

FILED
COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

TRANSAMERICA BUILDING COMPANY, :
INC., :

2015 FEB 11 PM 1:24

Case No. 2013-00349

Plaintiff, :

Judge McGrath

v. :

Referee Wampler

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

Defendant. :

ORIGINAL

**PLAINTIFF TRANSAMERICA BUILDING COMPANY, INC.'S OBJECTIONS TO THE
REFEREE'S DECISION DENYING TRANSAMERICA'S MOTION TO SEPARATE**

Plaintiff TransAmerica Building Company, Inc. ("TransAmerica") hereby submits its objections to the Referee's decision to deny TransAmerica's Motion to Separate the third-party claims of Ohio School Facilities Commission ("OSFC") brought against Steed Hammond Paul, Inc. ("SHP"), the OSFC's project architect, and Lend Lease (US) Inc. ("Lend Lease"), the OSFC's construction manager/advisor. The Referee denied TransAmerica's Motion to Separate, reasoning that since TransAmerica's prior Motion did not "reference [] any evidence or authority in support," TransAmerica's Motion should be denied "without prejudice." *Id.* (underlining added).

TransAmerica hereby objects to the Referee's decision, setting forth additional evidence from key Project records and documents which prove an agency relationship existed between the OSFC, as principal, and SHP and Lend Lease, as its agents, at all times relevant to this dispute. Upon review of this evidence, the Referee should grant TransAmerica's Motion to Separate and issue an Order separating the OSFC's third-party claims from TransAmerica's claims brought against the OSFC.

ON COMPUTER

I. Argument.

The principles of agency are well-established in Ohio:

An agency relationship can be established under one of any several distinct agency theories. An agency can be shown by: (1) actual or express authority of the principal; (2) the actual implied authority of the principal; (3) the apparent authority of the agent, also referred to as agency by estoppel; and (4) ratification of the unauthorized acts of a person or agent by the principal.¹

At a minimum, SHP and Lend Lease were granted “express authority” to act as on behalf of the OSFC as its agents.²

A. The Contract Documents Provided Both SHP and Lend Lease With Authority to Act as “Agents” of the OSFC.

Express authority is that authority which is directly granted to or conferred upon the agent or employee in express terms by the principal, and it extends only to such powers as the principal gives the agent in direct terms.³

Here, SHP and Lend Lease were granted “express authority” to act on behalf of the OSFC as its agents through both the Project’s General Conditions and through SHP and Lend Lease’s independent contracts with the OSFC. Those same documents demonstrate that the OSFC retained control over SHP and Lend Lease at all times relevant to this dispute—a key indicia of an agency relationship.⁴

i. *SHP had authority to act as an “agent” of the OSFC.*

With respect to SHP, the Project’s General Conditions demonstrate that: (1) SHP had broad authority to act on behalf of the OSFC to achieve the OSFC’s (not SHP’s) objectives, and (2)

¹ *Texas-Tennessee Int’l, Inc. v. Marshall C. Rardin & Sons*, 9th Dist No. 12431, 1986 Ohio App. LEXIS 7994, citing Restatement of the Law 2d, Agency (1958).

² The OSFC also granted implied and apparent authority to both SHP and Lend Lease to act as its agents on this Project.

³ *Master Consol. Corp. v. BancOhio Nat’l Bank*, 575 N.E.2d 817, 820 (Ohio 1991).

⁴ Control is particularly important because it is a key indicia of an agency relationship. See, e.g., *Williams v. ITT Fin. Servs.*, 1st Dist. Nos. C-960234 and C-960255, 1997 Ohio App. LEXIS 2721 (June 25, 1997); *New York, C. & S. L. R. Co. v. Heffner Constr. Co.*, 3rd Dist. No. 691, 223 N.E.2d 649, syllabus (agency relationship “exists only when one party exercises the right of control over the actions of another and those actions are directed toward the attainment of an objective which the former seeks”).

SHP's authority was under the direct supervision and control of the OSFC. Therefore, an agency relationship existed between SHP and the OSFC at all times relevant to this dispute.

