

NORTH CAROLINA COURT OF APPEALS

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SOUTHERN SEEDING SERVICE, INC. )  
 )  
 Plaintiff-Appellant )  
 v. )  
 )  
 W.C. ENGLISH, INC.; LIBERTY )  
 MUTUAL INSURANCE COMPANY; and )  
 TRAVELERS CASUALTY & SURETY )  
 COMPANY OF AMERICA )  
 )  
 Defendants-Appellees )

From Guilford County  
 Civil Action No. 12411

\*\*\*\*\*

REPLY BRIEF OF PLAINTIFF-APPELLANT  
 SOUTHERN SEEDING SERVICE, INC. ("SSS")  
 PURSUANT TO RULE 28(h)(2)

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ARGUMENT

Defendants' Brief presents new or additional issues that were not included in the Issues on Appeal. First, despite stipulating to the Proposed Issues on Appeal, Defendants now contend that none of those issues are properly before this Court, having purportedly been waived, abandoned, or not preserved by SSS. Second, Defendants now contest a number of the trial court's findings of fact and conclusions of law, which were not appealed by SSS or Defendants and were not previously proposed by Defendants as Issues on Appeal. In short, matters argued by Defendants do not arise naturally and logically from the Record and Issues on Appeal, justifying this Reply Brief. See Newsome v. N.C. State Bd. of Elections, 105 N.C. App. 499, 504, 415 S.E.2d 201, 204 (1992); N.C. R. App. P. 28(h)(2).

I. ISSUES ON APPEAL HAVE NOT BEEN WAIVED OR ABANDONED BY SSS, WERE PRESERVED BY SSS, AND ARE PROPERLY BEFORE THIS COURT.

A. SSS Identified Specific Errors of the Trial Court

Defendants claim that SSS "identifies no findings of fact and only one conclusion of law as incorrect," and that SSS "lists no specific conclusion of law to which it objects" regarding the no-damages-for-delay provision. (Def's Br. at 4, 8). SSS identified numerous specific errors made by the trial court, involving both the no-damages-for-delay provision and applicability of the payment bond. However, Defendants twice

admonish this Court to "not consider an argument based upon an issue not presented to *or adjudicated by* the trial tribunal, and the lack of an exception *or assignment of error* addressed to the issue attempted to be raised is a fatal defect" (Def's Br. at 14, 22-23 (citing Willoughby v. Wilkins, 65 N.C. App. 626, 636, 310 S.E.2d 90, 97 (1983) (emphasis added))).

Defendants' reliance on Willoughby is misplaced. First, the trial court here clearly *adjudicated* those issues involving the no-damages-for-delay provision and the payment bond. (R pp 236-37, ¶¶ 32, 33, 35). Second, Willoughby was decided before the N.C. Rules of Appellate Procedure were updated in 2009, to substitute Proposed Issues on Appeal for the former practice of "assignment of error." N.C. R. App. P. 10(b). SSS presented four Proposed Issues on Appeal, two involving the no-damages-for-delay provision and two involving the payment bond. (R p 276). Defendants stipulated to the Record, including the Proposed Issues on Appeal, and at no time objected to those issues or proposed other issues. (R p 275).

Defendants' implication that SSS "assigned error" to only one conclusion of law and no finding of fact is disingenuous. SSS specifically identified the following errors:

1. The trial court erred in its conclusions of law (R p 235, ¶ 30) that an equitable adjustment of a unit price to account for increased costs of work performed after a specific date

would amount to compensation or damages for delay, and that the no-damages-for-delay provision potentially conflicts with the price-escalation provision. (Pl's Br. at 11, 15).

2. The trial court erred in its conclusions of law (R p 236, ¶ 32) that the "potential conflict" can be resolved, in favor of the no-damages-for-delay provision, by giving effect to an illegal pay-when-paid clause within the no-damages-for-delay provision. (Pl's Br. at 17, 20).
3. The trial court erred in its observation<sup>1</sup> (R p 236, ¶ 33) that there was no provision in the first-tier subcontract between English and APAC for an equitable adjustment in English's unit prices for increased cost of work. (Pl's Br. at 22).
4. The trial court erred in its conclusion of law (R p 236, ¶ 35) that a breach of the English-SSS second-tier Subcontract is outside the terms of the payment bond. (Pl's Br. at 32).

