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COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

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**TRANSAMERICA BUILDING COMPANY,
INC.,**

Plaintiff,

v.

**OHIO SCHOOL FACILITIES
COMMISSION,
nka Ohio Facilities Construction Commission,**

Defendant.

Case No. 2013-00349

Judge McGrath

Referee Wampler

**TRANSAMERICA’S RESPONSE TO OSFC’S OBJECTIONS
TO THE REFEREE’S DECISION ON THE MOTION FOR SUMMARY JUDGMENT**

I. Introduction

Pursuant to Ohio Civ. R. 53(D)(3)(b)(i), TransAmerica Building Company, Inc. (“TransAmerica”) hereby responds to the Ohio School Facilities Commission’s (“OSFC”) Objections to the Referee’s Decision On The Motion For Summary Judgment Issued October 1, 2014.

II. TransAmerica’s Responses To OSFC’s Objections

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.

In its Motion for Summary Judgment, the OSFC argued that TransAmerica failed to exhaust its administrative remedies under Article 8 to the extent the Project was delayed for reasons attributable to the OSFC. After carefully considering that argument, the Referee concluded (correctly) that as an affirmative defense, the OSFC bears the burden of proof on this issue. The Referee was also correct that the OSFC did not satisfy that burden here. In its Memorandum in Opposition and through its Amended Complaint, TransAmerica set forth

sufficient evidence to prove that TransAmerica met its Article 8 obligations before filing suit against the OSFC. Alternatively, TransAmerica provided sufficient evidence to prove that the OSFC waived its right to insist on strict compliance with Article 8 through its own actions and inactions. Thus, the OSFC has failed to produce a persuasive argument that would make summary judgment appropriate in this case.

Related to the OSFC's first objection, the Referee properly concluded that the Article 8 provisions in the parties' construction contract do not bar TransAmerica's claims. In its analysis, the Referee considered the OSFC's failure to properly coordinate the project, its failure to provide an adequate set of construction plans, and its poor construction management—all of which caused substantial delay on the Project. (Opinion, pg. 17). From there, the Referee also correctly recognized that Ohio law—specifically R.C. 4113.62—prohibits public owners from causing delay on a public project and then avoid the natural consequences of such delay by relying on the boilerplate terms of their contract. Indeed when an owner (and those under its control) causes a project delay, such boilerplate terms are “void and unenforceable as against public policy.” R.C. 4113.62(C)(1).

Thus, the Referee was correct to conclude that the OSFC's reliance on the provisions of Article 8 is not persuasive: a public owner cannot hide behind boilerplate terms of a contract to avoid the consequences of its own neglect. *See Cleveland Constr., Inc. v. Ohio Public Emps. Retirement Syst.*, 10th Dist. No. 07AP-574, 2008-Ohio-1630, ¶ 19 (“an owner cannot cause a delay, and then avoid the natural consequences for causing the delay by using boilerplate contract language.”). Because the Referee's decision is consistent with the applicable law and the facts of this case, the OSFC's first objection should be overruled.

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”

In addition to holding that certain Article 8 provisions are unenforceable in this case, the Referee also correctly held that the OSFC waived its right to insist on TransAmerica’s strict compliance with each and every Article 8 provision. (Decision, pg. 18).

First, it is well settled that a party to a contract can, through its own action or inaction, waive contractual rights. Waiver is typically a “voluntary relinquishment of a known right.” *Chubb v. Ohio Bureau of Workers’ Compensation*, 81 Ohio St.3d 275, 278-79 (1998). But waiver can also arise by estoppel, “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.” *Nat’l City Bank v. Rini*, 162 Ohio App.3d 662, 668 (11th Dist. 2005). Waiver by estoppel allows a party’s inconsistent conduct to establish a waiver of contractual rights. *Id.* The OSFC’s conduct here, correctly recognized by the Referee, could give rise to a waiver by estoppel.

TransAmerica presented instances where the OSFC acted in a manner inconsistent with its obligations under the law, under the parties’ contract, and under Article 8. For example, TransAmerica noted the failure of the OSFC to do what is required of the OSFC under R.C. 153.01—to provide “full and accurate” construction plans. (See ¶29 of Amended Complaint). Further, the OSFC neglected its contractual obligations to TransAmerica by allowing its consultants, LL and SHP, to repeatedly promise TransAmerica that an updated set of plans would be provided in response TransAmerica’s initial Article 8 notice, but then never followed through. (See ¶35 of Bill Koniewich’s Affidavit attached to Memorandum in Opposition).

