

No. 73647-7 I

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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

INTEGRATED FACILITIES MANAGEMENT,
LLC, A Washington Limited Liabilities
Corporation dba SUN LIGHTING, fka PARTNER
MERCHANT SERVICES, INC.

Appellant,

v.

CITY OF MERCER ISLAND, a municipal
corporation in the State of Washington.

Respondent.

BRIEF OF APPELLANT

Appeal from the Superior Court of King County
No. 14-2-22169-0 SEA
The Honorable William Downing, Presiding

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ASSIGNMENTS OF ERROR

1. THE LOWER COURT ERRED WHEN IT DETERMINED THAT A PRIOR CONTRACT OF THE PARTIES GOVERNED THE DISPUTE.

2. THE LOWER COURT ERRED WHEN IT DETERMINED THAT AS A MATTER OF LAW, LACHES WAS A DEFENSE TO APPELLANT’S CLAIMS WHEN THE CLAIMS WERE BROUGHT WITHIN THE RELEVANT STATUTE OF LIMITATIONS.

3. THE LOWER COURT ERRED WHEN IT DETERMINED THAT EQUITABLE ESTOPPEL BARRED APPELLANT’S CLAIMS AS A MATTER OF LAW WHEN IT BASED ITS DECISION ON THE ACTIONS OF A SISTER CORPORATION OF APPELLANT’S, NOT ON THE ACTIONS OF APPELLANT.

DISPUTED FINDINGS OF FACT

1. Although the Court gave a written decision, in so doing, the Court made factual determinations. The Court determined that “The Plaintiff then participated in a competitive bidding process for the work, lost out, and then went away quietly.” CP 231. Appellant challenges this finding as unsupported by the record, particularly given the summary judgment standard that facts must be construed in a light most favorable to a complaining party. CP 313-14 (a sister corporation bid for the work after Respondent breached the subject contract and put the matter out for a public bid)
2. The Court further found “The document the plaintiff now proffers as purportedly showing the City had obligations to it was not produced until several years after the City had entered into a contract with another vendor and paid for the services it provided.” CP 231. Appellant challenges this finding as not supported by the evidence, given that the Court is required to view the evidence in the light most favorable to the moving party. Appellant in fact addressed the controlling contract with Respondent prior to the breach and shortly thereafter. CP 212-13; CP 210-11 (Appellant had their attorney attempt to work out the contract issue with Respondent within days of the breach); CP 313-14 (Respondent’s

agent signed the relevant contract in October 2009 and the contract issue was repeatedly addressed with Respondent in October and November 2010). CP 324-29; CP 208, 209 & 212.

STATEMENT OF FACTS

The parties, prior to 2009 for several years had contracted to have Appellant put up holiday décor work for the City of Mercer Island. CP. 209.

In October 2009, the contract was up for renewal. The City, through its agent, Keith Kerner, requested a contract for a renewal. Time was of the essence, so Mr. Kerner elected to sign the Appellant's contract form rather than use the City's form that had been used previous years sporadically (sometimes Appellant's contract, sometimes City's contract). CP 210-11 and CP 324-29. In front of Appellant's agent, James Folgedalen, Appellant's Project Account Manager, the City's agent, Mr. Kerner, signed the contract as well as some associated change orders. CP. 209-11.

The day before the scheduled installation, the project was put on hold in early October 2010. This was after the installation dates had been confirmed. CP. 207-11.

Just prior to the installation date, Mr. Kerner informed Robert Folgedalen, President of Appellant that he was leaving his post with the

City and was being replaced by Jason Kitner. CP. 207. Robert and Mr. Kitner met prior to the installation date and Appellant prepped for the job and arranged for the lift delivery. CP. 208. With Mr. Kitner, Robert reviewed the project and discussed changes and the need to prepare a change order to the existing contract. CP 208 and CP 324-29. On October 21, 2010, a copy of the contract and work order were provided. CP. 208.

On October 29, 2010, the day before the agreed installation was to begin, Mr. Kitner emailed Appellant and informed Appellant that he was placing the holiday décor project out for bid. CP. 208. He offered to allow Appellant to rebid the project.

Robert Folgedalen promptly called back and left a voice mail asking for an explanation as to why the City did that when they had a valid contract in place. This was followed up by Robert sending an email on November 1, 2010, inquiring re the same. CP. 208.

