

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

2015 JAN -9 PM 1:26

TRANSAMERICA BUILDING COMPANY, :
INC., :

Case No. 2013-00349

Plaintiff, :

Judge McGrath

v. :

Referee Wampler

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

Defendant. :

PLAINTIFF TRANSAMERICA BUILDING COMPANY, INC.'S
MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE OF DEFENDANT
OHIO SCHOOL FACILITIES COMMISSION TO FILE THIRD-PARTY
COMPLAINT INSTANTER

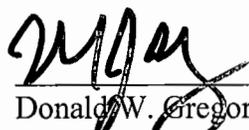
Plaintiff TransAmerica Building Company, Inc. ("TransAmerica") hereby responds to the motion for leave of Defendant Ohio School Facilities Commission's ("OSFC") to file a third-party complaint against its construction manager/advisor, Lend Lease (US) Inc. ("Lend Lease"), and its architect, Steed Hammond Paul, Inc. ("SHP"). The OSFC has long known of the shortcomings of its agents on this Project, but chose to ignore them until the eleventh hour when discovery is virtually complete and the case is cued up for trial. Because the OSFC's request is well over a year late and because an order granting leave would unfairly prejudice TransAmerica, the Court should deny the OSFC's motion for leave to file a third-party complaint under Civ.R. 14(A) at this late date.

Because SHP and Lend Lease are the agents of the OSFC, regardless of whether the Court grants the OSFC leave to file its third-party complaint, Civ.R. 14(A) requires that the Court separate the OSFC's third-party claims from TransAmerica's claims against the OSFC. Therefore, should the Court grant the untimely motion for leave, TransAmerica hereby moves

ON COMPUTER

the Court for an Order separating the OSFC's third-party claims from TransAmerica's claims against the OSFC. As TransAmerica's motion in this regard must be granted, the result is the same regardless of whether the Court denies the OSFC's motion for leave or grants it: the OSFC's third-party claims must be tried separately from the TransAmerica claims against the OSFC. A detailed Memorandum in Opposition is attached below.

Respectfully submitted,



Donald W. Gregory (0021791)

Michael J. Madigan (0079377)

Peter A. Berg (0092283)

KEGLER BROWN HILL + RITTER CO., LPA

65 East State Street, Suite 1800

Columbus, OH 43215

(614) 462-5400; Facsimile: (614) 464-2634

dgregory@keglerbrown.com

mmadigan@keglerbrown.com

pberg@keglerbrown.com

Attorneys for TransAmerica Building Company, Inc.

MEMORANDUM IN OPPOSITION

The OSFC overlooks Civ.R. 14(A) which provides (in relevant part):

Any party may move to strike the third-party claims, or for its severance or separate trial. If the third-party defendant is an employee, agent, or servant of the third-party plaintiff, the court **shall** order a separate trial upon the motion of any plaintiff.

Civ.R. 14 (A) (emphasis added). Both SHP, as architect, and Lend Lease, as construction manager/advisor, are undisputedly “agents” of the OSFC in relation to TransAmerica’s claims.¹ Therefore, the Court must separate the OSFC’s third-party claims from TransAmerica’s claims against the OSFC, regardless of whether the Court grants the OSFC’s current motion for leave.

To the extent that is not the end of the matter, the Court should deny the OSFC’s motion for leave as untimely under Civ.R. 14(A).

On June 6, 2013, TransAmerica filed its Complaint, alleging that the OSFC, through its architect and its construction manager, caused TransAmerica millions of dollars in damages on a Project that was poorly managed, substantially delayed, and significantly over budget. TransAmerica’s Complaint made it clear that the OSFC and its agents were responsible for these problems, and that the OSFC’s conduct caused TransAmerica extensive damages. Two (2) months later, TransAmerica slightly amended its original Complaint, adding claims for fraud, fraud in the inducement, negligent misrepresentation, and negligence, and filed its First Amended Complaint on August 1, 2013.

Unambiguously, the First Amended Complaint alleged:

- The OSFC, through its representatives including SHP and Lend Lease, breached the Contract . . . (See Amended Complaint, ¶ 62).

¹ See generally *Henderson Aerial Surveys, Inc. v. Kellam*, 10th Dist. No. 73AP-71, 1973 Ohio App. LEXIS 1747, 1 (July 10, 1973) (architect is owner’s agent on the project); see also *Constr. Sys. v. Garlikov & Assocs.*, 10th Dist. No. 11AP-802, 2012 Ohio App. LEXIS 2581, P41 (June 28, 2012) (while architect did not owe owner fiduciary duties, architect was the owner’s “agent”); *Jess Howard Elec. Co. v. Ohio Sch. Facilities Comm’n.*, Ohio Ct. Cl. No. 2010-12737, 2013 Ohio Misc. LEXIS 46, P2 (Apr. 26, 2013) (construction management was agent of owner).

