2018 IL App (1st) 171110-U

No. 1-17-1110

Order filed June 1, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ADVANCE IRON WORKS, INC.,	)	
	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	No. 13 CH 21554
SCHAEFGES BROTHERS, INC., and CONTINENTAL	)	
CASUALTY COMPANY,	)	Honorable
	)	Brigid Mary McGrath,
Defendants,	)	Judge, presiding.
	)	
(Schaefges Brothers, Inc., Defendant-Appellee).	)	

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *HELD*: The order granting plaintiff's application pursuant to Illinois Supreme Court Rule 308 (eff. July. 1, 2017) for interlocutory appeal is vacated, and the appeal is dismissed because this court improvidently granted the petition where the certified question presented involves factual issues inappropriate for consideration under Rule 308.

¶ 2 This interlocutory appeal appears before us pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017). Plaintiff, Advance Iron Works, Inc., filed the underlying breach of contract action against defendant, Schaefges Brothers, Inc., in relation to the parties' construction contract. Plaintiff seeks an answer to a question certified by the circuit court. Based on the following, we vacate our order granting the application for leave to appeal, deny the application, and dismiss the appeal.

¶ 3 FACTS

¶ 4 Plaintiff was a steel/iron fabricator that submitted a bid to defendant, the general contractor, for a Chicago Park District (Park District) boathouse project. The bid was accepted in April 2012. On July 11, 2012, the parties entered into a written construction contract. The effective date of the contract was May 25, 2012. Prior to signing the contract, Robert Sutphen, the vice president of plaintiff company, made a number of changes to the agreement. In relevant part, "Condition 2" provided:

> "It is understood by GC [defendant] that Subcontractor [plaintiff] and its subcontractors/vendors are allocating and committing significant production resources and costs and schedule thereof for this Agreement which can not [*sic*] be interfered with or be terminated and then be filled by other projects in a schedule timely manner, and such would cause financial damages and losses. In the event that Subcontractor[']s scope of work is altered or deleted, subcontractor and its vendors will be compensated for all labor, material, detail time expended as well as overhead and profit."

"General Condition 20" additionally stated:

> "[Plaintiff] will perform changes and additions in scope of work only upon prior written authorization from GC to perform such work (when possible), including compensation for same. Additional/extra work will be invoiced when the work is performed. All extra work is subject to a mark up of 10% for overhead and 10% for profit by [plaintiff]. [Plaintiff] shop, straight time, fabrication, labor rate for all work is $68.00 per man-hour. Full payment for additional/extra work is due within thirty (30) days after [plaintiff's] invoice."

¶ 5 The original contract amount was for $554,000; however, defendant subsequently announced significant design changes requiring plaintiff to submit four requests for change orders. According to plaintiff, the design changes increased the costs an additional $460,916. Defendant did not approve plaintiff's change orders. Instead, the Park District suggested the design changes could be completed for an additional $301,000. The parties failed to successfully negotiate a price for the design changes; therefore, the change orders were never signed. Notwithstanding, plaintiff designed, fabricated, and delivered portions of its scope of work that had been approved by defendant. Plaintiff sent defendant a total of five invoices requesting payment for its completed work and for prepayment of materials for subsequent work.

¶ 6 On September 5, 2012, plaintiff informed defendant via email that it was placing a "hold" on performing any additional work due to nonpayment of the outstanding invoices. In response, in a letter dated September 27, 2012, defendant terminated the parties' contract, stating that plaintiff failed to comply with the terms and obligations of the contract and, therefore, was in material breach thereof. The letter advised plaintiff that defendant agreed to pay plaintiff's

"actual out of pocket costs for material purchased and time expended as of September 21, 2012, along with associated overhead and profit for this work."

¶ 7 On September 19, 2013, plaintiff filed a complaint against defendant, alleging defendant breached the parties' contract by failing to pay for the work plaintiff performed under the contract, by interfering with plaintiff's ability to perform the remainder of the contract, and by terminating the contract without proper cause. Plaintiff alleged it substantially performed under the parties' contract. Plaintiff further alleged it suffered damages in the amount of $234,161, which included $63,006 for work performed prior to the termination of the contract, late payment charges of 2 percent per month, and $171,155 for lost profits due to lost work production. Plaintiff alternatively raised a claim for unjust enrichment against defendant where plaintiff performed work valued at $63,006 without defendant providing compensation for that benefit.

¶ 8 Defendant responded by filing a motion for summary judgment, alleging plaintiff failed to perform under the parties' contract and failed to establish non-speculative damages. On August 4, 2016, the circuit court denied defendant's motion for summary judgment; however, the court construed the parties' contract to limit plaintiff's recovery to lost profits only for work actually completed. In so doing, the court stated:

> "Regarding [defendant's] motion for summary judgment, the Court finds there's a genuine issue of material fact whether [plaintiff] breached the contract and, if so, the timing of the breach.
>
> However, the Court is making a summary determination that pursuant to Condition 2 of the contract at issue, [plaintiff] is entitled to overhead and profit only as to

work performed on the contract, not overhead and profit to which it would have been entitled had the contract not been terminated early.

In arriving at this conclusion, the Court is construing the contract as a whole and construing it at—basically construction is a natural and reasonable one. ***.

***. And the Court is construing the contract reasonably to avoid absurd results. ***.

The Court finds that the plaintiff's interpretation of [Condition] 2 is an unreasonable one ***.

Furthermore, at least one of the bases for calculations of lost profits pursuant to [plaintiff's] interpretation is speculative. And that is in measurement relying upon payment figures to a different subcontract agreement all together [*sic*] for the replacement subcontractors. Because by that point, the scope of work had changed dramatically.

