

66267-8

66267-8

No. 66267-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

PACIFIC NORTHWEST EARTHWORKS, LLC,

Appellant,

v.

THE CITY OF BELLEVUE, a municipal corporation,

Respondent.

REPLY BRIEF OF APPELLANT

Bruce P. Babbitt, WSBA #4830
Attorneys for Appellant

Jameson Babbitt Stites & Lombard, PLLC
999 Third Avenue, #1900
Seattle, WA 98104

2011 APR 28 10:54 AM
CLERK OF COURT

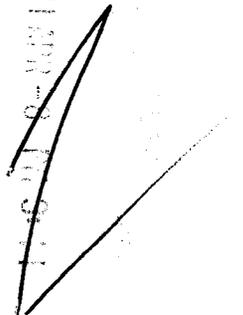


TABLE OF CONTENTS

INTRODUCTION.....	1
The Function Of The Trial Court, In A Summary Judgment, As Enhanced By The Mandatory Arbitration Rules, Is Not To Weigh The Evidence.....	2
The City Of Bellevue In its Contract Documents Made Sufficient, Positive Representations That Hard Rock Did Not Exist	4
Bellevue's Arguments That Plaintiff Had No Right To Rely On Contract Representations Violate Accepted Contract Interpretation Principles	7

TABLE OF AUTHORITIES

Washington Cases

Diamond “B” Constructors, Inc. v. Granite Falls School District, 117 Wn. App. 157, 70 P.3d 966 (2003) 9

Fisher Properties, Inc. v Arden Mayfair, Inc., 106 Wn.2d 826, 726 P.2d 8 (1986)..... 9

Maryland Casualty Company v Seattle, 9 Wn.2d. 666 (1941)..... 13

Mt. Adams School District v. Cook, 113 Wn. App. 472, 54 P.3d 1213 (Aug. 2002)..... 3

Munsey, et al. v. Walla Walla College, 80 Wn. App. 92, 906 P.2d 988 (1995) 4

Nevers v. Fireside, Inc., 113 Wn.2d 804, 947 P.2d 721 at 809 (1997) 4

W.A. Botting Plumbing & Heating v. Constructors Pamco, 47 Wn. App. 681, 736 P.2d 1100 (1987)..... 4

Federal Cases

Fehlhaber Corporation v United States, 151 F. Supp 817 (Ct. Cl. 1957) 5, 6, 13

Kennewick Irrigation District v United States, 880 F.2d 1018 (9th Cir. 1989)..... 9

Other Authorities

RAP 18.1 14

INTRODUCTION

Respondent City of Bellevue, as it did in its motion for summary judgment before the trial court, has recited its evidence and invited the court to weigh credibility of its evidence against the Pacific Northwest Earthworks' (PNWE's) evidence, including the declaration of Paul Traverso as to his reasonable reliance upon specifications.

Bellevue, in its response offers interpretations of the contract documents that, if accepted, render complete sections of the specifications meaningless and ineffective.

Bellevue, in general, argues that:

1. Bidders were not entitled to rely on the geotechnical report data and conclusions.
2. Bidders should do their own subsurface investigations.
3. Bidders could not rely on the specifications.
4. Nowhere did the city or the geotechnical report indicate that no hard rock would be encountered.
5. That in fact no hard rock was encountered.
6. That PNWE was unreasonable in its interpretation.

PNWE contends that none of these contentions were supported by the evidence or can they be maintained as a matter of law, and that as a matter of law PNWE was entitled to prevail on its legal contentions. Where factual issues exist they were material, disputed and improperly weighed and resolved by the trial court.

THE FUNCTION OF THE TRIAL COURT, IN A SUMMARY JUDGMENT, AS ENHANCED BY THE MANDATORY ARBITRATION RULES, IS NOT TO WEIGH THE EVIDENCE.

The indisputable proposition in this appeal is that the City of Bellevue invited the trial court, and again invites this reviewing court, to weigh the evidence, resolve ambiguities and factual disputes make judgments on the weight and credibility of the evidence and upon the ultimate reasonableness of the action and interpretation by PNWE. These are functions reserved to the Arbitrator.

