Third District Court of Appeal

State of Florida

Opinion filed October 2, 2019.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-1450, 3D18-1340, & 3D18-1337
Lower Tribunal No. 17-233-M

Seawatch at Marathon Condominium Association, Inc.,
Appellant/Cross-Appellee,

vs.

The Guarantee Company of North America, USA, et al.,
Appellees/Cross-Appellants.

Appeals from the Circuit Court for Monroe County, Mark H. Jones, Judge.

Duane Morris LLP, and Joseph A. Battipaglia, and Michael J. Shuman, for appellant/cross-appellee.

Etcheverry Harrison, LLP, and Edward Etcheverry, and Jeffrey S. Geller (Fort Lauderdale); Fergeson Skipper, P.A., and David S. Maglich, and Douglas R. Bald (Sarasota), for appellees/cross-appellants.

Before SALTER, MILLER, and GORDO, JJ.

MILLER, J.

Appellant, Seawatch at Marathon Condominium Association, Inc. ("Seawatch" or "Owner"), appeals, and Guarantee Company of North America, USA ("Guarantee" or "Surety") and Complete Aluminum General Contractors, Inc. ("CAGC" or "Principal"), cross-appeal, a final declaratory judgment. Following the default of the Principal on a multi-million dollar construction contract, the Surety rendered an election under the terms of the applicable standard performance bonds. The Owner filed suit, seeking a declaration regarding its rights and responsibilities. In the final judgment, the lower tribunal determined that, under the terms of the bonds, the takeover Surety was permitted to utilize the defaulting Principal as its completion contractor. The court further found the Surety was not required to maintain a Florida contracting license, and its election was conditional as it added unstipulated terms. Thus, notwithstanding its reluctant embroilment in litigation, the Surety remained obligated under the bonds. For the reasons explicated below, we discern no error and affirm.

FACTS AND PROCEDURAL HISTORY

The relevant facts are undisputed. On October 23, 2014, Seawatch entered into a $5.4 million construction contract, engaging CAGC to serve as the contractor for the renovation of three condominium buildings located in Marathon, Florida. Guarantee executed three standard American Institute of Architects A312 surety

bonds to secure CAGC's performance under the construction contract, for the benefit of Seawatch.

In 2017, after discovering certain defects in the renovations, Seawatch declared CAGC in default and effected a termination of the contract. Thereafter, Seawatch requested Guarantee to "promptly make an election under Paragraph 4" of the performance bonds.

Following the satisfaction of specified conditions precedent, under Paragraph 4, the Surety was required to promptly, at its own expense, exercise one of the following series of options:

> 4.1 Arrange for the CONTRACTOR, with consent of the OWNER, to perform and complete the Contract; or
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> 4.2 Undertake to perform and complete the Contract itself, through its agents or through independent contractors; or
>
> 4.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the OWNER for a contract for performance and completion of the Contract, arrange for a contract to be prepared for execution by the OWNER and the contractor selected with the OWNER'S concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the Bonds Issued on the Contract, and pay to the OWNER the amount of damages as described in paragraph 6 in excess of the Balance of the Contract Price incurred by the OWNER resulting from the CONTRACTOR Default; or

> 4.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances;
> 4.4.1 After investigation, determine the amount for which it may be liable to the OWNER and, as soon as practicable after the amount is determined, tender payment therefore to the OWNER; or
> 4.4.2 Deny liability in whole or in part and notify the OWNER citing reasons therefore.

Over the course of the next several months, Guarantee and Seawatch exchanged documentation and arranged a meeting, but failed to consummate a mutually agreed upon resolution to effect project completion. Eventually, Guarantee transmitted correspondence to Seawatch, announcing its formal election to assume and complete the contract under the provisions of Paragraph 4.2. Guarantee enclosed a draft of the proposed "Election and Agreement under Paragraph 4.2 of the Performance Bond" ("Takeover Agreement"). In the proposed agreement, Guarantee advised Seawatch that its completion team consisted of:

> a. CAGC, as completion contractor;
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> b. J.S. Held, as a construction consultant, . . . ;
>
> c. L.W. Construction Concepts . . . , as a subcontractor . . . ; and
>
> d. Any and all subcontractors, suppliers, materialmen and/or design professionals deemed necessary . . .

