

IN THE COURT OF APPEALS OF IOWA

No. 1-74 / 90-1033

FILED

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CLERK SUPREME COURT

ROHLIN CONSTRUCTION CO., INC.,

Appellee/Cross-Appellant,

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vs.

CITY OF HINTON, IOWA, and PLYMOUTH COUNTY, IOWA,

Appellants/Cross-Appellees,

Appeal from the Iowa District Court for Plymouth
County, Dewie J. Gaul, Judge.

Both defendants appeal and plaintiff cross-appeals the
district court's refusal to enforce a liquidated damages
provision found in three contracts for plaintiff's asphalt
resurfacing of county and city roads. **AFFIRMED.**

Patrick J. Phipps of Metcalf, Thompson & Phipps,
Menville, for appellant City of Hinton.

Robert J. Dull, County Attorney, LeMars, for appellant
Plymouth County.

Donald J. Hemphill of Hemphill Law Office, Spencer, for
appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.,
but decided en banc.

HAYDEN, J.

On May 31, 1988, both the City of Hinton and Plymouth County entered into various contracts with Rohlin Construction Co., Inc. Rohlin had submitted the successful bids. These contracts were for the asphalt resurfacing of certain county and city roads. The language of the contracts had been prepared on "proposal forms" prepared by the Iowa Department of Transportation and contained the following language:

If this bid is accepted, bidder agrees: to either complete the work within the contract period or pay liquidated damages, which shall accrue at the daily rate specified below, for each additional working day the work remains uncompleted.

The proposal indicated the amount of liquidated damages per day was \$400. The work was to be completed by September 2, 1988.

Rohlin was aware of these provisions when it submitted bids. Rohlin did not begin work on the asphalt resurfacing until September 17, 1988. Rohlin finished its work on October 13, 1988. Both the County and City withheld \$400 for each day the work was unfinished beyond September 2. The combined delays totaled eighty-one days. Defendants withheld a total of \$32,400 from the total combined contract bids of \$511,242.38. Rohlin then instituted a separate suit against each defendant to collect the monies withheld. The

two suits were consolidated. They were submitted to the district court upon a stipulation of facts.

The district court concluded both the City and County failed to prove damages due to the delay. Accordingly, the court held the liquidated damages provisions were excessive and in the nature of a penalty. It awarded to Rohlin the sums withheld plus interest, but declined to grant Rohlin attorney fees. The City and County each filed a separate notice of appeal from the court's refusal to enforce the liquidated damages provisions of the contracts. They have joined together in submitting a brief. Rohlin cross-appeals the court's refusal to award attorney fees.

Our review in this case is limited to assigned errors of law. Iowa R. App. P. 4. The trial court's findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

I. Liquidated Damages as Penalty

After examining the evidence, the trial court found the defendants had proven no actual damages arising out of the delay. The trial court concluded the \$400-per-day liquidated damages clause for every day beyond the agreed completion date constituted a penalty clause and hence was unenforceable.

The Iowa Supreme Court has summarized this state's rule on liquidated damages clauses:

Turning to the matter of liquidated damages specified in the agreement, certain rules laid down in our case law apply.

We have said pre-estimated liquidated damages, in a weighing of interests, must ordinarily be found reasonable to be enforceable.

The fact the instrument contains a recital that the sum therein named is agreed upon as liquidated damages is not necessarily controlling as to its legal effect.

The court will look into all the circumstances and give effect to such an agreement only so far as equity and good conscience will permit; and if the sum stipulated is out of reasonable proportion to the loss or injury actually sustained or reasonably to be anticipated, it will be treated as a penalty.

Engel v. Vernon, 215 N.W.2d 506, 516 (Iowa 1974) (citations omitted).

The Iowa Department of Transportation publishes a construction manual containing a schedule for setting liquidated damages. The schedule lists the liquidated damages at \$200 per day for the first Plymouth County contract, \$300 per day for the second Plymouth County contract, and \$100 per day for the City of Hinton contract. This schedule is apparently not mandatory, and neither defendant chose to follow its recommendations.

