

ORIGINAL

IN THE COURT OF CLAIMS OF OHIO

FILED
COURT OF CLAIMS
OF OHIO
2015 MAY 28 AM 9:1

TRANSAMERICA BUILDING COMPANY, INC., :

Plaintiff/Counter Defendant :

v. :

OHIO SCHOOL FACILITIES COMMISSION :
nka Ohio Facilities Construction Commission, :

Defendant/Counter Plaintiff/ :
Third-Party Plaintiff/Counter :
Defendant :

Case No. 2013-00349

Judge McGrath

v. :

LEND LEASE (US) CONSTRUCTION, INC., :

Third-Party Defendant/Counter :
Plaintiff/Fourth-Party Plaintiff :

Referee Wampler

and :

STEED HAMMOND PAUL INC., etc., :

Third-Party Defendant/Fourth- :
Party Plaintiff :

v. :

BERARDI PARTNERS, INC., et al., :

Fourth-Party Defendants. :

TRANSAMERICA BUILDING CO., INC.'S MEMORANDUM IN OPPOSITION TO
OSCF'S MOTION TO SET ASIDE ORDER DENYING CIVIL RULE 54(B) MOTION

On May 18, 2015, Defendant Ohio School Facilities Commission ("OSFC") filed a "54(B) Motion For Revision/Reconsideration From Order/Judgment," asking the Court to reinstate the referee's January 28, 2015 Order denying a separation of trials, and to vacate both the referee's March 24, 2015 Order granting separation and the Court's entry of April 17, 2015

Entry affirming the granting of separation. In an Entry that same day, Judge McGrath denied OSFC's Motion (the "May 18th Entry"), and the trial proceeded.

OSFC now has filed a pleading it calls a "Motion to Set Aside The Referee's Order Denying the State's Civil Rule 54(B) Motion." OSFC states that the Motion is brought pursuant to Civ. R. 53(D)(2)(B). (Motion at 1.) OSFC's Motion should be denied for several reasons.

First, Civ. R. 53(D)(2)(B), by its very terms, pertains only to the setting aside of a magistrate's (or, in this case, a referee's) order. That Rule does not authorize a motion to set aside a Judge's Entry. The May 18th Entry that is the subject of OSFC's Motion was entered by Judge McGrath, not Referee Wampler. Thus, no motion to "set aside" under Civ. R. 53 lies.

Second, even if Civ. R. 53 authorized OSFC to move to set aside Judge McGrath's May 18th Entry, that ruling was correct, for the reasons stated within it. Referee Wampler's January 28, 2015 Order denying separation was expressly "without prejudice" to the re-filing, by TransAmerica, of a renewed motion to separate trials, and OSFC did not object to the "without prejudice" language in the January 28, 2015, Order. In addition, Civ. R. 14 *requires* separation of trials under the circumstances presented here, a point OSFC does not dispute in its Motion.

Finally, even if OSFC *had* objected to the referee's "without prejudice" language in the January 28, 2015, Order, such an objection would have been without merit. Under Civ. R. 53, the referee is empowered to enter those orders necessary to regulate the proceedings, and there is no authority cited by OSFC or otherwise to suggest that such an order may not be "without prejudice" to reconsideration upon the presentation of additional evidence or authority. To the contrary, under Civ. R. 54(B), an interlocutory order "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liability of all the parties." Such revision may take place at the request of a party, or on the court's own initiative. *Featherstone v.*

CM Media, Inc., 2002-Ohio-6747, at P16 (10th Dist. 2002) (trial court may “reconsider an interlocutory order at any time before the entry of final judgment in a case either *sua sponte* or upon motion.”)

For all of these reasons, TransAmerica requests that OSFC’s Motion be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFF TRANSAMERICA'S MEMORANDUM IN OPPOSITION TO OSFC'S MOTION TO SET ASIDE ORDER DENYING CIVIL RULE 54(B) MOTION was sent via e-mail this 28th day of May, 2015 to:

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