SSS cited all of these errors both in its Brief to this Court and in its earlier Motion to Amend Judgment to the trial court. (R p 241). Defendants and the Court "can easily ascertain" the paragraphs of the trial court's Judgment containing the errors. S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, 659 S.E.2d 442, 454 (N.C. Ct. App. 2008). See also

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<sup>1</sup> This appears to be a finding of fact in support of the trial court's conclusions of law that English was not obligated to equitably adjust SSS's unit prices (R p 236, ¶ 33) and that English therefore did not breach the second-tier Subcontract between English and SSS (R p 236, ¶ 34).

Hassell v. Onslow County Bd. of Educ., 182 N.C. App. 1, 641 S.E.2d 324, 327 n.1 (2007) ("Defendant was given sufficient notice of the issues on appeal as evidenced by the filing of its brief thoroughly responding to plaintiff's arguments.").

The following discussion addresses specific instances that Defendants allege constitute waiver or abandonment by SSS of the no-damages-for-delay issue and the payment bond issue.

B. SSS Properly Preserved the Issues Regarding Applicability of the No-Damages-for-Delay Provision

Defendants contend that the legal effect of the no-damages-for-delay provision with respect to the price-escalation provision "is not properly before this Court and was never before the trial court." (Def's Br. at 13). However, the trial court ruled that the no-damages-for-delay provision barred equitable adjustment of a unit price under the price-escalation provision. (R p 236, ¶ 33). SSS timely made a Motion to Amend Judgment and Motion for a New Trial on this basis, and obtained an Order denying those Motions (R p 266), which preserves the issue for appeal. N.C. R. App. P. 10(a)(1).

The reason that this issue was never argued before the trial court is that SSS did not seek "compensation or damages for any delay," and English never asserted that the no-damages-for-delay provision barred the equitable adjustment of a unit price sought by SSS. During performance of the Subcontract,

English argued that the price-escalation provision only entitled SSS to recover the portion of its increased material costs measured beginning with the prices as of 1 July 2007. In its Motion for Summary Judgment, English argued unsuccessfully that the equitable adjustment was barred because SSS's work was completed "within time as specified in the specifications at the time of bidding." At trial, practically all of the testimony and evidence offered by Defendants was in support of this defense, which was unsuccessful. Defendants did not offer any testimony or evidence to suggest that the no-damages-for-delay provision barred an equitable adjustment of a unit price. The defense was not apparent to Defendants, so there was no reason that SSS should have conjured that defense, suggested it to Defendants, and then proceeded to argue against it.

Defendants contend that SSS "abandoned" any appeal of the trial court's conclusion of law (R p 236, ¶ 31) that the Subcontract is to be read as a whole, giving effect to both provisions if possible. (Def's Br. at 9). SSS did not "abandon" this issue because SSS agrees that the Subcontract is to be read as a whole. SSS has consistently taken the position that there is no conflict (actual or potential) between the no-damages-for-delay provision and the price-escalation provision, because an equitable adjustment of a unit price for actual cost of work performed after a certain date is not "compensation or



damages for any delay." SSS acknowledges that 1 July 2007 establishes a time element to the price-escalation provision, but SSS is not requesting compensation for idled equipment or extended overhead during delay periods, which are traditionally associated with compensation or damages for delay.<sup>2</sup>

Defendants also contend that SSS waived its argument that the pay-when-paid clause within the no-damages-for-delay provision is unenforceable by not specifically raising the issue of its enforceability. (Def's Br. at 13-14). The reason this issue was not raised at trial was because SSS did not and does not seek "compensation or damages for any delay," and Defendants never asserted that the no-damages-for-delay provision barred the equitable adjustment of a unit price sought by SSS. The trial court's Judgment, for the first time in the Record, introduces the argument that the no-damages-for-delay provision potentially conflicts with the price-escalation provision, and that the conflict is resolved by application of the (illegal) pay-when-paid clause. (R pp 235-36). SSS timely filed a Motion for New Trial on the issue of the "interplay of the provisions of the Subcontract" (R p 239, ¶ 3), and a Motion to Amend Judgment due to the trial court's errors "as to the interplay