The Project's General Conditions⁵ grant broad authority to SHP to act as the OSFC's agent:

- As Project Architect, SHP's role on the Project was comprehensive: "protect the [OSFC] against Defective Work throughout the completion of the Project." (General Conditions, Article 3.1.);
- SHP was to do this by advising and consulting with the OSFC and the Project's Construction Manager, designating a Project representative to observe and check the quality and progress of the work, and attending the Project at regular intervals. (General Conditions, Section 3.1.1);
- Moreover, SHP was authorized to "take such action as is necessary or appropriate to achieve conformity with the Contract Documents." (General Conditions, Section 3.1.1.1);
- SHP could also disapprove or reject defective work to ensure "the integrity of the design concept of the Project as a functioning whole as indicated by the Contract Documents." (General Conditions, Section 3.1.2).⁶

While broad, the General Conditions also subject SHP's authority to the OSFC's control:

- Further, while SHP had authority to observe, review and check the progress and quality of the work and to reject defective work, SHP could do so only to the extent that (1) those actions "protect[ed] the Commission" or (2) ensured the integrity of the Contract Documents. (General Conditions, Section 3.1.1).
- For example, while SHP could designate its own Project representative, that designation was "subject to approval by the [OSFC]." (General Conditions, Section 3.1.1.1).
- Moreover, while the General Conditions instruct SHP to be present on the Project at regular intervals, SHP was also required to attend the Project "as may be deemed necessary by the OSFC." (General Conditions, Section 3.1.1.2).

⁵ See William Koniewich's Affidavit in Support, ¶3, attached hereto as Exhibit A.

⁶ SHP was also responsible for aiding the Construction Manager in facilitating an orderly construction of the Project. For that purpose, SHP was authorized to, in consultation with the Construction Manager, "authorize minor changes or alterations in the Work" that were "consistent with the intent of the Contract Documents." (General Conditions, Section 3.1.2), obtaining the necessary Project permits, (*Id.*), attending project and coordination meetings, (*Id.* at 3.2.1.2.), reviewing any forms required under the Contract Documents, (*Id.* at 3.2.1.4.), and rendering decisions with respect to the Contractor's responsibilities on the Project, (*Id.* at 3.2.1.5.).

- SHP was also required to “immediately notify” the OSFC “at any time [SHP] disapproves or rejects an item of Work.” (*Id.*).

The General Conditions also demonstrate that SHP’s authority was at all times subject to the direct oversight and control of the OSFC. This is seen clearly in Section 3.2.2 of the General Conditions:

3.2.2 The Architect is the initial interpreter of all requirements of the Contract Documents. All decisions of the Architect are subject to final determination by the Commission.

Thus, while SHP was the “initial interpreter” of the Contract Documents, it was the OSFC who retained authority to make “**final determination [s]**” regarding key Project decisions. (General Conditions, Section 3.2.2).

The OSFC retained similar control over SHP with respect to other Project tasks:

- For example, while SHP could designate its own Project representative, that designation was “subject to approval by the [OSFC].” (General Conditions, Section 3.1.1.1).
- Moreover, while the General Conditions instruct SHP to be present on the Project at regular intervals, SHP was also required to attend the Project “as may be deemed necessary by the OSFC.” (General Conditions, Section 3.1.1.2).
- SHP was also required to “immediately notify” the OSFC “at any time [SHP] disapproves or rejects an item of Work.” (*Id.*).

Taken as a whole, the General Conditions demonstrate that while SHP was granted broad authority to act on behalf of the OSFC to achieve the OSFC’s (not SHP’s) objectives, the OSFC retained control over SHP’s work at all times. In short, the General Conditions prove that SHP acted as an agent of the OSFC.

SHP's contract with the OSFC further supports this point.⁷ First, SHP's contract delegated broad authority to SHP to act on behalf of the OSFC.

- As part of SHP's "Basic Services" in the "Construction Phase," SHP was tasked with jobs that would be highly important to any project owner, including:
 - monitoring project costs, (SHP Contract, Section 2.7.11.),
 - evaluating and signing the Contractor's applications for payment, (SHP Contract, Section 2.7.12.),
 - and participating directly in the resolution of any Contractor claims, (SHP Contract, Section 2.7.15.).⁸

While broad, SHP's authority was again under the direct control of the OSFC:

- For example, SHP's services were to comply at all times with the "**Ohio School Design Manual (unless otherwise waived by [an OSFC] approved variance).**" (SHP Contract, Section 2.1.1.). Thus, the OSFC set the minimum standards of SHP's work.
- SHP was required to submit copies of design documents to the OSFC and to amend those documents at the sole discretion of the OSFC. (SHP Contract, Sections 2.4.2., 2.5.1.).⁹
- The OSFC also controlled SHP's work throughout the construction phase of the Project by requiring that SHP "shall provide its services during the Construction Phase in accordance with this Agreement and the Standard Conditions." (SHP Contract, Section 2.7.1.).
- SHP was required to report directly to the OSFC with respect to: any contract interpretation, any defective work found on the Project, and as to all contractor-submitted pay applications. (SHP Contract, Sections 2.7.2., 2.7.3., 2.7.12.).

