PROGRAM MATERIALS
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April 24, 2020

COVID-19's Impact on Government Contractors and their Contracts

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April 24, 2020

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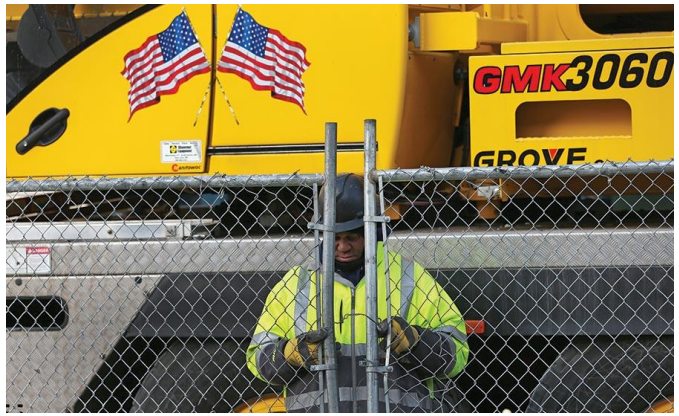
Overview

- Existing Government Contracts
  - Who makes the decisions?
  - What projects can continue?
  - Termination or suspension
  - Defenses
- Government Contracting Bidding
  - Issues
  - Emergency Procedures



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How Decisions are Made

- Emergency Orders
  - Federal Government Agencies
  - State Governor's Executive Orders
    - Governors have issued state-wide Executive Orders with lists of essential services and activities
  - Local Government Agencies
  - Practicality
    - The nature and fact-specific context of the situation is also a determining factor whether the work will continue

The State of Wisconsin

OFFICE OF THE GOVERNOR

EXECUTIVE ORDER #72

Relating to a Proclamation Declaring a Health Emergency in Response to the COVID-19 Coronavirus

WHEREAS, in December, 2019, a novel strain of the coronavirus was detected, now named COVID-19, and it has spread throughout numerous countries including the United States;

WHEREAS, international organizations, the federal government, state government, and local governments are all working together to contain the further spread of the disease and treat existing cases;

WHEREAS, the World Health Organization has declared a Public Health Emergency of International Concern, and the United States Department of Health and Human Services has declared a Public Health Emergency;

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Essential Services and Activities

The U.S. Cyber and Infrastructure Security Agency's "Essential Critical Infrastructure Workforce" advisory list includes:

- Services essential to continued critical infrastructure viability
- Workers who support crucial supply chains and enable functions for critical infrastructure

Individual states/local governments

- Adopt the essential services and activities from this federal advisory list;
- Create their own list of essential services and activities; or
- Compile a hybrid of both

Government Contracts During COVID-19

- Whether a contract will continue during COVID-19 depends on factors including if the services provided are considered essential, the purpose of the contract and type of industry

- Types of government contracts likely to continue:
  - Healthcare contracts
  - Construction contracts
  - Security contracts

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Termination – Who has the power to make decisions?

- Government Agencies
  - Ex. Department of Health, Department of Transportation
- Local Government
  - County, City, or Town Commission
    - Usually vested with decision-making power
  - Purchasing Manager
    - Depends on monetary threshold
  - County, City, or Town Administrator
    - Power may shift here in times of emergency
    - Depends on what is provided for in the contract, local code, agency's rules, or in emergency orders issued by local government agency

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Termination – For Cause

- Termination for cause refers to a material breach of a contract when one side failed to act up to the terms of the contract, and the other side is ending the relationship as a result. Termination for cause can result from work not being done or being done incorrectly.
- Typically refers to a specific material breach of the contract
  - Ex. Failure of performance, inability to deliver timely services or goods, or lack of adequate manpower
- Terms of Contract Dictate

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Termination – For Convenience

Termination for convenience clauses are contractual provisions which "permit one party to terminate a contract, even in the absence of fault or breach by the other party, without suffering the usual financial consequences of breach of contract."

Harris Corp. v. Giesting & Assocs., Inc., 297 F.3d 1270, 1272 (11th Cir.2002)

Such clauses can be exercised in times of emergency

Terms of contract dictate

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Termination - Defenses

- **Force Majeure**
  - A force majeure clause may excuse a party's performance or obligations under a contractual duty due to circumstances beyond the control of either party
  - The triggering event often includes an "act of God," which is an unpreventable event caused by forces of nature
  - Examples include war, earthquakes, hurricanes, tornados, flooding and other natural disasters
  - Examine the contract

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Termination - Defenses

- **Force Majeure**
  - Unless the parties entered into an agreement after the outbreak, an argument can be made that a party's nonperformance is excused because the outbreak was an unforeseeable event
  - Due to the classification of COVID-19 as a "pandemic," force majeure clauses that are explicit as to what is covered but lack language specifically regarding a pandemic or other viral outbreak may impact a force majeure defense
  - On the other hand, broad language in a force majeure clause may excuse nonperformance even without specific references due to the government-imposed travel bans and quarantines

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Beyond the Contractor's Control?

- FAR 52.249-14 (cost reimbursement and time and material contracts)
  - the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. Default includes failure to make progress in the work so as to endanger performance.
- FAR 52.249-8(fixed price supply and service contracts),

- FAR 52.212-4 (commercial contracts).

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Termination - Defenses

- **Impossibility of Performance**
  - Under this doctrine, a party is discharged from performing a contractual obligation which is impossible to perform and the party neither assumed the risk of impossibility nor could have acted to prevent the event rendering the performance impossible.
    - *Marathon Sunsets, Inc. v. Coldiron*, 189 So.3d 235, 236 (Fla. 3d DCA 2016).
  - It "refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform."
    - *Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc.*, 174 So.2d 614, 617 (Fla. 2d DCA 1965)

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Termination - Defenses

- **Impossibility of Performance**
  - Although impossibility of performance can include extreme impracticability of performance, courts are reluctant to excuse performance that is not impossible but merely inconvenient or profitless
  - "Feelings of financial frustration do not necessarily equate to findings of frustration or impossibility under the law."
    - *Valencia Ctr., Inc. v. Publix Super Markets, Inc.*, 464 So. 2d 1267, 1269 (Fla. 3d DCA 1985).

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Termination - Defenses

- **Frustration of Purpose**
  - "'Frustration of purpose' refers to that condition surrounding the contracting parties where one of the parties finds that the purposes for which he bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party."
    - *Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc.*, 174 So. 2d 614, 617 (Fla. 2d DCA 1965)

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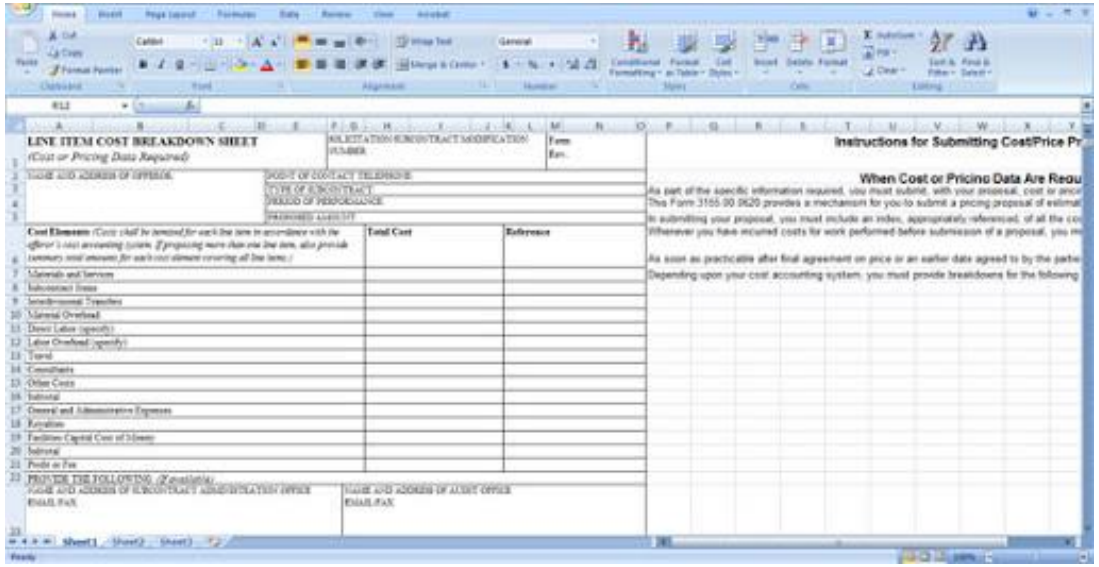
Termination/Suspension of Work

- Hard Bid Costs
- Adjustments
- Supply Chain
- Market Pricing



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Impacts of Termination or Suspension of Work

- Delay Damages
- Lost Profits
- Lease or Real Estate Costs
- Goods Ordered
- Mobilization/Demobilization Costs
- Personnel Expenses

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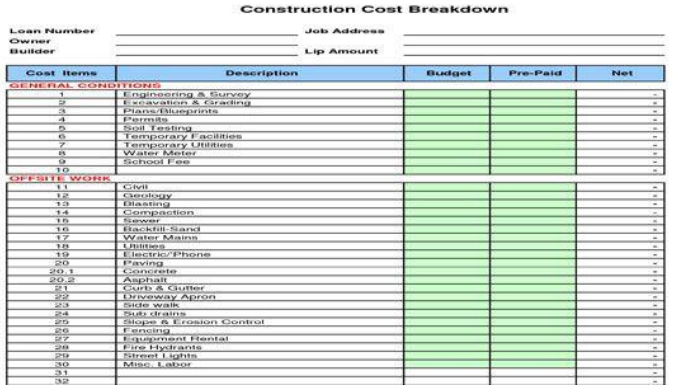
Documentation by Contractor

- **It is critical government contractors properly document costs and expenses they are entitled to in the event of termination or project suspension. This includes:**
  - Costs of materials purchased but not incorporated into the project
  - Overhead costs for leased office space
  - Delay costs
  - Mobilization and de-mobilization costs
  - Worker time logs



