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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CLEVELAND CONSTRUCTION, INC.

Appellant,

v.

JAMES A. CUMMINGS, INC., et al.

Appellee.

CASE NO.: 4D23-1917
L.T. No.: CACE16-006245

REPLY BRIEF OF APPELLANT
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<u>**INTRODUCTION**</u>

Cleveland Construction, Inc. submits this reply brief to address two issues:

(1) In Argument I of its Answer Brief (beginning at page 17), James A. Cummings, Inc. ("JAC") contends that the Court correctly found that JAC was entitled to supplement CCI pursuant to Article X of the Subcontract. In support, JAC refers to its August 13, 2015 supplementation letter, but omits the critical fact that the supplementation contemplated by that letter was *limited to* the New Connector Bridge ("Bridge"), a relatively small portion of the Project. According to the letter, JAC intended to supplement CCI at the Bridge because CCI was behind schedule in that area. However, at that time, JAC was blaming 100 percent of Project delay on Broward County ("County"), making supplementation under Article X improper. But even if JAC could show that supplementation at the Bridge was warranted and that it complied with Article X with respect to supplementing CCI on that work, the August 13, 2015 letter was used as the basis for supplementing CCI elsewhere in the Project, and the evidence showed that more than 90 percent of the amount claimed by JAC for supplementing CCI was for areas other than the Bridge—areas in which JAC did not follow the Article X notice requirements for supplementing CCI. That is a separate and distinct reason

why the Court erred in awarding JAC supplementation costs in areas other than the Bridge.

(2) In its Argument III.C, JAC contends that CCI did not properly plead its prevention of performance affirmative defense. However, CCI raised active interference as the Third Affirmative Defense in its Answer to JAC's Counterclaim, and thus did not waive the issue.

RELEVANT FACTUAL BACKGROUND

Although CCI provided a comprehensive account of relevant events in its initial brief, CCI presents the following timeline of the events before, during, and after JAC's August 2015 supplementation of CCI in the Bridge to demonstrate that (1) JAC has consistently maintained that the County is 100 percent responsible for the Project delays (which would be inconsistent with the right to supplement CCI under Article X), and (2) JAC failed to comply with the Article X pre-conditions for supplementing CCI in areas other than the Bridge:

- June 18, 2015: Both CCI and JAC agree this is the Contractual Completion Date for the Project. (SR. 30691).
- July 24, 2015: In the monthly contractor narrative which JAC submitted to the County, JAC informs the County that because of the changes that were made to the courtrooms by the County, the completion of the Project is

231 days behind schedule (i.e., the job is projected to complete on February 4, 2016 as opposed to the contractually required June 18, 2015), and the County is **100 percent responsible** for the delay (SR. 15003-15010). In attributing 100 percent of the delay to the County, JAC implies that neither JAC nor any of the subcontractors, including CCI, are responsible for causing any of the delay. Supplementation of CCI for delay under Article X is allowed only if CCI is causing delay, but JAC was putting 100 percent of the blame for the delay on the County (a position it maintains to this day).

- August 13, 2015: JAC informs CCI that it is exercising its right under Article X to supplement CCI on the Bridge *only*, purportedly because CCI is not keeping up with the schedule for that area. (Def.'s Tr. Exhibit 2320; SR. 2830-2834), notwithstanding JAC's correspondence to the County three (3) weeks earlier in which it attributed 100 percent of the delay to the County. The August 13, 2015 letter is limited to delay issues; there is nothing to suggest that CCI is being supplemented on the Bridge due to quality issues. *The August 13, 2015 letter became the springboard for later supplementation of CCI throughout the Project.*

- Post August 13, 2015 Supplementation Letter: JAC spends in excess of $6 million supplementing CCI's workforce under Article X for what it originally attributed to delays in the Bridge. Of the over $6 million paid to the

supplementation subcontractors, only a small portion—$234,111—is for the Bridge, and the remainder is attributable to other issues unrelated to the Bridge. (SR. 2869; SR. 4727).

- February 3, 2016: JAC invites the subcontractors, including CCI, to submit their delay claims that JAC intends to submit to the County. (SR. 19082).
- February 8, 2016: CCI submits its claim to JAC. (SR. 16144-16152).
- April 1, 2016: JAC sends Request for Change Order ("RCO") 246 to the County, which provides details regarding what JAC alleges is a 305-day delay, 100 percent of which it attributes to the County. (SR. 14240-14460). This is consistent with what JAC told the County about its sole liability for delay in the July 2015 narrative, discussed above.
- July 31, 2023: The Court enters the Amended Final Judgment (R. 2490-2505), holding that under Article X of the subcontract, JAC had the right to supplement CCI for delaying, or tending to delay, the Project. (*Id.*) However, the Court also found that JAC breached the contract with CCI by causing delay. (*Id.*).

