Third District Court of Appeal

State of Florida

Opinion filed January 2, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-801, 3D18-1255
Lower Tribunal No. 12-46272

Miami-Dade County Expressway Authority,
Appellant,

vs.

Electronic Transaction Consultants Corporation,
Appellee.

Appeals from the Circuit Court for Miami-Dade County, William Thomas, Judge.

Holland & Knight LLP, and Rodolfo Sorondo, Jr., Christopher Bellows, Monica Castro, and Tiffany Roddenberry, for appellant.

Vezina, Lawrence & Piscitelli, P.A., and Mike Piscitelli, Bradley S. Copenhaver and Christian L. Cutillo (Fort Lauderdale); Akerman LLP, and Gerald B. Cope, Jr., and Lorayne Perez, for appellee.

Before FERNANDEZ, MILLER and GORDO, JJ.

GORDO, J.

In this consolidated appeal, Miami-Dade County Expressway Authority ("MDX") appeals the trial court's final judgments awarding damages and attorneys' fees and costs to Electronic Transaction Consultants Corporation ("ETC") following a non-jury trial. We affirm the trial court's final judgments in all respects except as to the award of prejudgment interest, which we reverse and remand for calculation from a fixed date of loss.

FACTUAL & PROCEDURAL HISTORY

MDX and ETC entered into the Account Management and Toll Enforcement Systems ("AMTES") contract in 2009 for the design and operation of an electronic toll collection and enforcement system, locally known as Toll-by-Plate. The AMTES contract incorporated a schedule for the design and development of the system and milestone provisions for the implementation of the system.

In 2012, ETC sued MDX for breach of the AMTES contract seeking four types of damages owed under the contract: system, operations, maintenance and disentanglement damages. MDX then terminated the contract and ETC added a cause for wrongful termination.

Following a non-jury trial, the court found that: 1) MDX materially breached the AMTES contract by failing to follow the schedule and failing to comply with deadlines and requirements for submittal reviews and approvals; and 2) MDX wrongfully terminated the contract because, at the time of termination, the system

ETC delivered was in material compliance and ETC was substantially performing its contractual obligations.

After briefing on prejudgment interest, the trial court issued its final judgment awarding ETC $43,000,000 plus prejudgment interest and interest for a total of $53,298,717.27 in damages. The trial court subsequently entered final judgment as to attorneys' fees and costs awarding ETC $8,000,000 with interest.

MDX appeals the final judgment in favor of ETC and the award of attorneys' fees, asserting it is entitled to judgment as a matter of law because ETC failed to comply with the dispute resolution procedures set forth in the AMTES contract.

STANDARD OF REVIEW

"In reviewing a judgment rendered after a bench trial, 'the trial court's findings of fact come to the appellate court with a presumption of correctness and will not be disturbed unless they are clearly erroneous.'" Underwater Eng'g Servs., Inc. v. Util. Bd. of City of Key West, 194 So. 3d 437, 444 (Fla. 3d DCA 2016) (quoting Emaminejad v. Ocwen Loan Servicing, LLC, 156 So. 3d 534, 535 (Fla. 3d DCA 2015)). "Thus, they are reviewed for competent, substantial evidence." Id. (citing Verneret v. Foreclosure Advisors, LLC, 45 So. 3d 889, 891 (Fla. 3d DCA 2010)).

"To the extent the [c]ontract must be interpreted, such interpretation is reviewed de novo." Id. (citing Fernandez v. Homestar at Miller Cove, Inc., 935 So. 2d 547, 550 (Fla. 3d DCA 2006)).

LEGAL ANALYSIS

Contractual Interpretation

MDX contends ETC's claims are barred because it failed to comply with the alleged mandatory dispute resolution procedures of the AMTES contract. There is, however, no singular provision requiring mandatory dispute resolution for all claims arising under the contract. We decline to adopt MDX's interpretation, which urges us to read certain provisions of sections 14 and 15 out of context and import a binding dispute resolution requirement that the parties did not expressly provide for in the contract.

It is well settled that "the intention of the parties must be determined from an examination of the entire contract and not from separate phrases or paragraphs." Allen v. Nunez, 258 So. 3d 1207, 1217 (Fla. 2018) (quoting Moore v. State Farm Mut. Auto. Ins. Co., 916 So. 2d 871, 875 (Fla. 2d DCA 2005)). "[A] court may not interpret a contract so as to render a portion of its language meaningless or useless." TRG Columbus Dev. Venture, Ltd. v. Sifontes, 163 So. 3d 548, 552 (Fla. 3d DCA 2015). MDX's interpretation contravenes this principle and would require us to ignore the remainder of the text of sections 14 and 15.

"The deficiency in this [interpretation] is plainly encapsulated within the maxim, *expressio unius est exclusio alterius*." Espinosa v. State, 688 So. 2d 1016, 1017 (Fla. 3d DCA 1997). "If one subject is specifically named [in a contract], or if several subjects of a large class are specifically enumerated, and there are no general words to show that other subjects of that class are included, it may reasonably be inferred that the subjects not specifically named were intended to be excluded." Id. (quoting 3 Corbin on Contracts § 552 (1960)).

Section 14, entitled "Supplemental Agreements and Claims for Out of Scope Work," sets forth a process for modifying the scope of work or compensation due for extra work under the contract. Pursuant to this section, the contract may be modified by a Supplemental Agreement proposed by either party. Specifically, section 14.2 provides that ETC may propose a written Supplemental Agreement where circumstances arise justifying additional compensation or time or requiring changes in the scope of work. This section requires ETC to give MDX "notice" of its intent to file a claim for extra compensation before providing work beyond the scope of the contract.