In the present case, three separate contracts are involved. All three contracts had a liquidated damages clause of \$400 per day for each day after the contract completion day of September 2, 1988. The first contract with Plymouth County had a contract price of \$221,588.39 and took seventeen days to complete. The second contract with Plymouth County had a contract price of \$ 251,696.99 and took twelve days to complete. The contract with the City of Hinton had a contract price of \$37,957.00 and took three days to complete.

Our decision in this case is controlled by the Iowa Supreme Court case of Elzey v. City of Winterset, 172 Iowa 643, 154 N.W. 901 (1915) (cited with approval in Engel, 215 N.W.2d at 516). In that case, as in this, three separate contracts were involved. Two of the contracts were quite substantial, while the third was considerably smaller. Id. at 651-52, 154 N.W. at 904. Yet all three provided for liquidated damages of \$25 per day for delay after the contract completion date. Id.

In the present case, there is likewise three contracts, two substantial and one considerably smaller. Yet all three provide for \$400 per day in liquidated damages. In the words of the supreme court: "This alone has frequently been held sufficient for holding the stipulation to be for a penalty, even though the parties have expressly named it liquidated damages." Id. at 652, 154 N.W. at 904.

To be allowed, liquidated damages must be in reasonable relation to the reasonably anticipated damages for breach or delay. Engel, 215 N.W.2d at 516. There is no showing the \$400 per day is reasonably related to any anticipated damages of even the larger contracts. The fact the same amount is exacted for a much smaller contract as well shows it is merely intended as security for the early completion date, and thus a penalty clause. City of Winterset, 172 Iowa at 647, 154 N.W. at 904.

We find the language of the City of Winterset case directly on point here:

Assuming, for the present, that the plaintiff was wholly at fault for the failure to complete the the job within contract time, there is not the slightest hint in the evidence that damage or injury of any kind resulted therefrom to the city. True, if we were to hold that the contract clearly and conclusively provides for liquidated damages, the defendant was probably not required to offer such evidence--the breach of the contract being shown; but the utter absence of any such showing, directly or indirectly, and the tax which it places upon human ingenuity to conjecture what sort of loss or injury to the city in its corporate capacity the parties could have anticipated and provided against, for which an absolute forfeit of \$75 per day would be a reasonable compensation, are matters of very material consideration, when we come to decide whether we will treat that claim as providing for liquidated damages or penalty. It is to be kept in mind that this provision has no reference to a failure of the contractor to do a good, workmanlike job, or to a failure to do the work strictly and in all respects according to the plans and specifications, but relates only to the time when the work shall be done. It is conceivable that a few days' delay in that respect might work some public inconvenience, and it was proper that the city council should seek by the contract to insure or secure the completion of the work in the shortest time practicable, and the insertion of that clause in the writing for that purpose is easily explicable. But, as is pointed out in several of the authorities above cited, a stipulation for damages to secure the doing of the work within the time named is, in the very nature of the thing, security--penalty--and not liquidated damages. If it be the rule, as we have seen, that, to be upheld as liquidated damages, there must be some apparent fair proportion between the sum named and the damages to be reasonably anticipated from delay in the completion of the work, then the record should be such as in some way suggests what probable or possible loss or injury to the city must have been in the minds of the parties in making this agreement. Neither in evidence nor in argument is there pointed out any loss or injury sustained by the city or any liability imposed upon it because of the delay. The city withholds and refuses to pay plaintiff the sum of \$3,600 earned by him and offers no reason therefor save the "letter of the bond". As we have often held, there is no charm in the words "liquidated damages"; and if, on the

whole case, the stipulated sum may fairly be treated as a penalty, a mere security for due performance of the job, then the party claiming advantage of the clause may recover his actual loss and no more. The sum so withheld is grossly out of proportion to any conceivable loss or injury sustained by the city, Equity will not enforce such a claim.

There are still other reasons for holding this provision a penalty merely. Here are three several contracts, or three several parts of one contract, the subject-matters of which are of varying importance. Two of them are for the construction of comparatively large paving improvements, and one for another very small job of two or three blocks; yet in each agreement is inserted the same provision for \$25 per day damages in case of delay. This alone has frequently been held sufficient for holding the stipulation to be for a penalty, even though the parties have expressly named it liquidated damages. Foley v. McKeegan, 4 Iowa 1; Sanders v. McKim, 138 Iowa 122, 124.

