



Court of Claims of Ohio

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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

Judge Patrick M. McGrath
Referee Samuel Wampler

JUDGMENT ENTRY

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On October 1, 2014, the referee issued a decision recommending that defendant/counter plaintiff/third-party plaintiff/counter defendant's, Ohio School Facilities Commission (OSFC), motion for summary judgment be granted as to counts four, five and

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six, of plaintiff/counter defendant's, TransAmerica Building Company, Inc. (TransAmerica or TA), amended complaint. In the decision, the referee also recommends that OSFC's motion for summary judgment be denied as to the remaining counts of the amended complaint.

Civ.R. 53(D)(3)(b)(i) states, in part: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i). On October 15, 2014, TransAmerica and OSFC both filed their objections to the referee's decision.¹ On October 24, 2014, OSFC filed a response to TransAmerica's objections. On October 27, 2014, TransAmerica filed a response to OSFC's objections.

This case arises out of a public improvement project known as the Ohio State School for the Blind and Ohio School for the Deaf Projects (project). TransAmerica was the general trades prime contractor for the project. In his decision, the referee sets forth the following facts which form the basis for his recommendation:

Following bid opening, OSFC, through its agents represented to TA that an updated set of construction plans would be provided. On or about December 1, 2010, OSFC and TA entered into the contract for the project. As early as January 11, 2011, TA became aware that an updated set of approved construction plans had not been furnished by OSFC or its agents. On February 17, 2011, TA notified the Lend Lease, the construction manager for OSFC ("CM") that TA had not received a set of approved construction plans and without such plans its work would likely be impacted negatively, including potential delays and disruption to its work. The CM for OSFC responded on March 1, 2011 and indicated that a set of approved construction plans would be furnished on that date. They were not. TA mobilized to the worksite without updated approved construction plans and commenced work on the project. On March 1, 2012, TA sent OSFC notice of a claim

¹TransAmerica's October 15, 2014 motion for leave instanter to file a brief in excess of the page limitation is GRANTED.

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resulting from various causes, the majority of which are stated to be caused by OSFC or its agents. On March 8, 2012, TA submitted its certified and substantiated claim to the CM for OSFC. On September 5, 2012, TA's claim was denied by the CM for OSFC. On September 18, 2012, TA appealed the CM's decision to the OSFC. Thereafter, the parties pursued resolution through mediation rather than continuing with the appeal to the OSFC. On June 14, 2013, TA commenced this action in the court of claims against OSFC. Referee Decision, pgs. 8-9.

In its amended complaint, TransAmerica raises seven counts: (1) breach of contract, (2) equitable adjustment, (3) breach of express and implied warranties, (4) fraud, (5) fraud in the inducement, (6) negligent representation, and (7) negligence. OSFC moves for summary judgment as to all counts. In its motion, OSFC argues that (1) TransAmerica's claims are barred by the statute of limitations; (2) TransAmerica waived its claims by failing to follow the dispute resolution process set forth in Article 8 of the General Conditions; (3) OSFC is entitled to immunity for any allegations of fraud; (4) TransAmerica is unable to prove causation for its alleged damages; and (5) TransAmerica is limited to the amount of the original certified claim.

The referee determined that TransAmerica's claims of fraud, fraud in the inducement, and negligent representation are barred by the statute of limitation set forth in R.C. 2743.16(A). The referee determined that such claims do not arise out of the parties' contract and that such claims accrued at the latest on January 10, 2011, the point at which TransAmerica concluded that OSFC's alleged misrepresentations "made during and after the bidding process" were not true. Referee Decision, pg. 11. Inasmuch as TransAmerica filed its complaint in this court on June 14, 2013, the referee determined that such claims are barred by the two-year statute of limitations in R.C. 2743.16(A).

Regarding, TransAmerica's claims of breach of contract, equitable adjustment, breach of express and implied warranties, and negligence, the referee determined that such claims are not barred by the statute of limitations. The referee reasoned that such claims arise out of the parties' contract and are therefore subject to the dispute resolution

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procedure set forth in Article 8 of the General Conditions. The referee concluded that such claims did not accrue until after TransAmerica exhausted its administrative remedies set forth in the contract as required by R.C. 153.12(B). The referee determined that TA submitted its claim on March 8, 2012, but that such a claim did not accrue until its administrative remedies were exhausted on July 10, 2012. Inasmuch as TransAmerica filed its complaint in this court on June 14, 2013, the referee concluded that such claims are not barred by the two-year statute of limitations in R.C. 2743.16(A).

With respect to OSFC's argument that TransAmerica failed to follow the dispute resolution procedures outlined in Article 8, the referee concluded that the provisions of the General Conditions that waive or preclude liability for owner caused delays are unenforceable as against public policy. The referee further determined that OSFC, through its conduct, waived strict compliance with the Article 8 dispute resolution procedure. The referee reasoned that OSFC's rejection of TransAmerica's claim prior to substantiation and certification is an example of OSFC's conduct that amounted to a waiver of strict compliance.

