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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1528**

Central Specialties, Inc.,
Appellant,

vs.

Todd County, Minnesota,
Respondent.

**Filed May 12, 2014
Affirmed
Chutich, Judge**

Todd County District Court
File No. 77-CV-11-140

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Considered and decided by Chutich, Presiding Judge; Connolly, Judge; and Smith, Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

Appellant Central Specialties, Inc. appeals the district court's grant of summary judgment to respondent Todd County, arguing that the district court incorrectly ruled that Todd County acted properly in withholding money retained under the terms of a

construction contract. Because Todd County used discretionary power granted to it in the contract in releasing the retained funds and no genuine issues of material fact exist, we affirm.

FACTS

Central Specialties, Inc. was the general contractor on a series of road and highway construction projects (the projects) for Todd County (the county) that totaled over \$2.5 million in scope. This dispute between Central Specialties and the county arises over whether, under the terms of a state law and the parties' contract, the county properly kept funds known as "retainage." Retainage is generally defined as "a contractually created security system under which the owner retains a specified portion of earned progress payments to secure itself against certain risks." *Van Knight Steel Erection, Inc. v. Hous. & Redev. Auth. of City of St. Paul*, 430 N.W.2d 1, 3 (Minn. App. 1988) (quoting Justin Sweet, *Legal Aspects of Architecture, Engineering and the Construction Process* 428 (2d ed. 1977)). Minnesota law defines it as "the difference between the amount earned by the contractor . . . and the amount paid on the contract." Minn. Stat. § 15.71, subd. 5 (2012).

The facts underlying the retainage dispute are as follows. In June 2007, Central Specialties and the county entered into a written contract to complete the projects. The projects were to be performed according to the written contract, project plans, and the approved 2005 Department of Transportation Standard Specifications for Construction, except as stated otherwise in the special provisions of the project proposal.

The parties agree that most of the work on the projects was complete by the winter of 2007. In November 2007, the county sent a letter to Central Specialties to set up a meeting to discuss, among other things, a “punch list” of items that “will need to be taken care of prior to final acceptance and payment in the spring of 2008.” In January 2008, Central Specialties met with the county, and a preliminary punch list of items that needed to be completed was prepared. The county’s meeting note states that “it was understood there may be additions [to the punch list] depending on how the road and slopes hold up [through] the spring.”

The county and Central Specialties communicated during 2008 regarding Central Specialties’ requests for payment for additional material and work hours. As of May 2008, the county had paid Central Specialties approximately \$2.5 million. On May 12, 2008, Central Specialties sent a letter to the county that stated it agreed to the final quantities listed on three different estimates. The letter also requested that the county “[p]lease reduce the retainage to 1% as per our prior agreement.” The county’s memoranda in the record refer to a request to reduce the percentage of retainage, but do not state that the county agreed to the reduction.

Additional communications regarding punch list items, prices, and quantities, including work items from the Minnesota Pollution Control Agency for Central Specialties to complete, occurred in June and July 2008. On July 17, 2008, the county told Central Specialties that, for the work to be completed on one of the projects, Central Specialties needed to sign and return “Work Order #2” or to submit information required for a force account.

In October 2008, the county sent a letter to Central Specialties stating that Central Specialties' obligations on the 2007 construction projects "have been substantially completed," except for certain haul road restoration and a signed copy of Work Order #2. The county included "Final Pay Request #8" with the letter and stated, "Upon satisfactorily resolving the issue of the Restoration of Haul Road item(s) and receipt of the signed Work Order #2, the final payment of \$158,441.74 can be made."¹

On January 27, 2009, the county and Central Specialties met "to resolve any outstanding issues prior to contract finalization." The county's file memorandum on the meeting states that discrepancies existed about the quantity of materials used by Central Specialties and that Central Specialties was concerned that Work Order #2 showed prices not originally quoted. It claimed that the county owed it \$45,000 more for this work. The county's memorandum further states that Central Specialties also believed that it was unfair for the county to continue to withhold any retainage. The memorandum states that Central Specialties "was told that 5% was the amount specified in the Special Provisions to be retained and withheld on partial payments, and was considered necessary to protect the County's interests until all obligations of Contract were fulfilled by the contractor." Central Specialties was given an updated copy of Final Pay Request #8 at the meeting. The Todd County Engineer testified in deposition that the county continued to withhold the retainage in January 2009 because it was waiting for completion of the contract documents.

¹ This final payment amount included the disputed amount of about \$134,000 in retainage that was being withheld.

In February 2009, Central Specialties sued the county for breach of contract and breach of implied warranty “regarding the accuracy and suitability of the Project plan and specifications.” Central Specialties did not actually file the lawsuit with district court, however, until two years later in February 2011.

