

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY, FLORIDA

CIVIL ACTION NO.: 16-2022-CA-000773

CITY OF PALM COAST, a Florida
governmental entity,

Plaintiff,

-v-

BBI CONSTRUCTION MANAGEMENT,
INC., a Florida profit corporation, NO
FAULT LLC, a foreign limited liability
company; S&ME, INC., a foreign profit
corporation; and WESTFIELD
INSURANCE COMPANY, a foreign profit
company,

Defendants.

**DEFENDANT BBI CONSTRUCTION MANAGEMENT, INC.'S ANSWER TO
COMPLAINT, AFFIRMATIVE DEFENSES, INCORPORATED MOTION TO STRIKE
AND DEMAND FOR JURY TRIAL**

COMES NOW Defendant BBI CONSTRUCTION MANAGEMENT, INC., (“Defendant”
or “BBI”), and for its Answer to Plaintiff’s Complaint, states as follows:

Defendant denies each and every allegation of the Complaint except those which are
expressly admitted or otherwise qualified herein. Defendant further notes that some denials may
be due to the presence of multiple or compound allegations contained within a single paragraph of
the Complaint.

JURISDICTION

1. Paragraph 1 for jurisdictional purposes only, but denies that Plaintiff is entitled to
any damages, whatsoever.
2. Paragraph 2 of the Complaint is admitted.

3. Paragraph 3 is admitted.

4. BBI lacks sufficient knowledge to admit or deny paragraph 4 and, therefore, denies the same and demands strict proof.

5. BBI lacks sufficient knowledge to admit or deny paragraph 5 and, therefore, denies the same and demands strict proof.

6. BBI lacks sufficient knowledge to admit or deny paragraph 6 and, therefore, denies the same and demands strict proof.

7. Paragraph 7 is admitted for jurisdictional purposes only.

FACTUAL BACKGROUND

8. On information and belief, Defendant admits paragraph 8 of the Complaint.

9. BBI lacks sufficient knowledge to admit or deny paragraph 9; therefore, denied and strict proof is required.

10. BBI lacks sufficient knowledge to admit or deny paragraph 10; therefore, denied and strict proof is required.

11. BBI lacks sufficient knowledge to admit or deny paragraph 11; therefore, denied and strict proof is demanded. BBI further notes that the document attached to the Complaint as Exhibit A speaks for itself.

12. With regard to paragraph 12, admits only that Plaintiff entered into a contract with BBI to provide construction management services. BBI denies all other allegations and notes that the document attached as Exhibit B speaks for itself.

13. With regard to paragraph 13, admits that Plaintiff entered into a contractual relationship with BBI in relation to the project but alleges the terms and conditions of the document attached to the Complaint as Exhibit B speak for themselves. To the extent any other allegations

are contained in paragraph 13, they are denied.

14. With regard to paragraph 14, BBI contends that the document attached to the Complaint as Exhibit C speaks for itself.

15. With regard to paragraph 15, BBI admits that it entered into a written contract with co-defendant No Fault to provide labor, materials and equipment for a complete poured-in-place (“PIP”) surfacing scope of work for the Holland Park Phase 2 improvements. BBI notes the document attached to the Complaint as Exhibit D speaks for itself.

16. With regard to paragraph 16, admits that co-defendant S&ME served as the design professional for the Phase 2 Improvements, including the Splash Pad area, but otherwise denies paragraph 16 as phrased.

17. On information and belief, BBI admits the Splash Pad is connected to a reservoir tank and filtration system, but otherwise denies paragraph 17 as phrased.

18. On information and belief, BBI admits the system was intended to operate by directing water out to the spray nozzles and water feature elements but otherwise denies paragraph 18 as phrased.

19. On information and belief, BBI admits the Splash pad has deck drains and subterranean piping but otherwise denies paragraph 19 as phrased.

20. With regard to paragraph 10, BBI admits the splash pad was substantially complete by April 22, 2021 but lacks knowledge as to all other allegations therein and, therefore, denies the remainder of this paragraph and demands strict proof.

21. With regard to paragraph 21, BBI admits that Plaintiff made various complaints related to the Splash Pad but denies that the issues identified in paragraph 12, including subparts (a) – (g) therein, are the result of any breach of contract, breach of warranty, actions, omissions,

wrongful conduct or otherwise defective or deficient work on the part of BBI. Therefore, BBI denies the entirety of paragraph 21, including all subparts thereto, and demands strict proof thereof.

