

DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

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SARASOTA COUNTY, FLORIDA,  
Appellant/Cross-Appellee,

v.

SOUTHERN UNDERGROUND INDUSTRIES, INC.,  
Appellee/Cross-Appellant.

No. 2D20-2491

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January 19, 2022

Appeal pursuant to Fla. R. App. P. 9.030(b)(1)(A) from the Circuit Court for Sarasota County; Hunter W. Carroll, Judge.

Frederick J. Elbrecht, County Attorney, Bora S. Kayan, Deputy County Attorney, and Scott T. Bossard, Assistant County Attorney, Sarasota, for Appellant/Cross-Appellee.

Joseph W. Lawrence, II, and Mike Piscitelli for Vezina, Lawrence & Piscitelli, P.A., Fort Lauderdale, for Appellee/Cross-Appellant.

KELLY, Judge.

Sarasota County appeals from the amended final judgment that awards Southern Underground Industries, Inc. (SUI), damages for breach of a construction contract. SUI cross-appeals from the

portion of the amended final judgment in which the trial court found that the County was entitled to liquidated damages and deducted those damages from SUI's award. We affirm the amended final judgment except for the award of liquidated damages to the County.

### **Facts**

Sarasota County contracted SUI to install a sanitary force main pipe and a water transmission line underneath the Intracoastal Waterway. On August 26, 2016, while construction was underway, the owner of property adjacent to the project site complained that vibration from the drilling was causing damage to his home. On the same date, the County issued a Stop Work Order under a provision in the contract that authorized the County to stop construction, without penalty, to correct a safety issue.

SUI hired a structural engineer to review the building cracks and the foundation of the residence. The engineer determined that the damage was cosmetic, that the vibrations had not exceeded the acceptable threshold, and that the monitoring of the vibration in place was sufficient to detect and prevent future damage. SUI also

obtained an insurance policy, as required by the contract, to cover any homeowners' claims for damage to their property from the drilling. SUI offered to repair the damage to the home using a contractor of the homeowner's choice, but the homeowner rejected SUI's offer and instead sought a warranty from the County. The County gave no such warranty, so the homeowner ultimately pursued a claim under SUI's insurance policy.

SUI contended that September 14, 2016, the date of the engineer's report, was the last day the County could validly justify having a Stop Work Order in place for safety reasons. However, the County continued the suspension of work until November 27, 2016, while attempting to appease the homeowner's concerns. SUI requested compensation from the County under Article 6.5 of the contract for the expenses it incurred during the additional seventy-one days the project was suspended. Article 6.5 provides as follows:

**6.5 COUNTY MAY SUSPEND WORK:**

- A. The County may, at any time and without cause, suspend the work or any portion thereof for a period of not more than ninety (90) consecutive days by notice in writing to the Contractor. Such Notice shall fix the date on which the Work shall be

resumed. The Contractor shall resume the Work on the date so fixed. The Contractor may request an increase in Contract Price or an extension of the Contract Times, or both, directly attributable to any such suspension if a timely Claim is made pursuant to the Contract.

When the County denied SUI's request for additional compensation, SUI filed this breach of contract action. Following a bench trial, the trial court found that, although the County had a contractual right to suspend SUI's performance, SUI had a contractual right to seek an increase in the contract price and time. The trial court found that the County's denial of additional compensation was unreasonable and that the County's protracted efforts to mollify the homeowner amounted to bad faith and active interference.

Consequently, the court determined that SUI was entitled to an additional \$638,794.10, plus interest, for the expenses SUI incurred due to the County's "wrongful continuation of the stoppage order." The court further found that "[t]his amount is not for 'extra' work performed outside of the Contract; instead, this is the amount the County should have awarded to Contractor . . . under the terms of Article 6.5 had the County been performing reasonably and in

good faith under the terms of the Contract." However, because the matter with the homeowner had not been settled by the date set by the contract for final acceptance of restoration, the trial court awarded the County \$250 per day in liquidated damages for the 771 days beyond the final acceptance date, totaling \$177,750.

### **The Appeal**

The County argues that the trial court erred in awarding SUI damages despite the contract provision precluding damages for the County's delay.<sup>1</sup> Although "no damages for delay" clauses are recognized in the law, they will not be enforced in the face of

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<sup>1</sup> That provision states, in pertinent part:

11.5 DELAYS AND TIME EXTENSIONS:

A. No Claims for Delays:

1) No claim for damages or any claim other than for an extension of Contract Times shall be made or asserted against the County by reason of any delays caused by the County or others.

