

**ORIGINAL** IN THE COURT OF CLAIMS OF OHIO

FILED  
COURT OF CLAIMS  
OF OHIO

2015 MAY 11 PM 3:42

TRANSAMERICA BUILDING  
CO., INC.

Plaintiff,

v.

OHIO SCHOOL FACILITIES  
COMMISSION

Defendant.

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Case No. 2013-00349

Judge McGrath

Referee Samuel Wampler

**STATE OF OHIO'S MEMORANDUM CONTRA  
LEND LEASE'S MOTION FOR SUMMARY JUDGMENT OR  
IN THE ALTERNATIVE MOTION FOR LEAVE TO AMEND  
ITS THIRD PARTY COMPLAINT AGAINST LEND LEASE**

**I. INTRODUCTION.**

The State of Ohio hired Lend Lease to serve as its construction manager to oversee the successful construction of twelve new dormitories on the campus of the State of Ohio's School for the Deaf and Blind. As part of its duties, Lend Lease was to develop the schedules for the construction of these dorms.

The general contractor for this project is the Plaintiff in this case, Transamerica. Transamerica, in an effort to try and justify a claim nearly twice the size of its original contract, has based their claim, among other things, on poor scheduling.

The State moved, and was granted leave to add Lend Lease to this lawsuit in the event that Transamerica prevailed on its claims that related to Lend Lease's duties. However, Transamerica moved to sever the State's claims against Lend Lease which was granted.

Now, Lend Lease, relying on a indemnity provision relating to a negligence in one of their contracts for the State wants to escape any liability for their breach of contract duties that may have contributed to Transamerica's claim.

**II. LEND LEASE CANNOT ESCAPE THEIR CONTRACTUAL DUTIES TO THE STATE BY RELYING UPON A NEGLIGENCE INDEMINIFICATION PROVISION WITHIN ONE OF THEIR CONTRACTS.**

Lend Lease basis their Motion for Summary Judgment on one provision taken from one of the contracts that they had with the State that reads as follows:

Indemnification by Construction Manager Generally. To the fullest extent permitted by law, the Construction Manager shall and does agree to indemnify and hold harmless the Commission and their members, officers, employees and representatives from and against all claims, damages, losses, liens, causes of action, suits, judgments and expenses (including attorney's fees and other costs of defense), of any nature, kind or description, which (a) arise out of, are caused by or result from performance of the Construction Manager's services hereunder and (b) are attributable to bodily injury, personal injury, sickness, disease or death of any person, or to damage to or destruction of property, including the loss of use and consequential damages resulting therefrom, but (c) only to the extent they are caused by any negligent acts of the Construction Manager, anyone directly or indirectly employed by the Construction Manager or anyone for whose acts the Construction Manager is legally liable.  
(Hi-light added)

From the plain reading of this contract provision, the Court can see that it provides "generally" for indemnification of the negligent acts of Lend Lease. As Lend Lease points out in their Motion for Summary Judgment, such a provision would be necessary so that Lend Lease could determine what insurance it would need to procure to cover such liability. There is no provision in the contract that limits Land Lease's indemnification to only its negligent acts.

Nowhere in the portion of Lend Lease's contract presented to this Court is there any restriction on the State of Ohio's right to pursue Lend Lease for a breach of its contract with the

Nowhere in the portion of Lend Lease's contract presented to this Court is there any restriction on the State of Ohio's right to pursue Lend Lease for a breach of its contract with the State and the attendant duties it owed. In fact, it would make no sense for the State to enter into a contract with Lend Lease that laid out Lend Lease's duties for the nearly \$2 million dollars that it was to be paid on this project and then have no way to enforce those duties or recover for their breach. In fact, if Lend Lease had entered into a contract with unenforceable duties, it would be void for lack of consideration. The State would end up paying multi millions of dollars to Lend Lease for work that it didn't have to perform.

**III. ALTERNATIVE MOTION FOR LEAVE TO AMEND COMPLAINT.**

The State of Ohio made it clear in its Motion and subsequent Third Party Complaint that it was suing Lend Lease for, among other things, breach of contract.

The mere fact that this breach of contract is plead under the title of indemnification doesn't detract from the fact that there was sufficient notice pleading here. (See, e.g. *Kunz v. Buckeye Union Ins. Co.* (1982), 1 Ohio St. 3d 79 for the proposition that substance over form controls in pleadings and that a party will not be solely held to the title of the captions within its pleadings.)

However, if this Court believes that the pleadings should be clarified, the State of Ohio moves for leave to amend its Third Party Complaint to pursue its clear right of recovery for Lend Lease's breach of contract that form the underlying basis for any claim proven by Transamerica at trial.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *State Of Ohio's Memorandum Contra Lend Lease's Motion For Summary Judgment or in the Alternative Motion For Leave to Amend Its Third Party Complaint Against Lend Lease* was sent by regular U.S. mail, postage prepaid, this 21<sup>st</sup> day of April, 2015 to:

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