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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0515**

Lunda Construction Company,
Appellant,

vs.

County of Anoka,
Respondent.

**Filed January 14, 2019
Reversed and remanded
Florey, Judge**

Anoka County District Court
File No. 02-CV-17-244

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Considered and decided by Schellhas, Presiding Judge; Reilly, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

FLOREY, Judge

In this appeal of the district court's grant of summary judgment, appellant Lunda
Construction Company argues that the district court erred by (1) finding that appellant

failed to satisfy its contractual-conditions precedent and (2) enforcing the liquidated-damages provisions contained in its contract with respondent Anoka County. Because there are genuine issues of material fact that preclude summary judgment, we reverse and remand.

FACTS

I. The Parties' Contract

In March 2015, respondent publicly opened bids for a highway-construction project at the intersection of Highway 10 and Armstrong Boulevard in Ramsey, Minnesota. An essential component of the project was the closing and reopening of Armstrong Boulevard. Respondent's request for bids identified specific work to be completed within 150 calendar days following the May 4, 2015, closure of Armstrong Boulevard. As such, specific work, including the reopening of Armstrong Boulevard, was to be completed by October 30, 2015. All remaining work was to be completed no later than May 27, 2016.

On April 14, 2015, appellant was awarded the construction project, and later that month, appellant and respondent entered into a contractual agreement. The contract consisted of three components: (1) the 2014 Standard Specifications for Construction published by the Minnesota Department of Transportation (MnDOT specifications); (2) special provisions to the MnDOT specifications; and (3) two addenda. The special provisions and the two addenda modified the terms of the MnDOT specifications. Where the MnDOT specifications were not amended by the special provisions or the addenda, the MnDOT specifications controlled.

The definitions section provided that “State” or “Department” referred to respondent, which was referenced as “Owner” in the contract, and the “Engineer” referred to “the Engineer for the Owner.” Andrew Witter was respondent’s designated project engineer. “Contractor” referred to appellant.

A. Notice provisions

The parties’ contract included notice provisions, whereby appellant was required to submit notice to respondent in order to pursue any claims that may arise from the project. If a revision to the contract appeared necessary, appellant was to notify the engineer, Mr. Witter, immediately. Appellant was instructed to “not start or continue with an activity or Contract Item for which a Contract revision may be necessary without authorization from the Engineer.” Pursuant to section 1402.1 of the MnDOT specifications, appellant’s failure to provide requisite notice “constitute[d] a waiver of [appellant’s] entitlement to compensation or a time extension.”

Section 1403.3 provided that if appellant “disagree[d] with the Engineer’s response,” it was required, within five business days, to provide a written notice, including, among other things, a description of the situation, an explanation of why the situation represented a contract revision, and the proposed necessary revisions. Section 1403.5 instructed the engineer to provide a “final written response” within ten business days of receiving appellant’s written notice. The engineer’s response was to confirm, deny, or request additional information about appellant’s request for a contract revision.

Pursuant to section 1403.6, if appellant “disagree[d] with the Engineer’s final written response,” and wished to take further action, appellant was required, within five

business days, to “give the Engineer written notice of the intent to pursue a claim.” Section S-20.2 (1517) of the special provisions provided that appellant was required to “submit [its] claim to the Engineer no later than 60 Calendar Days after receiving written notice from the Engineer that direct damages (money or time due) resulting from the claim has occurred in the opinion of the Engineer.” If appellant’s claim was not submitted within the 60-day timeframe, appellant “waive[d] all claims for additional compensation in connection with the work already performed.”

Under section 1402.5, appellant was required to get preapproval before performing “Extra Work” as defined in the contract, otherwise, respondent could consider the work as unauthorized and performed at appellant’s expense.

