Scribbles Squibs[1] #48 (August 5, 2016):

GC's - RESIST LD'S WITH THE LAW OF CONCURRENT DELAY

By Massachusetts Construction Law Attorney Jonathan Sauer

I. INTRODUCTION.

Many of the dances between owner and general contractor were alive and well as far back as when the pyramids were being constructed.[2] [3]

The job[4] is finally complete. It ran long, despite the general contractor's (Good Guy General Contractor's) best efforts. Excessive rain delayed the job. There were design difficulties affecting structural steel and the mechanical trades, which resulted in a building that could not actually be built as originally designed. Delays in putting the job on the street resulted in everyone having to go through an unanticipated winter that was especially brutally cold.

---

[1] A 'squib' is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a 'squib' as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

[2] There is some Biblical research that suggests that this may even go back to the construction of the Tower of Babel. While the Bible teaches that the construction of the Tower of Babel resulted in God's strategy to weaken the power of human beings by having them speak many different languages, those in the construction trades have always known that the owner has always spoken one language, the architect has spoken another, the general contractor has spoken still another and the subcontractors have spoken even still another or others, subcontractor languages actually varying by trade. For example, for some reason, painters still largely only speak Greek. Possibly, the reason the Tower of Babel was not particularly successful might simply reflect design and construction issues where no one really understood what anyone else was saying. Not unlike today.

[3] Having majored in Egyptology in college – possible majors in English and history, unfortunately, already over-subscribed - this writer says available evidence suggests that the pyramids were actually originally designed to be the harem quarters, shaped like perfect boxes. It is believed that the shape of the pyramids actually resulted from a miscommunication between architect and his various engineers that was not recognized until after substantial construction had occurred. The owner complained bitterly. So, they buried him. As a point of interest, the word 'Tut' in Egyptian is actually defined as 'the big complainer'. Historical research, however, is divided over whether or not this might be a misspelling related in some fashion to certain aspects of the intended residents of the buildings, as to which a number of palindromes apply, even to this day.

[4] This job is the same one discussed in our last Squib, the construction of the "North Walpole Pizza Parlor, Hair Salon and Alligator Farm". The project has been completed and it looks really nice. It's right up the street, actually, from the Route 1A offices of Sauer & Sauer. Those readers looking for something a little bit different should consider a visit. With the many things it offers, there is something here to appeal to the whole family. Plan to stay for a few hours. The exciting, no holds- barred 'wrestle the alligator' contest takes place at 5pm exactly. (It's the earliest they could get the EMT's to commit to continuous coverage for up to three hours.) Alligator bites can be especially nasty, you see. Truth be told, the alligators don't lose all that often. Those wishing to wrestle them, primarily Dads half-full of the Pizza Parlor's surprisingly high alcohol content IPA, are required to sign a 21 page release in front of eight witnesses and three notaries. We, at Sauer & Sauer, are especially proud of it. Because we drafted it. For some reason, there has been a sharp increase in single parent households in the North Walpole area.

Everyone suffered through delays caused by the long lead times of the factory fabrication of a number of specially-fabricated items.[5] In spite of all of these factors, the owner could not be convinced to give the general contractor even a single day's time extension. Sound (painfully) familiar?

Notwithstanding all of these issues, the owner, at the architect's urging, decided to stir the pot by threatening liquidated damages.[6] At one thousand dollars per day and with the job's being six months past scheduled contract completion, the general contractor was rightly concerned.

He came to us at Sauer & Sauer and asked us what his[7] options were.

And, this is what we told him.[8]

II. THE LAW RELATIVE TO LIQUIDATED DAMAGES.

Before we get into 'concurrent delay', you have to understand what Massachusetts law is with regard to liquidated damages and, for that matter, what liquidated damages actually are.

The words "time is of the essence" are frequently tied into the provision for liquidated damages in a contract. If you find this phrase in your contract or general conditions, more likely than not, you will find also a provision somewhere else in the contract that says that there are liquidated damages for claimed late performance.

What are liquidated damages? And, when are liquidated damages (which are damages in a stated amount agreed to up-front as to the consequences of a party's delay) enforceable?

This issue is discussed in the case of A-Z Servicenter, Inc. v. Harry Segall, Trustee, 334 Mass. 672, 675 (1956) by the Supreme Judicial Court:

"Whether a provision of a contract for the payment of a sum upon a breach is rendered unenforceable by reason of its being a penalty depends upon the circumstances of each case. (Cases cited) Where actual damages are difficult to ascertain and where the sum agreed upon by the parties at the time of the execution of the contract represents a reasonable estimate of the actual damages, such a contract will be enforced. (Cases cited) But where the actual damages are easily ascertainable and the stipulated sum is unreasonably and grossly disproportionate to the real damages from a breach, or is unconscionably excessive, the court will award the aggrieved party no more than his actual damages. (Cases cited) The words "liquidated damages and not as a penalty" in the instant note are not decisive. If from the nature of the transaction

