FILED
COURT OF CLAIMS
OF OHIO

2015 FEB 11 PM 12: 45

IN THE COURT OF CLAIMS OF OHIO

TRANSAMERICA BUILDING COMPANY, INC.,	:	Case No. 2013-00349
Plaintiff,	:	Judge McGrath
v.	:	Referee Wampler
OHIO SCHOOL FACILITIES COMMISSION, nka Ohio Facilities Construction Commission,	:	
Defendant.	:	

ORIGINAL

TRANSAMERICA BUILDING COMPANY, INC.'S MOTION TO COMPEL DISCOVERY

TransAmerica Building Company, Inc. ("TransAmerica") submits this Motion to Compel with reluctance knowing the Court's strong desire that the parties resolve discovery disputes without its involvement. TransAmerica is fully aware of this but is left with no choice after making repeated attempts to obtain the documents over the past months, and in some cases years. The documents TransAmerica seeks with this Motion are significant to the overall dispute and will likely provide insight regarding issues the Court will face at the upcoming trial. In particular, TransAmerica seeks the following documents relating to the dormitory portion:

1. The signed "Posted Changes Set" of plans as represented by Lend Lease's Superintendent;

2. Project As-Builts;

3. E-mails of Chris Simonson (from October 1, 2010 – March 1, 2014); and

4. Certificate of Occupancy issued for the dormitory portion, including any Temporary Occupancy Permits.

ON COMPUTER

TransAmerica brings this Motion seeking a ruling from the Court directing the OSFC to produce these documents. In the alternative, if the OSFC cannot produce these documents, it should be precluded from claiming their existence during trial.

I. TransAmerica's Repeated and Prolonged Attempts to Obtain These Documents from the OSFC

The documents TransAmerica seeks with this Motion were previously requested in two (2) separate Requests for Production of Documents. TransAmerica issued its First Request for Production of Documents on August 13, 2013,[1] which specifically requested the occupancy permits and e-mails of Chris Simonson as shown below:

- Request #36 - Produce all certificate of occupancy permits issued for the Project including any temporary certificates.
- Request #49 - Produce all e-mails as it relates to the Project that Chris Simonson either received or sent.

The OSFC served a formal response on October 18, 2013, which did not direct TransAmerica to issue a subpoena directly to the Schools for Blind and Deaf and Lend Lease as it is now asserting.[2]

TransAmerica issued its Second Request for Production of Documents on March 28, 2014,[3] which specifically requested the signed "Posted Changes Set" of plans represented to exist by Lend Lease's Superintendent and the As-Built set of Plans.

- Request #3 - Provide the set of drawings for the dormitories that Lend Lease posted changes to and kept in its field office trailer as represented in the deposition of Jim Smith with Lend Lease.
- Request #4 - Provide the as-built set of plans for the dormitory portion of the Project.

---

[1] See TransAmerica's First Request for Production of Documents, attached as Exhibit A.
[2] See OSFC's Response to TransAmerica's First Request for Production of Documents, attached as Exhibit B.
[3] See TransAmerica's Second Request for Production of Documents, attached as Exhibit C.

On June 26, 2014 and prior to the Court's discovery deadline, counsel for TransAmerica provided a list of documents that remained outstanding,[4] which included the documents TransAmerica is requesting with this Motion. As shown below, the OSFC again failed to direct TransAmerica to subpoena these documents, but instead represented it would provide these documents, to the extent they could.[5]

From: William C. Becker <william.becker@ohioattorneygeneral.gov>
Sent: Wednesday, July 2, 2014 8:45 AM
To: Madigan, Michael
Cc: Craig Barclay; Margie Welsheimer; Jerry K. Kasai; Gregory, Don
Subject: RE: School for Blind and Deaf

Michael - we'll run down what we can.

William C. Becker
William C. Becker
Principal Attorney, Court of Claims Defense
Ohio Attorney General Mike DeWine
PHONE 614.466.7447
FAX 614.644.9185
EMAIL william.becker@ohioattorneygeneral.gov

150 East Gay Street, Floor 18
Columbus, Ohio 43215
www.ohioattorneygeneral.gov

From: Madigan, Michael [mailto:MMadigan@keglerbrown.com]
Sent: Thursday, June 26, 2014 4:55 PM
To: William C. Becker
Cc: Craig Barclay; Margie Welsheimer; Jerry K. Kasai; Gregory, Don
Subject: School for Blind and Deaf

Bill:

Attached is my list of outstanding discovery.