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<sup>2</sup> Contrast the equitable adjustment sought by SSS, for work performed after 1 July 2007, with the delay damages sought by English for its work during the acknowledged delay periods in 2005 and 2006. (R pp 262-65).

and construction" of the provisions (R p 241, ¶ 4). SSS's first Proposed Issue on Appeal was whether the no-damages-for-delay provision (which includes the pay-when-paid clause) bars SSS's recovery under the price-escalation provision. (R p 276).

To the extent that Defendants argue that SSS waived the unenforceability of the pay-when-paid clause by failing to specifically argue it before the trial court, Defendants are incorrect. SSS was entitled to rely on the statutory mandate that a pay-when-paid clause in a construction contract "is unenforceable," and that regardless of the language of the Subcontract, receipt of compensation by APAC or English was "not a condition precedent for payment to any other subcontractor." N.C. Gen. Stat. § 22C-2 (2010). Where a trial court acts contrary to a statutory mandate, the right to appeal the trial court's action is preserved, whether the statutory mandate is specifically pointed out to the trial court or not. Richard v. Michna, 110 N.C. App. 817, 821-22, 431 S.E.2d 485, 488 (1993).

Finally, Defendants' suggestion (Def's Br. at 19) that SSS waived the price-escalation provision by failing to specifically allege it in its Complaint is without merit. Defendants clearly understood the basis for which SSS sought additional compensation, as evidenced by their Motion for Summary Judgment, in which Defendants unsuccessfully argued that "the terms of the contract do not allow for any adjustment of prices." (R p 19.)

SSS's Complaint was therefore sufficient for Defendants "to understand the nature of the claim and to prepare for trial." Haynie v. Cobb, 698 S.E.2d 194, 198 (N.C. Ct. App. 2010). This is in marked contrast to Defendants' failure to argue, anywhere in the Record, that the no-damages-for-delay provision barred the equitable adjustment of a unit price sought by SSS.

C. SSS Properly Preserved the Issues Regarding Applicability of the Payment Bond

Defendants contend that the applicability of the payment bond should not be considered by this Court because the argument was "not made but could have been made at the trial level." (Def's Br. at 23). SSS alleged in its Complaint that the payment bond sureties were liable (R p 8) and presented evidence at trial of the obligation of the payment bond sureties (T pp 47-48). The trial court's conclusion that the payment bond sureties could not be responsible for any term not in the prime contract was so novel that it apparently did not occur to Defendants, who did not make that argument at any time. There was no reason that SSS should have conjured that defense, suggested it to Defendants, and then argued against it at trial.

SSS timely filed a Motion to Amend Judgment due to the trial court's errors regarding the obligations of payment bond sureties on North Carolina public projects. (R pp 249-52, ¶ 7). SSS's third Proposed Issue on Appeal was whether a breach of the

Subcontract would be outside the terms of the payment bond. (R p 276). To the extent that Defendants argue that SSS waived the N.C. Payment Bond Act by failing to specifically allege it and argue it at trial, Defendants are incorrect. SSS was entitled to rely on the statutory mandates (i) that "a payment bond is required" for public construction projects, (ii) that the payment bond shall be "conditioned upon the prompt payment for all labor or materials for which a contractor or subcontractor is liable," and (iii) that the "payment bond shall be solely for the protection of the persons furnishing materials or performing labor for which a contractor, subcontractor, or construction manager at risk is liable." N.C. Gen. Stat. § 44A-26(a) (2010). Where a trial court acts contrary to a statutory mandate, especially, as here, without notice to the parties, the right to appeal the trial court's action is preserved. Richard v. Michna, 110 N.C. App. 817, 821-22, 431 S.E.2d 485, 488 (1993).

