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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-24-00574
Appellate Case No. 2014-002749

Miller Construction Company, LLC.....Respondent/Appellant

v.

PC Construction of Greenwood, Inc. and Safeco Insurance Company of America..... Appellants/Respondents

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APPELLANTS' FINAL REPLY BRIEF OF APPELLANTS/RESPONDENTS

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STATEMENT OF THE CASE

Respondent/Appellant Miller Construction Company, LLC ("Miller") filed Respondent's Initial Brief on September 8, 2015, received by Appellant/Respondent PC Construction of Greenwood, Inc. ("PC") on September 9, 2015. Appellant PC files this Reply to the Response. To the extent the facts asserted by Miller are inconsistent with those set forth by PC in its Initial Brief, PC craves reference to the Statement of the Facts set forth in its Initial Brief for an accurate summary of the factual matters in dispute.

ARGUMENT

I. THE CLEAR AND UNAMBIGUOUS TERMS OF THE SUBCONTRACT ENTITLED PC TO RECOVER ANY AND ALL DAMAGES FROM MILLER FOR FAILURE TO COMPLY WITH THE PROJECT SCHEDULE

Miller erroneously equates the damages for delay caused by Miller with liquidated damages assessed by the Lander. The two are mutually exclusive as evidenced by the clear intent of the parties at the time of contracting. It is well established in South Carolina that the purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular sentence or provision within the contract. *Koon v. Fares*, 379 S.C. 150, 666 S.E.2d 230 (2008); *North American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 769 S.E.2d 237 (2015); 30 S.C. Jur. Contracts § 37.

Liquidated damages assessed by Lander and additional damages for delay caused by Miller are distinct and unrelated and are addressed separately in Paragraph 6(e) of the Subcontract. Read in its entirety, Paragraph 6(e) allows PC to recover damages from Miller *in addition* to any liquidated damages assessed by Lander. However, Miller argues that a single sentence within Paragraph 6(e) related to liquidate damages defines PC's remedies entirely and ends the inquiry, urging this Court to selectively interpret the Subcontract without ascertaining the intent of the parties by reading it as a whole.

In its Initial Brief, Miller mischaracterized the record, stating that "[d]uring testimony, PC agreed that unless Lander assessed ***damages for delay*** against PC, PC could not pass those damages onto Miller" and "PC admits that it was not assessed any damages due to delays", citing the following testimony of Randy Piontek:

Q: And under your contract you can only assess ***liquidated damages*** against Miller if they're assessed by Lander, correct?

A: Correct.

(R. p. 366, lines 15-18) (emphasis added).

Rather, Mr. Piontek testified that unless Lander assessed *liquidated damages* (not *delay damages* as Miller asserts) against PC, then PC could not pass those damages onto Miller. It is true that PC cannot assess liquidated against Miller unless Lander first assesses liquidated damages from PC under the terms of the Subcontract. In other words, liquidated damages cannot be passed down if they do not exist. That is the nature of a pass-down provision. What are clearly not included in the pass down provision are the additional damages caused by Miller's failure to comply with the Project Schedule:

> ...Subcontractor **shall also be liable for all additional damages** PC Construction of Greenwood, Inc. may incur **as a result of Subcontractors' failure to complete the Subcontractor's Work or any portion thereof in accordance with the Job Schedule**...

(R. pp. 541-542, Article 6(e) (emphasis added)).

Contrary to what Miller asserts in its Initial Brief, the fact that PC settled with Lander for something other than liquidated damages does not have a preclusive effect on PC's right to recover delay damages against Miller whatsoever. This line of reasoning is a red herring intended to confuse the issues before the Court. Miller cites to Subcontract Article 6(d) to support its general assertion that any agreement between PC and Lander is binding upon Miller; and therefore, precluded PC's claims against Miller. (Resp. Brief, pp. 7-8.) However, one only needs to read the title of the Paragraph – "Claims Relating

to Owner" and the initial line of the Paragraph to find it is clear that Article 6(d) applies only to claims "*for which Owner is or may be liable.*"

The record is clear that PC did not seek or recover damages for Miller's delay from Lander. In fact, such damages could not be recoverable from the Lander under the terms of the Prime Contract between PC and Lander, as PC is responsible for the delays caused by its own subcontractors. Instead, the damages that PC sought from Lander were related to delays caused by Lander relating to the asbestos and other issues not caused by PC or its subcontractors. Those issues do not overlap in any way with the claims for delay damages presented in this case for Miller's admitted failure to comply with the Schedule. Article 6(d) has absolutely no application to PC's right to recover delay damages from Miller for Miller's inexcusable delays and for which the Owner was not liable.

