

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 1254

ST. TAMMANY PARISH SCHOOL BOARD

VERSUS

HARTFORD CASUALTY INSURANCE COMPANY, ET AL.

v.g.w. by Jmm
WRC by Jmm
DATE OF JUDGMENT: AUG 20 2018

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2012-12891, DIVISION C, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE RICHARD A. SWARTZ, JR., JUDGE

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BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

Disposition: MOTION DENIED; JUDGMENT AFFIRMED.

McDonald, J. concurs

CHUTZ, J.

Plaintiff-appellant, Industrial Mechanical Contractors, Inc. (IMC), appeals the trial court's judgment, denying it delay damages and dismissing its claims against defendants-appellees, Polk Construction Corporation (Polk), and its surety, Hartford Casualty Insurance Company (Hartford). For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Polk entered into a contract for construction of Henry Mayfield Elementary School (the Mayfield project) with St. Tammany Parish School Board (STPSB) on July 27, 2009 (the prime contract). On September 25, 2009, Polk and IMC entered into a subcontract for IMC to provide all mechanical work including plumbing and heating, ventilation, and air conditioning for the sum of \$2,300,000.00. Hartford issued performance and labor and materials payment bonds to Polk. In accordance with the Louisiana Public Works Act (LPWA), the notice of substantial completion of the Mayfield project was filed on March 15, 2012.¹ It is undisputed that substantial completion was well beyond the initial contract completion time period.²

On March 16, 2012, IMC requested delay damages from Polk in the amount of \$599,373.47. IMC filed a statement of claim with the St. Tammany Parish Clerk of Court, requesting that amount in delay damages and providing notice to Polk and Hartford of the statement of claim on March 30, 2012.

STPSB subsequently invoked a concursus proceeding, naming Polk, Hartford, and IMC, among numerous others, as defendants with competing claims

¹ See generally La. R.S. 38:2241 *et seq.*, particularly La. R.S. 38:2241.1.

² It is undisputed that although the original prime contract stated the contractor would fully complete all work within 540 days, approved extensions resulted in an increase in the time period for completion.

for the sums due on the project. In conjunction with its concursus petition, STPSB deposited \$929,227.33 into the court's registry.

In addition to answering STPSB's concursus petition, IMC filed a cross claim against Polk and Hartford, averring entitlement to delay damages. A trial was held on the competing claims in the concursus proceeding, commencing on February 16, 2016. On February 25, 2016, all parties compromised their claims against one another, except IMC who declined to settle its cross claim against Polk and Hartford.³

After a five-day trial commencing on August 29, 2016, the trial court subsequently signed a judgment on January 6, 2017, in favor of Polk and Hartford, dismissing IMC's delay damage claim. This appeal by IMC followed.

MOTION FOR LEAVE TO FILE ATTACHMENTS

During the pendency of its appeal, IMC filed a motion averring that certain exhibits admitted at the trial, which were introduced into evidence on an external hard drive, were unavailable when it reviewed the appellate record. Thus, IMC sought leave to attach copies of those exhibits to its brief. In our review of the record, we located all the exhibits and, therefore, find that attaching a copy of the exhibits identified by IMC to its brief serves no useful purpose. Accordingly, inasmuch as the record already contains the exhibits, we deny the motion. See *Stonegate Homeowners Civic Ass'n v. City of Baton Rouge/Parish of East Baton Rouge*, 2011-0028 (La. App. 1st Cir. 7/26/11), 70 So.3d 1078, 1080, (a request for relief is moot when its rendition can serve no useful purpose).

³ Although IMC sought additional amounts that it alleged were owed by Polk under the original terms of the subcontract and approved change orders and which were set forth in its March 30, 2012 statement of claim, these additional amounts were compromised before the commencement of the trial on IMC's cross-claim allegations. In the appealed judgment, the trial court awarded legal interest on the compromised amounts; those awards were not appealed. Therefore, the only issue before us in this appeal is the propriety of the dismissal of IMC's delay-damage claim.

DISCUSSION

On appeal, IMC maintains that the trial court erred in its interpretation and application of the provisions of the subcontract it entered into with Polk. IMC specifically contends that in reaching its conclusion, the trial court incorrectly characterized its request for delay damages as a change order and, therefore, applied the wrong controlling contractual provision.

Initially, we note that a contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished. La. C.C. art. 1906. The proper interpretation of a contract is a question of law subject to *de novo* review on appeal. When considering legal issues, the reviewing court accords no special weight to ruling of the trial court, but conducts a *de novo* review of questions of law and renders judgment on the record. *Montz v. Theard*, 2001-0768 (La. App. 1st Cir. 2/27/02), 818 So.2d 181, 185.

