

STATE OF MICHIGAN
COURT OF APPEALS

DAN'S EXCAVATING, INC.,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

UNPUBLISHED

May 28, 2013

No. 310901

Court of Claims

LC No. 12-000025-MK

Before: HOEKSTRA, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

In this breach of contract dispute, defendant appeals as of right from the trial court's order, which denied defendant's motion for summary disposition and granted summary disposition in favor of plaintiff. A judgment ultimately was entered in favor of plaintiff against defendant for \$957,088.98. We affirm.

I. BASIC FACTS

This case involves construction projects at two different locations – one along I-94 and one along M-53. The I-94 project was let for bid by defendant on September 25, 2009. The M-53 project was let for bid on November 6, 2009. Both projects required the construction of cofferdams.¹

However, the bid documents for both projects contained conflicted information regarding the disposition of the cofferdams. The plans for both projects required the cofferdams to remain in place after the project was completed. But permits from the Michigan Department of

¹ A cofferdam is “a temporary watertight enclosure for construction or repairs in waterlogged soil or under water.” *Random House Webster's College Dictionary* (1997). Even though the cofferdam generally is a temporary structure, i.e., it gets removed after the construction is completed, sometimes it remains in place after the work is completed.

Environmental Quality (DEQ), which were included with the bid materials, provided that the cofferdams were to be removed at the completion of the projects.²

Plaintiff bid on the projects and was awarded the contracts on the basis of it providing the lowest bids. Plaintiff's bids were based on removing the cofferdams after the work was completed.

Later when defendant became aware that plaintiff intended to remove the cofferdams, defendant requested the DEQ to modify the permits to allow for the cofferdams to remain in place. The DEQ granted the request and amended the permits to contain the following language: "All cofferdam and temporary steel sheet pile shall then be removed in its entirety, unless shown to be left in place on the plans."

After failing to get defendant to pay for the losses it incurred as a result of having to leave the cofferdams, plaintiff filed the present claim in the Court of Claims, alleging breach of contract and unjust enrichment. Defendant moved for summary disposition, arguing that because the plain language of the plans calls for the cofferdams to remain in place, that plaintiff could not as a matter of law prevail on its claims. Plaintiff filed a response and moved for summary disposition as well. Plaintiff argued that the contracts explained which documents had priority in the event of any conflict, and this priority scheme allowed for the DEQ permits' language of requiring the cofferdams to be removed to prevail.

After conducting a hearing on the parties' competing requests for summary disposition, the trial court denied defendant's motion for summary disposition and instead granted summary disposition in favor of plaintiff. The trial court noted that the contracts incorporated section 104.06 of the MDOT 2003 Specifications, which provides that when there is a conflict in the contract, there is a priority order for determining which provision prevails.

The trial court concluded that, according to the terms of the contract, the terms contained in the DEQ permits prevailed over other contrary language in the plans. Consequently, the trial court ruled that plaintiff was "entitled to the substantial extra cost it incurred" as a result of defendant's unilateral modification of the contract. The trial court subsequently entered a judgment against defendant for \$957,088.98, the amount plaintiff had requested in moving for summary disposition.

² Both permits contained the following language: "[C]offerdams of steel sheet piling, gravel bags, clean stone, coarse aggregate, or concrete barriers shall be installed to isolate all construction activities from the water. The cofferdam shall be maintained in good working order throughout the duration of the project. Upon project completion, the accumulated materials shall be removed and disposed of at an upland site. *The cofferdam shall then be removed in its entirety.*" (Emphasis added.)

II. ANALYSIS

Defendant argues that the trial court erred in granting summary disposition in favor of plaintiff. We disagree.

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Dalley v Dykema Gossett*, 287 Mich App 296, 304 n 3; 788 NW2d 679 (2010). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

“The primary goal in interpreting contracts is to determine and enforce the parties’ intent. To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself.” *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000) (citations omitted). “If the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning; but if it is ambiguous, testimony may be taken to explain the ambiguity.” *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342; 132 NW2d 66 (1965). “A contract is ambiguous when two provisions ‘irreconcilably conflict with each other’ or ‘when [a term] is equally susceptible to more than a single meaning.’” *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007).

The parties do not dispute that each contract incorporated the DEQ permits, which stated that the cofferdams were to be removed in their entirety, and that each contract also contained other provisions stating that the cofferdams were to remain. Therefore, at first blush, it appears that there is a patent ambiguity in the contract, meaning that normally it would be up to the trier of fact to resolve the inconsistency, making summary disposition inappropriate. See *Badiee v Brighton Area Schs*, 265 Mich App 343, 351; 695 NW2d 521 (2005); *D’Avanzo v Wise & Marsac, PC*, 233 Mich App 314, 319; 565 NW2d 915 (1997).

However, extrinsic evidence is not necessary to resolve this inconsistency because the terms of the contract itself state which provisions prevail over other conflicting provisions. The bid materials included the MDOT 2003 Standard Specifications for Construction. Section 104.06 of the Standard Specifications provides that

[t]he following parts of the contract will prevail over all other parts in the following order:

- A. All proposal material except those listed below in B-F
- B. Special provisions
- C. Supplemental specifications

D. Project plans and drawings

E. Standard plans

F. Standard specifications

Here, the DEQ permits are included in Part A because they are part of the “proposal material” and not included in Parts B-F, while the project’s plans are located in Part D. Thus, by the plain language of the contract, the terms of the DEQ Permits requiring the cofferdams to be removed in their entirety would prevail over any conflicting terms located in the plans. While the express terms were in conflict, there was no “ambiguity,” per se, because the contract provided a means to resolve the conflict. Accordingly, the trial court was correct in determining that, as a matter of law, the contracts were unambiguous.

