



# Court of Claims of Ohio

The Ohio Judicial Center  
65 South Front Street, Third Floor  
Columbus, OH 43215  
614.387.9800 or 1.800.824.8263  
www.cco.state.oh.us

TRANSAMERICA BUILDING  
COMPANY, INC.

Plaintiff/Counter Defendant

v.

OHIO SCHOOL FACILITIES  
COMMISSION, etc.

Defendant/Counter Plaintiff

Case No. 2013-00349

Referee Samuel Wampler

DECISION OF THE REFEREE

FILED  
COURT OF CLAIMS  
OF OHIO  
2014 OCT -1 PM 1:12

On April 30, 2014, defendant Ohio School Facilities Commission ("OSFC") filed a motion for summary judgment ("Motion" or "MSJ") pursuant to Civ.R. 56, supported by its memorandum of law and argument, deposition testimony, specified allegations in the first amended complaint and various certified documents.<sup>1</sup> On May 14, 2014, plaintiff TransAmerica Building Company, Inc. ("TA") filed its opposition ("Brief in Opp."), supported by its memorandum of law and argument, excerpts of deposition testimony, affidavit and various certified documents referred to in the affidavit. On May 23, 2014, OSFC filed its reply to the opposition of TA ("Brief in Reply"), including objections to the admissibility of certain documents submitted by TA in its opposition to OSFC's Motion. OSFC's Motion is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

## **EVIDENCE IN SUPPORT OF AND IN OPPOSITION TO THE MOTION:**

OSFC, as the moving party, did not offer any evidence outside the pleadings by way of affidavit. OSFC did file certified documents in support of its motion, i.e. Exhibits A, C,

<sup>1</sup>OSFC did not file an affidavit, but instead relied on allegations of the amended complaint, deposition testimony and certified records to support its motion.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 2 -

DECISION

D and E. OSFC also submitted Exhibits B and F that were not certified and it submitted excerpts from deposition testimony, transcripts of which are on file with the court. TA did not object in its Brief in Opp. to any of the documents submitted by OSFC, nor did it file a motion to strike such exhibits. Generally speaking, summary judgment cannot be granted on the basis of documents that are not incorporated into a properly framed affidavit.

Specifically, Civ.R. 56(C) provides:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Some of the documents, although certified, were not properly incorporated into an affidavit, which is required by Civ.R. 56.

Civ.R. 56(E) provides in part:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

"The proper procedure for introducing evidentiary matter not specifically authorized by Civ.R. 56(C) is to incorporate it by reference in a properly framed affidavit pursuant to Civ.R. 56(E)." *Buzzard v. Public Emples. Retirement Sys.*, 139 Ohio App. 3d 632, 636 (Ohio Ct. App., Franklin County 2000). OSFC failed to incorporate its certified documents into a properly framed affidavit. However, because TA has not objected to their admission

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 3 -

DECISION

or the court's consideration of any of these materials, they may be considered in ruling on OSFC's motion.<sup>2</sup>

In support of its Brief in Opp., plaintiff submitted the affidavit of William Koniewich, the President of TransAmerica Building Company, Inc., which states that it is based on "personal knowledge of the events that led to the dispute. . ." Attached to the affidavit are documents, many of which are accompanied by a "certification of record" by Mr. Koniewich wherein he states that such document is a "true and accurate" copy of the document as it appears in the "project files for the Ohio School for the Deaf and Ohio State School for the Blind construction Project." It would be reasonable to infer that Mr. Koniewich is referring to the project file maintained by TA and as president of TA it would be reasonable to conclude that he is competent to authenticate records contained in the file, at least as to those documents which, on their face, would be the types of records that would typically appear in such a project file. OSFC has objected to the admissibility of exhibits B, C, H, I, J, K, L, M, N, P, Q, R, S, T, U, V, W, X, and BB, contending that they were not properly authenticated and are inadmissible hearsay. OSFC did not object to any testimony offered by William Koniewich in his affidavit (Brief in Opp., Exhibit A).

Civ.R. 56(E) requires that documents be authenticated by an affiant competent to testify as to matters stated therein.

