IN THE COURT OF APPEALS OF IOWA

No. 0-235 / 09-0712
Filed May 26, 2010

PHOENIX C & D RECYCLING, INC.,
An Iowa Corporation,
Plaintiff-Appellant,

vs.

DES MOINES METROPOLITAN AREA
SOLID WASTE AGENCY, d/b/a
METRO WASTE AUTHORITY, INC.,
A Municipal Corporation,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Phoenix C & D Recycling, Inc. appeals the district court's judgment for money damages in a contract dispute with Metro Waste Authority. **AFFIRMED.**

Thomas D. Hanson and Kara L. McClure of Hanson, Bjork & Russell, LLP, Des Moines, for appellant.

James E. Brick and Billy J. Mallory of Brick Gentry PC, West Des Moines, for appellee.

Heard by Vogel, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

Phoenix C & D Recycling, Inc. is in the business of acquiring construction and demolition waste materials (C&D) and recycling such materials for other uses. One use of C&D waste is as alternative daily cover (ADC) in landfills.[1] Metro Waste Authority, Inc. (MWA) owns and operates a municipal solid waste landfill in Polk County. MWA's operations are regulated by governmental agencies, including the Iowa Department of Natural Resources (IDNR) and the United States Environmental Protection Agency.

In 2001, MWA issued a Request for Proposals to build and operate a C&D recycling facility on its premises. Taylor Recycling Facility of New York was selected by MWA as the successful bidder. Accordingly, Taylor and MWA began contract negotiations for the construction and operation of a C&D recycling facility.

For MWA's 2004 fiscal year, it was facing an IDNR requirement to reduce its waste stream by twenty-five percent. MWA considered the use of C&D waste as a mechanism to reduce its waste stream.

In the fall of 2003, Phoenix approached MWA requesting an agreement to be designated as a facility for the acceptance of C&D waste and to process the balance into ADC for use at MWA's landfill.[2] After an MWA Board of Directors (board) meeting, the board adopted a resolution authorizing its executive director

[1] Alternative daily cover is a cover material used as a substitute for soil placed on the surface of a landfill at the end of each operating day to control fires, odors, blowing litter, and scavenging.

[2] Another private C&D recycler had previously requested a similar arrangement.

to enter into agreements with private waste facilities to become approved disposal sites for C&D waste.

In the resulting Agreement to Designate (Agreement), executed between MWA and Phoenix on January 16, 2004, MWA agreed to accept as ADC all of the materials provided by Phoenix that met specifications set out in an attached exhibit, Exhibit B. The Agreement also provided that Phoenix would pay a disposal fee and test costs for any material that did not meet MWA's standards. Exhibit B listed Agency Testing Criteria, standards establishing the physical properties of acceptable ADC, including an agency performance requirement that the ADC not contribute to odor generation. The Agreement also designated a third party to resolve by arbitration any disputes between Phoenix and MWA as to how the tests on ADC would be conducted and whether the ADC met MWA specifications.

In the spring of 2004, Phoenix began to produce ADC. MWA tested the ADC pursuant to the criteria set forth in Exhibit B of the Agreement. Testing took several weeks, and the test results showed that Phoenix's ADC failed to meet the testing criteria. On July 6, 2004, MWA sent three letters notifying Phoenix that ADC received between June 7 and June 25 was rejected because it did not meet minimum standards set by MWA. The letters also stated the specific deficiencies that caused the rejection, including high levels of asbestos, sulfate, organics, and total sulfur.

The parties engaged in negotiation regarding the terms of Exhibit B.[3] Phoenix requested that MWA retest the rejected material. Further, the parties disputed whether MWA's ADC testing criteria and sampling and testing procedures were valid.

In October of 2004, MWA's board discussed establishing a modification of MWA's Agreement with Phoenix called a Pilot Program in light of the fact that almost all of the ADC MWA had received from Phoenix did not meet MWA's standards. As part of the Pilot Program, MWA would develop more relaxed interim standards, and Phoenix would only be required to pay disposal and test fees for ADC that tested above these interim standards. The board voted to authorize an ADC Pilot Program to determine if the material accepted under the program posed any environmental risks for MWA. Phoenix and MWA agreed on the ADC Pilot Participation Agreement with the following terms: (1) Phoenix would not have to pay MWA for ADC received that complied with MWA's interim standards; (2) if the ADC delivered by Phoenix did not meet MWA's minimum standards, Phoenix would pay MWA the disposal and testing fees; (3) MWA had the right to discontinue the Pilot Program at any time for any reason upon twenty-four hours notice. The Pilot Participation Agreement also established new, more generous, testing parameters for sulfate, total sulfur, and organic content, three compounds for which Phoenix's ADC historically did not meet the specifications under the Agreement. The new parameters were the average levels of each

[3] Taylor was also in active negotiation with MWA over its ADC specifications and Agency Testing Criteria as established in Exhibit B.

compound in the material received under the Agreement plus one standard deviation.