Construction Cost Breakdown

Loan Number _____ Job Address _____
Owner _____
Builder _____ Lip Amount _____

Cost Items	Description	Budget	Pre-Paid	Net
GENERAL CONDITIONS				
1	Engineering & Survey			-
2	Excavation & Grading			-
3	Plans/Blueprints			-
4	Permits			-
5	Soil Testing			-
6	Temporary Facilities			-
7	Temporary Utilities			-
8	Water Meter			-
9	School Fee			-
10				-
OFFSITE WORK				
11	Civil			-
12	Geology			-
13	Blasting			-
14	Compaction			-
15	Sewer			-
16	Backfill-Sand			-
17	Water Mains			-
18	Utilities			-
19	Electric/Phone			-
20	Paving			-
20.1	Concrete			-
20.2	Asphalt			-
21	Curb & Gutter			-
22	Driveway Apron			-
23	Side walk			-
24	Sub drains			-
25	Slope & Erosion Control			-
26	Fencing			-
27	Equipment Rental			-
28	Fire Hydrants			-
29	Street Lights			-
30	Misc. Labor			-
31				-
32				-

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MITIGATION OF CONTRACTOR COSTS

- Stay in contact with agency representative
- Review contract interpretations or questions
- Remote workers
- Reassigning work/Reassigning Personnel
- Coordination with subcontractors
- Address rate reductions or payment terms

Prompt Payment Issues

- Prompt Payment Acts regulate the acceptable amount of time payments must be made to contractors and sub-contractors in the private and public sector
  - Fla. Stat. Chapter 255, §§705-78 (state government projects)
  - Fla. Stat. Chapter 218 Part VII (local government projects)
  - Fla. Stat. §§ 713.346(2) and 715.12 (private projects)

- The Prompt Payment Act passed by the federal government ensures that valid and proper invoices submitted by vendors are paid on time by federal agencies
  - 5 CFR Part 1315

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Modifying Government Contracts

- 3/27/2020 - CARES Act signed into law
- The CARES Act authorizes federal agencies to modify government contracts with contractors whose employees cannot perform services at federally approved sites
- Agencies are allowed to amend contracts, without consideration, to require the government to reimburse family or sick leave paid between January 1, 2020 and September 30, 2020
- Contractors must work with the specific agency to obtain relief as it is within the federal agency's discretion

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Government Bidding Issues

- Pre-bid Meetings
- Submission Deadlines
- Bid Openings
- Evaluation Committee Meetings
- Staff Reviews
- Sunshine Laws
- Public Records
- Performance Deadlines

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Government Bidding Emergencies

- Emergency Powers (Broward County, Florida Code, 21.39)
  - Emergency means a threat to public health, welfare, safety, property or other substantial loss to the County
  - All emergency procurements shall be made with such competition as is practical under the circumstances. The department director, or the director's designee, for the division requesting the emergency shall provide, prior to the issuance of a purchase order, a written account of the emergency detailing the complete circumstances of the emergency situation and the probable consequences if an emergency procedure is not instituted.
  - If other than a low vendor is selected, there shall be a written determination by the Director of Purchasing or the Director's designee in the contract file as to why the mathematically low vendor was not selected.

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Bidding - Emergencies

- "In cases of extreme emergency: (1) caused by enemy attack, sabotage or other such hostile actions or (2) resulting from an imminent security threat explosion, fire, flood, earthquake, hurricane, tornado or other such catastrophe, an awarding authority may, without competitive bids and notwithstanding any general or special law, award contracts otherwise subject to this subsection to perform work and to purchase or rent materials and equipment, all as may be necessary for temporary repair and restoration to service of any and all public work in order to preserve the health and safety of persons or property; provided, that this exception shall not apply to any permanent reconstruction, alteration, remodeling or repair of any public work.“ (Massachusetts G.L. c. 30, sec. 39M)

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The Novel Coronavirus' Impact on Government Contractors

As state and local governments scale back a myriad of services, some by mandated government orders and others by the force of circumstances, contractors are and will continue to be significantly impacted.

by Mark Stempler

Government contractors are a significant sector of the economy grappling with the devastating impact of COVID-19, the novel coronavirus. As state and local governments scale back a myriad of services, some by mandated government orders and others by the force of circumstances, contractors are and will continue to be significantly impacted. In the balance are hundreds of millions of dollars of public projects and revenues, from construction and design projects, to public transportation services, and to providers of all types of goods and services used by government agencies.

Key issues have and will continue to arise from the difficult decisions government agencies face, including: Can the contract be terminated, and under what circumstances? What happens to work in progress? What happens to orders from goods that may no longer been needed in the immediate future? What costs and expenses will the contractor be entitled to?

First, many government contracts contain termination provisions. The circumstances which allow for termination vary by contract. Generally, government contracts can be terminated for cause, or terminated for convenience. Termination for cause typically refers to a specific material breach of the contract. For instance, a failure of performance, an inability to deliver goods or services timely, or lack of adequate manpower.

Some contracts will describe the types of material breaches which may result in termination for cause. Contract may require a notice provision to alert a contractor it is in breach and allow for a time period in which a contractor can cure the purported breach. If the breach is cured, termination may be prevented.

Mark J. Stempler shareholder with Becker & Poliakoff.

In contrast, a termination for convenience clause generally gives a party the right to terminate the contract without cause, even if the other party does not breach the agreement. Such clauses can be exercised in times of emergency, such as the one we are facing now. Written notice from the agency to the contractor may still be required, as well as a time period to allow the contractor to demobilize or wind-down from the project.

It is important to determine who or what within a govern-

ment agency has the power to terminate a contract. Such decision-making power might be vested in the governing body, like a board of commissioners, or with a purchasing director depending on the monetary threshold. In times of emergency like, this, the power may shift to someone like a county or city administrator. This will depend on what is provided for in a contract, a local code, the agency's rules, or in emergency orders issues by the state or local government agency.

If the contract is terminated, contractors will need to determine what costs and other compensation they are entitled to. Costs incurred in a services contract may run through the date of actual termination following a notice period. Whether a contractor will be entitled to costs such as overhead for a space they were required to lease, or for administrative costs incurred in furloughing or laying off employees, may depend on specific contractual terms. It is critical for contractors to properly document costs now even if the government agency has not taken emergency action. If costs cannot be proven with a reasonably degree of certainty, the contractor may be forced to incur them even for a government-mandated work stoppage.

In Florida, issues like force majeure, impossibility of performance, and frustration of purpose are generally recognized defenses to nonperformance of a contract or render a contract unenforceable. A force majeure clause may excuse a party's performance or obligations under a contractual duty due to circumstances beyond the control of either party. The triggering event often includes an "act of God," which is an unpreventable event caused by forces of nature. Whether a force majeure clause can be triggered by the coronavirus outbreak will depend on the specific language in the contract.

If there is no force majeure clause in the contract, or even if the coronavirus does not constitute a force majeure under the contract, "impossibility of performance" can discharge a party from performing a contractual obligation which cannot be performed due to circumstances. This concept is raised when the facts making performance impossible were not known to the parties at the time the contract was entered, and neither party assumed the risk of impossibility nor could they have acted to prevent the event rendering the performance impossible. For example, it may be impossible to provide certain services to a state college if its campus is shut down.

"Frustration of purpose" is different, and typically refers to a condition surrounding the contracting parties where one of the parties finds that the purposes bargained for, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party.

These concepts are not limitless, however. Courts are reluctant to excuse performance that is not impossible but merely inconvenient or profitless. For instance, just because a government agency may not have the funds readily available to pay for goods or services or does not want them in the time contemplated in a contract, will not automatically prove frustration or impossibility under the law.

Government contractors who experience losses because they cannot meet their obligations due to the coronavirus should also consider relief through insurance coverage. Some insurance policies may cover force majeure or other similar circumstances, and a contractor's specific policy terms should be carefully evaluated.

The coronavirus is having an unprecedented impact on modern society, the economy and governmental functions. Government contractors must know their contractual rights and take steps to prepare for the challenges this viral threat poses.

Mark Stempler *is a shareholder with Becker in West Palm Beach practicing government procurement law and construction and civil litigation. Contact him at mstempler@beckerlawyers.com*

464 So.2d 1267
District Court of Appeal of Florida,
Third District.

VALENCIA CENTER, INC.,
a corporation, Appellant,
v.
PUBLIX SUPER MARKETS,
INC., a corporation, Appellee.

No. 84–1731.
|
Feb. 26, 1985.
|
Rehearing Denied March 25, 1985.

Synopsis

Tenant brought action against landlord on issue of employee parking entitlement under lease and landlord counterclaimed seeking declaratory judgment on whether lease was enforceable and which party was responsible for paying ad valorem taxes. The Circuit Court, Dade County, Milton A. Friedman, J., granted summary judgment to tenant on its claim, dismissed with prejudice two counterclaims of landlord and transferred venue of third back to county in which it originally was brought, and landlord appealed. The District Court of Appeal, Jorgenson, J., held that: (1) landlord was required to pay ad valorem taxes in absence of lease provisions to contrary; (2) landlord could not be released from lease under doctrine of commercial frustration; (3) landlord could not be released under doctrine of impossibility of performance; and (4) transfer of venue of counterclaim back to county in which it had originally been brought was improper.

Affirmed in part, reversed in part and remanded for further proceedings.

West Headnotes (7)

[1] **Landlord and Tenant** Liabilities for taxes and assessments

Generally, tenant has no duty to pay taxes or assessments on property in absence of an express provision in lease to the contrary.

[2] **Landlord and Tenant** Liabilities for taxes and assessments

Landlord was required to pay taxes on property, although payment may have been a hardship, since court cannot rewrite lease to alter tax liability where lease was silent.

[3] **Contracts** Discharge by Impossibility of Performance

Doctrine of commercial frustration is limited to cases when performance is possible but an alleged frustration, which was not foreseeable, totally or nearly totally destroys purpose of agreement.

