 74938-2

No. 74938-2

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

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Nov 03, 2016
Court of Appeals
Division I
State of Washington

TITAN EARTHWORK, LLC,

Appellant/Cross-Respondent,

vs.

THE CITY OF FEDERAL WAY,

Respondent/Cross-Appellant.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

Robert F. Noe
WSBA No. 19730
Kim A. Pratt
WSBA No. 19798
Kenyon Disend, PLLC
11 Front Street South
Issaquah, Washington 98027-3820
(425) 392-7090
Attorneys for Respondent/Cross-Appellant
City of Federal Way

TABLE OF CONTENTS

I. INTRODUCTION AND ARGUMENT 1

A. Provision 19.6 Regarding Attorney Fees Applies to Actions Related to Defaults in Performance 2

B. Titan Contractually Agreed to Indemnify the City, including Payment of Attorney's Fees 4

II. CONCLUSION 6

TABLE OF AUTHORITIES

TABLE OF CASES

Yakima County v. Yakima County Law Enforcement Officers Guild, 157 Wn. App. 304, 237 P.3d 316 (2010).....3-4

STATUTES

RCW 19.122 ..... 1, 2-3, 4, 5

RCW 49.48.030 4

REGULATIONS AND RULES

RAP 18.1 6

CR 8(c) 4

I. INTRODUCTION AND ARGUMENT

Titan continues to deny that it had obligations and duties imposed upon it as an excavator under the provisions of RCW 19.122 with which it had to comply or face liability in the event it caused damage to a utility. Titan continues to assert that it did not need to follow the provisions of RCW 19.122 because it had an excuse for not following such provisions.[1] Compliance with the statute, however, is not only required pursuant to its terms, but also pursuant to the terms of the contract between the parties. CP 000043.

Titan does not dispute that it failed to comply with RCW 19.122.040(2)(a) which required that Titan precisely locate the powerline. Instead, Titan continues to argue that its failure to locate the powerline should be excused or that it is reasonable to excuse noncompliance.[2] It then argues that because it has presented such an excuse, the City should

[1] Titan makes factual assertions in its Reply brief that are not supported in the record. For instance, Titan asserts at page 4 of it Reply Brief "Unbeknownst to all parties, PSE had misrepresented the location of its utilities, and failed to dig the pit deep enough to uncover the conduits that TSI eventually struck – the northern grouping". The CPs it cites do not support this factual contention. More accurately, after the initial digging (after the steel plate was removed and backfill placed into the opening), an additional utility locate was conducted and the remaining powerline was marked anew. CP 410-411 and 86-87.

[2] Titan attempts to introduce evidence at page 5 and 6 of its Reply Brief that is not part of the record to buttress its argument that its failure to comply with RCW 19.122 should be excused. Because this information was not before the trial court and not part of the record developed at the trial court, it cannot be considered and the attempt to introduce it at this time is improper.

then be held responsible for the damages to the marked powerline that Titan struck.

The court should note that Titan did not oppose PSE's imposition of its damage costs to Titan, but instead Titan chose to sue the City to shift those costs to the City. Titan couched its causes of action in this lawsuit as actions under the contract and argues that the City cannot recover its attorneys' fees as a prevailing party because attorneys' fees are not provided for under the contract. CP 005 and 006. Titan fails to mention in its complaint that compliance with RCW 19.122 is contractually required and, thus, was adopted into and became part of the contract through incorporation by reference. CP 000043. Its failure to do so was intentional.

A. Provision 19.6 Regarding Attorney Fees Applies to Actions Related to Defaults in Performance.

Titan argues that section 19.6 of the contract, which provides that if an action for default of performance is brought under the contract each party will bear its own attorneys' fees, constitutes a waiver by the City for any statutory attorney fee claim under RCW 19.122. CP 000052. The present action involves claims for failure to comply with provisions of the contract, but it also involves a claim and request for a determination of who bears the costs of damage to the powerline under the terms of RCW

19.122. That determination is not tied or bound to contract claims for "defaults on the performance of any terms of this Contract." CP 000052.