---

<sup>2</sup>Thus, we determined because the defendant did not raise any objection to the affidavit with the trial court, he waived that argument for purposes of appeal. Moreover, we concluded that, even if the affidavit included information that was not admissible, the trial court can consider non-complying documents in adjudicating a summary judgment motion when no objection to the documents was raised." *Citizens Banking Co. v. Parsons*, 2014-Ohio-2781, P14 (Ohio Ct. App., Franklin County June 26, 2014)

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 4 -

DECISION

Civ.R. 56(E) provides, in part, "Supporting and opposing affidavits shall be made on personal knowledge." Personal knowledge is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay." *State ex rel. Shumway v. State Teachers Retirement Bd.*, 114 Ohio App.3d 280, 288 (10th Dist.1996), quoting *Brannon v. Rinzler*, 77 Ohio App.3d 749, 756 (2nd Dist.1991).

Evid.R. 901 governs authentication or identification of evidence. Evid.R. 901 provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Authentication and identification are terms implying the process of laying a foundation for the admissibility of documents. *Premier Capital, LLC v. Baker*, 11th Dist. Portage No. P-0041, 2012-Ohio-2834.

OSFC's objection to the admissibility of Exhibits B, C, L, M, N, P, S, W and X is sustained, because from the face of the documents (or in some cases some of the documents within a single exhibit) they do not appear to be communications or documents between TA and OSFC or its agents, but rather communications or documents internal to OSFC and its agents. Such documents are not likely to reside in the project file of a contractor and William Koniewich fails in his affidavit to explain how these documents ended up in TA's project file. Accordingly, they have not been properly authenticated and constitute inadmissible hearsay.

All depositions referred to by TA in its Brief in Opp. have been filed with the court. Accordingly, OSFC's objection to excerpts of the deposition of Mr. Swartzmiller (Brief Opp. Exhibit E) is overruled.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 5 -

DECISION

**THE PLEADINGS:**

TA filed its complaint in this action on June 14, 2013 and amended its complaint on August 1, 2013. OSFC filed its answer to the amended complaint along with its counterclaim on August 20, 2013 and TA filed its answer to the counterclaim on September 9, 2013. The pleadings are closed and there are no pending motions to amend the pleadings by either party.

In its amended complaint, TA seeks damages based on seven distinct counts, four of which arise from contract and three of which sound in tort:<sup>3</sup>

- 1) breach of contract;
- 2) equitable adjustment;
- 3) breach of express and implied warranties;
- 4) fraud;
- 5) fraud in the inducement;
- 6) negligent representation; and
- 7) negligence.

**FACTS:**

The contract at the center of this action is typical of a contract for building projects constructed for the state of Ohio of the type involved here. At a minimum, such contracts typically consist of a form contract signed by the parties, general conditions, drawings and

---

<sup>3</sup>Whether the cause of action sounds in tort or contract is only relevant to the extent it is determinative of when the cause of action accrued, as explained more fully below.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 6 -

DECISION

specifications.<sup>4</sup> The structure of the price for this contract is also typical and is governed by three separate and distinct processes: 1) the competitive bidding process; 2) the change order process; and 3) the claims and dispute resolution process, here governed, at least in part, by Article 8 of the General Conditions (GC) and applicable statutes as discussed more fully below.

1. **Bidding.** The competitive bidding process establishes the price that the state will pay for full and complete performance of the contract by the contractor to whom the contract is awarded. R.C. 153.12.
2. **Change Order.** The state may decide to change the plans, details, bills of material, or specifications which may result in an increase or decrease in the price of the contract. See, R.C. 153.09 and 153.10. In this event, the owner must approve an increase or decrease in price if such change affects the price.<sup>5</sup>
3. **Claims.** The Contract Sum may also be increased or decreased or the time for completion may also be extended through the filing and processing of a claim,

---

<sup>4</sup>Unfortunately, neither party has submitted a complete copy of the contract, including all of the contract documents, and particularly a complete set of the General Conditions. OSFC refers to a contract entered into by the parties on or about December 1, 2011 in its motion for summary judgment, and refers to Paragraphs 1, 14 and 15 of the Amended Complaint filed by TA (each allegation of which it denied in its answer). However, while the Amended Complaint does refer to the contract (Exhibit "A") and indicates that a copy is attached, it is not on file with the court. It is noted that the original Complaint (which OSFC never answered) also refers to the contract (also as Exhibit "A") in Paragraph 7 and incorporates a copy of the contract entitled "Contract Form" into the pleading by such reference. For purposes of this motion the "Contract Form" attached to the original Complaint as Exhibit A is considered to be the contract which is the subject of this action. Moreover, except for establishing a contractual relationship between TA and OSFC and the approximate date it was entered into, none of the terms of the Contract Form are relevant to this decision on the Motion.

