

STATE OF MICHIGAN
COURT OF APPEALS

L. LOYER CONSTRUCTION COMPANY,

Plaintiff-Appellant,

v

CITY OF ANN ARBOR, MCI CONSULTING,
INC., a/k/a MIDWEST CONSULTING, LLC,
AMERITECH OF MICHIGAN,

Defendants-Appellees.

UNPUBLISHED

January 26, 2006

No. 263030

Washtenaw Circuit Court

LC No. 03-000243-CZ

L. LOYER CONSTRUCTION COMPANY,

Plaintiff-Appellant,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

No. 263031

Washtenaw Circuit Court

LC No. 04-000047-MM

Before: Owens, P.J., and Saad and Fort Hood, JJ.

PER CURIAM.

I. Facts and Procedural History

This case arises out of the West Liberty Street Reconstruction Project in Ann Arbor, a project funded by the Michigan Department of Transportation (MDOT) and the federal government. Plaintiff, L. Loyer Construction Company (Loyer), submitted a bid to MDOT for the project, which included, among other things, excavation and installation of sanitary and storm sewers, installation of manhole structures, construction of detention ponds, and repavement. According to Loyer, when it calculated its bid, it relied on plans and specifications drawn by defendant, MCI Consulting, Inc., a/k/a Midwest Consulting, LLC (MCI) at the direction of defendant, City of Ann Arbor. Loyer was the low bidder and, on November 20, 2001, Loyer signed a contract with MDOT to perform the work on 2.3 kilometers of West Liberty for \$2,383,396.44.

During its performance on the project, Loyer informed Ann Arbor that it could not continue the job without extra compensation because Loyer discovered underground Ameritech utility line duct banks along part of the planned path of the storm sewer. Loyer maintains that the plans from Ann Arbor and MCI showed the Ameritech lines were in a different location and that their actual location directly conflicted with the sewers and manhole structures. Ann Arbor and MCI redesigned the project to address the location of the Ameritech lines, but did not permit Loyer to withdraw from the project. Loyer asserts that the redesign resulted in numerous, costly changes and that it is entitled to additional compensation.

The record reflects that Loyer submitted requests for additional payment to Ann Arbor and that some requests were granted, but others were denied. On April 7, 2003, Loyer filed the complaint in Docket No. 263030 against Ann Arbor, MCI and Ameritech and asserted, under numerous counts, that defendants misled Loyer and other bidders when they knowingly failed to disclose the correct location of the Ameritech lines. Loyer further alleged that defendants entered into a secret agreement to shift the responsibility onto Loyer to bear the cost of building the project around the Ameritech lines.

In lieu of filing an answer to Loyer's complaint, on April 15, 2003, Ann Arbor filed a motion for summary disposition or dismissal under MCR 2.115(C)(4), (C)(7), (C)(8), MCR 2.113(F) and MCR 2.205. Codefendants MCI and Ameritech filed motions and sought dismissal based, in large part, on the arguments set forth by Ann Arbor. The trial court granted summary disposition to Ann Arbor on all of Loyer's claims except promissory estoppel and quantum meruit. The only claims the trial court dismissed pursuant to MCI and Ameritech's motions for summary disposition were breach of warranty, cardinal change, and breach of contract.

On March 19, 2004, Loyer filed the court of claims complaint against MDOT in Docket No. 263031.¹ Loyer asserted numerous claims against MDOT and alleged that MDOT knew the project plans misrepresented the location of the Ameritech lines and that they conflicted with the project, and that MDOT contracted with Loyer despite this knowledge. MDOT filed a motion for summary disposition on September 3, 2004, and the trial court granted the motion and dismissed the case.

Thereafter, in its case against Ann Arbor, MCI and Ameritech, Loyer sought to amend its complaint to reassert the claims the trial court previously dismissed and to assert additional claims based on the same set of facts. The trial court denied Loyer's motion to amend and, pursuant to defendants' motions for summary disposition, the trial court dismissed the remaining claims against Ann Arbor, MCI and Ameritech.

II. Analysis

A. Trial Court's Standard of Review

¹ The cases were consolidated and Washtenaw Circuit Judge Timothy Connors presided over both actions.

Loyer contends that the trial court applied the wrong standard of review to defendants' motions for summary disposition pursuant to MCR 2.116(C)(10).² We hold that Loyer has abandoned this issue for failure to properly brief the merits of its claim. In its brief on appeal, Loyer asserts that, in the trial court, it adequately supported its conspiracy to defraud claim, but Loyer fails to substantiate this contention with sufficient argument, citation to the record, or citation of supporting legal authority. As this Court explained in *Houghton ex rel Johnson v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003):

An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. [Citations omitted.]

