

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

2014 OCT 15 PM 3: 14

TRANSAMERICA BUILDING)
 COMPANY, INC.,)
)
 Plaintiff,)
)
 v.)
)
 OHIO SCHOOL FACILITIES)
 COMMISSION,)
)
 Defendant.)

Case No. 2013-00349

Judge McGrath

Referee Wampler

OBJECTIONS OF DEFENDANT/COUNTERCLAIM PLAINTIFF OHIO SCHOOL FACILITIES COMMISSION TO REFEREE'S DECISION ON MOTION FOR SUMMARY JUDGMENT ISSUED OCTOBER 1, 2014

Now comes the Defendant/Counterclaim Plaintiff, the Ohio School Facilities Commission ("Defendant" or "OSFC"), by and through counsel, and presents the following objections to the Referee's Decision ("Decision") filed October 1, 2014, in this matter ruling on Defendant OSFC's Motion for Summary Judgment ("Motion"). The Referee's Decision found that, with respect to the issue of Plaintiff Transamerica's ("TA") failure to follow the claim process of Article 8 of the General Conditions of Contract, OSFC did not shift the burden of proof and did not demonstrate that it did not waive strict compliance with those provisions. With respect to the argument that Plaintiff TA has failed to put forth any evidence of causation for its alleged damages, and that TA cannot change the amount of its Claim once it is certified, the Decision recommended that Defendant OSFC did not shift the burden of proof as required in a Civ. R. 56 Motion. Finally, the Decision found that, although the claims sounding in tort of Plaintiff were barred by the applicable 2 year statute of limitations, that Plaintiff's contract claim was not barred by the statute of limitations in that it held there was a 120 day difference between when that "claim" accrued versus when that "cause of action" accrued.

ON COMPUTER

Objection 1: The Referee's Decision Erred in Finding that Defendant OSFC Failed to Shift the Burden of Proof on Its Argument That Plaintiff TA failed to Properly Follow Article 8 of the General Conditions of Contract in Making Its Claim

The operative facts before the Court on this issue are not disputed as set forth in the Decision. Decision at 8-9. On February 17, 2011, Plaintiff TA filed its Notice of Claim based on not having received an approved set of plans. The Construction Manager ("CM") responded that a set of approved plans would be provided and on March 1, 2011, stated it considered the notification "closed at this time." *Id.* at 14. However, no updated plans were provided to TA from the architect. It was not until March of 2012, a year later, that TA filed another claim, which was based on the same allegations that were in its February 2011 notice.

Defendant OSFC asserts in its Motion that Plaintiff failed to follow through on its obligations to pursue its claim under Article 8 of the General Conditions of Contract ("GC"), while the Decision seems to infer that the notification on March 1, 2011, that the claim "was closed at this time," obviates the obligatory time period Plaintiff possessed to comply with its February 17, 2011, Notice of Claim. First, GC Article 8 does not contemplate a reset of a year to March of 2012 for the same claim. Secondly, and more importantly, even if the CM considered the matter "closed," Plaintiff still had the obligation to appeal that closure of its Claim, or more aptly, the denial of its Claim, pending the receipt of any updated plans. At the very least, Plaintiff should have re-filed its claim within 10 days of the date when it should have received the new set of "approved" plans, or by March 10, 2011. As the Tenth District Court of Appeals has made clear, the failure to properly follow the contractual dispute resolution process for presenting a claim constitutes a waiver of the claim. *Cleveland Constr., Inc. v. Kent State*

Univ. 10th Dist. No. 09AP-822, 2010-Ohio-2906; *Stanley Miller Constr. Co. v. Ohio School Facilities Comm.*, 10th Dist. Nos. 10AP-298, 10AP-299, 10AP-432, 2010-Ohio-6397.

For this reason, Plaintiff has waived all its claims for additional compensation in this matter.

Objection 2: The Referee's Decision Erred in Finding That It "Cannot Be Said On The Record Before the Court that OSFC Did Not Waive Strict Compliance With the Provisions of GC Article 8"

The standard for a waiver is set forth in in *Ashley v. Henahan*, 56 Ohio St. 559 (1897). The Court in *Ashley* held that "[s]uch stipulation being for the benefit of the employer, proof of a waiver must either be in writing, or by such clear and convincing evidence as to leave no reasonable doubt about it," ¶ 5 of the syllabus, "Equivocal conduct, or conduct of doubtful import, is not sufficient." *Id* at 574, quoting *O'Keefe v. St. Francis's Church*, 59 Conn. 551, 661, 22 A. 325, 327 (1890). There is nothing meeting this standard that has been proffered as a waiver by OSFC of the requirements of GC Article 8. Essentially the Decision requires that OSFC prove the non-existence of something that does not exist.

