

ORIGINAL

FILED
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 MEMORANDUM IN OPPOSITION TO
OSFC'S MOTION FOR CONTINUANCE**

TransAmerica hereby replies to Defendant OSFC's Motion for Continuance, which would delay trial of this case for the second time. As of today, trial is set to begin on December 8, 2014 for a case initiated in the Court of Claims on June 14, 2013. For the reasons set forth below, the court should deny the OSFC's motion and preserve the current trial date.

I. Relevant Facts

On October 14, 2013, the OSFC filed a Motion in Limine to preclude TransAmerica from presenting additional expert witness testimony regarding schedule analysis at trial. (OSFC's Motion in Limine, pg. 1) The OSFC objected because in the OSFC's opinion, the supplemental expert report and accompanying schedule analysis was "nine months late." *Id.* Alternatively, the OSFC argued that TransAmerica should be ordered to pay any cost the OSFC incurs in responding to TransAmerica's supplemental expert report and accompanying schedule analysis. *Id.*

At the request of the Referee, counsel for both parties held a teleconference with the Referee on the morning of October 21, 2014. During that teleconference, the Referee made it

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clear that he preferred to let both parties “try their case,” using all evidence reasonably available to both parties. TransAmerica argued against the OSFC’s Motion in Limine. Three days after the teleconference, TransAmerica provided Don McCarthy’s Supplemental Report to the OSFC on the morning of October 24, 2014—a full forty-five (45) days before the scheduled trial date of December 8, 2014.

The McCarthy Supplemental Report in question is comprised of a nine-page narrative with accompanying schedule and excel files, prepared by one of TransAmerica’s expert witnesses, Don McCarthy. Most significantly, the supplemental report incorporates a detailed schedule analysis that rebuts the OSFC’s arguments that TransAmerica has not proven its damages or the issue of proximate causation. It is important to note that the supplemental report does not contain any new theory or factual basis for the OSFC’s liability. Rather, the report simply supplements the expert report McCarthy submitted in January of 2014. Particularly the report responds to a primary criticism of the OSFC’s expert, Andy Englehart that TransAmerica has failed to support its damages with a schedule analysis.

On Monday, October 27, 2014, the Court issued an Order denying the OSFC’s Motion in Limine. The Order also provided four key instructions. It allowed TransAmerica to use the McCarthy Supplemental Report, it required TransAmerica to make its expert witness available to the OSFC for deposition if necessary, and it ordered TransAmerica to pay the costs associated with that deposition. The Order also required the OSFC to issue a response to the supplemental report (if needed) from its own expert no later than November 17, 2014.

On October 28, 2014, the OSFC moved to continue the trial to a later date, asserting that it “has no choice but to ask for a continuance of the trial date if Plaintiff insists on going forward

and introducing evidence from this nine month late expert report.” *See* Motion for Continuance pg. 1. TransAmerica hereby opposes that motion.

II. TransAmerica’s Response

TransAmerica takes issue with the OSFC’s assertion that the McCarthy Supplemental Report is “nine months late” when the report does not introduce any new theory about the case and does not change the methodology as to how the damages were calculated. Instead, the McCarthy Supplemental Report identifies additional scheduling and management flaws by Lend Lease, which were made known during the parties’ mediation session in July, 2014. Additionally, McCarthy goes on to address the OSFC’s expert’s primary criticism, which is the failure to support TransAmerica’s delay damages with a schedule analysis. With his Supplemental Report, McCarthy has now identified and apportioned 197 days of Project delays relying, in part, upon Lend Lease’s monthly schedule updates. McCarthy goes on to apportion 148 days of delay to the OSFC, 27 days to a previously agreed upon change order, 14 days to TransAmerica, and 8 days to weather. Finally, McCarthy recalculates the time-based damages according to the OSFC’s apportioned delays under the same per diem rate used in his January 2014 Report, which results in a modest claim reduction of \$150,968.21 (5% of the total previous claim) in favor of the OSFC. Keep in mind in his January Report, McCarthy identified that the Project was delayed 199 days and attributed all of those delays to the OSFC. This shows that McCarthy’s Supplemental Report is not a significant change and does not require an entirely new analysis to be performed by the OSFC and its expert.

