BARNES & THORNBURG LLP

NEWSLETTERS

Ohio Appellate Court Enforces Notice Provision And Denies Contractor Delay Damages

December 15, 2014 | Columbus

Note: This article appears in the December 2014 edition of Barnes & Thornburg LLP's *Construction Law Update* e-newsletter.

In *Boone Coleman Construction, Inc. v. Village of Piketon*, 2014-Ohio-2377, an Ohio appellate court held that a liquidated damages provision totaling almost one-third of the contract price was unenforceable against a general contractor. At the same time, the court affirmed summary judgment on the general contractor's claims against the owner.

In 2007, the village of Piketon, Ohio, sought bids for a construction contract to redesign an intersection and add a traffic light. The winning bidder was general contractor Boone Coleman, with a bid of $683,300. The contract explicitly stated that time was of the essence and substantial completion was required within 120 days. A liquidated damages provision called for damages of $700/day after 120 days. After an extension, the village began imposing the $700/day penalty as of May 31, 2008. The project was completed July 2, 2009 -- 397 days later.

At the conclusion of the project, the village paid $535,823 of the $683,300 price. Boone Coleman sued for the remaining $147,477, plus an additional $106,900 for additional costs encountered during the project. Piketon counter-claimed for $277,900 in liquidated damages.

Boone Coleman argued that it was not responsible for the delay and that it was entitled to additional compensation for unforeseen costs for subsurface work. Both arguments were rejected because of improper notice to Piketon. The notice provisions of the contract, an express condition, required Boone Coleman to provide notice to the village 30 days and 60 days after any delay began. Boone Coleman never notified the village of any delays. Even though the village acquired actual knowledge, Boone Coleman's failure to notify meant the delay was not excused and nullified any additional compensation.

In examining the enforceability of the liquidated damages clause, the court began with the premise that "penalty provisions in contracts are invalid on public policy grounds because a penalty attempts to coerce compliance with the contract instead of representing damages that may actually result..." *Id*. at ¶35. Ohio utilizes a three-prong test to determine whether a liquidated damage clause is enforceable. First, the damages must be "uncertain as to amount and difficult to prove." Second, the contract must not be "so manifestly unconscionable, unreasonable, and disproportionate in amount …] that it does not express the true intention of the parties." Third, it must be clear that "it was the intention of the parties that damages in the amount stated should follow the breach thereof." *Id*.

Finding the first and third prongs established, the court turned to the second prong. There the court found “the amount of damages is so manifestly unreasonable and disproportionate that it is plainly unrealistic and inequitable” and thus a penalty. *Id*. at ¶40. This holding was based both on the amount of liquidated damages (about one-third the contract price) and on the lack of evidence of a relationship between actual damages and liquidated damages. *Id*. at ¶42.

Liquidated damages provisions are a long standing topic of construction disputes. This case reminds us that courts often take a narrow view of such provisions, and contracting parties should discuss such terms with legal counsel before agreeing to them.

David Dirisamer is a staff attorney in the Columbus office. He can be reached by telephone at (614) 628-1451 or by email at ddirisamer@btlaw.com.

Visit us online at http://www.btlaw.com/constructionlaw.