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FILED
COURT OF CLAIMS
OF OHIO

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IN THE COURT OF CLAIMS OF OHIO

TRANSAMERICA BUILDING CO., INC.	:	Case No. 2013-00349
Plaintiff,	:	Judge McGrath
v.	:	Referee Samuel Wampler
OHIO SCHOOL FACILITIES COMMISSION	:	
Defendant.	:	

REPLY, *INSTANTER*, OF DEFENDANT, OHIO SCHOOL FACILITIES COMMISSION, IN RESPONSE TO LEND LEASE'S ALTERNATIVE MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO AMEND

I. INTRODUCTION

On May 14, 2015, Lend Lease filed its Alternative Memorandum in Opposition to Defendant, Ohio School Facilities Commission's ("OSFC") Alternative Motion for Leave to File Amended Third-Party Complaint, asserting that OSFC should not be granted leave to add a breach of contract claim against Lend Lease because OSFC's original Third-Party Complaint against Lend Lease did not put Lend Lease on notice that OSFC was alleging that Lend Lease breached its contracts with OSFC. Lend Lease's Memorandum in Opposition is without merit.

First, OSFC's Third-Party Complaint quite clearly put Lend Lease on notice that OSFC was alleging that, to the extent Plaintiff would prevail against OSFC, OSFC's liability would arise out of Lend Lease's breach of contract. Lend Lease's assertions to the contrary are disingenuous.

Second, Lend Lease failed to provide any credible argument supporting bad faith, undue delay, or undue prejudice, the presence of which would negate what would otherwise be liberal

granting of leave to amend. Lend Lease did not claim bad faith. And any purported delay resulted from Lend Lease's own delay in moving to dismiss OSFC's Third-Party Complaint months after that complaint was filed. Indeed, the sole basis of Lend Lease's Motion for Summary Judgment is the pleadings and contractual language incorporated by reference into the pleadings. Lend Lease's Motion for Summary Judgment is in reality then, a Motion to Dismiss pursuant to Civ.R. 12(B).

In any event, Lend Lease has been severed from the trial of Plaintiff's case. The trial as between OSFC and Lend Lease has not even been set yet. Also, long before OSFC filed its Third-Party Complaint, Lend Lease's attorneys and employees have been involved in this case. Lend Lease's attorneys defended the depositions of Lend Lease's employees. In addition to the allegations in the Third-Party Complaint, Lend Lease has known since 2013 that Plaintiff's claims against OSFC rise or fall, in part, out of whether Lend Lease breached its contracts with OSFC. Thus, not only is there no undue delay, there is no undue prejudice.

Accordingly, Lend Lease's Alternative Memorandum in Opposition is without merit. To the extent this Court would construe OSFC's Third-Party Complaint as not including a claim against Lend Lease for breach of its contracts with OSFC, justice requires granting OSFC leave to amend to make that claim crystal clear to Lend Lease.

II. LAW & ARGUMENT

A. Lend Lease Has Been on Notice Since 2013 That OSFC's Claims Against It Would Be for Breach of Contract.

Lend Lease first asserts in its Alternative Memorandum in Opposition that OSFC's Third-Party Complaint against it did not in any way provide notice that OSFC is asserting a claim for breach of contract. Not so.

In its Motion for Leave to File Third-Party Complaint, *Instanter*, OSFC unambiguously stated that Plaintiff's claims against OSFC included duties Lend Lease owed to OSFC. *Motion for Leave to File Third-Party Complaint*, pp. 2-3. OSFC stated that none of Plaintiff's claims were based on the actions of OSFC's employees—Plaintiff's claims involve solely the actions of Lend Lease (and SHP). *Id.* Lend Lease agreed to those duties through contracts with OSFC. Thus, any breach of duty by Lend Lease would constitute breach of contract.

In addition, OSFC's Third-Party Complaint, attached to OSFC's Motion and later filed with the Court, provided that Lend Lease was the Construction Manager on the subject project; also outlined some of Lend Lease's duties; expressly identified the contracts OSFC had with Lend Lease; incorporated those contracts by reference; and attached those contracts to the Third-Party Complaint. *Third-Party Complaint*, ¶ 11-12.

Significantly, OSFC's Third-Party Complaint follows up references to and incorporation of those contracts with an allegation that the acts of Lend Lease's agents and employees related to the project were performed in furtherance of Lend Lease's duties under the contract. *Id.* at ¶ 13. OSFC's Third-Party Complaint also identified Plaintiff's claims and incorporated them by reference. *Id.* at ¶¶ 18-19. Finally, OSFC expressly alleged that, if OSFC is found liable for, among other things, breach of contract, Lend Lease would be liable to OSFC. *Id.* at 23.

Surely, under notice pleading standards, Lend Lease was put on notice that, to the extent OSFC were to be found liable to Plaintiff, OSFC was asserting a claim against Lend Lease for breach of its duties under the contracts with OSFC—i.e., breach of contract. This notwithstanding the fact that, at the time Lend Lease was joined to this litigation, Lend Lease and its attorneys were well aware of the issues. Lend Lease and its attorneys had been involved since 2013, defending depositions and the like. They knew then, and they know now, that any liability

Lend Lease would have as to OSFC would be for breach of contract. For Lend Lease to argue otherwise is without merit.