As a result, TransAmerica relied on the OSFC's representations and elected not to bring this to the Court's attention, especially since the parties were working towards the July mediation.

When mediation discussions reached a conclusion without a resolution, counsel for TransAmerica sent a second follow-up e-mail on September 5, 2014 to counsel for the OSFC, noting that many of the discovery issues mentioned in the June 26, 2014 letter remained unresolved.[6] On October 2, 2014, the OSFC eventually responded with some documents. At that time, the paralegal for the OSFC stated that the missing documents should be obtained via a subpoena to the Schools for Blind and Deaf and Lend Lease respectively. Keep in mind the

[4] See June 26, 2014 letter from TransAmerica's counsel, attached as Exhibit D.
[5] See July 2, 2014 e-mail from the OSFC in response to TransAmerica's letter, attached as Exhibit E.
[6] See September 5, 2014 e-mail from counsel for TransAmerica, attached as Exhibit F.

discovery deadline of June 27, 2014 had passed. Furthermore, the OSFC to date has not provided a response in the form of a pleading to TransAmerica's Second Request for Production of Documents other than e-mails from the OSFC's paralegal.

Failing to have received a formal response to its Second Discovery Request, TransAmerica sent a third follow-up e-mail on December 9, 2014, again noting that the documents and e-mails sought in this current Motion were still missing.[7] Most recently, on January 26, 2015, counsel for TransAmerica made yet another attempt to resolve this matter without involving the Court. Counsel for TransAmerica once again noted the outstanding discovery issues, explicitly referencing the documents and e-mails sought in this current Motion. The next day, the OSFC's paralegal again asserted to "[p]lease subpoena [Lend Lease or School for Deaf and Blind] directly."[8] At that point, it became apparent TransAmerica would need the Court's involvement in order to obtain access to these documents.[9]

II. Why These Documents Are Important to the Dispute and the OSFC Should Be Ordered To Provide Them

Each of the documents TransAmerica seeks with this Motion are important to understanding this dispute and discoverable under Civ. R. Rule 26(B):

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

---

[7] See December 9, 2014 e-mail from counsel for TransAmerica, attached as Exhibit G.

[8] See January 26-27, 2015 e-mail exchange between TransAmerican and the OSFC, attached as Exhibit H.

[9] The Court has discretion to decide whether or not to deem a motion to compel untimely. *Craig v. Bridges Bros. Trucking LLC* 2014 WL 3809786, 3 (S.D. Ohio) (S.D.Ohio, 2014). Here the parties' mediation in July of 2014 and the prolonged efforts of TransAmerica to resolve this dispute constitute good cause that the Court should treat this motion as timely

Equally important is that the OSFC should possess these documents as the public owner of a $40 million construction project.

a. The signed "Posted Changes Set" of plans as represented by Lend Lease's Superintendent

TransAmerica's claim is based on the OSFC's failure to provide full and accurate plans as required under R.C. §153.01. The OSFC's failure to comply with R.C. §153.01 is illustrated by the fact that TransAmerica bid and constructed the Project from a set labeled "Bid" rather than the set labeled "Construction," which is the set SHP used to obtain the permit approvals and repeatedly represented would be provided to TransAmerica. At some point in time during construction, the OSFC, presumably at SHP and LL's direction, elected not to provide TransAmerica the complete set labeled "Construction" that had been provided to the plans examiner for concerns the set still contained errors and would lead to additional costs on a Project that already had significant budget problems. Instead, the Project was constructed from the "Bid" set, supplemented by various sketches and RFI responses. Throughout this litigation, this set has been referred to as the "Posted Changes Set" of plans. As shown below, the Lend Lease Superintendent testified that TransAmerica "**had all changes on anything that was added in the project as it was added on these documents that TransAmerica signed off on monthly.**"

> Q: Now, you're aware that there was a – that TransAmerica was working off of a bid set of drawings, correct?
> ...
> A: Yes.
>
> Q: And you're aware that there was talk about providing them with an updated construction set of drawings –
>
> A: Yes.
> ...

Q: And you agree with me that update construction set of drawings, that complete set was never provided to TransAmerica.