Finally, Defendants contend that SSS "abandoned its appeal against one of the surety companies, Travelers" (Def's Br. at 25) because SSS inadvertently omitted Travelers from its request for relief. Defendants are incorrect in stating that SSS "made no arguments anywhere in the appeal on the liability of" Travelers. Part IV of SSS's Brief is devoted to the liability of the payment bond sureties and nowhere limits its application to Liberty or absolves Travelers. (Pl's Br. at 32-34). SSS has

not abandoned, waived, or failed to preserve any Issues Presented in its Brief, or any claims against any Defendants.

II. DEFENDANTS ARGUE ISSUES NOT APPEALED BY SSS

A. Time Extensions Granted by NCDOT to APAC and English Do Not Bar Equitable Adjustment in SSS's Unit Prices

The trial court concluded that the Project was not completed "within time as specified in the specifications at the time of bidding." (R p 235, ¶ 27). SSS did not appeal, and Defendants did not cross-appeal, that conclusion of the trial court. However, in their Brief, Defendants argue that the conclusion was in error. (Def's Br. at 5 n.1, 10 n.3).

The effect of the time extensions granted by NCDOT in 2009, more than a year after the Project's final completion, was to waive almost all of the \$2.56 million in liquidated damages that APAC and English would otherwise be obligated to pay NCDOT for their failure to complete the contract work on time. The trial court agreed that time extensions granted by NCDOT were irrelevant to the triggering of the price-escalation provision, which granted an equitable adjustment of a unit price to compensate SSS for its increased actual costs of grassing work which took place *after* 1 July 2007. The time extensions, on the other hand, operated to excuse English and APAC for their delays in prosecuting the work *prior* to 1 July 2007. Although SSS did experience additional costs for the acknowledged delays in 2005

and 2006 (Pl's Br. at 6-7), SSS does not seek compensation or damages for any work performed prior to 1 July 2007.

B. Only SSS, Not English, Has Consistently Contended that the Subcontract Provisions Do Not Conflict

The trial court concluded that English contends that the no-damages-for-delay provision conflicts with the price-escalation provision. (R p 235, ¶ 28). SSS did not appeal, and Defendants did not cross-appeal, that conclusion of the trial court. However, in their Brief, Defendants now take the position that the two "provisions do not conflict." (Def's Br. at 10). Moreover, Defendants incorrectly state that SSS asserts that the two provisions conflict. (Def's Br. at 11).

SSS has consistently taken the position that the two provisions do not conflict. (Pl's Br. at 11, 21). It is Defendants who have manufactured a conflict between the two provisions. The no-damages-for-delay provision states, as a general rule, that SSS is not "entitled to compensation or damages for any delay." (R p 229). The provision includes one exception, known as a pay-when-paid clause, which allows SSS to recover delay damages "to the extent that [English] shall receive such damages from Owner or other third party." (R p 229). According to Defendants, this means "that SSS would not be entitled to compensation or damages for delay unless English received such compensation from NCDOT." (Def's Br. at 15.)

Defendants next argue that, under the terms of APAC's prime contract with NCDOT (executed in August 2003), and the terms of English's first-tier grading subcontract with APAC (executed in September 2003), there was no way for English to receive "compensation or damages for any delay."<sup>3</sup> Therefore, according to Defendants, the pay-when-paid "exception" to the no-damages-for-delay provision was superfluous, because by the time the Subcontract was executed (in October 2003), English had already contracted away its right to receive delay damages.

Furthermore, Defendants' Brief expands the restriction on "compensation or damages for delay" to encompass any damages that are "due to delay." (Def's Br. at 4, 6 (emphasis added)). Under Defendants' interpretation, since SSS would not have been performing work after 1 July 2007 *but for* delays earlier in time, any costs SSS incurred after 1 July 2007 were technically "due to delay." Therefore, according to Defendants, an equitable adjustment of a unit price for increased costs after 1 July 2007 would be "due to delay," and thus barred by the no-damages-for-delay provision. The price-escalation provision, like the pay-when-paid clause, becomes superfluous under that interpretation.

