1992 WL 113426
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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
Middle Section, at Nashville.

TENNESSEE EXCAVATING COMPANY, INC. and John T. Jenkins, Partnership and Thomas E. Gentry-Joint Venture, Plaintiffs/Appellants,
v.
MORRISON-KNUDSEN COMPANY, INC., the Saturn Corporation, and the Industrial Development Board of Maury County, Tennessee, Defendants/Appellees.

No. 01-A-019201CH00010.
|
May 29, 1992.

Appeal from the Chancery Court of Maury County at Columbia, Maury Chancery No. 90-243, WILLIAM B. CAIN, CHANCELLOR.

Attorneys and Law Firms

Lewis B. Hollabaugh, Lawrence B. Hammet, II, Manier, Herod, Hollabaugh & Smith, Nashville, for Plaintiffs/Appellants.

Samuel D. Lipshie, David K. Taylor, Boult, Cummings, Conners & Berry, Nashville, for Defendants/Appellees.

OPINION

TODD, Presiding Judge.

***1** The captioned plaintiffs have appealed from a partial final summary judgment under TRCP Rule 54.02, dismissing Count I of plaintiffs' complaint against the captioned defendants.

Plaintiffs agreed in writing to furnish "aggregate," which is gravel or crushed stone, as required by defendants for the construction of a manufacturing plant. The total amount of aggregate furnished by plaintiffs is not in dispute at this time. It is admittedly over 2,800,000 tons. There is no dispute as to the "base price" per ton under the contract. The present dispute relates to the "surcharges" or premiums above the base price per ton to be paid in event the total tonnage exceeded specified amounts.

Count I of plaintiffs' complaint seeks recovery for breach of contract by failure to pay plaintiffs the agreed price for quantities of crushed stone furnished to defendants pursuant to a written contract executed by the parties on September 12, 1986. The answer of defendants denies any breach of the contract.

The scope of this appeal is limited to the interpretation of a provision of the contract reading as follows:

Prices 6A through 6D above shall apply if the total aggregate quantity of the project (excluding concrete aggregates) ranges from 750,000 tons (guaranteed minimum) to 1,250,000 tons. Where aggregate quantities exceed 1,250,000 tons, the cost per ton shall be adjusted for the total quantity as follows:

a. 1,250,001 tons to 1,500,000 tons add *$0.21*/ton

b. 1,500,001 tons and greater add *$0.21*/ton

It is seen that, for pricing, certain quantities of stone were recognized, as follows:

A. The first 750,000 tons

B. The next 500,000 tons

C. The next 250,000 tons

D. All tons exceeding 1,500,000

It is uncontroverted that the total tonnage exceeded 1,500,000 tons, so that all four quantities are involved in this dispute.

Defendants admit and have discharged their liability for the .21 per ton premiums for the tonnage over 1,250,000 (category C, above), and for .42 per ton premium for the tonnage over 1,500,000 (category D, above); but defendants deny any liability for any premium for the tonnage which did not exceed 1,250,000 (categories A and B, above).

Plaintiffs insist that, once the total tonnage exceeded 1,500,000, defendants became liable to pay the .42 premium on all stone, including the first 1,500,000 tons (categories A, B, and C, above). Plaintiffs claim the entire .42 premium on categories A and B, for which no premium has been paid, and an additional premium of .21 per ton on category C on which defendants have already paid a .21 premium.

Plaintiffs make no claim as to category D on which defendants have already paid the .42 premiums.

Upon motion for summary judgment, the Trial Judge filed a comprehensive memorandum and held:

1. The quoted clause of the contract is unambiguous and means that defendants are not liable for any premiums in addition to those already paid.

***2** 2. Even if the clause of the contract should be ambiguous, the ambiguity is patent, rather than latent, and is not subject to clarification by extraneous evidence.

As a result, the first count of the complaint was dismissed; and this appeal ensued.