22. Paragraph 22 of the Complaint is denied.

23. Paragraph 23 of the Complaint is denied as phrased. Moreover, BBI specifically denies it failed to commit to perform repairs and affirmatively alleges the City rejected BBI's commitment to remediate or restore the Splash Pad in accordance with the contract documents at no cost to the City.

24. Paragraph 24 is denied.

25. With regard to paragraph 25, including subparts (a) – (j) therein, BBI denies the alleged deficiencies are the result of any breach of contract, breach of warranty, actions, omissions or otherwise defective or deficient work on the part of BBI. Therefore, BBI denies the entirety of paragraph 25, including all subparts thereto, and demands strict proof thereof.

26. BBI lacks sufficient knowledge to admit or deny paragraph 26; therefore, denied and strict proof is demanded.

27. With regard to paragraph 27, the notice addressed to BBI contained within Exhibit E to the Complaint speaks for itself. BBI lacks knowledge regarding the remaining documents contained in Exhibit E and, therefore, denies the same and demands strict proof.

28. Paragraph 28 is denied.

29. Paragraph 29 is denied.

30. Paragraph 30 is denied.

COUNT I - BREACH OF CONTRACT AGAINST BBI

31. BBI restates and incorporates by reference herein, its denials and responses as set

forth in paragraph 1 – 30 above.

32. With regard to paragraph 32, admits that Plaintiff and BBI entered into a contractual relationship but alleges the terms and conditions of the contract speak for themselves.

33. Paragraph 33 asserts a legal conclusion for which no response is needed. However, to the extent a response is required, then paragraph 33 is denied.

34. Paragraph 34 of the Complaint, including all of its subparts (a) – (j), are denied.

35. Paragraph 35 is denied.

36. Paragraph 36 is denied.

Unofficial Document

COUNT II – BREACH OF EXPRESS WARRANTIES AGAINST BBI

37. BBI restates and incorporates by reference herein, its denials and responses as set forth in paragraphs 1 – 30 above.

38. With regard to paragraph 38, BBI asserts the terms, conditions and exclusions of the document attached to the Complaint as Exhibit F speak for themselves. To the extent this paragraph misconstrues the document or imposes obligations on BBI which are inconsistent with Florida law or the warranty, paragraph 38 is denied.

39. With regard to paragraph 39, BBI asserts the terms, conditions and exclusions of the document attached to the Complaint as Exhibit F speak for themselves. To the extent this paragraph misconstrues the document or imposes obligations on BBI which are inconsistent with Florida law or the contract, paragraph 38 is denied.

40. With regard to paragraph 40, BBI asserts the document attached to the Complaint as Exhibit B speaks for itself. To the extent this paragraph misconstrues the documents or imposes obligations on BBI which are inconsistent with Florida law or the contract, paragraph 40 is denied.

41. With regard to paragraph 41, BBI asserts the document attached to the Complaint

as Exhibit B speaks for itself. To the extent this paragraph misconstrues the documents or imposes obligations on BBI which are inconsistent with Florida law or the contract, paragraph 41 is denied.

42. Paragraph 42 of the Complaint is denied in its entirety and BBI specifically denies that it was responsible for the design of the Splash Pad. Moreover, BBI affirmatively alleges the Splash Pad was constructed in a good and workmanlike manner and in substantial conformance with the plans and specifications provided by the City of Palm Coast.

43. Paragraph 43 is denied.

44. Paragraph 44 is denied.

COUNT III – NEGLIGENCE AGAINST BBI

45. BBI restates and incorporates by reference herein, its denials and responses as set forth in paragraphs 1 – 30 above.

46. BBI admits paragraph 46.

47. Paragraph 47 of the Complaint is denied insofar as it attempts to impose a legal duty on BBI which exceeds or is inconsistent with Florida law or the contract between the parties.

48. Paragraph 48, including all of its subparts (a) – (j), are denied.

49. Paragraph 49 is denied.

COUNT IV – BREACH OF FLORIDA BUILDING CODE AGAINST BBI

50. BBI restates and incorporates by reference herein, its denials and responses as set forth in paragraphs 1 – 30 above.

51. Paragraph 51 is denied.

52. With regard to paragraph 52, BBI admits it provided construction management services but other denies such paragraph as phrased.

