract contained a disclaimer regarding the soil boring reports which prevents plaintiff from recovering the additional costs. The trial court granted defendant's motion.

On appeal, plaintiff first contends that the trial court erred in determining that the contract disclaimer precluded plaintiff's claim. We disagree. Under Michigan law, where there is no ambiguity courts will enforce the terms of a contract as written. *Arco Industries Corp v American Motorists Insurance,* 448 Mich 395, 403; 531 NW2d 168 (1995). In *Hersey Gravel Co v State Highway Department*, 305 Mich 333; 9 NW2d 567 (1943), the Michigan Supreme Court dealt with a similar

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

issue. Therein, the Court carved out a narrow exception to general contract principles and determined that the plaintiff had the right to recover additional costs caused by unforeseen soil conditions because the defendant failed to furnish the plaintiff with all of the information in its possession regarding the condition of the soil at issue. The *Hersey C*ourt looked at all of the circumstances, including the defendant's extensive investigation of the area, past experience with the soil conditions, and the fact that the plaintiff did not have sufficient time to investigate the soil conditions, and concluded that the defendant had superior knowledge, which it was required to share with the plaintiff. *Id.* at 340-341.

In the instant case, not only are the disclaimers involved, which preclude additional damages for unforeseen circumstances, much more detailed and all-encompassing than the provision at issue in *Hersey,* but there is also no evidence that defendant had superior knowledge regarding the condition of the soil which it withheld from plaintiff. Although the evidence indicates that plaintiff did not have sufficient time to perform a complete investigation of the soil, unlike in *Hersey,* the undisputed evidence here indicates that plaintiff did not perform any investigation whatsoever. Accordingly, we find no error in the trial court's determination that plaintiff's breach of contract claims were precluded.

Next, plaintiff contends that the trial court improperly failed to consider the prior course of performance between the parties on another similar contract. We disagree. While it is appropriate for a court to look at the course of conduct between parties in order to interpret the intentions of the parties with respect to the terms of an agreement, *The Cooke Contracting Co v Department of State Highways*, 52 Mich App 402, 409-410; 217 NW2d 435 (1974), a prior course of conduct cannot alter the clear and unambiguous language of a contract. *Ditzik v Schaffer Lumber Co*, 139 Mich App 81, 89; 360 NW2d 876 (1984). Here, we conclude that the terms were clear and unambiguous. Moreover, a single occasion of conduct does not comprise a course of performance. See *Id*. Plaintiff's reliance in the instant case on only one prior contract between the parties is not sufficient to constitute a prior course of performance.

Next, plaintiff argues that the trial court erred in determining that the contract was not unconscionable. We disagree. Michigan law has adopted a two-prong test to determine whether a contract is one of adhesion or is unconscionable: "(1) What is the relative bargaining power of the parties, their relative economic strength, the alternative sources of supply, in a word, what are their options?; (2) Is the challenged term substantively reasonable?" *Rehmann, Robson & Co v McMahan*, 187 Mich App 36, 43; 466 NW2d 325 (1991). Here, plaintiff is an excavating contracting company with experience in construction contracts and projects such as the project at issue Additionally, this is not a situation where plaintiff had no other source from which to obtain a product or service. Plaintiff could have chosen not to submit a bid and sought work elsewhere. Therefore, the first prong of the test is not satisfied and as such, the contract was not unconscionable.

Finally, plaintiff contends that it should be able to recover under a theory of quantum meruit. We disagree. Quantum meruit as a theory of recovery is inapplicable where an express contract exists. *Hull and Smith Horse Vans v Carras* 144 Mich App 712, 716; 376 NW2d 392 (1985). Here, an express contract did exist. Moreover, the issue of whether plaintiff should recover the additional

expenses caused by the unforeseen conditions was specifically addressed in the contract disclaimer and throughout the bid process. Consequently, the doctrine of quantum meruit does not apply.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Marilyn Kelly
/s/ Joseph B. Sullivan