MAR 3.2, Authority of the Arbitrator, includes 3.2(7): “Determine the facts, decide the law, and make an award.” Under the MAR the arbitrator becomes the judge of both the facts and the law. Cook v Selland Construction 81 Wash. App. 98, 912 P. 2d 1088 (Division 3 1996)

Motions for summary judgment are reserved to the court, but the only way that the authority of the arbitrator and the reserved

authority of the court to determine summary judgments may be harmonized is that the court decides cases where there is no doubt that there is no issue of material fact.

In Zimmerman v W8less Products, L.L.C. Court of Appeals Division II No. 40077-4-II Published Opinion March 15, 2011 the court ordered partial summary judgment on a matter that was referred to arbitration, and thereafter the arbitrator rendered an award on damages.

The Appeals Court found that summary judgment should not have been granted because there were disputed issues of fact.

The proper application of summary judgment in the face of a contract calling for arbitration was Mt. Adams School District v. Cook, 113 Wn. App. 472, 54 P.3d 1213 (Aug. 2002).

There, although reciting that Washington courts apply a strong presumption favoring arbitration, and arbitration is favored by the court, the Court of Appeals affirmed a motion for summary judgment because the appellant Cook was not covered by the contract providing for arbitration at the time he was fired.

Thus, the trial court was properly able to determine that the threshold of arbitrability of the dispute was possible without inquiry into the merits of the dispute. The same presumption toward

arbitration should apply whether the arbitration is contractual or mandatory. The trial court should have engaged in presumption favoring arbitration which is the policy of the courts in this state and should not have determined the underlying merits of the dispute. W.A. Botting Plumbing & Heating v. Constructors Pamco, 47 Wn. App. 681, 683, 736 P.2d 1100 (1987). Only by such analysis could the two portions of MAR 3.2 be harmonized. See also Munsey, et al. v. Walla Walla College, 80 Wn. App. 92, 906 P.2d 988 (1995). The trial court should have construed the mandatory arbitration rule in accord with their purpose. See Nevers v. Fireside, Inc., 113 Wn.2d 804, 947 P.2d 721 at 809 (1997).

THE CITY OF BELLEVUE IN ITS CONTRACT DOCUMENTS MADE SUFFICIENT, POSITIVE REPRESENTATIONS THAT HARD ROCK DID NOT EXIST

“Excavated material meeting the Standard Specifications definition of rock is not expected (See Appendix G-Geotechnical Report). “CP 202.

“We evaluated the bedrock in accordance with the criteria of WSDOT standard Specifications 7-09.3 (7)B Rock Excavation. The Blakeley Formation bedrock does not meet this criteria.” CP 286

These positive statements were strongly and further buttressed by the characterizations of the “very soft,” very

“fractured” rock. In the Geotechnical Report’s analysis of the soils tested. CP 297-300.

PNWE has been unable to discover a single case where such positive representations were not sufficient to support a finding of misrepresented site conditions when they were shown to be incorrect; neither has Bellevue from an examination of all of its cited authority.

The case law in Washington and in the Federal Courts is entirely supportive of PNWE’s position and against Bellevue’s. Fehlhaber Corporation v United States, 151 F. Supp 817 (Ct. Cl. 1957), confronted the same arguments as Bellevue makes here and disposed of them as courts had for decades before that and have for decades since. First it held that the that the plaintiff was not required to make its own subsurface investigation and, second that because of the short time to prepare bids and the impossibility of plaintiffs making its own subsurface investigation that “caveatory and exculpatory” provisions did not relieve the Defendant of liability.

Plaintiff had a right to rely on the Government’s specifications and drawings and the Government is bound by any assertions made therein notwithstanding the fact that it was stated that the data would be for information only.

151 F.Supp at 825.

Bellevue in its brief makes a novel argument, not even essayed by the government entities in any of PNWE or Bellevue's cases. That is, even if the positive representations and factual data presented in the contract documents report that no hard rock was found, unless the government guarantees that no hard rock will ever be found, there can be no misrepresentation of site conditions.

