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Kilgore Pavement Maintenance, LLC, a Utah limited liability company v. City of West Jordan : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KILGORE PAVEMENT
MAINTENANCE, LLC, a Utah limited
liability company,

Plaintiff/Appellant,

v.

CITY of WEST JORDAN,

Defendant/Appellee.

Case No. 20100123-CA

**REPLY BRIEF OF APPELLANT
KILGORE PAVEMENT MAINTENANCE, LLC
APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, JUDGE SANDRA PEULER
CASE NO. 090901586**

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Pursuant to Utah Rule of Appellate Procedure 24(c) and 26(a), Appellant Kilgore Pavement Maintenance, LLC (“KPM”), by and through its undersigned counsel Strong & Hanni law firm, submits this brief in reply to the *Brief of Appellee* filed by Appellee City of West Jordan (“Brief of Appellee” or “Opposition Brief”).

ARGUMENT

A motion to dismiss under Rule 12(b)(6) is appropriately granted only if it appears the plaintiff would not be entitled to relief under the facts alleged or under any state of facts the plaintiff could prove to support its claim. *Mackey v. Cannon*, 996 P.2d 1081, 1084 (Utah App. 2000). When reviewing whether a district court has properly granted a motion to dismiss under Utah R. Civ. P. 12(b)(6), the appellate court must accept *all* factual allegations in the complaint as true and consider them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff. *Canyon Meadows Home Owners Assn. v. Wasatch County*, 40 P.3d 1148, 1151 (Utah App. 2001).

Contrary to this standard, West Jordan infuses its Opposition Brief with statements of alleged fact not contained in the pleadings and not found in the record. *Brief of Appellee* at 6-7, Appendices A, B, and C. Ostensibly, this stratagem is meant to create questions of fact regarding the high price and volatility of oil from 2006 and 2008 and whether, in fact, this was generally known by KPM at the time of contracting. *Id.* at 7, 22-24. Of course, these are questions of fact not considered by the district court and, consequently, are not the subject of this Court’s review. *See* Utah R. Civ. P. 12(b) (“If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented

to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56”).

Suffice it to say, KPM entered into a contract with West Jordan to provide asphalt related services that is attached to the *Complaint* (the “Contract”). R. 2, 28-30, 34-73. KPM alleges that a subsequent 300% price escalation of liquid asphalt oil (the raw material required to perform the Contract) was materially excessive, abrupt (occurring within a period of weeks), and unforeseen, thereby causing KPM to suffer an excessive and unreasonable cost increase, and rendering KPM’s performance on the “Contract Price”¹ impracticable. R. 2-4 (*Complaint* at ¶¶ 9-11, 18-21).

Accepting these allegations as true, therefore, the issues before the Court are relatively straightforward. Under the terms of the Contract and the common law rule adopted by Utah, did KPM expressly assume the risk of a commercial impracticability brought about by the extraordinary and unforeseen escalation of the cost of liquid asphalt oil? R. 242 (*Minute Entry* ruling that “one who assumes the risk of cost increases pursuant to contract terms cannot rely on a claim of impossibility/commercial impracticability”). Or, as pleaded by KPM, was the risk of impracticability not bargained for in the Contract?² R. 4 (*Complaint* at ¶ 19).

¹ Defined in the Contract at Art. I, “Definitions.” R. 35.

² KPM divides this question into two specific issues for appeal: (1) Did the district court err in determining that KPM assumed the risk of an unforeseen and extraordinary increase in the cost of liquid asphalt oil pursuant to the parties’ contract? (2) Did the district court err in dismissing KPM’s first cause of action because of its determination that “a party who assumes the risk of cost increases pursuant to contract terms cannot rely on a claim of impossibility/commercial impracticability? *Docketing Statement* at 2-4.

