

**ORIGINAL**

FILED  
COURT OF CLAIMS  
OF OHIO

IN THE COURT OF CLAIMS  
STATE OF OHIO

2014 AUG -7 PM 12: 05

Grand Valley Local School  
District Board of Education, et al.

Plaintiffs

-vs-

Buehrer Group Architecture &  
Engineering, Inc., et al.

Defendants

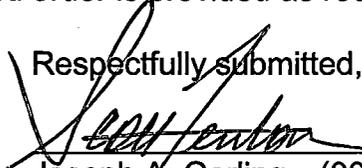
Case No. 2014-00469-PR

Judge McGrath

**MOTION OF DEFENDANT/COUNTERCLAIM PLAINTIFF JACK GIBSON  
CONSTRUCITON COMPANY PURSUANT TO CIVIL RULE 56(F) TO REQUEST A  
CONTINUANCE OF THE TIME TO RESPOND TO PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT, OR ALNTERNATIVELY, MOTION FOR JUDGMENT ON  
THE PLEADINGS**

Pursuant to Civ. R. 56(F) and Loc. R. 4(B), defendant/counterclaim plaintiff Jack Gibson Construction Company respectfully requests that the Court grant a 50-day continuance for Jack Gibson to file its memorandum opposing plaintiffs' motion for summary judgment. A memorandum in support is attached which in turn is supported by the affidavit of Jack Gibson's President, Jim Breese, attached as Ex. 1. This motion is not opposed by plaintiffs. A proposed order is provided as required by Loc. R. 4(B).

Respectfully submitted,



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**Counsel for Defendant Jack Gibson  
Construction Company**

**ON COMPUTER**

## MEMORANDUM IN SUPPORT

### I. INTRODUCTION/FACTS

This case concerns the design and construction of a new K-12 school construction project for plaintiff Grand Valley School District ("Grand Valley") located in Orville, Ohio, constructed between 2001 and 2005 (the "Project"). Jack Gibson Construction Company, Inc. ("Jack Gibson") served as the general trades contractor during the Project. Jack Gibson, however, did not prepare the plans and specifications for the Project or perform the site work. (Affidavit of Jim Breese ["Breese Aff."] ¶ 3).

The plaintiffs, the Ohio Schools Facilities Commission ("OSFC") and Grand Valley Local School District Board of Education ("Grand Valley")(collectively "plaintiffs") have moved for judgment on the pleadings, Civ. R. 12(C), or alternatively, for summary judgment under Civ. R. 56(C). Plaintiffs' alternative motions seek dismissal of Jack Gibson's counterclaim which alleges breach of an agreement entitled "Memorandum of Understanding" ("MOU") entered into during July of 2013.

According to the plain language of the MOU, plaintiffs agreed to compensate Jack Gibson for making repairs to the Grand Valley project which the parties engineering consultants agreed were "betterment" (i.e., improvements upon the project's original plans and specifications) or outside of Jack Gibson's original scope of work identified in its contract. The scope of the remedial work and later pricing was agreed to in advance by consultants hired by plaintiffs and Jack Gibson and detailed in exhibits "A" and "B" attached to the MOU agreement. (Id. ¶¶ 5-8). The value of the work Jack Gibson performed that plaintiffs agreed fell under the category of "betterment" and/or was not the responsibility of Jack Gibson or its subcontractors was

\$156,276.13. Plaintiffs admit in their Motion that they have only paid \$20,000 of this amount, leaving a balance of \$136,376.13 due Jack Gibson. (Breese Aff. ¶ 7).

Plaintiffs' motion is supported by the affidavit of its Treasurer Lisa Moodt, who alleges many facts that are not contained in the pleadings. Plaintiffs argue in their motion that the MOU is not a legally enforceable agreement because it lacks a certification from Grand Valley that funds were available. Plaintiffs claim that the source of the funding requirement is R.C. § 5705.41.

Because plaintiffs have alleged numerous facts outside of the pleadings, including the affidavit of Grand Valley's treasurer, the court must evaluate their motion under the evidentiary standards applicable to a motion for summary judgment. Civ. R. 56.

