FILED
MAY 31 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CONTINENTAL DREDGE AND MARINE CORPORATION, Plaintiff - Appellant, vs. CITY OF SIOUX CITY, IOWA, Defendant - Appellee.	)	May 31, 1979 66 2-62085

Appeal from Woodbury District Court - Donald M. Pendleton, Judge.

Plaintiff appeals judgment in favor of city on plaintiff's breach of contract action and from award of damages to city on its counterclaim. - Affirmed in part, reversed in part.

Michael Elwanger & Lowell Kindig, of Kindig, Beebe, Rawlings, Nieland and Killinger, Sioux City, for Appellant.

Michael Walsh & James Abshier, Sioux City, for Appellee.

Heard by Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

This appeal involves an attempt by plaintiff Continental Dredge and Marine Corporation to recover damages on a contract entered into with defendant, city of Sioux City. Trial court found in favor of the city on all of plaintiff's claims and awarded damages to the city pursuant to its counterclaim. Plaintiff has raised a number of issues for review. We affirm in part and reverse in part.

Breach of Warranty

In March, 1975, the city posted a notice of taking bids for a dredging project on its Cimmarina Harbor. According to the city's specifications, the marina was to be dredged to a minimum elevation of 1071 M.S.L. (Mean Sea Level). The contractor would be paid on the basis of cubic yards of dredge material removed. Paragraph seven of the specifications provided in part:

> It is estimated to remove about 40,000 cubic yards from the basin. Owner reserves the right to reduce this amount by approximately 10,000 cubic yards or increase the amount to as much as 60,000 cubic yards if he (sic) chooses to do so.

The exact amount of payment due for the removal of dredge material was to be determined by a comparison of preliminary and final soundings. These soundings were to be taken by the contractor. Plaintiff's president, Sandor G. Kiss, was awarded the contract on his low bid of $1.00 per cubic yard of excavation. Mr. Kiss, an experienced dredgeman, did not personally inspect the marina prior to submitting his bid but he was informed by a business acquaintance that it was going to be "an easy dredging." After the actual dredging operation began, it became apparent that there was considerably less than 30,000 cubic yards of material at elevation 1071. Mr. Kiss alerted the city engineer to the situation but continued to dredge at the same elevation. He then proposed that a different method of payment be used because of the substantial underrun of dredge material. The record shows that over 30,000 cubic yards could have been removed if the excavation had been made at an elevation of 1070. The city engineer testified that 1071 M.S.L. was the minimum requirement and that Mr. Kiss was free to dredge as deeply as necessary provided that he stayed within the contract's monetary limit. Mr. Kiss contended, however, that he was never given permission to dredge below 1071, that he relied on the quantities contained in the specifications when

he formulated his bid, and that if he had known about the underrun his unit price bid would have been considerably higher.

A warranty has been defined as "an assurance by one party to an agreement of a fact upon which the other party may rely; it is intended precisely to relieve the promisee of any duty to ascertain the facts for himself. Thus, a warranty amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue." Paccon, Inc. v. United States, 399 F.2d 162, 166 (Ct. Cl. 1968). Plaintiff herein argues that the city warranted the existence of at least 30,000 cubic yards of dredge material at elevation 1071, and the absence of this amount constituted a breach of warranty entitling plaintiff to damages. No words of warranty are used in connection with the contract's specifications of quantity. On the contrary, the contract states, "it is estimated to remove about 40,000 cubic yards." (emphasis added) The contract further provides "the work shall consist of dredging . . . to a minimum elevation of M.S.L. 1071." A provision requiring the contractor to take the preliminary soundings served as additional notice that the city could not guarantee a particular amount of dredge material. The contractual conditions specifically state that "bidders must satisfy themselves as to the nature of the work and all conditions affecting the performance of the contract." We are constrained to conclude that there was no warranty, express or implied, in the contract which guaranteed the existence of 30,000 cubic yards of dredge material above M.S.L. 1071.

