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FILED
Apr 21 2008, 9:33 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

TRI-COUNTY CONSERVANCY DISTRICT,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 55A01-0702-CV-77
	)	
GRADEX, INC.,	)	
	)	
Appellee.	)	

APPEAL FROM THE MORGAN CIRCUIT COURT
The Honorable Matthew G. Hanson, Judge
Cause No. 55C01-9902-CT-42

April 21, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Tri-County Conservancy District ("Tri-County") appeals the trial court's award of prejudgment interest in the amount of $200,437.65 on a judgment totaling $283,149.38 entered in favor of Gradex, Inc. We affirm.

Issues

The restated issues before us are:

I. whether the trial court properly determined that Gradex is entitled to prejudgment interest; and

II. whether the accrual of prejudgment interest should have partially stopped after Tri-County tendered $218,870.62 to the trial court clerk at an earlier stage of the litigation.

Facts

In a prior appeal in this matter, we set forth the facts as follows:

> Tri-County is a political subdivision of the State of Indiana, a conservancy district formed pursuant to Indiana Code Section 14-33-1-1 et seq. for the purpose of providing sewer services to freeholders within its boundaries. Gradex is a private corporation engaged in providing construction services for public works projects.
>
> During the spring of 1997, Tri-County advertised that it was accepting bids for the construction of sanitary and storm sewer improvements within its boundaries for a project known as Heartland Crossings, Phase I ("Heartland Project"). Tri-County prepared a bid package for the Heartland Project, including Information For Bidders, Specifications, a Bid Form, Attachments to the Bid Form, and a document entitled "Standard General Conditions of the Construction Contract." Civil Engineering Services, Inc. and Benchmark Consulting, Inc. prepared the Specifications document, significantly underestimating the lateral pipe footage required.

In pertinent part, the Information to Bidders advised contractors to provide a lump sum proposal, after independent examination of the jobsite. The proposal form also provided that increases or decreases in quantities should be computed at the unit prices bid and added to or deducted from the original contract. Neither Tri-County nor Gradex verified the quantity of pipe needed by independent inspection of the jobsite prior to bid submission.

Gradex submitted a "lump sum" bid for the Heartland Project for the amount of $1,700,726.00. Pursuant to Indiana Code Section 14-33-12-5, Tri-County could "let contracts or otherwise construct the works of improvement" only after court approval. Nevertheless, Gradex moved on-site on May 8, 1997 to commence work. On May 13, 1997, Tri-County's attorney issued a letter to Gradex, as the apparently successful bidder, which provided in pertinent part as follows:

> Please be advised that I represent Tri-County Conservancy District. At its regular board meeting, held on May 6, 1997, the Board was advised by the district engineer that Gradex, Inc. is the apparent successful bidder on Phase I of the installation of sanitary and storm sewers in Morgan County.
>
> The District has submitted detailed plans, specifications and cost estimates to the Natural Resources Commission, but has [not] yet received approval. Subsequent to receiving DNR approval, the Board must hold a public hearing as to the plans, specifications and cost estimates before it is authorized to enter into a contract for the project. After a thorough discussion, the Board believes that it is desirable and in the best interest of the District's freeholders and the over-all project that should Gradex desire to begin the initial stages of the construction project, <u>the District will reimburse Gradex for the cost of material and work performed prior to the signing of the contract at the unit prices contained in your bid</u>.

> In the event that you proceed with the project, prior to the execution of the contract by the District, you should keep the district engineer, Dale Koons, advised as to all costs and expenses incurred.

(Appellant's App. 165.) (emphasis added).

On July 17, 1997, Gradex Vice President Scott Sweeney ("Sweeney"), issued a letter to Tri-County, which read as follows:

> It appears that the granular and the #8 stone quantities on the above referenced project which were provided by the engineers per the bid documents are greatly understated, we will be sending our summary to date from our aggregate source with actual quantities.

(Appellant's App. 174.) On July 22, 1997, Sweeney issued a follow-up letter, which provided in pertinent part as follows:

> Please review the attached aggregate summary for the above referenced project. To date we have a total of 13,126 tons for granular which is below the bid quantity of 16,302 tons, so this quantity may be all right. The actual No. 8 stone quantity to date is 8,614 tons in lieu of 6,582 tons per the bid quantities.
>
> We will forward copies of all actual quantities for this project and will make adjustments at billing time.

