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United States District Court, M.D. Florida,
Jacksonville Division.

UNITED STATES of America f/u/b/o East Coast Metal Structures Corp., Plaintiff,
v.
ABBA CONSTRUCTION, INC. and Berkley Insurance Company, Defendants.

Case No. 3:20-cv-440-BJD-MCR
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Signed 06/22/2021

Attorneys and Law Firms

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ORDER

BRIAN J. DAVIS, United States District Judge

***1 THIS CAUSE** is before the Court upon Defendants' Motion for Summary Judgment (Doc. 24; Motion), Plaintiff's Response in Opposition (Doc. 35) and Defendants' Reply in Support of Motion for Summary Judgment (Doc. 37); Defendant ABBA's *Daubert Motion in Limine* to Exclude Testimony of Plaintiff's Expert, Ben Knight Abernathy (Doc. 31), Supplement (Doc. 33), and Joint Stipulation Regarding ABBA Construction, Inc.'s *Daubert Motion in Limine* to Exclude Testimony of Plaintiff's Expert, Ben Knight Abernathy (Doc. 34); Defendants' Motion to Strike Affidavit of Daymon Allmon (Doc. 38), Defendants' Supplement (Doc. 39), and Plaintiff's Response in Opposition to Defendants' Motion to Strike Affidavit of Daymon Allmon (Doc. 40); Plaintiff's Motion for Leave to Supplement Record in Opposition to Defendants' Motion for Summary Judgment (Doc. 41; Motion to Supplement) and Defendants' Response in Opposition (Doc. 43); Defendant ABBA's *Motion in Limine* to Exclude Testimony Regarding Jason O'Leary's Termination (Doc. 46) and Plaintiff's Response in Opposition to ABBA's *Motion in Limine* to Exclude Testimony Regarding Jason O'Leary's Termination (Doc. 48).

I. Background

Defendant ABBA, as prime contractor, entered an agreement with the Florida National Guard to perform construction connected with the Fire Crash Rescue Project to replace the fire station at the Jacksonville International Airport. Id. at 2. Defendant ABBA then subcontracted with East Coast to provide labor, tools, equipment, taxes, insurance, supervision, services and other work related to the construction of the Project's structural steel system. Id. at 3. East Coast Metal Structures brings this action against Defendants for payment pursuant to a federal government construction project (Doc. 1).

East Coast claims that it performed all work it was obligated to perform under the subcontract, but that ABBA breached the agreement by failing to make timely payment of the outstanding amount of $81,750. Id. at 3-4. In addition, East Coast brings a claim against Defendants ABBA and Berkley for violation of the Miller Act for failing to pay the amount ABBA owes East Coast secured by a payment bond issued by Berkley. Id. at 5.

ABBA filed a counterclaim against East Coast for breach of contract for failing to properly inform ABBA of East Coast's discovery of Contract Document inconsistencies and for failing to properly inform ABBA that East Coast's shop drawing submittals proposed deviations from the Contract Documents (Doc. 6). ABBA's counterclaim is based on repairs it made totaling $75,000.00 because of East Coast's purported breach of contract. Id. at 10. It is undisputed that ABBA recouped the $75,000.00 from the $81,750.00 owed to East Coast pursuant to the parties' contract through a charge-back. (Doc. 24 at 11 and 21); (Doc. 35 at 9-10). Berkley issued a check to East Coast for the remaining balance of approximately $6,750.00. (Doc. 36.1 ¶ 35).

Defendants' summary judgment motion argues that the accuracy of East Coast's preparation and production of its shop drawings was essential to the subcontract (Doc. 24 at 18). Defendants further contend that East Coast's services to ABBA were useless if ABBA was unable to rely on East Coast's construction plans and specifications. Id. In addition, Defendants assert that East Coast's breaches are material and because of that, Florida's prior breach doctrine excuses it from performance and necessitated ABBA's back charge to East Coast. Id. at 19.

***2** In addition, Defendants dispute East Coast's allegations of a right to apportion damages based on its failure to affirmatively allege fault by a nonparty, despite East Coast's testimony and that of its experts that either the Project's engineer or concrete subcontractor have some fault. Id. at 20.

