

Miller v. Mills Const., Inc., 2002 DSD 26

WILMA MILLER,
d/b/a Double Diamond Construction,
Plaintiff,

v.

MILLS CONSTRUCTION, INC.
and Van Tol Surety Co., Inc.,
Defendants.

[2002 DSD 26]

United States District Court
District of South Dakota--Southern Division
CIV. 99-4040

MEMORANDUM OPINION AND ORDER

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Hon. Karen E. Schreier, U. S. District Judge

[¶1] Plaintiff, Wilma Miller, doing business as Double Diamond Construction, filed this action alleging that defendant Mills Construction, Inc., failed to compensate Double Diamond for its performance under their subcontract. Mills and defendant Van Tol Surety Co., Inc., which provided the surety bond for Mills on this project, deny these allegations and Mills counterclaims, alleging that Double Diamond owes it damages for negligence and breach of contract.

FACTS

[¶2] Mills was hired to construct the Brookings AgriPlex, which consisted of a series of buildings for exhibitions, in Brookings, South Dakota. One of the buildings to be constructed was the Exhibition Arena. The Arena was a steel clear span structure, 286 feet long by 209 feet wide. Because Mills had not previously constructed a clear span building the size of the Arena, Mills opened up the project for bids from steel erection companies. Double Diamond's bid was accepted by Mills and the subcontract between the two parties was finalized on March 25, 1998.

[¶3] Under the subcontract, Double Diamond was to provide the labor and equipment necessary to fully construct the building. Mills was to provide the pre-engineered steel components and materials for the building. Double Diamond was responsible for unloading the building materials as they were delivered. Double Diamond was to be paid a total of \$209,875 under the subcontract.

[¶4] Mills contracted with American Building Company (ABC), a manufacturing company, to provide the pre-engineered steel components for the building. According to the Double Diamond subcontract, building materials were to be delivered beginning the week of April 6, 1998. ABC did not make its first delivery, however, until April 15, 1998, and the erection materials needed for the early stages of the building were not delivered until later shipments.

[¶5] The construction of a pre-engineered steel building occurs in two phases: the red-iron phase and the sheet metal phase. In the red-iron phase, the side wall columns and then the end wall columns are set onto concrete foundations and bolted down. Pipe braces or girts are then attached at the top in between each side wall column. The side wall columns are squared using x-bracing. Then the end walls are completed.

[¶6] Next the mainframes are erected. To erect the mainframes, two rafters are assembled on the ground and then lifted by cranes to rest upon the columns. The area between the two mainframes is known as a bay. Purlins, pipe braces, and rod braces are then placed between the mainframes to provide stability. After the red-iron phase is complete, the sheet metal phase occurs, which consists of attaching metal sheeting to the structure to form the roof and sides of the building.

[¶7] ABC did not ship the components for the Arena in order and as a result, the commencement of the construction was delayed. When Double Diamond went to set the columns, it found that the anchor bolts, which attach the side wall columns to the foundation, were "sticking up too high" and some of them had to be torched off.

[¶8] As Double Diamond began to assemble the mainframes, problems with the steel components became apparent. Double Diamond discovered that not only were the bolt holes to attach the two rafters frequently misaligned, but the correct bolts to attach the rafters had not been sent. Additionally, some of the mainframes were twisted. As the crew attempted to properly brace the mainframes, it was discovered that some of the clips, where the purlins and braces attach to the mainframes, were missing or were welded on backwards. Dan Miller, Miller's son and partner, testified that some of the rod braces that were to go in between the sidewall columns were the wrong lengths and that corrections had to be made so they would fit. Also, the clips (where the girts were to attach to the sidewall columns) were not properly centered, preventing the attachment of some of the girts for support.