<sup>5</sup>Although neither party offered a complete set of the General Conditions, by statute OSFC is required to approve change orders when changes to the plans are made that affect the price.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 7 -

DECISION

or by a request for extension of time. See GC Article 8, Exhibit E to OSFC's Motion and R.C. 153.16. The contractual claims process under Article 8 consists of three distinct steps:

Step 1 - initiation of the claim (written notice, GC 8.1.1 and 8.1.2);

Step 2 - submission of the claim (certification and substantiation, GC 8.2, 8.3, 8.4 and 8.5); and

Step 3 - resolution of the claim (job-site resolution, appeal to the Commission, or non-binding alternative dispute resolution, GC 8.8, 8.9 and 8.10).

Each of these three steps in the claims process is time-sensitive.<sup>6</sup> Here, if TA encountered an event that it believed would impact its cost of completion or the time for completion (or both), it was required to initiate a claim for an adjustment to the price of the contract or the time for completion, or both, by written notice to OSFC within 10 days of the occurrence of the event giving rise to the claim. Under the contract, once a claim was initiated, TA had 30 days (or, such additional time as may be agreed to by the Commission and the contractor) to submit its claim, including certification and substantiation of the claim. GC 8.2.1, 8.3.1 and 8.3.5. Once the claim was submitted, within the next 30 days the construction manager, acting with the assistance of the architect, was

---

<sup>6</sup>Steps 2 and 3 must be completed within 120 days or the claim is deemed denied.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 8 -

DECISION

required to schedule a meeting with the contractor to implement the dispute resolution procedure agreed to by the parties in their partnering agreement.<sup>7</sup>

On October 29, 2010, TA submitted its bid for the contract that is at the heart of this action. At the time that TA's bid was submitted, a complete set of construction plans had not been approved by the Department of Industrial Compliance ("DIC"). Following bid opening, OSFC, through its agents represented to TA that an updated set of construction plans would be provided. On or about December 1, 2010, OSFC and TA entered into the contract for the project. As early as January 11, 2011, TA became aware that an updated set of approved construction plans had not been furnished by OSFC or its agents. On February 17, 2011, TA notified the Lend Lease, the construction manager for OSFC ("CM") that TA had not received a set of approved construction plans and without such plans its work would likely be impacted negatively, including potential delays and disruption to its work. The CM for OSFC responded on March 1, 2011 and indicated that a set of approved construction plans would be furnished on that date. They were not. TA mobilized to the worksite without updated approved construction plans and commenced work on the project. On March 1, 2012, TA sent OSFC notice of a claim resulting from various causes, the majority of which are stated to be caused by OSFC or its agents. On March 8, 2012, TA submitted its certified and substantiated claim to the CM for OSFC. On September 5, 2012, TA's claim was denied by the CM for OSFC. On September 18, 2012, TA appealed

---

<sup>7</sup>It is not clear what the dispute resolution procedure, if any, consisted of here as no evidence of the partnering agreement has been submitted by either party.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 9 -

DECISION

the CM's decision to the OSFC. Thereafter, the parties pursued resolution through mediation rather than continuing with the appeal to the OSFC. On June 14, 2013, TA commenced this action in the court of claims against OSFC.

OSFC's Motion seeks summary judgment in its favor, contending that even construing the evidence most strongly in favor of TA, reasonable minds can come to but one conclusion and that conclusion is that:

- TA failed to file this action within the applicable statute of limitations;
- TA waived its claim by failing to properly follow the contractual dispute resolution process for presenting its claim (initiation and submission);
- TA has failed to establish that OSFC caused its damages (if any); and
- TA's claims for fraud against the State are not recognized in Ohio.
- TA's claim is limited to the amount of its claim.

