STATE OF MICHIGAN

COURT OF APPEALS

PRICE BROTHERS COMPANY,

Plaintiff,

v

D & T PEBBLE CREEK, INC. and D & T EMERALD CREEK, INC.,

Defendants,

and

PACENTRO CONSTRUCTION COMPANY, INC.,

Defendant-Cross-Plaintiff-Appellee/ Cross-Appellant,

v

D & T EMERALD CREEK, INC.,

Cross-Defendant-Appellant/ Cross-Appellee,

and

TOWER DEVELOPMENT COMPANY,

Third-Party Defendant-Appellant,

and

HUNTINGTON BANKS OF MICHIGAN f/k/a MACOMB WARREN BANK,

UNPUBLISHED
September 12, 1997

No. 186574
Macomb Circuit Court
LC No. 90-003744-CK

Cross-Defendant.

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

In this dispute arising from a construction contract, D & T Emerald Creek, Inc. (D & T) and Tower Development Company (Tower) appeal as of right an order granting judgment in favor of Pacentro Construction Company, Inc. (Pacentro) following a bench trial. Pacentro cross appeals the trial court's order denying its motion for mediation sanctions. We affirm.

The parties to this appeal entered into a construction contract pursuant to which Pacentro agreed to perform work related to a condominium project known as Emerald Creek Condominiums (Emerald Creek), that was under development by D & T. Only one portion of the parties' contract is at issue on this appeal. Under the relevant portion of the contract, which the parties and the lower court have termed the "dirt" portion of the agreement, Pacentro agreed to excavate dirt from Emerald Creek in order to create two ponds. Pacentro also agreed to use the excavated dirt to build "haul" roads, and to transport the dirt to a subdivision of single family homes being developed by Tower, where Pacentro would level it. The essential dispute involves the amount of compensation due Pacentro for the work performed pursuant to the dirt portion of the contract.

D & T and Tower first argue that the trial court erred in ruling that the portion of the construction contract from which this dispute arises was not ambiguous. Whether the language of a contract is ambiguous is a question of law, *Port Huron Educ Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996), which we review de novo. *In re Austin Estate*, 218 Mich App 72, 74; 553 NW2d 632 (1996).

The dispute in the present case involves the following contract language:

> Dirt Work A Unit [sic] price of $2.25 cu yd to excavate and haul dirt to Rose Pointe Estates and level and build haul roads with dirt
>
> 35 cu yd trucks = $78.75 per truckload
>
> Truck loads to be confirmed daily.

D & T and Tower argue that this language is ambiguous regarding the price that Pacentro was to be paid for performing the work. At trial, several experts testified that when dirt is excavated from the ground, its volume increases. This concept is referred to as fluffage or swelling. Therefore, if the contract price was based on the volume of the material in its natural state, which is measured in bank yards, it would be lower than if the price was based on the volume of the material after excavation, which is measured in truck yards.

D & T and Tower argue that the contract language regarding price is ambiguous, because it can be interpreted to support either method of measuring the material's volume. We disagree. If the contract only stated that the price was to be based on cubic yards, we might agree with appellants' contention that the contract language was ambiguous. However, the remainder of the contract language can only support one interpretation: that the price was to based on the volume of the material after it was excavated, i.e. $2.25 per cubic truck yard. The contract language "35 cu yd trucks = $78.75 per truckload" contradicts appellants' assertion that the measurement was to be in bank yards. Due to fluffage, truckloads would not accurately reflect the volume of the material in its natural state. Moreover, appellants' interpretation would render the line that states "Truck loads to be confirmed daily" meaningless. If the parties intended to later have the site cross-sectioned to determine the volume of the material in its natural state, there would be no reason to monitor the truck loads. Because the contract "fairly admits of but one interpretation," we agree with the trial court that it cannot be considered ambiguous. *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 706; 532 NW2d 186 (1995).

Next, D & T and Tower argue that the trial court erred in finding that Pacentro is entitled to be compensated for excavating and hauling 93,027 cubic truck yards of dirt. This Court will uphold a trial court's finding of fact unless it is clearly erroneous. MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support the finding, this Court is left with a definite and firm conviction that a mistake has been made. *Berry v State Farm Mutual Ins Co*, 219 Mich App 340, 345; 556 NW2d 207 (1996). Here, we are not left with such a conviction. The trial court's method of converting bank yards to truck yards was supported by the testimony of two experts, Rudolph Gross and Arthur Nichols.[1] Moreover, the challenges raised by D & T and Tower appear to go to the credibility of these witnesses, which is an issue that is properly resolved by the trier of fact. MCR 2.613(C); *Triple E Produce Corp v Mastronardi Produce Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995).

On cross-appeal, Pacentro claims that the trial court erred in denying its motion for mediation sanctions against D & T. We find that MCR 2.403(O)(5) controls this case because, as Pacentro concedes, the trial court's verdict awarded equitable relief. MCR 2.403(O)(5)(2) provides that costs *may* be awarded if the court determines that it is fair to award costs under all of the circumstances. Thus, the award of costs under MCR 2.403(O)(5)(2) is discretionary. Here, we find no abuse of discretion. After reviewing the record it is clear that the trial court was aware of its discretion in this matter and considered the circumstances of the case, which it found to be a legitimate dispute, in denying sanctions.

Affirmed.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s/ Joel P. Hoekstra

[1] We note that the trial court's use of the term fluffage may have been misplaced, because the experts' calculations also considered the implications of weight restrictions on the amount of material that could be carried in each truckload.