Appellant went so far as to have its attorney, Richard A. Forsell, in early November 2010, contact Respondent, City of Mercer Island. After that, on November 8, 2010, Mr. Forsell called Katie Knight at Mercer Island and left a voice mail requesting dialog about the contract for the holiday décor with Appellant. He did so again on November 10, 2010. No response was ever provided. CP. 212.

Also on November 3, 2010, Robert phoned Mr. Kitner again expressing that the existing contract was valid and could be modified with a change order. This was rejected by the City. Appellant was willing to include LED lights or other accommodations if so desired even though not required by the contract (as had been the pattern in the past). Appellant made it clear that the existing agreement would remain intact. CP 208.

A separate entity from Appellant, Sunlighting, which was not the entity they entered into the agreement with the City, did provide a separate bid. CP. 208.

The City thereafter awarded the décor project to a different company. CP. 209. Robert expressed to Mr. Kitner that this was a material breach of the contract and again offered to allow the City to remedy this issue. Mr. Kitner and the City refused. CP. 209.

As a result of the City's breach, Appellant lost valuable installation time. Appellant's business has a very limited opportunity to make money given the seasonality of the business. Appellant estimated that it lost approximately \$45,000 in revenue generation from other projects that could have been scheduled in the same time frame. CP 211.

PROCEDURAL FACTS

On August 12, 2014, Appellant filed a complaint citing breach of contract and other claims. CP 1-2. After Respondent filed its answer (CP 3-5), Appellant filed for arbitration on October 2, 2014.

Thereafter, Respondent filed for summary judgment on January 16, 2015. CP. 6-206.

Following hearing, the Court considered all appropriate pleadings, and the Court granted partial summary judgment. CP. 230-232. In partially denying summary judgment, the Court found that there were two issues of fact as to the untimely rescission of the contract by Respondent and how that damaged Appellant. CP. 230-232. Thereafter, Respondent filed an additional summary judgment motion as to the remaining issues. CP. 233-312. Following hearing after all appropriate pleadings were filed the Court granted Respondent's motion to summary judgment as to the remaining issues. CP. 338-339. This timely appeal follows. CP 340.

LAW AND ARGUMENT

1. THE LOWER COURT ERRED WHEN IT DETERMINED THAT A PRIOR CONTRACT OF THE PARTIES GOVERNED THE DISPUTE.

In the Court's oral decision granting partial summary judgment on February 13, 2015, the Court cited a prior contract that was no longer governing the current situation given that respondent's agent had signed

the contract presented by appellant and it was governing. See RP 26 (February 13, 2015) (The Court cited to Paragraphs 4.1 and 4.2 under the prior contract).

There is no paragraph 4.1 or 4.2 in the contract that respondent agreed to. CP 324-29. In the relevant contract, there is no termination at will provision. CP 324-29

PRIOR CONTRACTS DO NOT GOVERN

The Court's rationale was that the prior contract had given the respondent the right to terminate that contract at any time for any reason, so the Court felt that respondent was justified in terminating the contract the day before the installation based upon the prior contract provisions. RP 26 (February 13, 2015). Frankly, the prior contract provisions are irrelevant given the new signed contract that respondent agreed to.

Just as the compensation for each contract over the years that the parties enter into varied (increased); similarly, since the parties signed different contracts over the years (sometimes the City's contract and sometimes the appellant's contract), it is frankly irrelevant that the prior contract had a provision that allowed the City to terminate without any reason or advance warning. The contract that respondent signed was the governing contract and had no such provision. CP 324-29.

Clearly the lower Court erred in construing the existing contract (as set forth in CP 324-29) based upon the prior contract that did not govern the current obligations of each party to perform for the relevant year, 2010.

Just as it would be absurd to believe that the City would be justified in paying only the amount required by a prior contract to appellant for services rendered; likewise, it is absurd for the City to act based upon a prior contract.

This is the case even without addressing the fact that the Court has to construe the facts in the light most favorable to the moving party, and what the Court did was construe the facts in frankly an absurd fashion that the current relevant contract that the parties entered into somehow was subject to the prior contract, which it was not and there is no clause that would so indicate. CP 24-29.