Setting aside the above purported questions of fact, West Jordan responds to this query with two principal arguments. First, West Jordan asserts that under the terms of the Contract KPM “agreed to accept the Contract Price as full payment for its performance” and “expressly assumed the risk of increases in costs of materials,” including the unforeseen escalation in price of liquid asphalt oil. *Brief of Appellee* at 8-9, 19-22. And second, West Jordan argues that KPM cannot invoke the doctrine of impracticability as a “sword” to rewrite the terms of a “fixed-price” Contract.³ *Brief of Appellee* at 5-6, 12-14.

With respect to the former argument, the terms of the Contract and the common law rule of impracticability adopted by Utah do not foreclose KPM’s claim. Although a party may “agree to perform in spite of impracticability,” in the absence of express language, the potential foreseeability of a particular event does not necessarily imply the assumption of this “greater obligation.” *See Restatement (Second) of Contracts* § 261 (1981) cmt. c. In this case, West Jordan argues, and the district court apparently concurred, that KPM contractually assumed *all* risks associated with the costs of materials, including those risks that would normally excuse KPM’s performance under the doctrine of impracticability; regardless of any unforeseen increase in cost, no matter how abrupt, and no matter how extraordinary or excessive. *See* R. 242-43 (*Minute Entry*). However, the “four corners” of the Contract do not contain an absolute ceiling on

The former presents a question of contract interpretation; the latter, a question regarding application of the rule of impracticability. *Id.*

³ In its previously denied motion for summary disposition, West Jordan phrased this argument as KPM attempting to “rewrite” the terms of the Contract. *Memorandum in Support of Motion for Summary Disposition* at 6-7.

the “Contract Price” or “Cost of Work” to West Jordan (R. 35)—as distinguished from the “Work” (R. 37)—nor does the Contract include any other written provision which conclusively evinces the parties’ intent to allocate the risk of impracticability solely to KPM. Before the district court dismissed KPM’s claim, it should have considered facts relating to the relative increase in cost to KPM and the attending circumstances of the parties (for example, the bargaining power of the City and the inability of KPM to negotiate an asphalt price escalation clause)⁴ and determined whether the impracticability was actually foreseen *and* exclusively assumed by KPM. *Western Prop. v. Southern Utah Aviation, Inc.*, 776 P.2d 656, 659 n. 5 (Utah App. 1989) (noting that the “critical fact” is “whether the parties *actually did* foresee [the event] and provide accordingly in their contract” (emphasis in original text)); *see Raytheon Co. v. Sec. of the Army*, 305 F.3d 1354, 1367 (Fed. Cir. 2002) (“Whether performance of a particular contract would be commercially senseless is a question of fact.”).

Regarding West Jordan’s latter argument, KPM is not requesting the Court “rewrite” a fixed-price contract, nor is it seeking an untenable form of relief. *Brief of Appellee* at 5-6, 12. In addition to “Work covered by [a City-approved] Change Order,” Section 11.1(c) of the Contract provides a specific formula for determining “[t]he value

⁴ West Jordan argues that the inability to negotiate a price escalation clause in the Contract necessarily implies that KPM knew of and assumed the risk of impracticability. *Brief of Appellee* at 9 and 21. This is a fact question determined by the circumstances of the parties and should not be inferred against KPM on a 12(b)(6) motion to dismiss. *See Restatement (Second) of Contracts* § 261, cmt. c (stating that “[c]ircumstances relevant in deciding whether a party has assumed a greater obligation include his ability to have inserted a provision in the contract expressly shifting the risk of impracticability to the other party”).

of . . . any claim for an increase or decrease in the Contract Price” that would include KPM’s claim. R. 51. The rule of impracticability in conjunction with this term provides KPM an appropriate cause of action to adjust the Contract Price and compensate for the extraordinary and unforeseen change of circumstances imposed on KPM.

KPM respectfully requests the Court reject each of West Jordan’s arguments and reinstate its impracticability claim in the district court.

