What constitutes breach of contract?

Golf course contends construction company didn't distribute topsoil in accordance with specifications

by William Jabine

Those persons who are inclined to think that judges do not earn their salaries should give consideration to, among other things, the bewildering variety of subjects upon which they must pass judgment. They are supposed to become experts on almost everything at a moment's notice. For example, the Michigan Court of Appeals, Division 3, recently had to determine the proper distribution of topsoil on a newly constructed golf course, a matter which, before the case came up for argument, probably was completely foreign to the minds of the judges.

The plaintiff in the action, P.&M. Construction Company, had agreed to construct a nine-hole golf course near Kalamazoo for the defendant, Hammond Ventures, Inc. The work was to be done on an equipment-rental basis at a cost not to exceed $18,400. The job was performed during the spring and summer of 1962, and the plaintiff construction company was paid on account from time to time as the work progressed. The plaintiff claimed that the job was completed in September of that year and demanded payment of $2,090.55, the amount still unpaid, and an additional $744.90 as an extra for the construction of a practice green and the sum of $543.50 for other extras. The defendant refused to make payment, contending that the plaintiff had breached the contract in that the work was not performed in accordance with specifications for which the defendant claimed damages.

The plaintiff then sued the de-

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Breach of contract

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fendant for $3,378.95 and the defendant counter-claimed for damages in the amount of $10,420.85.

The case was heard by a trial court without a jury and the trial judge ruled that the plaintiff was entitled to the balance of $2,090.55, completing the $18,400 provided for in the contract plus extras amounting to $1,288.40. He further ruled that the plaintiff did not complete the work in accordance with the precise terms of the contract and that $2,495 should be deducted from the sum due the plaintiff, resulting in a judgment for the plaintiff for $883.95. Neither side was satisfied, and when the defendant appealed to the Court of Appeals, plaintiff cross-appealed.

The chief bone of contention was the question of whether or not the plaintiff had performed the work in accordance with a provision of the contract which read as follows: "All existing topsoil shall be saved and stockpiled and used to cover those areas disturbed by construction. All tees and green aprons, and fairway areas shall be covered with at least six inches of topsoil. Areas outside the fairways shall be covered with at least four inches of topsoil."

The opinion of the Court of Appeals states the facts of the topsoil dispute as follows:

"Plaintiff's exhibit number six, a checklist dated July 25, 1962, indicated work to be corrected by plaintiff. Plaintiff claimed it performed in accordance with that checklist. The exhibit bears the typewritten initials of Mr. Spear (the architect whose approval of the work was required. Ed.). However, he disclaims making it. On four occasions, a representative of plaintiff informed Mr. Spear, the architect, that plaintiff had completed the job and asked for a final inspection. Mr. Spear testified that upon each inspection, he found work yet to be accomplished in order to meet the specifications. On November 14, 1962, he wrote a letter to plaintiff reading in part as follows:

"Of major concern now is lack of sufficient topsoil on the turf areas. Referring to my specifications 'Earth Moving and Grading Work' Item four; Stripping and Respreading Topsoil—Existing topsoil shall be stripped in sufficient quantity to permit replacing six inches of topsoil over all proposed lawn areas disturbed by grading operations. All existing topsoil shall be saved. All topsoil shall be kept free of subsoil and debris.

"Your failure to abide by this specification, especially when more than adequate amounts of topsoil were available, is the most serious offense a contractor can make in the construction of a golf course since a thick, healthy turf is so essential to good maintenance. Prior to the start of your construction work on this site, Mr. Hammond had soiltest borings made in various locations throughout the property. It was found the depth of topsoil averaged 12 to 13 inches. After most of your grading work was com-

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Breach of contract

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pleted another soil survey was made and most areas showed only three to four inches of topsoil existing and many areas with only one to two inches."

Other testimony reviewed by the Court showed that on drawings introduced in evidence there were circles drawn indicating that in two areas on the fifth and fourth fairways the depth of topsoil was insufficient. There were also marks which indicated that in three low areas topsoil had been added to bring the depth up to specifications. There was also a statement that "the architect did not personally test the depths of topsoil present at the various points on the golf course nor did he have anyone do it under his supervision."

The Court continued: "After a careful review of the record, we conclude that there was competent evidence to justify the court's findings as to the areas deficient of topsoil and the proper amount of damages to be awarded defendant against plaintiff representing the cost of plaintiffs' failure to perform. Likewise there was ample evidence to justify the court's findings that plaintiff was entitled to recover for the extras claimed.

"This leaves one question remaining to be resolved, i.e., did the plaintiff P.&M. Construction Company carry its burden in showing performance on its contract?

"The trial judge did not find proper performance of all the terms of the contract, but did in effect rule that there was substantial performance. The trial judge ruled that plaintiff should be awarded the full amount due on the contract less defendant's damages for plaintiff's failure to perform. The damages awarded defendant were for costs to correct defects resulting from improper performance in the amount of $2,495. These damages represented replacement of topsoil to two small areas constituting a small percentage of the golf course constructed by plaintiff."

The judgment of the trial court was affirmed and as neither party had prevailed on appeal, no costs were awarded. (P.&M. Construction Company vs. Hammond Ventures, Inc., 142 N.W. 2d 468.) ☐

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