[5] Not many companies, actually, construct slides that are specifically designed to plunge into alligator ponds. As best as we understand it, it's some issue having to do with product liability law.
[6] This, by happy coincidence, would also assist in funding the copious change orders necessary to correct the design.
[7] In everything we write, references to 'he' are intended also as references to 'she' and 'it'.
[8] We apologize for the excessive legalese that follows, which we generally try to avoid with our Squibs. We provide it because this might be something you can bring to a meeting and simply hand to the owner and/or his architect. Possibly, minus the footnotes.

and the attending circumstances it appears that the contract is a cloak to hide a sum of money out of proportion to and differing greatly from the actual damages ordinarily arising from a breach, then the sum named as in the case at bar is a penalty. This is true even if it may be designated in the contract as liquidated damages."

A factor which the Supreme Judicial Court takes into consideration as to whether or not a certain sum represented enforceable liquidated damages is whether or not the disputed provision (on liquidated damages) is: " . . . negotiated on an arms-length basis[9] between two substantial business firms." Graves Equipment, Inc. v. M. DeMatteo Construction Co. & another, 397 Mass. 110, 112 (1986).

More likely than not, a subcontractor's or a general contractor's bidding on a project based on established contract documents or entering into a contract drafted by the other party is hardly an 'arms length negotiation'. But, it is that, in a certain sense, because of the fact that if one strongly objects to any particular bid document or contract provision, one can always not bid or not enter into the contract. Put another way, the law is not big on trying to divine subjective intent of parties in entering into a contract after the smoke has cleared. In the vast majority of circumstances, the contract is going to be enforced as written. To do otherwise would only increase fraud and uncertainty in the interpretation of contracts.

One thing to keep in mind is that there is a substantial body of law that says that liquidated damages are an alternative to actual delay damages. Thus, traditionally, the drafter of a contract will have to choose. Do I want to have a shot at actual damages, which could be hard to prove and which won't be that much of a motivating factor to my contracting party during construction? Or, do I want liquidated damages, a fixed sum, something my contracting party will be looking at throughout contract performance and which might tend to motivate him to move the job along?

Thus, one of the advantages of a liquidated damage clause is that having one in the contract might better ensure that the job might get done on time. In other words, the presence of a liquidated damage clause can/might serve as a deterrent to delay so that its actual imposition is unnecessary.

There is a body of law that says a party to a contract can't insist on having the right to assert a claim for liquidated damages and also have a right to assert a claim for actual delay damages. They are supposed to be mutually exclusive. You can have one. But, you can't have both. Recently, though, we have seen a sharp upswing in contracts which contain (or try to contain) both.

A key thing to keep in mind is that, unlike this writer[10], there are quite a few lawyers who were not born in church. They'll put clauses in contracts that they know – or, at least, suspect-

[9] There's a laugh!

[10] This writer, of German ethnicity, nonetheless, and somewhat inexplicably, was born at the Notre-Dame Cathedral, the one in Paris. He was abandoned by his mother, an action his first four wives said they thoroughly understand. He lived there for six weeks until found by a maintenance worker in the clock tower. He is, unfortunately, at least half-deaf. It's the bells, you see. For some reason, they go off several times an hour. If it were a German clock, it would ring precisely on the hour. And, that would be it. We're not talking Maginot Line, here. He attributes a

are unenforceable. They figure: 'Some contractors are cheap. They won't run this by a lawyer. Until, maybe, it is too late. So, maybe I'll get away with this.'

A good example is a provision in a contract in which the party signing a contract prepared by the other party agrees to give up rights to file a mechanic's lien. That might be a contractual provision. But it is, however, most likely unenforceable because one has a right to file a mechanic's lien by statute in Massachusetts.

Another example is no-damage-for-delay provisions. Your contract might bar delay claims. However, this legal principle has many exceptions and pre-conditions. And, for public jobs, a party might have a statutory right to claim delay damages even if that party has given up its contractual right to seek delay damages.

III. THE LAW ON CONCURRENT DELAY.

Here's some legal stuff[11], provided in this form so you can simply hand it to someone at a meeting. If that guy is bright, he'll run it past his lawyer. That might save both of you a lot of expense. And, reduce the agita.

