

IN THE COURT OF APPEALS OF IOWA

FILED

APR 27 1982

CLERK SUPREME COURT

MIDLANDS CORPORATION,

)

Plaintiff-Appellee,

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Filed April 27, 1982

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vs.

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CITY OF COUNCIL BLUFFS, IOWA,

)

1-382
2-66309

Defendant-Appellant.

)

Appeal from Pottawattamie District Court - Leo Connolly, Judge.

Defendant-city appeals from that portion of trial court's judgment against it in this action brought by plaintiff-developer for an accounting of amounts due under an urban renewal contract, asserting trial court erred 1) in determining that certain expenditures made by the city were not subject to the expense limitation set forth in the contract between the city and the developer; 2) in failing to find plaintiff was estopped from asserting that the expenditures were not subject to the contractual limitation; and 3) in determining that certain evidence was inadmissible. REVERSED AND REMANDED.

John M. Peters, Council Bluffs, Iowa, for defendant-appellant.

Philip J. Willson of Smith, Peterson, Beckman and Willson, Council Bluffs, Iowa, for plaintiff-appellee.

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

Defendant-city appeals from that portion of trial court's judgment against it in this action brought by plaintiff-developer for an accounting of amounts due under an urban renewal contract. Defendant asserts trial court erred 1) in determining that certain expenditures made by the city were not subject to the expense limitation set forth in the contract between the city and the developer; 2) in failing to find that plaintiff was estopped from asserting that the expenditures were not subject to the contractual limitation; and 3) in determining that certain evidence was inadmissible. We reverse and remand for entry of judgment in favor of defendant in accordance with this opinion.

Plaintiff, Midlands Corporation, was the redeveloper for a portion of a downtown Council Bluffs urban renewal area. Plaintiff entered into two contracts with defendant, City of Council Bluffs, which defined the parties' respective responsibilities in carrying out that portion of the urban renewal plan providing for the construction of a shopping mall. The first contract (Land Sale Contract), dated September 19, 1972, was an executory contract providing that defendant would sell certain land to plaintiff in and around the development, retain other land in that area, and build improvements, including a parking facility, on the retained land. Plaintiff was required to purchase the specified land for a stated amount and was to receive a 50 year easement on city-owned land for continued public use. The contract also provided that defendant's total investment, including the purchase price of the retained land, would "not exceed an amount that can be raised by tax increments due to redeveloper's improvements under Iowa Code chapter 403." Performance by the parties to perfect the sale was to be simultaneous.

In the interval between the execution of this document and the execution of the second contract, the parties took certain actions to put the development plan in effect. Due to various factors, several changes in the construction plan were required and expense estimates increased. It was determined that the tax

increments would raise a maximum of \$4,500,000, but plaintiff requested defendant to increase its contribution to \$4,934,155. The additional \$434,155 was to be raised from the sale of city parking lots. Defendant agreed to increase its contribution accordingly.

The second contract (Reciprocal Easement Agreement),¹ dated December 31, 1973), further detailed the parties' obligations and set forth the general plan for redevelopment. This agreement incorporated the Land Sale contract by reference and set forth the various changes thereto. The agreement specifically provided that:

[a]fter City shall have expended the sum of Four Million Nine Hundred Thirty-Four Thousand, One Hundred Fifty-Five and no/100 Dollars (\$4,934,155.00) or shall have committed itself by contracts therefor, Developer agrees to perform and pay for all remaining construction required on the part of the City by section 13.05 hereof.

At the completion of the redevelopment project, defendant had expended a total of \$5,811,614. Plaintiff paid defendant \$484,496.36 for claimed cost overruns, but brought this action for an accounting because it determined that, according to its interpretation of the contract, there were no cost overruns to reimburse. Defendant counterclaimed asserting that, based on its interpretation of the contract, plaintiff owed it an additional \$392,962.64 for cost overruns.

The parties agreed to an extensive pretrial stipulation which covered most of the facts set out above. The case was tried to the court on November 29-30, 1979, and trial court filed its findings of fact and conclusions of law on December 31, 1980. In regard to the disputed cost overruns, trial court determined that certain expenditures made by defendant were not to be included in calculating cost overruns. Specifically, trial court found that the cost of the land

¹ Hereinafter referred to as the REA.

retained by defendant, the improvement of the Indian Creek box, and the additional architectural supervision of the parking garage were not expenditures which contributed to defendant's \$4,934,155.00 investment limit provided for in the contracts. Defendant appeals from the judgment entered on these adverse findings.

I. Scope of Review. Since this is an action in equity, our review is *de novo*. Iowa R. App. P. 4. We "review the facts and the law and determine anew from the credible evidence all properly presented and preserved contentions." Miller v. American Woodlands, Inc., 275 N.W.2d 399, 402 (Iowa 1979).