Contracts have the effect of law for between the parties, and the courts are to interpret them according to the common intent of the parties. La. C.C. arts. 1983, 2045. If the words of the contract are clear, explicit, and lead to no absurd consequences, the court may not look beyond the contract language to determine the parties' true intent. La. C.C. art. 2046. Where factual findings are pertinent to the interpretation of a contract, those factual findings are not to be disturbed unless manifest error is shown. *Amitech U.S.A., Ltd. v. Nottingham Constr. Co.*, 2009-2048 (La. App. 1st Cir. 10/29/10), 57 So.3d 1043, 1058, writs denied, 2011-0866, 2011-0953 (La. 6/17/11), 63 So.3d 1036, 1043.

Polk's Liability:

In Section 5 of the subcontract entered into between Polk and IMC, the parties agreed:

In the event the Subcontract Work is delayed or disrupted by [STPSB], [Polk], or other subcontractors, [IMC] as its sole and exclusive remedy may upon written request properly made to [Polk]

obtain time extensions and an increase in the Subcontract price to the extent of any amounts and time extensions that [Polk], on behalf of [IMC], actually receives from [STPSB] or from the responsible subcontractors for such delays or disruptions. As a condition precedent to any relief, [IMC] must give [Polk] timely written notice of delay or disruption to the Subcontract Work.

IMC suggests that rather than applying Section 5, the trial court erroneously applied the timing requirements of Section 14, which IMC maintains is the change order provision of the subcontract. Section 14 of the subcontract states in part:

This Subcontract cannot be changed, modified, altered, suspended, or terminated, except in writing signed by an authorized representative of [Polk]. Any deviation from the Plans and Specifications without written consent shall be [IMC's] full responsibility. Any change to the contract amount not approved by written executed change order will not be paid. Claims for extras will only be allowed and paid where [Polk] has given a written change order prior to execution of the work.

Although IMC expends much argument challenging the trial court's rationale for denying delay damages, we are mindful that appellate courts review judgments, not reasons for judgment. *Bellard v. American Cent. Ins. Co.*, 2007-1335 (La. 4/18/08), 980 So.2d 654, 671; see also *Greater New Orleans Expressway Commission v. Olivier*, 2002-2795 (La. 11/18/03), 860 So.2d 22, 24 ("Appeals are taken from the judgment, not the written reasons for judgment"). Judgments are often upheld on appeal for reasons different than those assigned by the trial court judges. The written reasons for judgment are merely an explication of the trial court's determinations. They do not alter, amend, or affect the final judgment being appealed. *State in the Interest of Mason*, 356 So.2d 530, 532 (La. App. 1st Cir. 1977).

Even if the trial court erroneously applied Section 14 as IMC claims, our review of the contract documents shows that the trial court correctly determined that IMC failed to timely request delay damages. While IMC has correctly pointed out that Section 5 is the "sole and exclusive remedy" available to IMC for delay damages, according to Section 11 of the subcontract, the work IMC contracted to

do was “to be in accordance with the conditions of the [prime contract].” Under the prime contract, Polk agreed with STPSB that the contract price was “subject to additions and deductions as provided in the Contracts Documents,” which included supplementary conditions.

Article 4.3.2 of the supplementary conditions of the Plans and Specifications provides the following:

Time Limits on Claims. Claims by the Contractor must be made within twenty-one (21) calendar days after the occurrence of the event giving rise to such Claim; provided, however, that Contractor shall use its best efforts to furnish the Architect and [STPSB], as expeditiously as possible, with notice of any Claim ... once such Claim is recognized and shall cooperate with the Architect and [STPSB] and shall make every effort to mitigate the alleged or potential damages, delay or other adverse consequences arising out of the condition which is the cause of the Claim. Claims must be made by written notice. An additional Claim made after the initial Claim has been implemented by Change Order will not be considered unless submitted in a timely manner. Any notice of claim must clearly identify the alleged cause and the nature of the claim to include data and information then available to the claimant which will facilitate proper verification and evaluation of the claim.

IMC points out that Article 4.3.2 addresses the “Contractor,” not a “Subcontractor” such as IMC. Thus, IMC maintains Article 4.3.2 cannot be used to establish a time period by which it was required to submit its claim for delay damages. IMC therefore contends that since it presented its delay-damages claim to Polk on March 16, 2012, it is entitled to recover. We disagree.

According to Section 5 of the subcontract, IMC’s sole and exclusive remedy by which to obtain an increase in the subcontract price due to delay or disruption was “upon written request properly made to the Contractor.” Since the Subcontract was regulated by the supplementary conditions, including Article 4.3.2, IMC knew that Polk, as the Contractor, was required to make a claim within twenty-one calendar days after the occurrence of the event giving rise to the claim. Moreover, pursuant to Section 5 of the subcontract, to assert any claim -- including one “on behalf of [IMC]” for “an increase in the Subcontract price” as a result of delay or

disruption of IMC's subcontract work -- Polk was required to make the claim by written notice. Written notice was required, pursuant to Article 4.3.2, to "clearly identify the alleged cause and the nature of the claim to include data and information then available to [IMC as the claimant,] which will facilitate proper verification and evaluation of the claim."