7 Cases that cite this headnote

[4] **Landlord and Tenant** Liabilities for taxes and assessments

Payment of ad valorem taxes by landlord was not precluded by commercial frustration, although landlord's intention of making a profit may have been frustrated by tax increase where property could still be used for rental, purpose of lease.

2 Cases that cite this headnote

[5] **Landlord and Tenant** Excuses

Although impossibility of performance can include extreme impracticability of performance, courts are reluctant to excuse performance that is not impossible but merely inconvenient, profitless, and expensive to landlord.

8 Cases that cite this headnote

[6] **Landlord and Tenant** Liabilities for taxes and assessments

Doctrine of impossibility of performance did not release landlord from agreement, although taxes had increased, since performance was not impossible but merely resulted in feelings of financial frustration.

4 Cases that cite this headnote

[7] **Venue** Second or subsequent change

Trial court erred in transferring venue from county to which it had been transferred back to county where action was originally brought, since even if venue initially had been proper in original county, statute prohibited transferring it back. West's F.S.A. § 47.131.

1 Cases that cite this headnote

Attorneys and Law Firms

***1268** Holland, Starling & Severs and Kenneth Friedland, Titusville, for appellant.

Hahn, Breathitt & Watson and James Hahn, Lakeland, Fla., for appellee.

Before BARKDULL, BASKIN and JORGENSON, JJ.

Opinion

JORGENSON, Judge.

Valencia Center, Inc. (Valencia), the lessor and defendant below, appeals a final order (1) dismissing with prejudice its counterclaims seeking declaratory judgment on whether the lease is enforceable (count I) and which party is responsible for paying the ad valorem taxes (count II); and (2) granting summary judgment to Publix Super Markets, Inc. (Publix), the lessee and plaintiff below, on the issue of employee parking entitlement under the lease. Valencia also appeals the non-final order transferring venue of count III of its amended counterclaim (which sought to determine Valencia's rights to build over and above the existing rental units with the exception of the Publix unit) back to Polk County, where this action began. We affirm in part and reverse in part.

***1269** Valencia argues that its lease with Publix, which began in 1963 and, with options, runs until 2001, should no longer be enforceable under the doctrine of commercial frustration and/or impossibility. The current property appraisal, based upon market evidence of the present highest and best use for the parcel (a site for a high-rise complex), was approved by this court in *Bystrom v. Valencia Center, Inc.,* 432 So.2d 108 (Fla. 3d DCA 1983), *pet. for rev. denied,* 444 So.2d 418 (Fla.1984). Valencia's taxes (on the portion occupied by Publix) are up from $14,728.28 in 1963, when appraised as a shopping center, to $188,048.48 in 1983 under the new appraisal. Valencia contends that payment of the increased tax creates an incapacitating burden upon it and, further, that the purpose for which it entered the lease agreement is frustrated since, at the time the lease was made, Valencia could not foresee the new method of appraisal and subsequent tax leap.

[1] **[2]** The lease between Valencia and Publix is silent on the matter of payment of taxes. The general rule is that a lessee has no duty to pay taxes or assessments on the property in the absence of an express provision in the lease to the contrary. Annot., 48 A.L.R.3d 287 (1973); Annot., 86 A.L.R.2d 670 (1962); *cf. Oven v. Dawirs,* 419 So.2d 1186 (Fla. 1st DCA 1982) (where commercial lease silent as to payment of rental tax, lessor has burden of payment). Even though such payment may be a hardship for Valencia, the court cannot rewrite the lease to alter the tax liability. *Cf. Thompson v. First National Bank of Hollywood,* 321 So.2d 466 (Fla. 4th DCA 1975) (in absence of express agreement to impose such liability on lessee, burden to pay special assessment for improvement to lessee's property falls upon lessor). Valencia, the lessor, is obliged to pay the tax.

[3] **[4]** Neither the doctrine of commercial frustration nor the doctrine of impossibility apply to release Valencia from the lease agreement. These doctrines are similar, but distinct. *Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.,* 174 So.2d 614, 617 (Fla. 2d DCA), *cert. denied,* 180 So.2d 656 (Fla.1965); *Howard v. Nicholson,* 556 S.W.2d 477, 482 (Mo.Ct.App.1977). The doctrine of commercial frustration is limited to cases where performance is possible but an alleged frustration, which was not foreseeable, totally or nearly totally destroyed the purpose of the agreement, *Lloyd v. Murphy,* 25 Cal.2d 48, 153 P.2d 47 (1944) (lessee's obligation continues where risk of war and consequent limitation made business unprofitable but not impossible); that is not the case here. "Generally speaking, the courts have been careful not to find commercial frustration if it would only result in allowing a party to withdraw from a poor bargain," *Perry v. Champlain Oil Co.,* 101 N.H. 97, 98, 134 A.2d 65, 67 (1957). Valencia's *intent* when it entered the lease was to make a profit, an intention frustrated by the tax rise; however, Valencia's property can still be used for rental, the *purpose* of the lease. *See Megan v. Updike Grain Corp.,* 94 F.2d 551 (8th Cir.1938), *cert. dismissed,* 305 U.S. 663, 58 S.Ct. 1062, 83 L.Ed. 430 (1938) (lessee must continue to pay rent where

object of contract, use of grain elevator, possible but tariff rise, anticipated when lease renewed, made use unprofitable); *Lee v. Bowlerama Enterprises, Inc.,* 368 So.2d 913 (Fla. 3d DCA 1979) (doctrine of economic frustration and doctrine of impossibility unavailable to void lessee's purchase contract where zoning change modified but did not negate proposed use of property under lease).

[5] **[6]** Although impossibility of performance can include extreme impracticability of performance, courts are reluctant to excuse performance that is not impossible but merely inconvenient, profitless, and expensive to the lessor. *See Acme Markets, Inc. v. Dawson Enterprises, Inc.,* 253 Md. 76, 251 A.2d 839 (1969); *cf. Frazier v. Collins,* 300 Ky. 18, 187 S.W.2d 816 (1945) (lessee remains obligated under lease though contract rendered unprofitable by supervening government wartime regulations). A natural extension to the observation that "nothing is certain but death and ***1270** taxes," is that "it is certain that taxes will rise." *See Gulfstream Park Racing Association v. State, Department of Business Regulation,* 443 So.2d 113, 114 n. 1 (Fla. 3d DCA), *approved,* 441 So.2d 627 (Fla.1983). In sum, feelings of financial frustration do not necessarily equate to findings of frustration or impossibility under the law.

Publix filed this action in Polk County and Valencia, the defendant, then asserted its rights under section 47.011, Florida Statutes (1983), to transfer venue to either Brevard County, its principal place of business, or Dade County, where the property is located. The Polk County Circuit Court order transferring venue to Dade County or Brevard County was affirmed on appeal. *Publix Super Markets, Inc. v. Valencia Center, Inc.,* 440 So.2d 361 (Fla. 2d DCA 1983).

[7] We concur with our sister court that venue was improper in Polk County. Therefore, the trial court erred in transferring venue of count III of Valencia's counterclaim from Dade County back to Polk County, and we reverse that portion of the order.

Even if venue initially had been proper in Polk County, a second change of venue transferring this case back to Polk County is prohibited under section 47.131, Florida Statutes (1983). *See Bingham v. Manson,* 363 So.2d 370 (Fla. 1st DCA 1978).

We agree with the lower court that the lease adequately addressed the issue of employee parking and that, under the lease, Publix is entitled to a reasonable number of parking spaces (determined to be twenty) in a location Valencia selects.

Affirmed in part, reversed in part, and remanded for further proceedings.

All Citations

464 So.2d 1267, 10 Fla. L. Weekly 527

Code of Federal Regulations
Title 48. Federal Acquisition Regulations System
Chapter 1. Federal Acquisition Regulation
Subchapter H. Clauses and Forms
Part 52. Solicitation Provisions and Contract Clauses (Refs & Annos)
Subpart 52.2. Texts of Provisions and Clauses

48 C.F.R. 52.249–14

52.249–14 Excusable Delays.

Effective: June 14, 2007
Currentness

As prescribed in 49.505(b), insert the following clause in solicitations and contracts for supplies, services, construction, and research and development on a fee basis whenever a cost-reimbursement contract is contemplated. Also insert the clause in time-and-material contracts, and labor-hour contracts. When used in construction contracts, substitute the words "completion time" for "delivery schedule" in the last sentence of the clause.

Excusable Delays (APR 1984)

(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. Default includes failure to make progress in the work so as to endanger performance.

(b) If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be deemed to be in default, unless—

(1) The subcontracted supplies or services were obtainable from other sources;

(2) The Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and

(3) The Contractor failed to comply reasonably with this order.

(c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised, subject to the rights of the Government under the termination clause of this contract.

(End of clause)

Credits
[72 FR 27394, May 15, 2007]

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

Current through April 16, 2020, 85 FR 21305.

End of Document

174 So.2d 614
District Court of Appeal of Florida, Second District.

CROWN ICE MACHINE LEASING COMPANY, a Michigan corporation, Appellant,
v.
SAM SENTER FARMS, INC., a Florida corporation, Sam Senter, and James Talcott, Inc., a New York corporation, Appellees.

No. 4656.
|
March 31, 1965.
|
Rehearing Denied May 11, 1965.

Synopsis

Suit for rescission of contract for sale of 'snow ice' to be manufactured by defendant for plaintiff in ice making machinery maintained by defendant in plaintiff's fresh vegetable packing house . The defendant filed a counterclaim. The Circuit Court for Palm Beach County, Culver Smith, J., rescinded and concelled the contract and denied any relief to defendant on its counterclaim, and the defendant appealed. The District Court of Appeal, Driver, B. J., Associate Judge, held that the contract was properly rescinded where plaintiff had been induced to enter into contract through misrepresentation that defendant could and would furnish all ice required by plaintiff as needed and machinery installed by defendant was not capable of fulfilling these needs.

Affirmed.

