

IN THE COURT OF CLAIMS OF OHIO

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

Case No. 2013-00349

Judge McGrath

Referee Wampler

ORIGINAL

**RESPONSE OF DEFENDANT/COUNTERCLAIM PLAINTIFF OHIO SCHOOL
 FACILITIES COMMISSION TO THE OBJECTIONS OF PLAINTIFF
 TRANSAMERICA BUILDING COMPANY, INC. TO THE REFEREE'S
 DECISION ON THE MOTION FOR SUMMARY JUDGMENT**

Now comes the Defendant/Counterclaim Plaintiff, the Ohio School Facilities Commission ("Defendant" or "OSFC"), by and through counsel, and presents this Response to the Objections of Plaintiff Transamerica Building Company, Inc. ("TA" or "Plaintiff") to the Referee's Decision ("Decision") on OSFC's Motion for Summary Judgment.

The Decision recommended that summary judgment be denied in part and granted in part, specifically granting summary judgment on Plaintiff's claims sounding in fraud on the basis that the two year statute of limitations for making a claim sounding in fraud had expired prior to Plaintiff filing suit. On October 17, 2014, Plaintiff filed its Objections to the Decision of the Referee ("Objections"). Defendant OSFC hereby offers its Memorandum in Response to Plaintiff's Objections.

All of Ojections to the Decision concern the dismissal of Plaintiff's alleged fraud based on Plaintiff filing those claims outside the statute of limitations period. Plaintiff alleges that its fraud claim did not accrue until July of 2011. Plaintiff also alleges, inter

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alia, that there is no rational reason for treating the statute of limitations period for breach of contract differently than that for fraud. Plaintiff also asserts that the contractual provisions governing its claim for breach of contract under Article 8 of the General Conditions of Contract should control when the statute of limitations period for the fraud cause of action accrues.

A. Plaintiff Has Failed to State a Claim for Fraud Against the State

Whether due to Plaintiff missing the statute of limitations or that Plaintiff never received the “updated drawings,”¹ fraud claims cannot be brought against the State in this case. As was stated in *Groob v. Keybank*, 108 Ohio State 3d 348, 843 N.E. 2d 1170, syllabus at 2 (2006):

It is universally acknowledged that no liability will attach to a principal for the unauthorized fraud of his agent, unless such fraud is committed within the scope of the agent's authority.

For an employer to be liable for a tortious act of its employee, that employee must be acting within the scope of employment when the employee commits the tortious act. There is no allegation in the Complaint or otherwise that the fraudulent allegations complained of by Plaintiff fall within the duties of either the construction manager, Lend Lease, or the Architect, SHP. In fact, the deposition testimony demonstrates that the representation by the architect to provide an updated set of plans did not fall within any contractual requirements of the architect's contract. Deposition of Clay Keith at Exhibit 26.

Any and all duties and obligations of Defendant or Plaintiff are set forth in the contract between those parties. Plaintiffs cannot point to any provision of its contract which would require Defendant OSFC to provide it with an updated set of plans.

¹ Drawings which would show all change orders or other design clarifications on one document sheet.

Accordingly, any alleged promise made by Defendant's agents, the architect or construction manager, to provide any such additional plans was outside their scope of authority. Plaintiff could only rely on any such representations if it possessed an executed change order confirming that such a contractual change was being made. Any claims of fraud or any other related claims could only be made to the construction manager or architect, not Defendant OSFC.

Additionally, it is well settled, that any change to the contractual requirements requires an executed change order before such a change to the contract is validated. As was stated by the Ohio Supreme Court in *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Authority*, 78 Ohio St.3d 353, 678 N.E.2d 519, 1997-Ohio-202:

It is universally recognized that where a building or construction contract, public or private, stipulates that additional, altered, or extra work must be ordered in writing, the stipulation is valid and binding upon the parties, and no recovery can be had for such work without a written directive therefor in compliance with the terms of the contract, unless waived by the owner or employer. (*Id.* at 360).