- The OSFC, and its representatives, failed to handle fairly and impartially, in accordance with the Contract Documents and recognized customs and practice in the trade, requests for payment for any and all work, including additional or extra work. (See Amended Complaint, ¶ 63).
- The OSFC expressly and impliedly warranted the conditions of the Contract . . . The OSFC breached said representations and warranties in many regards . . . (See Amended Complaint, ¶¶ 70-71).
- OSFC and its agents knowingly, or with a reckless disregard for the truth, made false and material representations concerning the state of the plans and specifications, and the status of building permits to TransAmerica as a part of the bidding process and throughout the Project. (See Amended Complaint, ¶ 74).
- OSFC made false representation to TransAmerica when it released the drawings, plans and specifications and other contract documents for bid, when it induced TransAmerica's bid, when TransAmerica executed the contract, and throughout the Project in inducing TransAmerica to continue working on the Project by misrepresenting that design changes were ending and existing status of the design. (See Amended Complaint, ¶ 96).
- OSFC, through its agents, was responsible for providing design and construction management services for the Project in accordance with industry and statutory standards including Revised Code §153.01, and the applicable standard of care.

Unsurprisingly, TransAmerica's allegations in its First Amended Complaint track the language of numerous letters it sent to the OSFC months, even years, before TransAmerica filed its original Complaint. For example, as early as **March 8, 2012**, TransAmerica noted, under the subject heading "Narrative of the Circumstances and Identification of the Issues Giving Rise To The Claim," that TransAmerica's Certified Claim arose from (among other issues):

- Failure of Lend Lease to adequately schedule, coordinate, and sequence the Project.
- A non-professional and adversarial management style from the Lend Lease that is inconsistent to the General Conditions partnering provisions and not conducive to a successful Project.
- Delays caused by the insufficient design and untimely responses of the Project Architect, SHP.

(See Exhibit A, pg. 1, attached hereto). Those same problems were summarized by another Article 8 letter, dated **November 7, 2012**, wherein TransAmerica noted that its Supplemental Certified Claim comprised, among other issues, a “lack of a buildable design by SHP,” and a “lack of proper scheduling and coordination by Lend Lease.” (See Exhibit B, pgs. 1-2, attached hereto) (internal emphasis omitted).

In short, since this dispute began almost three (3) years ago, not a single one of TransAmerica’s allegations against the OSFC has changed. Indeed, the OSFC remains as aware of the nature of TransAmerica’s claims today as it was aware of them in March of 2012, when the OSFC received TransAmerica’s Certified Claim, let alone in the Fall of 2013, when the OSFC first responded with its Answer and Counterclaim.

Despite the fact that the OSFC was fully aware of TransAmerica’s claims throughout the entire eighteen (18) month duration of this case—through numerous phases of discovery, and during extensive motion practice on summary judgment—the OSFC now argues for the first time that it should be granted leave to unilaterally join two (2) additional parties to this litigation. The OSFC goes so far as to claim that justice “requires” this result, as its liability is merely secondary to the liability of its architect and construction manager.²

Granting the OSFC leave would, however, substantially (and unfairly) prejudice TransAmerica as it would place the already significantly-delayed trial date in further jeopardy, expose TransAmerica to unnecessary and additional costs, and impose additional burdens on TransAmerica’s recovery in this case. Because granting the OSFC’s request creates more problems than it solves, justice does not require that the OSFC be given leave of court to file its third-party complaint. Thus, the Court should deny the OSFC’s belated motion for leave.

² Of course, it was the OSFC who contracted with TransAmerica and promised it and other bidders that it would receive detailed, constructible, easily understood plans and specifications on bid day—not its architect or its construction manager. See R.C. §153.01.

To be clear, the OSFC remains free to seek indemnity and/or contribution from its Architect and Construction Manager through a separate action—either through an action filed in the Court of Common Pleas or in the OSFC’s current dispute against a different contractor on the same Project³. That separate action would provide the OSFC the same remedy it seeks here, but would avoid unnecessary prejudice to TransAmerica.

