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CONSTRUCTION CASES
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You said it!

An electrical subcontract directed toward the expansion of University of Mississippi Medical Center Children's Hospital contained a fairly perfunctory arbitration clause which read: "…any disputes between Contractor and Subcontractor… including any disputes in which Subcontractor has a claim against another subcontractor, shall be finally determined by binding arbitration in accordance with the current Construction Industry Rules of the American Arbitration Association by one or more arbitrators selected in accordance with said Rules. The parties acknowledge that this Subcontract evidences a transaction involving interstate commerce and that this agreement to arbitrate is enforceable under 9 U.S.C. §§ 1, *et seq*."

The project got into the weeds, and within about a year of commencement, "… scheduled construction was six months behind. By fall 2019, nearly a thousand Requests for Information and Construction Products Regulation had been issued, revealing significant issues with contractual documents and drawings." For its part, the electrical sub complained that the general contractor – for various reasons, including changes in the GC management team – failed to coordinate the various subcontractor trades, causing significant delays to the sub's work.

Then, when COVID arrived on the scene, the GC attempted to "squeeze" the sub to work faster, allegedly disregarding the need for standard COVID protocols. The subcontractor, which at one point had 40% of its workforce test positive for COVID, was terminated by the general contractor, whereupon the sub filed suit against the GC in Mississippi state court. The trial court agreed to compel arbitration, and subcontractor appealed.

Noting that the specified AAA rules (at Rule 9 thereof) declare in pertinent part that "arbitrators have power to rule on questions of arbitrability," the Mississippi Supreme Court affirmed the lower court, holding that the question of whether the sub's claims in the arbitration clause is a question for an arbitrator, not the court: "When both parties agreed to terms that expressly invoked the rules of the American Arbitration Association, they manifested their intent to be bound by such rules and the assignment of the scope of arbitrability as determined under the group's rules. Agreeing to the American Arbitration Association rules is tantamount to agreeing to delegate scope questions to the arbitrators."

Interestingly, there was a dissent in which two justices joined, urging that United States Supreme Court authority concerning delegation of questions of arbitrability to an arbitrator require a more overt statement in the arbitration clause (for example, expressly delegating "claims regarding the interpretation, scope or validity of this clause or arbitrabiltiy of any issue"). The Mississippi Supreme Court also noted cases decided in Texas as well as Mississippi which appear to follow that rationale.

The dissent was principally concerned about the advent of COVID, asserting that it "would find that the contract did not contemplate the impact of the COVID-19 pandemic on the parties ability to perform the construction contract. … Common sense supports a finding that the unforseen crisis of the pandemic is outside the contemplated scope of the agreement's arbitration clause. … [W]hether force majeure conditions are contractually contemplated within an arbitration provision in the absence of an express provision, are both novel issues of first impression best suited for development through Mississippi common law, not guessed at by arbitrators."

McInnis Elec. Co. v. Brasfield & Gorrie, LLC, 2023 Miss. LEXIS 284 (Oct. 19, 2023)

We will get you paid!

The Louisiana legislature enacted several years ago a mandamus statute geared at promoting payment to contractors engaged in public works projects in the state.

Louisiana Revised Statute 38:2191 provides for mandamus – a summary procedure – for an aggrieved contractor to pursue payment plus attorney's fees and interest when payments are delayed beyond the 45 days specified in the statute.

As regards progress payments on public works construction projects, the statute specifically provides that the statutory penalties are allowed only if the public entity "lacked reasonable cause for late payment" – a condition which would appear to be a pretty low hurdle for a reticent payor public entity.

In a case involving a street paving project, an appeal was taken to the Louisiana Fourth Circuit Court of Appeal of a trial court ruling wherein claims under the statute on seven separate invoices (corresponding to a claim of $201,000 on interest alone, and an indeterminate amount of attorney's fees) netted the contractor statutory penalties on only one invoice.

The Court of Appeal – noting that the factual findings of the trial court could only be reviewed under an "abuse of discretion"/"manifest error" standard – nonetheless reversed the trial court on all six remaining invoices. For its part, the Court of Appeal engaged in an independent, veritably microscopic review of the circumstances surrounding payment on all of the invoices, scouring the documentary evidence and testimony concerning each alleged delay in payment.

Ruling in favor of the contractor, the Court of Appeal held: "The trial court's finding to the contrary was unreasonable in light of the record."

Wallace C. Drennan, Inc. v. Cantrell, 2023-0193 (La. App. 4 Cir. 10/25/23); 2023 La. App. LEXIS 1753

Nearly smoked out!

A concrete subcontractor on a Buc-ee's project in Alabama filed a lien in excess of $1.6 million. The sub then initiated suit against the general contractor, its surety, and Buc-ee's.

At the trial court, the sub's claims were chopped down completely, on the basis that the sub was suing for monies which were due in part for work performed by an unlicensed sub-subcontractor. Under Alabama law, a contractor performing construction work in excess of $50,000 must be licensed, Ala. Code § 34-8-1. The trial court wrote: "Based on the undisputed material facts, all of [plaintiff's] claims are barred as a matter of Alabama law because [plaintiff] seeks to recover money that is based on, dependent on, and stems from illegal work performed by unlicensed sub-subcontractors. Under Alabama law, any person who performs contracting work for over $50,000 must be licensed by the Alabama Licensing Board for General Contractors."

