Court of Claims of Ohio

The Ohio Judicial Center
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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

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There are six motions pending before the court:

1. Plaintiff TransAmerica Building Company, Inc.'s Motion to Compel Discovery ("MOTION TO COMPEL") filed on February 11, 2015;

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2. Plaintiff TransAmerica Building Company, Inc.'s Motion in Limine ("MOTION IN LIMINE") filed on April 14, 2015; and

3. Plaintiff TransAmerica Building Company, Inc.'s Motion to Exclude Evidence Due to Spoliation ("MOTION TO EXCLUDE") filed on April 22, 2015;

4. Plaintiff TransAmerica Building Company, Inc.'s Motion for Leave to File Reply Brief ("MOTION TO REPLY") filed on April 28, 2015;

5. Third-party Defendant Lend Lease Construction, Inc.'s Motion to Reschedule the Non-oral Hearing Date ("MOTION TO RESCHEDULE") filed on May 6, 2015;

6. Plaintiff TransAmerica Building Company, Inc.'s Motion for Leave to File Reply Brief ("MOTION TO REPLY-SECOND") filed on May 7, 2015.

1. THE MOTION TO COMPEL.

On February 11, 2015, plaintiff TransAmerica Building Company, Inc. ("TA") filed its Motion to Compel Discovery ("Motion") along with Exhibits A through R, seeking an order for defendant Ohio School Facilities Commission ("OSFC") to produce the following documents:

Item #	Document Description
1	The Signed "Posted Changes Set" of plans as represented by Lend Lease's Superintendent;
2	Project As-Builts;
3	E-mails of Chris Simonson (from October 1 2010 - March 1 2014); and
4	Certificate of Occupancy issued for the dormitory portion including any Temporary Occupancy Permits.

On February 25, 2015, defendant OSFC filed its Memorandum in Opposition to the Motion ("Opposition"). On March 3, 2015, defendant OSFC filed its Supplement to Memorandum in Opposition to Plaintiff's Motion to Compel ("Supplement"). On March 24,

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2015, defendant OSFC filed its Second Supplement to Memorandum in Opposition to Plaintiff's Motion to Compel ("Second Supplement") reporting the status of its document production related to the items sought by TA's Motion. On March 27, 2015, defendant OSFC filed its Third Supplement to Memorandum in Opposition to Plaintiff's Motion to Compel ("Third Supplement") reporting the status of its document production related to the items sought by TA's Motion. On March 31, 2015, plaintiff TA filed its Reply ("Reply") to OSFC's previous supplements (Supplement, Second Supplement and Third Supplement) addressing the status of the document production. On April 3, 2015, defendant OSFC filed its Fourth Supplement to Memorandum in Opposition to Plaintiff's Motion to Compel ("Fourth Supplement") reporting the status of its document production related to the items sought by TA's Motion.

Status of Production: Based on the supplemental filings by OSFC and the reply by TA, it appears that Items #3 and #4 have been produced to the satisfaction of TA and that Item #2, the as-built drawings are in the process of being copied and produced. Production of Item #2 should occur no later than early in the week of May 4, 2015, according to discussions with counsel and the referee during a pretrial conference held on April 27, 2015. That leaves the matter of Item #1 for disposition by the instant Motion.

At the time of filing its Supplement on March 3, 2015, only Items #1 and #2 remained to be produced. In that regard, OSFC indicated in its Supplement that:

> "[t]he only documents **which exist**, which are the subject matter of Plaintiff's Motion to Compel is the as-built drawings. These documents are not in the possession of Defendant OSFC, but it is attempting to obtain them." [emphasis added].

From this statement it can be inferred that Item #1 does not exist and cannot be produced, despite testimony by Jim Smith, superintendent for the construction manager, to the contrary, i.e. that it did exist. Without further evidence regarding why Item #1 does not exist, it is not possible to fashion an appropriate sanction, if any, at this juncture. However, it is clear that no documents resembling Item #1 will be admissible at trial if they

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exist and were not timely produced during discovery. Testimony regarding Item #1 will be subject to the Ohio Rules of Evidence and will be addressed at trial, if at all.