Defendants assert that it was within the scope of East Coast's work per the subcontract to prepare and produce shop drawings that would be relied on and used by ABBA and others on the Project. Id. at 2. According to Defendants, East Coast subcontracted with Canam Steel Corporation for fabrication of the steel and metal. Id. Canam produced shop drawings related to its work for the Project and gave them to East Coast to provide to ABBA for approval. Id. Defendants contend that East Coast and Canam submitted inconsistent plans and specifications for the Project that resulted in incompatible dimensions from which a building could not be constructed. Id. at 7. Defendants claim that East Coast did not notify ABBA of any inconsistencies or changes in the plans. Id.

As a result, Defendants assert that ABBA relied on East Coast's initial approved plans that had a 2 1/2-inch slope to coordinate with the concrete and masonry subcontractors and others for installation on the project, while East Coast and Canam worked from unapproved drawings with a 2-inch slope. Id. at 9. This resulted in a misalignment of the roofing joists with their embed locations on the gable end walls due to the concrete subcontractor building the gable end walls at the 2 1/2-inch slope and Canam fabricating the steel roofing joists in compliance with a 2-inch slope. Id. at 10. ABBA then engaged another concrete subcontractor to perform the repair for the Project and charged East Coast $75,000 as a back charge for the Project's required repairs. Id. at 11.

II. Standard

Summary judgment shall be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The party seeking summary judgment has the burden to demonstrate no dispute exists as to any material fact in the case. Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1252-53 (11th Cir. 2003). All evidence and inferences from the underlying facts must be viewed in the light most favorable to the nonmovant. Earley v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990).

III. Motions

A. Motion to Supplement

In the Motion to Supplement, East Coast requests to supplement the record with the deposition transcript of Brett Rowan, a structural engineer with Jacobs Engineering Group, which designed the Fire Rescue Crash Station at the Jacksonville Airport central to this cause of action.

If a party opposing a motion for summary judgment shows by declaration or affidavit specific reasons it is unable to "present facts essential to justify its opposition, the court may ... allow time to obtain affidavits or declarations to take discovery." Fed. R. Civ. P. 56(d).

A motion to supplement may be denied where the party making the request fails "to identify the specific portions of the supplemental materials which would create material issues of fact." Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1213 & n.5 (11th Cir. 1995) ("We do not require trial courts to search the record and construct every argument that could have been made based upon the proffered materials.").

***3** The Court's Amended Case Management and Scheduling Order set the deadlines for discovery as February 1, 2021 and for filing dispositive motions as February 19, 2021 (Doc. 22). Defendants filed a timely motion for summary judgment February 19, 2021 (Doc. 24), and East Coast filed a timely response in opposition March 12, 2021 (Doc. 35). East Coast filed the instant Motion May 6, 2021. The final pretrial conference is set for June 23, 2021 (Doc. 22), and the bench trial is set for the July 6, 2021 term (Doc. 45).

East Coast asserts that Mr. Rowan was the primary person who reviewed drawings and answered questions concerning the design of the Fire Rescue Crash Station. Motion to Supplement at 2.

In its Undisputed Material Facts section, Defendants' Motion includes the deposition of the acting Project manager for East Coast on the Project "who was the sole point of contact

between ABBA and [East Coast] for the shop drawings on the Project, [who] could not even describe what the discrepancy was in the plans." Id. at 7-8. See (Doc. 29.1 at 7-11). Defendants' Motion also references the included deposition of Dean Allmon, the structural steel subcontractor on the Project, who is deemed as the "only subcontractor" who would have performed the calculations to determine the initial inconsistency between the 2-inch slope and joists. Id. at 8. See (Doc. 27.1 at 8-9).

As for the proffered supplemental evidence, East Coast contends that Mr. Rowan's deposition includes "documents and specifications that outline the requirements and other procedures needed for submittals, performance requirements, and calculations or product data to be included in the project." Motion at 3. In addition, East Coast provides that Mr. Rowan's deposition will offer evidence that once shop drawings are approved, they are not required to be submitted, even if they have comments. Id. at 4.

