


1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **VILLALOBOS CONSTRUCTION**
3 **COMPANY, INC.,**

Court of Appeals of New Mexico
Filed 10/8/2024 10:19 AM



Ramon J. Maestas
Chief Clerk

4 Plaintiff-Appellee,

5 v.

No. A-1-CA-41281

6 **NEW MEXICO DEPARTMENT OF**
7 **TRANSPORTATION,**

8 Defendant-Appellant.

9 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

10 **Kathleen McGarry Ellenwood, District Court Judge**

11 Cervantes Law Firm, P.C.

12 Joseph Cervantes

13 Las Cruces, NM

14 L. Helen Bennett, P.C.

15 L. Helen Bennett

16 Albuquerque, NM

17 for Appellee

18 Stelzner, Winter, Warburton, Flores & Dawes, P.A.

19 Dan Gershon

20 Albuquerque, NM

21 for Appellant

22 **MEMORANDUM OPINION**

23 **BOGARDUS, Judge.**

24 {1} Defendant appeals both a judgment on the merits and an order awarding costs

25 to Plaintiff. [3 RP 586] In this Court's notice of proposed disposition, we proposed

1 to reverse on both issues. Plaintiff filed a memorandum in opposition and Defendant
2 filed a memorandum in support, which we have duly considered. Remaining
3 unpersuaded, we reverse the district court’s award of \$78,763.02 for traffic control
4 devices and \$87,033.39 in costs in favor of Plaintiff.

5 {2} In our notice of proposed disposition, we suggested that the district court erred
6 in awarding Plaintiff \$78,763.02 for traffic control devices because the plain
7 language of the contract between Plaintiff and Defendant required Plaintiff to both
8 document its costs resulting from the delay in this case using actual cost records and
9 to measure expenses using generally accepted accounting principles. [CN 2] Plaintiff
10 tacitly acknowledges that it did not document its costs caused by the delay, but
11 makes two arguments in its memorandum in opposition concerning our proposed
12 conclusion. [MIO 16] Plaintiff first argues that the district court appropriately
13 awarded compensation for traffic control devices because Defendant’s “errors and
14 omissions nearly doubled the time required to complete the [p]roject . . . and resulted
15 in foreseeable additional costs and expenses borne by” Plaintiff. [MIO 16] In support
16 of this argument, Plaintiff relies on authorities indicating that “[i]n an action for
17 breach of contract, the breaching party is justly responsible for all damages flowing
18 naturally from the breach” and that a “defendant is liable for those consequential
19 damages that were objectively foreseeable as a probable result of their breach when
20 the contract was made.” [MIO 14-15]

1 {3} Although these are well recognized general principles of contract law, we do
2 not see how they excused Plaintiff’s failure to document its costs using actual cost
3 records and measure expenses using generally accepted accounting principles as
4 required by the contract. “[P]ublic policy encourages freedom between competent
5 parties of the right to contract, and requires the enforcement of contracts, unless they
6 clearly contravene some positive law or rule of public morals.” *Gen. Elec. Credit*
7 *Corp. v. Tidenberg*, 1967-NMSC-126, ¶ 14, 78 N.M. 59, 428 P.2d 33. Here, Plaintiff
8 does not assert that these terms clearly contravened positive law or a rule of public
9 morals. Consequently, by not enforcing the provision requiring Plaintiff to
10 adequately document the costs for the traffic control devices attributable to the delay
11 caused by Defendant, the district court erred in awarding \$78,763.02 for traffic
12 control devices.

