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TRANSAMERICA BUILDING	)	
COMPANY, INC.,	)	
	)	
Plaintiff,	)	Case No. 2013-00349
	)	
v.	)	Judge McGrath
	)	
OHIO SCHOOL FACILITIES	)	Referee Wampler
COMMISSION,	)	
	)	
Defendant.	)	

**RESPONSE OF DEFENDANT/COUNTERCLAIM PLAINTIFF OHIO SCHOOL FACILITIES COMMISSION TO THE OBJECTIONS OF PLAINTIFF TRANSAMERICA BUILDING COMPANY, INC. TO THE REFEREE'S DECISION TO DENY THE MOTION TO SEPARATE DEFENDANT'S THIRD-PARTY CLAIMS INTO A SEPARATE TRIAL**

**I. INTRODUCTION**

Now comes the Defendant/Counterclaim Plaintiff, the Ohio School Facilities Commission ("Defendant" or "OSFC"), by and through counsel, and presents this Response to the Objections of Plaintiff Transamerica Building Company, Inc. ("TA" or "Plaintiff") to the Referee's Decision ("Decision") on TA's Motion to Separate the Third-Party Claims into a Separate Trial ("Motion"). Defendant OSFC hereby offers its Memorandum in Response to Plaintiff's Objections.

This case involves the construction of twelve new Dormitories for the Ohio School for the Deaf and Ohio State School for the Blind ("Project"). Plaintiff TA was the general trades prime contractor on the Project. Plaintiff filed suit claiming damages for what essentially inaccurate plans, poor scheduling and other delays. Plaintiff alleged these damages resulted from the actions of the construction manager hired by Defendant, Lend Lease ("CM" or "Lend Lease"), and the architect, SHP Leading Design

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("Architect" of "SHP). Defendant OSFC joined Lend Lease and SHP as third-party defendants, for the purpose of indemnification and contribution for the claims made by Plaintiff. No new claims were added through the third-party complaint.

Plaintiff then requested that the third-party claim for indemnification be severed and tried separately, essentially asking this Court to hold two separate trials. Those separate trials would have the same issues exact issues, the same exact witnesses, probably have the same counsel present-whether at counsel table, or in the gallery-with both trials lasting two to three weeks. Whether the second trial would have the same outcome as the first one is unknown, as well as an endless list of the logistical details which would be duplicative between two such trials.

The Referee denied the Motion for separate trials on those same issues to be tried, from which Plaintiff now objects. Defendant hereby offers its Memorandum in Opposition to Plaintiff's objections.

## **II. ARGUMENT**

### **A. Denial of Separate Trials is Within the Discretion of the Court**

It is well settled that "under Civ. R. 14(A), a trial judge has discretion to determine whether a third-party complaint should be tried with the primary claim, severed from it, or be tried separately." *State ex rel. Jacobs v. Municipal Court of Franklin Co.*, 30 Ohio St.2d 239, 241 (1972). This does not mean that such a determination is in the uncontrolled discretion of the trial judge; rather, such discretion is to be exercised only after it is determined that the allowance or denial of the third-party claim is consistent or inconsistent with the purposes of Civ.R. 14(A). *Id.* When any party objects to a third-party complaint, a trial court must determine whether the

third-party complaint should be tried with the claims in the complaint, severed, or tried separately. *Id.* at 241. To determine whether a third-party complaint should be tried with the claims in the complaint, a trial court should first consider whether the claims in the third-party complaint arise out of the transaction or occurrence that is the subject matter of the complaint or is in some way derivative of it. *Franklin Cty. Dist. Bd. of Health v. Paxson*, 152 Ohio App.3d 193, 2003-Ohio 1331, ¶¶ 13-18 (10th Dist. 2003). Second, a trial court should consider whether the third-party complaint is consistent with the purposes of Civ.R. 14. The Ohio Supreme Court in *Jacobs* held that the purposes of Civ. R. 14 are to:

1. promote judicial efficiency by avoiding a circuitry of actions;
  2. consolidate separate actions that should be tried together;
  3. avoid a duplication of testimony and evidence; and
  4. avoid inconsistent verdicts on identical or similar evidence or testimony.
- Jacobs*, 30 Ohio St.2d at 241.