#### **ANALYSIS**

Civ.R. 56(C) states, in part, as follows:

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 10 -

DECISION

but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004 Ohio 7108, 821 N.E.2d 564, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

"In summary, we hold that a complaint which states facts sufficient to show a cause of action upon its face, but which is not supported by affidavits as to those facts, must stand against a defendant's motion for summary judgment that is accompanied by affidavits as to facts which neither negate an essential element of the plaintiff's cause, nor establish any affirmative defense or immunity against liability." *Mason v. Roberts*, 35 Ohio App. 2d 29, 41 (Ohio Ct. App., Ashland County 1971). Under Civ.R. 56, the non-moving party, OSFC, must negate an essential element of TA's cause, or establish an affirmative defense or immunity against liability through the submission of affidavits or other evidence as required by Rule 56(C).

#### **A. Statute of Limitations.**

OSFC is correct that the statute of limitation applicable to a claim for damages against the State is R.C. 2743.16(A). In its motion, OSFC relies on the key language of the statute, specifically "shall be commenced no later than two years after the date of accrual of the cause of action . . ." However, in its argument OSFC equates accrual of TA's "claim" under the contract with accrual of its "cause of action."<sup>8</sup> In order to determine

---

<sup>8</sup>Motion, at 5.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 11 -

DECISION

whether TA's *causes of action* are barred by the provisions of R.C. 2743.16(A), it must first be determined when TA's causes of action accrued, not when TA's claims under the contract accrued. The date of accrual depends upon which cause of action TA relies upon for recovery of its damages. As discussed below, because a cause of action based on tort may accrue earlier than a cause of action based on the contract, the bar of R.C. 2743.16(A) has application to the claims based on fraud, but not to causes of action based on contract, because of the provisions (R.C. 153.12 and 153.16).

**1. Fraud Claims:** Counts Four, Five and Six of the amended complaint all sound in tort and are merely variants of a cause of action for fraud. None of these counts arise from the contract between the parties, but according to the pleadings and the evidence presented are instead based in the first instance on alleged misrepresentations made during and after the bidding process. Each count alleges that the OSFC failed to provide complete and accurate plans sufficient to construct the project. [Amended Complaint, ¶ 74]. TA submitted its bid to the OSFC on October 28, 2010. [Amended Complaint, ¶¶ 11 and 12; Koniewich Aff. ¶ 6]. On December 1, 2010, TA executed the contract for which it had submitted its bid. [Amended Complaint, ¶ 14].<sup>9</sup> TA alleges that it was induced to enter into the contract by misrepresentations of OSFC through its agents that it would be timely

---

<sup>9</sup>TA failed to attach a copy of the contract to its amended complaint, but it was attached as Exhibit A to the original complaint filed on June 14, 2014 when this action was commenced, and although OSFC denied the allegation of paragraph 14 of the Amended Complaint, it admits the contract in its Motion at 2.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 12 -

DECISION

furnished with an updated and approved set of construction plans. [Amended Complaint, ¶ 91; Koniewich Aff. ¶ 10-12].

TA was still lacking an updated set of construction plans by January 10, 2011 and had formed a belief that a lack of such plans could negatively impact its work.<sup>10</sup> In its amended complaint, TA alleges that the conduct of the OSFC and its agents caused damages resulting from delay and disruption for which TA is entitled to recovery. [Amended Complaint, ¶¶ 102 and 108]. TA also alleges that it was damaged as a direct and proximate result of such misrepresentations. [Amended Complaint, ¶¶ 84, 92 and 102].