In all, East Coast includes twelve instances of additional deposition testimony by Mr. Rowan on various stages of the Project's process, including who would have used the construction documents for its construction, who would have reviewed or approved its specifications, who was responsible for coordinating construction, and whose responsibility it would have been to verify elevations and locations. Id. at 3-5. East Coast further proffers Mr. Rowan's deposition testimony as a "professional opinion as a structural engineer" on whether the elevations "depicted in the shop drawings submitted for approval by East Coast that contained the note regarding elevations subject to change should not have been used by the concrete subcontractor to build a masonry wall." Id. at 4.

The additional proffered evidence that East Coast asks the Court to allow through the deposition of Mr. Rowan seems more akin to expert testimony or opinion evidence than factual statements of personal knowledge concerning the facts at issue and an effort through such testimony to create an issue about an affirmative defense which has not been pled: apportionment.

If East Coast had intended to provide Mr. Rowan as an expert witness, he would have been required to file an expert disclosure. See Mann v. Taser Intl, Inc., 588 F.3d 1291, 1306-07 (11th Cir. 2009) (citing Fed. R. Civ. P. 26).

Here, the parties had agreed to East Coast's disclosure of expert reports as on or before October 9, 2020 and this date was not extended (Doc. 10). "Because the expert witness discovery rules are designed to allow both sides in a case to prepare their cases adequately and to prevent surprise, compliance with the requirements of Rule 26 is not merely aspirational." Reese v. Herbert, 527 F.3d 1253, 1266 (11th Cir. 2008) (citation omitted). An untimely disclosure of information or a witness as required by Rule 26(a) prevents the party from using the information or witness "to supply evidence on a motion ... unless the failure was substantially justified or harmless." Fed. R. Civ. P. 37(c).

***4** East Coast contends that scheduling issues between counsel and Jacobs and Mr. Rowan prevented the parties from deposing Mr. Rowan until March 22, 2021. Motion to Supplement at 2. East Coast's Motion to Supplement does not indicate the reason for the delay in filing the instant Motion nearly a month-and-a-half after Mr. Rowan's deposition nor why a request for an extension of the deadlines was not made prior to the dispositive motion deadline, which was approximately three months prior to the filing of the Motion. Id. East Coast's Motion also fails to offer any explanation for Mr. Rowan not being timely identified as an expert nor for failing to provide an expert report.

Instead, East Coast's Motion directs the Court to the affidavit of Daymon Allmon, which was submitted in opposition to Defendants' Motion for Summary Judgment, paragraph 37. Id. at 3. The affidavit states that "East Coast has plans to depose the project engineer on March 22, 2021, and also intends to depose the project architect." Id. Mentioning plans to depose a party by way of an affiant in an attached affidavit in opposition to a summary judgment motion hardly seems in line with the disclosure requirements of Rule 26 to allow for adequate preparation and the avoidance of surprise, especially when filed after the deadline for such disclosures and buried in statements from an affiant at the bottom of an affidavit.

Moreover, the proffered testimony, as presented in the Motion to Supplement, does not specifically identify from the supplemental material a material factual issue related to the terms of the subcontract for the Project. To the contrary, Mr. Rowan's testimony supports East Coast's argument that the very clear provisions of East Coast's contract requiring specific and timely notifications if Plaintiff submitted drawings different from the construction documents or identified an inconsistency were breached. See (Jacobs Dep.

58:14-59:10, 59:24-60:18, 60:19-61:7). Thus, East Coast's Motion to Supplement is due to be denied.

B. Motions to Exclude, Limit, or Strike Testimony

Defendant ABBA's *Daubert* [1] *Motion in Limine* to Exclude the Testimony of Plaintiff's Expert, Ben Knight Abernathy, contends that the testimony proffered by East Coast's expert uses unreliable methods, is confusing and unsupported, and does not accurately apply reliable theories to the facts of this case (Doc. 31 at 2).