West Headnotes (8)

[1] **Equity** Grounds

Chancellor who found some equity complaint properly denied motion to dismiss complaint for failure to state cause of action for rescission of contract for sale of "snow ice" manufactured by defendant for plaintiff.

5 Cases that cite this headnote

[2] **Cancellation of Instruments** Bill, Complaint, or Petition

The fundamental requirements to state cause of action for rescission or cancellation of contract are: (1) character or relationship of parties, (2) the making of contract, (3) existence of fraud, mutual mistake, false representations, impossibility of performance, or other ground, (4) rescission by one party and notification thereof to other party, (5) offer to restore any benefits received from contract, and (6) inadequacy of remedy at law.

44 Cases that cite this headnote

[3] **Contracts** Grounds for Rescission by Party

The two theories of "impossibility of performance" and "frustration of purpose" as grounds for rescission of contract are distinct; the first theory refers to those factual situations where purposes for which contract was made have, on one side, become impossible to perform; the second theory refers to that condition surrounding contracting parties where one of parties finds that purposes for which he bargains, and which purposes were known to the other party, have been frustrated because of failure of consideration or impossibility of performance by the other party.

31 Cases that cite this headnote

[4] **Sales** Rescission

Complaint sufficiently alleged impossibility of performance or frustration of purpose as grounds for rescission of contract for sale of 'snow ice' manufactured by defendant for plaintiff in ice making machinery maintained by defendant in plaintiff's fresh vegetable packing house, because machinery was not capable of fulfilling plaintiff's needs.

4 Cases that cite this headnote

[5] **Sales** Rescission

Complaint for rescission of contract for sale of "snow ice" manufactured by defendant for

plaintiff in ice making machinery maintained by defendant in plaintiff's fresh vegetable packing house was not required to allege offer by plaintiff to restore benefits, where defendant had removed machinery and leased it to another and had been compensated for all ice delivered to plaintiff.

5 Cases that cite this headnote

[6] **Sales** Rescission in general

The evidence, in suit for rescission of contract for sale of "snow ice" manufactured by defendant for plaintiff in ice making machinery maintained by defendant in plaintiff's fresh vegetable packing house, supported chancellor's finding that defendant assured plaintiff that the machinery would furnish all of ice needed by plaintiff when needed and that machinery installed was incapable of filling plaintiff's needs.

[7] **Sales** Right to Rescind; Grounds

Contract for sale of "snow ice" manufactured by defendant for plaintiff in ice making machinery maintained by defendant in plaintiff's fresh vegetable packing house was properly rescinded on basis of impossibility of performance or frustration of purpose, where plaintiff had been induced to enter into contract through misrepresentation that defendant could and would furnish all ice required by plaintiff as needed and machinery installed by defendant was not capable of fulfilling these needs.

5 Cases that cite this headnote

[8] **Contracts** Grounds for Rescission by Party

In questions of rescission or cancellation of contract upon theory of impossibility of performance, the courts applied pragmatic test that good intentions or laudable motive are immaterial, and results of performance are controlling.

7 Cases that cite this headnote

Attorneys and Law Firms

***615** Sullivan & Robinson, West Palm Beach, for appellant.

Gibson, Gibson & Reese, West Palm Beach, for appellees.

Opinion

DRIVER, B. J., Associate Judge.

Appellant, Crown Ice Machine Leasing Company, a corporation, appeals from a Final Decree entered by the Circuit Court of Palm Beach County, Florida, rescinding and cancelling a written contract between it and Sam Senter Farms, Inc., a corporation. ***616** Appellant was defendant and appellee was plaintiff below. Appellant will hereafter be referred to as 'Crown Ice' and appellee as 'Farms.'

The Record on Appeal reflects a complex pleading structure and an involved factual background. However, only so much of the pleadings and facts as are necessary to this Opinion will be recited.

Farms owns in Belle Glade, Florida, a packing house, where it prepares large volumes of fresh vegetables for shipment in carload lots. Crown Ice is a corporation engaged in the furnishing of ice and ice-making equipment to commercial users of ice. The two corporations, through their respective officers, Sam Senter, individually for Farms, and a Mr. Stella, for Crown Ice, during the summer and early fall of 1959, entered into negotiations, which led to a contract between the two corporations, whereby Crown Ice installed in Farms' packing house an ice-making machine designed to produce 'snow ice,' which was a type of ice required in Farms' operations. In exchange for the use of the ice-making equipment, Farms was to pay rental of $30,000 per year.

Shortly after the ice-making equipment was installed, disputes arose because of the failure of the ice machine to operate properly or to fulfill the purposes for which Farms had contracted. Consequently, upon the alleged failure of the machinery to operate, Farms refused to make the rental payments, and litigation ensued. However, this litigation was settled when the parties entered into a 'substitute contract' dated June 29, 1961.

This latter contract of 1961 cancelled out the previous contract between the parties and released the parties from their obligations thereunder, with the proviso, however, that, if Farms should default in the 1961 contract, then the parties

would revert to their status under the previous contract, which had been dated October 24, 1959.

Under the new or substitute contract, it was agreed that Crown Ice would take over the actual operation of the ice-making equipment already installed by Crown Ice at Farms' packing house, and Crown Ice would maintain and operate the machinery. Farms agreed to make facilities available for the ice-making equipment and to give Crown Ice the right to repair existing equipment and to install additional equipment as might be necessary. Farms further agreed to purchase the total ice-making capacity of the equipment from October 1st through June 30th of each year of the term of the agreement, paying $8 per ton for the ice purchased.

Under this agreement, Crown Ice took over the operation of the ice plant and installed additional equipment, including the equipment necessary to deliver the snow ice from the ice-making machine itself to where it was needed in the freight cars and trucks loaded at Farms' packing house. The record shows that even after efforts were made to correct the deficiencies in the operation of the ice-making and loading equipment, Farms complained that the equipment was not fulfilling the purpose for which it (Farms) had contracted. Crown Ice thereupon installed additional equipment in an effort to satisfy Farms' complaints. It is disputed as to whether or not the latter efforts of Crown Ice were effective. However, the Chancellor apparently found that they were not. This finding of the Chancellor is binding upon this Court.

On March 26, 1962, Farms notified Crown Ice that it would purchase no more ice from Crown Ice, and directed that the equipment of Crown Ice be removed from Farms' packing house. Crown Ice disputed Farms' action in rescinding the contract, charging that Farms had not purchased all of the ice produced by Crown Ice's icing equipment, and asserting Crown Ice's ability to fulfill the contract. However, the ice-making equipment was, in due time, removed by Crown Ice and leased to Swift & Company in Gainesville, Georgia. Farms, after notifying Crown Ice of its action, ***617** then filed suit to rescind and cancel the contract, alleging, in substance, that Farms had been induced to enter into the contract through misrepresentations that Crown could and would furnish all the ice required by Farms as needed, and alleging further that it was impossible for Crown Ice to perform in the manner to which it had agreed. Crown Ice answered the complaint and counterclaimed for damages against Sam Senter Farms, Inc., the appellee corporation, and against Sam Senter individually, as guarantor. The trial court, after taking volumes of testimony, on final hearing rescinded and cancelled the contract, as prayed for by Farms, and denied to Crown Ice any relief on its counterclaim. It is this Order that is appealed from.

Appellant assigned numerous errors as grounds for reversal. However, these are all encompassed in the two questions posed and argued in appellant's brief.

[1] As to the first of these, Crown Ice contends that the complaint should have been dismissed for failure to state a cause of action in that (a) it failed to allege any misrepresentation of a material fact; and (b) the complaint was fatally defective in not alleging an offer to restore Crown Ice to its original position. We shall first take up this attack on the ruling of the Chancellor in sustaining the complaint. The Chancellor in his decree found some equity in the complaint and, therefore, properly denied the motion to dismiss. We agree with the Chancellor.

[2] The fundamental requirements necessary to state a cause of action for rescission or cancellation of a contract are:

(1) The character or relationship of the parties;

(2) The making of the contract;

(3) The existence of fraud, mutual mistake, false representations, impossibility of performance, or other ground for rescission or cancellation;

(4) That the party seeking rescission has rescinded the contract and notified the other party to the contract of such rescission.

(5) If the moving party has received benefits from the contract, he should further allege an offer to restore these benefits to the party furnishing them, if restoration is possible.

(6) Lastly, that the moving party has no adequate remedy at law.

These minimum fundamental requirements were met by Farms in its original complaint, even though there was no allegation to restore Crown Ice to its original position. This was not necessary for the reason that, under the other allegations of the complaint, it was averred that Farms owed no further duty to Crown Ice, and that it (Farms) had received no benefits for which it still owed Crown Ice.

[3] **[4]** Concededly, the original complaint could have been more explicit in its allegations, but, reading the complaint as a whole, it alleges sufficient facts, which, if

proved, would entitle Farms to rescission or cancellation of the contract under the theories of 'impossibility of performance' or 'frustration of purpose.' These two theories of 'impossibility of performance' or 'frustration of purpose,' while theoretically distinct, are often confused by the courts and textbook writers in applying them. (Corbin on Contracts, Vol. 6, § 1353.) The complaint would have entitled Farms to seek relief under either one of these theories. 'Impossibility of performance' refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform. 'Frustration of purpose' refers to that condition surrounding the contracting parties where one of the parties finds that the purposes for which he bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party. (Corbin on Contracts, ***618** supra; 13 Corpus Juris—Contracts, Sections 708, 709 and 710; 17A C.J.S. Contracts §§ 461, 462.)

Farms in its complaint averred that it had entered into the contract for the purpose of having a readily available supply of ice; that Crown Ice was aware of Farms' needs, and induced Farms to enter into the contract upon the representation that Crown Ice, through its equipment installed at Farms' packing house, could and would supply this need. The complaint further averred that with the equipment for which the parties contracted Crown Ice could not possibly fulfill its bargain, and that, consequently, Farms alleged implicitly although not explicitly that its purpose in making the contract had been frustrated, and it was entitled to be discharged from its obligations.

