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Supreme Court of Montana.
 JEM CONTRACTING, INC., a Montana Corpora-
 tion, Plaintiff and Appellant,

v.

MORRISON-MAIERLE, INC., a Montana Corpora-
 tion, Gallatin County, a political subdivision of the
 State of Montana, and Madison County, a political
 subdivision of the State of Montana, Defendants
 and Appellees.

No. DA 13-0446.

Submitted on Briefs Jan. 2, 2014.

Decided Jan. 28, 2014.

Background: Contractor brought action against county and engineer services and supervision company, alleging detrimental reliance and fraudulent inducement for promises allegedly made during road construction job by engineer services and supervision company that contractor would be paid for unanticipated costs incurred during pulverization of the old road. The District Court, Eighteenth Judicial District, Gallatin County, [Mike Salvagni, P.J.](#), granted summary judgment in favor of defendants. Contractor appealed.

Holdings: The Supreme Court, [Jim Rice, J.](#), held that:

- (1) contract provision that required continued work during pending approval of change order was not void as against public policy, and
- (2) contractor was not harmed by alleged misrepresentations of engineering company.

Affirmed.

West Headnotes

[1] Appeal and Error 30  **893(1)**

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo


30k893 Cases Triable in Appellate

Court

30k893(1) k. In general. [Most Cited](#)

Cases

Supreme Court reviews a district court's ruling on a motion for summary judgment de novo, applying the same criteria as the district court. Rules [Civ.Proc., Rule 56](#).

[2] Judgment 228  **185(2)**

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185 Evidence in General

228k185(2) k. Presumptions and burden of proof. [Most Cited Cases](#)

All reasonable inferences which may be drawn from the evidence must be drawn in favor of the party opposing summary judgment. Rules [Civ.Proc., Rule 56](#).

[3] Appeal and Error 30  **863**

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In general. [Most Cited](#)

Cases

When reviewing a grant of summary judgment, the Supreme Court reviews a district court's conclusion that a moving party is entitled to judgment as a matter of law for correctness. Rules [Civ.Proc., Rule 56](#).

[4] Highways 200  **113(4)**

200 Highways

200VII Construction, Improvement, and Repair

200k111 Work of Construction or Repair

200k113 Contracts

200k113(4) k. Performance of contract and payment of compensation. [Most Cited Cases](#)

Public Contracts 316H 278

316H Public Contracts

316HV Construction and Operation

316Hk278 k. Change in plans. [Most Cited Cases](#)

Contract provision that required contractor to continue performance pending approval of a change order did not violate statutory prohibition of contracts that required a contractor to continue working despite not receiving progress payments, and therefore was not void as against public policy in road construction contract between contractor and county, where statute recognized an owner's right to dispute all or part of a progress payment request for a litany of reasons, including "disputed work or materials" and required an owner to promptly pay only the "approved amount." [MCA 28-2-2116\(2\)](#).

[5] Fraud 184 25

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k25 k. Injury and causation. [Most Cited Cases](#)

Contractor was not harmed by alleged misrepresentations of engineering services company, and therefore company was not liable to contractor for detrimental reliance and fraudulent inducement in action stemming from road construction contract with county, where company informed contractor that it was required to keep working pending approval of change order, and contractor was contractually required to continue working during pendency of approval of change order.

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For Appellees: [Matthew F. McLean](#), [Kelsey Bunkers](#); Crowley Fleck, PLLP; Bozeman,

Montana (for Morrison–Maierle, Inc.), [Chris P. Christensen](#); Madison County Attorney; Virginia City, Montana (for Madison **679 County), [Marty D. Lambert](#); Gallatin County Attorney; [Christopher B. Gray](#), Deputy County Attorney; Bozeman, Montana (for Gallatin County).

Justice [JIM RICE](#) delivered the Opinion of the Court.