A: I'm saying there was a complete set with all the updates, any RFI changes posted on a bid set of documents in both of my offices. So any changes, any RFI changes, any bulletins, anything that went out was posted in this set of drawings for TransAmerica to review. TransAmerica – each prime contractor had to come in monthly and review these drawings and sign off on them. So TransAmerica had all changes on anything that was added in the project as it was added on these documents that TransAmerica signed off on monthly.

. . .

Q: So you're telling me there's a set of plans where the prime contractors signed off on them?

A: Yes.

Q: Is that what you're telling me?

A: Yes.

Q: Is that – because I looked at all these documents.

A: Look on the front sheet of the as-built drawings that was posted and kept in the trailer throughout the whole project. Any time anything was added I personally would post that information in there, highlight it, and I made a little block up there, contract --- because this was to do with their pay apps, too.

Q: But I want to be very clear on this, because I have no seen that set of plans. And I've looked, and if it exists, I want to see it.

A: Oh, it exists.

Q: And I want to be very clear that you're telling me that there is a set of plans that you were updating that were signed by the other prime contractors.

A: Yes, for both sides.

. . .

A: They were required to come in and actually do any updates or changes on that – we call them redline drawings. That was part of their monthly – and dealt with their pay app. They were supposed to come in there, review these drawings for any changes. It's mentioned many times in my meeting minutes the drawings are in there, guys. You need to get in there and make sure you review them and sign them, the updated set of drawings. As updates come, they were

posted. **They were always there and available in both trailers for everyone to review, and they did have to sign them.**[10]

It was this revelation by Mr. Smith that a signed "Posted Changes Set" of plans existed that prompted TransAmerica to issue its Second Request for Production of Documents on March 28, 2014, which specifically sought this "set of drawings for the dormitories that Lend Lease posted changes to and kept in its field office trailer as represented in the deposition of Jim Smith with Lend Lease."

Despite the significance of these documents, the OSFC is now contending that TransAmerica should subpoena Lend Lease for them. However, counsel for TransAmerica had already subpoenaed Lend Lease for its entire Project File on August 13, 2013.[11] As seen in the attached e-mail, Lend Lease indicated on September 23, 2013 that it had fully responded to TransAmerica's subpoena.[12] Nonetheless, TransAmerica arranged to review Lend Lease's "entire Project Record" at Lend Lease's office on February 14, 2014. While making those arrangements, counsel for TransAmerica made it known that Lend Lease's Project File would include "[a]ny as-built set of plans in Lend Lease's possession" and "[t]he set of plans Lend Lease used during construction and that it updated throughout."[13] During its February 14, 2014 review, TransAmerica did not find a signed "Posted Changes" set nor a complete set designated as the As-Built plans.

Despite Jim Smith's deposition testimony and TransAmerica's repeated attempts to locate these drawings, both Lend Lease and the OSFC have failed to produce the mentioned set of signed "Posted Changes Set" of plans. If these documents really do exist, it is TransAmerica's right to review them before the upcoming trial. In particular, TransAmerica should have the

[10] See Jim Smith Deposition transcript, pages 41-44 (emphasis added), the specific pages are attached as Exhibit I.
[11] See subpoena issued by TransAmerica to Lend Lease requesting its "entire project file," attached as Exhibit J.
[12] See Lend Lease e-mail response to Subpoena, attached as Exhibit K.
[13] See February 4, 2014 e-mail from counsel for TransAmerica, attached as Exhibit L.

opportunity to identify differences in the "Posted Changes" Set, and the "Construction" Set to what was actually constructed.

Keep in mind that TransAmerica does not dispute that a "Posted Changes Set" of plans was kept in Lend Lease's trailer during construction. In response to a public records request made in 2012 and prior to its lawsuit being filed, TransAmerica did obtain a copy of what it believes to be that set. Importantly, that set is not signed by a single prime contractor. Additionally, TransAmerica is not certain that it has the latest version of the "Posted Changes Set" of plans. In particular, TransAmerica is not sure if later changes and posts were made after receiving its 2012 public records response. Again, it is critical that TransAmerica have the latest version of the "Posted Changes Set" of plans, and determine whether that set is signed by the prime contractors and includes the posted changes that took place for the entire Project.