[5] Crown Ice, as defendant-counter-claimant below, contended that it should be made whole for its expenses and costs incurred in installing the equipment in Farms' packing house, as well as loss of profit from the contract, and that the complaint was infirm for not alleging an offer to restore or make whole Crown Ice, citing as authority Willis v. Fowler, 102 Fla. 35, 136 So. 358; Pryor v. Oak Ridge Development Corporation, 97 Fla. 1085, 119 So. 326; and Columbus Hotel Corporation v. Hotel Management Company, 116 Fla. 464, 156 So. 893.

We aree with the Chancellor that the principles laid down in the above cited cases are not applicable herein. In each of the cases cited the party seeking rescission was, at the very time it sought rescission, in receipt of tangible benefits from its adversary, for which the adverse party had not been compensated. This is not so in the case at bar, since the only thing Farms had agreed to do was to purchase the ice from Crown Ice, and not the equipment to make that ice. And further, that Crown Ice had been compensated for all ice delivered to Farms. To require Farms to allege anything further in its complaint would require the Court to go further than construing the contract and, in effect, would constitute writing into the contract a duty on Farms to purchase the ice-making equipment, or pay for ice, which it had never received. The former could not be, for the reason that Crown Ice still has its equipment, for which it is collecting rents from Swift & Company, and certainly the latter ought not be required, since it would constitute payment of a penalty, and unjustly enrich Crown Ice by requiring Farms to pay Crown Ice for ice which it had never received. (Poinsettia Dairy Products v. Wessel, 123 Fla. 120, 166 So. 306, 104 A.L.R. 216.)

We now proceed to the second point raised by appellant; that is, that, if Crown Ice had made any misrepresentations to Farms to induce Farms to enter into the contract, these misrepresentations were in the nature of a promise to do something in the future, and, as such, insufficient to support an action for rescission and cancellation of contract.

[6] Farms, in its complaint, alleged that Crown Ice was fully aware of the requirements of the vegetable-processing business and of the need for having ice immediately available when required, and that Farms was induced to contract with Crown Ice only after being assured that Crown Ice, with the equipment installed and maintained on Farms' premises, would furnish all of the ice needed by Farms when needed. Implicit in the Chancellor's finding is that this inducement was made by Crown Ice and that the equipment installed by Crown Ice was not capable of fulfilling the needs of Farms. There is ample evidence in the record to sustain this finding by the Chancellor.

[7] Under these circumstances, having found impossibility of performance on the part of Crown Ice, with the consequent frustration of Farms' purposes in making the contract, the learned Chancellor had no alternative but to find for Farms and against Crown Ice. (13 Corpus Juris—Contracts, Secs. 708, 709, 710, pp. 638, 639; 17A.C.J.S. Contracts §§ 461, 462.)

***619** **[8]** Appellant argues that Crown Ice, in good faith, endeavored to fulfill its contract. We find this argument to be without merit for the reason that in questions of rescission or cancellation of contract, upon the theory of impossibility of performance, the courts have applied the pragmatic test that good intentions or laudable motive are immaterial, and the

results of performance are controlling. 7 (Fla. Jurisprudence —Contracts, Secs. 149, 175; Bacon v. Green, 36 Fla. 325, 18 So. 870.)

Our affirmance of the correctness of the lower court's ruling, granting the rescission and cancellation of the contract, makes unnecessary discussion of appellant's contention that, Farms having defaulted under the 1961 substituted contract, the parties revert to their positions under the October 1959 contract.

For the foregoing reasons, the decree appealed from is affirmed.

ALLEN, Acting C. J., and SHANNON, J., concur.

All Citations

174 So.2d 614

KeyCite Yellow Flag - Negative Treatment
Distinguished by Vila & Son Landscaping Corp. v. Posen Const., Inc., Fla.App. 2 Dist., September 19, 2012

297 F.3d 1270
United States Court of Appeals,
Eleventh Circuit.

HARRIS CORPORATION, Plaintiff–Counter–Defendant–Appellant–Cross–Appellee,
v.
GIESTING & ASSOCIATES, INC., Defendant–Counter–Claimant–Appellee–Cross–Appellant.

No. 01–13749.
|
July 17, 2002.

Synopsis

Sales contractor sued manufacturer after manufacturer terminated sales representative agreement, asserting claims for breach of contract and violation of state commission statutes. The United States District Court for the Middle District of Florida, No. 98-01363- CV-ORL, David A. Baker, United States Magistrate Judge, entered judgment on jury verdict for contractor, and manufacturer appealed. The Court of Appeals held that: (1) contract's termination for convenience clause unambiguously gave manufacturer right to terminate without cause, foreclosing extrinsic evidence; (2) manufacturer was not entitled to jury instruction requiring clear and convincing proof for statutory exemplary damages; and (3) damages for improperly reducing commissions during contract term were calculated up to date of termination for convenience only.

Affirmed in part, vacated in part, and remanded.

West Headnotes (6)

[1] **Evidence** Contracts of Employment
Principal and Agent Revocation by Principal

Under Florida law, clause in sales representative contract between two sophisticated private parties, manufacturer and sales contractor, stating that either party "may terminate ... for convenience at any time upon sixty days written notice" unambiguously permitted manufacturer to terminate without cause, foreclosing consideration of extrinsic evidence in contractor's breach of contract action; clause controlled regardless of fact that manufacturer had refused contractor's request that clause be removed, and regardless of fact that contractor had successfully negotiated clause's removal from one of parties' previous agreements.

6 Cases that cite this headnote

[2] **Contracts** Option to Renew or Terminate Contract

In general, termination for convenience clause permits one party to terminate contract, even in absence of fault or breach by other party, without suffering usual financial consequences of breach of contract.

6 Cases that cite this headnote

[3] **Contracts** Option to Renew or Terminate Contract

Termination for convenience clause may not be used to shield terminating party from liability for bad faith or fraud.

5 Cases that cite this headnote

[4] **Principal and Agent** Remedies

Under Alabama commission statute, manufacturer that terminated sales representative agreement and was sued by sales contractor for failure to promptly pay commissions was not entitled to jury instruction that exemplary damages required clear and convincing proof; statute provided for automatic trebling of damages upon finding of unpaid commissions. Ala.Code 1975, § 8–24–3.

[5] **Principal and Agent** Measure and Amount of Damages

Under Florida law, where manufacturer properly terminated sales representative agreement under termination for convenience clause before date when agreement would otherwise have expired,

but improperly reduced commissions prior to effective date of early termination, damages for breach were calculated up to date of valid early termination, not all the way to expiration date.

2 Cases that cite this headnote

[6] Implied and Constructive Contracts Amount of Recovery

Under Florida law, even if sales contractor could establish right to unjust enrichment damages from manufacturer based on unenforceable side agreement calling for higher commissions on certain product line than provided for in parties' main agreement, contractor was entitled only to reasonable value of labor performed and market value of any furnished materials, not benefit-of-bargain damages in amount that contractor would have had if contract had been enforced.

4 Cases that cite this headnote

Attorneys and Law Firms

***1271** Alexandre de Gramont, Jerome A. Murphy, Crowell & Moring, Washington, DC, for Harris Corp.

Steven D. Kelley, Lindquist & Vennum, P.L.L.P., Minneapolis, MN, Douglas C. Spears, Adams & Spears, PA, Orlando, FL, for Giesting & Associates, Inc.

Appeals from the United States District Court for the Middle District of Florida.

Before TJOFLAT, RONEY and COX, Circuit Judges.

Opinion

PER CURIAM:

Harris Corporation ("Harris"), a semiconductor devices and systems manufacturer, appeals in three aspects a judgment based on a jury verdict in favor of Giesting & Associates, Inc. ("Giesting") for breach of the sales representative agreement between the two. Giesting cross-appeals on three issues. The jury verdict, answering special interrogatories, assessed damages in three different categories. The district court entered a lump sum judgment in the amount of $748,336 plus prejudgment interest of $83,505.33. A separate judgment was entered against Harris for attorney's fees in the amount of $30,000. We vacate the judgment for damages and remand for further proceedings. We affirm the judgment for attorney's fees.

Giesting made the following claims against Harris which were presented to the jury:

(1) *Harris unlawfully terminated their sales representative agreement.* The jury found that Harris improperly terminated the contract and awarded damages of $417,664. We reverse this part of the judgment because the contract's "termination for convenience" language was unambiguous and the district court improperly admitted extrinsic evidence to effectively strike the clause from the contract. Without this extrinsic evidence there would have been an insufficient basis for a breach of contract claim based upon Harris' termination for convenience.

(2) *Harris violated applicable state statutes which require prompt payment of commissions upon termination and impose penalties for failure to do so.* The jury found that Harris violated the state commission statutes of Alabama, Georgia, Indiana, and Michigan, and awarded damages under these statutes of $122,046. We affirm this portion of the judgment.

(3) *Harris failed to pay commissions and other amounts that were due to Giesting under the agreement for work done prior to the termination date.* The jury found that Harris breached the agreement by improperly reducing commissions, awarding damages of $208,626. Harris does not appeal its liability for having improperly reduced the commissions, but contends the amount is based on an incorrect termination date and thus incorrect. We agree and vacate this portion of the judgment and remand for recalculation based on the agreement's proper termination date.

On cross-appeal, Giesting claimed that the district erred by denying its motion for ***1272** new trial which was based upon (1) Giesting's breach of contract claim on the J1850 product line; and (2) Giesting's unjust enrichment claim. Giesting also claims that the district court improperly limited Giesting's attorney's fees to $30,000 out of the $343,359 Giesting requested.

Harris Corporation, which manufactured and sold semiconductors, entered into a sales representative agreement, effective July 1, 1997, with Giesting &

Associates, Inc., whereby Giesting would be compensated through commissions on sales of Harris products. This was a non-exclusive contract and Harris had sales representative agreements with other firms. This 1997 agreement was preceded by five previous agreements over a period of ten years. They set forth in detail the parties' relationship. With one exception, they all contained a termination—for-convenience clause discussed below.

