HOMEBUILDING AND CONSTRUCTION INDUSTRY ALERT

5/18/15

Amount of Damages for Loss of Use in Construction Cases Does Not Need to be Established with Absolute Certainty

By Tom Wert, Board Certified Specialist – Construction Law

Recently, a Florida appellate court weighed in on the kind of evidence necessary to prove loss of use damages on a construction project as a result of delays caused by an architect's defective design. *Gonzalez v. Barrenechea*, 2015 WL 1940784 (Fla. 3d DCA, April 29, 2015). The case was filed by the owner of a high-end residential property, who hired an architectural firm to design a new home, including the air conditioning system. The homeowner could not move into the house when completed because the air conditioning system did not adequately cool the home. After nearly two years of re-design and extensive demolition/repairs, the homeowner sued the original design firm and sought damages for the loss of use stemming from his inability to move into the home during the repair period, $15,500 per month. The damage analysis was complicated by actions of the homeowner. Specifically, during the repairs, the homeowner's son was sleeping at the residence to serve as a security guard and the homeowner stored his boat, some cars and over $500,000 worth of furniture at the house. The Miami-Dade County Circuit Court refused to award the homeowner loss of use damages, finding that they were "too speculative" as a matter of law. The Court of Appeals disagreed.

Under Florida law, an owner who loses the use of a structure because of delay in its completion is entitled to damages for that lost use, measured by the rental value of the building under construction during the period of delay. To prove these damages, the plaintiff must present evidence regarding the reasonable certainty of the amount of damages. The amount of damages cannot be based upon speculation or guesswork. One of the reasons that the trial court, in *Gonzalez*, found the homeowner's damages to be too speculative was the homeowner's expert failed to reflect adjustments for the homeowner's son sleeping in the house and for the storage of the cars, boats, and furniture. This was despite the homeowner's submission of a twenty-page appraisal, which included maps, photographs, detailed descriptions of the subject property and three comparable rental properties and a numerical breakdown of adjustments, using factors such as rent concessions, location/view, design and appeal, age/condition, square footage, room count, and amenities, such as pools, barbeque grills, terraces, docks and garage size. Placed in this context, the court of appeals concluded that any missing adjustments concerning the son's presence and storage at the house were not sufficiently material to render the expert's damage estimate insufficient as a matter of law.

The son sleeping at the house as a *de facto* guard was deemed not a basis for any adjustment at all because this alleged "use" was seen as more of a burden than a benefit. The house was hot, humid, without sufficient airflow and, essentially, a messy construction site. After the son stayed overnight and let in the construction workers in the morning, he returned to his parents' home to eat, shower, launder his clothes and live with his family. Rather than hiring private security, the owner used his son as a guard. The appellate court held that, far from a "use" of the property, this course of action constituted a good faith mitigation of damages and, thus, the trial court erred in finding that the absence of an adjustment for this purported "use" made the appraiser's estimate too speculative.

As to whether an adjustment was necessary for the storage, the appellate court found any missing adjustment for storage was too small, compared to the $15,500 per month rent, to make the damage estimate speculative. Additionally, the need for the storage arose from the design and construction

defects caused by the architect. Obviously, “when people are waiting for a home to be built they start buying things, be it furnishings and others and it comes to a point in time where you got to have it delivered, you have to have it stored if you can't eventually move it in or if you move it in you have to protect it.” Rather than rent space for the necessary storage, the owner used the property for storage, which was also seen as a mitigation of damages, rather than a beneficial use.

The *Gonzalez* court advised that to attack the expert's opinion of fair rental value as too speculative as a matter of law, the architect needed to do more than merely establish that the expert failed to make certain adjustments. The architect needed to establish that the failure to make those adjustments was material, i.e., it removed the estimate from the range of fair market value. Otherwise, the failure to make those adjustments bears only on the weight of the expert’s testimony, not the competency or legal sufficiency of the damage estimate as a whole, and the damages cannot be held to be too speculative as a matter of law.

Judge Richard Suarez disagreed with the majority, concluding that the decision will now require the trial judge to guess at a damages figure based upon inaccurate rental valuations, which are unreliable and too speculative. Apparently, the homeowner's expert admitted his data was based on flawed facts and assumptions, that as a result he could not make an accurate rental valuation and that a revised rental valuation would likely decrease. There was no other evidence concerning the missing adjustments and, therefore, Judge Suarez concluded that, in attempting to comply with the majority's directive, the trial court would have no evidence, no data and no hard numbers to even guess at the appropriate damages figure. In his opinion, this would force the trial court to engage in speculation as to the adjusted amount of damages, contrary to established law.

The take away from the majority opinion in *Gonzalez* seems to be that the amount of damages for loss of use still needs to be based upon evidence that establishes the figure with reasonable certainty. However, reasonable certainty does not require that the amount be determined with absolute certainty. Apparently, we can establish loss of use damages without dotting every “i” and crossing every “t.”

Please address any questions with regard to the *Gonzalez* decision and loss of use damages to the following Roetzel Construction Law attorneys.

Tom Wert
Board Certified Construction Law Attorney
Certified Circuit Court Mediator
Roetzel & Andress LPA
420 South Orange Avenue
CNL Center II, 7th Floor
Orlando, Florida. 32801
407.835.8548 | twert@ralaw.com

Bob Menzies
Practice Group Manager
Business Litigation
239.649.2701 | rmenzies@ralaw.com

Mike Furbush
Board Certified Specialist – Business Litigation
407.835.8557 | mfurbush@ralaw.com