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ORIGINAL

IN THE COURT OF CLAIMS OF OHIO

TRANSAMERICA BUILDING COMPANY, :
INC., :

Plaintiff, :

v. :

OHIO SCHOOL FACILITIES :
COMMISSION, :

Defendant/Third-Party :
Plaintiff, :

v. :

STEED HAMMOND PAUL, INC. dba :
SHP LEADING DESIGN, :

Third-Party Defendant, :

and :

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

Third-Party Defendant/Third :
(Fourth) Party Plaintiff, :

v. :

G. STEPHENS, INC., :

Third-Party (Fourth-Party) :
Defendant. :

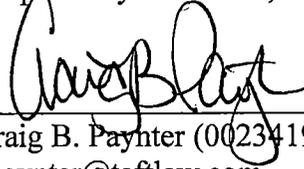
THIRD-PARTY DEFENDANT/THIRD (FOURTH) PARTY PLAINTIFF
LEND LEASE (US) CONSTRUCTION, INC.'S MOTION FOR LEAVE
TO FILE A REPLY BRIEF, INSTANTER

Third-Party Defendant/Third (Fourth) Party Plaintiff Lend Lease (US) Construction, Inc.

("Lend Lease") respectfully moves the Court, pursuant to Ohio Court of Claims Rule 4(C), for

an order granting Lend Lease leave to file a Reply to Defendant/Third-Party Plaintiff Ohio School Facilities Commission's Memorandum in Opposition of Lend Lease's Motion for Summary Judgment, *Instantly*. The reasons supporting this Motion are fully explained in the accompanying Memorandum in Support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

On April 10, 2015, Lend Lease filed a Motion for Summary Judgment with this Court. Defendant/Third-Party Plaintiff Ohio School Facilities Commission (“OSFC”) filed its Memorandum in Opposition to the Summary Judgment on May 11, 2015. OSFC’s memorandum contains what Lend Lease considers erroneous representations of its pleadings and of the contract documents. Lend Lease seeks leave to file its Reply Memorandum, *Instantly*, so the Court is presented with accurate facts and applicable Ohio law.

For the above stated reasons, Lend Lease respectfully requests that the Court grant Lend Lease leave to file its Reply to OSFC’s Memorandum in Opposition to Lend Lease’s Motion for Summary Judgment, *Instantly*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **THIRD-PARTY DEFENDANT/THIRD (FOURTH) PARTY PLAINTIFF LEND LEASE (US) CONSTRUCTION, INC.'S MOTION FOR LEAVE TO FILE A REPLY BRIEF, INSTANTER** was served by regular U.S. Mail, postage prepaid, this 14th day of May 2015, upon the following:

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Craig B. Paynter

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G. STEPHENS, INC., :

Third-Party (Fourth-Party) :
Defendant. :

Case No. 2013-00349

Referee Samuel Wampler

REPLY OF THIRD-PARTY DEFENDANT/THIRD (FOURTH) PARTY PLAINTIFF
LEND LEASE (US) CONSTRUCTION, INC. IN SUPPORT OF
ITS MOTION FOR SUMMARY JUDGMENT

AND

**MEMORANDUM IN OPPOSITION TO THE ALTERNATIVE MOTION FOR
LEAVE TO AMEND THE THIRD-PARTY COMPLAINT FILED BY DEFENDANT/
THIRD-PARTY PLAINTIFF OHIO SCHOOL FACILITIES COMMISSION**

I. Reply of Lend Lease in Support of Its Motion for Summary Judgment

Ohio School Facilities Commission (“OSFC”) bases its argument that the Motion for Summary Judgment is not well-founded on the hopes that the Court will modify the provisions of both its form contracts of adhesion and its Third-Party Complaint against Lend Lease (US) Construction, Inc. (“Lend Lease”). Only in this way can OSFC avoid the dismissal of its third-party claims against Lend Lease.¹

The Motion for Leave to File the Third-Party Complaint against Lend Lease in this case was filed by OSFC on December 30, 2014. That filing was preceded by approximately 18 months of exhaustive discovery and the continuance of at least two trial dates. After an exhaustive exploration of the facts underlying the project, as well as the claims of the parties prior to the filing of the Third-Party Complaint, OSFC distinctly and clearly identified its claims against Lend Lease as claims for indemnity and contribution. **NOWHERE IN THE THIRD-PARTY CLAIMS AGAINST LEND LEASE CAN THE COURT FIND THE THREE MAGIC WORDS UPON WHICH OSFC BASES ITS ARGUMENT IN THE MEMORANDUM CONTRA: “BREACH OF CONTRACT.”** Those words simply do not appear.