“It is well established a cause of action for fraud accrues when the fraud is discovered.” *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St. 2d 376, 379 (Ohio 1982). By this standard, it is clear that to the extent TA’s causes of action in Counts Four, Five and Six arise from alleged misrepresentations that updated approved construction plans would be furnished to the contractor, such causes of action all accrued at the latest on January 10, 2011, the date when, from the record before the court, TA concluded that such representations were not true. “The statute of limitations commences to run as soon as the injurious act complained of

---

<sup>10</sup>See Amended Complaint, ¶ 28 and Exhibit A to the MSJ, TA’s February 17, 2011 letter to Lend Lease in which it stated: “8.1.2.2 The circumstances responsible for causing impact are the lack of completed drawings. Starting approximately January 10, 2011, disruption is ongoing.” See also, Exhibit D to the MSJ wherein TA referred to “Transamerica’s notices that were issued as early as February 2011. . . .expressing concerns to SHP about the lack of a complete and coordinated set of plans for the Project.” TA again acknowledged that it was aware of the alleged misrepresentations that form the basis for its claim for fraud and misrepresentation, i.e. a lack of accurate and complete drawings and specifications.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 13 -

DECISION

is committed; delayed damage is ineffective to delay the accrual of a cause of action predicated upon a wrongful act.” *Public School Employee v. Liberty Moving and Storage, Inc.*, 1984 Ohio App. LEXIS 12114 (Ohio Ct. App., Franklin County Dec. 20, 1984). In other words, even if plaintiff’s damages occurred after January 10, 2011, its causes of action based on fraud/misrepresentation nevertheless accrued by that date.

TA filed its original complaint in this action on June 14, 2013. Because these causes of action in tort were not brought within two years of when they accrued (January 10, 2011), OSFC is entitled to summary judgment as to Counts Four, Five and Six as each count is barred by R.C. 2743.16(A).

**2. Breach of Contract.** Counts One, Two, Three and Seven each arise from the contract between the parties. Pursuant to R.C. 153.12(B), TA had to exhaust its contractual administrative remedies before filing this action.<sup>11</sup> This includes any remedies provided for in the contract and any alternative dispute resolution procedures. Here, such remedies and alternative dispute resolution procedures are referred to in GC Article 8 of the contract, although it is unclear from the evidence presented, what alternative dispute resolution procedures, if any, were required by the contract.<sup>12</sup> See, GC 8.10.4.

---

<sup>11</sup>R.C. 153.12(B) presents a rare instance where a statute requires a plaintiff to exhaust its administrative remedies before bringing suit. Unlike the judicially-created exhaustion of administrative remedies doctrine, R.C. 153.12(B) does not include any exceptions.” *Cleveland Constr., Inc. v. Kent State Univ.*, 2010-Ohio-2906, P37 (Ohio Ct. App., Franklin County June 24, 2010). See also, *Painting Co. v. Ohio State Univ.*, 2009-Ohio-5710, P10, P13 (Ohio Ct. App., Franklin County Oct. 29, 2009).

<sup>12</sup>Neither party submitted a complete copy of the General Conditions or any partnering agreement.

FILED  
COURT OF CLAIMS  
OF OHIO

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 14 -

DECISION

GC 8.3.2 provides that the statute of limitations begins on the date the contractor is required to file its substantiated and certified claim with the Commission. However, such a provision has no application to the extent it is inconsistent with the provisions of R.C. 153.16(B), which provides:

***“[n]otwithstanding any contract provision to the contrary, any claim submitted under a public works contract that the state or any institution supported in whole or in part by the state enters into for any project subject to sections 153.01 to 153.11 of the Revised Code shall be resolved within one hundred twenty days. After the end of this one hundred twenty-day period, the contractor shall be deemed to have exhausted all administrative remedies for purposes of division (B) of section 153.12 of the Revised Code.”*** [emphasis added]

It appears that TA first initiated a claim based on what it perceived would be potential cost and schedule impacts resulting from a lack of updated construction drawings on February 17, 2011. Motion, Exhibit A. TA also explained that it could not estimate the costs of such impacts at that time. The contract required TA to submit its claim by certifying and substantiating it within 30 days of the date it was initiated. However, before TA was contractually required to certify and substantiate its claim, OSFC (Lend Lease) advised TA by its March 1, 2011 letter that it considered TA's notification of February 17, 2011 "closed at this time." Brief in Opp., Exhibit H. In other words, it could be concluded that OSFC had rejected TA's claim before it was even submitted. Had TA submitted the claim it would have had

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 15 -

DECISION

to be resolved in no more than 120 days, or TA's administrative remedies would have been deemed exhausted and it could then file suit in the court of claims.<sup>13</sup>

Applying the provisions of R.C. 153.12(B) and 153.16(B) to TA's notification of February 17, 2011, TA's cause of action arising from its contract with OSFC did not accrue until at least July 18, 2011 (30 days to submit its claim and 120 days to resolve the claim). Under this analysis, TA had two years from July 18, 2011 to file this action.