B. Liquidated-damages provisions

The parties’ contract contained three separate liquidated-damages provisions. Two of the provisions subjected appellant to a combined total of \$4,500 per calendar day for work that remained incomplete after the agreed upon project deadline of May 27, 2016. Additionally, appellant was subject to \$10,000 per calendar day for failure to complete specific work, including the reopening of Armstrong Boulevard to “unrestricted traffic,” by October 30, 2015. There was also an incentive provision, requiring respondent to pay appellant \$10,000 for each calendar day that specified work was completed prior to the deadline. The incentive amount was to be capped at \$200,000.

II. Schedule delays

On April 23, 2015, work commenced, and by summer 2015, appellant encountered issues impacting the project’s timeline. Accordingly, appellant submitted written notice of

its potential claims, and on September 1, 2015, appellant and respondent met to discuss schedule delays and the resulting impact on the project. On September 11, 2015, appellant submitted another “Notice of Potential Claim,” wherein it stated: “[P]ursuant of [sic] Minnesota Department of Transportation Standard Specification 1517 this letter will serve as a notice that Lunda is preserving our rights to file a claim for contract time extensions and additional costs for the re-sequenced work, inefficiencies, rental equipment, and mobilizations that are currently unknown at this time.”

On September 25, 2015, ten business days later, Mr. Witter sent an email to appellant’s vice president stating, “Please see the attached response in regards to the requested additional day for the TH 10 and Armstrong Interchange.” The email was signed by Mr. Witter as “Assistant County Engineer.” Attached to Mr. Witter’s email was a letter drafted and signed by Mr. Witter as “Assistant County Engineer.” The letter stated that it was “[i]n response to [appellant’s] previously submitted scheduled impacts,” and it denied appellant’s request for a time extension. The letter reiterated the agreed-upon completion date of October 30, 2015, and stated respondent’s intention to begin deducting liquidated damages for every day that the specified work remained incomplete. Specifically, the letter stated:

In Conclusion, the owner has determined that there are no owner caused delays and in fact has helped mitigate the Contractor’s schedule a minimum of 18 days, and therefore, the 150 days bid by the contractor to complete the work as described in Section S-12 of the Special Provisions, results in a completion date of October 30, 2015 for this work, at which time the County will begin deducting \$10,000 per calendar day for every day this work is not complete.

On October 12, 2015, appellant's vice president responded to the letter.¹ The letter opened by stating:

Dear Mr. Witter:

Please let this letter serve as our written response to your letter dated September 25, 2015 and our intent to file a claim for compensation and time extension per MnDOT Standard Specification 1517.

The letter also stated a handful of times that the respective issues would be more fully addressed in appellant's "claim submittal." Appellant did not, thereafter, file a claim within the 60-day time period provided for in section S-20.2 (1517) of the special provisions.²

The October 30, 2015 deadline was not met, but by December 31, 2015, Armstrong Boulevard was reopened to the public. Between fall of 2015 and early 2016, the parties allegedly continued to discuss "potential compromises," and respondent did not deduct any liquidated damages following the missed deadline of October 30.

On April 12, 2016, appellant's vice president emailed Mr. Witter asking for an update since their latest meeting in early March 2016. On April 14, Mr. Witter responded, stating that respondent would "begin assessing damages on the next partial payment per the project specifications." That same day, appellant's vice president responded, in both email and letter form, stating appellant's disagreement with respondent's position and its

¹ Between respondent's September 25 letter and appellant's October 12 response, the parties apparently met to discuss a "recovery plan" for the construction project.

² Section S-20.2 of the special provisions supplements section 1517 of the MnDOT specifications.

intention to file a formal claim. Similar to the October 12, 2015 letter, the April 14 letter opened with:

Dear Mr. Witter:

Please let this letter serve as our written response to your email dated April 14, 2016 (attached) and our intent to file a claim for compensation and time extension per MnDOT Standard Specification 1517.

The April 14 letter—similar to the October 12 letter—stated that “[f]urther details and information will come with our Claim Submittal.”