Seawatch rejected the Takeover Agreement, contending that it materially modified the original project terms, and that language within the performance bonds prohibited Guarantee from retaining CAGC as its completion contractor.

Shortly thereafter, Guarantee sent Seawatch a revised Takeover Agreement. Although Guarantee altered some of the objectionable provisions, it reiterated its intention to retain CAGC.[1] Three days later, Seawatch filed its claim for declaratory relief, seeking a judicial imprimatur on its contention that, in the absence of consent by Seawatch, Guarantee was prohibited from hiring CAGC as the completion contractor under the performance bonds. Seawatch further asserted that in the event of a takeover, Guarantee was required to assume the role of general contractor. Accordingly, as Guarantee did not hold a contracting license, it was prohibited from electing the remedy provided in Paragraph 4.2.

Conversely, CAGC and Guarantee contended that Paragraph 4.2 imposed no restrictions on the selection of completion contractors and agents. Therefore, Guarantee sought to extricate itself from its assumption of the project, asserting that Seawatch had materially breached the performance bonds by refusing to accept CAGC's role in the completion of the project.

The lower tribunal determined that under the "clear and unambiguous language" set forth in Paragraph 4.2, Guarantee was within its rights to hire CAGC as a completion contractor, and rejected the argument that Guarantee was required to possess a contracting license. The court further found that Guarantee "did not

[1] The revised Takeover Agreement continued to include certain objectionable reservation of rights provisions.

make a legally sufficient election to proceed under Paragraph 4.2 of the [bonds]," as it conditioned the election upon Seawatch signing the Takeover Agreement. The instant appeal and cross-appeal ensued.

STANDARD OF REVIEW

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000) (citation omitted). The Court "view[s] the facts in a light most favorable to the nonmoving party and conduct[s] a de novo review of such a judgment." Maronda Homes, Inc. v. Lakeview Reserve Homeowners Ass'n, Inc., 127 So. 3d 1258, 1268 (Fla. 2013) (citation omitted).

LEGAL ANALYSIS

I. Selection of Completion Personnel

On appeal, Seawatch challenges the use of CAGC as a completion contractor under the terms of the performance bonds. "The purpose of a performance bond is to guarantee the completion of the contract upon default by the contractor." Am. Home Assurance Co. v. Larkin Gen. Hosp., Ltd., 593 So. 2d 195, 198 (Fla. 1992) (citation omitted). In the event of contractor default, "the surety [under the bond] performs the work, mitigates loss by its performance, and pays the subcontractors and suppliers." In re Modular Structures, Inc., 27 F.3d 72, 74 n.1 (3d Cir. 1994).

"As a general proposition, contracts of suretyship are regarded as analogous to contracts of insurance in that the various rules of construction governing insurance policies are applicable." Travelers Indem. Co. v. Mercer, 250 So. 2d 283, 285 (Fla. 4th DCA 1971) (citing 30 Fla. Jur. Suretyship and Guaranty §11). "The cardinal rule of contractual construction is that when the language of the contract is clear and unambiguous, the contract must be interpreted and enforced in accordance with its plain meaning." Columbia Bank v. Columbia Developers, LLC, 127 So. 3d 670, 673 (Fla. 1st DCA 2013) (citing Ferreira v. Home Depot/Sedgwick CMS, 12 So. 3d 866, 868 (Fla. 1st DCA 2009) ("Contracts are to be construed in accordance with the plain meaning of the words therein, and it is never the role of the trial court to rewrite a contract to make it more reasonable for one of the parties.")).