(Appellant's App. 175.) Tri-County did not respond to the letters from Gradex. Gradex performed the work that was the subject of the bid, and also performed additional work. Tri-County made no complaint concerning Gradex's work. At the conclusion of the work, Tri-County offered to pay Gradex the balance remaining on the original bid, subject to Gradex's execution of the written contract proffered by Tri-County ("the Proffered Contract"). Gradex refused to sign the Proffered Contract, and Tri-County withheld the final

> payment. Tri-County also refused to pay for additional work not reflected in a signed Change Order, or to pay for approximately 6,300 additional lineal feet of pipe.
>
> On February 4, 1999, Gradex filed its complaint against Tri-County. Gradex's Amended Complaint, filed May 14, 2001, alleged as alternate bases for recovery breach of contract, quantum meruit and equitable estoppel. On March 7, 2002, the trial court granted partial summary judgment to Tri-County on the equitable claims.
>
> On July 8, 2003, trial commenced on Gradex's breach of contract claim. At trial, Tri-County did not dispute the facts that its engineering documents were inaccurate or that it received the benefit of additional work and materials. Rather, Tri-County contended that it should not have to pay for work or materials not reflected by a Change Order signed by a Tri-County representative. At the conclusion of the bench trial, Gradex was awarded a judgment sum comprised of the balance remaining on the lump sum bid, compensation for extra work implicitly authorized by Tri-County, and an amount alternately designated as "late charges" or "interest." Gradex was not awarded compensation for additional materials used beyond the Specifications document amount. Gradex filed a motion to correct error, which the trial court granted in part to correct scrivener error. The motion to correct error was substantially denied. On July 16, 2004, a final judgment was entered for Gradex in the amount of $218,870.62.

Gradex, Inc. v. Tri-County Conservancy Dist., No. 55A04-0408-CV-440, slip op. pp. 2-6 (Ind. Ct. App. Oct. 12, 2005).

Included within the final judgment amount was $173,944.60, which represented the original total bid price of $1,700,726.00, plus a $38,720.00 change order that Gradex submitted, less the $1,565,501.40 Tri-County had already paid Gradex. Also included in the final judgment was $21,004.78 for additional work Gradex performed beyond the original bid specifications. Finally, the trial court awarded Gradex $23,921.24 in

prejudgment interest on the $21,004.78 amount, using a rate of 1.5% per month from January 8, 1998. The trial court did not award prejudgment interest on the $173,944.60 amount. Following the entry of judgment in the amount of $218,870.62, Tri-County tendered that amount to the trial court clerk. Gradex did not attempt to collect it.

On appeal, Gradex argued the trial court erred by concluding that Gradex and Tri-County had entered into a "lump sum" contract, as opposed to a "bid price" contract, pursuant to which Gradex was not entitled to recovery for the cost of additional materials it supplied to the jobsite that exceed the specifications of the bid. Gradex also challenged the trial court's denial of prejudgment interest on the award of $173,944.60. Tri-County cross-appealed the trial court's award of prejudgment interest on the $21,004.78.

We held that the trial court erred in denying recovery to Gradex for the cost of materials it supplied to the Heartland Project that exceeded the bid specifications. Thus, we remanded "for a factual finding as the amount Gradex is due for those materials." Id. at 12.[1] As for the prejudgment interest, we held that the trial court had erred in imposing a rate of 1.5% per month on the amount of $21,004.78, as opposed to the statutory rate of 8% per year. We also held that the trial court's findings were inadequate to support the outright denial of prejudgment interest on the amount of $173,944.60. On this issue, we remanded "with instructions for the trial court to determine the appropriate amount of

[1] We also observed that neither party challenged the trial court's ruling that a contract between the parties was formed on or before May 6, 1997, or in other words when Tri-County awarded the bid for the Heartland Project to Gradex.

prejudgment interest due, at the statutory rate, upon readily ascertainable damages." Id. at 14.

On remand, the trial court did not hold another evidentiary hearing. On November 13, 2006, the trial court concluded that Gradex was entitled to prejudgment interest on the $21,004.78 award in the amount of $14,858.00, based on the statutory rate of 8% annually and a beginning date of January 8, 1998, or thirty days after Gradex had completed its work on the Heartland Project. It also concluded that Gradex was entitled to prejudgment interest on the $173,944.60 award in the amount of $123,143.75, again at the statutory rate of 8% and a beginning date of January 8, 1998. Finally, the trial court concluded that Gradex was entitled to compensation of $88,200.00 for materials in the form of sanitary sewer lateral pipes it provided in excess of the bid specifications.[2] It also awarded prejudgment interest on this award in the amount of $62,435.90, using the 8% rate and the January 8, 1998 beginning date. Thus, the total principal damages award on remand was $283,149.38 and the prejudgment interest awarded was $200,437.65. Tri-County now appeals the award of prejudgment interest.