I. The terms of the Contract do not foreclose KPM’s impracticability claim.

As discussed in KPM’s principal brief, the primary factor for a determination of impracticability is actual foreseeability. *Western Prop.*, 776 P.2d at 659 n. 5. Because the rule is also based on the principle of assent, “the critical fact is not whether the event *could* have been foreseen, but rather, whether the parties *actually did* foresee it and provide accordingly in their contract.” *Id.* (emphasis in original text); *see also Corbin on Contracts* § 74.15 (stating that unless an assumption of risk is “explicitly allocated to a party,” whether such an allocation was contemplated more often requires “looking at the entire contract and other circumstances affecting the agreement”).

In this case, West Jordan argues the district court properly determined that commercial impracticability, caused by an abrupt 300% increase in the cost of liquid asphalt oil, well beyond the normal range, was—notwithstanding the pleadings—foreseen by the parties and exclusively assumed by KPM under the Contract. *Brief of Appellee* at 11, 19-22; R. 242 (*Minute Entry*). West Jordan’s Opposition Brief argues that Sections 6.2(d), 9.9(c), and 11.1(a) of the Contract each memorializes this supposed agreement of KPM to perform in spite of impracticability. *Id.* at 9, 21 (arguing that these

particular Sections show KPM “expressly assumed the risk of increases in the cost of materials”). However, only Section 11.1(a) speaks of cost and the “Contract Price.” R. 51. The “responsibilities” assumed by KPM for the “Work” under Sections 6.2(d) and 9.9(c) relate to indemnification of the City under Section 6.11, KPM’s means and methods of construction under Section 9(c) and (d), warranty under Section 13.1, and the like. R. 44, 46-47, 50, and 56. Significantly, the “Work” of KPM referenced in Sections 6.2(d) and 9.9(c), and relied upon by West Jordan to argue assumption of risk, is distinguished from the “Cost of Work” defined in Article I. R. 35 and 37.

Regarding Contract Price, Section 11.1(a) states that “[t]he Contract Price constitutes the total compensation (subject to City-authorized adjustments [under Section 11.1(b)])” payable to KPM and that “[a]ll duties, responsibilities, and obligations assigned to or undertaken by [KPM] shall be at its expense without change in the Contract Price.” R. 51. But, importantly, Section 11.1(c) of the Contract also provides a formula for changing the Contract Price *outside* of City-approved Change Orders. *Id.* (stating that “[t]he value of any Work covered by a Change Order or Work Directive Change *or of any claim for an increase or decrease in the Contract Price* shall be determined in one of the following ways . . .”) (emphasis added)). Of course, if only City-authorized Change Orders could increase the Contract Price, there would be no need for the additional language of Section 11.1(c) for any other “claim.”⁵ *See Jones v. ERA*

⁵ West Jordan argues that KPM misunderstands Section 11.1(c), which it asserts “merely describes how a City-authorized adjustment is to be valued.” *Brief of Appellee* at 22. This only begs the question posited by KPM. If “[t]he Contract Price may only be changed by a City-approved *Change Order*,” as defined in Section 11.1(b) (R. 51

Brokers Consol., 6 P.3d 1129, 1131 (Utah 2000) (stating that contract provisions should be interpreted by a court “in relation to all of the others, with a view toward giving effect to all and ignoring none.

Under the common law rule of commercial impracticability, as adopted by Utah, KPM has such a claim to increase the Contract Price according to Section 11.1(c) because the Contract does not explicitly allocate to KPM the risk of an unexpected 300% rise in cost of liquid asphalt oil. The district court erroneously concluded that KPM contracted for this risk without considering the degree of difficulty to KPM and whether the unforeseen increase was “well beyond the normal range” of contract expectation. *See Restatement (Second) of Contracts* § 261, cmt. c and d; *see also Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53, 73 (W.D. Pa. 1980) (holding that “[t]he increase in cost of performance [was] sever enough” in relation to the contract price, specifically, a 574.2% increase in costs, to warrant relief under the doctrine of impracticability). In deciding West Jordan’s Rule 12(b)(6) motion to dismiss, the district court should have considered these fact questions in favor of KPM and not ruled that an assumption of risk of normal cost increases necessarily forecloses *any* claim of impracticability. R. 242-43 (*Minute Entry*).