On appeal, defendant also argues that some materials within Part A also indicated that the cofferdams were to remain after the project was completed, thereby creating an ambiguity or inconsistency within Part A’s documents. Specifically, defendant claims that the Part A documents include “Item Sheets,” which provide that the cofferdams were not to be removed. However, at the trial court, defendant merely asserted that these Item Sheets were part of the project’s “plans”³ and did not contend that the Item Sheets were on an “equal” priority level with the DEQ Permits in Section 104.06’s priority scheme. Accordingly, because a party may not take a position before a trial court and then seek appellate relief based on a contrary position, *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003), defendant’s argument is now barred. See also *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008) (“[A] party may not remain silent in the trial court, only to prevail [on appeal] on an issue that was not called to the trial court’s attention.”) While defendant generally argued at the motion hearing that “numerous references in other proposal materials, plans, specifications” all stated that the cofferdams were to be left in place, defendant only relied on specific language in the DEQ Permits that mentioned that the work was to be done in “conformance with the plans.” But the fact that some Part A documents may have generally referenced that the work was to “conform[] with the plans” is not sufficient to elevate any plan specifics into the “Part A” tier. The reason for this is that the *specific* conflicting term located in the plans must yield to the *specific* conflicting term located in Part A’s DEQ Permits. Thus, any statement saying that the work was to comply with the plans must be interpreted such that the plans yield to any specific conflicts in any higher priority documents.

Moreover, even assuming *arguendo* that there were conflicting requirements for the cofferdams located within the Part A documents, we would be forced to conclude that the DEQ Permits would control nevertheless. It is well-established that courts must apply unambiguous provisions of a contract, *unless a provision is illegal* or a traditional defense to the enforceability

³ In its brief in support of summary disposition at the trial court, defendant’s reference to the Item Sheets was included in a footnote as support for its assertion that “[t]he *plans* on each project required that the cofferdams be left in place after the construction was completed.” (Emphasis added.)

of a contract applies. *Sherman-Nadiv v Farm Bureau Gen Ins Co*, 282 Mich App 75, 78; 761 NW2d 872 (2008). Here, the DEQ Permits were not just merely “additional information”; instead, compliance with these permits was mandated by law. Both DEQ Permits were issued under the authority of Part 31–Floodplain/Water Resources Protection, Part 301–Inland Lakes and Streams, and Part 303–Wetland Protection of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.101 *et seq.* Under Part 301 of the Act, MCL 324.30112(3) provides that, generally, “a person who violates this part *or a permit issued under this part* is guilty of a misdemeanor, punishable by a fine of not more than \$10,000.00 per day for each day of violation.” (Emphasis added.) Thus, the failure to adhere to the terms of the DEQ Permits, which included removing the cofferdams in their entirety, would have been against the law. As a result, any contractual terms requiring the cofferdams to remain in place were not enforceable. See *Sherman-Nadiv*, 282 Mich App at 78. Further, defendant’s subsequent decision to alter the DEQ Permits to require the cofferdams to remain in place was insufficient to alter the terms of the original contract because such modification lacked mutual assent. See *Quality Products & Concepts Co v Nagel Precision, Inc.*, 469 Mich 362, 372; 666 NW2d 251 (2003) (“[T]he freedom to contract does not authorize a party to unilaterally alter an existing bilateral agreement.”).

Defendant next argues that the trial court erred when it included an award of damages when it granted summary disposition in favor of plaintiff. We disagree.

Defendant’s assertion that plaintiff never raised the issue of damages at the trial court is incorrect. Plaintiff’s motion for summary disposition clearly requested that it be granted summary disposition and awarded \$957,088.98 for the damages it incurred. Plaintiff’s brief even detailed how those damages were allocated between the two projects, explaining that \$703,575.73 was incurred in the I-94 project and \$253,513.25 was incurred in the M-53 project. Plus, plaintiff filed an affidavit and other financial documents along with its motion as support for how it arrived at those damage calculations. Once a moving party properly supports its motion for summary disposition with documentary evidence, “the nonmoving party must respond with documentary evidence setting forth specific facts showing that there is a genuine issue for trial.” *Richardson v Mich Humane Society*, 221 Mich App 526, 527; 561 NW2d 873 (1997). “If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.” *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999), quoting MCR 2.116(G)(4). Here, defendant never contested the amount of claimed damages nor filed any evidence to contradict plaintiff’s evidence. Therefore, the proffered evidence showed that there was no dispute related to the amount of damages, and the trial court properly awarded that undisputed amount to plaintiff.

We note that both plaintiff and defendant mischaracterize the trial court’s role with regard to damages in a summary disposition context. Both parties describe the court’s determination of damages as a “finding of fact” made by the trial court. However, in deciding a motion for summary disposition, a court may not make any factual findings. *Nesbitt v American Cmty Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999). Instead, the court’s role is to determine whether there is any factual dispute. See *Maiden*, 461 Mich at 120. Again, because the submitted evidence established that there was no dispute, plaintiff’s proffered evidence necessarily controlled.

Affirmed. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder