

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

2015 APR -8 PM 4:40

TRANSAMERICA BUILDING COMPANY, :
INC., :

Plaintiff/Counter Defendant :

v. :

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

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

Case No. 2013-00349

Judge McGrath

v. :

LEND LEASE (US) CONSTRUCTION, :
INC., :

Referee Wampler

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. :

**PLAINTIFF TRANSAMERICA BUILDING COMPANY, INC.'S RESPONSE TO THE
OBJECTIONS OF DEFENDANT OHIO SCHOOL FACILITIES COMMISSION TO
REFEREE'S ORDER GRANTING MOTION TO SEVER**

In a last ditch effort to avoid the clear and unambiguous meaning of Civ.R. 14(A), the Ohio State Schools Facilities Commission ("OSFC") files its Objections to Referee's Granting of

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TransAmerica's Motion to Sever ("Objections"). In support, the OSFC argues for the first time that Referee Wampler has no authority to rule on pretrial matters, but instead that the Court (Judge McGrath) must not only be intimately involved in all pre-trial matters, but is the *only* Court of Claims official authorized to rule on preliminary matters such as severing a trial based on a Rule of Civil Procedure. Alternatively, the OSFC asserts that the Referee's decision "makes no sense." (*See* OSFC's Objections, pg. 5).

I. Referee Wampler Had Authority Under R.C. 2743.03(C)(3) and Civ.R. 53 to Decide TransAmerica's Renewed Motion To Separate.

The frivolity of the OSFC's desperate, last-ditch effort to delay the fast-approaching trial is perhaps best shown by the fact that the OSFC does not cite a single case—in Ohio or otherwise—in support. The assertion is inconsistent with decades of practice here in Ohio, whereby the Orders of Referees on pre-trial construction matters before the Court of Claims have been treated with respect and deference, not only by the parties that litigate before this Court, but also by Court of Claims Judges, Appellate Judges, and Justices that oversee it. The OSFC also completely disregards Judge McGrath's Entry filed on March 24, 2015, providing that "[i]nasmuch as [TransAmerica's Renewed Motion to Separate] contains additional information that the referee has not yet considered, the referee shall rule on such a motion." (*See* Order of Judge McGrath, attached hereto as Exhibit A) (emphasis added).

The OSFC's argument is also inconsistent with the language of the relevant statute and the relevant Ohio Rule of Civil Procedure which govern here. First, the OSFC argues that the Chief Justice did not appoint Referee Wampler as a magistrate with all powers pursuant to Civ.R. 53. (*See* OSFC's Objections, pg. 3). However, the OSFC fails to acknowledge that the plain meaning of R.C. 2743.03(C)(3)—the statute that governs the appointment of referees in

construction-related disputes—*requires* the Chief Justice to do just that. R.C. 2743.03(C)(3) provides in relevant part,

Proceedings governing referees shall be in accordance with Civil Rule 53, except as modified by this division. The referee or panel of referees shall submit its report, which shall include a recommendation and finding of fact, to the judge assigned to the case by the chief justice, within thirty days of the conclusion of the hearings.

R.C. 2743.03(C)(3) (emphasis added).

Second, the OSFC suggests that R.C. 2743.03(C) limits Referee Wampler’s authority to the role of submitting a report, including recommendations and finding of fact, after the completion of trial. (See OSFC’s Objections, pg. 3). **However, no language in R.C. 2743.03(C)(3) suggests his authority is so limited.**

The most salient portion of R.C. 2743.03(C) here is that “[p]roceedings governing referees shall be in accordance with Civil Rule 53.” Civ.R. 53 provides that “to assist courts of record . . . magistrates are authorized, subject to the terms of the relevant reference, to do any of the following:

- (a) **Determine any motion in any case;**
- (b) Conduct the trial of any case that will not be tried to a jury;
- ...
- (e) Exercise any other authority specifically vested in magistrates by statute and consistent with this rule.”