CLAIM OF CONTRIBUTION

OSFC does not bother to oppose Lend Lease’s argument that the Economic Loss Doctrine eliminates any ability of the State to seek contribution from Lend Lease. Lend Lease

¹ Lend Lease has filed a substantially identical motion for summary judgment, seeking to dismiss an identical Third-Party Complaint, in the companion case which arose out of the same project and which also remains pending in this Court, *Jutte Electric, Ltd. v. OSFC, et al.*, Ohio Court of Claims, Case No. 2014-00318.

has established that contribution is a tort claim, and due to the Economic Loss Doctrine, it cannot be considered a joint tortfeasor with OSFC. OSFC challenged neither the fundamental concepts of contribution nor the application of the Economic Loss Doctrine to bar the availability of any contribution claim. That contribution claim set forth in the Third-Party Complaint must be dismissed accordingly.

INDEMNITY CLAIM

OSFC does not dispute the characterization by Lend Lease of the Construction Manager Contract as OSFC's form contract. Neither does OSFC dispute the assertion that OSFC does not negotiate terms of those contracts. Rather, OSFC bases its argument opposing the Motion for Summary Judgment on a selective interpretation of the indemnification provision set forth in the Construction Manager Contract and upon a faulty suggestion that Lend Lease only addressed one of the several contracts which was signed by OSFC and Lend Lease.

First, OSFC argues that the Court should concern itself only with the third prong of the indemnification provision application requirements in § 6.2.1 of the OSFC form adhesion Contracts. OSFC points to provision "(c)" and suggests that the indemnification provision provides "generally for indemnification of the negligent acts of Lend Lease." (P. 2 of Memo Contra). To that extent, Lend Lease has no disagreement; Lend Lease acknowledges that prong "(c)" of the indemnification provision does require negligent acts of the construction manager.

However, OSFC focuses on this prong to the exclusion of the first two prongs, and more importantly, the second prong focused on by Lend Lease. OSFC again does not bother to address Lend Lease's argument straight up. By passing on an argument that prongs "(a)" and "(b)" [stated in the conjunctive (and)] are required as conditions prerequisite to Lend Lease's

liability under the indemnification provision, OSFC acknowledges the validity of the argument implicitly. OSFC would have this Court read the indemnification provision as if it were eliminating sub-condition “(a)” and “(b)” of the indemnification clause entirely. Both *Dugan & Meyers Constr. Co. v. ODAS, supra*, and *Cleveland Constr., Inc. v. Kent State, supra*, cited by Lend Lease in the Motion for Summary Judgment, hold that altering or ignoring contract language is inappropriate.

OSFC further complicates this unsupported myopic view of the indemnification provision by suggesting that Lend Lease only comments upon one of the many contracts between Lend Lease and OSFC for this project. Those contracts are attached to the Third-Party Complaint of OSFC, have been admitted and acknowledged by Lend Lease in its Answer (¶ 12), and can be viewed by the Court. Even a cursory review of those contracts indicates that Exhibits B, C, and E of OSFC’s Third-Party Complaint all contain the identical provisions on indemnification. Furthermore, Exhibits D and F to OSFC’s Third-Party Complaint are Amendments, but both contain the following language at ¶ F of those amendments:

The remaining terms and conditions of the Agreement for Construction Manager Services are effective to the performance of these services.

Consequently, all of the contracts between Lend Lease and OSFC for this project contain or incorporate the provisions upon which Lend Lease relies. OSFC would have the Court rewrite the indemnification provision in all of the contracts attached to its Third-Party Complaint by eliminating prongs “(a)” and “(b)” of the indemnification provision found in all of them.

NONEXISTENT BREACH OF CONTRACT CLAIM AGAINST LEND LEASE

OSFC stretches its argument to an illogical and unfounded conclusion where it argues that, “if Lend Lease had entered into a contract with unenforceable duties, it would be void for lack of consideration.” This argument is a logical strawman nonsequiter. Again, OSFC’s claims against Lend Lease are clear, distinctive, and unequivocal. They allege Lend Lease is liable to OSFC for contribution and indemnity. (¶ 23 of the Third-Party Complaint.) Further, the prayer for relief requests damages from Lend Lease based upon contribution and indemnity. Nowhere in the claims is there found the phrase “breach of contract.” OSFC could have alleged breach of contract, BUT DID NOT. Had such a phrase been inserted into a contract, OSFC’s argument for notice pleading might be cognizable, but that argument is unavailable. OSFC’s argument rises and falls on its hope that the Court will read into its Third-Party Complaint the existence of an allegation of a general “breach of contract,” which does not appear.