The plaintiffs have presented three issues, of which the first is:

The Trial Court erred in ruling that the contract provision is ambiguous (sic).

The memorandum of the Trial Judge states:

Both plaintiff and defendant insist that the above quoted language is unambiguous.

If it is not ambiguous, it has certain mind-boggling qualities.

First of all, an ambiguity does not arise in a contract merely because the parties differ as to interpretation of certain of its provisions. *Oman Construction Company v. Tennessee Valley Authority,* 486 Fed.Supp. 375; *Foote v. Maryland Casualty Co.,* 173 Fed.Supp. 925, Affirmed 277 Fed.2d 452, Cert. denied 81 S.Ct. 49, 364 U.S. 818, 5 L.Ed. 48.

While the language used in Paragraph 7 leaves much to be desired and is far removed from a model of clarity, it is not ambiguous. The first sentence deals with one eventuality, and the second sentence deals with another. The first sentence sets the prices for the "... total aggregate quantity of the project ..." where such tonnage ranges between 750,000 tons and 1,250,000 tons. The second sentence deals solely with aggregate quantities in excess of those governed by the first sentence. Thus the term "total quantity" used in the second sentence refers to "aggregate quantities exceed(ing) 1,250,000 tons" and is thus not synonymous with "... total aggregate quantity of the project ..." as used in the first sentence.

Thus under the contract 6A through 6D prices are applicable for every ton through and including ton No. 1,250,000. Where aggregate quantities range between 1,250,000 tons and 1,500,000 tons, an additional twenty-one (21) cents per ton is added to the 250,000 tons encompassed within 7a. When the tonnage exceeds 1,500,001 tons, an additional twenty-one (21) cents per ton is added to all tonnage in excess of 1,500,000 tons, as is provided by 7b.

If the Court is wrong in holding the provisions of the contract to be unambiguous and in fact a patent ambiguity is involved, the means of construing the contract is clearly set forth by the Court of Appeals in *Coble Systems, Inc. v. Gifford Co.,* 627 S.W.2d 359.

The written argument of plaintiffs asserts:

The Trial Court committed error in its ruling. The first error is its ruling that the subject contract provision is unambiguous. The Joint Venture would assert that the contract is at best ambiguous....

A. The Court committed error in ruling that the contract provision is unambiguous.

The Trial Court erred in holding that the contract provision is unambiguous. In accordance with applicable legal authority, the subject contract provision is ambiguous.

It must be assumed that an inadvertence occurred in plaintiffs' "Statement of the Issues" and that, contrary to the position of plaintiffs stated in the memorandum of the Trial Judge, quoted above, the plaintiffs insist to this Court that the contract is ambiguous.

***3** Plaintiffs argue that, by including in his memorandum a detailed discussion of the law of ambiguities, the Trial Court, by implication, held the contract to be ambiguous. This Court does not agree. The unequivocal statements in the memorandum of the Trial Judge contradict any such implication. Moreover, the analysis of the law of ambiguities was justified by the alternate ruling of the Trial Judge that, *even if* the contract should be held to be ambiguous, the ambiguity was patent and not latent and therefore not subject to elucidation by extraneous evidence.

In any event, the issue is before this Court de novo, and will be decided according to the best judgment of this Court, regardless of the verbiage of plaintiffs' brief or that of the Trial Judge.

Plaintiffs assert that an ambiguity arises from the usage and meaning of the terms, "total aggregate quantity" and "total quantity"; yet plaintiffs insist that both expressions identify the same quantity of crushed stone. This Court does not agree.

In the first place, the expression "total aggregate quantity" is identified and quantified by the following words, "of the project", so that the expression "total aggregate quantity of the project" means all crushed stone used on the entire construction project; whereas the words "total quantity" is not qualified by the words "of the project", but are qualified by the preceding words "Where aggregate *quantities* exceed 1,250,000 tons". The last quoted words imply that there is more than one "quantity", namely the quantity used on the entire project, that quantity exceeding 1,250,000 and that quantity exceeding 1,500,000.

