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J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc., 89 P.3d 1009 (Nev. 2004)[1]

COMMERCIAL LAW – BREACH OF CONTRACT, FRAUD IN THE INDUCEMENT, CARDINAL CHANGE/ ABANDONMENT/QUANTUM MERUIT

Summary

Appeal from a judgment entered pursuant to a jury verdict in an action concerning a construction contract.

Disposition/Outcome

Affirmed, with respect to the district court's judgment dismissing Appellant's fraud-in-the-inducement claim. Reversed, with respect to the remainder of the district court's judgment. Remanded to the district court for a new trial.

Factual and Procedural History

Las Vegas Sands, Inc., awarded respondent Lehrer McGovern Bovis, Inc. (LMB) a construction management contract for the Sands Exposition Center expansion project. After negotiations, LMB awarded the project's structural concrete portion to appellant J.A. Jones Construction Company (Jones). Jones's original bid for the concrete work was approximately $8.4 million. In order to reduce the bid amount, LMB agreed to perform various preparatory tasks and to streamline other tasks to shorten the time needed for Jones to complete its concrete construction, thus reducing Jones' overall costs. Both parties ultimately agreed that Jones would perform the concrete work for $7.4 million.

The parties' contract provides that the first phase of Jones's work (Phase I) would begin on July 1, 1997, and had to be completed by October 7, 1997. When Jones arrived on site on July 1, however, none of the preliminary groundwork had been completed. Because the excavation work was still in progress, Jones's crews were unable to do much work during the first two weeks of their contract. On July 3, Jones was told for the first time that major underground utilities were being planned throughout the Phase I area. At about the same time, Jones also learned of a change to the emergency egress plans. The new plans rendered at least a portion of the unexcavated area in Phase I inaccessible to any work by Jones or the excavator for a period of time. Due to these and various other complications, Jones did not complete Phase I until June 1998, eight months after the original completion date. Pursuant to various requests for change orders, LMB paid Jones an additional $1,078,303 for some of the changed-work expenses incurred during those eight months; however, outstanding requests remained.

After negotiations proved unsuccessful, Jones ultimately filed a complaint against LMB and National Fire Insurance Company of Hartford, holder of a surety bond related to the project.

[1] By: Christina H. Wang

In its amended complaint, Jones alleged claims for breach of contract, fraud in the inducement, cardinal change/abandonment/quantum meruit, and for enforcement of a mechanic's lien bond. On each of its first three claims, Jones sought more than $5 million in damages.

At trial, Jones introduced evidence that some of its Phase I work was changed or modified as a result of several instructions from LMB. Its major complaint, however, stemmed from the obstructions, hindrances, and inefficiencies that rendered its work more difficult and costly as a result of these changes and other major problems. As its defense, LMB relied upon the "no damages for delay" clause contained in its contract with Jones, whereby Jones agreed not to make any claims for damages on account of any delay, obstruction or hindrance. In response, Jones proposed jury instructions listing the following exceptions to the "no damages for day" provision of the contract: (1) willful concealment of foreseeable circumstances that impact timely performance; (2) delays not contemplated by the parties at the time they entered into the contract; (3) delays so unreasonable in length as to amount to an abandonment of the project; (4) delays caused by bad faith or fraud of the other party; and (5) delays caused by active interference on the part of the other party.

The district court, however, noted that Nevada has not adopted these exceptions and declined to give the proposed jury instruction. Additionally, during trial, the district court ordered Jones to elect between its contract-based and quantum meruit remedies and ultimately dismissed Jones' fraud-in-the-inducement claim. The district court also dismissed Jones's cardinal-change/ abandonment/quantum meruit claim. At the trial's conclusion, the jury awarded Jones $1,152,912, using a general verdict form.

On appeal, the Nevada Supreme Court, held that (1) Jones was entitled to an instruction on exceptions to the "no damages for delay" provision; (2) Jones was not required to elect between suing on contract or in quantum meruit; (3) Jones did not present sufficient evidence of fraud in the inducement; (4) Jones presented sufficient evidence of contract abandonment; and (5) Jones presented sufficient evidence of cardinal change.