I. Relevant Facts

On December 30, 2014, the OSFC moved for leave to file a third-party complaint against its architect, Steed Hammond Paul, Inc. (“SHP”), and its construction manager, Lend Lease (US) Inc. (“Lend Lease”). In its third-party complaint, the OSFC asserts that to the extent the OSFC is liable to TransAmerica, SHP and/or Lend Lease should either indemnify the OSFC or contribute to any judgment rendered in TransAmerica’s favor.

Acknowledging that the deadline for amending its pleadings has expired, the OSFC moved for leave of court to allow it to bring a third-party complaint against SHP and Lend Lease pursuant to Civ.R. 15(A). In its memorandum in support, the OSFC argues that “justice requires that leave of court be given.” (See OSFC Motion For Leave, pg. 3).

The OSFC’s analysis is simple and straightforward: there will be “no effect” on TransAmerica’s case, the OSFC argues, as TransAmerica’s presentation of evidence and its witnesses should remain the same. (See *Id.*). The OSFC reasons further, “there should [*sic*] no effect on the actual trial date since Lend Lease and SHP have been fully participating in the attempt to resolve this matter through alternative dispute resolution.” (See *Id.*) But even if the

³ The OSFC is involved in a separate but related dispute involving the same Project against its electrical prime contractor, Jutte Electric. *Jutte Electric, Ltd., et al. v. Ohio Schools Facilities Commission*, 2014-00318 (Ct. of Claims). Unlike TransAmerica’s case, there may be no prejudice involved in adding the OSFC’s agents as third-parties, given that the case has seen little substantive progress with no depositions taken to date.

OSFC and TransAmerica jointly argue against any further continuance of the trial date, it is virtually assured that new counsel for the third-party defendants will have very different ideas.

Trial in this case has already been postponed twice—a combined ten-month delay. Originally scheduled to be heard in August of 2014, upon agreement of the parties and consent of the Court, trial was postponed until December 8, 2014 so that the parties could participate in a second mediation. However, as December 8 approached, the OSFC moved—unilaterally—for an additional continuance of the trial date, asserting it did not have adequate time to respond to a supplemental expert report prepared by one of TransAmerica’s expert witnesses. (See OSFC’s Mtn. for Extension of Time, filed November 4, 2014). On November 19, 2014, the Court granted the OSFC’s motion for continuance of the trial date. Because of conflicting schedules among counsel, trial was postponed until May 18, 2015.

II. Law and Argument

Ohio Rules of Civil Procedure 14(A) provides:

(A) **When the defendant may bring in third party.** At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him. The third-party plaintiff need not obtain leave to make service if he files the third-party complaint not later than fourteen days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action

...

Any party may move to strike the third-party claim, or for its severance or separate trial. **If the third-party defendant is an employee, agent, or servant of the third-party plaintiff, the court shall order a separate trial upon the motion of any plaintiff.**

Civ.R. 14(A)(emphasis added).

The OSFC cites Ohio Rule of Civil Procedure 15(A) as the Rule controlling its motion, which provides:

(A) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires.

Civ.R. 15(A).

TransAmerica disputes that Civ.R. 15(A) controls the OSFC's current motion, as the OSFC has moved for leave to file a third-party complaint, to bring in two (2) third-party defendants, not to amend its pleadings. See Civ.R. 14(A) (governs when "the defendant may bring in a third party."). In any event, because the deadlines under both Civ.R. 14(A) or Civ.R. 15(A) have expired, and because the OSFC lacks TransAmerica's consent, the OSFC must move for leave of court to file its third-party complaint against SHP and Lend Lease.

Ordinarily, it is in the trial court's discretion as to whether leave should be granted or whether third-party claims should be consolidated or separated from the primary claims. It is well-settled that a trial court's decision on these issues will not be overturned without an abuse of discretion. See, e.g., *JBC Investment Co. v. Kaul Clay Co.*, 7th Dist. Mahoning No. 80 C.A. 37, 1981 Ohio App. LEXIS 12742, 8 (Mar 20, 1981) (using abuse of discretion standard, Seventh District upheld trial court's decision to consolidate trial of the third-party action with the primary action under Civ.R. 42(B)). In at least one case, the Tenth District Court of Appeals of Ohio affirmed this Court's decision to separate a third-party action from the original action pursuant to Civ.R. 42(A). See *Cincinnati Ins. Co. v. Keneco Distribs.*, 10th Dist. No. 97API04-459, 1997 Ohio App. Lexis 5135, 6 (Nov. 13, 1997) (affirmed Referee's decision to bifurcate third-party

subrogation action from primary action). The Court would be well within its discretion to deny leave of court here.