And the plaintiff's interpretation, the Court believes, is also at odds with Illinois Common Law."

¶ 9 Plaintiff responded by filing a motion to reconsider that portion of the circuit court's August 4, 2016, finding which limited its lost profits claim to lost profits for work actually performed instead of for its full contractual expectation damages. On December 20, 2016, the circuit court denied plaintiff's motion for partial reconsideration. The court reasoned:

"You know, Counsel, I'm looking at the law again. I'm looking at the contracts again. I still think I was correct in my interpretation of Condition Number 2 of the subcontract. And interpreting *** that provision pursuant to traditional contract

interpretations, even looking at the contract as a whole, I don't think that it covers overhead profit for work that wasn't performed.

*** [I]n the event that subcontractor[']s scope of work is altered or deleted, subcontractor and its vendors will be compensated for all labor, material, detail, time expended, as well as all overhead and profit. I think my interpretation is supported.

If I look at the A1A [*sic*] contract[1]—which is not the contract at issue, of course, here—but *** [u]nder section 14.4, *** it *** recognizes the right of the owner to terminate for the owner's convenience and without cause.

However, in these situations the contractors entitled to receive payment for work executed and costs incurred by reason of such termination along with the reasonable overhead and profit of work not executed.

***

In interpreting this provision in [C]ondition [2] it does not include overhead and profit for work that wasn't performed. And nor do I believe there's a genuine issue of material fact that profits were reasonably within the contemplation of the parties at the time the contract was entered.

So, you know, looking at it all again *** I just don't think it covers all the profit and overhead for the entirety of the contract, especially here where the contract was terminated weeks into it. So I stand by my original ruling."

¶ 10 Plaintiff then filed a motion requesting that the circuit court certify the following question for our review pursuant to Rule 308:

[1] The court is referring to an industry form contract.

> "Whether, in a breach of contract case, the trial court erred in construing contract language to exclude common law expectation damages such as lost profits, and in limiting recovery of lost [profits] to profits on work actually performed, when the contract provides, in part, that '[i]n the event that Subcontractors (*sic*) scope of work is altered or deleted, subcontractor and its vendors will be compensated for all labor, material, detail time expended as well as all overhead and profit?' "

The motion was granted. Plaintiff subsequently filed a timely application for leave to appeal the question, and we granted that application on July 13, 2017.

¶ 11 ANALYSIS

¶ 12 Rule 308 allows a circuit court, upon a finding that an order involves a question of law as to which there is substantial ground for a difference of opinion, to make an otherwise interlocutory order immediately appealable if an appeal may materially advance the ultimate termination of the litigation. Ill. S. Ct. R. 308(a) (eff. July 1, 2017). Appeals under Rule 308 should be limited to certain "exceptional" circumstances where the rule is strictly construed and sparingly exercised. *Morrissey v. City of Chicago*, 334 Ill. App. 3d 251, 258 (2002). A certified question is, by nature, a question of law that we review *de novo*. *Simmons v. Homatas*, 236 Ill. 2d 459, 467 (2010).

¶ 13 The certified question here was framed as a question of law involving the application of the familiar principles of contract interpretation. The primary objective of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to the unambiguous terms. *McRaith v. BDO Seidman, LLP*, 391 Ill. App. 3d 565, 577 (2009). However, after reviewing the briefs and the record in this case,

conducting our independent research, and considering the parties' oral arguments, we do not believe the interlocutory order considers a question of law as to which there is a substantial ground for difference of opinion or that an immediate appeal from the circuit court's order may materially advance the ultimate termination of the litigation.

¶ 14 Plaintiff contends that the certified question should be answered in the affirmative where it substantially performed under the contract and defendant prevented it from completing the entirety of the contract. Plaintiff likens the situation to an anticipatory repudiation where expectancy damages are available.

¶ 15 Defendant, in contrast, argues the certified question should be answered in the negative where plaintiff failed to substantially perform under the parties' contract and was entitled to damages only for work actually performed.

¶ 16 The resolution of the parties' arguments and the certified question involve a fact-intensive inquiry. The basis of the circuit court's denial of summary judgment was the existence of material questions of fact, namely, whether plaintiff breached the contract and, if so, when the breach took place. Moreover, plaintiff highlights a number of potentially inconsistent, fact-based statements made by the circuit court in the record. For example, in denying defendant's motion for summary judgment, the circuit court stated, "*** the facts before me, under the timing of all of this—you know, it's a month after [plaintiff] entered into the contact and on the facts of this case, *** there was nothing done." However, plaintiff argues that the certified question presumes the circuit court found it did not breach the contract because the question includes the propriety of damages for lost profits. Whether plaintiff breached the parties' contract, when that breach may have occurred, whether plaintiff substantially performed under the contract, and whether

defendant anticipatorily repudiated the parties' contract are all fact-based issues that must be addressed before the matter of damages can be decided. Therefore, "[a]ny answer we could give to the certified question would be equivocal, as well as 'advisory and provisional.' " *Morrissey*, 334 Ill. App. 3d at 258 (quoting *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 469 (1998)).

¶ 17 In light of the fact-intensive inquiry necessary to resolve the ultimate question of whether plaintiff is entitled to lost profits for the work performed or for the entirety of the contract, we do not believe that our answer to the certified question would materially advance the termination of this litigation. As a result, we vacate our July 13, 2017, order allowing the interlocutory appeal, deny the application for leave to appeal, and dismiss this appeal.

¶ 18 CONCLUSION

¶ 19 We vacate the order granting plaintiff's Rule 308 application for leave to appeal and dismiss the appeal.

¶ 20 Appeal dismissed.