There was no written change order authorizing an updated set of plans. If there were, Plaintiff would be arguing that point vehemently in its briefing. Plaintiff can only have an expectation to receive updated plans from Defendant if there was an executed change order agreeing to such. In that there is no such document, there is no expectation and there can be no fraud or fraud in the inducement as against Defendant OSFC.

B. The Decision Correctly Calculated the Expiration of the Statute of Limitations Period

Additionally, the Decision correctly calculated the days to the expiration of the two year statute of limitation period against the State per R.C. 2743.16. The Decision

calculated two years from the accrual of the cause of action in its calculation. However, Plaintiff takes issue with the Decision not adding the additional 120 days on to the limitation period as it did with the claims for additional compensation under Plaintiff's contract claims.² The Decision reasoned that fraud claims were not entitled to the additional 120 days since there is no required contractual process for fraud which Plaintiff must undergo. A claim for fraud is separate from the claims for breach of contract governed by the contractual process in Article 8 of the General Conditions of Contract.

For this reason the Decision was correct in limiting the limitation period for fraud to the two years set forth in R.C. 2743.16.

C. Plaintiff's Unauthenticated Evidence Was Rightfully Stricken

Plaintiff objects to the Decision striking a number of the exhibits it proffered from consideration. Plaintiff had attempted to authenticate a number of documents by having Plaintiff's president "certify" that the documents were accurate copies of documents taken from Plaintiff's project file. Many of the documents were letters or emails that were neither sent nor received by Plaintiff's president, or documents that had nothing to do with Plaintiff's president. In spite of that he attempted to authenticate these documents through his "certifications."

Civ. R. 56(E), with respect to the authentication of documents for purposes of summary judgment provides, in part:

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, ***shall set forth such facts as would be admissible in evidence***, and shall show

² Defendant OSFC has objected to the addition of 120 days to the limitation period for claims made under the contractual dispute resolution process as there is nothing in R.C. 153.16 which requires the addition of 120 days.

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. (Emphasis added.)

For purposes of a summary judgment motion, Plaintiff's president is not competent to authenticate the documents which were stricken by the Decision from consideration.

Plaintiff also asserts that the documents it proffered were public records and as such should be considered as evidence. Plaintiff confuses the concept of public records and documents which may be admissible in evidence. Pursuant to Evid. R. 901, evidence must still be authenticated sufficient to support a finding that it is what its proponent claims it to be, including public records. Evid. R. 901(A). "Such authentication may be by testimony of the *person having custody of the record or report in the office* where the record or report is kept." Staff Notes to Evid. R. 901(B)(7)³, emphasis added. Plaintiff's president cannot said to be the custodian of any public records, and as such cannot authenticate documents.

The Decision rightfully did not rely on any of this evidence in determining whether there was a genuine issue of material fact for trial as claimed by Plaintiff. The only admissible evidence to consider before this Court on the Motion for Summary Judgment demonstrated that Plaintiff's fraud claims accrued, at the latest, in early 2011.

For the above reasons, the Decision was correct in striking the exhibits proffered by Plaintiff.

D. Defendant Agrees With Plaintiff's Objection Regarding the Negligence Claim in Count VII of the Complaint

Plaintiff has objected to what it asserts was different treatment of its "negligence"

³ It should be noted here that Defendant did have its exhibits certified as coming from the files of Defendant's files from the individual having custody of those files in accordance with Evid. R. 902.

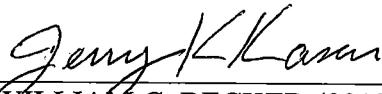
claim as opposed to its fraud claims. Defendants agree with Plaintiff. If this negligence claim were treated the same as the fraud claims, the Decision would have also recommended dismissal of the negligence claim. In fact, Plaintiff's negligence claim would have accrued at the latest at the same time that its alleged fraud claim accrued, and more than likely on the date it was awarded the contract, since that would have been the point in time it began to incur injury.

Conclusion

For the above stated reasons, Defendant OSFC responds to Plaintiff's Objections to the Decision of the Referee filed October 1, 2014 in this matter and requests the Court to affirm the Decision of the Referee with respect to Plaintiff's Objections.

Respectfully submitted,

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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 24th day of October 2014 to:

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