Moreover, implied within every contract is a right for one party to seek indemnification from the other party when the former may be liable for damages owed to a third party and that liability is secondary, or passive, to the latter party's primary, or active, liability for breach of its contractual duties. *Travelers Indemn. Co. v. Trowbridge*, 41 Ohio St.2d 11, 13-14, 321 N.E.2d 787 (1975)(stating that the right to indemnity arises out of contract, express or implied, and provides for reimbursement when a party is compelled to pay what another should pay). The bottom line is that OSFC's Third-Party Complaint put Lend Lease on notice that if OSFC were to be liable to Plaintiff for failing to properly schedule, coordinate, and sequence the project, then Lend Lease breached its contract by failing to properly perform those contractual duties.

B. Lend Lease Failed To Identify Bad Faith, Undue Delay, Or Undue Prejudice.

Civil Rule 15 provides in relevant part:

> **(A) Amendments.** A party may amend its pleading once as a matter of course within twenty-eight days after serving it or, if the pleading is one to which a responsive pleading is required within twenty-eight days after service of a responsive pleading or twenty-eight days after service of a motion under Civ.R. 12(B), (E), or (F), whichever is earlier. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. ***The court shall freely give leave when justice so requires.*** * * *
>
> **(E) Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. * * *

Civ.R. 15 (emphases added). Pursuant to the rule then, leave to amend should be freely granted where, as in this case, justice requires doing so and events (like Lend Lease's claim that it had no

idea they were defending against the terms of the contract) have occurred that require supplementation.

Civil Rule 15 allows for liberal amendment, and thus motions to amend pleadings pursuant to the rule should be refused ***only*** if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party. *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 99, 1999-Ohio-201, 706 N.E.2d 1261 (citation omitted). Lend Lease failed to demonstrate bad faith, undue delay, or undue prejudice in its Alternative Memorandum in Opposition.

Lend Lease did not suggest or imply bad faith. Lend Lease also did not demonstrate undue delay or prejudice.

OSFC moved for leave to file the Third-Party Complaint in late December 2014. Lend Lease moved for Summary Judgment on the basis that OSFC cannot recover from it under the terms of its contracts with OSFC. If Lend Lease truly believed that, Lend Lease could have filed a memorandum in opposition to OSFC's Motion for Leave, asserting that any claim against Lend Lease would be futile.

Similarly, Lend Lease's Motion for Summary Judgment is based entirely on the pleadings and contractual language incorporated by reference into the pleadings. Lend Lease's Motion for Summary Judgment is in reality then, a Motion to Dismiss pursuant to Civ.R. 12(B), or Motion for Judgment on the Pleadings pursuant to Civ.R. 12(C). Yet, Lend Lease did not file its Motion for Summary Judgment until months after OSFC's Third-Party Complaint was filed. Thus, any alleged delay as to getting this issue before the Court was caused by Lend Lease, not OSFC.

Moreover, Lend Lease failed to demonstrate undue prejudice. Lend Lease has been severed from the trial of Plaintiff's case. The trial between OSFC and Lend Lease has not even

been scheduled.

Lend Lease's attorneys and employees have also been involved in this case since 2013, long before OSFC filed its Third-Party Complaint. Lend Lease and its attorneys were involved in responding to written discovery. Lend Lease's attorneys defended the depositions of Lend Lease's employees.

Since 2013 then, Lend Lease has known that Plaintiff's claims against OSFC include duties that Lend Lease had contractually agreed to assume. Lend Lease has therefore been on notice for a long time that any claim filed against it by OSFC would be for Lend Lease's breach of contract. Thus, there would be no undue prejudice to Lend Lease if this Court grants OSFC leave to amend the Third-Party Complaint.

III. CONCLUSION

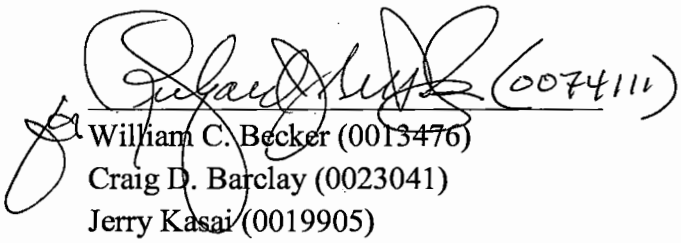
For the forgoing reasons, Lend Lease's Memorandum in Opposition to OSFC's Motion for Leave to File Amended Third-Party Complaint is without merit. Pursuant to notice pleading standards, OSFC's Third-Party Complaint put on notice Lend Lease that OSFC is pursuing Lend Lease for breach of contract. To the extent this Court would construe OSFC's Third-Party Complaint as not including a claim against Lend Lease for breach of its contracts with OSFC, justice requires granting OSFC leave to amend. OSFC's Alternative Motion for Leave is not made with bad faith, nor has there been undue delay and Lend Lease would not incur undue prejudice.

Indeed, the timing of Lend Lease's Motion for Summary Judgment is suspect. The issues raised in its Motion could have been raised when OSFC moved for leave to file the Third-Party Complaint, or immediately after the complaint was filed by way of a motion to dismiss. Lend Lease should not receive the benefit of waiting to raise the issue and then argue it is now too late.

Respectfully submitted,

MICHAEL DEWINE

Ohio Attorney General



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CERTIFICATE OF SERVICE

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