Finally, a trial court should consider whether a third-party complaint states claims upon which relief can be granted. *State Farm Mut. Auto Ins. Co. v. Charlton*, 41 Ohio App.2d 107, 109-10, 322 N.E. 2d 333 (10<sup>th</sup> Dist. 1974).

First, this Court should conclude that the claims in the Third-Party Complaint arise from the same transaction or occurrence that is the subject matter of the Complaint or are in some way derivative of the claims in the Complaint. *Jacobs*, 30 Ohio St.2d at 242; *Paxson*, at ¶ 18. The actions complained of by Plaintiff directly arise from the actions of SHP and Lend Lease. Thus, the claims in the Third-Party Complaint arise from the same Agreement and/or are derivative of the primary claim in the Complaint based on the Agreement. The tort claims in the Complaint and the Third-Party Complaint are also directly linked to actions which Plaintiff claims were undertaken by SHP and Lend

Lease. To not have those parties in the case would be detrimental to the entirety of the case since essentially Plaintiff is asking for this Court to rule on its allegations without those that committed the alleged acts are unable to defend themselves.

Second, here there can be no doubt that holding separate trials would not serve any intent of Civ. R 14 as set forth in *Jacobs*. Accepting Plaintiff's arguments would require this Court to hold two trials when one would suffice. With two separate trials on the same causes of action, there would undoubtedly be duplication of testimony and evidence, with the possibility there would be an inconsistent verdict on the same evidence. There is no valid reason, as set forth in *Jacobs*, which would favor having separate trials.

Trying the third-party claim with Plaintiff's claims would be more economical and efficient than having separate trials. Rather than having two trials with the same witnesses and all the same issues, one trial would be much more efficient for this Court. Additionally, trying the claims together, the Court would not have to struggle with any issue preclusion/collateral estoppel type of situation, as SHP and Lend Lease would be present to defend their interests.

Additionally, there would only need to be one judgment entry, one Referee, one set of objections to the final judgment entry, one appeal and one transcript. Doing this case on a piecemeal basis would not serve to promote judicial efficiency or justice.

For these reasons there is no good reason why a separate trial would be beneficial and therefore, Plaintiff's objections to the Referee's Decision should be rejected.

**B. SHP is not an Agent**

Plaintiff spends the entirety of its Objections citing to contractual language in the

contracts of SHP and Lend Lease which it asserts demonstrates that these entities were agents acting on behalf of Defendant thereby requiring a separate trial. This argument fails in that the Supreme Court has made it clear through *Jacobs, supra*, that the trial court possesses the discretion as to whether to sever trials, or try the third-party claims together. Under the criteria set forth in *Jacobs*, this Court possesses the discretion to try claims together or to sever claims into separate trials. This Court, in exercising its discretion, has chosen to try the claims together.

Under Ohio law, an agent principal relationship exists only when one party exercises the right of control over the actions of another... *the basic test is whether the principal has the right of control over the manner and means of the work being done.* *Washington Mutual Bank v. Chiapetta*, 584 F. Supp. 2d 961, 970 (N.D. Ohio 2008), emphasis added. Plaintiff even points out various contract provisions in both the contracts of SHP which it alleges indicates that SHP was an agent of OSFC. Yet, none of those provisions details the manner and means upon which SHP was to accomplish those goals. How SHP accomplished those contractual requirements was within its discretion. Plaintiff's characterization of "control" amounts to approving the work product of SHP as satisfactory or not, not to control the manner and means.

As simply put above, SHP was not an agent of Defendant OSFC and under Plaintiff's logic, the third-party claim against SHP would not be required to be tried separately. Based on this alone and assuming *arguendo*, that *Lend Lease were an agent of Defendant OSFC*, it would make no sense, or be efficient use of this Court, to only try the Lend Lease third-party claim separately, while keeping SHP in this case.

### III. CONCLUSION

For the above stated reasons, the trials for the third-party claims against SHP and Lend Lease are more appropriately tried together with the claims of Plaintiff Transamerica and should not be tried separately. The facts are identical, the witnesses would be identical, the arguments and cause of action would be identical. In fact, Transamerica, in its Complaint, specifically references the actions of SHP and Lend Lease as the basis for its Complaint. To require separate trials would waste this Court's time and resources on duplicative trials, duplicative appeals and unnecessary time of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objections to Referee's Report was sent by email and regular U.S. mail, postage prepaid, this 25th day of February 2015 to:

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