Analysis

I. Gradex' Entitlement to Prejudgment Interest

Tri-County first contends that Gradex failed to establish that is entitled to any prejudgment interest in this matter. "An award of pre-judgment interest in a breach of

[2] The trial court denied recovery to Gradex for excess sand and stone used in conjunction with installing the additional sewer laterals, finding the cost of such materials to be included within the bid price for the laterals. Gradex has not appealed that determination.

contract action is warranted if the amount of the claim rests upon a simple calculation and the terms of the contract make such a claim ascertainable." Olcott Int'l & Co., Inc. v. Micro Data Base Sys., Inc., 793 N.E.2d 1063, 1078 (Ind. Ct. App. 2003), trans. denied. An award of prejudgment interest is appropriate if the damages are complete and may be ascertained as of a particular time. Id. A trier of fact always needs to exercise its judgment to determine whether one party is liable in damages to another party, but prejudgment interest is proper if the trier of fact does not have to exercise its judgment to ascertain the amount of damages. Indiana Indus., Inc. v. Wedge Prods., Inc., 430 N.E.2d 419, 427 (Ind. Ct. App. 1982). If the criteria for awarding prejudgment interest are met, then a trial court should award prejudgment interest and it lacks discretion not to do so. See Olcott, 793 N.E.2d at 1078-79.

We note that in the first appeal in this matter, Tri-County cross-appealed the trial court's award of prejudgment interest on the sum of $21,004.78. However, the full extent of Tri-County's argument was that the trial court erred in applying an interest rate of 1.5% per month in calculating the interest, instead of the statutory rate of 8% per year. In its appellee/cross-appellant's brief, Tri-County argued, "the trial court's judgment as to the award of 1.5% per month and the corresponding calculation must be set aside." 1st Appeal Appellee/Cross-appellant's Br., p. 41. In its reply brief, Tri-County further argued, "If the award of interest on the $21,004.78 was proper, the evidence in the record would support only the statutory interest of 8% per annum, not the 1.5% per month—or 18% per annum—late charge rate from Gradex' invoices." 1st Appeal Cross-appellant's Reply Br., p. 10. At no time did Tri-County argue that, in fact, an award of prejudgment

interest categorically was improper on the $21,004.78, although clearly it could have done so. We conclude that with respect to the $21,004.78, Tri-County has waived any argument that prejudgment interest is improper on that amount by failing to make such an argument in the first appeal. See Montgomery v. Trisler, 771 N.E.2d 1234, 1239 (Ind. Ct. App. 2002), trans. denied, cert. denied (holding argument made on second appeal is waived if the issue was ripe for review but not raised in first appeal).

As for prejudgment interest on the award of $173,944.60, that issue was presented and addressed in the first appeal as well. However, the trial court had not awarded prejudgment interest on that amount, and it was Gradex who was appealing the failure to do so. Tri-County responded to Gradex' argument by reference to the trial court's apparent findings and conclusions that equitable principles precluded the award of such interest. Thus, it did not develop an argument that prejudgment interest was improper in accordance with case law governing such awards. In light of the trial court's findings and conclusions, such omission was understandable. We conclude that Tri-County has not waived its argument in this appeal regarding the propriety of awarding prejudgment interest on the $173,944.60 and we address that argument on the merits.

The trial court arrived at the figure of $173,944.60 by making the following calculations: Tri-County owed Gradex $1,700,726.00 under the original bid, plus $38,720.00 for an approved change order, for a total of $1,739,446.00. Tri-County paid Gradex a total of $1,565,501.40 before disputes arose concerning payment, and Gradex received no further payments. $1,739,446.00 minus $1,565,501.40 equals $173,944.60. We cannot perceive how the trial court's arrival at that figure was anything other than a

pure matter of simple addition and subtraction. The trial court did not err in awarding Gradex prejudgment interest on the $173,944.60.

Finally, we address the trial court's award of prejudgment interest on the amount of $88,200 for six-inch sewer laterals Gradex installed that exceeded the amount of such laterals that the original bid had called for. The trial court arrived at the $88,200.00 figure by multiplying 6,300 times $14.00. At trial, Gradex presented evidence that it installed approximately 21,300 linear feet of such laterals, whereas the bid called for installation of approximately 15,000 linear feet, and that it had invoiced Tri-County accordingly. An engineer for Tri-County also testified he was able to determine that Gradex installed approximately 21,000 linear feet of six-inch laterals. The bid placed a unit price for six-inch laterals of $14.00 per linear foot.

It is apparent to us that there never has been any serious dispute over the amount of pipe Gradex actually installed, nor the agreed-upon unit cost for such pipe. The only dispute was whether Tri-County was required to pay Gradex for providing materials for the Heartland Project that exceeded the specifications of the bid. We concluded in the first appeal that Tri-County was so required. Having reached that conclusion, on remand it was a straightforward task for the trial court to calculate the amount of damages to which Gradex was entitled: (21,300 – 15,000) x $14.00 = $88,200.00. The trial court did exercise its judgment in concluding Tri-County was not liable for the cost of sand and stone associated with the extra pipe, but it did not have to exercise judgment in calculating the amount of such pipe and its agreed-upon cost. As such, it was appropriate to award prejudgment interest on that amount.

