

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GRAND RIVER CONSTRUCTION, INC.,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

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UNPUBLISHED  
March 8, 2016

No. 325311  
Court of Claims  
LC No. 14-000234-MZ

Before: SERVITTO, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

At issue in this case is whether defendant, the Michigan Department of Transportation (MDOT), may charge two bid guaranties totaling \$75,000 against plaintiff, Grand River Construction, Inc. (Grand River). The Court of Claims denied MDOT's motion for summary disposition under MCR2.116(C)(8) (failure to state a claim) and (10) (no genuine issue of material fact), and granted Grand River's counter-motion for summary disposition under MCR2.116(I)(2) (non-moving party entitled to judgment). MDOT appeals as of right. We affirm.

**I. BACKGROUND**

On August 1, 2014, MDOT opened the bidding process for two highway construction projects: Items 1408-031 and 1408-048. Grand River submitted bids for each project, which incorporated MDOT's 2012 Standard Specifications for Construction (Standard Specifications). Grand River's bid stated that, subject to Subsection 102.17 of the Standard Specifications, it "agree[d] to pay [MDOT] the bid guaranty sum of [\$50,000 for Item 1408-031 and \$25,000 for Item 1408-048] if [it] fail[ed] to provide the required materials and/or execute the contract in accordance with Subsection 102.15." Subsection 102.15 outlines the procedures governing MDOT's award of a contract, and states in relevant part the following:

The Department will provide the contract and bond forms to the determined low Bidder, at the address on file with the Department. Within 28 calendar days of transmittal, the Bidder must return, and the Department must receive the fully executed contract, bond forms, and other documents required by the Department. The Department may grant an extension of that deadline, if the extension would not impair the Department's interests. If the Department

executes a contract received after the deadline, an extension will be deemed to have been granted.

If the Department does not receive the signed contract, bond forms, and other documents required within 28 calendar days of transmittal, or an extended deadline, the Department may award the contract to the next low Bidder, or otherwise exercise its discretion.

Subsection 102.17 of the Standard Specifications outlines the circumstances under which a bidder is required to pay the bid guaranty, and provides in relevant part the following:

The determined low Bidder's failure to sign the contract and submit satisfactory bonds and other required documents for the award of the contract within the 28 calendar day period provided, or within a Department-approved extension to that period, will result in the payment of the bid guaranty to the awarding authority.

Each Bidder has a positive duty to carefully prepare and check the accuracy of its bid. The Department will return the bid guaranty only if the Bidder clearly demonstrates the following:

A. The Bidder made a substantial error and signing the contract would impose a substantial and unjustified hardship on the Bidder, given the size and nature of the project;

\* \* \*

A Bidder's mistake in judgment in preparing the bid will not warrant nonpayment of the bid guaranty absent a compelling showing that enforcing payment of the guaranty would be unconscionable under all circumstances. The Bidder is responsible for clearly and convincingly satisfying the criteria for non-payment of the bid guaranty.

Pursuant to Subsection 102.08, a bidder may revise or withdraw its bid only until the bid submission deadline. Subsection 102.15 further provides that MDOT has 49 calendar days after the bid submission deadline to award a contract, and failure of MDOT to act within the specified time allows the determined low bidder to withdraw its bid without penalty.

On August 6, 2014, Grand River's chief financial officer, David Coates, sent a letter to MDOT stating that a new project estimator had mistakenly underestimated Grand River's bids on the two projects. Coates explained the following:

This is our first full year starting in MDOT projects. We cannot complete the projects for the submitted price as they would cause our organization a severe financial hardship. We understand there are penalties of \$50,000 and \$25,000 on proposal numbers 031 and 048, respectively, for failure to execute the contracts and we are requesting relief from the penalties.

Therefore given the above information we request our bids be withdrawn.

On August 12, 2014, the administrator of MDOT's Contract Services Division, Demetrius Parker, sent a letter to all of the bidders for Items 1408-031 and 1408-038, informing them that "the bids received for the above-referenced project[s] have been rejected," and that MDOT expected to advertise the projects again in the future. On August 13, 2014, Parker sent Grand River a letter stating that MDOT understood its August 6, 2014 letter to mean that Grand River "is withdrawing [its] bid" on the projects, so it was "required to pay the bid guaranty to MDOT" pursuant to Subsection 102.17. The letter included two invoices for the bid guaranties, and advised Grand River of its right to appeal the assessments.

