FILED
MAY 31 1978
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA and THE STATE BOARD OF REGENTS,	)	
Plaintiffs,	)	
v.	)	Filed May31, 1978
CITY OF IOWA CITY and KORSHOJ CONSTRUCTION CO., INC.,	)	
Defendants.	)	
KORSHOJ CONSTRUCTION CO., INC.,	)	
Cross-Petitioner/Appellant,	)	
v.	)	500
CITY OF IOWA CITY,	)	2-60196
Defendant/Appellee.	)	
CITY OF IOWA CITY, IOWA,	)	
Third-Party Plaintiff,	)	
v.	)	
H. ROBERT VEENSTRA, JAMES W. KIMM and VEENSTRA & KIMM, A Partnership,	)	
Third-Party Defendants.	)	

Appeal from Johnson District Court - Harold D. Vietor, Judge.

Appeal from dismissal of claim for damages caused by construction delay due to underground obstruction. Affirmed.

John T. Nolan, of Nolan, Lucas & Nolan, Iowa City, and John R. Phillips, of Rogers, Phillips & Swanger, Des Moines, for appellant.

Robert C. Tilden and Iris E. Muchmore, of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, and Anatolij Kushnir, Iowa City, for appellee.

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

PER CURIAM

This appeal is the last vestige of an action brought by the State of Iowa and the State Board of Regents against the city of Iowa City and Korshoj Construction Co. Veenstra and Kimm, a partnership engaged in civil engineering, were brought in as third-party defendants. The original claim was for damage done to a concrete encased bank of electrical conduits which served the University of Iowa. This original underlying action was settled, the insurers for the defendants and third-party defendants each agreeing to pay plaintiffs $8000. The Stipulation, Satisfaction and Release reserved the rights of the defendants and third-party defendants to determine their liabilities inter se. The judgment with which we are concerned disposed of these latter claims (which were for damages for delay, and not for indemnity) by dismissing the cross-claim of Korshoj Construction against the city.[1] It also dismissed the city's third-party petition against Veenstra and Kimm because that petition alleged only that the engineers were liable for any damages which the city had caused Korshoj Construction.

Before considering the parties' contentions, recitation of a few basic facts is essential. The contract between Korshoj Construction, designated as plaintiff for trial, and Iowa City involved the construction of a clarifier on the east side of the existing water treatment plant. The clarifier is a structure used for the purpose of filtering water. Its construction involved the excavation of a hole 23 feet deep. The first 12 feet were clay, while the bottom 11 feet were limestone. There were approximately 9 feet between the east wall of the clarifier (or, more precisely, the east end of the hole as it penetrated the limestone) and the east property line. Thus, it appeared that the excavation through the clay could be accomplished on a slope of approximately 22 1/2° from vertical. That angle approximated the estimated angle of repose for the clay.

[1] The cross-claim (designated as a cross-petition) was in four divisions. The first two alleged that the city was negligent in failing to disclose the concrete encased conduit prior to the submission of bids. The third division alleged breach of a warranty by the city that it would adequately anchor and secure the cement encasement; this claim arose from circumstances occurring after discovery of the obstruction. The fourth division alleged breach of warranties which arose out of the contract itself. In each of the four divisions damages of $60,000 were claimed for delay and the increased costs caused thereby. Trial was had solely upon the issue of liability.

That is, the minimum slope which could be accomplished in the available room was also the maximum slope at which the clay overburden could be left without artificial support to prevent dirt sliding into the hole. Once the limestone was penetrated, the excavation could proceed nearly vertically. Plaintiff bid on the belief that shoring or other expensive means of supporting the sides of the excavation would not be required.

On July 15, 1971, the concrete encased conduit, which was located four feet west of the property line, was uncovered in the process of digging the hole for the clarifier. Work on that phase of the job stopped and, according to trial court's findings, Korshoj Construction informed Veenstra and Kimm that this obstruction was not covered by the contract and that Korshoj would not proceed unless paid extra to deal with the problem.

The city ultimately responded by placing a utility pole, which was 70 feet long and 16 inches in diameter tapering to 12 inches, on top of the concrete encasement. The pole was then strapped to the encasement with cable. Later, shifting of the dirt required that a second pole be spliced into the splint-like system.

