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PUBLIC CONTRACTS - GEORGIA

City of Brookhaven v. Multiplex, LLC

Court of Appeals of Georgia - July 27, 2023 - S.E.2d - 2023 WL 4779591

City brought action against contractor for breach of contract to replace park and build new elementary school, seeking attorney fees and liquidated damages under contract's delay clause. Contractor asserted counterclaims.

The Superior Court granted contractor's motion for summary judgment on city's claim for liquidated damages and denied city's cross-motion for summary judgment, finding that delay clause was unenforceable penalty. City appealed.

The Court of Appeals held that:

- Undisputed difficulty of estimating damages did not preclude summary judgment on enforceability of delay clause;
- Parties intended that delay clause create penalty; and
- At time of contracting, delay clause did not set forth reasonable estimate of damages that might result from breach.

Undisputed difficulty of estimating damages that might result from any breach of public works contract between city and contractor, which called for swift replacement of public park, did not preclude contractor from showing, on its motion for summary judgment on city's claim seeking liquidated damages for breach of contract, that liquidated damages clause was unenforceable penalty, even though contractor would have burden at trial to show that provision was penalty; at summary judgment, contractor only had to point to absence of evidence on any one of the three factors provision needed to satisfy in order to constitute enforceable liquidated damages clause rather than penalty, and difficulty in estimating damages was only one of those three factors.

City and contractor intended that delay clause in contract to demolish public park, build new park, and build new elementary school, which provided for "Liquidated Damages at the rate of $1,000.00 per calendar day" in event of delay, would deter breach, and thus, clause was unenforceable penalty; contract contained no language indicating that liquidated damages were not intended as penalty, city testified that timely construction of new park was important to minimize time that area residents would need to go without a park, and city conceded that intent of delay clause was to "disincentivize delays" by requiring contractor to pay $1,000 per day from its net profits if project were not completed on time.

At time of contracting, delay clause in contract between city and contractor for demolition of old park, swift construction of new park, and construction of elementary school, which provided for "Liquidated Damages at the rate of $1,000.00 per calendar day" of delay, was not reasonable estimate of probable loss that might result from contractor's delay in construction of park, and thus, clause constituted unenforceable penalty; city did not attempt to estimate damages that might result from late completion of construction before contract was executed, and city representative testified that $1,000-per-day number was not project-specific, but rather, was chosen because it was

“standard” number for liquidated damages clauses, which city stated were very common in its construction contracts.

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