IN THE SUPREME COURT OF THE STATE OF NEVADA

THERMAL REMEDIATION SOLUTIONS, LLC, AN OREGON LLC DOING BUSINESS IN THE STATE OF NEVADA,
Appellant/Cross-Respondent,
vs.
RELIANCE INSURANCE COMPANY, A PENNSYLVANIA CORPORATION CONDUCTING BUSINESS IN THE STATE OF NEVADA,
Respondent,
and
HARDING LAWSON ASSOCIATES, INC., A CORPORATION DOING BUSINESS IN THE STATE OF NEVADA,
Respondent/Cross-Appellant.

No. 37803

FILED

SEP 18 2003

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal and cross-appeal from a judgment entered in favor of appellant, Thermal Remediation Solutions, LLC (TRS), after a bench trial. On appeal, TRS challenges the district court's judgment on various grounds. We conclude that the evidence in support of the district court's finding that TRS intentionally misrepresented itself was insufficient. We also conclude that Harding Lawson Associates, Inc.'s contentions on cross-appeal lack merit.

FACTUAL BACKGROUND

TRS specializes in the thermal recycling of non-hazardous petroleum contaminated soil. Patrick L. Rodrigue is the managing member of TRS and he has been involved in the thermal remediation industry since 1988.

03-15599

In the summer of 1998, Mark Sutton, a representative of Harding Lawson Associates, Inc. (HLA), contacted Rodrigue and asked TRS to act as a specialty subcontractor to HLA on a request for proposal for environmental remediation of complex hydrocarbon compounds (PAHs-PNAs) at a former manufactured gas plant located at 5th and Wells in Reno, Nevada. The 5th and Wells site was previously owned by Sierra Pacific Power Company (Sierra) and, as part of a sales agreement, Sierra was contractually obligated to remediate topsoil on the parcel. Because the project required the processing of only 6,000 tons of soil, Rodrigue did not believe it would be cost effective to move TRS' existing plant from Irwindale, California to Reno. TRS began considering whether a smaller thermal unit would be viable. Eventually, TRS decided that, with modifications, it could do the job with a mobile "cold" version plant. Rodrigue/TRS discussed this option with HLA, and HLA undertook to prepare its bid documents for consideration by Sierra.

HLA submitted its bid to Sierra on August 28, 1998, listing TRS as a subcontractor on the project. After HLA was short-listed for the contract, HLA requested that TRS provide Sierra a letter describing similar jobs performed by TRS. TRS's letter dated September 18, 1998, stated:

> The following-PAH-PNA-JOBS were successfully treated using thermal treatment, by Thermal Remediation Solutions Personal.
>
> Chevron Bulk tank Farm San Pedro, CA 400,000 tons 1983.
>
> Edison Company Visalia, CA 8,000 tons 1996.
>
> Shell Oil Distribution Center Carson CA, 20,000 tons 1997.

None of these projects involved a "mobile cold" plant. Prior to Sierra's acceptance of HLA's proposal, Sierra's project engineer visited TRS's Southern California facility and inspected and approved a portable low temperature thermal desorption (LTTD) plant TRS proposed to use on the project. Finally, on December 28, 1998, Sierra awarded HLA the contract.

On January 25, 1999, TRS signed a subcontract with HLA, which incorporated by reference the contract between HLA and Sierra. In accordance with the contract, TRS purchased and brought the LTTD plant, referred to above, a Gencore "cold" plant, to Reno. Neither Rodrigue nor TRS had been involved in any projects where a cold plant had been used to treat PNAs, but Rodrigue had operated cold plants for contaminates with carbon chains in excess of "C-30" in the past. Rodrigue had also treated soil from a manufactured gas plant at his fixed facility in California, a "hot" plant.

On February 3, 1999, TRS began to process soil from the parcel. Throughout the contract, TRS complained of various problems, among which were:

1. HLA's failure to provide twenty-four hour test result turnaround on lab results for treated soil.

2. HLA's provision of contaminated soil samples for testing.

3. HLA's provision of soil for recycling/remediation with contamination levels in excess of that contemplated in the original proposal (soils with a carbon chain in excess of "C-30").

4. HLA's failure to properly blend heavily contaminated soil with less contaminated soil and to properly blend retreated soil resulting in plugging and temperature spikes, which caused shutdowns in operation.

5. HLA's failure to maintain a constant stream of soil for retreatment, thus allowing the feed hopper to run empty.

In the end, TRS successfully treated a total of 6,600 tons of soil. However, before receiving test results confirming that the last three piles (170 tons) of soil were successfully treated, TRS removed its plant from the treatment site. TRS promised HLA that it would return to the job site to retreat soil failing to pass laboratory testing. TRS decided it was not feasible to bring the plant back to treat the three remaining piles. As a result, a new soil management plan was prepared. HLA added this new plan to the soil management plan already in place, and under this plan, TRS treated the remaining 170 tons at no cost to HLA.