On November 17, 2004, the board voted to pass a resolution deferring disposal and testing fees charged to Phoenix for previously rejected material. The resolution conditioned the deferral of the fees upon four conditions, including that Phoenix consistently produce ADC that met and exceeded the pilot program standards through July 1, 2006. The resolution stated, "In the event the vendor fails to meet the criteria set out above, the amount owed by that vendor shall immediately become due and owing."

In the fall of 2005, MWA claimed that it encountered an odor problem. Further, MWA had received ADC from Phoenix that exceeded even the more lenient standards established under the Pilot Program. On November 9, 2005, MWA terminated the Pilot Program after giving the required twenty-four hours written notice that it would cease acceptance of ADC under the terms of the Pilot Program and revert back to the procedures and standards under the original Agreement and Exhibit B.

Phoenix insisted that no odor problem existed. Phoenix further claimed that different laboratories using different testing methods to test the same sample yielded markedly different results. Phoenix also claimed that MWA had learned that its Agency Testing Criteria used in the Agreement, which were copied from New York state regulations, were not used or applied in New York as MWA was attempting to apply them. Phoenix concluded that MWA's criteria had no scientific validity and that MWA's testing was unreliable because of sampling and testing errors.

On November 23, 2005, MWA sent a letter to Phoenix notifying it of MWA's intent to initiate arbitration procedures pursuant to the terms of the Agreement to resolve all disputes as to how the tests would be conducted and whether the ADC received from Phoenix had met the requirements set out in the Agreement.

However, before the arbitration hearing occurred, on January 19, 2006, Phoenix filed a four-count petition against MWA. In count I, Phoenix requested that the district court enter declaratory judgment determining the enforceability of the arbitration clause and appointing qualified independent arbitrators. In count II, Phoenix requested a temporary injunction to maintain the Pilot Program between the parties. In count III, Phoenix requested that the district court reform the Agreement to reflect the intent of the parties, which Phoenix claimed was that MWA would accept C&D waste without charging a disposal fee. In count IV, Phoenix requested damages for breach of contract.

MWA filed an answer and counterclaim on February 21, 2006. MWA eventually dismissed counts I and III of its counterclaim before trial, leaving only count II, a claim for damages for breach of contract.

On April 10, 2006, the district court denied Phoenix's request for injunctive relief. On November 20, 2006, the district court entered an order to bifurcate the remaining claims to allow the court to first determine the existence and terms of the contractual relationship between the parties under the Agreement.

On April 13, 2007, the district court found the arbitration provision to be binding and specified two issues for arbitration: (1) how testing was to be

conducted; and (2) whether the ADC met MWA specifications. The district court also denied Phoenix's request for reformation of the Agreement.

A three-day arbitration hearing was conducted, and the arbitration panel issued its decision on October 31, 2007. The panel ruled that the ADC delivered by Phoenix to MWA both before and after the Pilot Program never met MWA specifications. The district court confirmed the decision of the arbitration panel by court order on December 18, 2007, and found that the arbitrators "understood and addressed" the issues submitted to arbitration.

The remaining issues, both parties' breach of contract claims, then proceeded to trial. The district court dismissed Phoenix's claim for breach of contract and granted MWA's counterclaim in the amount of $154,892.28, finding: (1) MWA had the right to terminate the Pilot Program; (2) Phoenix materially breached the contact; (3) Phoenix did not meet the conditions necessary for forgiveness of the pre-Pilot Program charges; and (4) because the ADC delivered by Phoenix to MWA did not meet the specifications of the contract, Phoenix owed the total disposal and testing costs, which the parties stipulated amounted to $154,892.28.

Phoenix appeals, arguing the district court erred in: (1) refusing to reform the Agreement; (2) denying Phoenix's claim of substantial performance; and (3) entering judgment on MWA's counterclaim against Phoenix.

II. Standard of Review

The parties disagree on the standard of review for Phoenix's reformation claim. Phoenix filed its petition at law and in equity. A claim for reformation is generally heard in equity. *See Gouge v. McNamara*, 586 N.W.2d 710, 712 (Iowa

Ct. App. 1998). MWA makes no citation to the record to support its contention that this case was heard at law. Therefore, we will review Phoenix's claim for reformation de novo. *See id.*

We review the claim of substantial performance and the court's judgment on MWA's counterclaim for errors at law. Iowa R. App. P. 6.907. We are bound by the district court's findings of fact if they are supported by substantial evidence. *Agri Careers v. Jepsen*, 463 N.W.2d 93, 94 (Iowa Ct. App. 1990).