Indeed, instead of issuing the updated plans as promised, the plans were withheld from TransAmerica out of fear the plans would expose the OSFC to additional costs. (See pages 18-19 of TransAmerica's Memorandum in Opposition).

The Referee's decision also finds support in relevant case law. In a recent Tenth District opinion, involving a delay claim similar to the claims made here, the Tenth District found that a public owner (the OSFC) waived its ability to insist that a contractor strictly comply with the notice and claim provisions of Article 6 and Article 8, when the OSFC itself acted in a manner inconsistent with its own obligations under those same provisions. *See J&H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Fac. Comm.*, 10th Dist. No. 12AP-588, 2013-Ohio-3827. In that case, the Tenth District quoted the Referee who wrote, "it is ironic that the OSFC asserts a contract defense based upon the alleged failure of J&H to strictly comply with the requirements of Article 8, when the evidence establishes the OSFC completely failed to comply with the Article 8 meeting requirement and claims process" *Id.* at 87. As the Referee properly recognized here, that same irony is present in this case.¹ (Opinion, pg. 18-19).

Another relevant case is *Aggressive Mech., Inc. v. Ohio Sch. Facilities Comm'n*, 2012-Ohio-6332, P23 (Ohio Ct. Cl. Sept. 18, 2012), where the Ohio Court of Claims held that "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." In other words, the presence of a legitimate waiver by estoppel argument should preclude summary judgment. Accordingly, the Referee's decision finds support in the applicable law and in the facts of this case. Thus, the OSFC's second objection should also be overruled.

¹ Interestingly, a few of the same individuals involved in the *J&H Reinforcing* case are also heavily involved here, making the same arguments that did not prove persuasive in *J&H Reinforcing*.

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 Article 8.”

The Referee also noted that the OSFC’s Motion for Summary Judgment failed to distinguish between damages resulting from delays caused by the OSFC and those resulting from delays of third parties—leaving a genuine issue of material fact to be heard at trial. (Opinion, pgs. 17-18). Despite this, the OSFC’s Objections still fail to categorize any of the delays on this Project. Instead, the OFSC simply states there is no such requirement. (Objections, pg 5).

As described above, in light of R.C. 4113.62—and as the Referee correctly held—the OSFC cannot avoid liability for the natural consequences of delays it caused on the Project by relying on the boilerplate language of its contract. *Cleveland Constr., Inc.*, 2008-Ohio-1630, ¶ 19. Again, TransAmerica has set forth facts tending to prove that the OSFC’s conduct caused substantial delay on this Project—including conduct by both SHP and LL, acting as agents for the OSFC. Specifically, TransAmerica presented evidence that the OSFC, through its agents, (1) issued a flawed and defective set of construction plans for bid, (2) failed to remedy the many defects present in those construction plans at any point in the Project, (3) mismanaged the Project from start to finish, and (4) withheld an updated and fully-coordinated set of construction plans from TransAmerica out of fear that the new plans would cause additional costs to the OSFC. TransAmerica has alleged that all of this conduct created delay on the Project, which in turn caused substantial damages borne by TransAmerica.

Through its objections, the OSFC again makes the argument that the Article 8 provisions control this dispute. Again, standing in stark contrast with the OSFC’s arguments on this point are several explicit and recent holdings of the Tenth District. *See Cleveland Constr., Inc.*, 2008-Ohio-1630, ¶ 19 (“an owner cannot cause a delay, and then avoid the natural consequences for

causing the delay by using boilerplate contract language.”); see also *J&H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Fac. Comm.*, 10th Dist. No. 12AP-588, 2013-Ohio-3827 (Tenth District held that a public owner—the OSFC—waived its ability to insist on strict compliance with Article 8 by failing to comply with Article 8 itself); *Aggressive Mech., Inc. v. Ohio Sch. Facilities Comm’n*, 2012-Ohio-6332, P23 (Ohio Ct. Cl. Sept. 18, 2012) (“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.”).

Despite the law created by these decisions, the OSFC continues to rely solely on the boilerplate language in its contract. Because the OSFC’s argument is inconsistent with applicable case law, its third objection should be overruled.

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.

In its Memorandum in Opposition and through its Amended Complaint, TransAmerica provided substantial evidence proving that the OSFC caused TransAmerica’s damages. Indeed, TransAmerica provided a 96-page expert report authored by Don McCarthy, one of TransAmerica’s expert witnesses, which explained how the OSFC’s conduct caused the delays TransAmerica experienced on the Project and calculates TransAmerica’s damages, based on project information McCarthy collected and analyzed in his investigation. At the same time—and as the Referee correctly noted—the OSFC did not submit its own expert report to support its assertion that TransAmerica had not, and could not, prove the issue of causation. (Opinion, pg. 19). As such, the Referee concluded (correctly) that the “OSFC failed to shift the burden of proof on this issue as required by the moving party under Civ.R. 56(C).” (Opinion, pg. 19).