When presented with scientific evidence, the district court is the gatekeeper as to its admissibility. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993). Expert testimony is admissible as contemplated by Federal Rule of Evidence 702 if:

> (1) [T]he expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1340-41 (11th Cir. 2003) (citation omitted). To determine whether an expert's opinion is reliable, a court considers: "(1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community." Id. (citation omitted). This is not an exhaustive list, and a court "should consider any additional factors that may advance its Rule 702 analysis." Id. (citation omitted).

***5** "A court has the power to exclude evidence in limine only when evidence is clearly inadmissible on all potential grounds." Stewart v. Hooters of Am., Inc., No. 8:04-cv-40-T-17-MAP, 2007 WL 1752843, at *1 (M.D. Fla. June 18, 2007) (citing Luce v. United States, 469 U.S. 38, 41 (1984)).

The parties filed a Joint Stipulation Regarding ABBA's *Daubert Motion in Limine* to exclude the testimony of Mr. Abernathy, president and general contractor for ABK Construction Group, and are in agreement in their request that the Court enter an order *in limine* "prohibiting Mr. Abernathy from testifying in any manner regarding the cost of repair" and withdraw the Motion as to the remainder of the requested relief (Doc. 34 at 2).

Aside from testimony regarding the cost of repair, what remains of Mr. Abernathy's proffered testimony are his opinions on the fault of ABBA and the concrete subcontractor for their reliance on East Coast's approved drawings (Docs. 25.1; 31). This is also reflected in Mr. Abernathy's report, in which he states, "the General Contractor erred in failing to verify all dimensions in the field before work was performed that relied upon or related to East Coast's drawings." (Doc. 31.1 at 2-3).

Mr. Abernathy offers his opinions on the shop drawing discrepancies and construction of the project (Docs. 25.1 at 14; 31.1). For instance, Mr. Abernathy testified that East Coast's change of its shop drawings from a 2 to 2 1/2 slope was a mistake, and he also did not understand why the slope changed nor that the elevations on the gable walls as established by East Coast's drawings were too high (Doc. 25.1 at 29-30). When questioned about how East Coast's project plans were created, Mr. Abernathy stated, "it's not for me to answer. "Ask the person who did these drawings." Id. at 30.

Overall, Mr. Abernathy's opinion testimony is speculative and not based in science and testing. As an example, when asked about the process of whether East Coast would prepare its drawings and then provide them to Canam or whether East Coast gives the information to Canam who then provides its drawings, Mr. Abernathy was unable to answer what their process was but said he assumed they would be working together (Doc. 25.1 at 9).

When asked about if he knew whether East Coast specified elevations in this Project, he stated that in the documents he had from East Coast, they provided an approximate elevation with a notation that it is "subject to change." Id. at 13-14. Mr. Abernathy further testified that he has never personally

prepared such drawings for a project because he is not an engineer. Id. When asked if in his opinion it was unreasonable for ABBA to rely on the March drawings, he said,

> Is it partially East Coast's fault, if they didn't, you know, offer those drawings to them? I guess it could be. But I don't know what happened with East Coast. I'm not the one to answer that. I don't know when they submitted them to them. I only know by what you told me today.... That is something you'll have to ask East Coast.

Id. at 44.

Mr. Abernathy's opinions do not meet the criteria for admissibility as an expert witness as his testimony would not assist in an understanding of the evidence nor determine a fact in issue—namely, whether the contract was breached because of a failure on East Coast's part to notify ABBA as specified in the agreement of inconsistencies or changes to the dimensions in the shop drawings for the Project. Nor does Mr. Abernathy's opinion testimony apply reliable principles and methods to sufficient facts or data of the case. His opinions as such are likely to confuse the issues.

***6** Even if admissible, Mr. Abernathy's opinions acknowledge that East Coast submitted shop drawings which were inconsistent with the Project's specifications. He faults however, ABBA and the concrete subcontractor for not catching the error before work was performed that related to East Coast's drawings. Putting aside the immateriality of fault given that the issue of apportionment or responsibility of a non-party has not been affirmatively pled, it is axiomatic that East Coast's obligation under its contract was the very act designed and agreed to by the parties to allow errors to be "caught." Moreover, Mr. Abernathy's "subject to change" notation opinion cannot reasonably be found to satisfy the Article 10 and Article 17 provisions of East Coast's subcontract with ABBA.