If a signed "Posted Changes Set" of plans cannot be produced, the OSFC, including Lend Lease and SHP, should be precluded from testifying to its existence. They should also be precluded from asserting that a signed "Posted Changes Set" of plans is somehow an acknowledgement by TransAmerica that it had all the information necessary and approved the convoluted and confusing method of constructing the Project.

b. Project As-Builts for the dormitory portion

Similar to the argument above, TransAmerica is also seeking the As-Built set of plans. If the OSFC cannot provide an As-Built set, how could it expect TransAmerica to construct the Project with the plans SHP issued at bid time? The OSFC's failure to provide an As-Built set of plans would illustrate the difficulties TransAmerica had with constructing the Project. Alternatively, a properly updated As-Built set is critical to determine what was actually built and comparing that to what TransAmerica was asked to bid.

c. E-mails of Chris Simonson (from October 1, 2010 – March 1, 2014)

TransAmerica has identified Chris Simonson, as the representative associated with the Schools for Blind and Deaf most knowledgeable of the various issues surrounding the construction of the Project. TransAmerica has every right to have access to the e-mails of Mr. Simonson to determine what he was being told by Lend Lease and SHP. In particular, TransAmerica seeks to find out the impact that the Campus Wide Packages, not a responsibility of TransAmerica, had on the Schools for Blind and Deaf and its plans to utilize the dormitories. Additionally, TransAmerica seeks to review Mr. Simonson's e-mails relating to any alleged moisture infiltration arising from the shingle roofs and whether that infiltration was caused by ice build-up due to an inadequate attic design as TransAmerica has contended.

d. Certificate of Occupancy issued for the dormitory portion, including any Temporary Occupancy Permits

As shown in an e-mail by the OSFC's Project Administrator,[14] sometime around August 2012, it appears the dormitory portion of the Project received its occupancy permit. While the OSFC's Project Administrator acknowledged this as a "Major Milestone," the OSFC is somehow unable to provide the actual occupancy certificate. TransAmerica should have access to the actual certificate to review if it included any conditions and to determine the precise date of when occupancy (either temporary or full) was obtained.

III. OSFC Should Not Be Excused From Providing These Documents By Directing TransAmerica to Subpoena Other Parties

In response to TransAmerica's most recent requests for these documents, the OSFC directed TransAmerica to subpoena the Schools for Blind and Deaf and Lend Lease for the respective documents. This response is troubling for various reasons. First, TransAmerica has

[14] See page 169, lines 22-24, and page 170, lines 1-3, in the deposition of Madison Dowlen, attached as Exhibit M along with the referenced email.

already subpoenaed Lend Lease and made multiple trips in search of these documents. Additionally, the OSFC has previously asserted in another case before this Court that its construction manager is "indisputably the agent of the OSFC."[15] As its agent, the OSFC has control over these documents purportedly in the possession of Lend Lease as described under Ohio.R.Civ.P. 34(A). Fed.R.Civ.P. 34(a) allows a party to ask for, and requires a party to produce for inspection and copying, documents within the responding party's "possession, custody, or control." Ohio's R.Civ.P. 34(A) has a similar provision, which states a party may serve a request to produce documents "that are in possession, custody, or control upon whom the request is served." The general principles about when, for Rule 34 purposes, a client has "control" of documents in the possession of a non-party are fairly straightforward. "Control" is defined as "the legal right or ability to obtain the documents from another source upon demand...." *Mercy Catholic Medical Center v. Thompson,* 380 F.3d 142, 160 (3d Cir.2004). Neither physical possession nor legal ownership of the documents is required; "[c]ourts have also 'interpreted Rule 34 to require production if the party has the practical ability to obtain the documents from another, irrespective of his legal entitlement.' " *In re NASDAQ Market–Makers Antitrust Litigation,* 169 F.R.D. 493, 530 (S.D.N.Y.1996), *quoting Golden Trade S.r.L. v. Lee Apparel Co.,* 143 F.R.D. 514, 525 (S.D.N.Y.1992). In *Craig v. Bridges Bros. Trucking LLC*, No. 2:12-CV-954, 2014 WL 3809786, at *4 (S.D. Ohio Aug. 1, 2014), the court determined a principal-agent relationship existed. The court went on to order the principal to produce the documents and found the principal was wrong to insist a subpoena be issued to its agent.

When it comes to construction documents like these on public projects, courts have required public owners to produce them in response to a public records request. In *State ex rel.*

---

[15] See page 5 of OSFC's Memorandum Contra to Converse Electric, Inc.'s Motion to Compel Discovery (Case No. 2011-08571, attached as Exhibit N.