[¶9] Miller and Dan told Mills of the problems. Mills told Miller to call ABC for solutions to the problems. Miller called ABC twenty-one times in less than a month's time, and informed it of the support column problems, incorrect rod bracing length, that mainframes were twisted, and of incorrect welding on the girts, along with other problems. ABC did not resolve many of the problems. On May 12, 1998, Dan called a halt to the red-iron erection of the building and informed Mills and ABC that nothing else could be done until the problems were corrected. On May 14, 1998, Miller wrote a detailed letter to all the parties and voiced her concerns about the structural integrity of the structure. ABC agreed to send an "engineer" to examine the problems. Dave Roberts, ABC's representative, arrived at the site on Friday, May 15, 1998. Roberts made a videotape of the visit in which Dan, Roberts, Jerry Ehlebracht (the Mills supervisor of the project), and Scott Lardy (Ehlebracht's supervisor), toured the site and looked at the problems identified by Double Diamond. The videotape documented examples of the problems that Double Diamond was facing. Roberts confirmed the problems and told ABC that it needed to send a structural engineer to the site to address the problems.

[¶10] Plans were made for the structural engineer to arrive the following week. Roberts informed the representatives of Double Diamond and Mills that the building was structurally sound and would stand unless hit by a tornado. Roberts told Ehlebracht and Lardy that there was nothing that could be done that day and that he would go back to ABC to determine how to fix the problems.

[¶11] Later that day, the structure collapsed. At trial, Mills called John Dupre, a structural engineer, as an expert witness. Mills' insurance company had initially hired Dupre to determine the cause of the collapse and arrived at the site the day after the collapse. Dupre testified the initial report and claim was that a gust of wind caused the collapse. He concluded that the collapse was a result of the wind load. Dupre also opined that the structure was inherently unstable at the time of the collapse and was vulnerable to wind load. Alan Bender, a climatologist, testified that the winds at the approximate time of the collapse were 35 miles per hour based on measurements taken by equipment near the construction site. His report noted, however, that an observer reported winds of 50 miles per hour at the time of the collapse. Also offered into evidence was a video made on May 18, 1998, by John Mills, the president of Mills Construction, depicting the damage of the collapse. In the video, John is heard commenting that the structure was "at probably one of its most vulnerable moments" at the time of the collapse. John also noted the weather was unusual and the winds were strong the day of the collapse. On the videotape he asked Ehlebracht what was discussed with Roberts during his visit on May 15, 1998. Ehlebracht replied that he asked Roberts if they were running a risk of the structure collapsing and Roberts told him no, that all the diagonal braces were in and the structure looked good. John also noticed that there were quite a few purlins and diagonal bracing in the bays that fell.

[¶12] On the morning of May 18, 1998, Miller, not knowing that the structure had collapsed, called Ehlebracht to find out when the ABC structural engineer was going to return to the site. Ehlebracht informed her that the building had collapsed. Mills requested that Double Diamond brace up those portions of the structure still standing with "whatever it takes to secure the undamaged area." Ex. 3. Double Diamond complied with that request.

[¶13] On May 21, 1998, Double Diamond requested that Mills pay \$119,928 for the work that had been completed on the building prior to the collapse. Double Diamond estimated that 80 percent of the red-iron work had been completed with a total cost of \$149,910 for the red-iron work under the contract. At this same time, Double Diamond and Mills began negotiating for Double Diamond's return to the project. On June 4, 1998, Lardy informed Miller that Mills would only pay \$50,000 of the \$119,928 that had been requested.

[¶14] Mills submitted an insurance claim to its builder's risk insurer for the damages it sustained when the building collapsed. Mills' insurance policy covered losses sustained from wind, but specifically excluded losses arising from faulty workmanship. Ex. 74, Part One, Section G. In its claim, Mills represented to insurance agent Greg Martin that the cost to re-erect the building to the level of completion prior to the loss would be \$119,928 plus an additional \$6,500 for equipment move-in costs. The agent used this figure in the Statement of Loss wherein he approved \$103,230.50 for structural steel erection and an additional 15.88354 percent for profit and overhead, which would total approximately \$119,600. Mills was paid the amounts set forth in the Statement of Loss by its builder's risk insurer.