The argument that the OSFC “has no choice” but to seek a continuance overlooks the fact that TransAmerica has simply supplemented its previous expert report, which results in a reduction in the claim. Delaying trial serves only to prolong TransAmerica’s opportunity to

finally get its day in court and hold the OSFC accountable for the damages it has caused. The OFSC has little to lose if this continuance is granted, while TransAmerica will continue to finance the seven-figure damages the OSFC caused should the trial dated be significantly delayed. Therefore, for the reasons set forth below and in the interest of justice, the Court should preserve the current December 8, 2014 trial date.

Should this Court grant the OSFC's Motion for Continuance, TransAmerica requests that the trial be set anytime between January 5 and January 31, 2015 and forecasts the trial to take 10 to 13 days. Scheduling a trial in February or March will be problematic as the schedule of Don Gregory and Mike Madigan is full with other prescheduled trials, hearings and speaking arrangements such that the case will likely be unable to be rescheduled until at least April, 2015 if not tried in December or January.

- i. The McCarthy Supplemental Report Is Not "Nine Months Late" Because, As A Matter Of Right, Parties May Supplement Expert Reports Up Until Thirty-Days Before Trial.*

The McCarthy Supplemental Report is not "nine months late" as claimed by the OSFC. Under the applicable Court of Claims Local Rule 7(E), parties may submit expert supplemental reports up until thirty (30) days before trial as a matter of right. Court of Claims Local Rule 7(E) states that "unless good cause is shown, all supplemental reports must be supplied no later than thirty days prior to trial." Here, TransAmerica provided Don McCarthy's supplemental expert report on October 24, 2014, a full **forty-five** days before the scheduled December 8, 2014 trial date. Even more significant, the OSFC was made aware of some of McCarthy's supplemental information regarding Lend Lease's schedule flaws during the parties' attempts at mediation in July 2014. Since that time the OSFC has had plenty of time to address those flaws with Lend Lease.

The evidence of which the OSFC now complains merely supplements McCarthy's findings presented in his original January 2014 expert report. That is, the Supplemental Report merely provides additional detail and analysis to support findings McCarthy has already made, which is that the Project was significantly delayed due to the actions and inactions of the OSFC and its agents.¹ The OSFC argues as if TransAmerica has sprung information on the OSFC at the eleventh hour. That is not true. This evidence merely supports McCarthy's original findings, of which the OSFC has known about since January of 2014.

ii. *The McCarthy Supplemental Report Is Not Late Because The OSFC Cannot Point To Any Unfair Surprise.*

The Ohio Rules of Civil Procedure clearly allow parties to supplement previously disclosed expert reports before trial. *See* Ohio Civ. R. 26(E). While the Ohio Rules clearly allow supplementation, the rules do not establish a firm cut-off date. Instead, some Ohio courts have suggested that supplementary evidence may be offered on the eve of trial, so long as the "supplementary information [does not] result in unfair surprise disproportionate to its probative value." *See, e.g., Shumaker v. Oliver B. Cannon & Sons, Inc.* (1986), 28 Ohio St. 3d 367, 504 N.E.2d 44; *Cox v. Metro Health Med. Ctr. Bd. of Trustees* (2012), 2012-Ohio-2283971 N.E.2d 1026, 1036 (8th Dist.); *Laster v. Light* (1995), 1995 WL 116852 (8th Dist.). If supplementary evidence is admissible this late in the pre-trial stage of litigation, it should be clear that TransAmerica's supplemental report, submitted forty-five days before trial, can be admitted without reservation.