Additionally, the issue of whether Defendant OSFC failed to strictly comply with the requirements of GC Article 8 is irrelevant with respect to the requirement that Plaintiff comply with the requirements of GC Article 8. Simply stated, per *Cleveland Construction, supra* and *Stanley Miller, supra*, Plaintiff waives its claim if it does not comply with the timelines set forth in GC Article 8. If OSFC fails to comply with the GC Article 8 timeline, the contractor's remedy is the right to file suit within 120 days of submitting its claim. R.C. 153.16(B) provides:

Notwithstanding 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.)

Additionally, to argue that OSFC waived its compliance with the General Conditions of Contract, assumes a change to the contract. It is well settled that any change to the contract terms, pursuant to the contract, must be in writing and signed by the owner. *Foster Wheeler Enviresponse, Inc. v. Franklin Cnty. Convention Facilities Auth.*, 78 Ohio St. 3d 353, 360, 678 N.E.2d 519 (1997). There was no change order issued here waiving the terms of the GC Article 8.

Based on the above, OSFC respectfully objects to the finding of the Decision that “It cannot be said that...OSFC did not waive strict compliance with” GC Article 8.

Objection 3: The Decision Erred in Finding that Since Defendant OSFC “Does Not Distinguish Between Damages Resulting From Delays Caused By OSFC and Damages Caused by Third Parties or TA Itself, Summary Judgment Must Be Denied With Respect to TA’s Non-compliance with GC Article 8”

The Decision relies on the holding of the Court of Appeals in *Cleveland Constr. Inc. v. Ohio Pub. Empl. Ret. Sys.*, 10th Dist No. 07AP-574, 2008-Ohio-1630, along with R.C. 4113.62, in finding that Defendant OSFC cannot assert a waiver on the part of contractor. Decision at 17. Essentially, what is implied in this finding is that a contractor never need follow the GC Article 8 process so long as it claims that some portion of its damages, no matter how miniscule, was a result of some action by the owner, or its agents. Such a finding is directly in conflict with the holdings of the Court of Appeals, along with this Court, in *Cleveland Constr., Inc. v. Kent State Univ.* 10th Dist. No. 09AP-

822, 2010-Ohio-2906; *Stanley Miller Constr. Co. v. Ohio School Facilities Comm.*, 10th Dist. Nos. 10AP-298, 10AP-299, 10AP-432, 2010-Ohio-6397. Such a finding would also conflict with *Dugan & Meyers Constr. Co. v. Ohio Dept. of Administrative Serv. et al*, 113 Ohio St. 3d 226, 864 N.E. 2d 68 (2007) and *Foster Wheeler, supra*, in that the terms of the contract govern the process.

Additionally, it should be noted that the ruling in *OPERS* dealt with the enforceability of a “no damages for delay” clause-i.e. a *blanket prohibition* on the contractor being able to receive monetary damages for owner caused delay. Here there is no blanket prohibition, there is a contractual dispute resolution process which the contractor is required to comply in order to be able to receive monetary damages.

The issue before the Court on the Motion was not any apportionment of Plaintiff’s claim between damages incurred as a result of Defendant’s actions versus damages which were caused by third parties, or by TA itself. The issue is whether TA complied with the relevant provisions of GC Article 8 -- which it did not. TA did not file the February 2011 Claim or the March 2012 Claim on a timely basis. It did not follow the GC Article 8 process with respect to the February 2011, Claim, nor did it certify or submit the required substantiation for that Claim. There is no requirement that Defendant OSFC differentiate between the cause of any damages which may be incurred.¹

The issue to determine is whether Plaintiff properly complied with the requirements of GC Article 8. If Plaintiff did not comply with the GC Article 8 requirements it has waived its Claim. It does not matter if its Claim was \$3 million or \$3, its Claim is waived and it is barred from recovering on that Claim in this lawsuit.

¹ Interestingly, as of the present, Plaintiff’s experts have not determined any causation of its alleged damages, let alone any apportionment of damages between Plaintiff and Defendant.

Objection 4: The Referee's Decision Erred in Finding That Defendant OSFC Failed to Shift the Burden of Proof in Demonstrating Plaintiff's Failure to Proffer Any Evidence On The Issue of Proximate Cause

Defendant OSFC objects to the finding of the Decision that OSFC failed to shift the burden of proof in its argument that Plaintiff fails to put forth any evidence regarding proximate cause. The testimony of both of Plaintiff's experts demonstrated that although each of them was testifying as to alleged breaches of contract which Defendant OSFC committed in either the design phase or the project scheduling, neither expert could, or would, say whether those specific breaches were the cause of any monetary injury claimed by Plaintiff. Motion at 11-13. The deposition testimony elicited from these witnesses clearly indicated that neither of them was, or would be, testifying as to any causal connection between the alleged breaches complained of and the damages being requested by Plaintiff. *Id.* That deposition testimony was certainly sufficient to put forth the matter at issue and satisfied the burden of going forward.² The Decision references that the expert reports were not put into evidence. However each of the expert's reports was an exhibit to each individual witness' deposition transcripts, which transcripts were filed with the Court.