A contract is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one. A strained construction may not be placed on the language used to find ambiguity where none exists. *Farmers-Peoples Bank v. Clemmer,* Tenn.1975, 519 S.W.2d 801; *Moore v. Moore,* Tenn.App.1980, 603 S.W.2d 736 and authorities cited therein.

The words of a contract must be interpreted in their usual and ordinary meaning. *Taylor v. White Stores,* Tenn.App.1985, 707 S.W.2d 514.

A contract must be enforced according to the ordinary meaning of its words unless both parties understand and agree at the time of the contract that its meaning is otherwise. Its ordinary meaning is that meaning which would have been derived from its words by reasonable persons dealing in the same situation as that of the contracting parties. *Moore v. Moore, supra; Hardwick v. American Can Co.,* 113 Tenn. 657, 88 S.W.2d 797 (1905).

The following definitions appear in Webster's Third New International Dictionary, unabridged:

Total: adj.: whole, entire; 1: of or relating to something in its entirety ...; 2a: viewed as an entity: complete in all details: overall, whole ...; b: constituting an entire number or amount: aggregate.

Total n.: la: a result of addition: aggregate, sum; b: a summation of factors: final result; 2: an entire quantity or configuration: amount, whole.

***4** Aggregate: adj.: 1: Formed by a collection of units or particles into a body, mass or amount, collective.

b(2): Composed of mineral rock fragments.

Aggregate n.: 1: Mass or body of units or parts somewhat loosely associated with one another; 2: The whole sum or amount; 3a: an aggregate rock, (b) any of several hard inert materials used for mixing in various sized fragments with a cementing material to form concrete, mortar or plaster; 4a: a total comprising all the elements or individuals in a particular category or group of categories in an economy.

Quantity: How much, how large; 1a: an indefinite amount or number; b: a determinate or estimated amount; c: total amount or number.

The same work lists the synonyms of the word, sum, as amount, aggregate, total, whole, number, quantity, and notes the following distinctions:

Sum may indicate the result of simple addition, and usually applies to a simple obvious putting together of things.

Amount may be used of more accumulative or combinative processes.

Aggregate may stress the notion of separate discrete particulars grouped together.

Total suggests completeness comprehending inclusiveness and perhaps magnitudes of result.

Quantity is broadly used in reference to anything measurable but usually applies to what is measured in bulk.

There is no contention or evidence that the parties mutually understood and agreed at the time of the contract that any word of the subject clause should have any but its ordinary meaning.

Since the principal subject of the contract is the production of aggregate (crushed stone), it must be presumed that, in the clause under discussion, the word, aggregate, is used in its meaning of crushed stone rather than its meaning of a collective sum. This use is also indicated by the use of another word, total, in respect to a collective sum.

The words of the disputed clause in their usually accepted and reasonable meaning produce the following interpretation of the clause under discussion:

The price of the first 750,000 tons is fixed by the guaranteed minimum clause. The price of the next 500,000 tons is fixed by Prices 6a through 6d. The price of the next 250,000 tons is fixed at .21 per ton more than Prices 6a through 6d.

The price of all tonnage in addition to 1,500,000 tons is fixed at .42 per ton more than Prices 6a through 6d.

This Court holds that the disputed clause is unambiguous and has the meaning just stated.

Plaintiffs next insist that the Trial Court erred in holding that *if the contract clause were ambiguous,* the ambiguity would be patent, rather than latent, thereby excluding consideration of extraneous evidence to elucidate the ambiguity.

Adhering to the above holding that the contract is *not* ambiguous, this Court agrees with the Trial Court that, even if the contract should be held to be ambiguous, the ambiguity would be patent and not latent, thereby excluding extraneous evidence to supply its meaning.