TransAmerica's supplemental report does not produce "unfair surprise disproportionate to its probative value." As such, the OSFC can hardly argue that it is surprised by the

¹ The supplemental report accomplishes three specific objectives: (1) it identifies delays to the Project based on the monthly schedule updates and apportions those delays amongst the OSFC and TransAmerica; (2) recalculates the time-based costs based on those apportioned delays and (3) identifies additional scheduling deficiencies present in the original project schedule.

supplemental report or its contents. Additionally, any “surprise” the supplemental report presents here—if there is any surprise at all—is not unfair. On top of the months the OSFC has already had to prepare, the OSFC still had a full forty-five days (over five weeks) to analyze the nine-page narrative, depose Mr. McCarthy, and prepare its defense.² This is especially true here when considering the OSFC has devoted at least three attorneys to this case. At the same time, the probative value of the supplemental expert report is substantial. The supplemental report provides additional evidence proving the extent of TransAmerica’s damages and establishes that the OSFC’s and its agents’ conduct was the proximate cause of those damages. Therefore, any “unfair surprise” the supplemental report presents—if any—clearly does not overcome its substantial probative value in this case.

iii. The Court Should Preserve The Current Trial Date In The Interest Of Justice.

Finally, the interests of justice dictate that the court should preserve the currently scheduled December 8, 2014 trial date or, alternatively, grant a modest extension to January 2015. A grant or denial of a continuance is entrusted to the sound discretion of the trial judge. *State v. Powell* (1990), 49 Ohio St. 3d 255, 259, 552 N.E. 2d 191, 196; *State v. Unger* (1981), 67 Ohio St. 2d 65, 423 N.E. 2d 1078, syllabus; *State v. Price* (1973), 34 Ohio St. 2d 43, 295 N.E. 2d 669. Other Ohio courts have considered several factors in making their decision including: the length of delay requested, prior continuances, inconvenience, the reasons for the delay, whether the Defendant contributed to the delay, and other relevant factors. *Ungar v. Sarafite* (1964), 376 U.S. 575, 589-591. Here, those factors weigh against continuing trial to a later date beyond a month.

² The Order also provided the OSFC and its experts a full twenty-one days to prepare a response to the McCarthy Supplemental Report.

For one, trial in this case has already been continued once—originally scheduled to begin on August 4, 2014, trial was delayed four months to begin on December 8, 2014. Unlike the current motion for continuance, that first delay was the product of the parties' attempt at mediation. Now that those mediation negotiations have proved unfruitful, TransAmerica sees no reason to delay trial of this matter further.

Second, while this case has been pending, the OSFC has withheld over \$824,000 in payment from TransAmerica from the final contract balance for over a year-and-a-half—not including the seven-figure delay damages TransAmerica was forced to endure on the Project. (Amended Complaint, ¶ 56) Delaying trial further only delays TransAmerica's ability to recover those damages.

Finally, as explained above, the OSFC has not put forth a persuasive argument that it will be prejudiced without an extension. Again, the OSFC has had months to prepare for trial on all of the issues present in this case. And even after TransAmerica submitted its supplemental expert report on October 24, 2014, the OSFC and its three attorneys still had forty-five full days (five weeks) to digest that nine-page report and prepare its defense. Further delay only serves to kick the can down the road—an undesirable development where TransAmerica has had to endure millions of dollars in damages on this Project without recovery from the OSFC for over a year and a half.

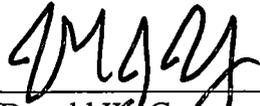
It is also worth noting that the OSFC made a similar argument in *J & H Reinforcing & Structural Erectors, LLC v. Ohio Sch. Facilities Comm'n*, 2012-Ohio-5298, 2012 Ohio Misc. LEXIS 171 (Ohio Ct. Cl.), where the OSFC moved for a continuance on the eve of trial, arguing that litigation should be delayed based upon deposition testimony the OSFC had known about for months. Concluding that the motion was not well taken, the Court of Claims denied that the

OSFC's request for an extension and preserved the scheduled trial date. The Court should do the same here.

Conclusion

TransAmerica therefore requests that this Court deny the OSFC's Motion for Continuance and preserve the current December 8, 2014 trial date. Should the Court grant the OSFC's Motion for Continuance, TransAmerica requests that the trial be set anytime between January 5 and January 31, 2015 and forecasts the trial to last 10 to 13 days.

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 31st day of October, 2014 upon:

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