II. Expenditure Limitation. Defendant argues that the Land Sale contract executed by the parties and their subsequent dealings evidence their intent that defendant's total investment was to be limited. Defendant further asserts that, notwithstanding any conflicting language in the second contract, the provisions of the entire agreement should be interpreted consistently with this manifest intention of limited total investment. Plaintiff argues that the first agreement was merely tentative, that many changes occurred during the interval between the two agreements, that these changed circumstances are evidenced in the new contract by a new provisions in which plaintiff agreed to reimburse defendant for cost overruns in exchange for defendant's increased investment, and that, accordingly, defendant agreed to exclude the cost of the land, Indian Creek box, and additional supervision costs, from its calculation of its total investment.

A. General Principles. We will first review the principles important to our resolution of these issues. Our objective is to ascertain the meaning and intention of the parties as expressed by their writing. Allen v. Highway Equipment Co., 239 N.W.2d 135, 138 (Iowa 1976). "A writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together." Restatement (Second) of Contracts § 202(2) (1979); see also Archibald v. Midwest Paper Stock Co., 176 N.W.2d 761, 763 (Iowa 1970).

"Interpretation involves ascertaining the meaning of the contractual words; construction refers to deciding their legal effect." Fashion Fabrics of Iowa v. Retail Investors, 266 N.W.2d 22, 25 (Iowa 1978). "[E]xtrinsic evidence is admissible as an aid to interpretation [of the contract] when it throws light on the situation of the parties' antecedent negotiations, the attendant circumstances and the objects they were striving to attain." Fashion Fabrics, 266 N.W.2d at 25. We will not separate one clause from another and interpret a contract seriatim, but rather will consider individual words and clauses in connection with the rest of the contract, to give effect to all parts thereof. Allen, 239 N.W.2d at 139; Haggin v. Derby, 209 Iowa 939, 945, 229 N.W. 257, 260 (1930). Generally, the burden of pleading and proving an issue go together, thus the burden of proof rests upon the party who affirmatively asserts the issue. Gipson v. Iowa Dept. of Job Services, 315 N.W.2d 834, 836 (Iowa App. 1981).

B. Land Retained by Defendant. Plaintiff argues that since the REA, which increases defendant's investment limit to \$4,934,155, refers to "contracts for improvments" and omits reference to the purchase price of the land, the land should be excluded from calculation of defendant's investment. Plaintiff further argues that antecedent negotiations reflect this interpretation. We disagree.

In pertinent part, the Land Sale contract states:

The Redeveloper [plaintiff] agrees that the maximum investment by the city in the purchase of the portion of land . . . not purchased by the Redeveloper, the design and construction of the parking facilities, and the design, construction and installation of the Mall and all improvements on all land on the plot plan not purchased by the Redeveloper, shall not exceed an amount that can be raised by tax increments due to Redeveloper's improvements under Iowa code chapter 403. (emphasis added).

This language clearly states that the cost of the land retained by defendant was to be included in calculating defendant's total investment.

The pertinent provisions of the REA state:

The City agrees to let contracts for the improvements required on the part of the City ... The City agrees to make funds available as needed to carry out said contracts up to a limit of Four Million, Nine Hundred Thirty-four Thousand, One Hundred Fifty-five and no/100 Dollars (\$4,934,155.00).

On their face, these provisions conflict with the Land Sale contract and negotiations indicating that the investment limit encompassed the land as well as the improvements. We believe, however, that these differences create an ambiguity which requires consideration of extrinsic evidence.

From our review of the evidence of negotiations during the interval between the two agreements, we conclude that, notwithstanding the agreement to increase defendant's investment by \$434,155, the parties clearly manifested their intention that defendant's total investment was to remain limited to \$4,934,155. Consequently, we further conclude that the phrase "total investment" used in these negotiations included the cost of the land retained by defendant.

A letter from Midlands to the City on November 26, 1973, states, in pertinent part:

We are also willing to agree that the total investment of the city in the parking garage, the enclosed mall, and the public areas retained by the city will not exceed the \$4,500,000 in bonds already authorized plus the proceeds from the sale of the City-owned parking lots in the amount of \$434,155, making the total City financial obligation \$4,934,155.

This language clearly indicates that, while the parties were considering increasing defendant's investment obligation, its financial commitment would be limited to the figures quoted and would encompass all costs, including costs of the land. A letter to plaintiff from defendant on December 3, 1973, reflects the same interpretation. In that letter defendant stated, "the city would agree that its total investment on the land retained by it will be an amount not to exceed \$4,500,000.00, plus an additional \$434,155.00 from sources available to the city."

This letter further indicated that defendant was to be reimbursed by plaintiff for cost overruns. In this regard the letter said: "... it must be understood that any expenditures for improvements on the land retained by the City over and above \$4,934,155.00 will be at Redeveloper's cost." We do not believe that this provision indicates, in any way, that defendant's investment ceiling pertained only to improvements. The evidence reveals that the city already owned the land at the time of these negotiations and, thus, any further costs would obviously have been for improvements. We believe that the letter reflects recognition of the ceiling on the financial obligation of the city which, including improvements, was not to exceed \$4,934,155.00.