In the first place no reported case, even those where the contractor was denied recovery, has ever imposed such a requirement, and Bellevue cites none. The positive representations in the subsurface information are universally held to be offered as assumptions for the bidder to rely upon for purposes of pricing, not an exclusion of foreseeable subsequent discoveries.

Secondly, such a requirement makes all of the information and representations in the contract documents completely useless. The universally accepted purpose of geotechnical reports and the statement that no rock is anticipated or was found is to cause bidders to price the job accordingly. For Bellevue to include such information and then, when it is proven to be inaccurate, claims that it was meaningless is sharp practice that no courts have tolerated.

BELLEVUE'S ARGUMENTS THAT PLAINTIFF HAD NO RIGHT TO RELY ON CONTRACT REPRESENTATIONS VIOLATE ACCEPTED CONTRACT INTERPRETATION PRINCIPLES

Bellevue relies on several clauses to disclaim the geotechnical report.

1. First it relies upon the statements in the report directed at the city.
2. Second, it refers to the Examination of the Work Site Clause for the purposes of the bidder examining the conditions at the site of the work.
3. Third it refers to the fact that no statement by any officer, agent, or employee with regard to the "physical conditions appertaining to the site of the work" shall be binding.

The effect of such an argument, if accepted, is that whole portions of the specifications and other contract documents are rendered meaningless.

If the statements in the geotechnical report directed at the city mean that contractors may not rely upon them why is the report made part of the contract documents, bound into the project manual, and referred to in the body of the specifications?

If the examination of the work site clause requires that bidders conduct their own geotechnical examinations why isn't time allowed for this work?

If the owner is not bound by statements or representations that are in writing and part of the contract documents, upon what part of the contract documents may the contractor rely? Everything in the contract documents is a representation by the owner.

The answer PNWE submits is that Bellevue again is asking the courts to endorse an improper interpretation of the contract documents, one that eviscerates whole sections of the contract documents, but also renders them illusory and unfair.

This Division in Diamond "B" Constructors, Inc. v. Granite Falls School District, 117 Wn. App. 157, 70 P.3d 966 (2003), reiterated that, "[I]f we were to adopt the District's interpretation, the definition of "Installer" would be meaningless. We must construe a contract to give meaning to every term." 117 Wn. App at 165.

A written contract must be read as a whole and every part interpreted with reference to the whole. (citation omitted). Preference must be given to reasonable interpretations as opposed to those that are unreasonable, or that would make the contract illusory.

Kennewick Irrigation District v United States, 880 F.2d 1018, 1031-32 (9th Cir. 1989).

When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we will adopt the latter interpretation.

Fisher Properties, Inc. v Arden Mayfair, Inc., 106 Wn.2d 826, 837, 726 P.2d 8 (1986).

This Division has consistently held that any ambiguities in a contract are to be resolved against the drafter of the language. Voicelink Data Services, Inc. v Datapulse, Inc. 86 Wash. App. 613, 937 P 2d 1158 (1997).

The City of Bellevue argues that PNWE was not entitled to rely on the soils report because the engineer who did it indicated to the City of Bellevue that they would have no liability to the City for the representations therein made. The City itself, as opposed to its engineer, at no point disclaimed that the soils report was part of the specifications, but in fact included it in the contract bid documents and referenced it directly in the specification sections dealing with rock. It is unreasonable and not accepted by the courts for a contracting party to disclaim the very report that becomes part of the specifications.

Another attempted disclaimer is that bidders were supposed to make up their own mind in their interpretation. The specifications

and contract documents declared that no rock was found or anticipated. The only way this can be harmonized is that the City is not liable for subjective unreasonable interpretations, because the only information provided bidders was that there was no rock.

The City next argues that the specifications said that contractors could not rely on any statements by any employees or agents of the City. Unless this is read to mean that the City is not responsible for anything said that is not included in the specifications or added by addenda, then this has the obvious consequence that no portion of the specifications may be relied upon for any purpose.

If in part of the contract documents Bellevue says that there is no rock and then says that those documents are not to be relied upon thereby, after the fact creating a classic ambiguity. This must be resolved against Bellevue.