53. Paragraph 53, including all of its subparts (a) and (b), are denied.

54. Paragraph 54 is denied.

55. Paragraph 55 is denied.

56. Paragraph 56 is denied.

COUNTS V - XIV

57. BBI restates, and incorporates by reference herein, all of its prior its denials and responses as set forth above.

58 – 127. Paragraphs 58 – 27 all appear to be directed toward other parties, including No Fault, S&ME and Westfield, and do not appear to be directed toward BBI; therefore, no response is required from this answering defendant. However, to the extent any allegations contained therein are intended to be directed to BBI, then BBI denies all such allegations and demands strict proof.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

1. The actions and/or omissions of BBI were not the cause and/or proximate cause for any injuries and/or damages alleged by Plaintiff and, therefore, BBI should not be held liable for any of the claimed injuries and/or damages. BBI served as the Construction Manager during the construction of Splash Pad and did not perform any of the work. Therefore, BBI could not have caused any of the purported damages alleged by Plaintiff resulting from construction of the Project.

SECOND AFFIRMATIVE DEFENSE

2. Plaintiff, whom BBI had no control over or legal responsibility for, was either the sole legal cause or was comparatively at fault for any alleged damages. BBI had no control or legal responsibility over the maintenance and operation of the system during the time period when the alleged damages occurred. Therefore, Plaintiff's claims are barred and/or any recovery for the

alleged damages should be reduced by the percentage of Plaintiff's actions, inactions, or faults attributed to the alleged damages.

THIRD AFFIRMATIVE DEFENSE

3. BBI is not liable to Plaintiff because the acts, conduct and/or omissions of others and/or any persons or entities not a party to this lawsuit constitute intervening and superseding proximate causes of Plaintiff's alleged damages, including the negligence of those parties and non-parties. Additionally, BBI, as construction manager, did not self-perform any work during the construction of the Subject Improvements and could not have caused the Plaintiff's claimed injuries.

FOURTH AFFIRMATIVE DEFENSE

4. BBI affirmatively states that the work performed by BBI and/or its contractors was done in accordance with instructions and recommendations, complied with all applicable codes and statutes per the regulatory authorities with jurisdiction on the Project, and as such, Plaintiff's claims are barred pursuant to Florida Statute § 553.84 and the Seibert Doctrine. *Edward J. Seibert, A.I.A., Architect and Planner, P.A. v. Bayport Beach and Tennis Club Association, Inc.*, 573 So.2d 889 (Fla. 2d DCA 1990).

FIFTH AFFIRMATIVE DEFENSE

5. Any damages sought by Plaintiff that were no part of the original design constitute improvements and betterment, to which Plaintiff is not entitled to recover from BBI, if at all.

SIXTH AFFIRMATIVE DEFENSE

6. Plaintiff, other parties to this lawsuit, and/or other persons and/or entities not a party to this lawsuit have destroyed, lost, spoiled, and/or otherwise failed to properly maintain the key evidence in this matter, whether intentionally or negligently, in connection with, among other

things, maintenance, repairs and/or investigation at the Subject Property thereby barring Plaintiff's recovery in whole or in part. To the extent Plaintiff is claiming damages resulting from evidence that has been destroyed, lost, spoiled, and/or otherwise failed to be properly maintained, BBI has been substantially prejudiced.

SEVENTH AFFIRMATIVE DEFENSE

7. Plaintiff's claims are barred to the extent that any alleged damages are exaggerated, unnecessary, unreasonable, and/or not causally related to BBI, speculative, excessive, remote, contingent, prospective, uncertain, improbable, not reasonably ascertainable, unforeseeable, and were not within the contemplation of the parties to their respective contracts at the time they were entered into or otherwise, and do not logically, naturally, probably or proximately flow from any alleged breach thereof. BBI affirmatively states that its expert will opine as to the reasonableness of Plaintiff's alleged damages.

EIGHTH AFFIRMATIVE DEFENSE

8. Any recovery by Plaintiff must be reduced or set off to the extent of payment previously or hereafter received by Plaintiff from others for payment of and/or settlement of the cause of action alleged. Any monies paid by other defendants, insurers, collateral sources of indemnity, and/or any persons or entities who are not a party to this suit reduces the Plaintiff's entitlement to damages from BBI, if any, as Plaintiff cannot twice recover for damages and cannot recover more than the pro rata share of a defendant's determined fault contribution to an economic loss.

NINTH AFFIRMATIVE DEFENSE

9. BBI is entitled to rely on the plans and specifications provided by the owners and/or design professionals in accordance with *United States v. Spearin*, 248 U.S. 132 (1918).