In December 2011, the county sent Central Specialties a letter that requested four signed documents: (1) a withholding affidavit for contractors; (2) Work Order #2; (3) a disadvantaged business enterprise payment affidavit; and (4) Final Pay Request #8. The letter stated that the “missing documentation is necessary for Todd County to gain approval for making final payment (releasing the retainage).” The letter also explained that Final Pay Request #8 “contains all previously agreed upon contract quantities and quantities included in Work Order #2” and “includes full payment of the remaining contract retainage.”

On May 8, 2012, the county sent Central Specialties a letter that acknowledged receipt of the disadvantaged business enterprise payment affidavit on January 20, 2012. The letter stated, “Based on receipt of all the required documentation needed for a state project contract closeout, Todd County has now reduced the remaining retainage from 5% to 0% for this contract.” A check made out to Central Specialties in the amount of \$134,774.24 was included with the letter.

As of June 1, 2012, the county and Central Specialties had not agreed about the quantities of certain items from the projects, and the county still had not received a signed version of Work Order #2. Normally, the county would not pay retainage and the final payment “unless all of the quantities were agreed upon.” When asked why the county

released the retainage in May 2012 when there were still quantity disputes with Central Specialties, the Todd County Engineer responded that, because the county had “received all those [contract] documents and we’re currently in a litigation[,] . . . we felt that that value we had, the [\$]134,000, could be released.”

In July 2012, the county moved for partial summary judgment, arguing that the county had discretion to reserve the retainage and that Central Specialties is not entitled to interest on the retainage amount. After a hearing, the district court denied the county’s motion for partial summary judgment and held that, even though the county had discretion to release the retainage, a genuine issue of material fact existed concerning whether the parties agreed to reduce the retainage from 5% to 1%.

At a December 2012 hearing, Central Specialties requested that the district court reconsider portions of its summary-judgment order. After further briefing, the district court granted the county’s motion for partial summary judgment, holding that no factual issue exists because no evidence shows that the county engineer agreed to reduce the retainage. In June 2013, the parties settled their claims regarding the unsigned work orders and quantity disputes.

Central Specialties appeals the district court’s summary judgment decision that disallowed interest and an award of attorney’s fees on the retainage dispute.

DECISION

We review de novo a district court’s grant of summary judgment. *Savela v. City of Duluth*, 806 N.W.2d 793, 796 (Minn. 2011). On review, we “determine whether genuine issues of material fact exist, and whether the district court correctly applied the

law.” *Id.* We view the record in the light most favorable to the party against whom summary judgment was granted, recognizing that summary judgment is a “blunt instrument” and is improper when reasonable persons may draw different conclusions from the evidence. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotation omitted). We affirm summary judgment if it can be sustained on any ground, however. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

Central Specialties contends that the county should pay interest on the retainage and attorney’s fees under the Minnesota Prompt Payment of Local Government Bills Act (the Prompt Payment Act) because the county withheld the retainage in bad faith. *See* Minn. Stat. § 471.425 (2012). Central Specialties believes that the county refused to pay the approximately \$134,000 in retainage because Central Specialties “refused to give up its claims for extra payment in the principal amount of \$45,000.” The county asserts that the Prompt Payment Act “does not apply because the County’s withholding of retainage was based on a good faith dispute and the County ultimately paid [Central Specialties] the retainage before it became due.” For the following reasons, we agree that the Prompt Payment Act does not apply.

I. Release of Retainage

Central Specialties first contends that, under Minnesota Statutes section 15.72 (2012) and the parties’ contract, the county was not allowed “to continue to withhold retainage after the work was substantially completed and after there were no assessments against [Central Specialties] for defective work.” We disagree.

We apply the plain meaning of a statute if the text is clear and unambiguous. *Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010). Section 15.71 defines retainage as “the difference between the amount earned by the contractor . . . and the amount paid on the contract.” Minn. Stat. § 15.71, subd. 5. Contrary to Central Specialties’ belief, this statutory provision does not direct *when* the retainage must be released by the county. Rather, another provision in the statute gives a public agency discretion to decide to release the retainage. Minn. Stat. § 15.72, subd. 2. That other provision states that a public agency “*may* reduce the amount of the retainage and *may* eliminate retainage” if the work is “progressing satisfactorily.” *Id.* (emphasis added). Because the provision is not mandatory, it does not require the county to release retainage at any particular time. *Compare* Minn. Stat. § 645.44, subd. 15 (2012) (stating that “[m]ay” is permissive), *with* Minn. Stat. § 645.44, subd. 16 (2012) (stating that “[s]hall” is mandatory”); *see also In re Welfare of S.L.J.*, 782 N.W.2d 549, 558 (Minn. 2010) (referring to these definitions and an exception not applicable here).