*392 ¶ 1 JEM Contracting, Inc. (JEM) appeals the order of the Eighteenth Judicial District Court, Gallatin County, granting summary judgment to defendant Morrison–Maierle, Inc. (MMI). The dispute arose out of a construction contract between JEM, as contractor, and defendants Gallatin County and Madison County (County Defendants) for a road improvement project. MMI was hired by County Defendants to provide engineering services and supervision on the project. JEM filed suit against MMI alleging detrimental reliance and fraudulent inducement for promises allegedly made during the job by MMI that JEM would be paid for unanticipated costs incurred during pulverization of the old road. MMI moved for summary judgment, arguing that JEM could not prove that it had been harmed by its alleged representations. The District Court granted MMI's motion, dismissing all claims against it.

¶ 2 We affirm and address the following issues:

¶ 3 1. *Did the District Court err by concluding that JEM was required to continue performance pending approval of a change order under a contract provision that JEM claims is void as against public policy?*

¶ 4 2. *Did the District Court err by granting summary judgment to MMI on the ground that JEM had failed to show it was harmed by the representations made by MMI?*

FACTUAL AND PROCEDURAL BACKGROUND

¶ 5 Defendant Counties retained JEM to

provide construction services on a road improvement project over a 3.6 mile stretch of road near Big Sky that passed through both counties. MMI was retained by the Defendant Counties to provide engineering services and to act as the owner's representative on the project. No contract was entered directly between JEM and MMI.

¶ 6 JEM alleged that on June 21, 2010, the first day of the project, it encountered subsurface conditions that differed significantly from the plans and specifications upon which it had based its bid, and which *393 would require increased time and costs for pulverization of the old road surface. JEM discussed the discrepancy with MMI's on-site representatives over the next few days, some of whom agreed with JEM that the conditions differed from the plans, and at least one who disagreed. JEM proceeded with the job and did not provide written notice to MMI of the alleged differing conditions until July 9, 2010. That same day, JEM and MMI met to discuss the situation. JEM alleged that MMI agreed in this meeting that the site conditions varied from the contract specifications and promised JEM it would be paid for the increased costs related to the differing subsurface conditions if JEM could find savings on the rest of the job to complete it within the contract price. Specific dollar costs were not discussed at this time as JEM did not know the amount of the change order it would be seeking.

¶ 7 On July 29, 2010, JEM submitted a claim for additional compensation. MMI reviewed the claim and determined that JEM had provided insufficient evidence to support its claim and additionally had failed to follow the notification procedure set out in the contract for nonconforming site conditions. JEM and MMI met to discuss the matter, and MMI again concluded that JEM had failed to provide sufficient evidence to substantiate its claim that site conditions differed from the plans. JEM presented its request directly to Defendant Counties on November 4, 2010. This request was reviewed by the counties' administrative committee for the project and was denied.

¶ 8 JEM completed its work on the project, contending that it had found savings in the remaining work, as requested by MMI, to cover the increased cost of subsurface work. Nevertheless, Defendant Counties continued to deny JEM's change order. The Counties also refused to release a portion of the retainage withheld from monthly progress**680 payments under the contract pending "substantial completion" of the project, due to JEM's failure to provide certain documents required by the contract. On June 13, 2011, JEM filed its complaint against Defendant Counties and MMI alleging breach of contract, detrimental reliance, quantum meruit, fraud by inducement, and punitive damages. JEM later clarified that the claims for breach of contract, quantum meruit, and punitive damages were made against Defendant Counties, while the claims for detrimental reliance and fraud by inducement were made only against MMI. JEM subsequently settled with Defendant Counties and dismissed its claims against them.

¶ 9 MMI moved for summary judgment, arguing that JEM's claims of detrimental reliance and fraud by inducement failed because (1) JEM *394 failed to state cognizable claims for relief; (2) MMI's alleged promises were nothing more than "agreements to agree;" and (3) the claims contradicted the clear and unambiguous terms of the contract. The District Court granted MMI's motion. JEM appeals from the order granting summary judgment to MMI.