Assuming that the as-built drawings (Item #2) have been copied and a copy thereof produced to plaintiff TA by no later than the week of May 4, 2015, it would appear that all documents sought by the motion which exist have been produced.

2. <u>THE MOTION IN LIMINE.</u>

On April 14, 2015, plaintiff TransAmerica Building Company, Inc. ("TA") filed its Motion In Limine ("Motion") along with Exhibits A through E, to limit testimony or other evidence related to OSFC delay damages it expects defendant Ohio School Facilities Commission ("OSFC") to present. On April 28, 2015, defendant OSFC filed its Memorandum in Opposition to the Motion. On April 29, 2015, TA filed its reply memorandum.[1]

It was recently observed by the 10th District Court of Appeals that:

> A motion in limine is a tentative, precautionary request to limit inquiry into a specific area until admissibility is determined during trial. *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, ¶ 35, 816 N.E.2d 1049; *accord Morgan v. Ohio State Univ.*, 10th Dist. No. 13AP-287, 2014-Ohio-1846, ¶ 34 (holding that an in limine order is "'a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of an evidentiary issue'"). An in limine ruling has no effect until it is acted upon at trial. *Morgan* at ¶ 34. Therefore, an appellate court need not review the propriety of such an order unless the claimed error is preserved by a timely objection, proffer, or ruling when the issue is actually reached during the trial. *Gable* at ¶ 35; *Cranford v. Buehrer*, 2d Dist. Montgomery No. 26266, 2015-Ohio-192, ¶ 13; *Faieta v. World Harvest Church*, 10th Dist. Franklin No. 08AP-527, 2008-Ohio-6959, ¶ 61.
>
> *Clemens v. Nelson Fin. Group, Inc.*, 10th Dist. Franklin No. 14AP-537, 2015-Ohio-1232, ¶ 52.

[1]TA's motion for leave to file its reply brief is granted as set forth later in this ruling.

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Traditionally, in limine motions are most valuable when a jury may potentially be prejudiced by hearing testimony that is likely to be inadmissible. Such is not the case here and, as pointed out in *Clemens*, to preserve the issue of admissibility of such evidence it must still be timely objected to at trial. Both parties are subject to L.C.C.R. 7(E) as it limits expert opinion testimony, and to the extent either party attempts to elicit expert opinion testimony that is not reflected in a written report provided pursuant to the requirements of L.C.C.R. 7, such testimony shall not be allowed. This is not to say if or when schedule analysis using critical path method by an expert witness will be required in this case. It will depend on the issue and the witness whose testimony is proffered at the time. If in fact it is determined that such analysis is required and can only be provided through expert opinion testimony, then the proffering party's compliance with L.C.C.R. 7(E) will, in the first instance, govern the admissibility of such evidence.

It should be noted that OSFC has not asserted a claim for liquidated damages by way of counterclaim or otherwise.[2] According to plaintiff's Amended Complaint, OSFC has wrongfully retained liquidated damages under its purported rights under the Contract.[3] TA has alleged in its Amended Complaint, filed on August 1, 2013, that OSFC wrongfully withheld payment under the contract between the parties in the amount of $824,605.42, including by wrongfully asserting liquidated damages against TA.[4] The contract, a copy of which was attached to the Complaint, filed on June 14, 2013, fixed the time for completion of TA's work under the contract and established the amount of liquidated damages to be assessed in the event the work was not completed by that time.[5] Such a clause is required

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[2] *See* Answer to plaintiff's Amended Complaint filed August 20, 2013.

[3] The Contract (see fn. 5, below) allowed OSFC to either "retain or recover" liquidated damages.

[4] *See* Amended Complaint, ¶¶ 56 and 62 f.