## **II. LAW & ARGUMENT**

### **A. Standard for Civ. R. 56(F) Motion**

Civ.R. 56(F) provides:

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

As shown, Civ. R. 56(F) affords a party the opportunity to request additional time to discover from the opposing party evidence necessary to adequately oppose a motion for summary judgment. *Morantz v. Ortiz*, 10th Dist. No. 07AP-597, 2008-Ohio-1046, ¶ 20. To be entitled to the relief provided for under Civ.R. 56(F), the party must support its motion for continuance with an affidavit explaining the reasons justifying an extension of discovery. *Id.* at ¶ 22.

**B. Plaintiffs are the Sole Source of Sworn Testimony that Jack Gibson Needs to Support its Memorandum Opposing Plaintiffs' Motion for Summary Judgment.**

Contrary to plaintiffs' contentions in their motion, the MOU is not rendered unenforceable by R.C. § 5705.41 due to the absence of a certification of funding from Grand Valley. R.C. § 5705.41 is a general statute concerning the appropriation of and expenditure of funds by taxing units which ceased applying to school districts after the passage of R.C. § 5705.412. *Tri-County North Local School Bd. of Educ. v. McGuire & Shook Corp.*, 748 F. Supp. 541, 548 (1989). R.C. § 5705.412 is a specific statute addressing the appropriation and expenditure of funds by school districts. *Id.*

In *Tri-County*, the United States District Court for the Southern District of Ohio was asked to decide whether a certificate of funding was required to be attached to a school construction contract that was paid for by a local bond levy and construction assistance funds from the state. The District Court found that the "plain purpose" of the certification requirement under R.C. § 5705.41 and its predecessors "was to prevent the incurring of an indebtedness by a municipal corporation beyond the *ordinary sources* of its *revenue* and whereby an annual excess of indebtedness will be created over these revenues . . ." (emphasis added). *Id.*, citing *Youngstown v. First Nat. Bank*, 106 Ohio St. 563, 571, 140 N.E. 176 (1922) (stating that Burns Law was "designed to apply to the usual and ordinary, and every day transactions between the public and the city through its officers"). The District Court explained that:

Ohio decisional law (which bespeaks a concern for protecting the ordinary sources of revenue of government) coupled with the omission of the pertinent bond language in O.R.C. § 5705.412, leads this Court to the conclusion that when a construction project for a school district is to be funded through proceeds from a bond issue combined with state building assistance funds, certification would neither be relevant nor necessary

since the contract could not affect the general source of funds which is available to operate the ordinary services of government.

The Plaintiff has moved this Court for summary judgment on the ground that no genuine issue of material fact exists with respect to the validity of the Defendant's contract with the Board. On the contrary, this Court holds that the absence of certification as defined under O.R.C. § 5705.412 is **not** a bar to the validity of the contract in question.

*Tri-County*, at 549 (emphasis added).

As stated in *Tri-County*, a certificate of adequate funding is **not** required to be attached to a school construction contract provided that sufficient evidence is produced showing that the debt contracted for was to be paid from accounts outside the school's general operating funds – which in *Tri-County* was a combination of funds from a bond issue and state building assistance funds. *Id.* at 549.

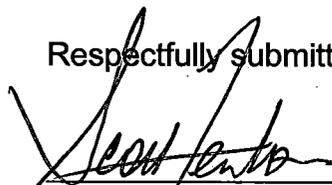
In the present case as well, Jack Gibson believes that both the original construction work and remedial work at issue in the MOU was paid from bond levies and construction assistance funds received from the OSFC. (Breese Aff. ¶ 9). Because Jack Gibson's employees lack "personal knowledge" of these facts, as required by Civ. R. 56(E), they cannot execute a proper affidavit to support a memorandum opposing plaintiffs' motion for summary judgment. (*Id.*) Grand Valley is the only source for sworn testimony concerning the source of funding for both the original construction and remedial work. Therefore, Jack Gibson respectfully requests a 50-day continuance in order to (1) serve plaintiffs with a brief set of requests for admission, interrogatories and requests for production of documents to determine the sources of funding identified above; (2) afford plaintiffs the time required under Civil Rules and Local Rules to serve responses; (3) afford Jack Gibson sufficient time to review plaintiffs' discovery responses; and (4) prepare a memorandum in opposition to plaintiffs' motion for

summary judgment. The time requested includes sufficient mailing days for all these events.