Negligence

In Division II of its brief, plaintiff alleges that the city was negligent in the preparation and administration of the contract. Plaintiff fails, however, to state, argue, or cite authority in support of this issue. Accordingly, the issue is deemed to have been waived. Iowa R. App. P. 14(a)(3).

Impossibility

The marina which was the site of plaintiff's dredging project lies adjacent to the Missouri River; the elevation of the water in the marina depends on the river's elevation. In turn, the elevation of the river at Sioux City is primarily controlled by a system of upstream dams operated by the Army Corps of Engineers. A Corps bulletin dated May 12, 1975, indicated that because of above normal spring rainfall and the

melting of the mountain snowpack, an exceptionally high amount of water would be released from the reservoirs for the remainder of the year. Plaintiff commenced its dredging operation on May 23, 1975. By July 19, 1975, the level of water in the marina had risen to such an extent that plaintiff could no longer reach elevation 1071 with the dredge it had been using. Plaintiff therefore ceased its operations after having dredged approximately 75 percent of the marina.

Plaintiff now asserts that it was discharged from completing the project due to impossibility of performance. Although the doctrine of impossibility of performance is recognized in Iowa, "the mere fact that performance becomes economically burdensome or unattractive does not excuse performance unless the increased cost is due to some unforeseen contingency which alters the essential nature of the performance." Nora Springs Co-op Co. v. Brandau, 247 N.W.2d 744, 748 (Iowa 1976). The record shows that plaintiff could have modified its equipment by extending the cutter head but failed to do so because the procedure was too expensive. Plaintiff made no attempt to rent or borrow suitable equipment or to subcontract the work to another dredger. The city offered to extend the time for performance but plaintiff refused. We conclude that the excuse of impossibility of performance is inapplicable to the instant case because plaintiff did not show that completion of the project was objectively impossible or that any increased cost was so prohibitive as to change the nature of its contract with the city. See Nora Springs Co-op Co., 247 N.W.2d at 747-48.

Counterclaim

In its amended counterclaim, the city sought rescission of the contract and restitution in the amount of $17,324.16. Trial court's judgment included an order rescinding the contract and awarding the city the sum of $10,661.37. Rescission and restitution are equitable remedies which will not be allowed for slight or technical breaches of contract. Maytag Co. v. Alward, 253 Iowa 455, 466, 112 N.W.2d 654, 659 (1962). "If the party who seeks rescission has an adequate remedy at law, ordinarily he is not entitled to rescind, but in case of repudiation, or of a breach going to the root of the contract, unless the damages can be ascertained with reasonable certainty, rescission is a matter of right, . . ." Id. Essentially, rescission is the unmaking of a contract with an eye towards putting the parties in the position they occupied before

the agreement was made. Butler Manufacturing Co. v. Elliott & Cox, 211 Iowa 1068, 1071-72, 233 N.W. 669, 670 (1930). In the instant case, there is nothing to suggest that the city's remedy at law for plaintiff's breach was inadequate. For breach of a construction contract committed by repudiation and abandonment, the injured party is entitled to judgment for damages measured by the reasonable cost of completion in accordance with the contract provided that such completion is possible and does not involve unreasonable economic waste. 5 A. Corbin, Contracts § 1089 (1964).

The city engineer testified that 34,375 cubic yards of sledge was present above M.S.L. 1070. At the contract price of $1.00 per cubic yard, plus the lump sum payments for mobilization, demobilization and miscellaneous work, the city would have owed the plaintiff approximately $59,603 if the contract had been fully performed. The record shows that the city paid plaintiff the sum of $20,324 for its partial performance and paid the Army Corps of Engineers $23,582 to complete the project in 1976. Thus, the city was economically advantaged by reason of plaintiff's breach of contract. The allowance of $10,751.36 to the city on its counterclaim is therefore reversed. In all other respects, the decision of the trial court is affirmed.

Affirmed in part; reversed in part.