On June 13, 2016, within the required 60-day timeframe, appellant submitted its claim to Mr. Witter “for direct damages (money and time due)” in connection with its work on the Armstrong Boulevard interchange project. Respondent denied appellant’s claim in its entirety, finding both that the claim lacked any merit and that appellant “failed to submit its claim in a timely fashion” thereby waiving its right to recover damages.

III. Appellant’s lawsuit

In early January 2017, appellant commenced a lawsuit against respondent. In October 2017, both parties filed motions for summary judgment. The district court denied appellant’s summary-judgment motion, granted respondent’s summary-judgment motion, and dismissed with prejudice appellant’s claims. The court determined that respondent’s September 25 letter served as “the Engineer’s final written response,” thereby “triggering the conditions precedent in Section 1403.6 and S-20.2 (1517).” It determined that because appellant failed to satisfy the two conditions precedent required for obtaining a time

extension, it waived its ability to recover any damages. The court also determined that the liquidated damages against appellant were legally enforceable. This appeal followed.

D E C I S I O N

I. Genuine issues of material fact precluded summary judgment.

A. The September 25, 2015 letter

Appellant challenges the district court's grant of summary judgment, arguing that the court erred by summarily dismissing all of its claims for an alleged failure to comply with the contract's notice provisions.

"On appeal from summary judgment, we review whether there are any genuine issues of material fact and whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). We must view the evidence in the light most favorable to the party against whom judgment was granted. *Id.* at 76-77. We review de novo both whether a genuine issue of material fact exists and whether the district court erred in its application of the law. *Id.* at 77; *see also Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009).

"A material fact is one that will affect the outcome or result of a case." *Laska v. Anoka County*, 696 N.W.2d 133, 140 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005). There is no genuine issue of material fact "if the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 327 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Aug. 21, 2007). To defeat a motion for summary judgment, the nonmoving party must do more than "merely create[] a metaphysical doubt as to a factual issue." *Ariola v. City of*

Stillwater, 889 N.W.2d 340, 353 (Minn. App. 2017) (quotation omitted), *review denied* (Minn. Apr. 18, 2017). The nonmoving party must present sufficient evidence to allow reasonable persons to find in its favor. *Carlson*, 732 N.W.2d at 327. Because summary judgment is a “blunt instrument . . . [it] is inappropriate when reasonable persons might draw different conclusions from the evidence presented.” *Ariola*, 889 N.W.2d at 353 (quotation omitted). At the summary-judgment stage, the district court “may not weigh the evidence or make factual determinations” nor “assess, evaluate, or determine credibility of the evidence.” *Carlson*, 732 N.W.2d at 327 (quotation omitted).

Whether respondent’s September 25 letter constituted the engineer’s final written response, triggering the two contractual conditions precedent to preserving appellant’s claim, is a factual question. Although the parties suggest that the letter involves a question of law, we conclude otherwise. The outcome of the case depends not on our interpretation of a particular contract provision—indeed, the contract does not define “the Engineer’s final written response.” Rather, the case will be decided according to whether, as a matter of fact, the September 25 letter was the engineer’s final written response triggering the conditions precedent for bringing a claim forward.

“A condition precedent is a contract term that calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which the promisor’s obligation is made to depend.” *Capistrant v. Lifetouch Nat’l Sch. Studios, Inc.*, 916 N.W.2d 23, 27 (Minn. 2018) (quotation omitted). Parties to a contract may expressly agree that written notice of a claim is a condition precedent to seeking recovery. *Valspar*, 764 N.W.2d at 365; *Buchman Plumbing Co., Inc.*

v. Regents of the Univ. of Minn., 215 N.W.2d 479, 486 (Minn. 1974) (adopting the district court’s finding that “written notice of claim was a condition precedent to [appellant’s] action”). That a party forfeited its claim under a contractual condition precedent must be established with “clear and unmistakable proof.” *Capistrant v. Lifetouch Nat’l Sch. Studios, Inc.*, 899 N.W.2d 844, 854 (Minn. App. 2017), *rev’d on other grounds*, 916 N.W.2d 23 (Minn. 2018).