TENTH AFFIRMATIVE DEFENSE

10. Plaintiff's claims, including but not limited to, the negligence-based claims are barred by the Economic Loss Doctrine. Where a Plaintiff's claims do not include personal injury or property damage, a Plaintiff is not entitled to pursue an action in tort to recover an economic loss. The Economic Loss Doctrine is a judicially created doctrine that prohibits a negligence action if the only damages suffered are to the product itself (i.e, economic losses). Because the Splash Pad is a product, the economic loss rule bars plaintiff's negligence-based claims.

ELEVENTH AFFIRMATIVE DEFENSE

11. Upon information and belief, Plaintiffs injuries and damages, if any, as alleged in the complaint, were approximately caused or contributed to by the Splash Pad having been used or operated in an unintended or abnormal manner, which may include, but would not necessarily be limited to, improper adjustment and/or operation of spray nozzles, improper treatment of water in the splash pad system, and/or the use of improper cleaning techniques and/or chemicals.

TWELFTH AFFIRMATIVE DEFENSE

12. Plaintiff's claims for replacement and/or repair of any alleged construction defects are barred under the doctrine of economic waste. More specifically, removal and replacement of the concrete deck beneath the splash pad it's unnecessary and constitutes economic waste. The city's damages, if any are restricted pursuant to the requirements set forth in *Grossman Holdings, Ltd., v. Hourihan*, 414 So2d 1037 (Fla. 1982).

THIRTEENTH AFFIRMATIVE DEFENSE

13. Plaintiff's claims against BBI are barred or must be reduced as Plaintiff has failed to mitigate its damages by refusing to allow BBI to perform work at no cost to the City of Palm

Coast pursuant to the respective letters of commitment dated November 4, 2022.

FOURTEENTH AFFIRMATIVE DEFENSE

14. Any damages or injuries which were or will be sustained by Plaintiff were caused in whole or in part, by the negligence and/ or tortious acts, omissions and/ or conduct of persons, parties or entities other than BBI. Such persons, parties or entities would include, but not be limited to, the City of Palm Coast and its agents and representatives, S&ME, the architect and engineer of record for the project, No Fault and its subcontractors and suppliers, any contractors and/or material suppliers who performed work at the subject Splash Pad, any and all subcontractors, independent contractors, suppliers, design professionals, vendors and/ or non-parties who supplied services or materials for the subject Splash Pad. Further, under the law announced by the Florida Supreme Court in *Fabre v. Marin*, 623, So.2d 1182 (Fla. 1993). BBI is only responsible, if at all, for the percentage of fault as may be found to exist between any and all entities, and/or individuals, whether or not named as defendants or parties in this litigation. BBI reserves the right to amend this affirmative defense and to plead the liability of any additional non-parties, if and when identified during discovery, and request that they be placed on a verdict form as *Fabre* defendants as discovery continues. Accordingly, any damages recoverable by plaintiff must be diminished in proportion to the amount of fault attributable to other persons, parties or entities.

FIFTEENTH AFFIRMATIVE DEFENSE

15. Plaintiff's claims, in whole or in part, are or may be barred pursuant to the holding set forth in *Slavin v. Kay*, 108 So.2d 462 (Fla. 1959) Where plaintiff accepted the completed work after having conducted an actual inspection of the property or been afforded a reasonable opportunity to inspect the work. As a consequence, Plaintiff's purported claims are barred by the doctrines of waiver and/or estoppel.

SIXTEENTH AFFIRMATIVE DEFENSE

16. BBI obtained the required permits for the subject improvements, the appropriate local governmental agency with authority to enforce the Florida Building Code approved the plans submitted by the Plaintiff and the architect of record, and the construction of the improvements passed all inspections required by the Florida Building Code. On information and belief, no alleged damage has occurred to property other than to the subject improvements themselves, which alleged defects and damage are denied. Moreover, the appropriate local government agency with the authority to enforce the Florida Building Code issued Certificates of Occupancy for the subject improvements. Additionally, BBI did not know, and/or would not have been expected to know, of any damages caused by alleged violations of the Florida Building Code. Therefore, pursuant to § 553.84, Florida Statutes, Plaintiff's claims for violation of the Florida Building Code are barred.

SEVENTEENTH AFFIRMATIVE DEFENSE

17. On information and belief, by virtue of Plaintiff's own actions, representations and conduct, including but not limited to, approving the poured in place product used to construct the safety surfacing for the Splash Pad, having subsequently approved and accepted the work, and other acts and representations and conduct which may be revealed during discovery, Plaintiff has waived any right to assert any claims against BBI. Additionally, Plaintiff waived any right to recovery against BBI because, upon information and belief, Plaintiff knew or should have known of the alleged defective condition(s) related to the subject improvements, if any as alleged by Plaintiff.