In 1998, because of a severe downturn in the semiconductor industry and based on economic conditions and business considerations, Harris decided to terminate its sales representative agreement with Giesting and a number of other sales representative firms. In a jury trial, the district court concluded that the termination-for-convenience clause was ambiguous and allowed extrinsic evidence that, in effect, allowed the jury to disregard this provision of the contract and decide that Harris had improperly terminated the contract.

We discuss each of the points raised by appellant Harris *seriatim,* but note that it is only the decision on the first issue that sets a precedent in this circuit and merits publication.

I. *Harris unlawfully terminated the sales representative agreement it had with Giesting.*

[1] The central issue is whether the "termination for convenience" section in the contract was sufficiently ambiguous for the district court to allow extrinsic evidence to effectively strike the section. The relevant portions of the contract read as follows:

> Harris or Representative may terminate this Agreement for convenience at any time upon sixty (60) days written notice to the other....
>
> Harris may also terminate this Agreement for default in the event Representative:
>
> (i) Fails to perform any material obligation required by this Agreement;
>
> (ii) Makes an assignment for the benefit of creditors or a trustee in bankruptcy, or a receiver is appointed;
>
> (iii) Submits any false or fraudulent reports or statements concerning Harris or its Products to any Customer, the Government, or to Harris;
>
> (iv) Violates any applicable federal or state law or regulation, including the export administration and control laws and regulations of the United States or any amendments thereto.

We review *de novo* whether a contract's language is ambiguous. *Hopkins v. BP Oil, Inc.,* 81 F.3d 1070, 1074 (11th Cir.1996) (citing *Dunkin' Donuts of Am., Inc. v. Minerva, Inc.,* 956 F.2d 1566, 1573 (11th Cir.1992)).

[2] **[3]** The district court erred in finding that the contract was ambiguous and permitting parol evidence. The general rule is that "termination for convenience" clauses permit one party to terminate a contract, even in the absence of fault or breach by the other party, without suffering the usual financial consequences of breach of contract. *See generally Stock Equip. Co. v. Tenn. Valley Auth.,* 906 F.2d 583 (11th Cir.1990). Termination for convenience clauses may not be used to shield ***1273** the terminating party from liability for bad faith or fraud. *T & M Distribs., Inc. v. United States,* 185 F.3d 1279, 1283 (Fed.Cir.1999). A "party who willingly and without protest enters into a contract with knowledge of the other party's interpretation is bound by such interpretation and cannot later claim that it thought something else was meant." *Perry & Wallis v. United States,* 192 Ct.Cl. 310, 427 F.2d 722 (1970); *see also* Restatement (SECOND) of Contracts § 201(2) (1981).

In this case we have two private, sophisticated parties who voluntarily entered into a contract. The record indicates that Giesting knew of the termination for convenience clause, what it meant, and requested that Harris remove it. Harris refused, and Giesting agreed to the contract anyway, even though it had successfully negotiated the provision out of one of the previous contracts.

"Termination for convenience" as used in this case is not ambiguous because the meaning of the phrase is plain on its face insofar as it permits termination without cause. In fact, a separate section in the contract discusses "termination for default," sometimes referred to as "termination for cause." The inclusion of the "termination for default" section strongly supports the application of the plain meaning of "termination for convenience" in this contract because it indicates that the parties differentiated between reasons for termination and expressly adopted both "termination for convenience" and "termination for default."

In an unpublished disposition, the Second Circuit, looking at Florida law, summarily affirmed the district court's opinion in *Trionic Assocs., Inc. v. Harris Corp.,* 198 F.3d 235 (2d

Cir.1999), stating that "[w]e affirm the judgment of the district court substantially for the reasons stated in its thorough and well-reasoned [published] opinion. *See Trionic Assocs., Inc. v. Harris Corp.,* 27 F.Supp.2d 175, 180–85 (E.D.N.Y.1998). We have considered all of the appellant's arguments on appeal and find them to be without merit." In *Trionic,* the district court held that the termination for convenience clause in the contract between Harris and Trionic, both of which were sophisticated, private companies, was valid and controlling, and Harris properly terminated for convenience its contract with Trionic. The *Trionic* court followed the general rule that conduct which is expressly authorized by a contract cannot be said to breach the implied covenant of good faith and fair dealing, reasoning that "Harris' past conduct may arguably have created an expectation that Harris would not terminate the contract for convenience, yet the Agreement expressly gives Harris the right to do so. The express contract terms controls over any alleged conflicting usage or course of dealing." *Trionic,* 27 F.Supp.2d at 181 (citing *Corenswet, Inc. v. Amana Refrigeration, Inc.,* 594 F.2d 129, 136 (5th Cir.1979) (holding that not exercising a termination for convenience clause for seven years did not create a course of conduct that overrode express contractual language that permitted termination of the contract "for any reason.")).

One other district court, in an unpublished opinion, entered summary judgment for Harris on an identical breach-of-contract claim. *Oasis Sales Corp. v. Harris Corp.,* Civ. No. 98–2737 (D.Minn. Aug. 4, 1999). A number of other unpublished district court opinions involved cases similar to the instant case. [1] Apparently, these ***1274** district courts did not publish their orders because standard "termination for convenience" language is so commonly regarded as *not* ambiguous. No cases other than this one have been cited to the Court that have held the clause to be ambiguous.

Because the contract's language is unambiguous, parol evidence may not be admitted, and the district court erred by permitting Giesting to enter parol evidence and by instructing the jury to consider it. *See, e.g., Lawrence v. United States,* 378 F.2d 452, 464 n. 37 (5th Cir.1967) (citation omitted), *Nanakuli Paving and Rock Co. v. Shell Oil Co., Inc.,* 664 F.2d 772, 780 (9th Cir.1981), *and Shipner v. Eastern Air Lines, Inc.,* 868 F.2d 401, 405 (11th Cir.1989).

There being no basis for a verdict in favor of Harris with the "termination for convenience" clause a part of the contract, Harris is entitled to judgment on Giesting's breach of contract claim for Harris' contract termination. Accordingly, the jury's $417,664 damage award should not have been included in the judgment.

II. *Harris violated applicable state statutes which require prompt payment of commissions upon termination and impose penalties for failure to do so.*

[4] Harris argues that (1) Giesting failed to meet its burden of proof on these claims; (2) the district court improperly permitted the jury to consider the state-law commission payment statutes of Alabama, Georgia, Indiana, and Michigan because these statutes unduly burden interstate commerce and are therefore unconstitutional; (3) the district court improperly denied Harris' request to instruct the jury that the exemplary damages provided for in the statutes may be awarded only upon a showing of clear and convincing evidence; and (4) "the district court's [jury] instruction that exemplary damages under the Alabama statute were 'automatic' was similarly erroneous."

Harris' burden of proof argument and the interstate commerce argument are without merit and warrant no further discussion. The states' commission payment statutes as applied in this case do not violate the Commerce Clause because they are not discriminatory nor do they improperly burden interstate commerce. Thus, the district court properly allowed the jury to consider them. *See Or. Waste Sys., Inc. v. Dep't. of Envtl. Quality,* 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994); *Minn. v. Clover Leaf Creamery Co.,* 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981); *and Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959). *See also* ALA.CODE §§ 8–24–2, 8–24–3; GA.CODE ANN. § 10–1–702; IND.CODE 24–4–7–5; MICH. COMP. LAWS § 600.2961.

With respect to Harris' requested "clear and convincing" jury instruction, the district court properly denied Harris' requested jury instruction. Unlike cases in which punitive damages are based on malice, wantonness, fraud, gross negligence, or oppressiveness, here the statutes specifically deal with contracts and commissions, and clearly delineate the type of damages and attorney's fees allowed, and under what circumstances they may be awarded. ***1275** None of the states' commission payment statutes mention malice, fraud, gross negligence, wantonness, or oppressiveness.

Contrary to Harris argument, the district court properly instructed orally and in writing that any damage award the jury found for unpaid commissions under the Alabama statute "is automatically trebled." The statute in question states that

"[a] principal who fails to pay a commission as required by § 8–24–2 is liable to the sales representative in a civil action for three times the damages sustained by the sales representative plus reasonable attorney's fees and court costs." ALA.CODE § 8–24–3.

There has been no argument that the amount awarded on this claim would differ because of the adjustment in the termination date made by this opinion.

Accordingly, the judgment properly included the sum of $122,046 in the judgment based upon the state statutes.

III. *Harris failed to pay commissions and other amounts that were due to Giesting under the agreement for work done prior to the termination date.*

[5] Harris disagrees with but does not appeal the jury's finding of liability on Giesting's breach of contract claim in connection with commission reductions made during the contract's term, but properly asserts that, if the Court holds that the agreement was properly terminated, the damage award on this claim is erroneous. The jury's award of $208,626, which was included in the district court's lump sum judgment, was based on a time period lasting through June of 1999, the expiration of the term of the agreement. Because Harris properly terminated the agreement earlier Harris' liability for those commissions should have ended on November 30, 1998, the date Harris' termination for convenience became effective.

Accordingly, upon remand the court will need to recalculate this award based upon the November 30, 1998 termination date, unless a jury is required.

IV. *Giesting's cross-appeal based on breach of contract concerning the J1850 product line, and unjust enrichment based on that claim.*

[6] Giesting alleged that the parties had entered into a "side" agreement that provided commissions on sales of J1850 automotive chip sets providing for higher commissions than those provided in the sales representative agreements between the parties. Giesting makes two arguments that the district court incorrectly entered judgment as a matter of law concerning this J1850 product line on two grounds.

First, Giesting claims that the agreement for Harris to pay Giesting commissions for services rendered for the J1850 product line "for the life of the product" should not have been barred by the Statute of Frauds. Under Florida law, an oral contract is unenforceable when the contract could not be performed within one year from the time it was made. FLA. STAT. § 725.01. The district court found no dispute that the product life was intended to be several years' duration, and that purported writings and e-mails between Harris and Giesting were insufficient as a matter of law to make it a written agreement which would not be barred by the Statute of Frauds. Upon a thorough review of the record, we hold that the district court did not err in entering judgment for Harris as a matter of law on Giesting's claim for additional commissions on the J1850 product line. *See Merlo v. United Way of Am.,* 43 F.3d 96 (4th Cir.1994). (applying Florida Law).