Furthermore, the Ohio Supreme Court has held that state courts seeking to interpret the Ohio Rules of Civil Procedure may look to decisions interpreting the federal rules for guidance. *State ex rel. Wright v. The Ohio Adult Parole Auth.*, 75 Ohio St.3d 82, 86 (1996). Moreover, several Ohio courts of appeal have adopted the holding of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), including the 8th District in *Parsons v. Greater Cleveland & Regional Transit Auth.*, 2010-Ohio-266, ¶ 11 (Cuyahoga Cty. Appeals) (“[T]he appellees’ obligation to provide the grounds for their entitlement to relief requires more than labels and conclusions, and a formula recitation of the elements of a cause of action will not do.”); and the 9th District in *Vagas v. City of Hudson*, 2009-Ohio-6794, ¶ 13 (Summit Cty. Appeals) (“[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and

conclusions [or] a formula recitation of the elements of a cause of action.”). OSFC neither labels its claims, makes a claim, nor requests relief based upon an enunciation of the three-word phrase – “Breach of Contract.”

II. Lend Lease's Memorandum in Opposition to the Alternative Motion by OSFC for Leave to Amend Its Third-Party Complaint

In a desperate attempt to salvage its case against Lend Lease, OSFC submits that it made “clear in its motion and subsequent Third-Party Complaint that it was suing Lend Lease for, among other things, breach of contract.” **NOTHING COULD BE FURTHER FROM REALITY.** The only clear notice Lend Lease can receive is from the claims written in the Third-Party Complaint and a breach of contract claim was not included.

OSFC made clear only that it was suing Lend Lease for claims based on contribution and indemnity. This was made clear in more than just the titles to captions within its pleadings, the language of the pleadings themselves set this forth clearly and unequivocally. The language of the prayer for relief also made it clear. Further, there was no mention of a generalized breach of contract allegation set forth in the caption, body, or prayer for relief of the Third-Party Complaint.

OSFC must have buyer's remorse for the language it chose for its Third-Party Complaint. However, this language was chosen after over a year and a half of vitriolic discovery and exploration of the facts, and leaves OSFC with a last ditch attempt to ask the Court to assess whether the Court believes it should “clarify” its allegations. Lend Lease submits that the allegations are distinct and clear and do not state a claim upon which relief can be granted.

At some point OSFC has to be viewed as having exhausted its ability to seek additional parties and join them to the case or to make additional allegations of parties improperly joined. No generalized notice of a breach of contract is found from the Third-Party Complaint, no specific allegation that Lend Lease was being pursued for a breach of contract of its obligations is made, no notice to Lend Lease under the contract is provided by OSFC or alluded to in its last

ditch Alternative Motion for Leave to Amend the Third-Party Complaint. Once again, OSFC is urging the Court to read language into the Third-Party Complaint that does not appear under the guise of “clarifying” the language. The Court’s discretion should not be employed in this case to allow amendment in the face of this Motion for Summary Judgment after the case has been pending for years.

CONCLUSION

OSFC attempts to avoid dismissal of its claims against Lend Lease by having the Court delete provisions in the indemnity clauses found in ALL of OSFC’s own adhesion contracts for this project and, alternatively, having the Court add an additional claim/count/cause of action not previously written or alluded to in OSFC’s Third-Party Complaint. Ohio courts, and indeed this Court, have clearly held contract terms should not be altered, ignored, or interpreted where they are clear and unambiguous. *See Dugan & Meyers Constr. Co. v. ODAS, supra*, and *Cleveland Constr., Inc. v. Kent State, supra*. The contract terms and claims asserted by OSFC were clear and should not be altered. No claim for breach of contract is generally or specifically stated, or implied.

With regard to the Alternative Motion for Leave to Amend its Third-Party Complaint, OSFC enlists the analysis of the Court by proposing, “if this Court believes the pleadings should be clarified . . . ,” then leave is requested. (Emphasis added). It is not the Court’s role to draft pleadings for the parties or make strategic decisions. OSFC, after at least 18 months of investigating the case and exploring discovery (in this and in the companion litigation), chose to plead causes of action based strictly in indemnity and contribution only. The time for filing amendments has passed when Lend Lease files its Motion which enables it to defeat the claims

selectively pled by OSFC, and it would be inequitable for the Court to allow amendments at this late date in the face of a dispositive motion for summary judgment.

The Motion for Summary Judgment should be granted. The Alternative Motion for Leave to Amend Third-Party Complaint should be denied. Lend Lease should be dismissed as a Third-Party Defendant as Ohio law and principles of equity require.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Reply of Third-Party Defendant/Third (Fourth) Party Plaintiff Lend Lease (US) Construction, Inc. in Support of Its Motion For Summary Judgment and Memorandum in Opposition to the Alternative Motion for Leave to Amend the Third-Party Complaint Filed By Defendant/Third-Party Plaintiff Ohio School Facilities Commission** was served by regular U.S. Mail, postage prepaid, this 14th day of May 2015, upon the following:

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