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<sup>3</sup> The English-APAC first-tier subcontract did not in fact prohibit delay damages, but allowed English "to file any claim for damages, delays, increased cost, or time extension in accordance with NCDOT specifications." (R p 30). In January 2009, English submitted a delay damages claim, seeking over \$1 million in compensation for its own extended overhead and idled equipment while its work was suspended. (R pp 262-65).

An interpretation of a contract "which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or superfluous." Ray D. Lowder, Inc. v. N.C. State Highway Comm'n, 26 N.C. App. 622, 639, 217 S.E.2d 682, 693 (1975). A much more reasonable approach to interpreting the Subcontract is to reject Defendants' expansive definition of delay damages, and instead limit application of the no-damages-for-delay provision to "compensation or damages *for delay*" (such as idled equipment and extended overhead during delay periods), rather than to bar any compensation that is a *consequence* of delay or "*due to delay*." The price-escalation provision grants an equitable adjustment of a unit price due to increased costs of actual contract performance after a certain date, not traditional damages for delay. Under this interpretation, the two provisions do not conflict and are both given reasonable meaning.

C. SSS Seeks Only an Equitable Adjustment for Its Increased Costs of Contract Work After a Fixed Date

The trial court found that SSS seeks only to recover its increased actual costs for contract work performed after 1 July 2007, including "dramatically" increased material costs and fuel costs. (R pp 232-33, ¶¶ 15, 18, 21). The trial court found that SSS does not seek to recover in this action its costs of extra work. (R p 233, ¶¶ 20, 21). SSS did not appeal, and Defendants



did not cross-appeal, those findings of the trial court. However, Defendants now argue that those findings are in error.

Defendants claim that SSS seeks to be paid "for additional work" or "for extra work." (Def's Br. at 21). This contention is inaccurate and misleading. SSS does not and has not sought "extra-contractual payments" for work "whether in the contract or not [and] whether the work was requested by the owner or not." (Def's Br. at 12-13). Defendants also argue, "The damages sought by SSS are, as a matter of law, delay damages." (Def's Br. at 6). Defendants cite no law supporting their position that an equitable adjustment of a unit price for actual cost increases constitutes "delay damages" as a matter of law.

Defendants cite Bolton Corp. v. T.A. Loving Co., 94 N.C. App. 392, 380 S.E.2d 796 (1989), to suggest that "invoice and actual cost records" are delay damages "as a matter of law." In Bolton, this Court actually said that the party seeking delay damages was required "to tie the loss to the period of 'undue delay.'" Id. at 406, 380 S.E.2d at 805. See also Cleveland Constr. Co. v. Ellis-Don Constr. Co., 709 S.E.2d 512 (N.C. Ct. App. 2011) (upholding an award of "delay damages" to compensate the general contractor for his costs *during* a 12.5-week period when the general contractor "was significantly delayed and disrupted"). Here, SSS does not seek damages for the period where delays occurred. Although SSS did incur increased costs

for the acknowledged delays in 2005 and 2006, SSS does not seek to recover those delay damages in this action. Instead, SSS seeks an equitable adjustment of a unit price due to dramatically increased costs for work performed after 1 July 2007, long after the project delays had taken place.

**CONCLUSION**

For the reasons stated herein, Plaintiff-Appellant asks this Court to hold that Defendants-Appellees English, Liberty, and Travelers are liable to Plaintiff-Appellant under the price-escalation provision of the Subcontract, and to reverse the Superior Court's Judgment to the contrary.

Respectfully submitted this 12th day of July 2011.



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N.C. R. App. P. 33(b) Certification:  
I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Reply Brief of Plaintiff-Appellant Southern Seeding Service, Inc. ("SSS") Pursuant to Rule 28(h)(2) was served on counsel for Defendants-Appellees by electronic mail and first-class mail addressed to the following:

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This the 12<sup>th</sup> day of July 2011.



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