In response, Grand River sent a letter to MDOT, dated August 15, 2014, describing in greater detail the circumstances surrounding its underestimated bids and "request[ing] relief from the bid guarantees from these projects." On September 16, 2014, the director of MDOT's Bureau of Finance and Administration sent Grand River a letter denying its request for relief from the bid guaranties. The letter included a final demand for payment and stated that non-payment would result in any of Grand River's other contract proceeds from MDOT being offset by the amount of the bid guaranties.

On September 19, 2014, Grand River's attorney sent MDOT a letter, asserting that the assessment of the bid guaranties was improper because Grand River never withdrew its bids, but rather only asked MDOT for permission to do so, and because MDOT rejected all bids on the projects, including Grand River's bid, without ever accepting Grand River's bid and awarding it the contracts. Accordingly, counsel argued, Grand River had no opportunity to decline, refuse, or otherwise fail to execute the contracts, which was required by Subsection 102.17 as a condition precedent to any assessment of the bid guaranties.

On October 6, 2014, Grand River filed a complaint seeking declaratory relief that MDOT could not withhold its earned contract proceeds from other projects on the basis of the improperly charged bid guaranties. MDOT filed a motion for summary disposition under MCR2.116(C)(8) and (10), and conversely, Grand River sought summary disposition under MCR2.116(I)(2). Relying on Subsections 102.15 and 102.17, the Court of Claims granted Grand River's motion, concluding that MDOT could not assess bid guaranties against Grand River when it failed to follow its own protocols for awarding a contract by not sending the contract, bond forms, and other documents to Grand River. Therefore, the Court of Claims concluded that MDOT never triggered Grand River's liability on the bid guaranties.

## II. ANALYSIS

Defendant argues that it was entitled to summary disposition because the bid guaranties were properly assessed. "This Court reviews de novo a lower court's grant or denial of summary disposition." *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996). Below, the Court of Claims granted plaintiff summary disposition under MCR2.116(I)(2). "Summary disposition is properly granted [under MCR2.116(I)(2)] if it appears to the court that that party, rather than the moving party, is entitled to judgment." *Id.* The interpretation of a contract, and whether a contract exists, are questions of law that we

review de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

MDOT first argues that the Court of Claims improperly granted Grand River's motion for summary disposition because it was not required to send the contracts for signing after Grand River repudiated the contract in its August 6, 2014 letter. "Under the doctrine of repudiation or anticipatory breach, if, before the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance." *Stoddard v Mfr Nat'l Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999). However, for the doctrine of repudiation to apply, a contract must exist between the parties. "Before a contract can be completed, there must be an offer and acceptance. Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed." *Kloian*, 273 Mich App at 452 (citation and quotation marks omitted).

In this case, a valid contract did not exist between MDOT and Grand River at the time Grand River sent its August 6, 2014 letter. Rather, Grand River's bid proposals constituted offers under MDOT's specifications, and to form a contract, MDOT was required to accept in the manner prescribed by the proposals. See *Independence Twp v Reliance Bldg Co*, 175 Mich App 48, 54; 437 NW2d 22 (1989). Under the terms of Grand River's offers, MDOT was required to "provide the contract and bond forms to the determined low Bidder, at the address on file with the Department." Subsection 102.15. Because MDOT never provided Grand River the contracts and bond documents necessary to execute the contracts, no valid contracts were formed, and the doctrine of repudiation does not apply.<sup>1</sup>

Under the terms of Grand River's bid proposals, which derived from MDOT's specifications, Grand River was only liable to pay the bid guaranties if it failed to "sign the contract and submit satisfactory bonds and other required documents for the award of the contract within the 28 calendar day period provided." Subsection 102.17. After Grand River

