No. 26431 -- CMC Enterprises, Inc. v. Ken Lowe Management Company

Maynard, Justice, dissenting:

FILED
December 16, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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December 17, 1999
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I dissent because I do not believe that the appellee, CMC Enterprises, Inc., should be allowed to recover for additional work done on the remodeling project absent written change orders approved by the appellant, Ken Lowe Management Company.

This case concerns two sophisticated business entities. The rules which govern consumer transactions do not apply here. For example, when grandma contracts with an itinerant blacktop company to have her driveway paved, and there is a dispute concerning the terms of the agreement, evidence of a subsequent oral agreement will be considered in determining the proper resolution of the matter. Such evidence usually consists of the testimony of the parties, and the trier of fact is forced to choose which party is the most believable. Although the admission of parol evidence is not a perfect way to discern the truth when the provisions of a contract are at issue, it is a recognition of the fact that parties who do not regularly engage in business most likely conduct their affairs in a relatively informal manner, i.e., verbal agreements, verbal modifications, etc. Therefore, the consideration of oral evidence in cases involving noncommercial parties is often the best way to find the truth.

Commercial entities, on the other hand, are expected to have a higher level of sophistication in conducting their business. Courts should be able to presume that when commercial parties contract on projects involving substantial sums of money, these parties ensure that everything is in writing. After all, this is just good business. This presumption allows courts to avoid the conflicting testimony and credibility assessments necessary in the above-mentioned context. Instead, the issue can be decided by looking at the applicable written provisions of the contract.

In this case, unilateral modifications were made to a contract that resulted in the addition of $73,762 to the cost of the appellee's work. There is no dispute that no written change orders were executed concerning these modifications. Therefore, the trial court should have looked at the written contract and judged accordingly. Instead, this case involving sophisticated commercial entities was treated like a grandma-itinerant blacktop company case wherein the appellee was permitted to testify about verbal changes made in the contract. This is not only bad business, it is bad law. It allows one party to make unilateral modifications in violation of the written terms of a contract.

In conclusion, the majority's decision is unfair to Ken Lowe Management Company. Also, it sends a terrible message to contractors like CMC Enterprises, Inc. I would reverse the judgment below and enforce the terms of the contract as written. Accordingly, I dissent.