Discussion

1. Instruction on Exceptions to No-Damages-for-Delay Provision

According to the Nevada Supreme Court, a party has the right to have the jury instructed on all theories of the party's case that are supported by the evidence if the instructions are correct statements of the law. The court found that although the contract's "no damages for delay" provision was valid and enforceable, the district court should have given an instruction regarding the exceptions to this provision, with certain modifications.

The court noted that most of the exceptions in Jones's proposed instruction aid in enforcing the "implied covenant of good faith and fair dealing that exists in every Nevada contract and essentially forbids arbitrary, unfair acts by one party that disadvantage the other."[2] Four of the five proposed exceptions relate directly to and are logical extensions of the implied covenant of good faith and fair dealing: (1) willful concealment of foreseeable circumstances that impact timely performance, (2) delays so unreasonable in length as to amount to project abandonment, (3) delays caused by the other party's bad faith or fraud, and (4) delays caused by the other party's active interference. These exceptions give rise to a violation of the duty of good

[2] Frantz v. Johnson, 116 Nev. 455, 465 n. 4, 999 P.2d 351, 358 n. 4 (Nev. 2000).

faith and fair dealing and are therefore a logical extension of existing law.[3] Additionally, they have been adopted by a majority of jurisdictions.

Accordingly, the court held that an instruction including these four exceptions should have been given, with one modification. The exception for "willful concealment of foreseeable circumstances that impact timely performance," should be blended with the exception for "delays caused by the other party's bad faith or fraud" to create a more general exception: delays caused by fraud, misrepresentation, concealment or other bad faith.

As to Jones's final proposed exception for "delays not contemplated by the parties at the time they entered into the contract," the court noted that this exception has been adopted by some courts and rejected by others. The court found that rejecting this exception is the better reasoned approach. Knowing that unforeseen delays can occur, parties can bargain accordingly. A subcontractor can protect itself from the risk of unforeseen delay simply by adjusting its bid price in recognition of the potential additional costs or by refusing to accept a "no damages for delays" provision in the contract.

In sum, the court concluded that the district court's instruction should have included the following three exceptions: (1) delays so unreasonable in length as to amount to project abandonment; (2) delays cased by the other party's fraud, misrepresentation, concealment or other bad faith; and (3) delays caused by the other party's active interference.

2. Election of Claims/Remedies[4]

Next, the court found that Jones should not have been forced to choose between suing on the contract and in quantum meruit. Although a party may not assert contradictory theories of recovery such that the assertion of one theory will necessarily repudiate the other, the doctrine of election of remedies applies only to inconsistent remedies.[5] The court noted that such contradiction or inconsistency did not exist in this case.

According to the court, an action may be based upon quantum meruit even though an express contract exists.[6] The contractor may base his action upon both the contract and upon a quantum meruit by setting up the former in one count, and the latter in another in his complaint. That a contract may have been changed or abandoned does not negate the assertion that at some point there existed a breachable contract. Therefore, a party is not required to elect between suing on the contract or in quantum meruit before obtaining a jury verdict. However, the district court can determine, after trial, if a duplicate recovery has been obtained on the two theories of recovery.[7]

Furthermore, causes of action for fraud in the inducement and breach of contract may be pursued as distinct claims with separate and consistent remedies. It is the law that one who has been fraudulently induced into a contract may elect to stand by that contract and sue for damages for the fraud. When this happens and the defrauding party also refuses to perform the contract as

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[3] United States v. Metric Constructors, 325 S.C. 129, 480 S.E.2d 447 (1997).

[4] On the seventh day of the trial, the district court directed Jones to choose between suing on the contract and in quantum meruit. So required, Jones elected to sue on the contract.

[5] Barringer v. Ray, 72 Nev. 172, 178, 298 P.2d 933, 936 (1956) (quoting Sackett v. Farmers' State Bank, 209 Iowa 487, 228 N.W. 51, 52 (Iowa 1929)).

[6] Paterson v. Condos, 55 Nev. 134, 142, 28 P.2d 499, 500 (Nev. 1934).

[7] Topaz Mutual Co. v. Marsh, 108 Nev. 845, 851-52, 839 P.2d 606, 610 (Nev. 1992).

it stands, he commits a second wrong, and a separate and distinct cause of action arises for the breach of contract.[8]

Thus, a plaintiff may assert several claims for relief and be awarded damages on different theories. However, a plaintiff is not permitted to recover more than his or her total loss plus any punitive damages assessed.