However, the only claim before the court is TA's claim submitted on March 8, 2012 (Motion, Exhibit B). TA's cause of action on that claim would not have accrued until July 10, 2012, or 120 days later. TA brought this action on June 14, 2013, well within the two years required by R.C. 2743.16(A). The applications of these statutes working together was explained in more detail in *R. E. Schweitzer Constr. Co. v. Univ. of Cincinnati*:

We concluded that R.C. 153.12(B) and 153.16(B), construed together, provide that "[consistent with [that] principle" any claim submitted under a public works contract with the state necessarily will accrue, at the latest, by the end of the 120-day statutory period when, by operation of law, all administrative remedies are deemed exhausted under R.C. 153.16(B), the claim is deemed rejected, and money the state allegedly owed is deemed withheld.

---

<sup>13</sup>The term "submitted" has particular relevance here. Although the claim was initiated on February 17, 2011, initiation of a claim is different from submission of the claim. Even the language of the contract, GC 8.3.1, provides that the "contractor shall submit" its substantiation of its claim, while GC 8.1.1 makes no mention of submitting a claim, rather only initiating it by written notice. Moreover, without substantiation (submission) of the claim, defendant was in no position to participate in the dispute resolution processes provided for in the contract. The only claim that was submitted was included as Exhibit B to the MSJ. That claim was submitted on March 8, 2012. 120 days from March 8, 2012 was July 10, 2012. By this analysis, TA had until July 10, 2014 to bring an action against OSFC based on its claim of March 8, 2012.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 16 -

DECISION

*R. E. Schweitzer Constr. Co. v. Univ. of Cincinnati*, 2011-Ohio-3703,  
P28 (Ohio Ct. App., Franklin County July 28, 2011)

On the basis of the record before the court, Counts One, Two, Three and Seven of the Amended Complaint are not barred by the statute of limitations.

**B. Compliance with GC Article 8 - waiver and/or preclusion of liability for delay.**

R.C. 4113.62(C)(1) provides as follows:

Any provision of a construction contract, agreement, or understanding, or specification or other documentation that is made a part of a construction contract, agreement, or understanding, that waives or precludes liability for delay during the course of a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, or that waives any other remedy for a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, is void and unenforceable as against public policy.

OSFC contends that TA failed to timely initiate its claim (10 days from the occurrence of the event giving rise to the claim) and, failed to certify and substantiate its claim (within 30 days after the claim is initiated) as required by the provisions of GC Article 8. Motion, at 5-6. According to OSFC, TA's failure to timely follow the GC Article 8 process for initiating and submitting its claims therefore constitutes an irrevocable waiver of the claims. See, GC 8.1.4, 8.2.2, 8.3.5, 8.4.2 and 8.5.3.

As OSFC points out in its Motion, TA contends that it was disrupted and delayed by OSFC because of lack of coordination, incomplete plans and lack of proper construction management. In other words, TA contends that its damages resulted from delay caused by OSFC. Motion, at 3, items a-g, inclusive.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 17 -

DECISION

The application of R.C. 4113.62(C)(1) was addressed in *Cleveland Const. v.*

**OPERS:**

\* \* \*an owner cannot cause a delay, and then avoid the natural consequences for causing the delay by using boilerplate contract language. See Black's Law Dictionary (8 Ed.2004) 932 ("The quality or state of being legally obligated or accountable; legal responsibility to another, \* \* \* enforceable by a civil remedy.") This, the legislature has said, is void as against public policy.

*Cleveland Constr., Inc. v. Ohio Pub. Emples. Ret. Sys.*, 2008-Ohio-1630, P19 (Ohio Ct. App., Franklin County Apr. 3, 2008).

See also, *Aggressive Mech., Inc. v. Ohio Sch. Facilities Comm'n*, 2012-Ohio-6332, P27 (Ohio Ct. Cl. Sept. 18, 2012).