The record is devoid of any evidence showing that IMC apprised Polk either of its intention to assert a claim for delay damages or of the amounts it claimed were due it until after substantial completion of the Mayfield project. Its request was untimely under Section 5 of the subcontract inasmuch as at the time it was submitted, Polk was already precluded from making a timely claim on IMC's behalf under Article 4.3.2 of the supplementary conditions. See also La. C.C. art. 1778 ("A term for the performance of an obligation is a period of time either certain or uncertain. It is certain when it is fixed. It is uncertain when it is not fixed but is determinable either by the intent of the parties or by the occurrence of a future and certain event. It is also uncertain when it is not determinable, in which case the obligation must be performed within a reasonable time").

As confirmed by Polk's construction expert Joe Caldarera⁴ during questioning by counsel at trial, notice of a delay-damage claim is required because it gives the owner and/or the general contractor the option of limiting the adverse impact of the delay through modification of other elements of the work. IMC's evidence of emails apprising Polk of delays IMC was experiencing and of the resulting effects in IMC's performance of the subcontract work simply did not advise Polk that IMC would seek delay damages.

Thus, the record supports the trial court's conclusion that IMC did not request delay damages "upon written request properly made." IMC's request for

⁴ Caldarera was accepted as an expert in construction, particularly construction management, scheduling, costs, pricing, estimating, and labor utilization as well as in pile driving.

delay damages, submitted to Polk untimely, i.e., after Polk was precluded from submitting the claim to the architect or STPSB under Article 4.3.2 of the supplementary conditions, was not “properly made” under Section 5 of the subcontract. Accordingly, we find no error in the trial court’s dismissal of IMC’s claims for delay damages against Polk.

Hartford’s Liability:

Insofar as the judgment of the trial court dismissed IMC’s claims, we likewise find no error. Under La. R.S. 38:2241 of the LPWA, a public entity, such as STPSB, who enters into a contract for construction in excess of twenty-five thousand dollars shall require of the contractor a bond with good, solvent, and sufficient surety in a sum of not less than fifty percent of the contract price for the payment by the contractor to claimants as defined in La. R.S. 38:2242. Therein, a “claimant” is defined in relevant part as “any person to whom money is due pursuant to a contract with ... a contractor ... for doing work, performing labor, or furnishing materials or supplies for the construction ... of any public works.” Because the trial court correctly determined that Polk did not owe any money to IMC for its claim for delay damages pursuant to the provisions of the subcontract it entered into with Polk, IMC is not a claimant to whom Hartford owes payment under its statutory bond.⁵ Accordingly, the trial court correctly dismissed IMC’s claims against Hartford.

Additional Attorney Fees:

Polk and Harford answered the appeal and seek an award for additional attorney fees and costs they incurred in responding to IMC’s appeal. The trial court

⁵ Because IMC is not a claimant under the LPWA, we do not reach the issue of whether Hartford as a statutory surety may raise the pay-if-paid defense to avoid liability on the bond. See e.g. *Glencoe Educ. Foundation, Inc. v. Clerk of Court and Recorder of Mortgages for Parish of St. Mary*, 2010-1872 (La. App. 1st Cir. 5/6/11), 65 So.3d 225, 231, writ denied, 2011-1142 (La. 10/21/11), 73 So.3d 383. IMC failed to show that it was denied delay damages because of a viable paid-if-paid claim since, having failed to timely submit the claim for payment, it waived any paid-if-paid relief it may have had under Section 5 of the subcontract.

expressly pretermitted “claims for attorney’s fees and/or costs by any party” from its certified, final judgment. Thus, the general rule permitting an increase in attorney fees when a party who was awarded attorney fees in the trial court is forced to and successfully defends an appeal, see *Aswell v. Div. of Admin., State*, 2015-1851 (La. App. 1st Cir. 6/3/16), 196 So.3d 90, 96, writ denied, 2016-1263 (La. 11/7/16), 209 So.3d 102, is inapplicable. And while La. C.C.P. art. 2164 provides that an appellate court may award damages, including attorney fees, for a frivolous appeal, Polk and Hartford have not raised such an argument in their answer. See La. U.R.C.A. Rule 2-12.4B(4) (providing that all assignments of error and issues for review must be briefed; and that the court may consider as abandoned any assignment of error or issue for review which has not been briefed). Thus, because we find no basis to award additional attorney fees to Hartford and Polk, we deny their answer to the appeal.

DECREE

IMC’s motion for leave to file attachments is denied. For the reasons expressed herein, the trial court’s judgment is affirmed. Polk’s answer to appeal is denied. Appeal costs are assessed against plaintiff-appellant, Industrial Mechanical Contractors, Inc.

MOTION DENIED; ANSWER TO APPEAL DENIED; JUDGMENT AFFIRMED.