

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

CITY OF PALM COAST, a Florida
governmental entity

CASE NO.: 2022-CA-000773

Plaintiff,

v.

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

Defendants.

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**DEFENDANT WESTFIELD INSURANCE COMPANY'S
ANSWER AND AFFIRMATIVE DEFENSES**

COMES NOW Defendant WESTFIELD INSURANCE COMPANY, ("WESTFIELD"),
by and through its undersigned counsel, and hereby answers the Complaint filed on November
29, 2022, by Plaintiff, CITY OF PALM COAST, ("Plaintiff"). WESTFIELD answers the
correspondingly numbered paragraphs (1- 127) as follows:

JURISDICTION

1. Admitted for jurisdictional purposes only.
2. Admitted.
3. Admitted.
4. Without knowledge, therefore Denied.
5. Without knowledge, therefore Denied.
6. Admitted.
7. Admitted for jurisdictional purposes only.

FACTUAL BACKGROUND

8. Admitted.

9. Without knowledge, therefore Denied.

10. Without knowledge, therefore Denied.

11. Without knowledge, therefore Denied. WESTFIELD further notes that the document attached to the Complaint as Exhibit A speaks for itself.

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

13. WESTFIELD admits that Plaintiff entered into a contract 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. Admitted.

15. Without knowledge, therefore Denied.

16. Without knowledge, therefore Denied.

17. Without knowledge, therefore Denied.

18. Without knowledge, therefore Denied.

19. Without knowledge, therefore Denied.

20. With regard to paragraph 20, 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.

21. With regard to paragraph 21, WESTFIELD Admits that Plaintiff made various complaints related to the Splash Pad but denies that the issues identified in paragraph 21, 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, WESTFIELD denies the entirety of paragraph 21, including all subparts thereto, and demands strict proof thereof.

22. Denied.

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

24. Denied.

25. Denied, including subparts (a) – (j) therein. Denied that 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, WESTFIELD denies the entirety of paragraph 25, including all subparts thereto, and demands strict proof thereof.

26. Without knowledge, therefore Denied.

27. The notice addressed to BBI contained within Exhibit E to the Complaint speaks for itself. WESTFIELD is without knowledge regarding the remaining documents contained in Exhibit E and, therefore, denies the same and demands strict proof.

28. Denied.

29. Without knowledge as to Plaintiff's relationship with, or obligations to, its attorneys, therefore Denied.

30. Denied.

COUNTS I - XIII

31-113. The allegations in Paragraphs 31 – 113 all appear to be directed toward other parties, including BBI, No Fault, and S&ME, and do not appear to be directed toward Westfield; therefore, no response is required from this answering defendant. However, to the extent any allegations contained therein are intended to be directed to WESTFIELD, then WESTFIELD denies all such allegations and demands strict proof.

COUNT XIV – BREACH OF BOND AGAINST WESTFIELD

114. WESTFIELD reasserts the prior responses to paragraphs 1-30 as if fully set forth herein.

115. Admitted.

116. Admitted.

117. Admitted.

118. Without knowledge, therefore Denied.

119. Denied.

120. Admitted.

121. Admitted.

122. Admitted.

123. Without knowledge, therefore Denied.

124. Admitted that Plaintiff issued an allegation of contractor default and termination in a written instrument dated October 21, 2022. All other parts of paragraph 124 not specifically admitted herein are Denied.

125. Admitted that the documents attached to the Complaint as Exhibit C appear to be accurate and complete copies of the bonds issued jointly by WESTFIELD and BBI. WESTFIELD denies all other allegations and notes that the documents attached to the Complaint as Exhibit C speak for themselves.

126. Denied.

127. Denied.

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ATTORNEY FEE ENTITLEMENT

WESTFIELD has retained the undersigned attorneys to maintain this defense and have become obligated for reasonable attorney fees, for which Plaintiff, CITY OF PALM COAST is obligated, pursuant to Fla. Stat. §§ 627.756 (1) and 627.428 (1). To the extent WESTFIELD is determined to be the prevailing party concerning Plaintiff's claim on the performance bond, Plaintiff, CITY OF PALM COAST, shall also be obligated for WESTFIELD's reasonable attorney fees and costs.

WHEREFORE, Defendant, WESTFIELD INSURANCE COMPANY, request that Plaintiff, CITY OF PALM COAST's claims be stricken; that Plaintiff take nothing thereby; and that judgment be entered in favor of Defendant, WESTFIELD INSURANCE COMPANY for prevailing party attorneys' fees, costs and such other equitable relief this Court may deem proper.

AFFIRMATIVE DEFENSES

First Affirmative Defense

WESTFIELD is entitled to all defenses of the principal Contractor, BBI. WESTFIELD hereby adopts and incorporates all other affirmative defenses asserted by BBI to the extent that such defenses also operate to affirmatively defend against WESTFIELD's alleged liability if any.

Second Affirmative Defense

WESTFIELD 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 WESTFIELD's alleged liability if any.

Third Affirmative Defense

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

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Fourth Affirmative Defense

WESTFIELD's liability to Plaintiff, if any, is limited to the penal sum of the performance bond.


Fifth Affirmative Defense

Plaintiff's claims against WESTFIELD and/or 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 waive 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 persons, 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 Pad; lost profits;...; consequential damages;.... and/or "additional City time and labor...."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing has been furnished by the Florida Courts E-Filing Portal and has been served electronically via the Court's electronic noticing system, this 17th day of January 2023.

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