To hold otherwise in this case and say the city may retain this large sum, not because it has in any manner suffered loss or injury, but because, by giving literal effect to the damage clause of the contract, it has the power to do so is repugnant to an enlightened sense of justice. Compensation, and not gain or profit, is the sole basis for the recovery of damages, save where exemplary damages are allowable.

Id. at 650-52, 154 N.W. at 903-04 (emphasis added); see generally Annot., Contractual Provision for Per Diem Payments for Delay in Performance as One for Liquidated Damages or Penalty, 12 A.L.R.4th 891 (1982).

We determine the liquidated damages clauses were in fact penalty clauses. They bear no relation to anticipated or actual damages suffered either by Plymouth County or the City of Hinton.

We affirm the trial court on this issue.

II. Attorney Fees

Rohlin complains the trial court abused its discretion in denying attorney fees. The Labor and Material on Public Improvements Act, Iowa Code section 573, expressly provides for attorney fees in the case of litigation.

The court may tax, as costs, a reasonable attorney fee in favor of any claimant for labor or materials who has, in whole or in part, established a claim.

Iowa Code § 573.21.

The language in the statute indicates the trial court may award attorney fees. The award is discretionary, not mandatory. Sheer Construction, Inc. v. W. Hodgman and Sons, Inc., 326 N.W.2d 328, 334 (Iowa 1982).

A discretionary ruling is presumptively correct, and on appeal will be overturned only where an abuse of discretion has been demonstrated. An abuse is found only where the discretion is exercised on grounds or for reasons clearly unreasonable.

Id.

The trial court in the present case pointed out in its ruling:

The question as to whether the contracts provide for a penalty or whether the provisions for liquidated damages are enforceable is not an obvious one, and only after careful study of the authorities has this court concluded the contract provisions call for a penalty and thus should not be applied. The plaintiff knew the provisions when it bid and when it signed the contracts, and made no effort to comply with them. It took a chance they would be held unenforceable. Its conduct does not entitle it to attorney fees in this case, in the considered judgment of the Court. Each party should bear its own fees.

Our review of this case convinces us the trial court

acted within its discretion in denying attorney fees to Rohlin. We affirm the trial court on this issue.

The trial court is affirmed on all issues.

Costs on appeal are taxed two-thirds to Plymouth County and one-third to the City of Hinton.

AFFIRMED.

Oxberger, C.J., and Schlegel, J., concur; Donielson and Habhab, JJ., specially concur; and Sackett, J., concurs in part and dissents in part.

DONIELSON, J. (specially concurring)

I concur in the result. I find it quite disturbing that the plaintiff entered into these contracts with absolutely no intention of fulfilling the contracts within the time specified. By granting the plaintiff relief in this case, we sanction a party's breach of contract. However, under current Iowa law, a party may breach a contract term (apparently intentionally or otherwise) and still obtain relief from a liquidated damages provision if that provision is unreasonable. See Elzey v. Winterset, 172 Iowa 643, 154 N.W. 901 (1915). Here, I agree that the liquidated damages provisions in these three contracts (calling for damages of \$400 per day for every day beyond the contract deadline) constitute penalties. I base my conclusion solely on the fact that the amount in each contract exceeds that amount recommended by the Iowa Department of Transportation (DOT) construction manual schedule. I find this schedule is DOT's assertion of reasonable liquidated damages for specified dollar amounts of contracts. Pursuant to that schedule, the City of Hinton contract should have provided for liquidated damages of \$100 per day, one of the Plymouth County contracts should have provided for \$200 per day and the other \$300 per day. Because the amounts actually included exceed the schedule amounts, I find the liquidated damages clauses to be unreasonable and therefore unenforceable.

I write also to emphasize that I believe courts should not lightly disregard contract terms, especially where the parties are competent business persons and have engaged in arms-length negotiations. As a reviewing court, we employ hindsight. Consequently we are not in a good position to evaluate the reasonableness of a liquidated damages provision, which is included in the contract precisely because of the uncertainty and indefiniteness of actual damages.