II. PC PRESENTED UNCONTROVERTED EVIDENCE THAT MILLER DELAYED THE PROJECT

A. MILLER'S OWN WITNESSES TESTIFIED THAT MILLER FAILED TO MAINTAIN THE PROJECT SCHEUDLE

The only evidence presented to the Trial Court was that Miller did not maintain the Project Schedule. (R. p. 281, lines 12-23; R p. 292, lines 18-23; R. p. 334, line 4-p. 337, line 25; R. p. 339, line 13-p. 342, line 12). Miller's own superintendent, Robert Sisk, admitted that Miller did not meet all of the durations set forth in the Schedule:

Q: You did say you are familiar with the schedule?

A: Yes, sir.

Q: That is part of your job to, you communicated with Mr. Piontek about the scheduling during the project?

A: Yes, sir.

Q: And you understood that the schedule, in the schedule there are durations for certain activities, right?

A: Yes, sir.

Q: And you agree with me that Miller did not meet all of the durations that are set forth in the schedule, you agree with that, don't you?

A: There was some jobs, yea, there was some we were late on.

(R. p. 390, lines 5-17).

Respondent mischaracterizes the Record in an attempt to suggest that Miller did not delay the project. (Resp. Brief, pp.10-11). Miller suggests that "[n]umerous witnesses testified that Miller did not cause any delays on the project. Some of these same witnesses testified that, if anything, Miller kept the project running as best it could, in accordance with the job schedule." (Resp. Brief, p. 11). The testimony Miller cites in support is that of Jeff Beaver, Bradley Grogan, and Frank Sells, all of whom are employees of Lander. Each of these witnesses testified that (1) they did not know what the Schedule was or the individual duration requirements for specific activities and (2) they had no knowledge of what Miller's obligations were to PC or whether Miller complied with the Schedule. (R. pp. 411, line 12- p. 412, line 9; R. p. 422, lines 6-23; R. p. 426, line 7-p. 427, line 1).

The only way Miller could succeed in rebutting PC's claim for delay is by showing the delays were not caused by Miller. There is testimony by Mr. Miller in which he admits to delays for some of the durations, but he attempts to pass the blame onto other subcontractors. There are several missed durations for which Mr. Miller does not address or attempt to explain at all. Nevertheless, Mr. Miller's testimony is unsubstantiated and not supported by the Record.

Notably absent from Miller's Initial Brief is any mention of the following language provided in Subcontract Article 6(e):

> ...provided that **Subcontractor must give written notice of delay** to PC Construction of Greenwood, Inc. within such time as to enable PC Construction of Greenwood, Inc. to give Owner any notices required by the Contract Documents, but in any event, no later than five (5) days after the occurrence of the event claimed to be a substantial delay, **otherwise the right to such an adjustment to the job schedule is waived**.

(R. pp. 541-542 (emphasis added)).

Mr. Miller himself testified that he understood the terms of the Subcontract, yet he failed to incorporate any request to alter the schedule in any change order:

Q: And you, Mr. Brousseau had you go through the activities that, that is for the basis for PC's delay damages. And it sounded to me like you had an explanation for each one of these, right, for why the durations were what they were?

A: I don't recall that.

Q: Well, we just walked through. You had an explanation as to what was delaying you on each of these activities.

A: You are talking about—

Q: Talking about what you just talked to Mr. Brousseau about?

A: Yes, sir.

Q: And none of those issues that you raised were incorporated into any kind of request to alter the schedule that was presented to PC. Is that a fair statement?

A: That is correct.

Q: And that is how the subcontract dictates it should have occurred. Is that a fair statement?

A: That is correct.

(R. p. 441, lines 2-22).

Miller offered no evidence to rebut PC's claim that Miller delayed the Project. Instead, Miller admitted that it did not meet several of the durations on the Schedule. Even assuming Miller can point to a scintilla of evidence in the record that suggests the delays assessed by PC were caused by other subcontractors on the Project, Miller admitted to failing to comply with the clear terms of the Subcontract, which require it to submit a change order request for additional days in the event of *any* delay regardless of cause.

B. PC ROUTINELY NOTIFIED MILLER OF THE DELAYS IT CAUSED ON THE PROJECT. NEVERTHELESS, THE OBLIGATIONS TO COMPLY WITH THE PROJECT SCHEDULE ARE NOT CONTINGENT ON PC NOTIFYING MILLER.

PC routinely notified Miller of its delays on the Project at weekly Project meetings and in a series of emails. PC did what it could to work with and encourage Miller to meet the Schedule throughout the Project. For example, on March, 21, 2011, Gary Piontek wrote the following to Mike Miller and included a list of items for Miller to complete:

> Mike we need to work together on getting these items taken care of. Many of them are going on concurrently and will require additional manpower on site to maintain the schedule. Lets work together. Was hoping to have you and some more guys down here today.