### III. CONCLUSION

For the above reasons, Jack Gibson respectfully requests that the Court grant an order in its favor for a 50-day continuance of its time to respond to plaintiffs' motion for judgment on the pleadings or alternatively for summary judgment in order to seek discovery from plaintiffs in order to respond to these motions. This motion is not opposed by plaintiffs. A proposed order is provided as required by Loc. R. 4(B).

Respectfully submitted,



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**Counsel for Defendant Jack Gibson  
Construction Company**

**AFFIDAVIT OF JIM BREESE**

STATE OF OHIO                    )  
  ) SS:  
COUNTY OF TRUMBULL         )

I, Jim Breese being duly sworn and cautioned according to law, state as follows:

1. I am over the age of 18, I have personal knowledge of the statements made in this affidavit, and I am competent to testify regarding same.

2. During all times relevant to this case, I have been employed by the Jack Gibson Construction Company, Inc. ("Jack Gibson"). Between 2001 and 2003, I served as Vice President of Operations. On January 15, 2003, I became Jack Gibson's President.

3. Between 2001 and 2005, Jack Gibson served as the general trades contractor to build a new K through 12 school construction project for plaintiff Grand Valley School District ("Grand Valley") located in Orville, Ohio. Jack Gibson did not perform any design or site work.

4. Attached as Exhibit 1 to Jack Gibson's Answer and Counterclaim is a true and accurate copy of a Memorandum of Understanding ("MOU") executed by Jack Gibson on July 3, 2013.

5. The MOU states that plaintiffs would pay Jack Gibson for remedial work that was "betterment" or improvements to the plaintiffs' original contracts or for work that was outside of the scope of work contained in Jack Gibson's original contract.



6. Jack Gibson performed the work identified by the parties' consultants, attached as Exhibits A and B to the MOU.

7. The value of the work that was classified as "betterment", or outside the original scope of Jack Gibson's work, was \$156,276.13. Plaintiffs admit in their motion that they only paid \$20,000 of this amount which leaves a balance of \$136,376.13 owned to Jack Gibson. At no time prior to signing the MOU or performing the remedial work were we told by plaintiffs that they only intended to pay Jack Gibson \$20,000 for "betterment" or work outside of Jack Gibson's original contract. Jack Gibson has suffered a substantial economic hardship by plaintiffs' breaking their promise in the MOU to pay for this work.

8. As explained in Jack Gibson's Counterclaim, plaintiffs breached the MOU by failing to pay Jack Gibson for remedial work performed that was "betterment" and for work that was outside of Jack Gibson's original scope of work.

9. We believe that both the original construction and remedial work may have been paid for by funds obtained from local bond levies and through state construction assistance provided through the OSFC. We further believe that these funds may have been maintained in accounts separate and apart from Grand Valley's general operating funds. Although we believe that the statements contained in this paragraph are true, Jack Gibson's employees lack "personal knowledge" to offer sworn testify on these matters. Therefore, we need to seek sworn testimony directly from Grand Valley concerning the source of the funding for the original construction and remedial work.

10. Jack Gibson minimally needs a 50-day continuance of its time to file a memorandum opposing plaintiffs' motion in order to (1) serve upon both plaintiffs a brief set of requests for admission, interrogatories and requests for production of documents asking plaintiffs to identify the sources of funding for the original project and remedial work that plaintiffs agreed to reimburse Jack Gibson for; (2) afford plaintiffs the time required under Civil Rules and Local Rules to serve responses; (3) sufficient time to review plaintiffs' discovery responses; and (4) prepare a memorandum in opposition to plaintiffs' motion for summary judgment.

Further affiant sayeth naught.



\_\_\_\_\_  
Jim Breese, President  
Jack Gibson Construction Company

Sworn to before me and subscribed in my presence this 6<sup>th</sup> day August 2014.



Notary



Sharon C. Morgan  
Notary Public, State of Ohio  
Recorded in Portage County  
My Commission Expires  
March 3, 2018

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing document was served via regular U.S. Mail, postage prepaid, on this 7 day of August 2014, to the following:

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