[5] *See* Exhibit A to the Complaint, Article 3. Although the contract is referred to in the Amended Complaint it does not appear that it was attached as stated therein. Accordingly, for purposes of ruling on the instant Motion, Exhibit A to the Complaint is used as a reference.

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by law and withholding liquidated damages is likewise required by law, provided the facts support withholding them.[6] Plaintiff alleges that OSFC breached the Contract by wrongfully withholding liquidated damages. It is plaintiff, not defendant who bears the burden of proving breach of contract, including wrongful withholding of liquidated damages by OSFC. OSFC need not offer any expert testimony on whether TA completed its work under the contract within the time fixed by the parties. It need only establish the date for completion, including any extensions sought and granted in accordance with the Contract Documents and, the date that all such work was completed such that Final Acceptance occurred. These basic facts can be established without the need for expert testimony or schedule analysis. The issues of time extensions that were or should have been granted in mitigation of liquidated damages, if any, will be addressed at trial.

3. THE MOTION TO EXCLUDE.

On April 22, 2015, plaintiff TransAmerica Building Company, Inc. ("TA") filed its MOTION TO EXCLUDE to preclude testimony or other evidence related to damages it anticipates OSFC will present in support of its claim for the cost of roof repairs. On May 6, 2015, defendant OSFC filed its Memorandum in Opposition to the MOTION TO EXCLUDE. On May 8, 2015, TA filed its reply memorandum.[7]

Notice under R.C. 153.17. R.C. 153.17 is optional for the owner, not mandatory. In the circumstances presented in this case it does not create a duty of notice and opportunity to cure in a situation where the contract was complete, but later discovered to

[6] *See* R.C. 153.19. "All contracts under sections 153.01 to 153.60, inclusive, of the Revised Code, shall contain provision in regard to the time when the whole or any specified portion of work contemplated therein shall be completed and that for each day it shall be delayed beyond the time so named the contractor shall forfeit to the state a sum to be fixed in the contract, which shall be deducted from any payment due or to become due to the contractor."

[7] TA's Motion for Leave to file its reply brief is granted as set forth later in this ruling.

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be defective.[8] Moreover, even if the statute applied and was mandatory, it appears from the evidence submitted that defendant OSFC substantially complied with the notice requirements.

This statute provides the public owner with the right to supplement forces and materials on a construction project and make demands upon a surety to take over the project if the owner elects to proceed in that manner during construction. Specifically, R.C. 153.17 provides in relevant part as follows:

> **(A)** When in the opinion of the owner referred to in section 153.01 of the Revised Code, the work under any contract made under any law of the state is neglected by the contractor or such work is not prosecuted with the ***diligence and force specified or intended in the contract,*** such owner ***may*** make requisition upon the contractor for such ***additional*** specific force or materials to be brought into the work under such contract or to remove improper materials from the grounds as in their judgment the contract and its faithful fulfillment requires.
>
> Not less than five days' notice in writing ***of such action*** shall be served upon the contractor or the contractor's agent in charge of the work. If the contractor fails to comply with such requisition within fifteen days, such owner with the written consent of the Ohio facilities construction commission, may employ upon the work the additional force, or supply the special materials or such part of either as is considered proper, and may remove improper materials from the grounds.
>
> [emphasis added].

R.C. 153.17 grants the owner the option to request ***additional*** forces, supply ***additional*** materials or remove materials from the grounds and is exactly that--an option, not a statutory obligation as TA contends. The word ***"may"*** as emphasized above makes this clear. When reading a statute to determine whether action to be taken under the statute is mandatory or optional, the Supreme Court of Ohio has given clear guidance:

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[8]Plaintiff alleges in the Amended Complaint at Paragraph 61, that it had substantially performed all of its obligations under the contract.

