IN THE COURT OF APPEALS OF IOWA

No. 2-143 / 11-1183
Filed June 27, 2012

SENECA WASTE SOLUTIONS, INC.,
Plaintiff-Appellee,

vs.

SHEAFFER MANUFACTURING CO., L.L.C., and SHEAFFER PEN CORPORATION, A Division of BIC USA, INC.,
Defendants-Appellants.

Appeal from the Iowa District Court for Lee County, John M. Wright, Judge.

Defendants appeal a district court judgment for money damages in excess of a stated not-to-exceed contract price. **AFFIRMED.**

Benjamin P. Roach of Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, for appellants.

Brenda L. Myers-Maas, Clive, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

VAITHESWARAN, P.J.

Sheaffer Manufacturing and Sheaffer Pen Corporation appeal a district court judgment for money damages in excess of a stated not-to-exceed contract price.

I. Background Facts and Proceedings

Sheaffer[1] decided to shut down its pen manufacturing facility in Fort Madison. In connection with the closure, the company solicited bids to have the facility cleaned and decontaminated. Seneca Waste Solutions, Inc. submitted the successful bid. The parties subsequently executed a contract and, in an attachment identified as "Exhibit A," detailed the "scope of work" and the "project cost estimate." The contract specified that the work would be charged on a time and materials cost basis "at the rates quoted by contractor in Exhibit A." The contract also specified that the work would not exceed "One Hundred Seventy Thousand Dollars ($170,000), inclusive of all taxes, subcontractor fees, and any and all other surcharges, costs and expenses." This became known as the "not-to-exceed price."

Seneca anticipated that the clean-up process would generate wastewater, most of which would be handled through an on-site wastewater treatment plant. Seneca assumed that only the wastewater generated in cleaning and dismantling this plant would have to be handled at an off-site facility. It subcontracted with Heritage Environmental Services to treat approximately 4000 gallons of wastewater, and identified a charge to Sheaffer of "cost plus 15%." It included a

[1] We will refer to defendants Sheaffer Manufacturing Co., L.L.C. and Sheaffer Pen Corporation as "Sheaffer."

provision stating the estimate was "subject to change based on waste analysis and volume."

Shortly after Seneca began its clean-up work, Sheaffer shut down the on-site waste water treatment plant and directed Seneca to have all the wastewater treated by the off-site facility. As a result, Heritage ended up handling 18,000 gallons of waste water rather than the 4000 gallons originally contemplated. Heritage billed Seneca $66,689.65 for its services. The original subcontracted cost for the disposal of 4000 gallons was to be $34,325.85, including Seneca's 15% mark-up.

Seneca sent Sheaffer invoices totaling $211,599.47. Sheaffer paid Seneca $145,980.87 and tendered payment of $24,019.13, to bring its total payment up to the not-to-exceed price of $170,000. Seneca rejected the tendered payment and filed a damage suit for the outstanding invoiced amount.

All the parties moved for summary judgment. The district court granted Sheaffer's motion and dismissed Seneca's case in its entirety, concluding that the not-to-exceed price was controlling and Seneca could not recover more than that amount.

Seneca appealed the summary judgment ruling. The Iowa Supreme Court considered the appeal and found a genuine issue of material fact as to whether Sheaffer modified the contract. The court reversed and remanded the case for trial. *See Seneca Waste Solutions, Inc. v. Sheaffer Mfg. Co.*, 791 N.W.2d 407, 412–13 (Iowa 2010).

Following a bench trial, the district court concluded that Sheaffer modified the written contract, thereby causing Seneca to incur unexpected costs. The court reasoned that "the wastewater treatment unit was under the control of Sheaffer and by shutting it down just days after the project began Sheaffer through its actions requested a significant change." The court entered judgment for $65,618.60 plus interest against Sheaffer, the difference between the amount Sheaffer paid ($145,980.87) and the amount of Seneca's final invoice ($211,599.47).

Sheaffer appealed and the Iowa Supreme Court transferred the appeal to this court. Our review is for errors of law, with fact-findings binding us if supported by substantial evidence. *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 179 (Iowa 2010).

II. Analysis

As a preliminary matter, Sheaffer contends the district court erred in requiring Seneca to prove a contract modification by a preponderance of the evidence rather than by a higher clear, satisfactory, and convincing standard of proof. We agree with Sheaffer that the court appeared to apply the lower standard, but we conclude application of this lower standard finds support in the law. *See Roth v. Boies*, 115 N.W. 930, 932 (Iowa 1908) ("Having found that the partnership was not dissolved prior to May 18, 1901, we next inquire whether the parties to the contract ever agreed upon any change in its terms and conditions. The burden is upon the appellant to establish such change by at least a fair preponderance of the evidence."). We will proceed to the merits.

"[A] written contract may be modified by a subsequent oral contract having the essential elements of a binding contract." *Seneca Waste Solutions*, 791 N.W.2d at 412. "Consent to the modification may be either express or implied from acts or conduct." *Id.* at 413.

Sheaffer argues it "never expressly agreed to pay Seneca any amount over the not-to-exceed price of $170,000 despite the increased wastewater that required offsite disposal." In response, Seneca does not dispute the absence of an express agreement to modify the written contract. Instead, Seneca contends Sheaffer impliedly consented to modify the contract's not-to-exceed price when it unilaterally shut down the on-site wastewater treatment plant and required Seneca's subcontractor, Heritage, to process more than four times the wastewater specified in the written contract.