Korshoj then proceeded with the excavation. The deposition testimony of Harold G. Wright, Korshoj Construction's executive vice president, is significant here. He voluntarily characterized the eventual dirt slide and collapse of the concrete encasement as "inevitable." Nevertheless, Korshoj Construction apparently decided that the job might be completed before the inevitable occurred, and that work could continue without placing anyone in danger. Korshoj increased the slope to approximately 11° from vertical to lend the encasement some support, although it was realized that the clay could not stand for long at a slope so much steeper than its angle of repose, particularly while bearing the weight of the concrete encasement. It also made unsuccessful attempts at protecting the slope from rain through the use of thin plastic sheeting. Even though these steps were taken, it remained the opinion of Korshoj's people that the only workable solutions would be removal of the encasement or shoring of the slope.

On the evening of November 1, 1971, after heavy rains, the encasement collapsed into the clarifier excavation, cutting off electricity to parts of the University. In October of 1973 the State initiated this action.

Korshoj Construction argues on appeal that the judge-made findings of fact have no support in the evidence. The primary complaint seems to be that there was no basis for determining that the contractor had knowledge of the "massive" concrete encasement, as opposed to a cable laid directly in the ground or a light metal or plastic conduit. Its argument from this point then becomes twofold. First, the size, inflexibility and immobility of the concrete encasement take it out of the contract provisions which place the risk of running into undisclosed subterranean objects on the contractor. Second, the contract should not be construed to put such a risk on the contractor. In dealing with either branch of the argument, there is at least an implicit contention that knowledge of buried power lines on the part of Korshoj Construction was substantially different from knowledge that those power lines were encased in concrete.

The principles which govern our review of judgments rendered by trial courts sitting as fact finders are set out in Grefe v. Ross, 231 N.W.2d 863, 865 (Iowa 1975) and Farmers Insurance Group v. Merryweather, 214 N.W.2d 184, 186 (Iowa 1974) and need not be repeated here. Cleo Kron, superintendent for the city water department, testified that he told William Mayer, Korshoj's construction superintendent, of the University cable during Mayer's pre-bid inspection of the site. Kron did not recall telling Mayer that the cable was encased in concrete. Mayer was taken out to the parking lot, where he could see the approximately 26-inch wide asphalt patch placed over the trench in which the concrete encasement rested. That patch ran for 125 feet, parallel to the east property line, and pointed toward a manhole in the northeast corner of the lot. James W. Kimm, a civil engineer and partner in Veenstra and Kimm, testified that there were miles of conduit in Iowa City, most of which was unrecorded. He also testified that concrete encasement is a common method of protecting underground electrical conduit. Thus, Kimm testified, one should not be surprised to find buried electrical conduit encased in concrete. Trial court's finding that Korshoj Construction had actual knowledge of the obstruction is, therefore, adequately supported by the evidence. Also adequately supported is trial court's finding that Korshoj refused to take any action regarding the concrete encasement without additional payment. That finding is solidly grounded upon Kimm's testimony and the deposition of Harold G. Wright.

The first finding, that the city gave Korshoj Construction notice of the obstruction, destroys the factual predicate upon which cross-claim divisions I, II and IV rest.[2] The finding that Korshoj refused to deal with the problem becomes important in our consideration of the theory pleaded in division III. Thus, it remains to consider the legal effect of that finding when considered in light of the contract provisions. We construe the contract according to rule 14(f)(14), Rules of Appellate Procedure.[3]

First, the concrete encasement which obstructed work was a conduit and part of a utility within the contemplation of paragraphs 6-06, 6-07 and 6-08 of the contract. This conclusion is justified in light of Kimm's testimony about the nature and frequency of such obstructions. See Connie's Const. Co. v. Fireman's Fund Ins., 227 N.W.2d 207, 210 (Iowa 1975). The encasement did not interfere with the clarifier; it interfered only with the contractor's method of operation. Thus the costs of removal (the alternative regarded as the best by several witnesses) would be borne by Korshoj Construction. (Contract, ¶ 6-06.) If the encasement was not removed, the contractor was obligated to protect it. (Contract, ¶ 6-07.) Failing that, the contractor was liable for repair of the "utility." (Contract, ¶ 6-08.)

Second (actually an alternative to the first conclusion), if the concrete encasement was a condition not contemplated by the contract it fell within the provisions of paragraph 4-04. Contrary to the statement in its brief (Appellant's Brief, p. 7) Korshoj Construction did not comply with the notice requirements of that portion of the contract. The contract required written notice to the engineer with copies of

[2] Because the findings negate any conclusion that the city was negligent, we do not need to consider Korshoj Construction's contention, raised in division IV of its brief, that the contract's "save harmless" clauses should be strictly construed against the city.

We perceive, however, that Korshoj raises two separate and independent contract construction arguments. The first, which we have declined to reach, is based upon a reluctance to allow a party, by contract, to escape liability for its negligence. The second, which is considered below in footnote 3, depends upon suggested inconsistencies among various portions of the contract.