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> The character of a statute, as mandatory or permissive, is commonly determined by the manner in which particular terms used therein are construed.
>
> In determining whether a statute is mandatory or permissive, it is often necessary, as in this case, to trace its use of the terms "may" and "shall."
>
> The statutory use of the word "may" is generally construed to make the provision in which it is contained optional, permissive, or discretionary (*Dennison v. Dennison*, 165 Ohio St. 146 (1956)), at least where there is nothing in the language or in the sense or policy of the provision to require an unusual interpretation (*State ex rel. John Tague Post, v. Klinger*, 114 Ohio St. 212 (1926)).
>
> *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 107 (1971).

There is no evidence in support of the MOTION TO EXCLUDE that even remotely infers that TA was prosecuting the work at all, much less with any degree of ***"diligence and force specified or intended in the contract."***[9] In fact there is no evidence that TA was employing any forces or providing any materials to the jobsite when OSFC decided to take corrective action with respect to TA's work. Any action by OSFC to perform roof repairs could not have been "additional," or in addition to TA's diligence and force. To the contrary, as previously noted, according to TA's Amended Complaint it had substantially performed its obligations under the Contract.

Moreover, the owner must exercise its option to supplement the contractor's work in order to trigger its obligation to give five days' notice ***"of such action."***[10] It is apparent

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[9]In fact, TA has not cited to the record a complete copy of the contract from which it can be determined whether TA was prosecuting the work with the diligence and force required. Of course, as previously noted, TA has alleged that it substantially performed its obligations under the Contract in any event.

[10]Even if defendant OSFC was required to give five days' notice under R.C. 153.17, it appears to have satisfied that obligation when Exhibit A-1 to the MOTION TO EXCLUDE was sent to TA. Even though the email is described as a "96 hour notification" in fact called for a specific response in that it gave TA six days to make a firm commitment and plan of action with a proposed schedule for TA to correct its work on the roof. While there were intervening communications as evidenced by Exhibits A-2 and A-3, from the evidence presented TA did not provide the response requested, and in fact did not address what corrective action it would take, if any, for over 40 days.

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from all of pleadings and evidence submitted by TA in support of its MOTION TO EXCLUDE that TA was no longer on the jobsite. It also appears that in its letter dated September 12, 2014 (Exhibit A-4), while TA cites R.C. 153.01 (presumably this letter was prepared with the assistance and input from legal counsel as the parties were involved in the instant case and had been for over a year and the email transmitting the letter was copied to counsel), it makes no mention of its now alleged right to notice under R.C 153.17. For all of the foregoing reasons, TA has failed to show that defendant OSFC violated R.C. 153.17 when it undertook roof repairs.

Spoliation: The defendant OSFC is correct when it states that allegations of spoliation are serious. However, on the basis of the record before the court it cannot be determined that spoliation has occurred. For example, TA's disclosed expert witness, James S. Luckino, AIS CSI, stated in his report (Exhibit A-4) on p. 1/10 that he:

> "has visited the two sites and participated as an observer during selective invasive review of the as-built conditions of the roofs. This invasive review was conducted by Mays Consulting and Evaluation Services of Delaware, Ohio. Mays was retained by the Ohio School Facilities Commission (OFCC) [sic]. These invasive encounters were conducted on May 22, June 16, and June 17, 2014. During that time frame, Mays directed areas for selective demolition to verify how the assembly was completed."

Consideration of whether spoliation has occurred at this stage of the proceedings would be premature in light of this statement by Mr. Luckino.

Defendant OSFC contends that TA must plead spoliation and cites the Supreme Court of Ohio decision in *Smith v. Howard Johnson Co.*, 67 Ohio St. 3d 28 (1993), and because it has not been alleged in a pleading that TA cannot assert it in this action. This is not what the court in *Smith* said. The court in *Smith* was asked very specific questions by a federal district court and answered only those questions precisely. The federal court did not ask the court to opine on whether an action for spoliation was the exclusive remedy for such conduct in Ohio. In fact, other remedies have been recognized in Ohio by the

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Court of Appeals. For example, in Greene County, the Court of Appeals addressed an exclusion sanction based on alleged spoliation of evidence:

> There is logic in the contention that a court should consider a challenge to an expert's testimony prior to ruling on spoliation. If the scientific conclusions supporting the expert's claims of spoliation are invalid, there would be no reason to grant a motion for sanctions. However, we need not consider whether the trial court abused its discretion in the case before us, because we have already determined that the court erred in granting the motion for spoliation.
>
> *Hetzer-Young v. Elano Corp.*, 2d Dist. Greene No. 2013-CA-32, 2014-Ohio-1104, ¶ 50.