3. Fraud in the Inducement[9]

To establish fraud in the inducement, a party must prove by clear and convincing evidence each of the following elements: (1) a false representation made by the defendant; (2) the defendant's knowledge or belief that the representation was false (or knowledge that it had an insufficient basis for making the representation); (3) the defendant's intention to therewith induce the plaintiff to consent to the contract's formation; (4) the plaintiff's justifiable reliance upon the misrepresentation; and (5) damage to the plaintiff resulting from such reliance.[10] Fraud is never presumed; it must be clearly and satisfactorily proved.[11]

Jones primarily based its fraud-in-the-inducement claim on the following: (1) preparation for underground utilities began shortly after the contract was signed, despite LMB's assurances that no underground utilities would be installed; (2) LMB knew that some areas of caliche had required blasting, but nevertheless promised Jones that its footings could be poured directly against bearable caliche; and (3) LMB knew that some kind of revision to an egress would be necessary. According to Jones, these facts showed that LMB's representations at the time of contract negotiations and signing must have been false and that LMB intended to deceitfully induce Jones into signing a contract that LMB knew could not have been carried out as planned.

The court, however, found that no evidence introduced at trial clearly and convincingly demonstrated that LMB intended to deceive Jones into signing the contract based on information it knew at the time was either false or lacked a sufficient basis as related to Jones's specific work plans in the Phase I area. Thus, the court affirmed the district court's dismissal of Jones's fraud-in-the-inducement claim.

4. Cardinal Change/Abandonment/Quantum Meruit[12]

Jones presented its cardinal-change and abandonment theories as one claim, arguing that contract abandonment and cardinal change were essentially the same and could lead to recovery

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[8] Bankers Trust Co. v. Pacific Employers Insurance Co., 282 F.2d 106, 110 (9th Cir. 1960).

[9] Jones's claim for fraud in the inducement was formally dismissed on the thirteenth day of trial when the district court granted LMB's NRCP 41(b) motion. NRCP 41(b) provides for the involuntary dismissal of a claim after the close of the plaintiff's case "on the ground that upon the facts and the law the plaintiff has failed to prove a sufficient case for the court or jury."

[10] Wohlers v. Bartgis, 114 Nev. 1249, 1260-61, 969 P.2d 949, 958 (1998).

[11] Havas v. Alger, 85 Nev. 627, 631, 461 P.2d 857, 860 (Nev. 1969).

[12] Jones asserts that the district court erred by dismissing its "cardinal change/abandonment/quantum meruit" claim on day twelve of the trial.

in quantum meruit. The court found that Jones introduced evidence sufficient to submit both theories to the jury.[13]

a. *Contract abandonment*

Different theories exist by which contractors have recovered the reasonable value of performed work not contemplated by the terms of a contract. The contract-abandonment theory has been used in some cases to permit recovery outside the contract when the work contracted for is altered beyond the contract's scope.[14] The original contract is held to exist as far as it can be traced to have been followed, and the excess must be paid for according to its reasonable value. However, where the alterations and changes are so great that it is impossible to follow the original contract, the contract will be deemed to have been wholly abandoned, so that the contractor can recover upon a quantum meruit.[15]

Generally, contract abandonment occurs when both parties depart from the terms of the contract by mutual consent. This consent may be express, or it may be implied by the parties' actions, such as when the acts of one party inconsistent with the contract's existence are acquiesced in by the other.[16] Contract abandonment has been recognized where there have been so many substantial changes to the contract that it can no longer be used to determine the value of the work done.[17] The issue of whether contract abandonment has occurred generally presents a question of fact.[18]

At trial, Jones introduced evidence from which a jury could conclude that by directing Jones to perform its work at an inadequately prepared and maintained site, LMB in effect directed Jones to perform work inconsistent with provisions in the parties' contract which specifically described the efficient manner and time frame in which Jones was to perform its work. Thus, the court found that Jones's claim of contract abandonment was improperly dismissed.

b. *Cardinal Change*

The cardinal-change doctrine serves to provide a breach remedy for contractors who are directed to perform work which is not within the general scope of the contract and which is therefore not redressable under the contract.[19] Thus, a cardinal change occurs when the work is so drastically altered that the contractor effectively performs duties that are materially different from those for which the contractor originally bargained.[20] The contractor must prove facts with

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[13] Although Jones did not assert on appeal that a separate claim for quantum meruit would be appropriate, the court noted that both the contract-abandonment and cardinal-change theories may result in a damages award based on quantum meruit.