Furthermore, while Loyer claims that the trial court refused to review evidence Loyer submitted in response to defendants' motions for summary disposition, the record reflects that the trial court considered the evidence filed by the parties and concluded that Loyer failed to establish a genuine issue of material fact for trial.³ Nothing in the record reveals that the trial court applied the wrong standard of review, or that it failed to adequately consider documentary evidence, as required by MCR 2.116(G)(5). Accordingly, Loyer is not entitled to relief on this claim.⁴

² Loyer does not appeal the trial court's dismissal of its conspiracy claim against Ann Arbor. The trial court granted Ann Arbor's motion for summary disposition on this issue pursuant to MCR 2.116(C)(7) because the claim does not fall under a recognized exception to governmental immunity. Loyer raises no argument with regard to the trial court's dismissal on this basis and, therefore, we do not address it here.

³ Indeed, a de novo review of the evidence submitted indicates that the trial court correctly dismissed Loyer's conspiracy claim because, even if Loyer could show that defendants acted in concert, Loyer failed to present evidence to support the underlying tort of fraud or misrepresentation. Loyer alleged that defendants conspired to defraud bidders by intentionally misrepresenting the location of the Ameritech lines on the plans. Loyer presented no evidence that defendants made knowingly or recklessly false representations to Loyer regarding the location of the Ameritech lines on the plans or that any of the defendants intended for Loyer to rely on such representations. Rather, the evidence established that defendants marked the plans based on the information available and the plans clearly stated that it was the contractor's responsibility to locate and protect public utilities. The plans also indicate that the stated locations of utilities are based on the best information available from surveys, but that the contractor is not relieved of its responsibility to verify the accuracy and location of existing utilities.

⁴ We also conclude that Loyer has abandoned his argument that the trial court erroneously denied its motion to amend the complaint. In its appeal brief, Loyer simply quotes an excerpt from an Institute of Continuing Legal Education publication and provides no analysis or clarification of its claims. Accordingly, Loyer has unequivocally abandoned this issue. *Houghton, supra* at 339-340.

Loyer further contends that the trial court should not have relied on language in the contract between Loyer and MDOT because the agreement was procured by fraud and, therefore, there was no meeting of the minds necessary to form a valid contract. Again, this issue is not preserved because it was not argued before or decided by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). To the contrary, in the trial court Loyer took the position that defendants breached or interfered with its contract with MDOT and Loyer relied on provisions of the contract to support its claims.

Specifically, Loyer argued that, contrary to the terms of the contract, defendants made changes to its methods of construction and that “Ann Arbor forced the contractor to continue working in contravention of the contract design and plans and specifications upon which the contractor bid.” Loyer further asserted that the terms of the contract required Ameritech to remove or relocate its lines and that any agreement between Ann Arbor and Ameritech with regard to the lines violated the contract. It is well-settled that “[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.” *Living Alternatives for the Developmentally Disabled, Inc v Dep’t of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994). See also *Flint City Council v State of Michigan*, 253 Mich App 378, 395; 655 NW2d 604 (2002). Accordingly, Loyer will not be heard to argue the invalidity of a contract that it sought to enforce.⁵

B. Exhaustion of Administrative Remedies

Loyer also argues that the trial court erred when it ruled that Loyer was required to exhaust its administrative remedies through MDOT before filing its action in the court of claims. Once again, Loyer cites no applicable legal authority to support its argument. However, the trial court’s ruling was clearly correct.⁶ Loyer filed this action to recover additional compensation for

⁵ Loyer further maintains that the trial court’s interpretation of the “changed condition” provision of the contract “is erroneous on its face.” Loyer offers no explanation of how the trial court’s interpretation was incorrect and merely asserts that “Loyer presented a case for Conspiracy to Defraud and Interference with Contract.” This is clearly insufficient briefing. Because Loyer offers no legal or factual argument to support its assertion, it has abandoned this issue. *Houghton, supra* at 339-340. For the same reason, we reject Loyer’s assertion that the trial court should have allowed a jury to consider the original scope of the project and the changes that were required to complete the work. The only support Loyer offers on this issue is the cursory statement that “Loyer claimed that the project misrepresented the scope of the work.” Though Loyer complains that the trial court should not have decided the case on a motion for summary disposition, Loyer fails to even assert, let alone substantiate, which summary disposition ruling was improper, which evidence supported its claims, and what legal authority justifies reversal. Accordingly, Loyer has also abandoned this issue. *Id.*