Earlier communications revising cost estimates also indicate the land was to be included in the calculations. A letter from plaintiff to defendant on October 20, 1972, itemizes the city's financial obligation, and specifically includes the cost of the land.

Plaintiff also argues that the Land Sale contract was tentative, but we find no merit to this assertion. Although the first agreement was executory, it was executed. Further, the Land Sale contract was specifically incorporated in the REA which provided:

It is also specifically agreed that this REA [2nd agreement] is also subject to all terms, provisions, covenants, conditions and restrictions contained in a certain agreement entitled "Contract for Sale of Land for Private development [1st contract]"

Construing these two documents as a whole, and giving effect to each provision, we conclude that the land was to be included in the calculations. We believe the language in the REA referring to improvements does so simply because, like the letter of December 3, 1973, those were the expenditures left to be undertaken. In light of all the evidence, it does not mean that defendant's investment commitment encompassed only expenditures for improvements. Properly interpreted, the provision means: expenditures for improvements are not to

exceed the fund available, which is \$4,934,155.00 minus the amount already invested by the city. The amount already expended by the city, we know from prior negotiations, includes the purchase cost of the land retained.

We thus conclude trial court erred in determining that the cost of the land retained by defendant was to be excluded in calculating defendant's total investment.

C. Indian Creek Box. Plaintiff argues that the cost of improvements on the Indian Creek sewer box is specifically exempted from the total investment calculation by the Land Sale contract because it is a part of defendant's obligation for "site preparation." We disagree.

The contract states in pertinent part:

The Agency [city], without expense to the Redeveloper or assessment or claim against the Property and prior to completion of the Improvements (or at such earlier time or times as the Redeveloper and the Agency may agree in writing), shall, in accordance with the Urban Renewal Plan, provide or secure or cause to be provided or secured, the following:

(a) Vacation of Streets, Etc.

* * *

(b) Replatting, Resubdivision, or Rezoning.

* * *

(c) Improvements of Existing Streets.

* * *

(d) Construction and Dedication of New Streets.

* * *

(e) Installation of Sidewalks.

* * *

(f) Street Lighting, Signs, and Fire Hydrants.

* * *

(g) Installation of Public Utilities. The installation or relocation (by the Agency or by the appropriate public body or public utility company) of such sewers, drains, water and gas distribution lines, electric, telephone, and telegraph lines, and all other public utility lines, installations, and facilities as are necessary to be installed or relocated on or in connection with the Property by reason of the redevelopment contemplated by the Urban Renewal Plan and the development of the Property: Provided, That the Agency shall not be responsible for, nor bear any portion of the cost of, installing the necessary utility connections within the boundaries of the Property between the Improvements to be constructed on the Property by the Redeveloper and the water, sanitary sewer, and storm drain mains or other public utility lines owned by the City or by any public utility company within or without such boundaries, or electric, gas, telephone, or other public utility lines owned by any public utility company within or without such boundaries, and the Redeveloper shall secure any permits required for any such installation without cost or expense to the Agency.

We note first that these provisions are set forth in the first agreement, the Land Sale contract, which contains the original total investment limit. Thus, construing these provisions consistently with the contract as a whole, we conclude that provision (g) covers improvement of the Indian Creek Box, but that expense is includable in the investment calculations. The mere fact these improvements were to be at defendant's expense does not exempt them from contributing to defendant's total investment for the purpose of determining the limit of defendant's expenditures. Rather, we are convinced that the provision stating that these expenditures are to be made "without expense to the Redeveloper" effectively reiterates the fact of its inclusion. We believe that the purpose of the provision is to ensure that plaintiff, as a property owner, is not assessed for these expenditures. Thus, assuming defendant's total investment was less than the ceiling, defendant could not tax plaintiff for the cost of these improvements. However, in the event defendant's expenditures exceeded the ceiling, reimbursement was required under additional provisions of the contract made on a later

date. By reimbursing defendant, plaintiff is not paying for any specific expenditure, but is being assessed for cost overruns generally as per the parties' agreement.

We thus conclude trial court erred in excluding cost of the Indian Creek improvements from calculations of defendant's expenditure limit.

D. Additional Architectural Supervision. Plaintiff finally argues that the cost of additional architectural supervision for the parking garage construction constituted extra services at defendant's expense and are not subject to the reimbursement terms of the parties' agreement. We disagree. While this expense may have constituted an extra expense to be incurred by the owner (defendant), this was a provision in the contract between defendant and the architect. Assuming defendant was responsible for such costs under its agreement with the architect, this agreement had no relevance to the expenditure limits in the contract between plaintiff and defendant. The cost of supervision was nonetheless an expense incurred by defendant, not subject to plaintiff's approval, resulting from the construction of the parking garage. We conclude that it is therefore includable in the overrun calculations. While it may have been prudent for plaintiff to have provided that such expenditures, which were not a part of cost planning, were not to be subject to the reimbursement provision, no such protective measures were taken.

In summary, we reverse trial court's ruling on these issues and remand to trial court for entry of judgment in favor of defendant on these issues.

REVERSED AND REMANDED.