Second, Giesting argues that even if the J1850 contract is unenforceable under ***1276** Florida law, the court erred in directing a verdict on Giesting's claim for unjust enrichment. Giesting argues it should recover benefit of the bargain damages in the exact amount that it would have had the contract been enforced. The district court did not abuse its discretion in directing a verdict on this claim because (1) Giesting was entitled only to reasonable value of labor performed and the market value of any furnished materials; and (2) Giesting presented insufficient evidence as to these values. *See generally, Casielles v. Taylor Rolls Royce, Inc.,* 645 F.2d 498 (5th Cir.1981); *Tooltrend, Inc. v. CMT Utensili, SRL,* 198 F.3d 802 (11th Cir.1999).

V. *Giesting's cross-appeal from the separate judgment for attorney's fees.*

We have considered the arguments of Giesting that it was entitled to more than the $30,000 the district court awarded for attorney's fees. The attorney's fees award was based on the claims for unpaid and underpaid commissions and statutory penalties under the Alabama, Georgia, Indiana and Michigan statutes. We have affirmed the $122,046 award of damages based on those claims. A review of the district court's decision concerning the amount of attorney's fees reveals no abuse of discretion in the attorney's fees award.

Conclusion

We have carefully reviewed the record and the briefs and the points made at oral argument before this panel, and have considered every issue raised on this appeal. The points not

mentioned in this opinion are either mooted by the decisions here made, or do not merit further discussion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

All Citations

297 F.3d 1270, 15 Fla. L. Weekly Fed. C 811, 15 Fla. L. Weekly Fed. C 863

Footnotes

1 *See, e.g., Lantec, Inc. v. Novell, Inc.,* No. 2:95–CV–97ST, 2001 WL 1916256, at *5, 2001 U.S. Dist. LEXIS 7911, at *14 (D.Utah May 8, 2001) (holding that termination for convenience clause gave part the "absolute right" to terminate agreement with agreed-to 90 days notice without having to show cause); *A.P.J. Assocs., Inc. v. N. Am. Philips Corp.,* No. 98–74911, 2001 WL 279760, at *6 (E.D.Mich. Jan.30, 2001) (holding that sales representative agreement containing termination for convenience clauses were not ambiguous); *Mountbatten Sur. Co. v. AFNY, Inc.,* No. 99–2687, 2000 WL 375259, at *3, n. 27 (E.D.Pa. April 11, 2000) (granting summary judgment where contract provided for termination for convenience); *TSI Energy, Inc. v. Stewart & Stevenson Operations, Inc.,* No. 98–CV–0331, 1998 WL 903629, at *5–6 (N.D.N.Y. Dec. 23, 1998) (stating that termination for convenience clause "clearly and unambiguously gave [defendant] the right to terminate the contract at any time without cause.").

State of Louisiana

EXECUTIVE DEPARTMENT

PROCLAMATION NUMBER JBE 2020 – 30

ADDITIONAL MEASURES FOR COVID-19 PUBLIC HEALTH EMERGENCY

WHEREAS, pursuant to the Louisiana Homeland Security and Emergency Assistance and Disaster Act, La. R.S. 29:721, *et seq.*, the Governor declared a Public Health emergency in Proclamation Number 25 JBE 2020;

WHEREAS, on March 13, 2020, in emergency proclamation 27 JBE 2020, the Governor supplemented the measures taken in his declaration of a Public Health Emergency with additional restrictions and suspensions of deadlines and regulations in order to protect the health and safety of the public from the threat of COVID-19;

WHEREAS, the order was further supplemented on March 14, 2020 with additional measures necessary to ensure that goods and supplies can be delivered within the State of Louisiana; that health care providers can be available for treatment of those affected with COVID-19; that certain fees and fines for the Department of Health for those affected by the disaster are waived; that certain insurance regulations may be lifted by the Commissioner of Insurance; and that workers who lose employment because of this emergency are able to obtain unemployment benefits in a timely manner;

WHEREAS, in the days since the declaration of public health emergency, the COVID-19 outbreak in Louisiana has expanded significantly;

WHEREAS, additional measures are necessary to protect the health and safety of the public;

WHEREAS, these measures are in line with the best guidance and direction from the White House, the Centers for Disease Control, and state health officials;

WHEREAS, these measures relating to gaming establishments, restaurants, bars, cafes, and coffee shops are necessary because of the ability of the COVID-19 virus to spread via personal interactions and because of physical contamination of property due to its propensity to attach to surfaces for prolonged periods of time; and

WHEREAS, all of these additional restrictions and suspensions will run concurrent with the term of the initial emergency declaration; however, such term shall be extended or shortened as circumstances dictate.

NOW THEREFORE, I, JOHN BEL EDWARDS, Governor of the State of Louisiana, by virtue of the authority vested by the Constitution and the laws of the State of Louisiana, do hereby order and direct as follows:

SECTION 1: In an effort to reduce and limit the spread of COVID-19 in Louisiana, and to preserve the health and safety of all members of the public, all gatherings of **50** people or more between 12:00 a.m. Tuesday, March 17, 2020 and Monday, April 13, 2020 shall be postponed or cancelled. This applies only to gatherings in a single space at the same time where individuals will be in close proximity to one another. It does not apply to normal operations at locations like airports, medical facilities, shopping centers or malls, office buildings, factories or manufacturing facilities, or grocery or department stores. This order does not limit the ability of a local jurisdiction or political subdivision from enacting more restrictive limitations.

SECTION 2: Pursuant to La. R.S. 29:766 et seq. the Governor has determined that some business establishments are unable to continue current operations without unacceptable risks to the health and safety of the public. Therefore, at 12:00 a.m. on Tuesday, March 17, 2020, all casinos, video poker establishments, movie theaters, bars, bowling alleys, and fitness centers and gyms, statewide, shall cease operations completely. Any truck stop may remain in operation but shall cease all gaming operations. Race tracks may remain open but no members of the public may be allowed therein and no gaming operations shall be allowed. These restrictions shall remain in place until 11:59 p.m. on April 12, 2020, unless terminated earlier.

SECTION 3: Pursuant to La. R.S. 29:766 et seq. the Governor has determined that some business establishments are unable to continue current operations without unacceptable risks to the health and safety of the public. Therefore, at 12:00 a.m. on Tuesday, March 17, 2020, all restaurants, cafes, and coffee shops, statewide, shall cease allowing for any on premises consumption of food or beverages. Any establishment affected by this order may continue take out, drive-thru, and delivery services, however, in no circumstance shall the food or beverages purchased be consumed on premises. Hotel restaurants may continue operations, but only for the service of registered hotel guests via room service. These restrictions shall remain in place until 11:59 p.m. on April 12, 2020, unless terminated earlier.

SECTION 4: All state agencies, boards and commissions, and local political subdivisions of the state shall provide for attendance at essential governmental meetings via teleconference or video conference and such attendance shall be allowed during the pendency of this emergency. All efforts shall be made to provide for observation and input by members of the public. Before any meeting conducted pursuant to this section, the state agency, boards and commission, or local political subdivision of the state shall first provide a written certification that it will otherwise be unable to operate due to quorum requirements. Such certification shall be posted at the same time and in the same manner as the agenda for the meeting. Nothing in this order shall be interpreted to waive any notice requirements.

SECTION 5: A. Legal deadlines, including liberative prescription and peremptive periods applicable to legal proceedings in all courts, administrative agencies, and boards, are hereby suspended until at least Monday, April 13, 2020, including, but not limited to, any such deadlines set forth by law within the following:

1. Louisiana Civil Code;
2. Louisiana Code of Civil Procedure;
3. Louisiana Code of Criminal Procedure;
4. Louisiana Children's Code;
5. Title 9 of Louisiana Revised Statutes, Civil Code Ancillaries;
6. Title 13 of Louisiana Revised Statutes, Courts and Judicial Procedure;
7. Title 14 of Louisiana Revised Statutes, Criminal Law;
8. Title 15 of Louisiana Revised Statutes, Criminal Procedure;
9. Title 18 of Louisiana Revised Statutes, Louisiana Election Code;
10. Title 23 of Louisiana Revised Statutes, Labor and Worker's Compensation;
11. Title 32 of Louisiana Revised Statutes, Motor Vehicles and Traffic Regulations;
12. Title 40 of Louisiana Revised Statutes, Public Health and Safety;
13. Title 47 of Louisiana Revised Statutes, Revenue and Taxation;

14. Title 49 of Louisiana Revised Statutes, State Administration; and

15. Title 56 of Louisiana Revised Statutes, Wildlife and Fisheries.

B. In addition, all other deadlines in legal proceedings in all courts, administrative agencies, and boards shall be suspended until Monday, April 13, 2020.

C. Courts, administrative agencies and boards statewide shall use due diligence in communicating with attorneys, parties to proceedings with pending deadlines, and the public how the court, agency or board will implement and interpret the provisions of this Order.

D. Paragraph B of this Section shall not be interpreted so as to prohibit an owner of immovable property from reclaiming leased property if abandoned as provided by law, or entering leased property to make necessary repairs as provided by law.

SECTION 6: Pursuant to La. R.S. 14:329.6, a state of emergency is declared to exist statewide for the purposes of allowing the chief law enforcement officer of any political subdivision to, in order to protect life and property and to bring the emergency situation under control, promulgate orders for any provision therein, including a local curfew from 10:00 p.m. to 5:00 a.m.

SECTION 7: The following additional provisions relating to the Office of Motor Vehicles are hereby suspended:

A. The expiration date of driver's licenses which expire on or after March 9, 2020, but on or before May 10, 2020, is suspended and the expiration date is extended to May 20, 2020.

