

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

AMERICAN ENVIRONMENTAL)
PROTECTION, INC.,)

Plaintiff/Appellant)

VS.)

BOARD OF EDUCATION OF THE)
MEMPHIS CITY SCHOOLS, and)
ENVIRONMENTAL PROTECTION)
SYSTEMS, INC.,)

Defendants/Appellees.)

Shelby Chancery No. 101154-1 R.D.

Appeal No. 02A01-9509-CH-00202

FILED

October 10, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE NEAL SMALL, CHANCELLOR

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AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

HOLLY KIRBY LILLARD, J.

American Environmental Protection, Inc. ("AEP") appeals from the trial court's

judgment holding that it was not entitled to recover the costs of removing asbestos-containing materials that were in excess of the amounts specified in the original bid documents. AEP has raised two issues for our consideration, which are: (1) whether the evidence preponderates against the trial court's finding that AEP received adequate compensation for its services, and (2) whether the evidence preponderates against the trial court's finding that AEP was barred from recovery due to its negligence and/or assumption of the risk. We find that the evidence does not preponderate against these findings; therefore, we affirm the decision of the court below.

In January 1991, the Board of Education of the Memphis City Schools ("the board") invited qualified contractors to submit bids for the removal of asbestos-containing materials from Hamilton Elementary School. The board hired Environmental Protection Systems, Inc. ("EPS"), an engineering firm, to prepare the project bid documents for distribution to prospective bidders. The bid documents included a project manual, which stated that the quantity of materials to be removed was 3,000 square feet of surfacing material in the cafeteria, and 1,500 square feet of surfacing material in the indoor recreation area. In addition to the stated quantities, the project manual contained a scaled drawing of the areas from which the asbestos-containing materials were to be removed.

Prior to AEP's submission of its bid on the project, Terry Reeves, president of AEP, discovered that the quantity of materials stated in the bid documents was substantially less than the quantity of materials indicated in the scaled drawing. When Reeves discovered this discrepancy, he allegedly told another AEP employee to call Ward Lindsay, asbestos program manager for EPS. Following the alleged conversation with Lindsay, the content of which was inadmissible hearsay, AEP submitted its bid based on the quantity stated in the contract, 4,500 square feet. Lindsay denies that he had a discussion with anyone from AEP prior to the submission of bids.

AEP was the successful bidder on the project for \$96,000.00. This bid was based on the stated quantity of 4,500 square feet. After AEP arrived at the site, it discovered that

the material to be removed was more than twice the amount stated in the project manual. In fact, the actual quantities to be removed corresponded to the quantities indicated in the scaled drawing.

AEP submitted a change order to Lindsay in which AEP requested an additional \$43,000.00 for the removal of all of the material. Lindsay allegedly told Reeves that the change order would be approved by the board. However, the board refused to pay AEP the additional \$43,000.00. Although AEP knew that it would not be paid for its work in removing the additional material, AEP nevertheless continued to work on the project in order to avoid being cited for breach of contract. AEP removed all of the asbestos-containing materials from the subject areas, thereby incurring a loss of \$52,535.00.

AEP brought this action, alleging that the board was liable for breach of contract for failing to approve the change order. Alternatively, AEP alleged that it was entitled to recover the reasonable value of its services under quantum meruit. AEP's cause of action against EPS was based on intentional and/or negligent misrepresentation. AEP alleged that it reasonably relied on EPS' erroneous statement of the quantity of materials to be removed in preparing and submitting its bid.

The trial court held that although EPS erroneously stated the quantity of materials in the bid documents, AEP knew about the mistake prior to the time that it commenced work. Furthermore, the trial court held, AEP's bid was within the range of reasonableness for the project because another bidder submitted a bid for the actual amount of square footage that was only slightly more than that of AEP's bid. Finally, the trial court held that the board was not liable for breach of contract because the board never agreed to the proposed change orders.