[14] *See*, *e.g*., C. Norman Peterson Co. v. Container Corp., 172 Cal.App.3d 628, 218 Cal.Rptr. 592, 598 (Ct. App. 1985).

[15] *Paterson*, 55 Nev. at 141, 28 P.2d at 500 (quoting Hood v. Smiley, 5 Wyo. 70, 36 P. 856, 857 (1894)).

[16] *See id*. at 141-42, 28 P.2d at 500.

[17] Rudd v. Anderson, 153 Ind.App. 11, 285 N.E.2d 836, 840 (1972).

[18] *See*, *e.g*., Harris v. IES Associates, Inc., 69 P.3d 297, 305 (Utah Ct.App. 2003).

[19] PCL Const. Services, Inc. v. U.S., 47 Fed. Cl. 745, 804 (2000).

[20] Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320, 1332 (Fed. Cir. 2003).

specificity that support its allegations that a cardinal change occurred.[21] Although the cardinal-change doctrine has been predominantly discussed in disputes based on government contracts, its underlying premise—that compensation for costs resulting from an abuse of authority under the changes clause should not be limited by the terms of that clause—applies to private contracts that include changes clauses.[22] Thus, this cause of action is viable in the context of private construction contracts.

Whether a change is cardinal is principally a question of fact, requiring that each case be analyzed individually in light of the totality of the circumstances.[23] Thus, a determination of the scope and nature of alleged changes requires a fact-intensive inquiry into the events that led to the excess work and their effect on the parties. The court must investigate the contract as a whole to determine whether the owner or construction manager is responsible for the contractor's difficulties.[24]

While there is no precise calculus for determining whether a cardinal change has occurred, the courts have considered the following factors: (1) whether there is a significant change in the magnitude of work to be performed; (2) whether the change is designed to procure a totally different item or drastically alter the quality, character, nature or type of work contemplated by the original contract; and (3) whether the cost of the work ordered greatly exceeds the original contract cost.[25]

In this case, the court noted that the issue is whether the entirety of the changes and impacts on Jones's work was so extensive as to force Jones to perform work beyond the confines of the contract. Because the evidence required to demonstrate the occurrence of cardinal change is similar to that required by the contract-abandonment theory, the court found that Jones could also be entitled to relief on its claim under a theory of cardinal change. Consequently, the court held that the district court erred in dismissing this claim.

Conclusion

This case establishes that "no damages for delays" provisions of construction contracts are not enforceable for (1) delays so unreasonable in length as to amount to project abandonment; (2) delays caused by the other party's fraud, misrepresentation, concealment, or other bad faith; or (3) delays caused by the other party's active interference. This case also recognizes the cardinal-change doctrine" as a breach remedy for contractors who are directed to perform work which is not within the general scope of the contract, and which is therefore not redressable under the contract.

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[21] *PCL*, 47 Fed. Cl. at 804.

[22] *See*, *e.g*., Hensel Phelps Const. v. King County, 57 Wash.App. 170, 787 P.2d 58 (1990) (concluding that a subcontractor whose contract incorporated terms of a government contract had not demonstrated the occurrence of a cardinal change when the shape and size of an area to be painted remained the same and its only claims were for acceleration, having to re-do work, and problems involving the stacking of trades).

[23] Becho, Inc. v. United States, 47 Fed. Cl. 595 (2000); *see also* Rumsfeld, 329 F.3d at 1332.

[24] *See* Stone Forest Industries, Inc. v. U.S., 973 F.2d 1548, 1550-51 (Fed.Cir. 1992) (determining that a material breach of contract "depends on the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties").

[25] *Becho*, 47 Fed. Cl. at 601 (concluding, in light of the factual nature of the inquiry, that a motion for summary judgment on the issue of cardinal change was precluded by existing material questions of fact).