Following the logic of *Hetzer-Young*, it would seem prudent to first consider the proffer of expert testimony by defendant regarding the roof installed by TA or its subcontractor before considering an exclusion sanction.

Other Ohio courts that have considered an exclusion sanction without considering a claim in a pleading case for spoliation are: *Altercare, Inc. v. Clark*, 9th Dist. Lorain No. 12CA010211, 2013-Ohio-2785 and *Cincinnati Ins. Co. v. GM Corp.*, 6th Dist. Ottawa No. 94OT017, 1994 Ohio App. LEXIS 4960, fn. 3. (Oct. 28, 1994) "We are of the opinion that the better method to raise 'spoliation of evidence' within the context of a civil case is for sanctions under Civ.R. 37."

Here the cut-off date for discovery was June 27, 2014. To the extent there has been any spoliation of evidence, TA has known about it for at least the past 6-9 months and has not brought it to the attention of the court. Any motion under Civ.R. 37 would be well outside the discovery cut-off date and late at best.

Any matter of spoliation at this late date will be addressed, if at all, at trial.

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4. **THE MOTION TO REPLY.**

On April 28, 2015, plaintiff TA filed its MOTION TO REPLY and on May 6, 2015, defendant OSFC filed its Memorandum Contra in Opposition to TransAmerica's Motion to File Reply Brief.

L.C.C.R. 4(C) permits the filing of a reply brief with leave of court. On April 27, 2015, a pretrial conference was held. During the pretrial conference the referee indicated that he wanted to rule on all pending motions as soon as possible and if plaintiff intended to file a reply brief with regard to the MOTION IN LIMINE, it should be filed no later than April 30, 2015, which plaintiff TA in fact did. It would be fair to consider this as leave of court to file the reply brief.

5. THE MOTION TO RESCHEDULE.

On May 6, 2015, third-party defendant Lend Lease filed its MOTION TO RESCHEDULE. The referee considers this motion as a motion for an extension under L.C.C.R. 4(B) and therefore decides this motion ex parte. The referee finds there is no prejudice to OSFC by extending this date for two days as requested.

6. THE MOTION TO REPLY-SECOND

On May 7, 2015, plaintiff TA filed its MOTION TO REPLY to OSFC's Memorandum Contra Plaintiff's Spoliation of Evidence Motion in Limine. For good cause shown, the Motion is GRANTED. TA filed its brief on May 8, 2015.

ORDER ON MOTIONS

For the reasons set forth above, plaintiff TA's February 11, 2015 **MOTION TO COMPEL IS DENIED** as moot; plaintiff TA's April 14, 2015 **MOTION IN LIMINE** is **NOT WELL TAKEN** and is therefore **DENIED**; plaintiff TA's April 22, 2015 **MOTION TO EXCLUDE** is **NOT WELL TAKEN** and is therefore **DENIED**; plaintiff TA's April 28, 2015

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MOTION TO REPLY is **WELL TAKEN** and therefore **GRANTED**; third-party defendant Lend Lease Construction, Inc.'s **MOTION TO RESCHEDULE** is **WELL TAKEN** and is therefore **GRANTED**; and plaintiff TA's May 7, 2015 **MOTION TO REPLY** is **WELL TAKEN** and is therefore **GRANTED**. The non-oral hearing pursuant to L.C.C.R. 4(D) on Third-party Lend Lease's motion for summary judgment currently set for May 12, 2015, is hereby VACATED and is now set for a non-oral hearing on *May 15, 2015.*

for Gary Peterson
SAMUEL WAMPLER
Referee

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