It is clear from the timeline of events that at all points in time before, during, and after supplementation of CCI, JAC attributed 100 percent of delay to the County. Nevertheless, on August 13, 2015, JAC supplemented

CCI's work on the Bridge, ostensibly due to CCI's delay in performing that work. In so doing, JAC refers only to issues with delay (again, which JAC just three (3) weeks earlier claimed was the sole fault of the County), and limits the supplementation to the Bridge.

ARGUMENT

I. JAC Improperly Relied on Article X to Supplement CCI

A. At the time of supplementation, JAC referred only to delay issues with the New Connector Bridge

In its Answer Brief, JAC repeatedly references various problems it found with both the quality and progress of CCI's work to support its decision to supplement JAC in August 2015, and ultimately terminate CCI for default in February 2016. In support of its argument that supplementation was proper, JAC cites to the above-referenced August 13, 2015 letter regarding JAC's intention to supplement CCI under Article X of the subcontract for failure to prosecute. (JAC's Answer Brief, p. 10-11; SR. 2830-2834). JAC suggests that the letter references work quality as a basis of supplementation

(it does not), and ignores the fact that the letter was limited to supplementation in the Bridge.[1]

Nevertheless, in the months following the August 13, 2015 letter, JAC spent over $6 million supplementing CCI. (SR. 2869). Of the total amount that JAC expended to complete and correct CCI's work, only a small portion was for work on the Bridge (*Id.*). The remainder was attributable to other issues with the Project unrelated to the Bridge. (*Id.*).

By way of example, JAC introduced evidence showing that nearly $4,647,000 of the approximately $6,000,000 it spent and charged to CCI for supplementation was paid to a company called The Circle Group ("Circle"). In Defendant's Trial Exhibit 2621 (SR. 4726-4734), JAC included a summary of each invoice ("PCO") paid to Circle, which identified where the work was done and how much it cost. SR. 4727 shows that PCO #1139 for $234,111 was for the "Bridge". The balance of the exhibit shows that every other PCO was for supplementation elsewhere on the Project. So of the $4,647,000 paid to Circle, approximately $4,400,000 was for work purportedly performed in

[1] In the first sentence of the August 13, 2015 letter, JAC states "[p]ursuant to our requests on July 28, 2015 and August 11, 2015 (Exhibit A), CCI was to provide a recovery plan for the exterior finishes **related to the New Connector Bridge** by August 12, 2015." (SR. 2831) (emphasis supplied). Further, in the email correspondence in Exhibit A, the subject lines specifically refer to the "CCI Connector Bridge Recovery Plan." (SR. 2832-2833).

areas that were not the subject of the August 13, 2015 Article X supplementation letter.

In the instant case, JAC attempts to justify supplementation of CCI by generalizing about issues with progress and quality. However, it is clear that at the time of the August 2015 supplementation, JAC referred only to progress (not quality) issues with regard to the Bridge. (SR. 2830-2834). Setting aside the fact that at the time of the Bridge supplementation (and continuing to this day) JAC was blaming the County for 100 percent of the Project delay, and despite representing to CCI in the August 13, 2015 letter that supplementation was limited to the Bridge, JAC relied on the letter as the basis for Project-wide supplementation for purported progress and quality issues, charging CCI for nearly all of the supplementation costs having nothing to do with a relatively small part of the Project.

Although no on point cases in Florida have been found that explicitly say a contractor's failure to comply with the pre-conditions to supplementation amount to a breach of subcontract, rendering the supplementation improper, supplementation and default termination are analogous concepts—both allow a contractor to take back work from a subcontractor who is not performing, and charge the subcontractor the cost of having a third-party perform the work. The only practical difference is that

with supplementation, only a portion of the subcontractor's remaining work is taken back, while a default termination results in all of the remaining work being taken back. The close relationship of the two concepts is apparent, since under Article X, in the event of a CCI default, JAC has the option of either supplementing or default terminating CCI.[2] For that reason, the many cases that address the process a contractor must go through to *properly* terminate a subcontractor for default are highly relevant here.