For the above stated reason, Defendant OSFC objects to the Decision finding that OSFC failed to demonstrate that Plaintiff has not produced any evidence to demonstrate that the alleged breaches of contract by OSFC were the cause of Plaintiff's alleged injuries.

² If Plaintiff attempts to supplement its expert testimony in this regard, Defendant will move to strike such supplementation. Such supplementation would certainly indicate the failure of Plaintiff to demonstrate causation. At the very least such a supplementation would prejudice Defendant to the extent of requiring a continuance and further depositions.

Objection 5: The Referee's Decision Erred in Not Finding that, as a Matter of Law, Plaintiff is Limited to the Amount as Requested in its Certified Claim, and Cannot Increase that Amount

OSFC objects to the Decision's finding that it failed to shift the burden on this issue. GC Article 8 specifies the process a contractor must undertake in order to make a claim for additional money. Motion at Exhibit E. Within 30 days of Notice, the contractor is required to provide a notarized certification of the claim along with documentation substantiating the claim. *Id.* at 8.2, 8.3. As pointed out in the Decision, Plaintiff's Claim increased over \$800,000 between the notarized certification and this lawsuit.

As numerous Courts have pointed out, the language of the contract must be followed. *See, Dugan & Meyers Constr. Co. v. Ohio Dept. of Administrative Serv.et al*, 113 Ohio St. 3d 226, 864 N.E. 2d 68 (2007). Here the language of the contract explicitly sets out the process for certifying, by notarization, what the amount of the claim was, and also the process for substantiation of that amount. Plaintiff did neither of those actions for its additional claim amount over and above the March 2012 claim. Even assuming that supplementation was acceptable, any such amount would need to follow the GC Article 8 process, which the amounts in excess of \$2.17 million did not follow. For this reason Defendant OSFC objects to the Decision.

Objection 6: The Decision Erred in Not Finding that that the Statute of Limitations Had Expired For the Contract Claims

The Decision found that the applicable 2 year statute of limitations had expired for the tort claims, yet found that the statute of limitations had not expired for the contract claims. This was based on an interpretation of the difference between the "accrual of a claim" and "accrual of a cause of action." The Court determined that the "cause of

action” accrued 120 days subsequent to the “accrual of the claim” due to the language of R.C. 153.16. However, the language of R.C. 153.16(B) only addresses the administrative process a contractor is required to go through with its claim and not the accrual of a cause of action.

The operative language of R.C. 153.16(B) relied upon by the Decision provides that at 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.” That language merely addresses the time which the public owner has to resolve the claim, with the outcome being that the administrative remedies are exhausted and the contractor may then go to the Court of Claims. There is no mention of the accrual of a claim versus the accrual of a cause of action, or any mention of tolling of the statute of limitations or the “accrual of a cause of action.”

In determining the intent of the General Assembly, words must not be inserted or deleted from a statute. *State ex rel. Celebrezze v. Commissioners*, 32 Ohio St. 3d 24, 512 N.E. 2d 332 (1986); *Wheeling Steel Corp. v. Porterfield*, 24 Ohio St. 2d 24, 263 N.E. 2d 249 (1970). Exceptions not made cannot be read into a statute. *Lima v. Cemetary Association*, 42 Ohio St. 128 (1884). Here there is no mention or reference in R.C. 153.16(B) that the statute of limitations is tolled for 120 days by the operation of the contractual remedies. Nor is there any reference in R.C. 153.16(B) that the contractual administrative resolution process differentiates between the accrual of a claim as opposed to the accrual of a cause of action.

For this reason, Defendant OSFC objects to the finding of the Decision that the statute of limitations is increased by 120 days for contract claims as opposed to tort

claims thereby making the filing of this action barred by the 2 year statute of limitations.³

Conclusion

For the above stated reasons, Defendant OSFC objects to the Decision of the Referee filed October 1, 2014 in this matter and respectfully requests the Court to modify the Decision as requested in these Objections.

Respectfully submitted,

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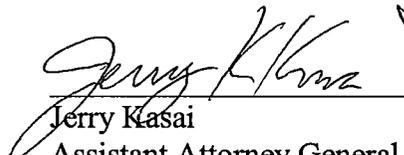
Attorneys for Defendant OSFC.

³ Defendant OSFC concedes that this argument may be inconsistent with the Court of Appeals case cited in the Decision.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objections to Referee's Report was sent by email and regular U.S. mail, postage prepaid, and email this 15th day of October 2014 to:

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