STANDARD OF REVIEW

[1][2][3] ¶ 10 We review a district court's ruling on a motion for summary judgment de novo, applying the same *M.R. Civ. P. 56* criteria as the district court. *Dick Anderson Constr., Inc. v. Monroe Constr. Co., LLC*, 2009 MT 416, ¶ 20, 353 Mont. 534, 221 P.3d 675. Summary judgment is appropriate when there are no genuine issues as to any material fact, and the moving party is entitled to judgment as a matter of law. *M.R. Civ. P. 56(c)(3)*. All reasonable inferences which may be drawn from the evidence must be drawn in favor of the

party opposing summary judgment. *Dick Anderson*, ¶ 20. We review the district court's conclusion that the moving party is entitled to judgment as a matter of law for correctness. *Dick Anderson*, ¶ 21.

DISCUSSION

¶ 11 1. *Did the District Court err by concluding that JEM was required to continue performance pending approval of a change order under a contract provision that JEM claims is void as against public policy?*

[4] ¶ 12 The contract between JEM and Defendant Counties (the Contract) contained the following provision:

6.18 Continuing Work

A. Contractor shall carry on the Work and adhere to the Progress Schedule during all disputes or disagreements with Owner. No Work shall be delayed or postponed pending resolution of any disputes or disagreements, except as permitted by Paragraph 15.04 or as Owner and Contractor may otherwise agree in writing.

(Paragraph 6.18.) JEM asserts this provision is void under § 28–2–2116(2), MCA, which provides: A provision, covenant, clause, or understanding that is in, collateral to, or affects a construction contract and that states that a party to the contract may not suspend performance under the contract or terminate the contract if another party to the contract fails to make prompt payments under the contract as provided in 28–2–2103 is against the public policy of this state and is void and unenforceable.

In turn, § 28–2–2103, MCA, requires that a construction contract *395 contain a procedure for monthly billing by the contractor. The contractor must submit payment requests to the owner “based upon actual or estimated work performed and materials supplied during the preceding monthly billing cycle.” Section 28–2–2103(1)(a), MCA. After receipt of the request, the owner has 21 days

to disapprove all or a portion of the requested amount for a defined list of reasons, § 28–2–2103(1)(c), MCA, but the owner is required to pay the contractor the “approved amount” of the bill within seven days of approval. Section 28–2–2103(1)(f), MCA.

¶ 13 JEM argues that because Paragraph 6.18 of the Contract references “all” and “any” disputes and disagreements, it is broad enough to encompass an owner's failure to make progress payments. JEM argues that the provision thus prohibits a contractor from work stoppage when progress payments are not made in violation of *681 § 28–2–2116, MCA, and is void. However, JEM ignores the exception stated within Paragraph 6.18: “except as permitted by Paragraph 15.04.” Paragraph 15.04 explicitly provides that the contractor may terminate performance if monthly progress payments are not made. Thus, Paragraph 6.18 clearly limits its applicability to disputes that do not involve an owner's failure to make progress payments.

¶ 14 JEM then asserts that a change order nonetheless equates to a progress payment because a change order is merely a request to be paid additional sums for “work performed and materials supplied” under § 28–2–2103(1)(a), MCA. JEM thus reasons that the statutory prohibition of contracts that require a contractor to continue working despite not receiving progress payments likewise prohibits contracts that require a contractor to continue working despite not being paid for a change order. However, JEM reads the statute too broadly. Section 28–2–2103, MCA, clearly recognizes an owner's right to dispute all or part of a progress payment request for a litany of reasons, including “disputed work or materials,” § 28–2–2103(1)(c)(iii), MCA, and requires an owner to promptly pay only the “approved amount.” JEM's argument would turn a statute meant to protect contractors' progress payments for agreed-upon work into a mandate that owners progressively pay contractors for billed amounts regardless of work quality or conformance with the contract.

¶ 15 The District Court correctly rejected JEM's assertion by holding that Paragraph 6.18 is not void as against public policy under the statute, and by concluding that JEM was obligated to continue its performance under the Contract.