However, the Court does not have discretion in deciding whether to separate third-party claims from the primary action where the third-party defendants are “agents” of the third-party plaintiff. In this narrow category of cases, upon motion of the plaintiff the Court “shall order a separate trial.” *See* Civ.R. 14(A), *supra*.

Again, the OSFC fails to adequately explain why it waited over a year and a half to seek indemnification and/or contribution from its agents. Still, even without an excuse for its eighteen (18) month delay, the OSFC’s current motion might otherwise be acceptable if granting the motion did not unfairly prejudice TransAmerica. But contrary to the OSFC’s self-serving analysis in its motion for leave, the OSFC’s request does prejudice TransAmerica. It likely delays the long awaited trial date. It leaves TransAmerica without millions of dollars of lost working capital for a greater period time. It may well force TransAmerica to expend another fortune in legal fees to revisit discovery demanded by the third-parties. Because the OSFC’s motion presents more problems than it solves, justice does not require this Court to grant leave. Rather, justice requires that this case proceed to trial as swiftly as possible, without additional and unnecessary heavy burdens placed on TransAmerica.

The Court should deny the OSFC’s belated motion for three (3) independent but equally compelling reasons. First and foremost, the OSFC ignores the fact that by joining two (2) additional parties to this litigation, those parties will bring time constraints of their own. Adding additional parties to the mix, with less than six (6) months advance notice of the trial date, may well jeopardize the May 18, 2015 trial date. Adding the third-party defendants to this litigation

could easily lead to numerous depositions, hearings, and perhaps even additional expert report filings—all of which require the availability of the parties and their (presumably busy) attorneys.

Of course, another delay in the trial date would further compound the effect of the millions of dollars of damages TransAmerica has endured for several years without payment from the OSFC. Without these funds, TransAmerica's ability to procure new business is diminished, and the negative impact of this dispute on TransAmerica is prolonged and increased. Contrary to the OSFC's assertions, justice requires that this case proceed to trial as swiftly as possible, without imposing additional, significant, and unnecessary burdens on TransAmerica's recovery.

Second, granting leave to file a third-party complaint would likely force TransAmerica to spend additional resources (both time and money) on discovery that is duplicative, the costs of which (unlike the OSFC) will not be borne by the taxpayers. The Ohio Rules of Civil Procedure would grant both third-party defendants' rights to additional discovery—from both the OSFC and TransAmerica.⁴ TransAmerica will be obliged to answer that discovery, regardless of whether it is duplicative (as it likely will be) of the extensive discovery already conducted in the prior eighteen (18) months of this litigation. These costs are not trivial and are not paid in taxpayer dollars.

Finally, an already lengthy trial will become even lengthier with the addition of at least two (2) additional teams of lawyers, further increasing TransAmerica's costs. Bear in mind SHP and Lend Lease, as fourth-party plaintiffs, may very well bring in their own additional parties—further complicating this dispute and creating additional burdens on TransAmerica's recovery.

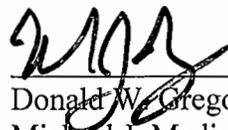
⁴ See Civ.R. 14(A) (“The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim . . . may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.”).

For example, Lend Lease has already blamed its scheduling consultant G. Stephens, Inc., and SHP has blamed its sub-consultant Berardi + Partners, Inc., for their shortcomings here.

III. Conclusion

Because it would be highly prejudicial to TransAmerica to grant leave this late in the litigation, the Court should, in its discretion, deny the OSFC's motion for leave. The OSFC may seek indemnity and/or contribution from its architect and construction manager through a separate action. That separate action would provide the OSFC the same remedy, presumably with little or no prejudice to the OSFC, but would avoid the significant and unnecessary prejudice that granting leave this late in the litigation would impose on TransAmerica. Failing that, this Court must order a separate trial, separating the OSFC's third-party claims from TransAmerica's claims against the OSFC, as required in Civ.R. 14(A).

Respectfully submitted,



Donald W. Gregory (0021791)

Michael J. Madigan (0079377)

Peter A. Berg (0092283)

KEGLER BROWN HILL + RITTER CO., LPA

65 East State Street, Suite 1800

Columbus, OH 43215

(614) 462-5400; Facsimile: (614) 464-2634

dgregory@keglerbrown.com

mmadigan@keglerbrown.com

pberg@keglerbrown.com

Attorneys for TransAmerica Building Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum In Opposition was sent via e-mail and by regular U.S. mail, postage prepaid, this 9th day of January, 2015 to:

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



Michael J. Madigan

(0079377)