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<sup>1</sup> In some cases, an agreement to keep an offer open and irrevocable for a specified period of time is enforceable as an option contract. See *In re Smith Trust*, 480 Mich 19, 25; 745 NW2d 754 (2008). However, option contracts must be supported by consideration, which must be different than the consideration relied on in the event of an acceptance. *Sulzberger v Steinhauer*, 235 Mich 253, 257; 209 NW 68 (1926). In this case, it does not appear that MDOT furnished any valuable consideration in exchange for Grand River's offers, which pursuant to Subsections 102.08 and 102.15 could not be revised or withdrawn for 49 calendar days after the bid submission deadline. If a valid option contract existed, however, we would nonetheless conclude that the doctrine of repudiation does not apply in this case. Repudiation of a contract "must not be uncertain or equivocal." *Sullivan v Bennett*, 261 Mich 232, 238; 246 NW 90 (1933). In its August 6, 2014 letter, Grand River did not unequivocally withdraw its offers in violation of the Standard Specifications, but rather merely "request[ed] our bids be withdrawn." Therefore, even if an option contract existed, Grand River did not repudiate the contract, i.e., its agreement to keep its offers open for a specified period of time, in certain and unequivocal terms.

submitted its request to rescind its offers, MDOT could have still accepted the offers and provided Grand River the contracts to sign because Subsections 102.08 and 102.15 provided that offers could not be revised or withdrawn for 49 calendar days after the bid submission deadline. However, rather than accepting Grand River's offers and triggering its liability to either sign the contracts or pay the bid guaranties, on August 12, 2014, MDOT sent a letter rejecting all of the offers. When an offer is rejected, "the offeree's power of acceptance is thereafter terminated." *DaimlerChrysler Corp v Wesco Distrib, Inc*, 281 Mich App 240, 247; 760 NW2d 828 (2008) (citation and quotation marks omitted). Because the unambiguous language of MDOT's bid specifications predicated payment of the bid guaranties on Grand River's refusal to sign the contracts after they were awarded by MDOT, the Court of Claims properly concluded that MDOT's failure to follow its acceptance and contract award protocols precluded the assessment of the bid guaranties against Grand River.

Lastly, MDOT argues that Grand River should be equitably estopped from changing its position after MDOT relied on its representations. "Equitable issues are reviewed de novo, but we review for clear error the court's findings of fact supporting its decision." *AFSCME Int'l Union v Bank One, NA*, 267 Mich App 281, 293; 705 NW2d 355 (2005).<sup>2</sup>

The doctrine of equitable estoppel rests on broad principles of justice. It is applicable both to actions of law and equity. Estoppel arises where a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe certain facts. The other party must not only have justifiably relied on this belief, but also must be prejudiced if the first party is permitted to deny the facts upon which the second party relied. [*Schepke v Dep't of Natural Resources*, 186 Mich App 532, 534-535; 464 NW2d 713 (1990) (citation omitted).]

MDOT argues that Grand River expressed an intention to refuse to execute the contracts, which MDOT relied on to its detriment when it declined sending Grand River the contracts, rejected all of the bids, and proceeded to re-advertise the projects. MDOT suggests that Grand River concocted a scheme to induce it to avoid complying with its own contract award protocols. Considering the record as a whole, we are not convinced that Grand River did anything other than simply request MDOT's permission to withdraw its bids without penalty. Moreover, even if Grand River's August 6, 2014 letter misled MDOT into believing that Grand River would not execute the contracts, MDOT was still required to follow the clear language in the Standard Specifications to trigger Grand River's liability for the bid guaranties. See *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 444; 513 NW2d 148 (1994) (rejecting an equitable estoppel claim asserted to overcome the plain language of a trust). "The doctrine of

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<sup>2</sup> Typically, for an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Although defendant raised this issue below, the Court of Claims did not address the elements of the doctrine. Nonetheless we address this issue on appeal because the record contains all of the facts necessary to properly resolve the issue. *Id.* at 443-444.

estoppel should be applied only where the facts are unquestionable and the wrong to be prevented undoubted.” *Kamalath v Mercy Mem Hosp Corp*, 194 Mich App 543, 552; 487 NW2d 499 (1992). Under the facts of this case, MDOT has not shown that it is entitled to equitable relief.

Affirmed.

/s/ Deborah A. Servitto  
/s/ Michael F. Gadola  
/s/ Colleen A. O’Brien