⁷ SHP's Agreement for Professional Design Services is attached to the Motion for Leave of Defendant Ohio Schools Facilities Commission to File Third-Party Complaint Instantly as Exhibit A.

⁸ SHP was also responsible for: providing formal interpretations of the Contract Documents as necessary to complete the work, (SHP Contract, Section 2.7.2.), visiting the Project at regular intervals and observe the progression of the work, (SHP Contract, Section 2.7.4.), participating in all pre-construction, progress, and quality control meetings, (SHP Contract, Section 2.7.7.), reviewing and assessing submittals by the Construction Manager and the various Contractors, (SHP Contract, Section 2.7.9.), and preparing bulletins and other necessary documentation for changes in the work, (SHP Contract, Section 2.7.10.).

⁹ The OSFC's control over SHP is perhaps made most apparent by the fact that SHP was required to obtain the OSFC's written approval with respect to all of SHP's design documents. (See SHP Contract, Sections 2.4.2., 2.5.1.).

Perhaps most revealing, SHP's contract expressly limits SHP's authority "on behalf of the Commission" to those acts specifically authorized in SHP's contract:

1.1.11 Limitation of Authority. The Architect shall not have any authority to bind the Commission for the payment of any costs or expenses without the express written approval of the Commission or the Commission. The Architect shall have authority to act on behalf of the Commission only to the extent provided herein. The Architect's authority to act on behalf of the Commission shall be modified only by an amendment in accordance with Subparagraph 9.5.2.

(SHP Contract, Section 1.1.11.). This point is important, as courts have found similar contractual provisions compelling enough to establish an agency relationship on their own.¹⁰

In summary, the Project's General Conditions and SHP's contract demonstrate together that while SHP was given broad authority to act on behalf of the OSFC, SHP's authority was at all times controlled by the OSFC. Therefore, SHP was an "agent" of the OSFC at all times relevant to this dispute.

i. *Lend Lease had authority to act as an "agent" of the OSFC.*

As to Lend Lease, the General Conditions demonstrate the same two key facts: (1) the OSFC granted Lend Lease broad authority to act on the OSFC's behalf to achieve the OSFC's Project objectives and (2) while Lend Lease had that authority, the OSFC maintained control over Lend Lease's conduct. Thus, like SHP, Lend Lease was also an "agent" of the OSFC at all times relevant to this dispute.

The General Conditions delegate broad authority to Lend Lease to act on the OSFC's behalf:

- Among other responsibilities, the General Conditions tasked Lend Lease with scheduling and coordinating the work to "complete the Project in accordance with the Contract Documents." (General Conditions, Section 4.2.2.).

¹⁰ See *Kmart Corp. v. Meadowbrook, LLC*, 81 Va. Cir. 365, 369, 2010 Va. Cir. LEXIS 280 (December 21, 2010) (found agency relationship where "Standard Terms & Conditions" limited engineer's services to the "scope of services contained in the Contract."), discussed *infra* pg. 20.

- Lend Lease was to “develop and keep current the Construction Schedule” and maintain a “schedule of submittals which is coordinated with the Construction Schedule.” (General Conditions, Section 4.2.2.).
- Lend Lease was also required to monitor the performance of the work to ensure compliance with its Construction Schedule, (General Conditions, Section 4.2.4.), had authority to disapprove or reject defective work to ensure conformance with the Contract Documents, (General Conditions, Section 4.2.5.), and “with the Assistance of the Architect, shall render written recommendations . . . on any matter in question involving the Contractor.” (General Conditions, Section 4.2.10.).

While broad, Lend Lease’s authority—similar to the authority of SHP—was at all times subject to the OSFC’s control:

- For example, while Lend Lease had broad authority to coordinate and schedule the work, the General Conditions required that Lend Lease’s scheduling decisions “shall not exceed the time limits specified in the Contract Documents.” (General Conditions, Section 4.2.3.1.).
- In fact, Lend Lease’s conduct on the Project was at all times controlled by the OSFC’s pre-approved Contract Documents:
 - The OSFC could reject work only to ensure that the work “conforms to the Contract Documents.” (General Conditions, Section 4.2.5.).
 - Moreover, Lend Lease was to “monitor the progress of the Work for conformance with the Construction Schedule” and required to “initiate and coordinate revisions of the Construction Schedule as required by the Contracts Documents.” (General Conditions, Section 4.2.4.).
- Like SHP, Lend Lease was required to “immediately notify” the OSFC upon any rejection of defective work. (General Conditions, Section 4.2.5.).
- Further, while Lend Lease was given authority to “attend and conduct any and all progress and coordination meetings,” Lend Lease was also required to produce written reports of each meeting and to distribute that report directly to the OSFC, within three working days after the meeting. (General Conditions, Section 4.2.7.).

Indeed, important decisions—such as scheduling the Project’s working hours—were subject to the direct approval of the OSFC:

4.2 RESPONSIBILITY AND AUTHORITY OF THE CONSTRUCTION MANAGER

- 4.2.1 The Construction Manager shall consult with the Architect, the Commission and any governmental authority having jurisdiction over the Project, to obtain full knowledge of all rules, regulations or requirements affecting the Project. The Construction Manager shall establish the Project's regular working hours, subject to approval by the Architect and the Commission.

(General Conditions, 4.2.1.).

Taken as a whole, the General Conditions demonstrate that while the OSFC granted broad authority to Lend Lease to act on its behalf, Lend Lease was at all times under the direct supervision and control of the OSFC. In short, the General Conditions demonstrate that an agency relationship existed between the OSFC, as principal, and both SHP and Lend Lease, as agents, at all times relevant to this dispute.

As with SHP, Lend Lease's contract with the OSFC further supports this point.¹¹

Lend Lease had broad authority to act on the Project to ensure a timely and efficient completion of the Project.

- Among other items, Lend Lease was tasked with: recording the progress of the work, (Lend Lease Contract, Section 2.7.5.); scheduling the project, (Lend Lease Contract, Section 2.7.6.); scheduling, conducting, and participating in construction-related meetings, (Lend Lease Contract, Section 2.7.7.); and maintaining Project cost accounting records, (Lend Lease Contract, Section 2.7.11.).

At the same time, Lend Lease's authority was under the control of the OSFC.

- Lend Lease's contract sets forth **detailed procedures (prescribed by the OSFC)** by which Lend Lease was to: record the progress of the work; schedule the project; participate in meetings; and maintain cost-accounting records. (Lend Lease Contract, Sections 2.7.5, 2.7.6, 2.7.7., 2.7.11.).
- Lend Lease was also required to report directly to the OSFC throughout its Project activities. (Lend Lease Contract, Sections 2.7.3., 2.7.6., 2.7.12.).

¹¹ Lend Lease's Final Agreement for Construction Management Services is attached to the Motion for Leave of Defendant Ohio Schools Facilities Commission to File Third-Party Complaint Instantly as Exhibit B.

- Finally, as with SHP, Lend Lease’s contract also contains an **express “limitation of authority”** limiting the OSFC’s “authority to act on behalf of the Commission only to the extent provided herein.” (Lend Lease Contract, Section 1.1.11).

The fact that Lend Lease acted as an “agent” of the OSFC is further supported by the OSFC’s own position on this issue in a prior dispute. In 2012, the OSFC argued before this Court that its Construction Manager was “**indisputably** the agent of OSFC” for the purpose of the attorney-client and attorney work product privileges:

Plaintiff’s argument cites to the fact that the communications in question were shared with Rob Kelly, a consultant retained by OSFC. Under the Civil Rules, “A party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including his attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing of good cause therefor. Civ R. 26(B)(3). Here, Quandel is indisputably the agent of OSFC and Rob Kelly is a consultant retained by OSFC and its attorneys to aid in fact finding for the underlying dispute. Plaintiff’s argument overlooks the fact that “an agent acting on behalf of legal counsel...is subject to all the legal implications of the attorney-client and attorney work product privileges.” *Am Motors Corp.*, 61 Ohio St. 3d, 575 N.E. 2d 116, at 346; see *State v. Post*, 32 Ohio St. 3d 380, 385, 513 N.E. 2d 754 (1987) (The attorney-client privilege “includes communications through persons acting as the attorney’s agents.”).

The OSFC’s opposite argument here is not persuasive.¹²

In summary, the Project’s General Conditions and Lend Lease’s contract with the OSFC taken together demonstrate two key facts: (1) Lend Lease had broad authority to act on behalf of the OSFC as its agent, and (2) while that authority was broad, Lend Lease’s authority was at all

¹² See OSFC’s Memorandum Contra Motion To Compel Discovery, *Converse Electric, Inc. v. OSFC*, Oh. Ct. Claims Case No. 2011-09571, pg. 5, attached hereto as Exhibit B. The Referee should also note that in the initial stages of discovery in this case, the OSFC took the position that certain emails between the OSFC, SHP and Lend Lease were “privileged.” See Robert Grinch Email Log—Documents Withheld, attached as Exhibit C hereto.

times subject to the direct control of the OSFC. Therefore—as the OSFC recognized in *Converse Electric*—Lend Lease should be treated as an agent of the OSFC.