Accordingly, to the extent damages are sought by TA as a result of delays caused by OSFC, the provisions of GC Article 8 that waive or preclude liability for such delays are unenforceable as against public policy.<sup>14</sup> Because OSFC's Motion does not distinguish

---

<sup>14</sup>GC 8.1.4, 8.2.2, 8.3.5, 8.4.2 and 8.5.3 are clearly made unenforceable by R.C. 4113.62 as it applies to damages resulting from owner-caused delay. Whether the initiation (notice) provisions and submission (certification and substantiation) provisions are enforceable calls for a more fact-intensive inquiry than is available from the record before the court and application and/or interpretation of those provisions considering the contract as a whole, the content of which is also not before the court, cannot be made at this time. In *Foster Wheeler Enviresponse v. Franklin County Convention Facilities Auth.*, 78 Ohio St. 3d 353, 361 (Ohio 1997), the court observed:

The cardinal purpose for judicial examination of any written instrument is to ascertain and give effect to the intent of the parties. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St. 3d 51, 53, 544 N.E.2d 920, 923. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St. 3d 130, 31 Ohio B. Rep. 289, 509 N.E.2d 411, paragraph one of the syllabus.

"Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." [citations omitted] Technical terms will be given their technical meaning, unless a different intention is clearly expressed. *Cincinnati Ins. Co. v. Duffield* (1856), 6 Ohio St. 200, paragraph one of the syllabus.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 18 -

DECISION

between damages resulting from delays caused by OSFC and damages resulting from delays caused by third parties or TA itself, on the record before the court summary judgment must be denied with respect to TA's alleged non-compliance with GC Article 8.

As an alternative argument, TA also contends that even if all of the provisions of GC Article 8 applied to its claim and even if TA failed to timely comply with such provisions, OSFC, through its conduct, nevertheless waived its right to enforce the time-sensitive provisions of GC Article 8. See Amended Complaint, ¶ 57 and Brief Opp. at 22-25.

"[W]aiver of a contract provision may be express or implied. \* \* \* '[W]aiver by estoppel' exists when the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon it. \* \* \* Waiver by estoppel allows a party's inconsistent conduct, rather than a party's intent, to establish a waiver of rights. \* \* \* Whether a party's inconsistent conduct constitutes waiver involves a factual determination, \* \* \* and such a factual determination is properly made by the trier of fact."

*Aggressive Mech., Inc. v. Ohio Sch. Facilities Comm'n*, 2012-Ohio-6332, P23 (Ohio Ct. Cl. Sept. 18, 2012)

The Amended Complaint at ¶ 57 alleged that OSFC waived the contract's notice and contract dispute resolution procedures and OSFC's Motion fails to shift the burden on this issue as required by Civ.R. 56. To the contrary, the record before the court reveals conduct by OSFC that is inconsistent with its insistence that TA strictly comply with each and every provision of GC Article 8. The best example of such conduct is OSFC's

---

Most important to this case, a writing, or writings executed as part of the same transaction, will be read as a whole, and the intent of each part will be gathered from a consideration of the whole.

In other words, it cannot be said on the basis of the record before the court that all provisions of Article 8 are unenforceable to the extent the damages sought by TA resulted from owner-caused delay.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 19 -

DECISION

preemptive rejection of TA's notice of claim on March 1, 2011, weeks before the certified and substantiated claim was to be submitted under the contract. Apart from OSFC's failure to shift the burden on the issue of waiver as alleged by TA in its Amended Complaint, it cannot be said on the record before the court that OSFC did not waive strict compliance with the provisions of GC Article 8.

### **C. Causation of TA's damages**

While OSFC refers to limited deposition testimony of two of TA's experts on the issue of establishing damages caused by OSFC and/or its agents, OSFC did not submit a report from either expert to give context to the testimony, nor to support any of the references to the reports set forth in its Motion. In this regard OSFC failed to shift the burden on this issue as required by the moving party under Civ.R. 56(C). Consequently, TA had no obligation to oppose the Motion regarding the issue of causation of damages.

Moreover, in ruling on a summary judgment motion, demonstrating a lack of proof on the issue of causation is insufficient to shift the burden as explained below.