[3] We are unpersuaded by plaintiff's attempt, in its brief, to create ambiguity and inconsistency in the contract and thus justify a strict construction against the city. Rules for dealing with such contentions were reviewed in Allen v. Highway Equip. Co., 239 N.W.2d 135, 139 (Iowa 1976). Paragraph 2-04 cannot be read as a warranty by the city to the contractor that all underground conditions were shown in the plans and specifications. Such a warranty was specifically disclaimed by paragraph 6-08. Paragraph 2-04 is concerned with the situation in which the structure which has been constructed turns out to be defective. If the defect arises because the plans or specifications did not call for adequate methods or materials paragraph 2-04 places the risk on the owner.

such notice to the city, before conditions are disturbed. Without such written notice to the owner, any claims for additional compensation are, by the terms of the contract, waived. Korshoj's notice was oral and was directed to the engineering firm alone. The failure to utilize the contractually agreed upon procedure for dealing with items beyond the scope of the contract seriously weakens any contentions, raised after damage has been incurred, that the concrete encasement was not contemplated by that instrument.

Nor did the actions of the city relieve plaintiff of its contractual obligations. The city was faced with a wrongful cessation in the construction of its water treatment plant addition. This situation may be analogized to cases in which additional expenses are incurred in attempting to avoid the adverse consequences of a breach. In such cases, if the attempt at mitigation is reasonable, the enhanced damages may be recovered. Apex Mining Co. v. Chicago Copper & Chemical Co., 306 F.2d 725 (8th Cir. 1962); see generally Calamari & Perillo, The Law of Contracts § 218 (1970). Simply put, the city made the best it could of a bad situation. It should not be held responsible for Korshoj's damages. See Dittmer v. Nokleberg, 219 N.W.2d 201, 208 (N.D. 1974).

The analogy is not perfect, however. If applied directly to this case, the mitigation doctrine's requirement that the measures which are taken must be reasonable could create serious problems for the city. The reasonableness of attempting to support an encasement which was estimated to weigh 300 to 400 pounds per foot of length with poles of relatively narrow section might be questionable. (It, of course, must be noted that the poles were a second choice; the original preference was for steel I beams. The utility poles were chosen only after such beams proved unavailable).

A strict application of the analogy is unnecessary, however. The city is in a defensive posture in this case, not an offensive one. It is not attempting at this juncture to recover damages for Korshoj's breach. The city is merely resisting Korshoj's attempt to collect for damages which Korshoj caused itself; the contractor is clearly guilty of the misfeasance which set this unfortunate sequence of events in motion. Cf. Yonan v. Oak Park Federal Savings & Loan Ass'n., 27 Ill. App. 3d 967, 977, 326 N.E.2d 773, 781 (1973) ("[A] party to a contract cannot complain of detriment sustained as a result of its own breach of contract.").

Trial court's findings and conclusions were correct. Both branches of plaintiff's argument must be rejected. The concrete encasement was within the contemplation of the contract. That contract placed the risk of such obstructions on the contractor, at least in the absence of changed conditions requiring notice and a claim under paragraph 4-04 of the contract. The judgment must, therefore, be affirmed.

AFFIRMED.

CARTER, J., concurs specially.

CARTER, J., (specially concurring)

I concur in the result and in the disposition which the majority makes of the claims made under divisions I, II, and IV of Korshoj's cross-petition against the city. I do not agree with the reasoning of either the majority or the trial court relating to the claims embraced in division III of said cross-petition.

The division III claims are based upon the alleged failure of the city to adequately anchor and secure the cement encasement, after it undertook the task of doing so. Both the majority and the trial court have concluded that recovery under that theory is precluded because the work performed by the city in anchoring the encasement was Korshoj's responsibility under the contract which it wrongfully refused to perform. Assuming this to be correct, I can not agree that such circumstance should necessarily serve to insulate the city from responsibility for its own active misfeasance after Korshoj's refusal to proceed with this portion of the work. Rather, I submit that under these circumstances, once the city undertook to do this work itself, it was obliged to exercise reasonable care to avoid injury to other persons. Such duty would exist as to the entire world, including Korshoj. The latter's earlier breach of contract should not serve as a defense to a tort claim based upon the city's breach of such duty.

Had Korshoj predicated its division III claims on the city's negligence in completing this part of the project, I believe the trial court would have been obliged to try out this issue on the merits without regard to Korshoj's earlier breach of contract, if any. But these division III claims are based upon alleged express and implied warranties for which a prima facia case is not established by Korshoj's proof. For this reason I believe the division III claims are properly denied but on the wrong grounds.