B. The expiration of a temporary driver's license issued pursuant La R.S. 32:667(A) which were issued on or after March 9, 2020 through May 10th, 2020 is suspended until June 9, 2020.

C. All students who enroll in a driver's education course after March 9, 2020 shall be allowed to begin the driver's education course without the issuance of the temporary instructional permit until May 10, 2020.

D. Any suspension for which the official notice of withdrawal was issued on or after Feb 17,2020, but before May 10, 2020, shall remain pending until June 9,2020.

SECTION 8: For procurement and contracting, strict compliance with the Louisiana Procurement Code (La. R.S. 39:1551, *et seq.*), Telecommunications Procurement (La. R.S. 39:1751-1755), and Information Technology Procurement (La. R.S. 39:196-200), shall not be required. However, all state agencies should comply with the following conditions:

A. An appointed official within the agency, or the equivalent for officials in higher education, must determine that the failure to strictly comply with the statutory restriction is necessary due to the emergency.

B. A centralized point of contact for each agency must monitor all transactions conducted without strict statutory compliance, maintaining copies of all documentation. Documentation should specify whether the purchase falls into the "emergency" or "permanent" category and whether the purchase relates to the COVID-19 event referenced in Proclamation Number 25 JBE 2020 and all documentation must be maintained and available for audit and FEMA reimbursement purposes.

C. Written competitive quotes and/or offers must be obtained whenever possible and agencies must take the necessary steps to assess that fair and equitable pricing is being offered.

D. Performance-based contracting should be used where practical.

E. Statewide contracts should be used where practical.

F. To the maximum extent possible, such emergency contracts should be only for the duration of the emergency or to allow the agency time to comply with normal competitive bidding requirements if the goods or services will be required for an extended period of time.

G. Copies of contracts which would otherwise require approval by the Office of State Procurement and the supporting documentation discussed above must be provided to the Office of State Procurement within thirty (30) days or sooner, if practical. Additionally, LaGov agencies should enter small purchases into the LaGov system as soon as practical. The Office of State Procurement shall review the contracts and documentation to determine compliance with this Executive Order

H. Payments to contractors should be made only after verification that all goods and services meet contract requirements.

I. All Public Bid Openings shall be suspended. Bid openings will continue, however public openings will not occur in order to limit the potential for exposure. Bid openings will be made available via phone conference or web conference.

J. All required Procurement Support Team meetings will be held via phone conference or web conference.

SECTION 9: All departments, commissions, boards, agencies and officers of the State, or any political subdivision thereof, are authorized and directed to cooperate in actions the State may take in response to the effects of this event.

SECTION 10: These provisions extend from 12:00 a.m. on Tuesday, March 17, 2020 to Monday, April 13, 2020, unless terminated sooner.

IN WITNESS WHEREOF, I have set my hand officially and caused to be affixed the Great Seal of Louisiana in the City of Baton Rouge, on this 16th day of March, 2020.

GOVERNOR OF LOUISIANA

ATTEST BY THE
SECRETARY OF STATE

SECRETARY OF STATE

189 So.3d 235
District Court of Appeal of Florida,
Third District.

MARATHON SUNSETS, INC.,
etc., Appellant/Cross–Appellee,
v.
Greg COLDIRON, et al.,
Appellees/Cross–Appellants.

No. 3D15–1886.
|
March 16, 2016.

Synopsis

Background: Property owners brought action against neighboring property owner seeking to enforce deed restrictions. The Circuit Court, Monroe County, Timothy J. Koenig, J., determined that bar added to restaurant site did not violate deed restriction, but ordered neighboring property owner to construct and maintain a traffic control device. Neighboring property owner appealed and property owners cross-appealed.

[Holding:] The District Court of Appeal, Shepherd, J., held that neighboring property owner was excused from complying with court order requiring it to reconstruct gate due to doctrine of impossibility of performance.

Affirmed in part and reversed in part.

West Headnotes (2)

[1] Covenants Judgment

Property owner was excused, pursuant to the doctrine of impossibility of performance, from complying with trial court order entered in deed restriction dispute requiring it to reconstruct a gate after it was damaged and taken down as a result of certain sewer work in the area, where property owner sought permission to reconstruct the gate and a permit for the gate was categorically denied by the governing authorities.

[2] Contracts Discharge by Impossibility of Performance

Under the doctrine of "impossibility of performance or frustration of purpose," a party is discharged from performing a contractual obligation which is impossible to perform and the party neither assumed the risk of impossibility nor could have acted to prevent the event rendering the performance impossible.

1 Cases that cite this headnote

***235** An appeal from the Circuit Court for Monroe County, Timothy J. Koenig, Judge.

Attorneys and Law Firms

Franklin D. Greenman, Marathon, for appellant/cross-appellee.

***236** Horan, Wallace & Higgins, LLP, and Darren M. Horan, Key West, for appellees/cross-appellants.

Before WELLS, SHEPHERD and LAGOA, JJ.

Opinion

SHEPHERD, J.

Dissatisfied with the results obtained below in an action brought by neighbors to enforce certain deed restrictions imposed on property in Marathon, Florida, both parties appeal. The property owner, Marathon Sunsets, Inc., challenges the trial court's injunction directing it to construct and maintain a traffic control device on Kyle Way East. Greg and Michelle Coldiron ask this Court to overturn the trial court's decision that the Tiki Hut bar, added to the restaurant site, does not violate the deed restriction authorizing use solely as a restaurant, defined as "a food service establishment deriving no less than fifty percent of its revenue from the sale of food and non-alcoholic beverages." Because substantial, competent evidence supports the trial court's ruling as to the restaurant only restriction, we affirm without further discussion. We reverse, however, the portion of the final judgment ordering Marathon Sunsets to reconstruct the previously dismantled gate on Kyle Way East.

[1] **[2]** Under the doctrine of impossibility of performance or frustration of purpose, a party is discharged from performing a contractual obligation which is impossible to perform and the party neither assumed the risk of impossibility nor could have acted to prevent the event rendering the performance impossible. *See, e.g., Shore Inv. Co. v. Hotel Trinidad, Inc.,* 158 Fla. 682, 29 So.2d 696 (1947); *Ferguson v. Ferguson,* 54 So.3d 553 (Fla. 3d DCA 2011); *Leon Cnty. v. Gluesenkamp,* 873 So.2d 460 (Fla. 1st DCA 2004); *Am. Aviation, Inc. v. Aero–Flight Serv., Inc.,* 712 So.2d 809 (Fla. 4th DCA 1998). Evidence presented below clearly demonstrated Marathon Sunsets sought permission to reconstruct the gate to Kyle Way East after it was damaged and taken down as a result of certain sewer work in the area. A permit for the gate was categorically denied by the governing authorities. Under these circumstances, the doctrine of impossibility of performance applies, and the trial court erred in ordering Marathon Sunsets to do that which it may not do without the necessary permit.

Accordingly, we reverse the portion of the final judgment ordering construction of the gate, and affirm in all other respects.

All Citations

189 So.3d 235, 41 Fla. L. Weekly D685

End of Document

Public Construction Bidding and COVID-19 FAQs

Guidance for Public Construction Bidding During COVID-19

For further information, please contact Deborah.Anderson@Mass.gov (mailto:Deborah.Anderson@Mass.gov).

Q: How can awarding authorities meet the "public bid opening" requirement for construction bids?

Awarding authorities are not required to hold in-person bid openings. They may videotape the opening; livestream it or open the bids on public TV. The openings need not take place at a public office. However, there should be a witness to the opening. Audio-only recordings will suffice.

Q: How can bidders participate in a virtual bid opening?

Bidders should be invited to participate by conference call arranged by the awarding authority.

Q: What steps should the awarding authority take to publicize the opening if it is not livestreamed as it happens?

If videotape is used, it should be posted to the awarding authority's website as soon as possible. The actual bids, except for confidential information such as Update Statements, should be scanned by the awarding authority and posted to its website.

Q: How should bidders submit bids if Town Hall is closed?

Bids should be submitted in a secure manner. For example, the awarding authority may set up a locked drop-box at Town Hall or direct bidders to mail bids to a post office box.

Q: Is it permissible for bidders to email or fax their bids?

No. Bids must be "opened" on the designated date and time. Bidders should be directed to upload their bids to the awarding authority's website, if it is technically feasible. Otherwise, bidders should either mail their bids or drop them off to a secure location.

Q: How should bidders handle bid security if it is required?

Bidders should either scan their bonds or checks and upload to the awarding authority's website. Cash bid security should be discouraged.

Q: Will the Attorney General's Office continue to hold Bid Protest Hearings?

Yes. Please visit the **AG's Bid Protest Hearing webpage** (/service-details/scheduled-bid-protest-hearings) for information on conference call-in numbers.

Q: What are the procedures for emergency procurements?

There are emergency provisions regarding building construction in G.L. c. 149, sec. 44J(6) and sec. 44A(4), both of which require a waiver from DCAMM. The waiver procedure is **available here.** (/how-to/emergency-waiver-request)

The emergency procedures for public works construction are found at G.L. c. 30, sec. 39M:

"In cases of extreme emergency: (1) caused by enemy attack, sabotage or other such hostile actions or (2) resulting from an imminent security threat explosion, fire, flood, earthquake, hurricane, tornado or other such catastrophe, an awarding authority may, without competitive bids and notwithstanding any general or special law, award contracts otherwise subject to this subsection to perform work and to purchase or rent materials and equipment, all as may be necessary for temporary repair and restoration to service of any and all public work in order to preserve the health and safety of persons or property; provided, that this exception shall not apply to any permanent reconstruction, alteration, remodeling or repair of any public work."

Q: Can an awarding authority issue an addendum indefinitely postponing any currently scheduled bid opening or RFQ submission?

Yes, prior to the due date such an addendum can always be issued.

Q: Does the Attorney General's Office have a recommendation on whether bid openings should be held off for all non-exigent work?

This is a policy decision that each awarding authority should make on its own.

Did you find what you were looking for on this webpage?

◯ Yes ◯ No

SEND FEEDBACK