⁶ “Whether a court has subject-matter jurisdiction is a question that this Court reviews de novo.” *Huron Valley Schools v Secretary of State*, 266 Mich App 638, 645; 702 NW2d 862 (2005). As this Court also explained in *Service Employees Intern Union Local 466M v City of Saginaw*, 263 Mich App 656, 660; 689 NW2d 521 (2004):

(continued...)

work it performed under its contract with MDOT which was governed by MDOT's Standard Specifications. The specifications in effect at the time of the contract state that claims for additional compensation must be processed under MDOT's administrative procedures and that adjustments will be made if a contractor shows that alterations or change of work resulted in extra costs. But, to seek additional payment, Specification 104.09 states that a contract must follow MDOT's written claim procedures. These procedures required Loyer to submit claims to the project engineer for approval. Loyer then had 30 days in which to appeal the engineer's decision to the MDOT district engineer and, thereafter to MDOT's central office. And, though Loyer submitted requests for additional compensation to the project engineer, at the time it filed its complaint against MDOT, Loyer failed to exhaust his remedies through the MDOT appeals process. This Court has held that the Court of Claims does not have jurisdiction to review claims against MDOT until the contractor has exhausted the administrative remedies outline above. *Oak Construction Co v State of Michigan*, 33 Mich App 561, 565-566; 190 NW2d 296 (1971). Accordingly, the trial court correctly dismissed Loyer's complaint against MDOT as premature. *Id.*

Loyer asserts, unconvincingly, that it would have been futile to continue the MDOT procedures. "However, as this Court has noted, 'courts should not presume futility in an administrative appeal but should assume "that the administrative process will, if given a chance, discover and correct its own errors." ' " *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43, 52; 620 NW2d 546 (2000), quoting *Greenbriar Convalescent Center, Inc v Dep't of Public Health*, 108 Mich App 553, 562; 310 NW2d 812 (1981), quoting *Canonsburg General Hosp v Dep't of Health*, 492 Pa 68, 74; 422 A2d 141 (1980). Rather, as this Court explained in *Huron Valley Schools v Secretary of State*, 266 Mich App 638, 649; 702 NW2d 862 (2005):

[A]dministrative law requires courts to move cautiously when called on to interfere with the jurisdiction of administrative agencies. *Citizens, supra* at 52. A mere expectation that an administrative agency will act a certain way is insufficient to satisfy the futility exception. *WA Foote Mem Hosp v Dep't of Pub Health*, 210 Mich App 516, 524-525; 534 NW2d 206 (1995).

Though Loyer speculates that MDOT would not fairly review its claims because it allegedly knew about the Ameritech lines, Loyer offers no support for this position. Because Loyer

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This Court reviews de novo a trial court's grant or denial of summary disposition. When reviewing a motion for summary disposition under MCR 2.116(C)(4), we must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact. *Cook v Applebee's of Michigan, Inc*, 239 Mich App 311, 315; 608 NW2d 62 (2000).

"Summary disposition for lack of jurisdiction under MCR 2.116(C)(4) is proper when a plaintiff has failed to exhaust its administrative remedies." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000).

abandoned this claim and because we will not presume futility, we reject Loyer's futility argument.⁷

Affirmed.

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood

⁷ To the extent Loyer's brief can be read to assert that Loyer raised a constitutional claim that MDOT could not resolve, as this Court explained in *Michigan Sup'rs Union OPEIU Local 512 v Department of Civil Service*, 209 Mich App 573, 578; 531 NW2d 790 (1995):

[T]he exhaustion requirement is displaced only when there are no issues in controversy other than the constitutional challenge. *Jones v Dep't of Corrections*, 185 Mich App 134, 138-139; 460 NW2d 575 (1991). The mere presence of a constitutional issue is not the decisive factor in avoiding the exhaustion requirement. If there are factual issues for the agency to resolve, the presence of a constitutional issue, or the presence of an argument couched in constitutional terms, does not excuse the exhaustion requirement even if the administrative agency would not be able to provide all the relief requested.

Loyer also complains that further administrative review would be inadequate because MDOT has no authority to resolve Loyer's claims against Ann Arbor, MCI, and Ameritech. There is no question that Loyer properly filed his claims against those defendants in circuit court and that the claims were properly resolved by that court. The only matter that required further administrative review was Loyer's claims for additional compensation from MDOT. Accordingly, the court properly dismissed those claims against MDOT for failure to exhaust administrative remedies.