[¶15] On June 30, 1998, Double Diamond informed Mills that before it would return to the job site, Mills needed to pay the balance due on the \$119,928 invoice and that a new contract needed to be executed for the completion of the project. The parties were not successful in reaching an agreement. Mills completed the project on its own.

[¶16] On February 22, 1999, Double Diamond commenced this action against Mills and Van Tol alleging breach of contract. In its answer and counterclaim, Mills denies liability and alleges that Double Diamond was negligent in its erection of the Arena and breached the subcontract.

DISCUSSION

[¶17] A. Double Diamond's Claim

[¶18] "An action for breach of contract requires proof of an enforceable promise, its breach, and damages." *McKie v. Huntley*, 620 NW2d 599, 603 (SD 2000) (citing *Krzycki v. Genoa Nat'l Bank*, 496 NW2d 916, 923 (Neb. 1993)). Double Diamond alleges that Mills breached the subcontract by failing to begin delivery of the building components by April 6, 1998, and by failing to have the components delivered in the order in which they were to be erected. The first paragraph of the subcontract states, "[s]cheduling of the unloading may make it difficult to start the erecting right away." The court finds that the contract does not specify an order in which the components were to be delivered, and that the start date was tentative. Thus, the failure to begin delivery on April 6, 1998, or to deliver the components in a specific order, was not a breach of the contract.

[¶19] Double Diamond also alleges that Mills breached the contract by providing steel components that were not properly manufactured. The record is replete with documentation, which existed before the collapse, of problems with the steel components. The videotape of Roberts, an agent of ABC, describes in detail the problems with the steel components that ABC manufactured. Lardy, an agent of Mills, noted in his log the following problems that he observed on the site:

- pipe braces at the end frame had to be modified ... which allowed only two bolts in lieu of three.
- X-bracing pieces were too long and had to be shortened. Holes in the frames had to be made larger so as not to interfere with the anchor bolts.
- cable bracing between frames was interfering with flanges on all pipe braces.
- top flanges, on the 1st section of rafter, were welded on one side which caused the flange to not be square with the web. The clips on the rafter tipped because of this and made the connection of the purlins

impossible. Without the purlins or pipe braces on, they could not install the cable x-bracing.

- some girt clips were welded on upside down, clips did not line up vertically on the rafter.
- some purlin clips did not line up across from frame to frame
- some gussets were missing from the columns.
- the worst frames were the three north frames.

The sheer number of problems made it impossible for Double Diamond to perform under the contract. It was Mills' duty to provide components that were fit for the purpose of the contract. By failing to provide the appropriate materials, Mills breached the contract.

[¶20] B. Mills' Claim

[¶21] Mills alleges that the collapse of the structure was due to Double Diamond's negligence in erecting the steel, in its failure to provide additional temporary bracing, and in its failure to attach more purlins and bracing. Negligence is the failure to use ordinary care. Ordinary care is what a reasonable person would do under the same or similar circumstances. *See Lovell v. Oahe Elec. Co-op.*, 382 NW2d 396, 398 (SD 1986). Dan testified at trial that he installed some extra bracing because he felt that the factory-provided bracing was insufficient. When they left at night, Dan tied down the last bay that had been worked on to the equipment and anchor bolts. Mills argues that the erection manual calls for temporary bracing or wind bracing. The court finds that the erection bracing as described in the ABC manual was not possible because of the large number of defective manufacturing problems that existed, which caused further problems with the installation of the purlins.

[¶22] During the construction process, Mills supervisors did not suggest that Double Diamond should utilize additional temporary bracing. Mills argues that Double Diamond was the expert and it was relying on Double Diamond's expertise. Mills, however, had been in the business of construction and erection of steel buildings for numerous years and bore the ultimate responsibility for the project. Mills should have known if there was a need for additional bracing. Moreover, Roberts, the "engineer" from ABC, did not recommend additional temporary bracing after he personally observed the structure. The court, therefore, finds that a reasonable person would not have placed additional temporary bracing to stabilize the structure.