Thus, Defendant ABBA's motion in limine to exclude Mr. Abernathy's testimony is due to be granted.

In Defendants' Motion to Strike Affidavit of Daymon Allmon (Doc. 38), they assert that East Coast included an affidavit of its corporate representative, Daymon Allmon, with its response to Defendants' Motion for Summary Judgment and that paragraphs 10, 23, 26, 31, and 32 of Mr. Allmon's affidavit should be stricken (Doc. 38 at 2). Mainly, Defendants argue that the aforementioned paragraphs of the affidavit contain hearsay statements and are not based on the personal knowledge of the affiant and are thus inadmissible. Id.

"An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Further, "statements in affidavits that are based, in part, upon information and belief, cannot raise genuine issues of fact, and thus also cannot defeat a motion for summary judgment." Ellis v. England, 432 F.3d 1321, 1326 (11th Cir. 2005) (citations omitted).

Defendants take issue with the following statement in Paragraph 10: "The fact [that] ABBA fired its superintendent immediately after the problem with the height of the gable walls was discovered demonstrates its knowledge that ABBA's personnel erred and breached the contract." (Doc. 36.1 at 4). Mr. Allmon's deposition states: "In the construction industry you don't use approval drawings in the field. The fact that somebody did is a major problem and an issue. I assume ABBA has squared away by letting his superintendent go. You never use unapproved drawings." (Doc. 26.1 at 16).

Putting aside that Mr. Allmon has never been identified as an expert qualified to offer opinions about industry standards, Paragraph 10 may be considered an admission that could be inferred from ABBA's conduct and admissible as evidence of ABBA's knowledge of an error; but both because of its timing and immateriality to the notice issues central to the alleged first breach of contract, the "admission" is of no consequence in considering Defendants' Motion for Summary Judgment.

As for Paragraph 23, it includes the following statement:

> East Coast's Project Manager, Scott Carmichael, spoke to ABBA's Project Manager, Chris Jones, on multiple occasions about drawings. ABBA's Project Manager told East Coast's Project Manager to simply bring the field use drawings to the site when

> East Coast mobilized because ABBA did not have any way to print the field use drawings. (Carmichael deposition, page 39, lines 8 to 14)[.]

***7** Id. at 8. In Paragraph 26, Defendants assert that the following statement is not made on personal knowledge nor admissible: "Prior to mobilizing, East Coast had never been informed that its field use drawings were required. In fact, we were told the opposite." Id. at 9. Defendants raise a similar argument about Mr. Allmon's statements in Paragraphs 31 and 32:

> In fact, East Coast's Project Manager was informed by ABBA's Project Manager that the concrete subcontractor was going to be back charged for the error in the construction of the gable walls. (Carmichael deposition, page 52, lines 13 through 21)[.]
>
> East Coast's Project Manager was also informed that ABBA's Superintendent, Jason O'Leary, was fired because of the error with the construction of the gable walls. (Carmichael deposition, page 48, lines 12 to 15)[.]

Id. at 10.

"[A] district court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be 'reduced to admissible evidence at trial' or 'reduced to admissible form.' " Macuba v. Deboer, 193 F.3d 1316, 1323 (11th Cir. 1999) ("allowing *otherwise admissible evidence* to be submitted in inadmissible form at the summary judgment stage, though at trial it must be submitted in admissible form" (quoting McMillian v. Johnson, 88 F.3d 1573, 1584 (11th Cir. 1996))).

East Coast has not offered an exception to these hearsay objections nor a basis for the testimonys' reduction to admissible evidence at trial, and the Court finds none.[2] Even if considered in connection with Defendants' Motion for Summary Judgment, again both because of their timing and irrelevance to the notice issues central to the first breach of contract issue, they fail to create a material issue of fact. Accordingly, Defendants' motion regarding paragraphs 10, 23, 26 and 31 is due to be granted.

