



# Court of Claims of Ohio

The Ohio Judicial Center  
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Columbus, OH 43215  
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TRANSAMERICA BUILDING  
COMPANY, INC.

Plaintiff/Counter Defendant

v.

OHIO SCHOOL FACILITIES  
COMMISSION, etc.

Defendant/Counter  
Plaintiff/Third-Party  
Plaintiff/Counter Defendant

v.

LEND LEASE (US) CONSTRUCTION,  
INC.

Third-Party Defendant/Counter  
Plaintiff/Fourth-Party Plaintiff

and

STEED HAMMOND PAUL INC., etc.

Third-Party  
Defendant/Fourth-Party Plaintiff

v.

BERARDI PARTNERS, INC., et al.

Fourth-Party Defendants

Case No. 2013-00349

Referee Samuel Wampler

ORDER OF THE REFEREE

FILED  
COURT OF CLAIMS  
OF OHIO  
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On February 11, 2015, plaintiff/counter defendant, TransAmerica Building Company, Inc. ("TA"), filed an Objection to Magistrate's Decision ("Objection") denying its request for separate trials. On February 17, 2015, TA filed a motion ("Motion") to separate the trial of

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third-party plaintiff Ohio School Facilities Commission's ("OSFC") claims from the trial of TA's complaint and OSFC's counterclaim, along with its memorandum in support. On February 25, 2015, defendant/counter-plaintiff/third-party plaintiff OSFC filed its response ("Response") in opposition to the Objection filed by TA supported by its memorandum in support.<sup>1</sup>

OSFC cites *State ex rel. Jacobs v. Municipal Court of Franklin Co.*, 30 Ohio St.2d 239 (1972) for the proposition that the grant or denial of a motion to separate the trial of a third-party complaint is addressed to the sound discretion of the trial judge.<sup>2</sup> In the context of the issue before the court in *Jacobs*, that proposition remains the law today. However, the court in *Jacobs* was not asked to apply the following mandate of Civ.R. 14(A), which provides in part:

. . . [i]f 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***. Emphasis added.

An analysis of the emphasized words above determine the outcome of the Objection and Motion.

Here, ***plaintiff*** TA has moved the court for an order pursuant to Civ.R. 14(A) separating the trial of the third-party complaint against alleged ***agents*** of OSFC from the trial of TA's claims against OSFC. OSFC argues that the referee has discretion to grant or deny TA's motion and, in any event, even if there is proof of agency. In this regard, the OSFC is mistaken, for on the issue of discretion, the Supreme Court of Ohio has also stated:

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<sup>1</sup>This decision considers the Objection and the Motion as one in the same and therefore considers OSFC's response to the Objection as its opposition to both the Objection and the Motion as the issues are the same. Because the Objection was based on "additional evidence" an objection to the decision denying the request to separate pursuant to Civ.R. 14(A) was not ripe.

<sup>2</sup>Response, p. 2.

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Ordinarily, the word "shall" is a mandatory one, whereas "may" denotes the granting of discretion.

*Miller v. Miller*, 132 Ohio St.3d 424, 431 (2012), citing *Dennison v. Dennison*, 165 Ohio St.146, 149 (1956), in which the court held:

Although it is true that in some instances the word, "may," must be construed to mean "shall," and "shall" must be construed to mean "may," in such cases the intention that they shall be so construed must clearly appear. Ordinarily, the word, "shall," is a mandatory one, whereas "may" denotes the granting of discretion.

Civ.R. 14(A) does allow that "[a]ny party may move to strike the third-party claim, or for its severance or separate trial." Such a motion filed by "any party" under this provision of Civ.R. 14(A) would denote the granting of discretion. However, in the next sentence of Civ.R. 14(A) a motion by "any plaintiff" must be granted if the third-party defendant is an agent of the third-party plaintiff, in that the word "shall" was used in denoting the action to be taken on the motion. This is the basis for TA's motion and such action by the referee on such a motion, assuming it otherwise has merit, is not discretionary, but instead mandatory.

There is no language in the Civil Rules that expresses the intention that the word "shall" as used in Civ.R. 14(A) should be construed to mean "may." Unlike the Federal Rules, a decision to separate a third-party claim for trial based on a motion by any plaintiff is not addressed to the sound discretion of the trial court, so long as a third-party defendant was acting as an agent for a third-party plaintiff. While the referee agrees with OSFC that a single trial would promote judicial economy and should not unduly burden TA, TA is within its rights to demand separate trials, and accordingly the referee is without discretion to deny TA's motion, assuming a sufficient showing can be made that, for purposes of the motion, a third-party defendant was acting as an agent for OSFC, a third-party plaintiff.