[¶23] Mills also alleges that Double Diamond used the wrong size of purlins when it initially erected the structure. No witnesses testified that they saw the wrong size purlins installed prior to the collapse. After the collapse, Mills requested that Double Diamond do whatever it could to brace the portion of the structure that remained standing. Dan testified that the proper size purlins were used prior to the collapse and the wrong size purlins were installed subsequent to the collapse as additional bracing. Mills points out that there were purlins of the proper size still on the site. The proper purlins, however, were not accessible until after the collapse when the wreckage was removed, which was after Double Diamond had left the job. The court finds that the collapse was not a result of a deviation from the erection plans, and therefore, the collapse was not a result of negligence on Double Diamond's part.

[¶24] Mills also alleges that Double Diamond breached the contract by providing poor workmanship. Prior to the collapse, Mills did not allege that Double Diamond provided poor workmanship. After the collapse, when Ehlebracht was interviewed by the Brookings County Register, Ehlebracht said, "there's no blame on the erectors." Even though faulty workmanship was excluded from Mills' builder's risk insurance policy, Mills submitted a claim for damages after the collapse. After Mills was sued by Double Diamond, Mills alleged faulty workmanship by Double Diamond. Because its recent allegations conflict with prior statements made by representatives of Mills, the court does not find the allegations credible.

[¶25] Mills, by failing to provide Double Diamond with the proper materials, and then failing to provide the fixes for the resulting problems, prevented Double Diamond from performing the contract. "As a general rule, a party cannot maintain an action on a contract without prior substantial compliance on his part." *Mills v. Denny Wiekhorst Excavating, Inc.*, 293 NW2d 112, 113 (Neb. 1980). Mills did not substantially comply with its obligations under the

contract and therefore, may not maintain an action against Double Diamond for breach of contract. Even if Mills could maintain the action, the court finds that Double Diamond's performance under the contract was not substandard. As stated previously, several people employed by Mills and by ABC, who were experienced in the erection of such structures, did not find any fault with the workmanship prior to the collapse. Allegations of poor workmanship only arose after there was a potential for financial loss by Mills. There is no credible evidence that Double Diamond breached the contract.

[¶26] C. Damages

[¶27] Double Diamond seeks an award of damages which includes progress payments due under the original fixed-price contract, expenses incurred in performing work resulting from the inferior nature of the materials Mills supplied, and compensation for consequential damages resulting from the downtime Double Diamond experienced after the building collapsed. Double Diamond is entitled to damages for Mills' breach of contract. "In an action for breach of contract, the plaintiff is entitled to recover all his detriment proximately caused by the breach, not exceeding the amount he would have gained by full performance." *Ducheneaux v. Miller*, 488 NW2d 902, 915 (SD 1992) (quoting *Regan v. Moyle Petroleum Co.*, 344 NW2d 695, 696 (SD 1984)). "To recover damages for breach of contract, the loss must be clearly ascertainable in both its nature and origin." *McKie*, 620 NW2d at 603 (citing SDCL 21-2-1). Double Diamond must prove that a reasonable relationship exists between the method used to calculate damages and the amount claimed. *Id.*

[¶28] 1. Progress Payments

[¶29] Double Diamond claims that the total value of the work that had been completed on the site prior to the collapse was \$119,928. Double Diamond submitted an invoice to Mills in this amount on May 21, 1998. The invoice reflected that 80 percent of the red-iron phase had been completed. Mills then submitted a loss claim to its insurance agent in which Mills stated that it would cost \$119,928 "to erect the building back to its original state just before the collapse." Ex. 75. The insurance company paid Mills approximately \$119,600 for its re-erection costs. At the time that Mills submitted its loss claim to its builder's risk insurer, Mills did not dispute that Double Diamond was 80 percent complete with the red-iron phase and that the total amount allocated to the red-iron phase under the contract was \$149,910. In fact, Mills made these same representations to its insurance carrier. The court finds that Double Diamond has proven by a preponderance of the evidence that 80 percent of the red-iron work under the contract had been completed for a total amount of \$119,928. Mills is entitled to a credit of \$70,000 for the amount previously paid to Double Diamond. Thus, Double Diamond's damages for progress payments due under the original fixed-price contract is \$49,928.