Turning next to the parties’ contract, we interpret contract language based on its plain and ordinary meaning. *Brookfield Trade Ctr., Inc. v. Cnty. of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998); *see Van Knight Steel*, 430 N.W.2d at 3 (stating that retainage “is generally defined by the terms of the contract”). “We read contract terms in the context of the entire contract and will not construe the terms so as to lead to a harsh and absurd result.” *Brookfield Trade Ctr.*, 584 N.W.2d at 394.

“The primary goal of contract interpretation is to determine and enforce the intent of the parties.” *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn.

2004). “[W]hen a contract is unambiguous, a court gives effect to the parties’ intentions as expressed in the four corners of the instrument, and clear, plain, unambiguous terms are conclusive of that intent.” *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. App. 2003), *review denied* (Minn. Feb. 25, 2004). Contract terms “will not be considered ambiguous solely because the parties dispute the proper interpretation of the terms.” *Id.*

Here, the contract does not explicitly state when retainage must be released. But three provisions of the contract, when read together, show that the parties intended the release of retainage to be concurrent with final payment. *See Burgi v. Eckes*, 354 N.W.2d 514, 518 (Minn. App. 1984) (“Terms in a contract should be read together and harmonized where possible.”).

First, special provision S-16 states that “an amount equal to five percent (5%) will be retained by the contracting agency” from “the total amount ascertained as payable on each partial estimate.” The 5% retainage “will be considered necessary to protect the Agency’s interest in consideration of charges or assessments against the Contractor.” This special provision shows that the parties intended the retainage to be withheld until it was no longer necessary to protect the county’s interests because of any possible charges or assessments against Central Specialties.

Second, specification 1906 of the contract uses somewhat broader language to describe the purpose of retainage:

From the amounts ascertained as payable on each partial estimate, no fixed percentage will be retained except as may be specifically required by law or otherwise stipulated in the

Special Provisions. However, the Department reserves the right to deduct therefrom and *withhold until satisfaction is assured*, such amounts as may be needed to protect the Department's interests in consideration of charges or assessments against the Contractor, *whether arising from this Contract or any other contract with the Department.*

(Emphasis added.)

The third provision, specification 1908, which directs how final payment will occur, states that when the project “has been completed and accepted as provided in [specification] 1516,”

the Engineer will prepare a final statement showing the accepted quantities of every item of work performed by the Contractor. All estimates upon which previous payments have been based are subject to correction in the final statement. The final voucher, showing the accepted quantity and value of each item of work performed and *all amounts to be retained* or deducted under the provisions of the Contract, will be submitted to the Contractor for approval before being passed for payment.

If the final voucher shows that the total of all partial payments made exceeds the total amount due the Contractor, the Contractor shall promptly refund the overpayment.

(Emphasis added.) This specification shows that (1) previous payments may be adjusted and the contractor may need to refund money to the county when estimates are finalized and (2) amounts may be retained at the time the final voucher is prepared and may continue to be retained until final payment is made.

Specification 1908 further provides that “[u]nless the Contractor has presented an affidavit showing that all claims against the Contractor by reason of the Contract have either been paid or satisfactorily secured, *final payment may be withheld or a sufficient amount may be retained* therefrom to cover the unpaid lienable claims.” (Emphasis

added.) Thus, amounts may be retained until Central Specialties submits an affidavit that shows that all claims against Central Specialties “have either been paid or satisfactorily secured.”

Nothing in the contract supports Central Specialties’ position that the retainage must be released upon substantial completion of the project. The county admits, and we agree, that the contract could have called for release upon substantial completion and that some construction contracts do. But we will not read such a requirement into the contract when the language, on its face, does not contain such an obligation.

The undisputed facts show that Work Order #2 and Final Pay Request #8 had not been signed by Central Specialties when the county released the retainage in May 2012. The record does not establish whether the county had formally approved of the projects or whether “satisfaction [was] assured” before the county released the retainage. Central Specialties has not identified a specific point in time after which the county could no longer make charges or assessments against Central Specialties.

Reading the contract provisions together, charges or assessments could be made by the county against Central Specialties until final payment. This language, along with the explicit language requiring the withholding of retainage, shows that the parties contemplated release of retainage with final payment. Under the terms of the contract, the county appropriately exercised its discretion in deciding to release the retainage when it did.

II. Whether Genuine Issues of Material Fact Exist

A. Use of Discretion

Central Specialties asserts that, even if the county had discretion to decide when to release the retainage, the county did not exercise its discretion reasonably and in good faith. It asserts that a genuine issue of material fact exists as to whether the county “withheld retainage for an improper purpose by trying to use it to force [Central Specialties] to agree to waive its claims for extra compensation.”