In May of 1999, HLA paid TRS $15,000.00, representing mobilization fees to set up the cold plant. During the job, HLA made no payments to TRS despite successful treatment of the soil and despite HLA's receipt of payments from Sierra in connection with the remediation project. In response, on May 27, 1999, TRS recorded a mechanic's lien for $300,000.00 against the property at 5th and Wells. On August 16, 1999, HLA posted a $316,500.00 surety bond obtained through Reliance Insurance Company (Reliance). After a period of negotiation, HLA paid TRS $100,000.00 of the total owed to TRS, and on August 25, 1999, TRS recorded an amended mechanic's lien in the amount of $211,000.00. Thereafter, on September 8, 1999, the district court entered a stipulated order discharging and releasing the mechanic's lien upon posting of the surety bond.

On October 22, 1999, TRS filed a complaint against HLA and Reliance alleging breach of contract and bond recovery pursuant to NRS 108.2421. On December 13, 1999, HLA filed an answer and counterclaim,

which HLA thereafter amended. HLA's counterclaims alleged breach of contract and negligent and intentional misrepresentation against TRS.

Following a bench trial in October of 2000, the district court issued its decision on January 11, 2003:

> TRS substantially performed the contract in question, and is deserving of the price of $244,800.00 for the soil treated. In addition, TRS shall receive $2,500.00 in delay costs, and $20,804.58 in damages caused to the plant by large rocks and improperly blended soils. This totals $268,104.58. As HLA has already paid $115,000.00, there remains an outstanding balance of $153,104.58 due to TRS from HLA.
>
> This amount must be offset by the amount of damages suffered by HLA. [sic] which total $113,958.25. This leaves a balance due from HLA to TRS of $39,146.33.
>
> [TRS] shall have judgment against the defendants in the amount of $39,146.33.

The offset was based upon the district court's separate finding that TRS was guilty of intentional misrepresentation of its abilities to perform under the subcontract. On April 26, 2001, TRS filed a notice of appeal. On May 7, 2001, HLA filed a notice of cross-appeal. Reliance did not join HLA in its cross-appeal and has not separately submitted any documents in connection with these appellate proceedings.[1]

[1]As we have reversed and remanded this matter, Reliance's liability on remand is limited to HLA's unsatisfied liabilities.

DISCUSSION

Intentional misrepresentation

TRS argues that the evidence presented to the district court was insufficient to support the district court's findings that TRS misrepresented its ability to perform.

To recover for the tort of intentional misrepresentation, HLA was required to prove by clear and convincing evidence that:

1. TRS made a false representation;

2. TRS had knowledge or belief that the representation was false (or insufficient basis for making the representation);

3. TRS intended to induce HLA to act or to refrain from acting in reliance upon the misrepresentation;

4. HLA justifiably relied upon the misrepresentation; and

5. HLA sustained damages resulting from such reliance.[2]

Regarding the causal connection between TRS's wrongful conduct and HLA's damages, HLA was required to prove that

> "[t]he false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course; and when he was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it, and would have done the same thing without it for other reasons, his loss is not attributed to the defendant."[3]

---

[2]See Lubbe v. Barba, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975) (citing Prosser, Law of Torts, 685 (4th ed. 1971)).

[3]Id. at 600, 540 P.2d at 118 (quoting Prosser, Law of Torts, at 714).

In this case, the district court found that "TRS made intentional misrepresentations to HLA about its expertise and experience in this type of job, knowing that these statements were exaggerations of these attributes." The district court did not clarify exactly where or when these misrepresentations were made, but focused on the September 18, 1998, letter TRS was asked to provide to Sierra, and found that "none of the projects TRS listed as 'similar' to the job in question involved a cold plant." It appears that the district court concluded TRS misrepresented itself in this letter.

We conclude the district court erred in finding TRS liable for intentional misrepresentation to HLA, since the false representation (if it was one) could not have played a material and substantial part in leading HLA to adopt its particular course of conduct in using TRS as a subcontractor. We further conclude that there was insufficient evidence to establish that false intentional misrepresentations were made by TRS.

TRS wrote its letter on September 18, 1998. HLA submitted its bid to Sierra, offering TRS as a subcontractor, on August 28, 1998. It is clear that the misrepresentations in the letter, if any, did not influence HLA's initial choice to use TRS as a subcontractor. More particularly, the evidence showed that Sierra wanted information describing similar jobs performed by TRS and requested the letter, not HLA. Notably, Sierra was fully satisfied with TRS's performance and hired TRS to perform on a subsequent project.