Here, the delineated election set forth in Paragraph 4.2 is clear and unambiguous. In the event of default, the surety is permitted to "[u]ndertake to perform and complete the Contract itself, through its agents or through independent contractors." Unlike the election set forth in Paragraph 4.1, the provision, by its express language, does not reflect any requirement of mutual assent in the selection of the completion team. Accordingly, by its plain terms, "Paragraph 4.2 places no restrictions on whom [Guarantee] can use to complete the project." St. Paul Fire & Marine Ins. Co. v. VDE Corp., 603 F.3d 119, 123 (1st Cir. 2010) (citation omitted).

Nonetheless, Seawatch attempts to "graft the owner consent provision contained in Paragraph 4.1 onto the performance option actually selected by [Guarantee], Paragraph 4.2." St. Paul Fire & Marine Ins. Co. v. City of Green River, 93 F. Supp. 2d 1170, 1178 (D. Wyo. 2000), aff'd 6 F. Appx. 828 (10th Cir. 2001). However, such a reading cannot sustain intellectual muster, as "[t]o replace [the conjunction] 'or' with 'and' would require that we ignore the ordinary and natural meaning of the terms," and defeat the obvious distinction in the delineated election options. See Wal–Mart Stores E., L.P. v. N. Edgefield Organized Neighbors, Inc., No. M2013-01351-COA-R3CV, at *4 (Tenn. Ct. App. Dec. 17, 2013) (declining to find "or" and "and" interchangeable where the context did not suggest such an intention). Moreover, as aptly observed by the First Circuit Court of Appeals, in construing an identical contract:

> The absence of a consent requirement in Paragraph 4.2, and the presence of such a requirement in Paragraphs 4.1 and 4.3, sensibly reflects the different obligations assumed by a surety electing to proceed under each of these provisions. In choosing to proceed under Paragraph 4.2, which requires the surety to *undertake* to perform and complete the construction contract, [the surety] "assumed primary responsibility to complete the contract, and with that responsibility came the freedom to assemble the project team of its choosing." Green River, 93 F. Supp. 2d at 1177; see also Richard S. Wisner & James A. Knox, Jr., The ABCs of Contractors' Surety Bonds, 82 Ill. B.J. 244, 246 (1994) (explaining that when a surety elects to take over and complete the project, it directly assumes the contractor's underlying contractual obligation to complete the project). Once the surety has elected to perform under Paragraph 4.2, the surety and the obligee . . . negotiate

> an agreement, commonly called the "takeover agreement," which is "the critical document for the completing surety and obligee in defining their future rights and obligations and in establishing a clear understanding of the scope of remaining work to be completed." Philip L. Bruner & Patrick J. O'Connor, Jr., 4A Bruner & O'Connor on Construction Law § 12:80 (2009). Following negotiation of the takeover agreement, the surety awards a completion contract to a contractor. Id.
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> In contrast, a surety electing to proceed under Paragraph 4.1 must *arrange for* the original contractor to perform and complete the construction contract with the owner's consent, by financing the original contractor's continuing performance. See Wisner & Knox, at 245-46. Under this provision, the surety "does not assume primary responsibility for completing the contract, and the owner is required to maintain an ongoing contractual relationship with the terminated contractor." Green River, 93 F. Supp. 2d at 1177; see also Wisner & Knox, at 246. Thus, "[w]hile it makes sense that the owner would have the right to object to such a 'shotgun wedding' to the contractor it just terminated [under Paragraph 4.1], it does not follow that the [owner] would have this right when the surety assumes primary contractual responsibility [under Paragraph 4.2]." Green River, 93 F. Supp. 2d at 1177.

VDE Corp., 603 F.3d at 123-24.