The City of Bellevue asked the trial court to find that PNWE's reliance on the specifications was not reasonable. It does so by postulating that the trial court should put itself in the position of a "reasonable contractor." There was no direct evidence, or even circumstantial evidence, that PNWE did not reasonably interpret the specification with regard to the presence or absence of rock. PNWE

was not even the low bidding contractor on this item of work. Several other bidders included even more nominal amounts for the item that Bellevue and its geotechnical engineering firm indicated did not exist. To omit any bid item would cause the bidder to be disqualified. Bellevue also had the option to disqualify bidders whose bid was obviously unbalanced. It did not do so with the bidders who put a nominal sum in for rock excavation.

Inclusion of a nominal amount under the bid item is not an acknowledgement that rock will be encountered, but rather that the bidder would like to be awarded the contract. A knowledgeable arbitrator charged with determining the facts would easily resolve this issue.

The only contractor in a position to say what a reasonable contractor would do was Paul Traverso. In answer to Bellevue's assertion that no rock was found, Paul Traverso in his declaration said he did find hard rock in the entire trench area. Moreover, PNWE was the only entity involved in this contract that actually had analytical tests performed on the soils that were encountered. The tests determined that rock was present that exceeded the compressive limits defined in the specifications.

The only tests before the trial court were included in Paul Traverso's declaration CP 395-441. Earth Consulting Incorporated performed two separate tests in accordance with the standard specifications and found that the material encountered was hard rock. CP 422-423. Bellevue has no answer to this hard evidence.

Mr. Traverso's declaration sets out the fact of his reliance on the contract description of the soils and how his cost structure and schedule relied upon the representations. Mr. Traverso says in his declaration that if the soils had been as represented his existing equipment would have been more than adequate. Bellevue offers no rebuttal. If the originally planned, equipment would have been adequate for the soils conditions represented in the specifications a contractor is entitled to recover for the differences in equipment that must be employed and the lost productivity caused by the representations not being accurate. Fehlhaber Corporation v United States, 151 F. Supp. 817, 138 Ct. Cl. 571, 599-604.

There were issues of fact including issues of reasonability of contract interpretation issues of whether a contractor was reasonable in determining that the soils could be excavated with its normal equipment, and a myriad of other facts and inferences from facts that no court was authorized to make on a motion for

summary judgment. As argued in the opening brief and before the trial court, the sole legal issue is whether the City of Bellevue could legally enforce a clause disclaiming its own specification. That proposition was authoritatively determined by the State Supreme Court in Maryland Casualty Company v Seattle, 9 Wn.2d. 666 (1941).

The trial court's determination was selective, arbitrary, unreasoning, and at odds with all available case law in this state. The trial judge's comments reveal that she did not even review Paul Traverso's detailed declaration prior to the hearing. The trial court should be reversed and the matter remanded for arbitration with the ruling from this tribunal as a matter of law as guidance for the anticipated arbitration that any attempted disclaimers by the City of Bellevue are not effective in this state in the circumstances where the statements and representations and other materials provided the bidders are proved to be inaccurate.

ATTORNEY FEES

The contract between the parties, as the City of Bellevue points out, contains an attorney fee clause. Under RAP 18.1 PNWE claims its attorney fees and costs in obtaining the reversal of the summary judgment in favor of the City of Bellevue.

Respectfully submitted this 8th day of April, 2011.

JAMESON BABBITT STITES &
LOMBARD, P.L.L.C.

By: _____

A handwritten signature in black ink, appearing to read "B. Babbitt", written over a horizontal line.

Bruce P. Babbitt WSBA #4830
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Erika Trask, declare as follows:

1. I am a paralegal with the law firm of Jameson Babbitt Stites & Lombard, P.L.L.C., over the age of 18 years, a resident of the State of Washington, and not a party to this matter.
2. On April 8, 2011, I sent via ABC-Legal Messenger Service a copy of the foregoing Reply Brief of Appellant to:

Cheryl A. Zakrzewski
City of Bellevue
450 – 110th Avenue NE,
Bellevue, WA 98004
czakrzewski@bellevue.gov

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of April, 2011, at Seattle, Washington.