Civ.R. 53(C)(1)(a) (emphasis added). Further, Civ.R. 53(D)(1)(b) enables a court of record to specify or limit the magistrate’s authority by “directing the magistrate to determine only particular issues [or] directing the magistrate to perform particular responsibilities.” Civ.R. 53(D)(1)(b).

Rather than limit the authority of a referee, R.C. 2743.03(C)(3) merely prescribes a mechanism by which the referee (or panel) is to timely submit its findings to Judge McGrath “within thirty days of the conclusion of the hearings.” That is, in keeping with the purpose of the Court of Claims statute, R.C. 2743.03 requires the referee or panel to submit its report in a timely fashion after the conclusion of a hearing. This is consistent with the fundamental goal of the “construction-referee statute” to ensure construction disputes are decided in a timely fashion by persons experienced in construction.

The OSFC also ignores the plain meaning of Civ.R. 53 which provides magistrates and, in this instance, referees, with authority to “[d]etermine any motion in any case.” Civ.R. 53(C)(1)(a). The OSFC also overlooks Judge McGrath’s Entry on March 24, 2015, specifically requiring Referee Wampler to consider and decide TransAmerica’s Renewed Motion. (Discussed *supra*, pg. 2). Judge McGrath ordered that “[i]nasmuch as [TransAmerica’s Renewed Motion to Separate] contains additional information that the referee has not yet considered, the referee shall rule on such a motion.” (See Order of Judge McGrath, attached hereto as Exhibit A) (emphasis added). Clearly then, Judge McGrath authorized Referee Wampler to hear and decide the Renewed Motion, as was Judge McGrath’s prerogative under Civ.R. 53(D)(1)(b) to direct “the [referee] to perform particular responsibilities.”

Finally, R.C. 2743.03(C)(3) does not suggest that the word “hearings” equates only to a “trial.” If that result was intended, the Legislature surely could have used the word “trial” itself in R.C. 2743.03. Instead, when left undefined by the Legislature, the word “hearings” is defined much more broadly, as “evidentiary hearings of some kind.” *Pruszyński v. Reeves*, 117 Ohio St. 3d 92, 94 (2008). And, in the absence of a statutory definition, the Ohio Supreme Court has left the task of defining the term “hearings” to the sound discretion of the trial court. *Id.*

II. Referee's Wampler Correctly Applied Civ.R. 14(A) And His Order Is Consistent With The Facts Of This Case.

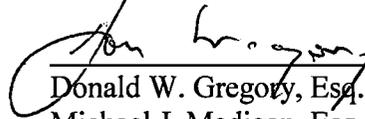
There are numerous independent reasons that support Referee Wampler's recent Order, which have all been thoroughly briefed in the Memoranda referenced below previously filed with the Court:

1. The OSFC has been aware of the nature of TransAmerica's claims against the Architect and Construction Manager advisor since at least March 8, 2012, when TransAmerica submitted its Certified Claim to the OSFC. (See TransAmerica's Memo in Opp. to Motion for Leave, filed January 9, 2015, pg. 4). But while the OSFC had clear notice of the nature of TransAmerica's claims against the OSFC *years* ago, the OSFC nonetheless waited until December 30, 2014 to file its third-party complaint asserting claims for indemnity and contribution against its Project Architect, SHP, and its Construction Manager, Lend Lease. (See OSFC's Motion for Leave, filed December 30, 2014).
2. By asserting its third-party claims months after the end of discovery in TransAmerica's case against the OSFC, and months after the cut off for expert reports, the OSFC's motion for leave to file its third-party complaint presented the real and substantial risk that trial in this case would be delayed again. To that point, trial had already been delayed twice—a total of ten months of delay from the original trial date. (See TransAmerica's Memo in Opp. to Motion for Leave, filed January 9, 2015).
3. At present, trial is currently scheduled for May 18, 2015, nearly two full years after this litigation was initiated in the Court of Claims on June 14, 2013. (See Complaint). Both sides recently confirmed to Referee Wampler in a conference call that they are "ready to go" to trial.
4. During that almost two year delay, the OSFC has withheld from TransAmerica over \$824,000 in "liquidated damages" penalties from TransAmerica's contract amount, without a legitimate justification. This is in addition to the millions of dollars in damages the OSFC caused TransAmerica to lose on this Project. (See Amended Complaint, filed on August 1, 2013).
5. While TransAmerica opposed the OSFC's Motion For Leave to File its Third-Party Complaint, TransAmerica also moved under Civ.R. 14(A) to separate the third-party claims of the OSFC against its agents from TransAmerica's claims against the OSFC. (See TransAmerica's Memo in Opp. to Motion for Leave, pgs. 7-8). The language of Civ.R. 14(A) is not complicated, and it bears only one reasonable interpretation. The Rule governing "Third Party Practice," provides in relevant part: "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).