.....

3) This provision shall not preclude recovery of damages by the Contractor for hindrances or delays due solely to bad faith or willful, malicious, or grossly negligent conduct on the part of the County or its agents.

governmental "fraud, bad faith, or *active interference*" with performance under the contract. *See Triple R Paving, Inc. v. Broward County*, 774 So. 2d 50, 54 (Fla. 4th DCA 2000) (emphasis added) (quoting *Newberry Square Dev. Corp. v. S. Landmark, Inc.*, 578 So. 2d 750, 752 (Fla. 1st DCA 1991)). The record supports the trial court's finding that the County impeded work on the project, at SUI's expense, long after it was determined that it was safe to proceed with minimal damage to the adjacent homes.

The County also argues that an award to a contractor for damages outside the terms of the contract is barred by sovereign immunity. However, as the trial court found, the award to SUI was not compensation for extra contractual work but was payment for work performed to achieve the contract result. *See Ajax Paving Indus., Inc. v. Charlotte County*, 752 So. 2d 143, 144-45 (Fla. 2d DCA 2000) (holding that additional costs incurred to achieve the contract result are properly awarded to a contractor and are not barred by the doctrine of sovereign immunity). "Contractors have previously been allowed to sue governmental bodies for delay damages 'caused by the knowing delay of the public authority which transcends mere lethargy or bureaucratic bungling.'" *Id.* at 145 (quoting *S. Gulf Utils.*,

*Inc. v. Boca Ciega Sanitary Dist.*, 238 So. 2d 458, 459 (Fla. 2d DCA 1970)).

Accordingly, we affirm the award to SUI for the time and expense caused by the County's unjustified suspension of work.

### **The Cross-Appeal**

The trial court found that "[t]he contract specified the County could assess liquidated damages against the Contractor in the amount of \$250 per day for every day final completion was delayed beyond the contracted-for final acceptance date." Because final acceptance did not occur until the homeowner settled his claim with the insurance company on April 27, 2020, the court found that the County was entitled to \$177,750 in liquidated damages for the 711 days beyond the final acceptance date. SUI cross-appeals from that award, arguing that because SUI did not cause the delay in resolving the homeowner's claim and the County did not suffer damage from the delay, the liquidated damage clause is unenforceable. We agree.

"[T]he parties to a contract may stipulate in advance to an amount to be paid or retained as liquidated damages in the event of

a breach." *Lefemine v. Baron*, 573 So. 2d 326, 328 (Fla. 1991). For a liquidated damages clause to be enforceable, "the damages consequent upon a breach must not be readily ascertainable," and "the sum stipulated to be forfeited must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach." *Id.* "[L]iquidated damages clauses can exist only when they provide for 'damages' (something to be given by one party who breaches the contract to the other party to compensate the other party for his loss which is a consequence of that breach)." *Hawk's Cay Invs., Ltd. v. Brandy Marine of the Keys, Inc.*, 524 So. 2d 681, 683 (Fla. 4th DCA 1988) (quoting *Bayshore Royal Co. v. Doran Jason Co. of Tampa, Inc.*, 480 So. 2d 651, 652 (Fla. 2d DCA 1985)).

The County failed to show that it suffered any loss from the delay of final acceptance of restoration. SUI obtained an insurance policy to cover damage caused by the drilling; thus, the County was never responsible for damage to the homes adjacent to the project. The homeowner negotiated directly with the insurance company and ultimately reached a settlement—at no expense to the County. The trial court specifically found that SUI completed all work

required by the contract on March 7, 2018, except resolving the homeowner's claim. Thus, because the County had the full use of the completed construction project for over two years before final acceptance, "the sum stipulated to be forfeited" was "grossly disproportionate to any damages that might reasonably [have been] expected to follow from a breach." *See Lefemine*, 573 So. 2d at 328; *see also Goldblatt v. C.P. Motion, Inc.*, 77 So. 3d 798, 800-01 (Fla. 3d DCA 2011) (holding that a court can invalidate a liquidated damage clause where the stipulated amount of damage is disproportionate to the damages actually suffered).

Accordingly, we affirm the amended final judgment except for the portion of the judgment that deducts liquidated damages from SUI's award and remand for the trial court to recalculate the award to SUI in accordance with this opinion.

Affirmed in part, reversed in part, and remanded with directions.

SILBERMAN and LUCAS, JJ. Concur.

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Opinion subject to revision prior to official publication.