(emphasis added)), then an adjustment to the Contract Price “for any claim” other than a Change Order becomes meaningless.

II. KPM does not improperly invoke the doctrine of impracticability as a “sword” to “rewrite” the Contract.

Contrary to West Jordan’s averment, KPM’s affirmative claim is not contrary to the common law doctrine of impracticability and does not seek to “rewrite” the Contract. *Brief of Appellee* at 13-14, 18-19.

First, West Jordan cites no authority proscribing the use of impracticability as an affirmative claim for damages. Although commonly asserted as a justification for lack of performance, “[l]ike the common law in general, the impossibility doctrine is sufficiently flexible and adaptive to achieve just results dependent on the factual circumstances presented to the court.” *Corbin on Contracts* § 74.15. Impracticability is not prescribed solely as a defense. Significantly, West Jordan does *not* argue against the general proposition that impracticability can be “treated as a type of constructive change to the contract,” thus entitling a contractor to equitable adjustment. *Raytheon*, 305 F.3d at 1367. And it does *not* argue that lack of a specific clause in a given agreement precludes equitable adjustment. *See M.J. Paquet, Inc. v. N.J. Dept. of Transp.*, 794 A.2d 141, 149-50 (N.J. 2002). In this case, the impracticability caused by the rise in cost of liquid asphalt should be treated as a type of constructive change—i.e. modification—of the Contract, thus allowing for an adjustment of the Contract Price consistent with Section 11.1(c).⁶

⁶ West Jordan misunderstands the purpose for KPM citing these two cases. *Brief of Appellee* at 14-16. The issue is not whether the City modified the Contract, but whether the doctrine of impracticability, as articulated by *Raytheon*, *supra*, would allow for the drastic rise in cost to KPM to be treated as a constructive change. If so, then KPM would be entitled to an “equitable adjustment” of the Contract Price, notwithstanding the

Second, as discussed above, Section 11.1(c) provides a formula for increases in the Contract Price according to Sections 11.2 and 11.4. R. 52-55. These provisions provide for “the value of Work” to be determined by the “Cost of Work,” specifically, “the sum of all costs necessarily incurred and paid by the Contractor [KPM] for labor, materials, and equipment, plus Contractor’s overhead, and profit in the proper performance of the work.” R. 51 (Sections 11.1(c) and 11.2(a)). Sections 11.2(c) and 11.4 further include terms that define these amounts. R. 52, 54-55. The formula to determine the increase in Contract Price for KPM’s commercial impracticability claim is set by the Contract and there is no need to rewrite its terms. KPM’s claim merely compels West Jordan to compensate KPM according to the change it requested and which the City should have approved. R. 3 (*Complaint* at ¶¶ 12-15).

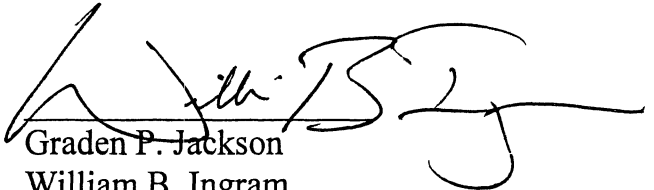
CONCLUSION

For these reasons, and those set forth in its principal brief, KPM respectfully requests the Court reject West Jordan’s arguments and reinstate its impracticability claim in the district court.

absence of a price escalation or similar clause, because the language of Section 11.1(c) plausibly permits the same. *Cf. M.J. Paquet*, 794 A.2d at 153-54 (finding the relevant contract provision ambiguous, plausibly allowing for the adjustment, and identifying other independent equitable grounds to justify the claim).

DATED this 5th day of November, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of November, 2010, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was served by the method indicated below, to the following:

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