13 {4} Plaintiff next asserts that the doctrine of waiver by estoppel applies in this
14 circumstance because Defendant “led [Plaintiff] to believe that . . . [Defendant]
15 should continue to provide contractual services and would be paid for its work” and
16 because Defendant “compensate[d] [Plaintiff] for traffic control management and
17 did not require strict adherence to the contractual proof provisions regarding that
18 claim.” [MIO 18] Waiver by estoppel is a type of equitable estoppel where a party,
19 through its conduct, impliedly waives certain contractual conditions. *Brown v.*
20 *Taylor*, 1995-NMSC-050, ¶ 10, 120 N.M. 302, 901 P.2d 720. “The party asserting

1 [waiver by estoppel] must establish: (1) the party to be estopped made a misleading
2 representation by conduct; (2) the party claiming estoppel had an honest and
3 reasonable belief based on the conduct that the party to be estopped would not assert
4 a certain right under the contract; and (3) the party claiming estoppel acted in
5 reliance on the conduct to its detriment or prejudice.” *Cafeteria Operators, L.P. v.*
6 *Coronado-Santa Fe Assocs., L.P.*, 1998-NMCA-005, ¶ 16, 124 N.M. 440, 952 P.2d
7 435. We note that “[e]stoppel is rarely applied against the state or its governmental
8 entities, and only in exceptional circumstances where there is a shocking degree of
9 aggravated and overreaching conduct or where right and justice demand it.” *Env’t*
10 *Control, Inc. v. City of Santa Fe*, 2002-NMCA-003, ¶ 22, 131 N.M. 450, 38 P.3d
11 891.

12 {5} Plaintiff does not assert that it raised estoppel below, the record does not
13 reflect the issue was argued, and the district court did not enter any findings or
14 conclusions related to such a theory. Nonetheless, this Court will affirm trial court
15 rulings “on grounds not relied upon by the district court if those grounds do not
16 require us to look beyond the factual allegations that were raised and considered
17 below.” *Atherton v. Gopin*, 2015-NMCA-003, ¶ 36, 340 P.3d 630 (internal quotation
18 marks and citation omitted). However, we are unable to do that in this circumstance.

19 {6} Plaintiff’s theory of waiver by estoppel would require this Court to assess
20 whether and how Plaintiff was misled by Defendant’s approval of the traffic control

1 management costs, such that it failed to document its costs for traffic control devices.
2 We would also have to make findings involving both the reasonableness of
3 Plaintiff's belief that those documentation requirements would be waived and also
4 whether Plaintiff somehow acted in detrimental reliance on that belief. No such
5 findings were made below, and the facts that were before the district court are
6 inadequate on appeal to conduct a full analysis of waiver by estoppel. *See Cent. Mkt.,*
7 *Ltd., Inc. v. Multi-Concept Hosp., LLC*, 2022-NMCA-021, ¶ 34, 508 P.3d 924
8 (concluding the party asserting waiver by estoppel did not show that it was misled
9 to its prejudice because it did not introduce evidence "of any change of position to
10 its detriment based on its belief").

11 {7} Regarding the award of costs, our notice of proposed disposition suggested
12 that the district court erred in concluding that Section 109.11 of the contract was
13 unconscionable because the contract between the parties contained a separate
14 provision waiving attorney fees and costs for either party and that, based on our
15 interpretation of *Fort Knox Self Storage, Inc. v. Western Technologies, Inc.*, 2006-
16 NMCA-096, 140 N.M. 233, 142 P.3d 1, the parties chose to limit the recovery of
17 costs, notwithstanding a prevailing party's ability to recover costs in NMSA 1978,
18 Section 39-3-30 (1966) and Rule 1-054 NMRA. Plaintiff's memorandum in
19 opposition does not respond to either of these proposed conclusions. "Our courts
20 have repeatedly held that, in summary calendar cases, the burden is on the party

1 opposing the proposed disposition to clearly point out errors in fact or law.”
2 *Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683.
3 Consequently, we conclude that the district court erred in finding that Section 109.11
4 was unconscionable and awarding Plaintiff \$87,033.39 in costs on that basis.

5 {8} Accordingly, for these reasons and those stated in our notice of proposed
6 disposition, we reverse.

7 {9} **IT IS SO ORDERED.**

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KRISTINA BOGARDUS, Judge

10 **WE CONCUR:**

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12 _____
JENNIFER L. ATTREP, Chief Judge

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14 _____
GERALD E. BACA, Judge