Defendants further claim that paragraphs 17, 20, and 22 contradict Mr. Allmon's deposition testimony and East Coast's response to the Request for Admissions. Id. The statements at issue in Paragraphs 17 and 20 are:

> East Coast then combined the information provided on the two sets of drawings after the return comments from the engineer and produced field use drawings with the correct slope and approved joist measurement.
>
> In any event, the roof slope in the field use drawings showed the 2 by 12 slope after receipt and review of comments and instructions from the engineer when the approval drawings were returned in January 2019.

Id. at 6-7. Defendants contest the admission of these statements as misleading and inappropriate and argue that East Coast admitted in its depositions and requests for admissions that this field use set was never provided, produced, nor mentioned to ABBA until East Coast was on the project site on October 7, 2019[3] (Docs. 24.5; 26.1 at 15-16; 38 at 7).

***8** Mr. Allmon's deposition acknowledges that he was unsure when the March drawings were provided to ABBA and that in the response to ABBA's request, East Coast admitted that it did not provide ABBA its revised drawings for the project at any time prior to October 1, 2019 (Doc. 26.1 at 15-16).

In Paragraph 22, Mr. Allmon states that "ABBA never asked East Coast for its field use drawings, and East Coast never suspected its field use drawings would be needed or utilized by any other subcontractor or tradesman before our mobilization." Id. at 8. At his deposition, Mr. Allmon testified that others at the project site would need East Coast's drawings, and in particular, that the "concrete sub is relying on these drawings to do his anchor bolts and to set his embeds." (Doc. 26.1 at 15-16).

"When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact [for summary judgment], that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." Van T. Junkins & Assoc., Inc. v. U.S. Indus., Inc., 736 F.2d 656, 657 (11th Cir. 1984). In such a situation, the affidavit should be disregarded as a sham. Id. This rule, however, is only to be applied "sparingly because of the harsh effect [it] may have on a party's case." Allen v. Bd. of Pub. Educ. for Bibb Cty., 495 F.3d 1306, 1316 (11th

Cir. 2007) (citation omitted). Further, there must be "some inherent inconsistency between an affidavit and a deposition before disregarding the affidavit." Id. (citation omitted).

Upon review, the statements in paragraphs 17, 20, and 22 are inherently inconsistent with the deposition testimony when read in the complete context of the deposition to warrant striking the statements. However, the Court will allow for the admission of the remaining statements in the affidavit. Thus, Defendants' motion is due to be granted as to the request to strike the statements in Paragraphs 17, 20, and 22 of Mr. Allmon's affidavit.

In Defendant ABBA's Motion in Limine to Exclude Testimony Regarding Jason O'Leary's Termination (Doc. 46), it requests that the Court exclude testimony at trial concerning whether ABBA terminated Jason O'Leary's employment because of any shop drawing errors at issue in this action (Doc. 46 at 2). ABBA suggests that East Coast will proffer testimony of Chris Jones, ABBA's project superintendent, who made statements that Mr. O'Leary's employment was terminated because of some responsibility for the project's elevation issues. Id. Mr. Jones is deceased. Id. ABBA argues that the statement is inadmissible hearsay and not subject to any exception. Id. In addition, ABBA suggests its human resources records memorialize the reason Mr. O'Leary is no longer employed with ABBA. Id.

One potential exception to the hearsay rule applicable here may be the "statement against interest" exception. See Fed. R. Evid. 804(b)(3). In order for a hearsay statement to be admitted under this exception, it must be "so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil ... liability ... that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Macuba, 193 F.3d at 1325 n.19. And for this exception to apply, the declarant must be unavailable, as is the situation here. See id.

***9** However, whether the testimony is admissible under an exception ultimately depends on whether it is relevant. Relevant evidence is admissible unless "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 402, 403. However, exclusion through Rule 403 is "an extraordinary remedy, whose major function ... is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." United States v. Grant, 256 F.3d 1146, 1155 (11th Cir. 2001) (internal citations and quotation marks omitted).