¶ 16 2. *Did the District Court err by granting summary judgment to MMI on the ground that JEM had failed to show it was harmed by the *396 representations made by MMI?*

[5] ¶ 17 To succeed on either of its claims, JEM was required to prove harm as an element. *See Keil v. Glacier Park, Inc.*, 188 Mont. 455, 462, 614 P.2d 502, 506 (1980) (party asserting promissory estoppel must have been injured by the reliance on a promise); *In re Estate of Kindsfather*, 2005 MT 51, ¶ 17, 326 Mont. 192, 108 P.3d 487 (party asserting fraud must prove “consequent and proximate injury or damages caused by their reliance on the representation”). Though JEM acknowledges that there is no contract between it and MMI, it asserts that the amount it would have been owed under the Contract, but was subsequently denied, from the damages it sustained as a result of MMI's representations. Thus, JEM's claims against MMI are contingent upon benefits arising from the Contract.

¶ 18 MMI argued it was entitled to summary judgment because JEM could not prove that it had been harmed by MMI's alleged representations because (1) Paragraph 6.18 obligated JEM to continue working during the dispute over the change order, (2) JEM's claim for a change order was barred because JEM failed to follow the procedure outlined in the Contract governing notification of nonconforming subsurface conditions, and (3) its alleged promises that JEM would be paid for a change order if savings were made throughout the remaining work were merely “agreements to agree,” rather than a clear and unambiguous promise.

¶ 19 After holding that Paragraph 6.18 was not void, the District Court concluded that JEM could not show that it had suffered harm as the result of MMI's representations because JEM was contractu-

ally obligated by Paragraph 6.18 to continue working on the project despite the dispute over the change order. It reasoned that “a party cannot assert claims for promissory estoppel or fraud based on allegations that a misrepresentation induced the party to do what the party's contract required them to do in any event,” and thus, even if MMI had notified JEM on the first day that it would not receive a change order, JEM would have been required to continue working. The court declined to consider MMI's other arguments.

¶ 20 JEM argues the District Court's analysis was in error for considering only the harm related to JEM's ability to stop working. JEM also alleged that it was harmed by **682 finding cost savings on the remaining work, based upon MMI's alleged promise that JEM would be paid for the pulverization change order if savings were found elsewhere. Because JEM's profit was calculated as a percentage of the total cost per item, it suffered a loss in profit by reducing the costs of other items. Because the Contract did not obligate JEM to reduce costs *397 on these other items, but JEM did so based upon MMI's representations, JEM argues that it sufficiently demonstrated harm to prevent summary judgment.

¶ 21 However, we decline to address JEM's claim of harm for lost profits in light of MMI's argument that the change order request was properly denied by reason of JEM's failure to comply with the Contract's notification procedure for nonconforming conditions. The Contract contained the following provision regarding notification of the owner upon discovery of subsurface conditions that were materially different from the conditions indicated in the Contract:

4.03 Differing Subsurface or Physical Conditions

...

Contractor shall notify the Owner and Engineer in writing about differing subsurface or physical conditions within **5 days of discovery** and before

disturbing the subsurface as stated above. No claim for an adjustment in the contract price or contract times ... will be valid for differing subsurface or physical conditions if procedures of this paragraph 4.03 are not followed.

(Emphasis in original.)

¶ 22 JEM did not provide written notice to Defendant Counties until 18 days after discovery of the allegedly differing conditions, and during that time proceeded to disrupt and remove the subsurface material at issue. MMI raised this defense before the District Court and before this Court. JEM has presented no reason why its failure to comply with the Contract notification procedure should not bar its claim under the clear language that “[n]o claim for an adjustment in the contract price ... will be valid for differing subsurface or physical conditions if procedures of this paragraph 4.03 are not followed.”

¶ 23 Even if the District Court erred by failing to consider JEM's argument that it was harmed by losing profits, we nonetheless conclude that summary judgment in favor of MMI was appropriate for the reasons stated above. *See Knutson v. State*, 211 Mont. 126, 129, 683 P.2d 488, 490 (1984) (“Although the reason given by the District Court in granting summary judgment was incorrect, its result can be sustained under the wrong-reason, right-result appellate rule.”). It is undisputed that JEM failed to follow the specific notification procedure in the Contract for differing subsurface conditions that was required for payment.

¶ 24 Affirmed.

We concur: MIKE McGRATH, PATRICIA COTTER, BETH BAKER and LAURIE McKINNON, JJ.

Mont., 2014.

JEM Contracting, Inc. v. Morrison-Maierle, Inc.

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