The district court adopted Seneca's position, finding that Sheaffer modified the scope of work "by requesting additional work." *See id.* at 413 ("When a party to a contract modifies the scope of the work by requesting 'extras' or additional work, the party must pay the fair and reasonable value of the extra work."). Substantial evidence supports this finding. *See Davenport Osteopathic Hosp. Ass'n of Davenport, Iowa v. Hosp. Serv., Inc. of Iowa*, 154 N.W.2d 153, 157 (Iowa 1967) (stating whether a contract has been modified by the parties is ordinarily a question of fact).

Seneca employees testified that the closure of the on-site plant changed the scope of work. One employee characterized it as a "substantial change." Another testified Seneca's bid would have been different if Seneca had known

that its subcontractor would have to treat more than 4000 gallons of wastewater. These employees testified that the not-to-exceed price applied to duties within the originally-contemplated scope of Seneca's work. Additional duties were not subject to this limitation.

Sheaffer's witnesses also lent support to the district court's finding of a contract modification. Sheaffer's manager in charge of shutting down the Fort Madison facility agreed that the closure of the on-site wastewater treatment plant amounted to a change in the scope of Seneca's work. Another Sheaffer representative acknowledged the cost of waste disposal would change depending on the quantity of waste going to Seneca's subcontractor. While this employee nonetheless stood by the not-to-exceed price, an email she sent reflects equivocation on this point. Specifically, she stated:

> I received a call late this afternoon from Seneca indicating they may be approaching the "not-to-exceed" price agreed upon by the contract. They claim the difference is in the volume of wastewater which they have had to dispose. Obviously, I did not agree to exceeding the contract price and I asked them to keep me informed as work concludes next week.
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> But they may have a point. Looking at my original worksheet, I had assumed (as we all discussed) that Sheaffer would be treating much of the wastewaters from power washing, etc. on site in the wastewater treatment unit which would be the last equipment cleaned and dismantled. But, as I understand it, this was the first unit cleaned and then all wastewaters were subsequently sent off site for treatment via pumper truck.
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> Even though this was not our original plan, dismantling the treatment unit first may not have been a bad idea. If we had treated these additional wastewaters on sight [sic], we very well may have had more and worse exceedances of the NPDES permit limit than the two we already experienced before the shutdown of outfall 001. (And we might be looking at fines or other enforcement actions.) So, though I am not thrilled at the possibility of a higher closure/clean up cost, these potential extra cost [sic] are not so bad when put into perspective.

> To be best prepared to deal and negotiate with Seneca (if it becomes necessary), would you please forward me a copy of all invoices which you have received to date from Seneca?

This e-mail, which Seneca's attorney characterized as a "smoking gun," together with the testimony cited above amounts to substantial evidence in support of the court's finding that Sheaffer modified the scope of Seneca's work by closing the on-site wastewater treatment plant.[2]

Sheaffer additionally contends that Seneca built a cushion into the not-to-exceed price, which should have covered the cost of treating the additional wastewater at the off-site facility. It points to a document included in the contract which refers to Seneca's "budgetary estimate" of $143,520.67, a figure well below the not-to-exceed price of $170,000.

Seneca responds that this cushion was used to cover increased labor costs associated with activities within the scope of work specified in the written contract. As discussed previously, it contends its subcontractor's cost of treating 18,000 rather than 4000 gallons of wastewater was not within the originally-specified scope of work. That cost, in its view, increased from $34,325.85 to $78,193.10, a difference of $43,867.25.

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[2] Seneca also asserts that Sheaffer modified the scope of Seneca's work by generating wastewater that contained hexavalent chrome, rather than the trivalent chrome that Seneca expected. Seneca asserts the hexavalent variety was more expensive to process. The original contract, however, does not state that Heritage was limited to processing trivalent chrome. At trial, Seneca cited Sheaffer's response to a survey proffered by Heritage in which Sheaffer stated that Heritage would be processing "chrome contaminated debris." That response made no distinction between trivalent and hexavalent chrome. And, in any event, this survey response was not incorporated into the original contract. For that reason, there could be no modification of the contract based on the type of chrome that was ultimately handled by Heritage.

Again, the district court accepted Seneca's responsive argument, finding that "this cushion was used up due to an increase in labor costs for other parts of the project." Substantial evidence supports this finding.

Seneca's general manager testified,

> There was nine days of that project that went over due to the additional handling of materials which included per diem, labor, materials, supplies, personal protective equipment, over that nine days. Because the original estimated length of the project was twenty days. We completed the job in twenty-nine days, and within that extra nine days would have also accounted for the additional 12 to 13,000 gallons of liquid that had to be handled and disposed of off-site by Heritage.

He continued, "The $43,867 was that above and beyond the original 4000 gallons. . . . The only material that my group was responsible for was the 4000 gallons that Sheaffer Pen stated that they could not treat, and that was included in that original estimate."

As substantial evidence supports the district court's findings that (1) Sheaffer modified the scope of work specified in the written contract and (2) the cushion did not cover the costs associated with the increased volume of wastewater handled by Heritage, we conclude the district court did not err in awarding Seneca damages in excess of the not-to-exceed price in the contract.

AFFIRMED.