The purpose in permitting a stipulation of damages as compensation is to render certain and definite that which appears uncertain and not easily proven. The courts recognize that the parties, particularly at the time of execution of the instrument, are in as good a position as anyone to arrive at a fair amount of damages for a subsequent breach. In the event they are not unconscionable or excessive, courts will not disturb it.

Solomon v. Dept. of State Hwys. & Transp., 345 N.W.2d 717, 719 (Mich. App. 1984) (quoting Curran v. Williams, 352 Mich. 278, 282-283, 89 N.W.2d 602 604 (1958)).

Here, were it not for the large divergence from the scheduled amounts, I am not at all sure I would find the liquidated damages provisions unconscionable or excessive. But, where DOT has determined amounts it believes to be reasonable under various circumstances, those conclusions should not be arbitrarily ignored. I concur.

Habhab, J., joins this special concurrence.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

In May and June 1988 plaintiff, a substantial road contractor, contracted with defendants to complete three road projects by September 2, 1989, and agreed to pay defendants \$400 a day for each day the contract was not completed on schedule. Defendants wanted the roadways completed by that time because the road was to be used by school traffic and traffic to a local grain elevator. Plaintiff did not even start the projects until September 17, 1989, over two weeks after they were to have been completed and did not complete the project until October. As a result of this, defendants attempted to withhold from plaintiff's contracts. Defendant county had two contracts totaling \$473,285.38. The county withheld \$22,200 or 4.7 percent. Defendant city had a contract for \$37,958. The city withheld \$10,200 or 27 percent.

The trial court found when the plaintiff bid on the projects, plaintiff noted the projects had an unusually early completion date and a high per diem rate for liquidated damages. The plaintiff also knew then it would not complete the project by the completion date in the contract. The trial court also found the completion date was selected by defendants so the work would be done shortly after school started and before September grain traffic began. The trial court found minimal damages but

gave no consideration to the public loss of the use of the roadway in fixing damages.

The majority has affirmed applying Elzey v. City of Winterset, 172 Iowa 643, 154 N.W.2d 905 (1915). I do not find Winterset applicable, but if it is, this 1915 case should be reviewed by our supreme court in view of current business practices. I would not apply Winterset, because, first, the supreme court in Winterset found there was no damages. My review of this record convinces me there were damages. Secondly, I think it important we recognize Winterset is a 1915 case and should be limited to its specific facts. The attitudes on this issue have changed since 1915. In Sides Const. Co. v. City of Scott City, 581 S.W.2d 443, 446-47 (Mo. App. 1979), the court recognized the attitude change and the need for the change when they said:

The right to stipulate for liquidated damages for delay in completing construction of public works is generally recognized, and the stipulated amount may be recovered, if reasonable. Provisions for fixed per diem payments for delay in the performance of such contracts are usually construed as stipulations for liquidated damages, and not as penalties, where the actual damages are uncertain or are difficult of ascertainment, and where the stated sum is a reasonable estimate of probable damages or is reasonably proportionate to actual damages.

In deciding such questions, the courts should consider the nature of the contract, the public detriment to be contemplated by the delay, and the difficulty in approximating damages as a result of the delay. In such cases, the courts generally

hold that such contractual provisions are stipulations for liquidated damages, and are not penalties. 64 Am.Jur.2d Public Works and Contracts, § 127, at p. 996. See also 13 Am.Jur.2d, Building and Construction Contracts, 84-86, pp. 85-88.