Finally, "[i]t is common practice for a surety undertaking to complete the project itself to hire the original contractor, as [Guarantee] elected to do here." Id. at 124 (citations omitted); see also Fidelity & Deposit Co. v. Jefferson Cty. Comm'n, 756 F. Supp. 2d 1329, 1336 (N.D. Ala. 2010) (holding that by its express terms, Paragraph 4.2 places "no restrictions on whom [the Surety] can use to complete the

project") (citing Green River, 93 F. Supp. 2d at 1177).[2] "By completing the project itself, the surety obtains greater control than it would have had if it elected to require the obligee to complete, because the surety can select the completing contractor or consultants to finish the project as well as control the costs of completion." Bruce C. King, Takeover and Completion of Bonded Contracts by the Survey, 27 Brief 22, 25 (1997). Accordingly, we decline to import an unpenned requirement into the contract.

II. Sufficiency of the Election Under the Performance Contract

On cross-appeal, Guarantee and CAGC contend that the trial court erred by concluding that Seawatch did not materially breach the performance bonds by refusing to allow CAGC to serve as the completion contractor under the Paragraph 4.2 election and by seeking court intervention. "A material breach occurs where the covenant not performed is of such importance that the contract would not have been made without it." Green River, 93 F. Supp. 2d at 1178 (quoting Dragon Constr., Inc. v. Parkway Bank & Tr., 678 N.E.2d 55, 58 (Ill. App. Ct. 1997)); see Covelli Family, L.P. v. ABG5, L.L.C., 977 So. 2d 749, 752 (Fla. 4th DCA 2008) ("To constitute a

[2] We reject Seawatch's contention, without further elaboration, that Guarantee must be a licensed general contractor in order to avail itself of the election provision set forth in Paragraph 4.2. See § 489.128(3), Fla. Stat. (2019) (distinguishing between surety and contractor); see also Richard S. Wisner & James A. Knox, Jr., The ABCs of Contractors' Surety Bonds, 82 Ill. B.J. 244, 246 (1994) (explaining that, in exercising a takeover and completion option, "[t]he surety does not undertake the construction itself").

. . . material breach, a party's nonperformance must 'go to the essence of the contract.'") (quoting Beefy Trail Inc. v. Beefy King Int'l, Inc., 267 So. 2d 853, 857 (Fla. 4th DCA 1972)). Nonetheless, when there is a disagreement as to the meaning of terms in a contract, one party's offer to perform in accordance with his interpretation is not itself an anticipatory breach, as "[s]uch a [breach] . . . must be distinct, unequivocal, and absolute." Mori v. Matsushita Elec. Corp. of Am., 380 So. 2d 461, 463 (Fla. 3d DCA 1980); see Alvarez v. Rendon, 953 So. 2d 702, 709 (Fla. 5th DCA 2007) ("An anticipatory breach of contract occurs before the time has come when there is a present duty to perform as the result of words or acts evincing an intention to refuse performance in the future."). "If the offer appears to be made in the good faith belief that the offeror's interpretation is correct, that will be evidence of his continued adherence to the agreement." Pac. Coast Eng'g Co. v. Merritt-Chapman & Scott Corp., 411 F.2d 889, 894 (9th Cir. 1969) (citations omitted).

Here, the parties genuinely disagreed in their interpretation of the bond agreement. Thereafter, Seawatch promptly sought judicial intervention through its declaratory action. As the filing of a declaratory relief action is not, under these circumstances, a breach of any express provision of the bond agreement, and Guarantee's election was conditioned upon the acceptance of the revised proposed Takeover Agreement, we agree with the trial court's conclusion that Seawatch did not materially breach the bond agreement so as to relieve Guarantee from its

obligations thereunder. See, e.g., Atlas Assurance Co. v. McCombs Corp., 194 Cal. Rptr. 66 (Cal. Ct. App. 1983) ("Absent other facts, the mere filing of an action to declare the insurer's rights and duties relative to an insurance policy cannot form the basis of breach of the duty of good faith and fair dealing); see § 86.011, Fla. Stat. (2019) (The circuit court "may render declaratory judgments on the existence, or nonexistence: (1) [o]f any immunity, power, privilege, or right; or (2) [o]f any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future.").

Accordingly, we affirm the well-reasoned order of the lower tribunal.