III. Reformation

Phoenix argues that the Agreement does not accurately reflect the parties' true agreement, and therefore, the district court should have reformed the Agreement. Phoenix requests that the court: (1) "simply prohibit or greatly reduce the [disposal] fee MWA charges for the ADC;" (2) adopt certain provisions of the Pilot Program, such as relaxed testing requirements; or (3) develop an appropriate testing, sampling, and measurement regime.

A party who seeks reformation has the burden of proving by clear, satisfactory, and convincing evidence that the contract does not reflect the true intent of the parties, either because of fraud or duress, mutual mistake of fact, mistake of law, or mistake of one party and fraud or inequitable conduct on the part of the other. *Wellman Sav. Bank v. Adams*, 454 N.W.2d 852, 855 (Iowa 1990). "In reforming the instrument, the court does not change the agreement between the parties, but changes the drafted instrument to conform to the real agreement." *Id.*

Phoenix claims that a mutual mistake was made when the Agreement was initially signed. The record as a whole establishes that both parties knew and

understood that the ADC delivered by Phoenix would have to meet the standards as listed in the Agreement, including Exhibit B. The parties also knew that if the ADC delivered by Phoenix failed to meet the applicable standards, Phoenix would have to pay disposal and testing fees. Phoenix and MWA signed the contract with that understanding. There is nothing in the record to indicate that the intent of the parties was anything other than what was specifically stated in the Agreement. Phoenix cannot now expect the court to reform the contract simply because it was unable to meet the terms to which it agreed. Though, as the district court found, the contract may have been poorly written, it reflected the intent of the parties, both parties knew its terms, and both parties signed the contract without fraud, deceit, or duress. We agree with the district court's three separate conclusions that Phoenix failed to carry its burden to establish the Agreement should be reformed.

IV. Substantial Performance

Phoenix next argues the district court erred in denying its claim of substantial performance. Phoenix asserts that strict compliance with the contract was not necessary in this case and that, even if it were, MWA's failure to act in good faith excuses any requirement of strict compliance.

> Substantial performance is that which, despite deviations from the contract requirements, provides the important and essential benefits of the contract to the promisee. The doctrine is intended to protect the right of compensation of those who have performed in all material and substantive particulars, and it excuses contractual deviations or deficiencies which do not severely impair the purpose underlying a contractual provision.
>
> The defense of substantial performance is not a valid principle to ameliorate against our clear rules of contract construction.

SDG Macerich Prop., L.P. v. Stanek Inc., 648 N.W.2d 581, 586 (Iowa 2002) (internal citations and quotations omitted).

The contract in this case unambiguously required that Phoenix pay a disposal fee for ADC that did not meet specific criteria listed in the agreement. MWA included these criteria in the contract to ensure that when it used ADC received from Phoenix, it would not encounter environmental problems. The record establishes that the ADC delivered by Phoenix did not meet MWA's specifications. Phoenix's delivery of ADC to MWA that did not comply with the specifications in the contract deprived MWA of an important and essential benefit of the contract. Because Phoenix did not perform "in all material and substantive particulars," the doctrine of substantial performance is not applicable to this case. *See id.*

Phoenix further asserts that MWA's rigid adherence to the terms of the contract despite its inexperience with ADC and the testing criteria constitute a failure to perform the Agreement in good faith. Phoenix seems to raise this argument as another attempt to rewrite the terms of the contract. However, "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Kooyman v. Farm Bureau Mut. Ins. Co.*, 315 N.W.2d 30, 34 (Iowa 1982). Good faith performance and enforcement requires faithfulness to an agreed common purpose, found in the terms of the contract; it does not include an obligation to rewrite the terms of the contract to help the other party. We agree with the district court that there is no evidence to conclude that MWA,

in enforcing the contract terms to which the parties had agreed, failed to act in good faith.

V. Breach of Contract Counterclaim

Phoenix claims that the district court erred in entering judgment on MWA's counterclaim against Phoenix for disposal and testing fees in the amount of $154,892.28.

The resolution deferring payment of the pre-Pilot Program fees contained several criteria Phoenix had to fulfill in order for the charges to be forgiven. The record shows Phoenix did not meet these criteria; therefore, Phoenix was required to pay the pre-Pilot Program fees. The parties stipulated that the disposal and testing fees associated with pre-Pilot Program ADC totaled $65,867.75.

In the post-Pilot Program period, the specification and terms of the original Agreement applied. The Agreement required Phoenix to pay all disposal and testing fees for ADC that did not meet these specifications. The parties stipulated that such disposal and testing fees totaled $89,024.53.

The district court correctly entered judgment for MWA in the amount of $154,892.28.

AFFIRMED.