EIGHTEENTH AFFIRMATIVE DEFENSE

18. On information and belief, Plaintiff is estopped from asserting and has waived any claims against as against BBI by virtue of Plaintiff's own actions, representations and conduct,

including but not limited to, approving the poured in place product used to construct the safety surfacing for the Splash Pad, having subsequently approved and accepted the work, including any and all alleged defects that would have been apparent and/or obvious during reasonable inspection and testing prior to or immediately after acceptance of the improvements, and by such other acts and presentations and conduct as may be revealed in discovery.

NINETEENTH AFFIRMATIVE DEFENSE

19. The Splash Pad architect of record was charged with a non-delegable duty to ensure that the design conformed with the applicable laws, regulations and building codes, as provided in *Atlantic National Bank of Jacksonville v. Modular Age, Inc.*, 363 So.2d 1152 (Fla. 1st DCA 1978). To the extent the work and/or materials provided by BBI did not meet the applicable codes, industry standards or good construction practices, such is and was the responsibility of the architect of record and/or Plaintiff. BBI was required to follow the design specifications provided by the City's design professional and, to the extent such design(s) failed to conform to the Florida Building Code, or to any applicable industry standards or practices, Plaintiff's claims are barred as against BBI.

TWENTIETH AFFIRMATIVE DEFENSE

20. Plaintiff's claims against BBI for consequential damages are barred as Plaintiff waived any and all claims for consequential damages by the terms of the written construction contract, specifically, General Conditions, Section 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES. That section reads in part, "The Contractor and Owner waived Claims against each other for consequential damages arising out of or relating to this Contract. This Mutual waiver includes . . . damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing business and reputation, and for loss of management or employee productivity or for the

services of such person, and....” By operation of such voluntary relinquishment of a known right, Plaintiff is barred or estopped from now claiming damages for “...loss of use and enjoyment of the Splash Paid; lost profits;...; consequential damages;.... And/or “additional City time and labor....”

TWENTY-FIRST AFFIRMATIVE DEFENSE

21. Plaintiff’s claims against BBI for attorneys’ fees as part of Plaintiff’s claims must fail as Plaintiff has failed to properly plead legal grounds for entitlement, in accordance with the requirements of Florida law. *Stockman v. Downs*, 573 So.2d 835 (Fla.. 1991).

TWENTY-SECOND AFFIRMATIVE DEFENSE

22. BBI hereby adopts and incorporates all other affirmative defenses asserted by any other Defendant / Third Party Defendant to the extent that such defenses also operate to affirmatively defend against BBI’s alleged liability if any.

RESERVATION

23. BBI reserves any and all rights to supplement its answer and affirmative defenses as discovery and investigation are ongoing.

INCORPORATED MOTION TO STRIKE

Pursuant to Fla. RCP 1.140(f), Defendant BBI hereby moves to strike the Plaintiff’s claims for attorney’s fees against Defendant BBI as asserted in paragraphs 36, 44, 49 and 56 of the Complaint. Plaintiff has failed to set forth any statement of ultimate facts showing that the City of Palm Coast is entitled to attorney’s fees from Defendant BBI as required by Fla. RCP 1.110(b). In addition to its failure to plead with the requisite specificity, Plaintiff has also failed to set forth any ultimate facts alleging a good faith basis for its purported entitlement to attorney’s fees from Defendant BBI pursuant to the parties’ contract or by way of any statute under Florida law.

Stockman v. Downs, 573 So.2d 835, 838 (Fla. 1991); *Cadenhead v. Gaetz*, 677 So.2d 96 (Fla. 1st DCA 1996) (claim for attorney's fees required to have good faith legal basis under statute or contract or should be stricken). As such, all provisions of the Complaint, including but not limited to those allegations contained in paragraph 36, 44, 49 and 56 of the Complaint, in which Plaintiff seeks attorney's fees should be dismissed as to Defendant BBI. Defendant BBI reserves the right to supplement this motion through additional amendments and memoranda, as warranted.

DEMAND FOR JURY TRIAL

Defendant BBI Construction Management, hereby demands trial by jury of all issues so triable as of right by jury.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the E-Filing Portal and Electronic Mail, attached Service List, this 23rd day of January, 2023.

Respectfully submitted.

**LUKS, SANTANIELLO, PETRILLO, COHEN
& PETERFRIEND**

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