***5** In *Teague v. Sowder,* 121 Tenn. 132, 114 S.W. 484 (1908), the Supreme Court affirmed a Trial Court ruling excluding extrinsic evidence in respect to intention of the maker of a deed and said:

... This is a case of a patent ambiguity on the face of the instrument, which may not be remedied by parol evidence. The difference between latent and patent ambiguities, and the admissibility of parol testimony in such cases, is well stated in the following authorities:

"A latent ambiguity is where the equivocality of expression or obscurity of intention does not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by the mere development of extraneous facts, without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport

with the ordinary or legal sense of the words and phrases made use of."

"A patent ambiguity is one produced by the uncertainty, contradictoriness, or deficiency of the language of an instrument, so that no discovery of facts, or proof of declarations, can restore the doubtful or smothered sense without adding ideas which the actual words will not themselves sustain." *Weatherhead v. Sewell,* 9 Humph. 295.

"Ambiguity that may be removed by parol evidence is not a doubt thrown upon the intention of the party in the instrument by extrinsic proof tending to show an intention different from that manifested by the words of the instrument. It must grow out of the question of identifying the person or subject mentioned in the instrument," etc. Id.; *Harrison v. Morton,* 2 Swan, 469; *Gourley v. Thompson,* 2 Sneed, 391; *Eatherly v. Eatherly,* 1 Cold., 464, 78 Am.Dec., 499; *Horton v. Thompson,* 3 Tenn.Ch., 581; *Clark v. Clark,* 2 Lea., 725.

121 Tenn. pp. 148-149.

In *Coble Systems, Inc. v. Gifford Co.,* Tenn.App. 181, 627 S.W.2d 359, this Court held that parol evidence is admissible to supply an ambiguity only when the ambiguity is latent. The ambiguity was found to be one produced by the uncertainty of the language of the instrument, producing a patent ambiguity as to which parol evidence was inadmissible.

There is no evidence in this record that any ambiguity in the meaning of the contract arises from the ambiguous state of extrinsic circumstances to which the words of the instrument refer and which are susceptible of explanation by the mere development of extraneous facts without altering or adding to the written language.

Plaintiffs cite *Farmers-Peoples Bank v. Clemmer,* Tenn.1975, 519 S.W.2d 801. In that case, the Supreme Court held that an instrument signed by the defendant was a clear and unambiguous continuing guaranty. The present case does not present clear and unambiguous support for the interpretation urged by plaintiffs.

Plaintiffs next argue that there is a latent ambiguity because the parties could not anticipate the quantity of crushed stone that would be needed and that the ambiguity arises from the total amount ultimately used. This Court does not agree. The contract undertakes to make explicit provision for prices regardless of the total quantity used. There was no upper limit to the quantity to be priced under the contract.

***6** Alternately, plaintiffs argue that, if the ambiguity is patent, the Trial Court should have considered extrinsic evidence consisting of change orders which are alleged to be a part of the contract. There is evidence that the parties did agree to "change orders" unrelated to the contract clause. At issue in this appeal, such "change orders" have been examined and are not found to be of such nature as to render ambiguous an unambiguous contract clause, or to change a patent ambiguity to a latent ambiguity so as to admit extraneous evidence.

The ambiguity, if any, in the clause under discussion is the "retroactive" application of the "add-on" rates to deliveries made before the deliveries reached the volume which triggered the add-on rates. This ambiguity, if present, is patent and unexplainable unless plaintiffs have shown that, because of some fact or situation outside the contract, the words of the contract have a meaning other than their ordinary meaning. The plaintiffs have not shown such. Therefore, their claim is based upon a contract which does not sustain their claim.

The judgment of the Trial Court is affirmed. Costs of this appeal are taxed against the plaintiffs. The cause is remanded to the Trial Court for collection of costs in that Court.

Affirmed and remanded.

LEWIS and CANTRELL, J., concur.

All Citations

Not Reported in S.W.2d, 1992 WL 113426

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