Cincinnati Enquirer v. Krings, 93 Ohio St.3d 654, 659, 758 N.E.2d 1135, 1141 (Ohio, 2001), the Supreme Court of Ohio ruled that documents pertaining to cost overruns of the Cincinnati Bengals Stadium project were public documents despite the fact they were in the possession of private entities, including the construction manager. Importantly, the court held that "governmental entities cannot conceal information concerning public duties by delegating these duties to a private entity." Similar to this case, TransAmerica sees no reason why the OSFC should be able to side step its obligations to provide these documents. This is especially true when the Supreme Court of Ohio has determined documents regarding a public construction project are public records even though they are in the possession of private entities.

With respect to the Schools, they both are public entities and the OSFC was administering this Project on their behalf. Former Executive Director for the OSFC, Richard Hickman, has previously stated the Schools were state agencies.[16] Furthermore, with respect to this Project, Mr. Hickman acknowledged in his deposition that the decision was made the OSFC would administer the entire Project without any involvement from the State Architect's Office.[17]

Lastly, TransAmerica has attached a privilege log that the OSFC previously submitted, which contains highlighted e-mails of other members of the Schools for Blind and Deaf that have not been released under a claim privilege.[18] If the OSFC wants to claim privilege for certain e-mails that were either sent to or received by members of the Schools for Blind and Deaf, it should be required to produce non-privilege e-mails of the School's on-site representative.

---

[16] See Pre-Proposal Conference for Professional Design Services, attached as Exhibit O and referenced on page 21 of Richard Hickman's deposition.
[17] See page 26 lines 8 – 21 of Richard Hickman's deposition, attached as Exhibit P.
[18] See OSFC Privilege Log (containing highlights), attached as Exhibit Q. It should also be noted the number of emails involving Lend Lease personnel that are also held under a claim of privilege, further supporting the agency relationship between the OSFC and Le+nd Lease.

IV. Conclusion

At best, the idea that these key project documents were never obtained or discarded reflects poorly on the OSFC's management of this Project and its use of tax payer dollars, which is a fundamental part of TransAmerica's claim. Accordingly, TransAmerica requests that this Court enter an Order granting TransAmerica's Motion to Compel Discovery and in particular for this Court to order the OSFC to provide the following documents:

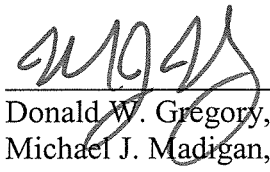
1. The signed "Posted Changes" Plans as represented by Lend Lease's Superintendent;
2. Project As-Builts;
3. E-mails of Chris Simonson (from October 1, 2010 – March 1, 2014); and
4. Certificate of Occupancy issued for the dormitory portion, including any Temporary Occupancy Permits.

In the alternative, if the OSFC cannot produce these documents, it should be precluded from claiming their existence during trial.

TransAmerica also requests an Order requiring the OSFC to pay all costs associated with this current Motion, including reasonable attorneys' fees, as provided in Civ.R. 37(4), and any additional sanctions the Court finds appropriate. The undersigned certifies that he has made reasonable efforts to resolve this matter through communication with counsel for the OSFC, as illustrated by the correspondence attached to this Motion. Those informal efforts, including correspondence, have proved fruitless, making this current Motion to Compel necessary.[19]

[19] Se Affidavit of counsel for TransAmerica, attached as Exhibit R.

Respectfully submitted,

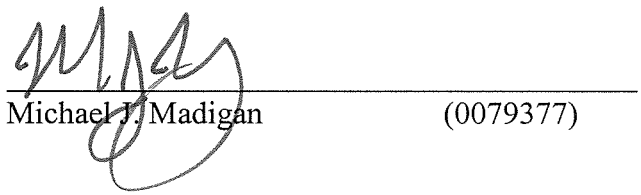


Donald W. Gregory, Esq. (0021791)
Michael J. Madigan, Esq. (0079377)
Peter A. Berg, Esq. (0092283)
Kegler Brown Hill & Ritter Co., L.P.A.
65 E. State Street, Suite 1800
Columbus, OH 43215-5400
(614) 462-5400; Facsimile: (614) 464-2634
dgregory@keglerbrown.com
mmadigan@keglerbrown.com
pberg@keglerbrown.com
Attorneys for TransAmerica Building, Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was sent via e-mail and by regular U.S. mail, postage prepaid, this 11th day of February, 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)