2. THE LOWER COURT ERRED WHEN IT DETERMINED THAT AS A MATTER OF LAW, LACHES WAS A DEFENSE TO APPELLANT'S CLAIMS WHEN THE CLAIMS WERE BROUGHT WITHIN THE RELEVANT STATUTE OF LIMITATIONS.

Brost v. L.A.N.D., Inc., 37 Wn.App. 372, 680 P.2d 453 (1984), sets

forth:

A Court is generally precluded, absent highly unusual circumstances, from imposing a shorter period under the doctrinal of laches and that of the relevant statute of limitations. Ibid at 375.

TARDINESS DOES NOT JSUTIFY LACHES

Brost further clarifies “that the purpose of laches is to prevent

injustice and hardship” (citation omitted). Further:

It is only appropriate to apply laches when a party, knowing his rights, takes no steps to enforce them and the condition the other party has *in good faith become so changed that he cannot be restored to his former state.* (citation omitted) . . . However, “[s]o long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, . . .” (citation omitted) Laches is an extraordinary remedy to prevent injustice and hardship and should not be employed as a mere artificial excuse for denying to a litigant that which in equity and good conscience he is fairly entitled to receive, when the assertion of the claim, though tardy, is within the time limited by statute and the rights of no one have been prejudiced by the delay. Like most equitable doctrines it is to be applied with circumspection and as a means of administering justice. It is not to be employed as a barrier solely for the purpose of defeating meritorious claims grounded upon the plainest principles of common honesty. (citation omitted) . . . Determining whether injury cognizable under the doctrine of laches occurs depends on assessing the inherent equities of a particular case. (citation omitted) Ibid. at 375-76.

In Brost, the Court found that using laches there was an injustice, not an act of justice. Finding that the City can just get away with blowing off its contract and leaving plaintiff who in good faith contracted to perform (without remedy) would also constitute an injustice. (see Brost Ibid at 376).

DENIAL OF JUSTICE IS INAPPROPRIATE

The lower court clearly erred in determining that Appellant as a matter of law acted with laches since it filed its complaint close to four years after the breach took place, given that this was still within the statute of limitations. The extraordinary laches remedy exists only to prevent injustice and hardship. In this case, it has been used as an artificial excuse to deny Appellant justice which in equity and good conscious Appellant is entitled to receive. There was no prejudice to the City. The City after signing a valid contract decided it didn't want to comply with its agreement and caused damages to Appellant by so doing. That was the only injustice that has occurred in this case.

NO HIGHLY UNUSUAL CIRCUMSTANCES

Brost, supra. at 375, makes it clear that absent highly unusual circumstances, it is not appropriate to apply laches. This case doesn't have anything that would qualify under that requirement. Nothing changed from Respondent's position over those less than four years between when Respondent breached the contract to when Appellant filed the lawsuit. Respondent brushed Appellant aside, along with its contract that it had signed and agreed to, without any legal basis whatsoever. It was clearly inappropriate to determine that Appellant's action was barred by laches.

3. THE LOWER COURT ERRED WHEN IT DETERMINED THAT EQUITABLE ESTOPPEL BARRED APPELLANT'S CLAIMS AS A MATTER OF LAW WHEN IT BASED ITS DECISION ON THE ACTIONS OF A SISTER CORPORATION OF APPELLANT'S, NOT ON THE ACTIONS OF APPELLANT.

BREACH TIMELY PROTESTED

Appellant protested Respondent's conduct in every way that it possibly could at the time of the breach. Appellant's president upon receipt of the City's email promptly called back and left a voice mail inquiring as to how the valid contract could just be brushed aside. CP. 208. He further followed that up with an email just a few days later. CP. 208.

NO MISTAKING APPELLANT'S POSITION

Following that, Appellant had its attorney, Richard Forsell, in early 2010 contact Respondent and a number of attempts to address this were made by Appellant's attorney. CP 212. The president of Appellant's company again contacted the breaching agent of Respondent on November 3, 2010, (again just days after the breach) and offered to make any change orders that the City deemed necessary or other accommodations. Appellant made it clear that the existing contract was not to be breached and that it remained binding. CP. 208.