Default termination is recognized as a "drastic sanction which should be imposed…only for good grounds and on solid evidence. *See J.D. Hedin Construction Co. v. U.S*., 408 F.2d 424, 431 (Ct. Cl. 1969). As a result, when terminating for default, a party must strictly comply with the contractual termination provisions. Terms of a contractual termination provision will be strictly construed, and a terminating party that fails to strictly comply with termination provisions with be considered to be in breach of the contract. *See Aberdeen Golf & Country Club v. Bliss Const., Inc.*, 932 So. 2d 235 (Fla. Dist. Ct. App. 2005); *see also Anvil Mining Co. v. Humble*, 153 U.S. 540, 14

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[2] Article X states in part that "…Cummings shall be at liberty (but without obligation) after three (3) days' written notice to Subcontractor…to provide through itself or to others, any such labor or materials, and to deduct the cost thereof from any money due or thereafter to become due to Subcontractor under this Agreement; and [JAC] shall also be at liberty (but without obligation) to terminate the employment of Subcontractor…." (SR. 19107)

S. Ct. 879 (1894). Simply stated, to properly terminate a contract, a party cannot do so arbitrarily but must do so in strict compliance with the terms set forth in the contract. *See Anvil, 153 U.S. 540, 14 S. Ct. 879.*

Supplementation, like termination for default, is a drastic remedy, because it deprives the party being supplemented from completing its work, and exposes that party to the cost of supplementation. Article X contemplates that CCI would be "on the hook" for supplementation costs only to the extent it was in default AND was notified of this fact and given an opportunity to cure. The August 13, 2015 letter relied on by JAC is likely procedurally acceptable as to the Bridge, but could not realistically support supplementation elsewhere on the Project. JAC failed to give the proper Article X notices for these other areas, which is an absolute bar to its right to recover the supplementation costs in those other areas.

In supplementing CCI for work beyond the single issue referenced in the August 13, 2015 letter, JAC imposes a drastic remedy on CCI without strictly complying with Article X of the subcontract. The logic (and case law establishing) that an improper default termination amounts to a breach of contract applies equally to an improper supplementation. JAC cannot prevail, because it gave notice to CCI of its intended supplementation in one small part of the Project for purported delay related issues, and then used that as

the basis to supplement CCI for purported delay and quality issues throughout the Project.

As discussed in the following section, JAC's supplementation of CCI under Article X was improper because (according to JAC) the County—not CCI—was delaying the Project. But even if there was some plausible basis for supplementing CCI in the Bridge, JAC failed to properly invoke Article X to supplement CCI elsewhere in the Project.

B. JAC cannot fault CCI progress to justify supplementation while blaming the entire delay on the owner

Whether or not JAC had reasonable grounds to supplement CCI for issues extending beyond those cited in its August 13, 2015 letter does not change the fact that at all points in time JAC has exclusively blamed the County—not itself, CCI, or the other subcontractors—for the Project delay.

In its Answer Brief, JAC describes "three separate but related paths" concerning the difficulties that affected the construction of the Project. (JAC's Answer Brief, 8-11). The paths include: (1) "JAC and the County," (2) "the work of the subcontractors other than CCI," and (3) CCI. (*Id.*). Regarding the third path that JAC purports "runs directly through CCI," JAC states that "because of the various problems JAC found with the progress and quality of CCI's work, in August 2015 JAC supplemented CCI (SR.2831-34; IB.13)…." (JAC's Answer Brief, 10-11).

However, as has been shown above, at the time that JAC supplemented CCI in August 2015, it cited only to delay issues with the Bridge. (SR.2831-34). JAC made no reference to any quality issues that required supplementation. Therefore, JAC's reference to "various problems" with the "quality of CCI's work" is an obvious red herring.

Further, just a mere three (3) weeks prior to JAC's supplementation letter, on July 24, 2015, JAC represented to the County in the monthly contractor narrative that because of the changes the County made to the courtrooms, the completion of the Project was 231 days behind schedule (i.e., the job was projected to complete on February 4, 2016) and the County was **100 percent responsible** for the delay (SR. 15003-15010). JAC reiterated this position when it submitted RCO 246 to the County on April 1, 2016 and, again, attributed 100 percent of the 305-day delay to the County. (SR. 14240-14460). By blaming the County for 100 percent of the delay, JAC implicitly states that neither JAC nor any of the subcontractors, including CCI, are responsible for the delay. CCI was not in default, and JAC could not invoke Article X to supplement CCI and then bill CCI for the supplementation costs.