Even if admitted, the reason ABBA terminated Mr. O'Leary's employment after the walls of the project had been built and the elevation issue discovered is unrelated to the material factual issue as to whether the contract was first breached. Instead, such testimony is likely to confuse the issues central to this case and therefore, is inadmissible. Defendant ABBA's motion to exclude testimony regarding Mr. O'Leary's termination is due to be granted.

C. Motion for Summary Judgment

In the Motion for Summary Judgment, Defendants contend that the ABBA and East Coast subcontract has at least two unambiguous provisions regarding East Coast's duties as to how it was expected to perform in the event it became aware of inconsistencies in the Project's plans and specifications. Motion at 2. East Coast submitted its structural steel shop drawings to ABBA November 19, 2018 (Docs. 24.2; 29.1). Canam submitted its steel decking and steel joint drawings December 13, 2018 (Docs. 24.3; 27.1; 28.1). However, when submitted, "they were inconsistent with each other and with the Project's engineered drawings and specifications." Motion at 6; see (Doc. 27.1). The Project's plans and specifications required a 2-inch roof slope and steel roof joists with a 123-inch depth (Docs. 24.6; 26.1). East Coast's submitted shop drawings changed the slope to a 2 1/2 inch slope (Doc. 26.1). This resulted in incompatible dimensions and the building could not be constructed (Doc. 27.1).

East Coast then submitted shop drawings to change the roof slope 1/2 an inch, while Canam's shop drawings submitted its own separate fix that would shorten the joists from 123 inches to 113 5/16 inches (Docs. 24.2-3; 26.1). East Coast did not notify ABBA of the inconsistencies in the Project's plans, of the inconsistencies between East Coast and Canam's submissions, nor that its submissions had a proposal to remedy the inconsistencies (Docs. 26.1, 27.1, 29.1). In March of 2019, East Coast created another set of drawings after coordinating with Canam that changed the slope from 2 1/2 inches to 2 inches (Doc. 27.1).

On this record, the parties do not dispute that East Coast never informed ABBA of the changed plans and never submitted the March 2019 drawings to ABBA before the Project began in October of 2019 consistent with the requirements of Article

10 and Article 17 of their contract (Docs. 24.5; 26.1). While East Coast admits it did not provide ABBA with revised drawings for the Project prior to October 1, 2019, East Coast does argue that it submitted a note on the drawings that the "Elevations are subject to change based on joist manufacturer fab & field use drawings." (Doc. 24.5 at 1). These notations do not substantially comply with the contract's provisions regarding the time and character of notice to be given.

Because it was not informed of any changes to the drawings, ABBA "relied upon the information contained in the approved structural steel shop drawings to coordinate the installation of work by other trades, specifically the concrete and masonry subcontractors." Motion at 9; see (Doc. 26.1). As a result, ABBA was working from East Coast's initial approved plans with a 2 1/2 inch slope while East Coast and Canam were working from unapproved drawings with a 2-inch slope. Motion at 9; see (Doc. 26.1).

***10** The Subcontract between ABBA and East Coast (subcontractor) provides that "in the event of any lawsuit under this clause, the Courts of Florida shall have sole and exclusive jurisdiction.... Subcontractor hereby consents to jurisdiction and venue in Florida." (Doc. 1 at 19). A breach of contract action pursuant to Florida law is comprised of: (1) a valid contract, (2) a material breach, and (3) damages. See Abruzzo v. Haller, 603 So. 2d 1338, 1340 (Fla. Dist. Ct. App. 1992). "The meaning of contract terms is an issue of law and therefore is a matter for the court to decide; nevertheless, the meaning of ambiguous terms may be proved by extrinsic evidence." Lazovitz, Inc. v. Saxon Constr., Inc., 911 F.2d 588, 592 (11th Cir. 1990).

The parties do not dispute the validity of the contract. Of relevance is the following provision in Paragraph 15 of the parties' agreement:

> Should inconsistencies or omissions appear in the Contract Documents, it shall be the duty of the Subcontractor to timely notify ABBA in writing. Upon receipt of said notice, ABBA shall instruct Subcontractor as to the measures to be taken, and Subcontractor shall comply with ABBA's instructions.