6. As Referee Wampler correctly acknowledged in his recent opinion, the word “shall” is mandatory and removes discretion from the trial court. (*See Order of Referee Wampler, March 24, 2015, pg. 3*) (*citing Miller v. Miller, 132 Ohio St.3d 424, 431 (2012)*). Regardless of whether Referee Wampler has authority to rule on preliminary matters, Civ. R. 14(A) binds all courts in Ohio and removes discretion from any member of the judiciary asked to apply it.
7. Referee Wampler at first denied TransAmerica’s argument under Civ.R. 14(A) “without prejudice,” writing that TransAmerica had not—to that point—provided sufficient evidence and authority to establish that SHP, the Project’s Architect, and Lend Lease, the Project’s Construction Manager, were “agents” of the OSFC. (*See Order of Referee Wampler, January 28, 2015, pg. 3*).
8. As predicted by TransAmerica, shortly after leave was granted to the OSFC to file its Third-Party Complaint, both of the third-party defendants moved the Court for a continuance in the trial date. (*See Motion for New Trial Date by Third-Party Defendant Lend Lease, filed on March 4, 2015*). Additionally, the third-party defendants also sued multiple fourth-party defendants, complicating the dispute further and creating the real risk that if trial was indeed delayed again, that delay would be significant.
9. TransAmerica submitted its Renewed Motion to Separate citing abundant authority from Ohio and across the country that establishes the controlling rule: an Architect overseeing construction and a Construction Manager advisor managing a project act as “agents” of the Owner. (*See TransAmerica’s Renewed Motion to Separate, filed February 17, 2015*).
10. Proving that SHP and Lend Lease acted as “agents” of the OSFC at all times relevant to this dispute, TransAmerica also cited numerous provisions in the parties Contract, the Project’s Instructions to Bidders, and project correspondence which established—conclusively—that both SHP and Lend Lease acted on behalf of the OSFC and under the control of the OSFC at all times on the Project. (*See TransAmerica’s Renewed Motion to Separate, filed February 17, 2015*).
11. In light of this authority, this evidence, and prior admissions of the OSFC—who itself had made the argument that SHP and Lend Lease were agents of the OSFC under their contracts—Referee Wampler correctly determined that under the clear and unambiguous language of Civ.R. 14(A), he had no discretion but to grant TransAmerica’s motion to separate. (*See Order of Referee Wampler, March 24, 2015, pg. 5*)
12. Apart from a reasonable interpretation of the law, Referee Wampler’s Order avoids real and substantial prejudice to TransAmerica, who did nothing to bring about the current dilemma that has now haunted this dispute for months and cost TransAmerica significant legal expenses to defend.

In light of any or all of the reasons above, the Court should deny the OSFC's most recent Objections and allow this case to proceed to trial on May 18, 2015 without further delay.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFF TRANSAMERICA BUILDING COMPANY, INC.'S RESPONSE TO THE OBJECTIONS OF DEFENDANT OHIO SCHOOL FACILITIES COMMISSION TO REFEREE'S ORDER GRANTING MOTION TO SEVER was sent via e-mail and by regular U.S. mail, postage prepaid, this 8 day of April, 2015 to:

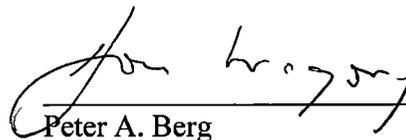
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