JAC has consistently maintained that the County was 100 percent responsible for the delays while CCI was working on site. Nevertheless, it

supplemented CCI due to failure to timely prosecute work with regard to the Bridge. Article X of the subcontract affords JAC the right to supplement if CCI "fail[s] in any respect to prosecute the Work with promptness and diligence, or tend to cause by any action or omission the stoppage or delay of or interference with the work of [JAC]." (SR. 19107). It is clear that when JAC was representing to CCI that it would be supplementing CCI's work with another subcontractor due to progress delays with the Bridge, it was simultaneously telling the County that it was 100 percent to blame for the Project delay.

Furthermore, in its Final Amended Judgment, the Court found that JAC delayed CCI's work. (SR. 2497) ("The evidence in this case shows, at times, JAC disrupted CCI's work. CCI, like all the subcontractors on this job experienced delays which were not of their making."). Both the Court's finding that JAC contributed to delaying CCI's work, as well as JAC's consistent position that the County was responsible for the entire delay are inconsistent with JAC's reliance on Article X as its basis to supplement CCI. Even though both JAC and the Court state that Article X applies, what has not been shown in the evidence is any failure on CCI's part to do or not do anything to trigger supplementation. As a result, JAC's reliance on Article X to supplement CCI is improper.

II. CCI Properly Pleaded Active Interference in its Answer to JAC's Counterclaim

A. Active interference was properly pleaded as an affirmative defense

In its Answer and Affirmative Defenses to JAC's Counterclaim, CCI asserted as its Third Affirmative Defense that JAC's breach of contract claims are barred by "refusing to timely and adequately pay CCI for its Subcontract work and actively interfering with CCI's Subcontract work." (R. 306). Affirmative defenses must be specifically pleaded in order to be effective. Fla. R. Civ. P. 1.110(d). In Florida, although not specifically listed, prevention of performance is recognized as an affirmative defense. *See*, *e.g.*, *Palomares v. Ocean Bank of Miami*, 574 So. 2d 1159, 1161 (Fla. Dist. Ct. App. 1991).

Prevention of performance is based on the contract principle that "where a party contracts for another to do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing the agreed thing." *Harry Pepper & Assocs., Inc. v. Hardrives Co.*, 528 So. 2d 72, 74 (Fla. Dist. Ct. App. 1988) (citation omitted); *see also Cty. of Brevard v. Miorelli Eng'g*, 703 So. 2d 1049, 1051 (Fla. 1997) (citation omitted). Similarly, in Florida, "active interference" is an established exception to the enforcement of "no damage for delay" clauses, which is

"predicated upon an **implied promise and obligation not to hinder or impede performance**." *Newberry Square Dev. Corp. v. S. Landmark, Inc.*, 578 So. 2d 750, 752 (Fla. Dist. Ct. App. 1991) (emphasis supplied); *Triple R Paving, Inc. v. Broward Cty.*, 774 So. 2d 50, 54 (Fla. Dist. Ct. App. 2000); *McIntire v. Green-Tree Cmtys., Inc.*, 318 So. 2d 197, 199 (Fla. Dist. Ct. App. 1975). The case law makes clear that both "prevention of performance" and "active interference" are based on an implied promise not to hinder or obstruct contractual performance of another party. Accordingly, in specifically including active interference as an affirmative defense, CCI has properly pleaded prevention of performance, and thus, the defense is not waived.

B. JAC's reliance on condition precedent cases is distinguishable from the facts of the instant case

Finally, in its argument that CCI did not plead "prevention of performance" as an affirmative defense, JAC relies on cases which are distinguishable from the instant case. In finding that the appellee was not entitled to summary judgment for nonpayment of rent, the Court in *Magnum v. Susser* states, "[appellee] did not include in its answer either of the affirmative defenses upon which it relied its summary judgment motion, and did not plead non-occurrence of the condition precedent of proper notice to vacate." 764 So. 2d 653, 655 (Fla. 1st DCA 2000). In *Davie Westview*

Developers, Inc. v. Bob-Lin, the Court affirmed the trial court's ruling that because the owner did not specifically plead that the contractor's failure to provide the contractor's affidavit as a condition precedent to foreclose on a mechanic's lien, the argument was waived. 533 So.2d 879, 880 (Fla. 4th DCA 1988). In citing to cases in which a party's failure to specifically and particularly plead non-occurrence of a condition precedent resulted in waiver of the argument, JAC suggests CCI's failure to raise prevention of performance as an affirmative defense thereby waives the argument. However, prevention of performance is distinguishable from non-performance of a condition precedent, and nevertheless, CCI did affirmatively raise "active interference" as a defense.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in CCI's initial brief to this Court, the amended final judgment in favor of JAC on its counterclaim should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the font and word length requirements of the Florida Rules of Appellate Procedure.

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