

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 11, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-1127
STATE OF WISCONSIN**

Cir. Ct. No. 02CV000043

**IN COURT OF APPEALS
DISTRICT II**

JOSSART BROS., INC.,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF OOSTBURG,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Jossart Bros., Inc. appeals from a judgment dismissing its claim against the Village of Oostburg for additional costs incurred in a public works project. Jossart argues that because the Village's solicitation for bids included incorrect wage information, its contract with the Village should be reformed due to a mutual mistake. It also argues that the Village is estopped from

denying Jossart's claim for additional costs. We affirm the judgment because Jossart knew that the wage information was incorrect and did not rely on the information provided.

¶2 The Village solicited bids for a sewer project. Pursuant to WIS. STAT. § 66.0903 (2001-02),¹ bidding contractors were required to pay their employees no less than the prevailing wage rates established by the Wisconsin Department of Workforce Development (DWD). The bidding documents included wage rate schedules provided to the Village by the DWD. Thinking that the DWD's wage rate for heavy equipment operators was extremely low, Jossart contacted the Village about the applicable rate. Jossart was told that was the rate to bid by.

¶3 Jossart prepared its bid. It did not use the DWD rate of \$9.25/hour for heavy equipment operators as specified in the bid documents. Instead, Jossart used a rate of \$25.00/hour. The contract was awarded to Jossart and work commenced August 6, 2000.

¶4 After commencing work, Jossart made inquiries with the DWD about the prevailing wage rate for heavy equipment operators. A revised rate was issued August 23, 2000, setting the rate at \$35.31/hour. Jossart contacted the Village and indicated that the bid was based on erroneous information. As the project was nearing completion, Jossart submitted a claim for an additional \$19,253.93, the amount over the contract price it expended to conform to the revised wage rate. The claim was denied and this action followed.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶5 Both parties moved for summary judgment. The circuit court granted the Village’s motion for dismissal. We review the circuit court’s grant of summary judgment using the same methodology as the circuit court. *City of Beaver Dam v. Cromheecke*, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principal is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. *Id.*; WIS. STAT. § 802.08(2).

¶6 Jossart first claims that the contract should be reformed based on a mutual mistake.² “Reformation of a written instrument is appropriate when the instrument fails to express the intent of the parties, either because of the mutual mistake of the parties, or because of the mistake of one party coupled with fraud or inequitable conduct of the other.” *Hennig v. Ahearn*, 230 Wis. 2d 149, 174, 601 N.W.2d 14 (Ct. App. 1999). “A mutual mistake is one reciprocal and common to both parties, where each alike labors under a misconception in respect to the terms of the written instrument.” *Cont’l Cas. v. Wis. Patients Comp. Fund*, 164 Wis. 2d 110, 117, 473 N.W.2d 584 (Ct. App. 1991).

¶7 Jossart was aware that the prevailing wage rate stated in the bid documents was inaccurate. When the contract was made, the Village adhered to

² Although the label “reformation of contract” was not included in the complaint, the issue was presented to the circuit court as part of Jossart’s claim for recovery under an unjust enrichment theory.

the belief that the bid documents stated the applicable wage. Jossart did not.³ There was no mutual mistake.

¶8 Further, to obtain reformation Jossart must establish that reliance on the mistaken fact was justified. See *Hennig*, 230 Wis. 2d at 176. Jossart made no reliance on the mistaken figure in the bid documents. It utilized a different wage rate in submitting its bid. Reformation of contract is not permitted when a party to the contract knows that the pertinent assertion is false. *Id.* at 177. In short, Jossart cannot recover simply because it made a bad guess with respect to the prevailing wage rate.

¶9 Jossart next argues that the Village is equitably estopped from compensating Jossart for the correct wage rate because despite knowledge that the wage rate in the bid document was error, the Village allowed Jossart to continue and complete the project without corrective action. Jossart contends that the Village's nonaction and unresponsiveness to Jossart's inquiry about wage rate, induced Jossart to continue the project under the assumption that something would be done to remedy losses caused by the erroneous information.

¶10 Estoppel is not applied as freely against governmental agencies as it is in the case of private persons. See *DOR v. Family Hosp., Inc.*, 105 Wis. 2d 250, 254, 313 N.W.2d 828 (1982).

Generally, to establish equitable estoppel, a party must demonstrate: (1) action or non-action (2) by the party against whom estoppel is asserted (3) that induces reasonable reliance by the party asserting estoppel (4) to

³ Jossart characterizes the mistake as the "absence of the correct wage rate." Even so stated, the Village was not under the belief that the bid documents failed to include the correct wage rate.

that party's detriment. However, when estoppel is asserted against the government, the party invoking it bears a heavy burden: the evidence must be so clear and distinct that the contrary result would amount to a fraud.

Kamps v. DOR, 2003 WI App 106, ¶20, 264 Wis. 2d 794, 663 N.W.2d 306 (citations omitted).

¶11 The parties' contract sets forth what is to be done in the event there is a discrepancy:

If, during the performance of the Work, CONTRACTOR discovers any conflict, error, ambiguity, or discrepancy within the Contract Documents or between the Contract Documents and any provision of Law or Regulation applicable to the performance of the work or any standard, specification, manual or code, or of any Supplier, CONTRACTOR shall report it to ENGINEER in writing at once. CONTRACTOR shall not proceed with the Work affected thereby ... until an amendment or supplement to the Contract Document has been issued by one of the methods indicated in paragraph 3.04.

Paragraph 3.04 of the contract provides that amendments and supplements would be by several types of written amendments, written change orders or written engineer's interpretation or clarification.⁴

¶12 Upon discovery that the wage rate was wrong and notification to the Village (via the engineer), Jossart was required or entitled to stop work until the discrepancy was resolved. Jossart did not avail itself of this remedy. Jossart's reliance on the Village's nonaction was not justified or reasonable. In other words, Jossart could not simply assume contract adjustments would be made. Any

⁴ Jossart argues for the first time on appeal that the contract provision is ambiguous and does not apply to the wage discrepancy but only to errors relating to safety issues, design flaws, OSHA violations, or engineering concerns. We generally will not review an issue raised for the first time on appeal. *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

detriment it suffered was of its own making by bidding the project based on only a guess of the prevailing wage rate and by not following the contractual remedy.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