The OSFC fails to explain why its argument is any different from the argument already rejected by the Tenth District in *Columbus Distributing Co. v. Carlisle Syntec Systems*, 1990 Ohio App. LEXIS 4364, 8-9 (10th Dist 1990). As the Referee correctly noted, the “lack of evidence” rationale is persuasive “only [in] directed verdict cases, **not summary judgment cases.**” *Columbus Distributing*, at 8-9. Also, the Tenth District went on to state that a plaintiff is not required to offer expert evidence unless the moving party “first present[s] evidence that there was no proximate causation.” *Id.* Therefore, the OSFC’s fourth objection should be overruled.

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.

As the Referee correctly noted, the OSFC “provid[ed] no authority or reference to contractual provisions that preclude” TransAmerica from supplementing its certified claim. (Opinion, pg. 21). Indeed, the parties’ contract is silent on whether TransAmerica is allowed to supplement its original claim. Moreover, any ambiguity should be resolved against the drafter of the contract—the OSFC.

Further, the parties’ contract does not contain a limitation of liability provision that might limit TransAmerica’s ability to recover breach of contract damages, which are defined generally as “losses that are reasonably to be expected as a probable result of the breach.” *Roesch v. Bray*, 46 Ohio App.3d 49, 51 (6th Dist. 1988) (citing *Roegge v. Wertheimer*, 1 Ohio Law Abs. 834 (Super. Ct. 1923)). Accordingly, the Referee was correct in holding that the “OSFC failed to shift the burden on this issue as required by Civ. R. 56.”

Additionally, the Referee correctly held that since damages caused by the owner are not subject to provisions that preclude or waive the OSFC’s liability, any limitation on

TransAmerica's damages is a factual issue not appropriate for summary judgment. Therefore, the OSFC's fifth objection should be overruled.

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

The Referee properly considered the application of R.C. 153.12 and R.C. 153.16(B) to the facts of this case and correctly determined that TransAmerica's breach of contract related claims are not barred by the statute of limitations. The Referee's decision analyzed two different bases for the accrual of TransAmerica's breach of contract claims. The first was based on TransAmerica's initial February 17, 2011 notice letter. The second was based on TransAmerica's March 8, 2012 certified claim. The Referee correctly concluded that under either of these two scenarios, TransAmerica filed within the two-year statutory time period. In that analysis, the Referee properly concluded that a breach of contract claim does not accrue until a contractor exhausts its administrative remedies.

The OSFC fails to reconcile the requirements of R.C. 153.12(B) to exhaust all administrative remedies with the corresponding time period under R.C. 153.16(B). Ohio case law makes it clear that a contractor's claim against the State accrues only after the contractor's administrative remedies have been exhausted in response to a **claim** submitted by the contractor.

Two relevant Ohio cases prove this point. First, in *Painting Co. v. Ohio State Univ.*, 10th Dist. No. 09AP-78, 2009-Ohio-5710, the court found:

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 owes is deemed withheld.

Id. at ¶ 14 (emphasis added). Second, in *R.E. Schweitzer Constr. Co. v. Univ. of Cincinnati*, 10th Dist. No. 10AP-954, 2011-Ohio-3703, the Tenth District concluded that, because no administrative decision was ever made regarding the validity of the contractor's claim,

by operation of R.C. 153.16(B), [the contractor's] administrative remedies were deemed exhausted **120 days after [the contractor] filed its claim**, or April 12, 2005. At that point, [the contractor's] claim was deemed rejected, and the money [the public owner] allegedly owed was deemed withheld. Pursuant to R.C. 2743.16(A), [the contractor] had two years from that date, or until April 12, 2007, to file its complaint in the Court of Claims.

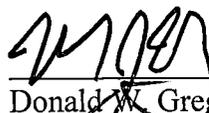
R.E. Schweitzer Constr. Co. v. Univ. of Cincinnati, 10th Dist. No. 10AP-954, 2011-Ohio-3703.

Because the Referee's decision correctly interpreted *Painting Co.* and *R.E. Schweitzer Constr. Co.*, the OSFC's sixth and final objection should be overruled.

III. Conclusion

Therefore, TransAmerica requests that this Court overrule all objections brought forth by the OSFC regarding the Referee's October 1, 2014 Decision on the OSFC's Motion for Summary Judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true copy of the foregoing was served via U.S.

Mail, postage prepaid, this 21st day of October, 2014 upon:

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