Titan asserts that Yakima County v. Yakima County Law Enforcement Officers Guild, 157 Wn. App. 304, 237 P.3d 316 (2010) supports the proposition that attorney fee waivers are enforceable despite a statute that may mandate an award of an attorneys' fees. This assertion does not, however, accurately capture that Court's ruling and the Court's holding in that case is inapplicable to the instant matter. In Yakima, the Court painstakingly, from pages 333 through 346 of that decision, distinguished those matters where the contractual attorney fee waiver applied and where it did not based on the different types of proceedings and causes of action that were involved. The Court addressed whether an arbitrator's fees should have been be awarded to the prevailing party. Although the collective bargaining agreement (contract at issue) had a fee waiver provision, the Court found that an award to the prevailing party was appropriate under equity. Id. at 339-340. The Court then considered whether the prevailing party was entitled to collect attorneys' fees pursuant to a statute because that party had to bring an action to recover wages. It held that the waiver did apply to that action and to an appeal related to that action because of the nature of the proceedings. It held, " . . . [t]he superior court proceedings are then not so attenuated from the

arbitration proceeding itself as to be separate for purposes of attorney fee recovery under RCW 49.48.030 and was then waived by the CBA." Id. at 345.

Here, Titan was required to comply with the provisions of RCW as an excavator, regardless of any contractual provision requiring it to do so. Had it not paid PSE for the damage to its powerline, PSE could have sued it to recover its damages under the statute regardless of the existence of any contract. The City here, in its defense to this lawsuit, raised the claim that Titan did not comply with RCW 19.122.[3] This claim could be brought independent of any contract claim and it was plead as such. Thus, consistent with the Yakima case, the waiver would not impact the City's ability to recover fees under the statute. The waiver provision of the contract only applies to actions brought concerning "defaults on the performance of any terms of this Contract."

B. Titan Contractually Agreed to Indemnify the City, including Payment of Attorney's Fees.

In this case, PSE recovered damages it suffered to its powerline from the plaintiffs. Titan now seeks to recoup that money from that City. Titan is only pursuing an action against the City now because PSE made a claim against it for striking the PSE powerline. Titan is contractually

[3] The City plead this as an affirmative defense, CP 12, but it can be considered as a counterclaim under CR 8(c).

required to bear the costs associated with the PSE claim under the indemnification provision of the contract between the parties. Section 8.1 provides that the "Contractor agrees to indemnify, defend, and hold the City, . . . harmless from any and all claims, demands, losses, actions and liabilities (including costs and attorney's fees) to or by any and all persons or entities . . . arising from, resulting from, or connected with this Contract to the extent caused by the negligent acts, errors or omissions of the Contractor . . . or by the Contractor's breach of this Contract." CP 000047.

Titan has a contractual obligation to indemnify the City and hold the City harmless here because of its negligence and its breach (failure to comply with RCW 19.122) when it dug and struck the PSE powerline. Here, Titan was negligent when it failed to comply with the provisions of RCW 19.122 requiring it to precisely locate the powerline and it breached its contractual obligation to do so as well. Instead, Titan sued the City (in an effort to pass the PSE claim onto the City) and the City was forced to incur attorneys' fees and costs in its defense. The City is entitled to recover those costs and fees from Titan under such circumstances pursuant to the indemnity provision.

II. CONCLUSION

The City refers the Court to its Response/Cross Appeal for further discussion and argument related to the award of attorney's fees in this matter. As requested, this Court should remand this matter back to the lower court for reconsideration on the amount of the attorney fees to be awarded to the City as the prevailing party herein. The Court should award additional attorney fees and costs to the City as prevailing party pursuant to RAP 18.1.

The trial court's decision should otherwise be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of November, 2016.

By _____

Robert F. Noe
WSBA No. 19730
Kim A. Pratt
WSBA No. 19798
Attorneys for Respondent/Cross-Appellant City of Federal Way
KENYON DISEND, PLLC
11 Front Street South
Issaquah, Washington 98027
(425/392-7090)

DECLARATION OF SERVICE

I, Kathy Swoyer, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 3rd day of November, 2016, I served a true copy of the foregoing *Reply Brief of Respondent/Cross-Appellant*, on the following counsel of record using the method of service indicated below:

Sean Dowell J. Craig Rusk OLES MORRISON RINKER & BAKER LLP 701 Pike Street, Suite 1700 Seattle, WA 98101	☒ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: dowell@oles.com Rusk@oles.com
Mark Orthmann Assistant City Attorney City of Federal Way 33325 Eighth Avenue South Federal Way, WA 98003	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: Mark.orthmann@cityoffederalway.com

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

DATED this 3rd day of November, 2016, at Issaquah, Washington.

Kathy Swoyer