B. Other Project Records Show SHP And Lend Lease Acted as the OSFC's Agents.

SHP and Lend Lease's authority to act on behalf of the OSFC, and the OSFC's control over SHP and Lend Lease, can be also inferred from correspondence during the Project:

- For example, on July 18, 2011, Madison W. Dowlen, Project Administrator of the OSFC, wrote to SHP notifying SHP that it had failed to deliver important Project Documents, including the drawings and specifications for the Campus Wide Bid Package, on time and were delaying the Project. Dowlen wrote, "Please note if contractors submit delay claims as a result of drawings and specifications being received late, SHP will be expected to pay those costs."¹³
- On August 30, 2011, Clayton Keith, Project Manager for Lend Lease, put the OSFC on notice through a "Contract Notification" that because of delays in receiving corrected drawings, the Project was at risk of being delayed.¹⁴
- On November 15, 2011, Clayton Keith wrote to Madison Dowlen with two questions in relation to TransAmerica. Keith asked "can we go ahead and start assessing LD's based on the roof and window enclosure complete milestone." Seeking the OSFC's guidance, Keith continued, "Let me know your thoughts."¹⁵

These emails show that while SHP and Lend Lease had broad authority on the Project, both were also under the direct supervision and control of the OSFC throughout the Project.¹⁶

¹³ See email dated July 18, 2011, from OSFC Project Administrator Madison Dowlen, attached as Exhibit D hereto, which was previously authenticated as seen on Page No. 103 in the Deposition Transcript of Madison W. Dowlen already on file with the Court.

¹⁴ See email dated August 30, 2011, from Lend Lease Project Manager Clayton Keith, attached as Exhibit E hereto, which was previously authenticated as seen on Page Nos. 130-131 in the Deposition Transcript of Madison W. Dowlen already on file with the Court.

¹⁵ See email dated November 15, 2011, from Lend Lease Project Manager Clayton Keith, attached as Exhibit F hereto which was previously authenticated as seen on Page No. 143 in the Deposition Transcript of Madison W. Dowlen already on file with the Court.

¹⁶ The OSFC's control over the design team was established from day one. In the Pre-proposal Conference for Professional Design Services held on January 26, 2007, the OSFC made clear that the design team would need to follow the OSFC's detailed design requirements. Further, the OSFC made it clear that a particular firm would only be hired to perform services during the design phase if the OSFC was satisfied with that firm's services in the earlier stages of the Project. See January 26, 2007 Pre-Proposal Meeting Minutes, attached hereto as Exhibit G, which were previously authenticated as seen on Page No. 21 in the Deposition Transcript of Richard Hickman already on file with the Court.

SHP and Lend Lease's authority as agents can also be implied from the OSFC's conduct on the Project. In place of the OSFC, both SHP and Lend Lease were actively involved on the Project from start to finish.¹⁷ SHP and Lend Lease regularly attended project meetings, issued frequent correspondence directly to Project participants, and even maintained a consistent presence on the Project in a work-site trailer.¹⁸ Throughout SHP and Lend Lease's involvement on the Project, it was clear to all Project participants including TransAmerica that SHP and Lend Lease were acting in their capacity as representatives (or agents) of the OSFC.¹⁹ From the OSFC's conduct throughout construction, it was clear to TransAmerica that SHP and Lend Lease were present on the Project to represent the interests of the OSFC.²⁰

Illustrating this point, the OSFC permitted Lend Lease and SHP to approve change orders on its behalf which increased TransAmerica's contract amount. There are at least eleven such changes orders, which comprise over \$50,000, where only SHP and Lend Lease provided approval yet the OSFC allowed TransAmerica's contract to increase. In most cases, Lend Lease signed the change order on behalf of the OSFC.²¹ The OSFC also induced TransAmerica into believing, in good faith, that SHP and Lend Lease were agents of the OSFC.²²

II. Conclusion

Key project records show that an agency relationship existed between the OSFC, as principal, and SHP and Lend Lease, as its agents, at all times relevant to this dispute. Therefore, the Court should grant TransAmerica's Motion to Separate and issue an Order separating the OSFC's third-party claims pursuant to Civ.R. 14(A).

¹⁷ Koniewich Affidavit in Support, ¶4

¹⁸ Koniewich Affidavit in Support, ¶5.

¹⁹ Koniewich Affidavit in Support, ¶6.

²⁰ Koniewich Affidavit in Support, ¶7.

²¹ Koniewich Affidavit in Support, ¶8.

²² Koniewich Affidavit in Support, ¶9-12.

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 Objections to the Referee's Decision Denying TransAmerica's Motion to Separate was sent via e-mail and by regular U.S. mail, postage prepaid, this 17th 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)