"We note initially that the trial court's reliance on State Farm is somewhat misplaced. While State Farm does discuss a plaintiff's burden to provide proof of causation in strict liability and negligence claims, it does so in the context of an appeal from a directed verdict, not summary judgment. Although the standards for granting directed verdict and summary judgment are similar to a certain extent, the burden upon a summary judgment motion is on the moving party (defendants herein) to present sufficient evidence to show entitlement to judgment, whereas a directed verdict motion should be sustained if the plaintiff fails to present evidence on the determinative issues. *Rayburn v. J.C. Penney Outlet Store* (1982), 3 Ohio App. 3d 463.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 20 -

DECISION

Defendants argue that plaintiff failed to provide even one expert witness who specifically stated that some action of defendants proximately caused the damage to plaintiff's roof. In essence, defendants rely on 'negative' evidence to sustain their burden that no genuine issue of material fact exists on the issue of proximate cause. However, this rationale (lack of evidence) coincides only with directed verdict cases, not summary judgment cases. Furthermore, even accepting the trial court's conclusion that no expert evidence was offered by plaintiff which definitively showed that defendants' actions caused the damage, plaintiff is not required to do so unless defendants first present evidence that there was no proximate causation. Also, when all facts and inferences are construed most strongly in favor of plaintiff, as they must be, reasonable minds can clearly differ on the essential elements."

*Columbus Distributing Co. v. Carlisle Syntec Systems*, 1990 Ohio App. LEXIS 4364, 8-9 (Ohio Ct. App., Franklin County Oct. 4, 1990)

There remains a genuine issue of material fact as to whether the delays and disruptions, if any, arising from the action or inaction of OSFC and/or its agents constituted a breach of contract, and if so, whether such breach caused damages to TA and in what amount.

On the basis of the record before the court, OSFC did not meet its initial burden and summary judgment must be denied on the issue of proximate cause and/or proof of damages.

**D. Claims for fraud.**

OSFC contends that Ohio does not recognize a claim for fraud against the state and that TA's claims for fraud and misrepresentation should be dismissed as a matter of law.

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 21 -

DECISION

OSFC's motion fails to shift the burden on this issue as required by Civ.R. 56 and because TA's claims are barred by application of R.C. 2743.16(A) in any event, this issue is moot.<sup>15</sup>

**E. Limitation on the amount of TA's claim.**

In its March 8, 2012 claim (MSJ Exhibit B) TA sought an increase of \$2,170,800.75 over and above its adjusted contract price. In addition, it sought payment of \$801,754.75 for what it contended was wrongfully withheld liquidated damages plus interest. In its amended complaint, TA seeks \$3,000,000 for what it describes as an "equitable adjustment" and a contract balance of \$824,605.42. OSFC objects to the increase in the amount sought in this action, but provides no authority or reference to contractual provisions that preclude such an increase. In this regard, OSFC has failed to shift the burden on this issue as required by Civ.R. 56.

Given the determination that damages arising from delays caused by the owner are not subject to the provisions that preclude or waive liability for such damages, i.e. some or all of the provisions of Article 8, the limit on the amount of damages recoverable by TA cannot be decided on the basis of the record before the court and summary judgment in this regard must be denied.

Based upon the foregoing, the court finds that OSFC is entitled to judgment as a matter of law on Counts Four, Five and Six of TA's Amended Complaint. Therefore, it is recommended that defendant's motion for summary judgment be GRANTED as to Counts

---

<sup>15</sup>R.C. 2744.02 has no application to the issue of the right to immunity asserted by the State. See also, R.C. 2743.01(A).

2014 OCT -1 PM 1:12

Case No. 2013-00349

- 22 -

DECISION

Four, Five and Six of the Amended Complaint and be DENIED as to the remaining counts of the Amended Complaint.

*A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

  
SAMUEL WAMPLER  
Referee

cc:

Craig D. Barclay  
Jerry K. Kasai  
William C. Becker  
Assistant Attorneys General  
150 East Gay Street, 18th Floor  
Columbus, Ohio 43215-3130

Donald W. Gregory  
Michael J. Madigan  
Capitol Square Office Building  
65 East State Street, Suite 1800  
Columbus, Ohio 43215-4294