

**THE FLORIDA BAR CONSTRUCTION LAW COMMITTEE**  
**CONSTRUCTION TRANSACTIONS SUBCOMMITTEE**  
Construction Contract Provisions 2020

**CASE NOTE**

**ARCHITECT’S SCOPE OF SERVICES**

Design agreement required Architect to perform certain duties:

The contract stated: “the architect was responsible for:

- (1) visiting the site and attending construction events and meetings regularly;
- (2) conducting joint observations of the work with the county;
- (3) informing the county of the progress and quality of the work;
- (4) managing administrative records outlined in the contract;
- (5) assisting the county in determining the amounts owed to the contractor; and
- (6) certifying the contractor's evaluation for payment.”

“The architect was to:

- (1) interpret and give recommendations on disputes arising between the county and contractor;
- (2) recommend rejection of work not in conformity with the contract;
- (3) review and act on the contractor's “shop drawings, product data and samples”;
- (4) coordinate with the county to review “Change Orders for Code Compliance”;
- (5) conduct site observations, make recommendations, and assist the county in determining the project's completion; and
- (6) ~~manage the finalization of~~ assist with finalizing the project by preparing a punch list of incomplete or work needing correction and ~~confirm~~ advise regarding the contractor's “successful demonstration” of the project.”

Appellate court reversed summary judgment in favor of Architect. The contract duties set forth standard scope of services for an Architect. However, testimony by the Architect himself was that he was the “eyes and ears” on the project and was enlisted to “run the job.” The seminal case of *A.R.Moyer v. Graham*, 285 S. 2d 397 (Fla. 1973), held a contractor has a cause of action against a “supervising” architect for damages resulting from the architect’s negligent performance of such duties. The more supervision and control an architect exerts over the project and the contractor, the more factual support for the contractor’s claim for damages resulting from the architect’s negligence even where the contract, as here, also stated that it created no third-party beneficiaries.

Alternative contract language is redlined in quotations from case above to suggest a more advisory, rather than a “supervisory” duty, on the part of the architect.

---*Grace and Naeem Uddin, Inc. v Singer Architects, Inc.*, 278 So. 3d 89 (Fla. 4<sup>th</sup> DCA 2019)

## **DELAY CLAIMS AND DAMAGES**

- No damages for delay

A contract waiver of damages (“no-damages-for-delay” provision) between the owner and the contractor did not bar the contractor’s right of action for delay damages against the architect. *Perez-Gurri Corp. v McLeod*, 238 So. 3d 347 (Fla. 3rd DCA 2017)

- Mutual waiver of consequential damages

Damages for cost to repair hangars, taxiways, and subgrade under concrete and asphalt surfaces. Trial and appellate courts held that such damages were not recoverable as such damages were characterized as consequential damages and, as such, were barred by virtue of the waiver of consequential damages contained in the contract between the Engineer and the Owner.

First District Court of Appeal certified question to the Florida Supreme Court:

Where a contract expressly requires a party to inspect, monitor, and observe construction work and to determine the suitability of materials used in the construction, but the party fails to do so and inferior materials are used, are the costs to repair damage caused by the use of the improper materials general, special, or consequential damages?

*Keystone Airpark Authority v Pipeline Contractors, Inc.*, 266 So.3d 1219 (Fla. 1<sup>st</sup> DCA 2019)

## **INDEMNIFICATION**

- Section 725.06, Florida Statutes

Entire indemnity provision is not void and unenforceable under statute if the indemnitor is required to indemnify its indemnitee for “claims, damages, losses, and expenses or causes of action [that] are caused in part by those indemnified hereunder...” The appellate court reasoned that the only portion of the provision that violated the statute was the portion requiring the subcontractor to indemnify the general contractor for its own negligence even if only a portion of the loss was caused by the general contractor.

---*CB Contractors, LLC v. Allens Steel Products, Inc.*, 261 So. 3d 711 (Fla. 5<sup>th</sup> DCA 2018)

## **LIENS**

- Interest, delinquent account charges, “finance charge”

Contract language calling for “1-1/2% monthly delinquent charge” to be added to attorney’s fees and costs to collect the account were not recoverable under the statute, which allows recovery for “finance charges” and not “delinquent charges.” Persuasive dissent notwithstanding, suppliers will, no doubt, change the contract language to use the statutory language, i.e., “finance charge” in future supplier agreements if they intend to collect interest on unpaid sums.

---*Fernandez v. Manning Bldg. Supplies, Inc.*, 2019 4655988 (Fla. 3<sup>rd</sup> DCA 2019)

## MISCELLANEOUS PROVISIONS

- Third Party Beneficiary

Contract expressly barred any third-party beneficiaries. Therefore, the architect could not be a third-party beneficiary of the contract between the Owner and Architect.

---*Perez-Gurri Corp. v McLeod*, 238 So. 3d 347 (Fla. 3rd DCA 2017)

- Flow down

Subcontract expressly incorporated prime agreement terms into the subcontract. However, the indemnification obligation was limited to subcontractor, not its subcontractors by the express terms of the indemnity provision.

--- *Blok Builders, LLC v Katryniok*, 245 So. 3rd 779 (Fla. 4th DCA 2018)

- Merger/integration clause

Express provision that agreement constituted the entire agreement and superseded all prior agreements, oral and written, precluded claim for fraud in the inducement. Also covenant not to sue in later transaction released claims of each subsidiary, predecessor, affiliates, and assigns against the other. Third transaction for assignment for the benefit of creditors transferred all assets. Complaint was dismissed on third attempt and affirmed by Third District Court of Appeal.

---*YS Catering Holdings, Inc. v. Attollo Partners LLC*, 274 So. 3<sup>rd</sup> 1203 (Fla. 3rd DCA 2019)

## TERMINATION OR SUSPENSION OF THE CONTRACT

- Performance of condition (failure of)

Real estate contract required performance of funding before transfer of property was to occur as conditions of closing.

---*Univ. Housing by Dayco Corp v. Foch*, 221 So. 3d 701 (Fla. 3rd DCA 2017)