If the parties disagree on Supplemental Agreements, section 14.6 provides that MDX may issue Unilateral Agreements and that ETC must proceed with work but is entitled to protest under section 14.7. Section 14.7 sets forth the protest procedures for resolving disputes between the parties as to the nature of proposed

changes to the contract or discretionary decisions made unilaterally by MDX. This provision requires the written protest by ETC to set forth its reasons for claiming "additional compensation," the nature of "out-of-scope work" involved, the amount of "additional compensation" requested and the details of any requested "schedule adjustment." Section 14.9 explicitly provides this process is the exclusive remedy where changes to the contracted work are involved.

Here, the trial court found that the work at issue was indeed within the scope of work contemplated by the AMTES contract. ETC did not seek to modify the scope of work or change the terms of the contract. Rather, ETC specifically sued to recover damages owed for work performed within the scope of the contract. Based on our review of the plain language of section 14, the protest procedures exclusively apply to disputes regarding work outside the scope of the contract. Accordingly, section 14 is not applicable to ETC's claims.

Likewise, section 15—to the extent it incorporates and elaborates on the protest procedures in section 14—does not bar ETC's claims. Section 15 is entitled "Formal Notice of Potential Claims and Dispute Resolutions and Claims." Various provisions of this section elaborate on the dispute resolution process regarding out-of-scope work including the Notice of Potential Claims requirement. Accordingly, to the extent these provisions refer to Supplemental Agreements and the Notice of Potential Claim procedures, they are inapplicable to the claims presently at issue.

Section 15 does, however, contain certain requirements for actions regarding general claims arising under the AMTES contract. In fact, this section contains the only condition precedent to litigation mandated by the contract. Specifically, section 15.4 H. provides "the Contractor shall have first submitted its claim (together with supporting documentation) to MDX, and MDX shall have had sixty (60) days thereafter within which to respond thereto." As to this requirement, the trial court found that MDX had actual, written notice of ETC's claims more than 60 days prior to filing suit and ETC was, therefore, in compliance with the terms of section 15.

We, therefore, affirm the court's interpretation of the contract, which allowed ETC's claims to proceed to trial.

Compensatory Damages

MDX asserts the damages awards cannot be sustained by the evidence presented. We review the trial court's "award of damages to see if it is supported by substantial competent evidence viewing the facts and all reasonable inferences in the light most favorable to the verdict." Alvarez v. All Star Boxing, Inc., 258 So. 3d 508, 512 (Fla. 3d DCA 2018).

"Under Florida law, 'the plaintiff must present evidence regarding a reasonable certainty as to its amount of damages . . . .'" Gonzalez v. Barrenechea, 170 So. 3d 13, 16 (Fla. 3d DCA 2015) (quoting Regions Bank v. Maroone Chevrolet, L.L.C., 118 So. 3d 251, 257 (Fla. 3d DCA 2013)). Here, we find the damages

amount was supported by testimony from ETC's expert, Louis Wenick, and MDX's expert, Robert Stone. Thus, we affirm the trial court's award without further discussion.

Prejudgment Interest

MDX appeals the trial court's award of prejudgment interest arguing there was no prejudgment date of loss. "There are two prerequisites to the award of prejudgment interest as damages: (1) [o]ut-of-pocket pecuniary loss, and (2) a fixed date of loss." Albanese Popkin Hughes Cove, Inc. v. Scharlin, 141 So. 3d 743, 747 (Fla. 3d DCA 2014) (quoting Underhill Fancy Veal, Inc. v. Padot, 677 So. 2d 1378, 1380 (Fla. 1st DCA 1996)). "[T]he finder of fact, whether judge or jury, has to decide both entitlement to and amount of prejudgment interest." Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212, 215 (Fla. 1985). "It is well settled that prejudgment interest is calculated from the date that payment was due." Wright v. Guy Yudin & Foster, LLP, 176 So. 3d 368, 373 (Fla. 4th DCA 2015) (citing Bevins v. Antuna, 68 So. 3d 420, 420 (Fla. 4th DCA 2011)). See Lumbermens Mut. Cas. Co. v. Percefull, 653 So. 2d 389, 390 (Fla. 1995) ("[P]rejudgment interest is allowed in Florida for actions based on contract from the date the debt is due." (citing Parker v. Brinson Constr. Co., 78 So. 2d 873, 874 (Fla. 1955))). In this case, the trial court's judgment does not include a fixed date of loss. Accordingly, we remand for the trial court to set the prejudgment date of loss.

Attorneys' Fees

The trial court awarded ETC $5,000,000 for attorneys' fees and $3,000,000 for costs pursuant to an agreed order based on ETC prevailing in the case below. According to the express terms of section 15.4 A. of the AMTES contract,[1] we affirm the award of attorneys' fees and costs.

CONCLUSION

We affirm, in part, the trial court's final judgments in favor of ETC. We reverse and remand solely for calculation of the amount of prejudgment interest based on a fixed date of loss.

Affirmed in part, reversed in part and remanded.

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> **15.4 Actions**
> . . .
> A. If any dispute regarding Contractor claims arising hereunder or relating to the Agreement (and the Contractor's Work hereunder) results in litigation, the prevailing party in such litigation shall be entitled to recover reasonable attorney's fees and costs including costs and expenses of expert witnesses.