The present case differs considerably from a case Tri-County relies heavily upon, Portage Indiana School Constr. Corp. v. A.V. Stackhouse Co., 153 Ind. App. 366, 287 N.E.2d 564 (1972). There, we reversed an award of prejudgment interest in a construction contract case. Specifically, we observed:

> In this case we are confronted with a wide range of figures as to the amount claimed. We are concerned with the ascertainment of the cost of materials, labor, engineering, administration, equipment rental, freight bills, licenses, permits and fees which cannot be determined with certainty by resort to any source other than the detailed and specific records of Stackhouse which were not put forth as a part of any itemized bill or demand until the trial of this case. Except for unit prices, no standards of valuation can be prescribed in construction contracts such as this one since each contract varies according to its specific plans and specifications.

Stackhouse, 153 Ind. App. 374-75, 287 N.E.2d at 569-70 (emphasis added). Here, by contrast, there was a set unit price for the six-inch sewer laterals, and the amount of such laterals Gradex installed has never been disputed and was readily ascertainable by both Gradex' and Tri-County's engineers.

We also note that the fact that a plaintiff ultimately recovers an amount different than what it originally sought does not preclude an award of prejudgment interest, so long as the amount ultimately awarded was readily ascertainable and arrived at by simple calculation. See Indiana Indus., 430 N.E.2d at 427. Finally, we reject Tri-County's contention that because there was significant dispute regarding the type of contract it entered into with Gradex, and most specifically whether it was required to pay Gradex for materials it supplied in excess of the bid specifications, that an award of prejudgment interest was improper. However, questions of contract interpretation go to the initial

issue of whether a party is liable under the contract, not the amount of damages, and is not relevant to the question of prejudgment interest. See id. Clearly, many disputed contract cases involve competing contract interpretation arguments, but that fact alone does not preclude an award of prejudgment interest when interpretation of the contract is settled and the amount of damages becomes readily ascertainable. The trial court did not err in awarding prejudgment interest in the total amount of $200,437.65.

II. Effect of Tri-County's Tender to the Trial Court Clerk

Next, we address Tri-County's contention that when it tendered $218,870.62 to the trial court clerk in 2004, prejudgment interest should have stopped accumulating on that portion of the final damages award. "The award of prejudgment interest is based on the rationale that there has been a deprivation of the plaintiff's use of money or its equivalent and that unless interest is added, the plaintiff cannot be fully compensated." 4-D Bldgs., Inc. v. Palmore, 688 N.E.2d 918, 920 (Ind. Ct. App. 1997). It is true that a proper tender discharges the obligation to pay additional interest. Id. However, a proper tender generally requires full payment of a debt due. Id. A tender of less than the full payment due does not constitute a discharge of all subsequent liability for interest. Cole Assocs., Inc. v. Holsman, 181 Ind. App. 431, 435-36, 391 N.E.2d 1196, 1199 (1979).

Tri-County's tender of $218,870.62 in 2004 clearly was not a proper tender to the extent of discharging Tri-County's liability for prejudgment interest. It was not a full payment of the debt owed to Gradex, as established by our decision in the first appeal regarding Tri-County's need to pay Gradex for additional materials it provided for the

Heartland Project. Thus, the trial court properly imposed prejudgment interest on the full amount of its damages award running from January 8, 1998, until final judgment was entered on November 13, 2006.

Finally, we note that Tri-County appears to argue it should not be required to pay prejudgment interest because it is a political subdivision of the State of Indiana, and the freeholders of the district it serves ultimately will be required to bear the burden of payment. However, Tri-County cites no authority for the proposition that it is categorically exempt from having to pay prejudgment interest for any damages it might cause. Nor did it make such an argument in the first appeal, when it was challenging the award of prejudgment interest on the amount of $21,004.78. Nor, apparently, has it ever made such an argument before the trial court in all the years this case has been litigated. For all these reasons, this argument is waived in this appeal. See Supervised Estate of Williamson v. Williamson, 798 N.E.2d 238, 242 (Ind. Ct. App. 2003) (holding argument in appellate brief must be supported by cogent argument and citation to relevant authority); Montgomery, 771 N.E.2d at 1239 (holding argument ripe for review in first appeal but not made is waived in second appeal); Nance v. Miami Sand & Gravel, LLC, 825 N.E.2d 826, 834 (Ind. Ct. App. 2005), trans. denied (holding argument not presented to the trial court is waived for appellate review). Moreover, as both the trial court and this court have noted previously, this whole unfortunate situation and ten years of litigation could have been easily avoided if Tri-County had simply complied with the statutory mandate that it obtain court approval before forging ahead with the Heartland Project.

Conclusion

The trial court did not err in awarding prejudgment interest to Gradex in the amount of $200,437.65. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur in result.