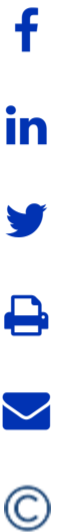


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Stevan Pardo, left, and Nicole Rekant, right, of Pardo Jackson Gainsburg. Courtesy photos

COMMENTARY

## Third District Fails to Consider Arbitrariness When Determining Anticipatory Breach

Florida contractors beware. A recent decision by the state's Third District Court of Appeal may impact how you chose to word future contracts with clients.

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[Construction](#)

By Nicole Rekant and Stevan J. Pardo

Florida contractors beware. A recent decision by the state's Third District Court of Appeal may impact how you chose to word future contracts with clients.

The ruling, which involved an air conditioning company that had contracted for church repairs, raises doubts as to whether a contractor can legally refuse to perform work when the person who hires them fails or refuses to provide assurances that the worksite is safe after the contract is signed and the contractor subsequently learns of potential worksite dangers.

In a recent decision by Florida's Third District Court of Appeal, *24 Hour Air Service v. Hosanna Community Baptist Church*, 2021 WL 2345668 (Fla. 3d DCA June 9, 2021), a licensed air conditioning contractor agreed to repair a church's smoke detector and air conditioner. When the contractor's employees entered the church's attic to start the repairs, they realized that the wooden platform they were standing on was caving in and they ran before part of the ceiling collapsed. After the church repaired the ceiling structure, the contractor refused to return and complete the contracted-for repairs citing safety reasons. The church sued the contractor for refusing to complete the repairs. The contractor's representative testified that he had requested proof of the ceiling repairs from the church, which was never provided. At a bench trial, the court ruled in favor of the church.

The Third District affirmed, holding that there was competent substantial evidence to support a claim for anticipatory breach against the contractor. The appellate court explained that "an anticipatory breach of contract occurs when there is absolute repudiation by one of the parties prior to the time when his performance is due under the terms of the contract." The court added that

“repudiation can be shown where one party makes additional demands not included in the initial agreement.” Specially, the court stated that where one party to the contract arbitrarily demands performance not required by the contract and couples this demand with a refusal to further perform unless the demand is met, that party has anticipatorily repudiated the contract. This breach “relieves the nonbreaching party of its duty to further perform and gives that party a right to sue for breach of contract.”

The appellate court found that the contractor’s request that the church provide safety assurances of the ceiling repairs was an additional demand that was not agreed to by the parties under the service contract. Therefore, the court held that despite the contractor’s argument that it never abandoned the job, its demand for safety assurances, coupled with its refusal to complete the agreed repairs until such assurances were provided, was an anticipatory breach of the contract.

In affirming the trial court, the Third District did not address the part of the law that holds a party liable for anticipatory breach when it arbitrarily demands performance not required by the contract.

In the *24 Hour Air Service* case, there was nothing arbitrary about the contractor’s demand for assurance of its workers’ safety when the workers had narrowly escaped from the church’s caved in ceiling during their prior visit to the church’s property to perform their contract work. The contractor had actual knowledge that the worksite had been dangerous. The contractor’s demand for reassurances was not a hypothetical concern that it knew or should have known in advance to include in the contract. The known danger, which the employees witnessed and barely escaped, arose only after the contract was made. The Third District did not discuss in its opinion whether the contractor’s post-contract demands were reasonable, and thus not arbitrary, under the circumstances.

From a contractor’s perspective, it was not only prudent but also critical from a liability standpoint to demand reassurances of safety from the church before returning to finish the work. Had the contractor’s employees returned and been injured because the church ceiling had not been properly fixed and no assurances had been obtained from the church, then the contractor could have been exposed to a negligence claim or even a gross negligence claim for failing to protect its employees (workers’ compensation laws aside) from a known danger.

Flipping the hypothetical, if the employees had been injured after the contractor had been assured repairs had been made, then the contractor may have had a claim for negligence. The court’s ruling does not consider the practicalities of avoiding these potential disasters, but rather discourages a contractor from taking safety precautions in such a scenario. A conscientious contractor should not have to choose between worker safety in a situation where the danger to its workers becomes known only after the contract is signed and subjecting itself to a lawsuit and damages based on anticipatory breach.

In a prior case, *A.I.C. Trading v. Susman*, 40 So. 3d 769 (Fla. 3d DCA 2010), the same Third District court recognized the “arbitrary” factor in finding liability for anticipatory breach for post-contract demands. In that case, the court found that a landlord made demands that were not part of the agreement and that were totally unfounded. Similarly, in *Pegasus Imaging v. Northrop Grumman*, 2010 WL 1528506 (M.D. Fla. Apr. 14, 2010), the court, citing the same rule quoted by *24 Hour Air Service*, including the “arbitrary” language, held that the plaintiff stated a cause of action for anticipatory breach where a license agreement permitted use of software and the defendant demanded that the plaintiff stop using the software unless it agreed to an expanded license agreement and paid additional fees. In both of these Florida cases, it was apparent that the post-contractual demands were arbitrary.