On the question of whether the third-party defendants architect ("AE") and construction manager ("CM") were agents of the state, there is sufficient evidence to establish the agency. When OSFC filed its third-party complaint, it incorporated all

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allegations of agency made by plaintiff TA in its complaint on August 1, 2013.<sup>3</sup> OSFC also alleges in its third-party complaint that both the AE and CM were hired by contract with OSFC to perform design and management tasks for OSFC's project.<sup>4</sup> Copies of the contracts were attached to the Third-Party Complaint as exhibits A and B.

Additionally, the contract between TA and OSFC describes the authority granted by OSFC to the AE and CM, at least as represented by OSFC to TA.<sup>5</sup> For example, General Condition ("GC") 2.16.1 provides that the contractor shall promptly correct any work rejected by the Architect or the Construction manager--a clear grant of authority to the Architect and Construction Manager to act on behalf of OSFC when rejecting work by the contractor. In their Contract, TA and OSFC also agreed that the Architect was responsible for certain defined oversight as set forth in GC 3.1 (including "authority to disapprove or reject any item of Work" per GC 3.1.2) and for certain defined contract administration as set forth in GC 3.2. They also agreed that the Construction Manager's "Responsibility and Authority" in the contract would be as set forth in GC 4.2.

It is understandable, then, that when OSFC filed its Motion for Summary Judgment in this action on April 30, 2014, in its memorandum of support, it made the following argument:

Furthermore, a principal cannot be held liable for the intentional acts of its agent when those acts are outside the scope of the agency (citations omitted). **The CM's or AE's agency is limited by its contract with OSFC.** That contract does not in any way provide either the CM or AE the authority to intentionally withhold information from or fraudulently misrepresent facts material to a contractor. Accordingly, as a matter of law, OSFC is entitled to summary judgment on Plaintiff's allegations of fraud and fraud in the inducement contained in Counts Four and Five of the Amended Complaint.

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<sup>3</sup>Third-party Complaint, ¶¶ 18 and 19.

<sup>4</sup>*Id.*, ¶¶ 6-16, inclusive.

<sup>5</sup>Exhibit A to the Affidavit of William Koniewich in support of the Motion.

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OSFC also limited the authority of its CM and AE. For example, at paragraph 1.1.11 entitled "Limitation of Authority" in its contract with the CM the OSFC made clear that the CM had authority to act on its behalf, but only within the scope of its agreement with the OSFC.<sup>6</sup> A similar provision (paragraph 1.1.11) was included in OSFC's contract with the AE.<sup>7</sup> It is clear from these two contracts that the CM and AE were granted limited authority to act as agents on behalf of the OSFC during design and construction of the project. As the contracts were incorporated by reference into the pleading by OSFC they constitute judicial admissions regarding the authority granted to the AE and CM to act as agents for OSFC. As such, TA need offer no proof on the issue of agency, although it has done so.

It is elementary that a party who has alleged and has the burden of proving a material fact need not offer any evidence to prove that fact if it is judicially admitted by the pleadings of the adverse party.

*Gerrick v. Gorsuch*, 172 Ohio St. 417, 420 (1961).

Given the evidence presented, admissions and other matters of record, and consistent with the authorities cited by TA, a sufficient showing has been made that the AE and CM were both acting as agents of OSFC during construction of the project. Applying the mandatory language of Civ.R. 14(A), plaintiff is entitled to separate the trial of the third-party complaint from the trial of its claims against OSFC and counterclaims by OSFC against it.

TA's motion to separate the trial of the third-party complaint from TA's claims against OSFC in the main action and OSFC's counterclaims against TA is WELL-TAKEN and is therefore GRANTED. TA's February 11, 2015 and February 17, 2015 motions for separate trial are GRANTED. TA's February 17, 2015 motion for leave to file a brief in excess of the page limitation is GRANTED. TA's March 5, 2015 motion for leave to file a reply brief is GRANTED. The *May 18-June 5, 2015* trial shall pertain to TA's claims against

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<sup>6</sup>Exhibit B to the Third-Party Complaint, p. OSFC 4.

<sup>7</sup>Exhibit A (Professional Design Services Contract) to the Third-party Complaint, p. 4.

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OSFC and OSFC's counterclaims against TA. A separate trial shall be held as to the remaining claims at a later date. The March 3, 2015 and March 5, 2015 motions to continue the trial are DENIED as moot. A case management schedule shall be issued regarding the third-party and fourth-party claims at a later date.

On a related matter, on March 23, 2015, the court conducted a status conference with the parties. As a result of the conference, OSFC shall file a notice regarding the status of the documents, which are the subject of the pending motion to compel, within *one week* of the date of this entry.

  
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SAMUEL WAMPLER  
Referee

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