(R. p. 592).

Eventually, PC's project manager had to get its President, Randy Piontek, involved in its attempt to have Miller comply with the schedule. (R. p. 353, line 10-p. 357, line 22). In an email to Mike Miller from Chris Piontek dated March 31, 2011, Chris

urges Miller to direct its efforts to complete the soccer venue, which was already behind schedule:

> I spoke with Matt this morning about this and he is on board...
>
> We need to direct all attention to the completion of the soccer venue next week. The university is looking into potential liquidated damages for this area of the project as it was scheduled to be complete last year.

(R. p. 595).

In another email dated April 22, 2011, Chris again voices his concern to Miller regarding the ongoing delays:

> We are getting further and further behind schedule. PC gave Miller Construction the ok to proceed with the parking lot/softball/Intra Mural Field areas well over a month ago. **Since there has been little or no work done in these areas.** In the attachment you will notice I have marked up the schedule and plugged in dates for which the items were to have been completed. This has now become a serious issue as we are already being charged liquidated damages for the soccer venue. I am confident that we will be facing LD charges for the other venues if we continue with the lack of concern for the schedule. **Please let PC know in writing how your company plans to recover the schedule.**

(R. pp. 598-600 (emphasis added)).

Gary Piontek testified extensively as to how Miller delayed the Project, and confirmed that PC communicated these concerns to Miller on numerous occasions. (R. p. 281, line 12-p. 292, line 17). In addition to the multiple written communications to Miller, there are numerous internal email exchanges introduced at trial which substantiate PC's concerns that Miller was delaying the Project. (R. p. 582, 584, 602-604).

Miller now attempts to circumvent the terms of the Subcontract by arguing for the first time on appeal that PC has somehow waived its right to recover delay damages. Miller never raised any issue of waiver as an affirmative defense or at trial, nor has it ever challenged the enforceability of any of the terms of the Subcontract. Further, the Trial Court never ruled that PC waived any of its rights under the Subcontract to recover for delays or that any of the terms of the Subcontract were unenforceable. (R. pp. 1-9). In fact, the testimony reflects that Miller had a clear understanding of the terms of the Subcontract and knew it must comply with Schedule. (R. p. 440, line 3-p. 441, line 22).

Setting aside the fact that the issue of waiver is not properly before this Court, Miller appears to argue that PC waived its right to recover delay damages as a result of the following: (1) PC did not complain or give notice to Miller regarding delays and (2) PC made no mention of delays at the time Miller's final pay application was submitted. (Resp. Brief, pp. 10-11.)

While the record clearly reflects that PC did complain to Miller on numerous occasions regarding the delays, the obligations to comply with the Schedule are not contingent on PC notifying Miller. These obligations are absolute. There was no confusion as to the requirements to comply with the Schedule, which is reinforced numerous times throughout the Subcontract itself.

Further, PC did not waive any rights by releasing progress payments or final payment to Miller as Miller claims. The last sentence of Article 3(e) of the Subcontract relating to conditions of payment provides as follows:

> No such determination or payment shall relieve Subcontractor from its obligations under the Subcontract, nor stop PC Construction of Greenwood, Inc. from

> subsequently asserting Subcontractor's failure to satisfy said obligations.

(R. p. 535).

Miller does not challenge the enforceability of Subcontract Article 3(e), and PC never represented to Miller that it did not intend to seek any damages from Miller. Miller's delays are the very reason why PC refused to remit payment to Miller for the final balance of the Subcontract. There are simply no terms within the Subcontract that require PC to withhold payment or notify Miller of its delays to preserve PC's rights to pursue damages. As such, PC did not waive its right to recover delay damages from Miller.

C. PC'S DAMAGES DUE TO MILLER'S DELAYS ARE NOT SPECULATIVE

Miller's argument regarding the speculative nature of damages in this case is also not properly before this Court. Miller failed to raise this issue at any time at trial or in its post trial brief, and Miller never cross-examined PC's witnesses regarding the same.

Nevertheless, Miller argues that PC is not entitled to recover because the damages due to the delays are speculative and duplicative. (Resp. Brief, p. 11-12.) Miller mischaracterizes the Record, suggesting in its Initial Brief that "PC simply provided a sheet of figures that were not supplemented with corresponding bills, statements or testimony." (Resp. Brief, p. 12.)[1]

[1] Miller also cites *Drews Co., Inc. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 213, 371 S.E.2d 532,535-36 (1998) in support of its argument that PC's damages are speculative. Miller's reliance on *Drews* is wholly misplaced as the Court in *Drews* was examining the propriety of lost profits relating to the delay of opening a new business. In this case, PC's damages were based on actual costs incurred, which was reduced to a daily rate. Evidence was submitted as to the individual components of the daily rate and specific fact and expert testimony was provided as to the damages alleged.