APPELLANT MAINTAINED CLAIM RE: BREACH BY CITY

Under protest, Appellant had a sister company, Sunlighting, prepare a bid. CP. 208. The fact that Appellant had a sister company do this does not preclude its position that Appellant made a abundantly clear to Respondent that the contract was valid and binding.

Thereafter Appellant's president once again attempted to grant Respondent the opportunity to remedy its material breach and again the City refused. CP. 209.

OWN VOLITION?

This is not a case for equitable estoppel. Aside from the fact that the facts are to be construed most favorably to Appellant, equitable estoppel applies when the conduct of the party against whom this defense is applied to has acted of its own volition in a manner such that it is only fair to preclude the defending party from being granted relief inconsistent with its prior conduct. Cf. Kramarevcky v. DSHS, 863 P.2d 535, 122 Wn.2d 738 (1993) (equitable estoppel allowed to stop DSHS from recouping payments when it was DSHS error and not the respondent's error that caused the overpayment).

DIFFERENT BIDDER

In our case, first off it wasn't even Appellant who under protest, engaged in the bidding process, it was a sister corporation that did. So Appellant hasn't done anything inconsistent with its position that there

was a breach of contract and that its contract should have been abided by and that Appellant is entitled to damages given the breach.

NO WRONGDOING BY APPELLANT

In addition, Appellant did not cause the breach. There was no fault whatsoever that Appellant engaged in. Respondent just decided on the day before Appellant was going to perform that it would breach the contract and engage in the bidding process contrary to the contract.

EQUITABLE ESTOPPEL ELEMENTS

Indeed, the elements of equitable estoppel cannot fairly be determined to have been proved in this case. The elements are:

1. An admission, a statement, or act inconsistent with the claim afterwards asserted;
2. Action by the other party on the faith of such admission; statement, or act; and
3. Injury to such other party arising from permitting the first party to contradict or repudiate such admission, statement or act.

Bingnold v. King County, 65 Wn.2d 817, 399 P.2d 611 (1965);

Moore v. Dark, 52 Wn.2d 555, 327 P.2d 429 (1958); Nelson v. Bailey, 54

Wn.2d 151, 338 P.2d 757 (1959); Code v. London, 27 Wn.2d 279, 179

P.2d 293 (1947). Schaffer v. State, 521 P.2d 736, 83 Wn.2d 618 (Wash.

1974).

ELEMENT ONE: INCONSISTENCY

The Court felt that the act of Appellant's sister corporation in bidding on the contract was sufficient to meet the first element of equitable estoppel. However, this was not Appellant's act. Appellant adamantly and repeatedly made its position clear to Respondent that its contract was valid and that Appellant never wavered from this position. Appellant was nothing but consistent in its position.

ELEMENT TWO: NO DETRIMENTAL RELIANCE

The only thing Appellant did was to inform a sister corporation (following Respondent's breach) of a bidding opportunity. There was no action by Respondent in reliance of the act by Appellant's sister company. The fact is that Respondent had already breached the contract when it announced that it would not abide by the contract and instead was pursuing a bid process post contract. It didn't act on the fact that Appellant's sister corporation participated in the bidding. It was acting irregardless and independently of whether either Appellant or its sister corporation bid on the project. There was no action as a result of anything Appellant or its sister corporation did, by Respondent.

**ELEMENT THREE: ABSOLUTELY NO INJURY TO
RESPONDENT**

Finally, there certainly was no injury either to Respondent from the fact that Appellant's sister corporation bid on the project. It is not like

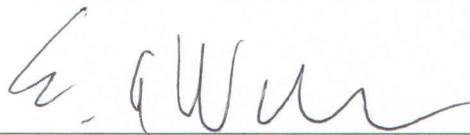
Respondent had the position at any time that it would only do the bidding procedure if Appellant agreed to do that. To the contrary, it was a *fait accompli* that the City was pursuing the bidding of this project despite the fact that it had a valid contract for Appellant to perform under the contract, and that it had an obligation to pay for such performance. Only respondent caused damage.

The lower Court erred in finding that equitable estoppel applied in this case.

CONCLUSION

For the reasons set forth, the lower Court should be reversed and the case should be remanded to the lower Court and proceed with arbitration.

Respectfully submitted this 10th day of November, 2015.



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Attorney for Appellant