

STATE OF MICHIGAN
COURT OF APPEALS

BUENA VISTA CHARTER TOWNSHIP,

Plaintiff/Third-Party Plaintiff-
Appellee,

v

ANKLAM CONSTRUCTION,

Defendant/Third-Party Plaintiff-
Appellant,

and

RC ASSOCIATES ENGINEERING,

Third-Party Defendant/Appellee.

UNPUBLISHED
February 10, 2004

No. 243974
Saginaw Circuit Court
LC No. 96-016609-CZ

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Defendant Anklam Construction, Inc. appeals as of right from the trial court's order denying defendant's claims for damages above the contract price that it incurred because of a necessary eight-foot change in the location of the water main. We affirm.

This appeal arises out of a construction project to install a water main along Portsmouth Road in Buena Vista Township. Buena Vista, as owner of the project, hired an engineering firm, RC Associates, Inc., to develop the contract specifications and public contract documents. On May 11, 1995, Buena Vista entered into a fixed cost contract with Anklam to install the water main for the amount of \$170,470.

The original design of the project called for the water line to be set twenty-eight feet off the centerline of Portsmouth Road. But when the Saginaw County Road Commission refused to issue a permit, Anklam was forced to alter the plans by eight feet. Anklam consequently requested change orders from RC Associates. While acknowledging that some additional costs would be incurred, RC Associates did not agree with the extent of the changes Anklam proposed. Anklam ultimately decided to proceed and completed its performance under the contract.

The trial court's opinion provided in pertinent part as follows: (1) Anklam failed to prove that the moving of dirt to accommodate the twenty-foot alignment generated extra cost; (2) that the permit fees for soil erosion control and soil inspection plan review were Anklam's responsibility; and (3) that the new ditch was an agreement that Anklam undertook with the county road commission and was not part of its contract with Buena Vista.¹

On appeal, Anklam raises several distinct claims for additional costs that it incurred to perform the contract. We review a trial court's findings of fact for clear error.² "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed."³

I. Movement of Dirt

Anklam testified that it was entitled to \$20,900—calculated at \$2 a lineal foot for 10,450 feet—for the eight-foot relocation of the pipe because it was required to level the machine in order to dig the trench and lay the pipe. We disagree.

Mike Rybicki, the project engineer, testified that even without the relocation, the excavator's right or left track would have been impinged by the ditch slope. In essence, he claimed that the eight-foot difference only changed the side of the excavator that was affected by the ditch. In a letter replying to Anklam's request for additional funds, he stated that a review of the site "did not warrant any additional field conditions to contend with that would increase the difficulty of the project." We defer "to 'the trial court's superior ability to judge the credibility of the witnesses who appeared before it.'"⁴

Further, Anklam failed to offer any evidence showing that it incurred additional costs because the project took longer to complete due to the relocation. Rather, Anklam simply stated that it was owed additional monies because it had to place the dirt behind the excavator instead of beside it. And the videotape offers no support that the moving of dirt to level the excavator generated additional costs. Thus, we find no error with the trial court's factual findings in this regard.

¹ We note that plaintiff has voluntarily agreed to pay for the claims relating to water hookups, boring of tile, stone replacement, and extra depth. Thus, we limit our review on appeal to defendant's claims regarding the movement of dirt, permit fees, and ditching.

² MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

³ *Walters*, *supra* at 456.

⁴ *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003); quoting *Rellinger v Bremmeyr*, 180 Mich App 661, 665; 448 NW2d 49 (1989).

II. Permit Fees

Anklam next asserts that the trial court's factual findings concerning the permitting and inspection fees were clearly erroneous. Specifically, Anklam cites the fees for the soil erosion permit (\$40) and the soil erosion plan review and inspection (\$576). We disagree.

According to Anklam, it was entitled to these fees because they were not included in the original contract as a bid item. But the contract clearly provides that "[t]he Contractor shall procure all permits and licenses and pay all charges and fees necessary and incidental to the due and lawful prosecution of the work."

III. Ditching

Anklam ultimately challenges the trial court's conclusion that Buena Vista was not responsible for the \$40,000 in costs that Anklam incurred in digging the new ditch. We find no clear error.

Anklam fails to present any proof that this expenditure or undertaking was included in the contract between Anklam and Buena Vista. Indeed, Anklam admits that there was no agreement to pay the four dollars a foot Anklam is now claiming as damages for digging the ditch. There is also no record evidence that the reditching project was authorized by a change order or written agreement. In fact, Mr. Rybicki testified that Anklam had no contractual responsibility beyond putting in the pipe. The record therefore supports the trial court's findings that defendant independently undertook the reditching endeavor with the road commission and that it was not a part of the instant parties' contract.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper