IN THE SUPREME COURT OF THE STATE OF NEVADA

BRAVO FIRE SYSTEMS, INC.,

Appellant/Cross Respondent,

vs.

KALB CONSTRUCTION COMPANY, A NEVADA CORPORATION,

Respondent/Cross-Appellant.

No. 35206

FILED

SEP 07 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal and cross-appeal from a judgment after a bench trial in which the district court denied relief to both parties, concluding that they had failed to meet their respective burdens of proof. On appeal, Bravo Fire Systems, Inc. ("Bravo") contends primarily that Kalb Construction Company ("Kalb") breached the parties' subcontract agreement when Kalb terminated Bravo without providing twenty-four hour written notice. Kalb counters on cross-appeal that it properly terminated Bravo because Bravo anticipatorily repudiated the agreement by refusing to perform the work.

Resolution of these issues requires interpretation of the relevant provisions of the agreement.[1] The following principles guide our analysis. "[I]ssues of contractual construction, in the absence of ambiguity or other factual complexities, present questions of law."[2] In construing a

[1]Kalb asserts that the only agreement in question is a verbal agreement because Bravo failed to allege breach of the written agreement in its complaint. But the record clearly demonstrates that the parties' arguments below centered on the written agreement. Thus, NRCP 15(b) resolves Kalb's concern on this point: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

[2]Ellison v. California State Auto Ass'n, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990).

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-- reading that phrase in context -- we conclude that this phrase simply preserves Kalb's rights and remedies in addition to its right of taking over the project, but it does not relieve Kalb of its obligation to comply with the notice/cure provision.

Kalb's primary argument on cross-appeal is that Bravo repudiated the agreement by an "absolute refusal to man the job." Based on this, Kalb asserts that it was not bound to give twenty-four hour notice and that the district court erred by refusing to award Kalb the additional costs it incurred in hiring another subcontractor to finish Bravo's work.[6]

Generally, if one party repudiates an agreement, the other party is excused from its further obligations under the agreement.[7] To anticipatorily repudiate an agreement, one party must first, by words or conduct, manifest a "definite unequivocal and absolute intent not to perform a substantial portion of the contract."[8] Generally, "mere nonfeasance on the part of the obligor will not support a finding of repudiation."[9]

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[6]Bravo counters by arguing that Kalb should be barred from alleging anticipatory repudiation on appeal because it was not raised below. We disagree. The theory of anticipatory repudiation need not be specifically named in order to survive this challenge so long as the party sufficiently alleged breach of contract. See Wholesale Sand & Gravel, Inc. v. Decker, 630 A.2d 710, 711-12 (Me. 1993) (concluding that it is not necessary "to state specifically whether the claimed breach of contract was a breach in the classic sense or an anticipatory repudiation").

[7]See Restatement (Second) of Contracts § 253(2) (1981).

[8]Bird v. Casa Royale West, 97 Nev. 67, 70, 624 P.2d 17, 19 (1981) (quoting Kahle v. Kostiner, 85 Nev. 355, 358, 455 P.2d 42, 44 (1969)).

[9]Richard A. Lord, 13 Williston on Contracts § 39:40, at 685 (4th ed. 2000).

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Kalb asserted below that in early June, Bravo stated that it refused to continue work on the project until it was fully paid. Consequently, on June 18, 1997, Kalb sent Bravo a letter demanding that Bravo complete the work on a particular unit. Despite its concerns about Kalb's underpayments and refusal to approve certain change orders, Bravo complied and completed the job as requested on June 24, 1997. Only a few days later, Kalb fired Bravo. The record does not demonstrate any unequivocal statement of intent not to perform from Bravo. To the contrary, following the alleged statements of repudiation, Bravo performed the work as Kalb demanded. Furthermore, even assuming that Bravo's actions were an unequivocal statement that it did not intend to perform, in order to perfect its rights under an anticipatory repudiation theory, Kalb should have first demanded "adequate assurances" from Bravo of Bravo's intent to perform rather than terminating it.[10] In any event, the parties' agreement required twenty-four hour written notice, which Kalb failed to provide.

Based on the plain language of the agreement and the undisputed fact that Kalb did not provide the twenty-four hour written notice contemplated by the agreement, we conclude that Bravo was clearly entitled to judgment.[11] We therefore reverse

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[10]See Restatement (Second) of Contracts § 251. Based on the above conclusions, we need not address Bravo's arguments that Kalb breached the agreement by failing to approve the change orders and by failing to pay Bravo the full amount that Bravo invoiced, which, analyzed in context, are essentially defenses to Kalb's anticipatory repudiation theory.

[11]The record belies the district court's conclusion that Bravo failed to meet its burden of proof. Unfortunately, the district court offers no clues as to its reasoning, having failed to issue findings of fact and conclusions of law as required by NRCP 52(a). We admonish the district court to comply with NRCP 52(a) and issue findings of fact and conclusions of law in all future cases.

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the district court's judgment and remand this case to the district court with instructions to enter judgment in Bravo's favor and to calculate Bravo's damages. In addition, according to the agreement, Bravo, the prevailing party, is also entitled to "its reasonable attorneys' fees and costs incurred from the non-prevailing party in amount to be determined by [the] court."

Because the district court erred by refusing to give effect to the plain language of the agreement, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Rose

cc: Hon. Michael A. Cherry, District Judge
Leavitt Sully & Rivers
Ellsworth Moody & Bennion Chtd.
Clark County Clerk

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