(Doc. 1 at 20). In addition, the subcontract includes a provision on approvals, which states the following in Paragraph 17:

> Submissions shall be in strict accordance with the Contract Documents, provided however, if Subcontractor wishes to propose a deviation from the Contract Documents, such deviation shall be clearly identified on the submission and accompanied by a letter describing such deviation in detail and the effect, if any, on Subcontractor's work and time of performance. Requested deviations will be allowed only when specific written approval referencing the deviation is given to Subcontractor. No general approval granted by ABBA or the Owner shall relieve Subcontractor from complying with the Contract Documents.

(Doc. 1 at 20).

By entering the Subcontract with ABBA, East Coast agreed to prepare and submit shop drawings that would be relied on by others in construction of the building and its affected parts (Docs. 1 at 14, 25; 26.1). Consistent with the terms of the Subcontract, Daymon Allmon testified on behalf of East Coast that his understanding of East Coast's scope of work for the project was to "buy and install structural steel and miscellaneous metals" and also to supply "structural steel shop drawings, and we also supplied the bar joint manufacturer's drawings." (Doc. 26.1 at 7).

Upon review of the record and consideration of the submitted pleadings, the Court concludes that the parties are not disputing the material facts, but rather, whether a material breach of the contract occurred. Because the undisputed facts show that a reasonable factfinder would conclude that East Coast breached its contract with ABBA by failing to timely inform ABBA of inconsistencies in the Project's plans, identify material changes to the Project's plans and receive approval for any deviations as specified by the Subcontract,

and as a result ABBA suffered damages, summary judgment is due to be granted in favor of Defendants.

Because summary judgment is being granted in favor of Defendants as to all claims in this action and against Plaintiff East Coast, it is not necessary to hold the Final Pretrial Conference June 23, 2021, and it will be removed from the Court's calendar.

Upon consideration, it is

ORDERED:

1. Defendants' Motion for Summary Judgment (Doc. 24) is **GRANTED**.

2. Defendant ABBA's *Daubert Motion in Limine* to Exclude Testimony of Plaintiff's Expert, Ben Knight Abernathy (Doc. 31) is **GRANTED**.

***11** 3. Defendants' Motion to Strike Affidavit of Daymon Allmon (Doc. 38) is **GRANTED**.

4. Plaintiff's Motion for Leave to Supplement Record in Opposition to Defendants' Motion for Summary Judgment (Doc. 41) is **DENIED**.

5. Defendant ABBA's *Motion in Limine* to Exclude Testimony Regarding Jason O'Leary's Termination (Doc. 46) is **GRANTED**.

6. The Clerk is directed to enter judgment in favor of Defendants and against Plaintiff as to Plaintiff's claims against Defendants and also in favor of Defendants as to Defendants' counterclaim against Plaintiff. [4]

7. The Clerk of the Court shall terminate all remaining motions, and close the case. The Court retains jurisdiction to determine Defendants' request for attorney's fees and costs. The parties shall confer to attempt settlement of said request. Failing settlement, the parties shall submit memoranda and evidence in support of or in opposition to said request **on or before July 21, 2021**.

DONE AND ORDERED at Jacksonville, Florida, this 22nd day of June, 2021.

All Citations

Slip Copy, 2021 WL 3286668

Footnotes

1 Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993).

2 For purposes of deciding this Motion, the Court is not deciding that an exception, could not apply, but even if it did, it would not change the outcome of this Order.

3 This is materially important because these field use drawings corrected the error from ECM's previously submitted and approved drawing package. Had ABBA received these revised drawings or even simply been informed that ECM's previously approved drawings were inconsistent at any time before the concrete subcontractor set the roofing joists, embed plates and the gable end walls, the error and this suit could have been wholly avoided.

4 Because Defendants already recovered the damages resulting from Plaintiff's breach of contract, Plaintiff does not need to pay any additional money for its breach of contract.