The district court also concluded that Rodrigue exaggerated his credentials to HLA, causing HLA to enter into a subcontract with TRS. The only findings of the district court relative to Rodrigue's credentials are:

> 20. Patrick Rodrigue, the managing partner of TRS, had never bid a project for treating PNA-contaminated soil before.
>
> 21. Neither TRS nor Mr. Rodrigue had ever been involved in a project where a "cold" plant such as the one in this case was used to treat PNAs.

With regard to these findings, the district court was inaccurate about Rodrigue's prior experience bidding PNA contaminated soil. The evidence showed, not that Rodrigue had never bid a PNA contaminated soil job, but rather that he had never bid a PNA contaminated soil job using a cold plant. Rodrigue testified that he was also involved in a prior project involving a cold plant, a sister Gencore plant to that used in this project, which performed the processing of carbon chains in excess of C-30. The trial testimony does not clarify whether this project involved PNAs, but Rodrigue and TRS previously treated PNA contaminated soil at the TRS fixed facility.

Finally, HLA presented evidence that there was an error in Rodrigue's resume. The wording of Rodrigue's resume could have lead a reader to believe that Rodrigue designed various types of thermal desorption units; however, Rodrigue was only instrumental in the design and development of the units. This semantical difference is not sufficient to show that TRS misrepresented itself. Additionally, HLA's reliance on Rodrique's resume was questionable given that Sutton testified he believed he received Rodrigue's resume and statement of qualification on August 27, 1998, and HLA's bid documents, which were considerable in length and complexity, were submitted on August 28, 1998.

The record also reflects that Rodrigue expressed some reluctance during negotiations to participate. Thus, it appears that there was no intent to fraudulently or intentionally misrepresent the qualifications of TRS in order to obtain this particular subcontract.

We conclude that the district court erred in finding that HLA showed by clear and convincing evidence that all the elements of its intentional misrepresentation claim were met.

Damage awards

TRS argues that the district court erred in awarding HLA damages, specifically: (1) $45,796.00 in costs HLA incurred in the retreatment of 3,300 tons of soil; (2) $22,363.25 in delay damages; and (3) $45,799.00 for money HLA expended to draft a second soil management plan for remediation of the final 170 tons of soil. These particular damages, although fully analyzed by the district court under that portion of its decision relating to HLA's breach of contract claim, were not awarded as breach of contract damages. The district court explained that HLA was not entitled to contract damages and, thus, awarded all the damages under HLA's intentional misrepresentation claim.

Because we conclude that HLA did not satisfy its burden of showing that all the elements of its claim for intentional misrepresentation were met, the district court's award of damages under this claim was improper. Thus, we remand this case to the district court for the court to reconsider its award of damages without regard to the intentional misrepresentation claim, i.e., (1) the $45,796.00 in costs incurred in the retreatment of the soil and (2) the $22,363.25 in claimed delay damages.[4] With regard to the $45,799.00 claimed for the drafting of a second soil management plan, we conclude that this claim was not based upon TRS's inability to perform as a matter of law. These damages arose

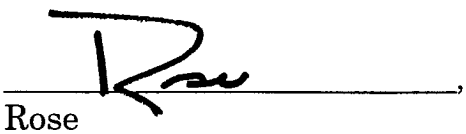
[4]We are aware the district court's decision concluded that HLA's damages were not contractual, but damages awarded on the misrepresentation claim appear to be in fact breach of contract damages.

from the dispute between TRS and HLA because of HLA's non-payment to TRS for work TRS had performed.

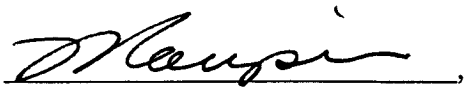
CONCLUSION

We conclude that the district court erred in finding that HLA showed by clear and convincing evidence that all the elements of its intentional misrepresentation claim were met; that TRS's other assignments of error are without merit; and that the district court inappropriately awarded HLA offset damages under HLA's intentional misrepresentation claim. Accordingly, we

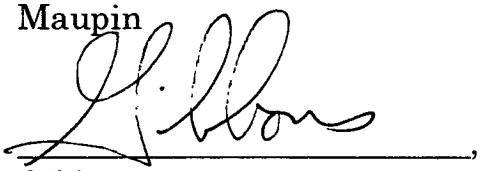
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Rose



_____, J.
Maupin



_____, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
Michael B. Springer
Bible Hoy & Trachok
Gordon & Rees
Washoe District Court Clerk