Turning to the issue of causation, the referee ruled that genuine issues of material fact exist as to whether the delays and disruptions allegedly caused by OSFC constituted a breach of contract and whether such a breach caused damages to TransAmerica. Finally, the referee determined that OSFC has not provided any authority for the proposition that TransAmerica is bound by the amount set forth in its March 8, 2012 Certified Claim. Consequently, the referee recommended that summary judgment be granted as to TransAmerica's claims of fraud, fraud in the inducement, and negligent representation and be denied as to the breach of contract, equitable adjustment, breach of express and implied warranties, and negligence claims.

OSFC and TransAmerica both timely filed objections to the referee's recommendation. Additionally, TransAmerica provided additional evidence in the form of an affidavit of William Koniewich, President of TransAmerica, and meeting minutes from the project. TransAmerica sets forth three objections to the recommendation, generally

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challenging the referee's decision that its claims for fraud, fraud in the inducement, and negligent representation are barred by the statute of limitations. OSFC sets forth six objections challenging the referee's conclusions regarding the statute of limitations, proximate cause, application of Article 8, and whether there is a limitation of TransAmerica's claim to the amount listed in the certified claim.

As an initial matter, the court notes that Civ.R. 53(D)(4)(d) provides, in relevant part, "Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the [referee]." TransAmerica has not demonstrated that it could not produce the additional evidence for consideration by the referee. Indeed, OSFC argued in its motion for summary judgment that TransAmerica's claims were barred by the statute of limitations. TransAmerica has not demonstrated that it could not, with reasonable diligence, have produced such evidence for consideration by the referee. Accordingly, the court declines to consider the additional evidence, which was not considered by the referee.

Turning to the parties' objections, the court notes that many of the objections pertain to arguments previously considered and rejected by the referee or pertain to the additional evidence that TransAmerica has sought to put forth, which the court has declined to consider. The court has conducted a de novo review of the motion for summary judgment and the court agrees with the referee with the following exception. The referee determined that "to the extent damages are sought by TA as a result of delays caused by OSFC, the provisions of GC Article 8 that waive or preclude liability for such delays are unenforceable as against public policy." Referee Decision, pg. 17.

R.C. 4113.62(C)(1), provides in relevant part: "Any provision of a construction contract * * * that waives or precludes liability * * * when the cause of the delay is a proximate result of the owner's act or failure to act, or that waives any other remedy for a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, is void and unenforceable as against public policy."

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R.C. 4113.62(C)(1) was addressed in *Cleveland Construction Inc. v. Ohio Pub. Employees Ret. Sys.*, 10th Dist. Franklin No. 07AP-574, 2008-Ohio-1630. In finding a no damages for delay clause of the contract unenforceable as against public policy, the court of appeals stated “an owner cannot cause a delay, and then avoid the natural consequences for causing the delay by using boilerplate contract language.” *Id.* at ¶ 19. The contract at issue in *Cleveland Construction* contained a clause purporting to limit the remedies of the contractor and prohibit compensation for delay even when the delay was caused by the owner. *Id.* at ¶ 8-9. The court of appeals therefore held that such a prohibition amounted to a “no damages for delay clause” and was thus unenforceable as against public policy. *Id.* at ¶ 20-21.

By contrast, Articles 8.1.4, 8.2.2, 8.3.5, 8.4.2, and 8.5.3 of the General Conditions, clauses that the referee deemed to be unenforceable pursuant to R.C. 4113.62(C)(1), neither limit a contractor’s remedies nor waive liability for an owner-caused delay. Each provision states that a *contractor’s failure to comply* with the provisions set forth in Article 8 shall constitute an irrevocable waiver of the claim. Article 8 sets forth a dispute resolution process agreed upon by the parties to the contract. Such a dispute resolution process does not amount to a prohibition of damages or a no damages for delay clause. Indeed, the provisions of Article 8 setting forth the dispute resolution process have been enforced to the detriment of the contractor even when the delays may have been caused by the owner. *Cleveland Constr. Inc. v. Kent State Univ.*, 10th Dist. Franklin No. 09AP-822, 2010-Ohio-2906; *Stanley Miller Constr. Co. v. Ohio Sch. Facilities Commission*, 10th Dist. Franklin Nos. 10AP-298, 10AP-299, 10AP-432, 10AP-433, 2010-Ohio-6397. Therefore, the court declines to adopt the portion of the referee’s decision invalidating Articles 8.1.4, 8.2.2, 8.3.5, 8.4.2, and 8.5.3 as against public policy. To the extent that OSFC challenges such a conclusion, the objection is SUSTAINED. However, the court agrees with the referee’s alternative basis for denying summary judgment in that genuine issues of fact exist regarding whether OSFC waived strict compliance with the provisions set forth in Article 8. Therefore, the parties’ remaining objections are OVERRULED.

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Upon review, the court finds that the referee has properly determined the issues and appropriately applied the law with the exception set forth above. Therefore, the court modifies the referee's decision and recommendation consistent with the decision herein. OSFC's motion for summary judgment is GRANTED, in part, as to TransAmerica's claims of fraud, fraud in the inducement, and negligent representation but DENIED, in part, as to the remaining claims.



PATRICK M. MCGRATH
Judge

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