Appellant argues the contractual conditions precedent were not triggered by the September 25, 2015 letter because (1) the letter was a determination of respondent, the owner, not a final written response of the engineer triggering appellant’s notice obligations under section 1403.6, and (2) the letter was written before the October 30, 2015, deadline, thereby precluding any possibility that direct damage *had* occurred in the opinion of the engineer pursuant to section S-20.2.

Appellant submits that following the September 25 letter, discussions between the parties regarding appellant’s claims and respondent’s threat to assess liquidated damages continued up until respondent’s email dated April 14, 2016. It contends that if the letter constituted the engineer’s final written response, respondent would have begun assessing liquidated damages on October 31, 2015, rather than waiting until May 2016.

Respondent argues that the district court correctly determined that the September 25 letter was the engineer’s final written response and that appellant waived its claims by failing to provide timely notice. It contends that appellant’s October 12 response demonstrates its understanding that the September 25 letter triggered the conditions precedent for bringing a claim forward. Respondent submits that it never gave appellant

any indication that it was reconsidering its decision to assess liquidated damages, and its reason for not deducting any amount until May 2016 was because appellant specifically asked that respondent refrain from assessment while the parties were considering potential resolutions.

Whether the September 25 letter constituted the engineer's final written response, triggering the two contractual conditions precedent, is a fact that is in dispute. First, "final written response" by the engineer is undefined in the contract. Second, the September 25 letter fails to expressly state that it was serving as the engineer's final written response. And, finally, it is unclear whether the letter was signed by Mr. Witter in his capacity as the designated project engineer as required by the contract. That the September 25 letter triggered appellant's notice obligations is a disputed fact that, no doubt, has a direct impact on the outcome of the case.

To defeat respondent's motion for summary judgment, appellant did more than "merely create[] a metaphysical doubt as to a factual issue." *See Ariola*, 889 N.W.2d at 353. Appellant submitted affidavits, depositions, and copies of relevant written communications between the parties, as evidence to permit reasonable persons to find that the September 25 letter did not constitute the engineer's final written response. For example, appellant's vice president stated in his affidavit that "almost immediately after [respondent's] September 25, 2015 letter—on September 28, 2015—I personally met with [respondent's] project engineer, Andrew Witter" wherein "we discussed and agreed to a recovery plan for the Project construction." Attached to the affidavit was a copy of a letter from Mr. Witter to appellant's vice president confirming the September 28 meeting.

The vice president's affidavit also alleged that "Mr. Witter expressly noted [respondent's] willingness to listen to and consider [appellant's] proposed solutions." And, as support, appellant attached a January 2016 email communication from Mr. Witter to appellant's vice president stating that although respondent would not accept appellant's initial proposed solution, it "would be willing to entertain another proposal should [appellant] desire."

We review the evidence in the light most favorable to appellant, the party against whom judgment was granted. *STAR*, 644 N.W.2d at 76-77. Because appellant produced sufficient evidence to allow reasonable persons to find in its favor, and, at this stage in the proceedings, it was improper for the district court to make any factual determinations, the genuine fact issues precluded the grant of summary judgment.

B. The liquidated damages assessed against appellant

Appellant argues that the district court erred by enforcing the liquidated-damages provisions because they were unenforceable penalties. It argues that respondent not only failed to show that the three different provisions were reasonable amounts, but that it failed to show that it suffered any actual damages. Appellant submits that it did not have any negotiating power because, had appellant tried to negotiate the amounts, respondent would have rejected its bid.

Although these arguments need not be addressed until the questions surrounding the September 25 letter are resolved, we provide the following analysis and conclusion to provide clarity on the issue and guidance for the parties in the event that the liquidated-damages provisions apply.