[¶30] Double Diamond also requests that it be awarded the entire amount that Mills requested from the insurance company, which would include \$7,129.56 for safety lines, \$6,262.08 for general conditions supervision, and \$2,733.33 for excise tax. These sums should have been included in the negotiated subcontract between Double Diamond and Mills. Under the subcontract, Double Diamond was not entitled to additional payments for expenses or taxes. Furthermore, these sums were for services or materials that were determined to be needed in the re-erection of the structure. Double Diamond has not shown that these amounts were losses caused by the breach. The court, therefore, will not award these amounts.

[¶31] 2. Expenses Resulting From Delays and Inferior Materials

[¶32] Double Diamond also seeks compensation for the extra labor expense and costs that it incurred trying to construct the Arena with inferior materials. To determine the amount of this loss, Double Diamond advocates the use of the "total cost" method because of the difficulty in assigning a precise monetary loss.

[¶33] The South Dakota Supreme Court recognized that the "total cost" method is applicable when: "(1) the nature of the losses makes it impossible or exceedingly impractical to calculate them with reasonable accuracy; (2) the bid or estimate was realistic; (3) the actual costs were reasonable; and (4) the contractor was not responsible for the added expenses." *McKie*, 620 NW2d at 605. A modified total cost approach allows for problems ascribed to the contractor to be deducted from the total costs. *Id.* The court found the total cost method to be an appropriate method of determining damages in a construction contract dispute with allegations of delay and nonperformance. *Id.*

[¶34] While the nature of this construction contract dispute may have justified the use of a total cost method to determine damages, the court finds that Double Diamond did not introduce adequate evidence for the court to determine the extra costs attributable to the changed condition created by Mills. "Under the total cost method, as usually defined, the amount attributable to the changed conditions is the total cost expended, adjusted for any amounts attributable to the contractor (modified total cost), less the original contract price, adjusted for bid errors (modified total cost)." Bernhard A. Aaen, *The Total Cost Method of Calculating Damages in Construction Cases*, 22 Pac. L.J. 1185, 1192 (1991). To determine total damages, this amount is then added to the original contract price less any amounts already paid. *Id.*

[¶35] Wilma Miller testified during the trial that Double Diamond's total damages for the work it had completed, including the extra work attributable to the delays and inferior materials, was \$149,910. She testified that the figure of \$149,910 was based on time, expenses, and equipment costs. Lien waivers to document expenses were admitted into evidence. On cross-examination, Miller admitted that she could not identify what amounts represented extra equipment or labor charges.

[¶36] It appears that the amounts set forth in the lien waivers are included in Double Diamond's detailed itemization that was provided to Mills to justify the \$119,928 invoice. Exhibit 104. Furthermore, the total labor costs identified by Mills also appear to be included in Exhibit 104. The court finds that Double Diamond did not prove by a preponderance of the evidence extra expenses resulting from delays and inferior materials.

[¶37] 3. Consequential Damages

[¶38] Double Diamond also requests \$33,795 for down-time charges from the date of the collapse through the end of the contract term. During that month, Double Diamond did not have other work scheduled because it was scheduled to work on the Arena. Because Double Diamond and Mills were negotiating the terms of Double Diamond's return to complete the erection of the Arena, Double Diamond could not take on other work. Double Diamond seeks \$9,000 for wages and payroll costs, \$3,000 for office expenses and administration, \$9,006 for insurance coverage, \$17,989 for contractor profit margin and \$2,900 for equipment costs. The court finds that these damages are proximately caused by the breach and that Double Diamond is entitled to recover \$33,795 in consequential damages. Therefore, based on the foregoing discussion, it is hereby

[¶39] ORDERED that judgment be entered in favor of the plaintiff in the amount of \$83,723.

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