**IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA**

ROAD ROCK, INC., a Florida Corporation, and ROBERT ELMORE,

Plaintiffs,

v.

FLORIDA POWER & LIGHT COMPANY, a Florida corporation,

Defendant.

CASE NO. 04-13626 (07)
Complex Litigation Unit
Judge Robert A. Rosenberg

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## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came before the court for trial, non-jury, in July 2009 and November 2009. The court has subject matter jurisdiction over this dispute and personal jurisdiction over the parties. Venue is appropriate in this court. After considering the evidence, weighing the credibility of the various witnesses, and reviewing the parties' trial and post-trial memoranda, the court makes the following findings of fact and conclusions of law.

## INTRODUCTION

Essentially this is an action for breach of contract brought against Florida Power & Light Company ("FPL") by plaintiffs, Robert Elmore ("Elmore"), Geraldine Elmore ("Ms. Elmore")( jointly referred to as "The Elmores"), and Road Rock Inc. ("Road Rock").

On June 30, 2009, this court granted plaintiffs' motion for summary judgment, finding that FPL had breached the contract of December 2, 1955, as incorporated and amended on May 21, 1984, by preventing Elmore (and Road Rock) from excavating the rock, sand, and stabilizer

in the two FPL cooling lakes. The matter was set for trial on the issue of breach of contract damages.

There is a dispute regarding the proper parties in this matter. The Fourth District Court of Appeal previously held that Road Rock is neither a party to the contract, nor a third party beneficiary of the contract. *Florida Power & Light Co. v. Road Rock, Inc.*, 920 So. 2d 201 (Fla. 4th DCA 2006). Road Rock thus was dismissed as a party from the breach of contract claim at the close of plaintiff's case. Mr. Elmore is the sole shareholder of Road Rock, and perhaps the "alter ego" of the company.

## FINDINGS OF FACT

1. This is a bench trial on damages only. The court previously determined FPL is liable for breach of contract. Under the 1984 contract which incorporates the applicable terms and conditions of the 1955 contract, the Elmores own title, and have the right to remove all rock, sand, and stabilizer "within the lake presently established on the property"[1] down to a depth of -60 feet below mean sea level. The property is the 150-acre lake and a contiguous 50-acre lake which includes the A/B and B/C barriers.
2. FPL's breach of contract occurred on May 13, 2004 when it informed Elmore and the Broward County Department of Environmental Protection (DPEP) that it would not allow him to remove the rock, sand, and stabilizer from the lake.[2]
3. FPL asserts it sought only to stop Elmore from removing the A/B and B/C barriers from the lake. This argument is unpersuasive. The effect of FPL's filing an administrative appeal of Elmore's dredge permit was to preclude all dredging in the FPL lakes.[3]

[1] Pls.' Ex. 2, Contract ¶ 2 (May 21, 1984)
[2] Def.'s ex. 43, Letter from R. Grady, Attorney for FPL, to A. Allen, DPEP (May 13, 2004); Def.'s Ex. 29, Letter from E. Myers, DPEP, to R. Elmore (May 21, 2004); Def.'s Ex. 44, Petition of FPL for Review of issuance of License (June 2, 2004).

4. FPL disputes the contract with Elmore permits the removal of the A/B and B/C barriers. We find these barriers were a part of the contract and intended for removal.

5. There are 550,728 tons of excavatable material in the A/B and B/C barriers, consisting of 212,665 tons of sand and 338,063 tons of rock. There is controversy as to the intended depth of this accounting—either to the lake bed or to extend into the underburden[4] below the lake bed surface to the depth of -60 feet. We find, from the parties proposed Findings of Fact and Conclusions of Law to avoid a double counting, the excavatable material calculation of the A/B and B/C barriers to only encompass the barrier portion from the lake bed upwards and not extending below into the under bed.

6. The court finds the testimony of Wendell Wiggins, Ph.D. persuasive. Specifically:

    a. The slope used for excavation is a slope of 3:1.

    b. The total excavatable volume of the underburden is 5,245,333 cubic yards of material. This consists of 1,051,235 cubic yards of sand and 4,194,098 cubic yards of rock.

    c. The total remaining material in the lakes for removal is 5,796,061 cubic yards, consisting of 1,263,900 cubic yards of sand and 4,532,161 cubic yards of rock.

7. The conversion factor used to convert yards to tons was also in dispute. FPL asserts through their expert, Stephen Olmore, the conversion rate should be 1.11 tons per cubic yard for sand and 1.3 tons per cubic yard for rock. The plaintiff asserts a conversion factor of 1.4 tons per cubic yard of sand and rock. The plaintiff has been using the 1.4 conversion factor for both sand and rock with the company that removed the material,

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[3] Pls.' Ex. 9, 2004 Environmental Resource License (May 24, 2004).

[4] The amount of material that would be removed from the lake bed to result in a lake depth of -60 feet, as permitted by Broward County permit, Pls.' Ex. 6, 2005 Excavation Agreement at 1.

Lauderdale Sand and Fill ("LS&F") from the inception of their business. It is conceivable, as plaintiff asserts, the material to be excavated would be subject to the 1.4 factor, absent the breach by FPL. For the purposes of determining damages, the court finds the plaintiff's position persuasive and will use a conversion factor of 1.4 tons per cubic yard of sand and rock.