There was a time when the courts were quite strong in their view that almost every contract clause containing a liquidated damages provision was, in fact, a forfeiture provision which equity abhorred, and therefore, nothing but actual damages sustained by the aggrieved party could be recovered in case of contract breach caused by delay past the proposed completion date. But, in modern times, the courts have become more tolerant of such provisions, probably because of the Anglo-Saxon reliance on the importance of keeping one's word, and have become more strongly inclined to allow parties to make their own contracts and to carry out their own intentions, free of judicial interference, even when such non-intervention would result in the recovery of a prestatd amount as liquidated damages, upon proof of a violation of the contract and without proof of actual damages. United States v. Bethlehem Steel Co., 205 U.S. 105, 119, 27 S. Ct. 450, 455, 51 L.Ed. 731, 737 (1907); Yerxa v. Randazzo Macaroni Mfg. Co., 315 Mo. 927, 957-58, 288 S.W. 20, 34 (1926). The reasoning in United States v. Bethlehem Steel, supra, has been followed by Missouri in public works construction cases. See Bloomfield Reorganized School Dist. No. R-14 v. Stites, supra, and Southwest Engineer Co. v. Reorganized Sch. Dist. R-9, 434 S.W.2d 743 (Mo. App. 1968).

(Emphasis added.)

I also would find the trial court erred in failing to give consideration to loss of public use and in placing the burden of proving damages on defendants, rather placing the burden on plaintiff to show the damages were not reasonable. Damage of the public by reason of delayed use of the roadway does not easily convert to dollars and cents. See Solomon v. Dept. of State Highways and Transp.,

345 N.W.2d 717, 719-20 (Mich. App. 1984).¹ And as the Missouri appellate court said in Sides Const. Co. v. City of Scott City, 581 S.W.2d 443, 447 (Mo. App. 1979):

It is true that the precise amount of such damages is difficult to ascertain. That is why a liquidated damages provision in a construction contract is beneficial to both parties. It protects the owner from a future laborious recitation of item by item damage, and it protects the contractor from a potential lump sum claim of substantial sums of money in the event of breach of the completion provision. Here, the contract was for \$274,000. The liquidated damages were

1. The Michigan court said:

To determine whether the amount stipulated as liquidated damages is reasonable, the Court looks to conditions at the time the contract was entered into, not at the time of breach of the contract:

"It is a well-settled rule in this State that the parties to a contract can agree and stipulate in advance as to the amount to be paid in compensation for loss or injury which may result in the event of a breach of the agreement. Such a stipulation is enforceable, particularly where the damages which would result from a breach are uncertain and difficult to ascertain at time contract is executed. If the amount stipulated is reasonable with relation to the possible injury suffered, the courts will sustain such a stipulation.

"The purpose in permitting a stipulation of damages as compensation is to render certain and definite that which appears to be uncertain and not easily proven. The courts recognize that the parties, particularly at the time of execution of the instrument, are in as good a position as anyone to arrive at a fair amount of damages for a subsequent breach. In the event they are not unconscionable or excessive courts will not disturb it. Just compensation for the injuries sustained is the principle at which the law attempts to arrive. Courts will not permit parties to stipulate unreasonable sums as damages, and where such an attempt is made have held them penalties and therefore void and unenforceable." Curran v. Williams, 352 Mich. 278, 282-83, 89 N.W.2d 602 (1958).

\$8,300, which is only 3.029 percent of the total amount of the contract. When we consider modern interest rates, and the fact that the defendant was paying interest on its bond issue money at the rate of 5.83 percent during the time the plaintiff was in default (a stipulated fact), the amount of liquidated damages here was not oppressive, was not greatly disproportionate to the total amount of the contract, and should not be considered as a penalty.

Furthermore, plaintiff admittedly and intentionally violated the letter of the contract. Therefore, plaintiff had the burden to plead and prove the clause was a penalty. See Gordon v. Pfab, 246 N.W.2d 283, 288 (Iowa 1976). To show the clause was a penalty, plaintiff had the burden to prove what actual damages defendant sustained by virtue of plaintiff's breach and show the provision of the contract was not reasonable in light of the damages defendant actually sustained. See Korshoj v. Mills, 156 F. Supp. 138, 139 (S.D. Iowa 1957); Heaberlin v. Heaberlin, 255 Iowa 403, 409, 122 N.W.2d 841, 844 (1963); Pace v. Zellmer, 194 Iowa 516, 518, 86 N.W. 420, 421 (1922). I would find plaintiff did not meet this burden as to Plymouth County.

I would affirm the judgment against the City of Hinton.

I would reverse the judgment against Plymouth County.