The trial court also took a cleaver to the plaintiff's alternative claims for unjust enrichment/quantum meruit, finding that the existence of a contract precluded those theories.

The sub appealed to the Alabama Supreme Court, urging that it was not trying to fudge the rules during the project, but was simply using temporary labor from a labor agency, offering this nugget: "[Plaintiff] contends that People HR and the other labor brokers it used are temporary staffing agencies in the business of providing temporary laborers, which, in this case, supplemented [plaintiff's] workforce, and that those entities did not contract to perform construction activities covered under § 34-8-1. There was evidence indicating that the temporary laborers utilized the same timekeeping software as [plaintiff] employees, that [plaintiff] determined the hourly wages it billed [the GC] for the temporary laborers' work, and that [plaintiff] paid for liability insurance for the temporary laborers."

The Alabama Supreme Court found that the foregoing set of facts did not necessarily wrap up the plaintiff's appeal, but noted that the case was distinguishable from earlier Alabama Supreme Court authority on the topic. In assessing the lower court judgment as potentially a knee-jerk reaction, the Alabama Supreme Court wrote:

"[I]n that [earlier] case, there was no dispute as to the role and the extent of the unlicensed contractor's involvement in construction and supervisory activities. Here, there was evidence indicating that the temporary laborers were directed and supervised on the project by [plaintiff's] supervisor… [and] a dispute… regarding whether the temporary laborers were engaged in actual concrete work, construction, or supervisory activities that fall under the licensing requirements of § 34-8-1 or whether they were engaged in menial labor."

Opining that the foregoing findings gave the trial court something additional to chew on, the Alabama Supreme Court reversed the lower court's judgment against the subcontractor and remanded the principal contract claims for further consideration by the lower court.

MSE Bldg. Co. v. Stewart/Perry Co., 2023 Ala. LEXIS 114 (Oct. 20, 2023)

Leaving the "work" for someone else?

Such was the circumstance on the construction of a $32,000,000 six-story assisted-living facility in Coral Gables, Florida.

In 2022, relatively early in the construction process, the general contract was terminated for cause by the owner, and suit was filed by the owner in federal court in Florida. One of the disputes raised by the general contractor had to do with what the term "Work" meant in the general contract, as the general contractor urged that the GC itself was entitled to unilaterally terminate the agreement based on suspension of the "Work" for 120 days prior to the owner's termination for cause. "Plaintiff contends that Defendant's argument over the meaning behind the term 'Work' in the Agreement is an effort 'to avoid the inconvenient fact that [Defendant]' in fact performed work under the Agreement during those 120 days."

At issue: two separate portions of the construction contract defining the term "Work." In the basic "Agreement" portion of the contract, "Work" was defined to "generally" consist of the construction of the new building and parking garage. Within the general conditions to the contract, however, the term "Work" was defined as the "'…construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or part of the Project.'"

After refusing defendant's effort to insert expert testimony disguised as lay witness testimony on the matter of "how the construction industry interprets the term 'Work'," the court also decided to reject parol evidence entirely on the topic of the parties' dispute regarding the meaning of the term "Work" in the contract: "[N]either party has argued that the term 'Work' is ambiguous. …The parol evidence rule provides that a written document intended by the parties to be the final embodiment of their agreement may not be contradicted, modified or varied by parol evidence. …. 'Generally, the party seeking to introduce parol evidence must establish that the document is ambiguous and in need of interpretation.' …The parol evidence rule provides that a written document intended by the parties to be the final embodiment of their agreement may not be contradicted, modified or varied by parol evidence."

Ultimately, the court ruled in favor of the project owner: "Here, the parties dispute what 'Work' means. Upon a review of the contract, the Court finds that § 1.1.3 [in the general conditions] explicitly provides the definition while § 2.1 [in the Agreement portion] provides a general description of what 'Work' could include. Defendant's argument that '"Work" is defined' in § 2.1 is incorrect because § 2.1 describes what the 'Work of the Contract generally consists of' but does not define it. … It is a generic, overall statement about the nature of the project. However, unlike § 2.1, § 1.1.3 (1) individually addresses the term 'Work' (as compared to 'the Work of the Contract'); (2) is a subsection within the 'Basic Definitions' section; and (3) provides details regarding what it includes (as compared to a generalization of what it consists of)."

The foregoing appears to be the right outcome, although as always in these cases of a poorly drafted agreement: the ruling was a veritable tossup, and the court could have ruled in favor of either party.

The takeaway: draft better agreements, and don't leave it up to a court to decide the meaning of the fundamental terms of your contracts!

Sunrise of Coral Gables Propco, LLC v. Current Builders, Inc., 2023 U.S. Dist. LEXIS 183512 (S.D. Fla. Oct. 12, 2023)