Liquidated-damages provisions are prima facie valid in Minnesota. *See Gorco Constr. Co. v. Stein*, 99 N.W.2d 69, 74 (Minn. 1959). Courts “look with candor, if not with favor, upon a contract provision for liquidated damages when entered into deliberately between parties who have equality of opportunity for understanding and insisting upon their rights.” *Id.* A predetermined liquidated sum “saves the time of courts, juries, parties, and witnesses and reduces the delay, uncertainty, and expense of litigation.” *Id.* However, liquidated damages that, in effect, act to penalize are invalid. *Id.*

In determining the validity of the liquidated-damages provisions, we look not to the parties’ intent, but ask “whether the amount agreed upon is reasonable or unreasonable in the light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances.” *Id.* “[W]hen the measure of damages . . . is susceptible of definite measurement, we have uniformly held an amount greatly disproportionate to be a penalty.” *Id.* at 75. The party challenging the provisions bears the burden of showing they are invalid. *See id.* at 74.

Appellant fails to meet this burden. Appellant has not offered any supporting evidence to suggest that the amounts were unreasonable or that they were susceptible of definite measurement at the time the contract was formed. Indeed, the parties’ contract explicitly stated: “In view of the difficulty in making a precise determination of actual damages incurred, the Department will assess a daily charge not as a penalty but as liquidated damages to compensate the Department for the additional costs incurred.”

The difficult nature of calculating damages in public-works contracts was corroborated by affirmations or testimony from at least three different Anoka and MnDOT

employees. Furthermore, appellant's vice president testified that, in 2015, all of its ten projects had liquidated-damages provisions in its contracts. The vice president stated that those provisions have included amounts of \$10,000 per day, and even as high as \$50,000 per day. Lastly, we are not persuaded by appellant's argument that it lacked any negotiation power. Appellant is a sophisticated, experienced party, and there is no suggestion that it was compelled to submit its project bid or enter into a binding agreement with respondent.

Appellant also argues that the three different provisions were not supposed to be enforced together; rather, the two smaller amounts were supposed to be subsets of the \$10,000 figure, not amounts in addition to that assessment. This understanding is contrary to the plain language of the contract. The respective contract provisions provided that the daily liquidated damages charge of \$1,000 was "[i]n addition to" the daily charge of \$10,000, which was "[i]n addition to" the daily charge of \$3,500.

Furthermore, the record indicates that appellant was well aware that the three provisions were to be applied independently of each other. Appellant's vice president agreed in his deposition that appellant was subject to "both MnDOT's 3,500 and then also this separate \$10,000 amount." He agreed that "there would be a third category of liquidated damages that would apply to this project, a thousand dollars per each day the work remained incomplete after that May 27, 2016, date."

Based on the plain language of the contract, the sophistication of the parties, and appellant's failure to present evidence indicating either that respondent's damages were

readily ascertainable or that the amounts were unreasonable under the circumstances, we conclude the district court did not err by enforcing the liquidated-damages provisions.

That being said, looking at the evidence in the light most favorable to appellant, we conclude there was a genuine issue of material fact regarding the exact amount of damages to be assessed.³ Appellant submits that Armstrong Boulevard was reopened to the public by December 31, 2015, and therefore, it was inappropriate for respondent to continue assessing a daily liquidated damage charge of \$10,000 beyond that date. Respondent, on the other hand, contends that as of December 31, “substantial work still remained to be completed” including “all lighting, signing, signals, and guardrails.” It contends that the “remaining work was significant, and took [appellant] until June 2016 to complete.”

Whether the specified work was completed by December 31, 2015, or sometime before June 2016, is a question of fact in dispute, and at this stage in the proceedings, the evidence allows reasonable persons to come to different conclusions. Because the total amount of liquidated damages is a genuine fact issue, the district court erred in granting respondent’s summary-judgment motion.

Reversed and remanded.

³ We note that despite the parties’ experience and sophistication in contracts of this nature, their failure to clearly enforce their respective rights under the contract has significantly contributed to the existence of genuine issues of material fact on both the conditions precedent and liquidated damages issues.