A covenant of good faith and fair dealing is ordinarily implied between the parties to a contract. *Minnwest Bank Cent. v. Flagship Properties LLC*, 689 N.W.2d 295, 303 (Minn. App. 2004). This implied covenant requires that “one party not ‘unjustifiably hinder’ the other party’s performance of the contract.” *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995) (citation omitted). “To establish a violation of this covenant, a party must establish bad faith by demonstrating that the adverse party has an ulterior motive for its refusal to perform a contractual duty.” *Minnwest Bank*, 689 N.W.2d at 303. Actions that are done honestly or based on an honest belief regarding rights or duties are done in good faith. *Prairie Island Indian Cmty. v. Minn. Dep’t of Pub. Safety*, 658 N.W.2d 876, 889 (Minn. App. 2003).

Good faith is typically a question of fact to be determined by the jury. *Hoyt v. Duluth & I. R. R. Co.*, 103 Minn. 396, 400, 115 N.W. 263, 264 (1908) (reviewing jury’s finding in conversion case); *see J.E.B. v Danks*, 785 N.W.2d 741, 750 (Minn. 2010) (examining whether there is genuine dispute as to party’s intentions in filing child abuse report). No genuine issues of material fact exist for trial “when the nonmoving party

presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

The record does not show a genuine issue of material fact as to the county's intentions in not releasing the retainage. The record and the depositions of the county employees involved in the projects show that the county believed that the retainage could be withheld until the projects were finalized and every obligation in the contract was complete. And, as discussed above, the plain terms of the contract justify this belief. The record also shows that ongoing disputes existed between the county and Central Specialties about quantities and payments for one of the work orders and for final payment, resulting in this litigation. Central Specialties sued the county just a few days after their January 2009 meeting to try to finalize the contract. At the time the county released the retainage, the county and Central Specialties still had not agreed on payment for the projects, and it was not until June 2013 that the parties settled these claims.

Central Specialties has not presented “sufficiently probative” evidence to counter the county's belief that it could continue withholding the retainage until all contract obligations were resolved. *See id.* Although the county ultimately released the retainage without having signed copies of Work Order #2 or Final Pay Request #8, the “early” release of retainage alone does not show that the county was acting in bad faith, especially given the ongoing litigation. Because reasonable persons could not draw different conclusions about the county's intentions, no genuine issue of material fact

exists as to whether the county acted in good faith in the use of its discretion to release the retainage. *See id.*

B. Reduction in Amount of Retainage

Central Specialties contends that a genuine issue of material fact exists regarding the amount of retainage that was withheld. Specifically, Central Specialties argues that the county agreed to reduce the retainage from 5% to 1%. The only reference in the record to an alleged agreement is in the May 2008 letter from Central Specialties to an assistant county engineer. The end of the letter states, “Please reduce the retainage to 1% as per our prior agreement.” One of the owners of Central Specialties also submitted an affidavit claiming that the agreement occurred. Employees from the county testified in deposition that no such agreement existed.

Even if Central Specialties’ evidence raises a factual issue about the existence of an agreement to reduce the retainage, an agreement between Central Specialties and an assistant county engineer is, as a matter of law, not sufficient to change the retainage percentage. To be sure, specification 1501 of the Standard Specifications allows the engineer to decide all questions regarding “[i]nterpretation of the Plans, Specifications, and Special Provisions” and “[m]easurement, control of quantities, and the amount of any deductions or adjustments to be made in payment.” But the specification does not give the engineer the authority to reduce the retainage percentage because the retainage provision in the contract is mandatory. Because special provision S-16 explicitly states that 5% *will* be retained, any modification of this percentage would be a contract modification, and no evidence suggests that either the assistant county engineer or the

Todd County Engineer had the authority to make such a modification. In fact, the Todd County Engineer confirmed in his deposition that the county board would have had to formally approve any reduction in the percentage of retainage withheld. Thus, the district court properly ruled, as a matter of law, that no genuine issue of material fact existed concerning the validity of an agreement to reduce the amount of retainage.

III. Prompt Payment Act

Under the Prompt Payment Act, a municipality must pay interest to a vendor if the municipality does not pay an obligation according to the terms of the contract. Minn. Stat. § 471.425, subd. 4(a). The municipality must pay interest and attorney's fees if the municipality has not made payments according to the contract terms unless there is a "good faith dispute." *Id.*, subd. 4(c).

Here, the district court properly concluded that the Prompt Payment Act does not apply. As discussed above, Central Specialties has not shown that the county did not pay the retainage according to the terms of the contract. The county had the discretion to withhold the retainage until final payment.

Affirmed.