The trial court's findings in this case are reviewed by this court *de novo*, accompanied by a presumption of correctness, unless the evidence preponderates otherwise. T.R.A.P. 13(d).

We will first address AEP's breach of contract and quantum meruit claims against the board. AEP argues that the board breached its contract with AEP by failing to approve a change order for the additional work. In support of its position, AEP relies on industry custom. However, AEP has cited no legal authority for its position, nor has it directed us to any provision of the contract that obligates the board to approve change orders for additional work. In addition, Hank Ciarloni, general manager of an asbestos removal company, testified that this was not the type of situation in which a change order would have been appropriate because the additional square footage was not an unforeseen or concealed site condition. The trial court agreed with Ciarloni and noted that any change order procedure would not bind the board to pay more than the contract price. We do not find that the evidence preponderates against the trial court's determination in this respect. Therefore, we hold that the board did not breach its contract by failing to approve the change orders.

Similarly, we reject AEP's contention that it is entitled to recovery under quantum meruit. The doctrine of quantum meruit allows a party who has provided goods or services to another to recover the reasonable value of those goods or services as long as the party seeking to recover can demonstrate that: (1) there is no existing, enforceable contract covering the same subject matter; (2) he or she provided valuable goods or services; (3) the party against whom recovery is sought received the goods or services; (4) both parties should have reasonably understood that the provider of the goods or services expected to be paid; and (5) it would be unjust for the party that received the benefit of the goods or services to retain them without paying for them. Castelli v. Lien, 910 S.W.2d 420, 427 (Tenn. App. 1995).

In the present case, Reeves conceded that the contract contemplated the removal of all asbestos materials located in the cafeteria and the indoor recreation area. Consequently, we believe that AEP has not satisfied the first requisite for a recovery in quantum meruit because there existed an enforceable contract between AEP and the board that covered the same subject matter.

In our opinion, AEP's cause of action against EPS, which is based on negligent and/or intentional misrepresentation, must also fail. In order to prove intentional or fraudulent misrepresentation, AEP must show: (1) that EPS made an intentional misrepresentation of a material fact in order to mislead or to obtain an unfair advantage over AEP; (2) that the representation was made with knowledge of its falsity and with fraudulent intent; (3) that the representation was of a material existing fact; and (4) that AEP reasonably relied on the representation to its injury. Godwin Aircraft, Inc. v. Houston, 851 S.W.2d 816, 821 (Tenn. App. 1992).

Even assuming that AEP could establish the first three of the above requirements, we find that AEP has failed to satisfy the critical element of reasonable reliance. It is undisputed that AEP discovered the discrepancy between the stated quantity and the quantity portrayed in the scaled drawing prior to submitting its bid. AEP had ample opportunity to examine and measure the site prior to submitting its bid, but declined to do so. In fact, the bid documents expressly state that the bidder is responsible for verification of the square footage. Specifically, the documents state that "plans are schematic in nature. The contractor is responsible for field verification of exact quantities." The project manual also states:

Bidders shall carefully examine site and documents to obtain first hand knowledge of existing conditions. Contractor will not be given extra payment for conditions which can be determined by examining site and documents.

Ciarloni testified that his company was one of the companies that bid on the Hamilton Elementary school job. Ciarloni stated that he relied on the scaled drawing, rather than the stated quantities, in calculating his bid on the project. Ciarloni also went to the site and measured all of the areas from which the materials were to be removed.

From the foregoing evidence, we cannot say that AEP's reliance on the stated quantities in the bid documents was reasonable or justifiable. Because an action for negligent misrepresentation also requires a showing of justifiable reliance, we must deny AEP recovery on this basis as well. Atkins v. Kirkpatrick, 823 S.W.2d 547, 552 (Tenn. App.

1991).

Accordingly, the judgment of the trial court is affirmed. Costs on appeal are adjudged against AEP.

HIGHERS, J.

CONCUR:

CRAWFORD, P.J., W.S.

LILLARD, J.