8. Mr. Elmore's damages resulting from FPL's 2004 breach of contract are the amount of royalty he would have received had FPL not blocked him from excavating the material. Elmore had a contract with LS&F, under which material was first excavated and a royalty then paid to him. The applicable royalty was 25%. On April 1, 2005, however, Elmore and LS&F entered into a written agreement which increased the royalty to 30%. To calculate the royalty, the court must determine (1) the total quantity of excavatable material in the FPL lakes; (2) when it would have been excavated; and (3) the price at which the material would have sold. That formula is (quantity x price) ÷ royalty = damages.

9. There is a dispute regarding the rate plaintiff could effect removal of the remaining excavatable material. Although there does not appear to be a great amount of activity in the years immediately prior to the breach by FPL, this is simply not indicative of the amount or rate of material plaintiff could remove per year. In any event, plaintiff is entitled to the remaining material or its value.

10. The plaintiff contends the remaining fill could have been removed from the lakes beginning in mid-2005 and ending sometime in 2011. The defendant argues a longer time table for removal. If the court were to adopt the defendant's position, this would likely result in a higher cost after removal as both experts offering testimony agree the

price of sand increased in the years subsequent to the breach. The court, in any event, finds the plaintiff's timetable persuasive.

11. Both Helen Shields and Henning Hansen testified as to the market prices of sand from the lakes. Shields was the sole witness testifying to the 2005 market price of sand from the lakes as $12 per ton. Averaging the testimony of the two witnesses for 2006, the court adopts the market price of sand at $14.33 per ton.

12. Using the removal schedule proposed by the plaintiff, 500,000 tons of sand would have been removed in 2005. The remaining 763,900 tons of sand would have been removed from the lakes in 2006.

13. The 2005 value of the 500,000 tons of sand is 500,000 x 12 x .30, or $1,800,000. The 2006 value of the 763,900 tons of sand is 763,900 x 14.33 x .30, or $3,612,407.

14. For the year 2006, Hansen testified the market value of rock was $12 per ton. For the years 2007-2010, Hansen testified the market value of rock was $10 per ton. The court adopts these values.

15. After the completion of sand removal in 2006, the excavation of rock would have commenced with 236,100 tons of rock being removed that year. The 2006 market value of the rock is calculated as 236,100 x $12 x .30, or $849,960.

16. In 2007- 2010, 1,000,000 tons of rock would have been removed per year at $10 per ton for a total of $40,000,000 x .30, or $12,000,000.

17. Assuming the value of rock remains constant in 2011, the remaining 296,061 tons would be removed for a value of $888,183.

18. The value of the total royalties for the sale of rock and sand in the lakes is $19,150,550.

## CONCLUSIONS OF LAW

1. FPL's refusal to allow Elmore to excavate the sand and rock he owned is a material breach of contract.

> A material breach, as where the breach goes to the whole consideration of the contract, gives to the injured party the right to rescind the contract or to treat it as a breach of the entire contract—in other words, an entire or total breach—and to maintain an action for damages for total breach. [5]

2. Once FPL breached the contract in 2004, Elmore had the right to sue for damages. "The rule is quite clear that a contracting party, faced with a material breach by the other party, may treat the contract as totally breached and stop performance."[6]
3. Mr. Elmore was entitled to remove the rock and sand from the lakes. Thus, he is now entitled to calculable value of royalties for the excavatable rock and sand in the lakes of $19,150,550
4. Mr. Elmore is also entitled to pre-judgment interest on the $19,150,550. The plaintiff proposes compounding interest on the monies due. The court is not persuaded and instead employed a simple interest calculation.
5. The statutory interest rates applicable to these royalty earnings are:

| Year | Florida Statutory Interest Rate |
|---|---|
| 2004 | 7% |
| 2005 | 7% |
| 2006 | 9% |

[5] *Hyman v. Cohen*, 73 So. 2d 393, 397 (Fla. 1954) (Damages consist of profits a party would have received by full performance).
[6] *City of Miami Beach v. Carner*, 579 So. 2d 248 (Fla. 3d DCA 1991).

| | |
|---|---|
| 2007 | 11% |
| 2008 | 11% |
| 2009 | 8% |
| 2010 | 6% |

6. Applying those interest rates to the royalties that Elmore would have received yields a total of accrued simple interest due of $1,313,360.

| Year | Florida Statutory Interest Rate | Accrued Damages | Simple Interest Accrued |
|---|---|---|---|
| 2005 | 7% | --- | --- |
| 2006 | 9% | $1,800,000 | $162,000 |
| 2007 | 11% | $4,462,367 | $490,860 |
| 2008 | 11% | $3,000,000 | $330,000 |
| 2009 | 8% | $3,000,000 | $240,000 |
| 2010 | 6% | $3,000,000 | $90,500 (7/30/2010) |

**Total prejudgment interest through July 30, 2010: $1,313,360**

7. Accordingly, Elmore is entitled to a judgment of **$20,463,910**.

The plaintiff will present a final order of judgment consistent with this opinion.

DONE AND ORDERED in Broward County, Florida this ____ day of August 2010.

ROBERT A. ROSENBERG

Robert A. Rosenberg
Circuit Judge

AUG 11 2010

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cc:
Drew B. Sherman, Esq., 1000 Corporate Dr., Ste 310, Ft. Lauderdale, FL 33334
Robert C. Grady, Esq., 100 NE Third Ave., Ste 280, Ft. Lauderdale, FL 33301