The amount of damages sought by PC is clearly supported by the Record. At trial, PC carefully quantified exactly how it arrived at the amount of damages PC incurred due to Miller's delays. Gary Piontek testified regarding how he determined Miller's delays impacted PC financially. (R. p. 293, line 1-p. 299, line 14; R. pp. 621-623). Gary compared the difference between Miller's scheduled durations and the actual completion date for each. He then determined what delays could have been attributable to other subcontractors, the owner, asbestos, or other interference, and only accounted for those delays for which Miller was solely responsible. (R. p. 293, line 2-p. 298, line 1; R. pp. 621-622). Gary broke down each of PC's expenditures and explained how he arrived at a daily cost of delay. (R. p. 298, line 2-p. 299, line 13; R. p. 623).

PC took a conservative approach in calculating its damages, only including delays encountered in activities associated with site clearing and demolition, the Soccer venue and the Tennis venue. (R. p. 293, line 1-p. 294, line 19). The total delays associated with those activities were 145 days. Because it cost PC $945.07 per day to serve as the general contractor on the site (R. p. 623), PC multiplied 145 days by $945.07 for a total delay damage claim of $137,035.15 in direct costs and extended overhead. (R. pp. 621-622; R. p. 298, line 2-p. 299, line 14).

Finally, PC offered John Bahr to testify as a scheduling expert. Mr. Bahr independently reviewed the Project Schedule and other project documents and ultimately concluded that the Delay Damage Summary was a "very reasonable approach" to calculate delays:

Q: Alright. Explain to the Court what you have reviewed.

A: With regards to scheduling?

Q: Yes.

A: I reviewed the schedule analysis and the over, the course of this project there are many iterations of the schedule but they all start with the baseline. So I reviewed the original project baseline and I went through the entire schedule. I actually opened up the software and reviewed that and compared it to the as-billed schedule. And that's to basically check and verify the dates that Gary Piontek had used to match the archive or historical information that I had of the project and they did.

Q: Okay. All right. And with respect specifically to Tab 16, the Delay Damage Summary?

A: Yes.

Q: What is your opinion with regards to the delays that are depicted in this exhibit and claimed by PC?

A: Well, I think the delays that are claimed are not excusable delays by Miller Construction and that PC is entitled to those delays. I also thought it was a very reasonable approach. It's an approach that normally I would take and compare the original baseline, the plan, to what the subcontractor actually achieved. And then I also though tit was a very fair approach because it only addressed the upfront work that was totally dependent on Miller Construction. It addressed the soccer complex and it addressed the tennis area. It didn't address other areas on the job, that although Miller did not, most of the time, meet their target dates, PC Construction did not include in their claim.

(R. p. 334, line 25-336, line 6).

Mr. Bahr also assisted PC in calculating the $945.07 daily rate and testified that was is a reasonable one. (R. p. 336, lines 12-19; R. p. 337, lines 6-25). The methodology Mr. Bahr used to calculate the rate was one he has used many times in his experience. (R. p. 336, lines 19-23). Mr. Bahr provided an analysis of the labor and resources that were assigned and utilized in the Project and calculated those according to the days Miller delayed the Project. (R. p. 338, line 1-p. 344, line 24; R. pp. 625-628).

It is clear from the testimony and the Record that PC set forth more than adequate information to support its claim for damages in this case. Other than its conclusory allegation that PC's calculations are speculative, Miller can provide no evidence to support its assertion that PC's damages are unreasonable. Nevertheless, Miller failed to preserve this issue at trial and is not entitled to be heard for the first time on Appeal.

CONCLUSION

For the reasons stated above and in Appellants' Initial Brief of Appellants-Respondents, this Court should reverse the trial court's holding that PC cannot recover under their breach of contract cause of action, and reverse the trial court's holding that Miller did not cause delay on the Project. This action should be remitted to the Trial Court for a judgment to be entered in favor of PC in the amount of $89,686.89.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the **APPELLANTS' FINAL REPLY BRIEF OF APPELLANTS/RESPONDENTS** upon the attorney of Record for the Respondent/Appellant by mailing a copy of the same to their attorney of record, David J. Brousseau, Esquire, McIntosh, Sherard, Sullivan & Brousseau, Post Office Box 197, Anderson, South Carolina 29622 via United States mail, postage prepaid this 9th day of November 2015.

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APPELLANTS' BRIEF CERTIFICATION

I certify that the **Appellants' Final Reply Brief of Appellants/Respondents** conforms to the requirements of Rule 211(b) of the Appellate Court Rules.

November 9, 2015

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