A building contractor, who agreed to complete work before a designated date and in default thereof to pay specified sum for each day's delay, was liable, subject only to limitation that owner could not recover damages for delay caused by his acts or of those of persons for whose conduct he is responsible. Wallis v. Inhabitants of Wenham, 204 Mass. 83, 90 N.E. 396 (1910)

In the case of Lafayette Place Associates v. Boston Redevelopment Authority, 427 Mass. 509, 519, 694 N.E.2d 820 (1998), the Supreme Judicial Court stated:

" "The general rule is that when performance under a contract is concurrent one party cannot put the other in default unless he is ready, able, and willing to perform and has manifested this by some offer of performance." Leigh v. Rule, 331 Mass. 664, 668, 121 N.E.2d 854 (1954). See 6 Corbin, Contracts S 1258 (1962). Any material failure by a plaintiff to put a defendant in breach bars recovery, see Kanavos v. Hancock Bank & Trust Co., 395 Mass. 199, 202-203, 479 N.E.2d 168 (1985). See also Pas-Teur, Inc. v. Energy Sciences, Inc., 11 Mass. App. Ct. 967, 968-969, 417 N.E.2d 487 (1981) (citing cases), unless the plaintiff is excused from tender because the other party has shown that he cannot or will not perform. Leigh v. Rule, supra. Even if a potential buyer notifies the seller of the buyer's intention to tender on a certain date and appears at the registry of deeds on that date with the required consideration, there may not be the "readiness to perform" that is a necessary condition of placing the defendant in breach. See Mayer v. Boston Metro. Airport, Inc., 355 Mass. 344, 350-352, 354-355, 244 N.E.2d 568 (1969)."

---

pronounced Dowager's hump to these early experiences, saying that everyone he knew that lived there had one. In fact, the Cathedral is somewhat famous for it.

[11] If this reads as very formal and as very stiff, it should be kept in mind that more than a few judges might be afflicted with constipation.

And, as stated by the Court in the case of Peabody N.E., Inc. v. Town of Marshfield 426 Mass. 436, 443-444, 689 N.E.2d 774 Mass.,1998:

"Liquidated damages are inappropriate here. This court has held that, where both the plaintiff (contractor) and the defendant (owner) were to blame for the plaintiff's delayed completion of a project, the defendant was not entitled to liquidated damages. Morgan v. Burlington, 316 Mass. 413, 418, 55 N.E.2d 758 (1944). As previously noted, the plaintiff and the town in the present case were independently culpable for the delay in substantial completion until August 30, 1991. Moreover, it appears that the town's refusal to deem the project substantially complete in August, 1991, single handedly caused the further delay in actual completion until April 23, 1992. Hence, under Morgan and other relevant authority, liquidated damages are improper with respect to both delays. See 5 S. Williston, Contracts § 789, at 764 (3d ed. 1961) ("Where both parties are at fault a party who has contributed to the breach cannot recover a sum stipulated as liquidated damages, even though performance of the contract is continued, and the other party thereafter is at fault").

Dear Reader, appellate cases on a wide variety of subjects, come down every week. Sometimes, every day. The law is not static. And, it is not simple. And, the application of any particular legal principle to a specific situation might be heavily fact-dependent and/or document-dependent. So, just consider the above a starting point in terms of your fight to resist liquidated damages. Your lawyer will know how to update this research at the point in time you might actually need it.[12]

IV. CONCLUSION.

Good record keeping during construction serves many purposes. One of them is to keep clear and accurate records of what time was lost due to the failure of the owner to make a necessary decision. Or, how much time did it take the architect to approve key submittals or to respond to necessary RFI's. Or, to what extent did the contract plans and specifications have to be modified before they were sufficient to achieve an acceptable result during construction.

These and other acts and omissions on the part of other parties involved in the construction process might support your claim for concurrent delay as resisting an owner's claim for liquidated damages.

And, please keep in mind that the two most valuable sources of information in cases involving delay are good daily reports[13] and regular dated photographs.

****

(Copyright claimed 2016)

[12] One might save money by using an attorney who already keeps up with the changes in construction law.
[13] The courts don't care a whit that your superintendent doesn't want to fill them out. You shouldn't, either.

Jonathan P. Sauer
Sally E. Sauer
Sauer & Sauer
Phone: 508-668-6020; 508-668-6021
jonsauer@verizon.net; jonsauer@sauerconstructionlaw.com
sallysauer@sauerconstructionlaw.com

Main Office
15 Adrienne Rd.
E. Walpole, MA 02032

Conference Facility
284 Main Street (Route 1A)
Walpole, MA 02081

All correspondence and deliveries should be sent/made to the Main Office only.
All client meetings, depositions and seminars take place at the Conference Facility.

www.sauerconstructionlaw.com

****

This article is not intended to be specific legal advice and should not be taken as such. Rather, it is intended for general educational and discussion purposes only. Questions of your legal rights and obligations under your contracts and under the law are best addressed to legal professionals examining your specific written documents and factual and legal situations. Sauer & Sauer, concentrating its legal practice on only construction and surety law issues, sees as part of its mission the provision of information and education (both free) to the material suppliers, subcontractors, general contractors, owners and sureties it daily serves, which will hopefully assist them in the more successful practice of their business. Articles and forms are available on a wide number of construction and surety subjects at www.sauerconstructionlaw.com. We periodically send out 'Squibs' - short articles, such as this one - on various construction and surety law subjects. If you are not currently on the emailing list but would like to be, please send us an email and we'll put you on it. All prior Squibs can be found on our website.

"Knowledge is Money In Your Pocket! (It Really is!)"

(Advertisement)