

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

2015 OCT 13 PM 3: 55

TRANSAMERICA BUILDING COMPANY,
INC.,

Case No. 2013-00349

Plaintiff/Counter Defendant

Judge McGrath

v.

Referee Wampler

OHIO SCHOOL FACILITIES
COMMISSION, nka Ohio Facilities
Construction Commission,

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.

**TransAmerica's Motion In Support of Prejudgment Interest
and Authority For Court To Issue Final Appealable Order**

Pursuant to the October 5, 2015 conference call with Referee Wampler, TransAmerica Building Company, Inc. ("TA") provides this motion to support its recovery of prejudgment interest. Additionally, TA provides authority supporting the discretion given to this Court to issue

a Final Appealable Order with respect to the claims involving TA and OSFC that were subject of the trial that commenced on May 18, 2015 and culminated in the Referee's comprehensive September 17, 2015 Decision.

I. Prejudgment Interest Rate

TA calculated per diem rates for the three (3) sources of recovery that make-up the total \$1,837,404.35 award in the Referee's September 17, 2015 Decision and those respective amounts are noted below:

LD Amount	\$ 686,000.00
Contract Balance	\$ 131,667.40
Claim Amount	\$ 1,019,736.95
Total Award	\$ 1,837,404.35

Based on GC paragraph 8.14 (JX-B), the rate of prejudgment interest on a Claim "shall be the applicable statutory rate." Accordingly, the award of prejudgment interest is governed by R.C. 2743.18(A) and 1343.03(A). R.C. 2743.18(A)(1) provides that "[p]rejudgment interest shall be allowed with respect to a civil action on which a judgment or determination is rendered against the state for the same period of time and at the same rate as allowed between private parties to a suit." When computing the amount of prejudgment interest, the court is to look to R.C. 1343.03(A) to determine when the interest commences and the legal rate of interest to apply. Under R.C. 1343.03(A), when money becomes due on a contract, the "creditor is entitled to interest at the rate per annum per determined pursuant to section of 5703.47 of the Revised Code."

R.C. 5703.47 states that "[f]or purposes of any section of the Revised Code requiring interest to be computed at the rate per diem annum required by this section, the rate determined by the commissioner (Ohio Tax Commissioner) under this section, rounded to the nearest whole

number per cent, plus three per cent, **shall** be the interest rate per annum used in making the computation for interest that accrues during the following calendar year.” The Ohio Tax Commissioner has certified an interest rate of 3% for the applicable years in this case as shown below:

The screenshot shows the Ohio Department of Taxation website. The main heading is "Ohio Department of Taxation". Below the navigation bar, there is a section titled "Tax Professionals" with a sub-section "Annual Certified Interest Rates".

Annual Certified Interest Rates

By Oct. 15 of each year, the Ohio Tax Commissioner certifies the interest rates that will apply to overdue taxes during the next calendar year. For most taxes, the interest rate is calculated by adding three percentage points to the federal short-term rate (rounded to the nearest percentage point) that was in effect during July of the current year.

Based on this formula, the Tax Commissioner has certified that the interest rate that will apply to most overdue taxes will be 3 percent. A table of interest rates that apply to previous years may be found below.

Since July 1, 2005, a different rate of interest has applied to overdue estate taxes and tangible personal property taxes. This rate is calculated by simply rounding the federal short term rate to the nearest percentage point. Accordingly, the interest rate on overdue tangible personal property and estate taxes will be 0 percent. See Table 2 for the rate in effect in previous years.

An example of how to calculate interest using these tables is also listed below, as well as copies of recent journal entries certifying these rates.

Calendar Year	Annual Rate	Monthly Accrual
2015*	3.0%	0.25%
2014*	3.0%	0.25%
2013*	3.0%	0.25%
2012*	3.0%	0.25%
2011*	4.0%	0.33%

In accordance with the Court’s direction that a hearing to determine prejudgment interest was unnecessary, the Referee has discretion to take judicial notice of the statutorily mandated 3% interest rate determined by Ohio’s Tax Commissioner since that rate is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Evid. R. 201(B).

II. Prejudgment Interest on \$686,000.00 for Wrongfully Withheld Liquidated Damages

With respect to the \$686,000.00 in wrongfully withheld liquidated damages, prejudgment interest on such amount differs depending on the year. For years 2012 and 2013, TA determined its prejudgment interest (at a rate of 3%) from the date the pay applications were signed by the

OSFC. This is consistent with R.C. 153.14, which applies to all public improvement contracts, and reads in part:

Payment on approved estimates filed with the owner or its representative shall be made within thirty days. Upon the failure * * * to make such payments within thirty days * * * there shall be allowed to the contractor, in addition to any other remedies allowed by law, interest on such moneys not paid within thirty days.

In *Ernst v. Ohio Dept. of Adm. Serv.* (1990), 69 Ohio App.3d 330, 337, 590 N.E.2d 812, 817, the 10th District Court of Appeals determined that R.C. 153.14 controlled over a nearly identical contract provision found in GC subparagraph 9.2.2 (JX-B). The Court also noted that R.C. 153.12, which specifically addresses partial progress payments, reads in pertinent part:

“Partial payment to the contractor for work performed under the lump sum price **shall** be based on a schedule prepared by the contractor *and approved by the architect or engineer* who shall apportion the lump sum price to the major components entering into or forming a part of the work under the lump sum price.” (Emphasis added)

Accordingly, the Court in *Ernst* found that the thirty-day (30) period begins to run once the payment request has been both submitted to the owner and approved by the associate architect. However, approval by the associate architect must be made within a reasonable time. *Id.* at 338, 590 N.E.2d at 817. Where approval is not given within a reasonable time, the thirty-day (30) period will be deemed to expire at the end of the reasonable time. *Id.* at 338, 590 N.E.2d at 817.

Applying the “reasonable time” requirement to the approval of its pay applications, TA calculated its prejudgment interest based on the date the pay applications were signed by the OSFC for pay applications 10 thru 15 (see JX-G-10 thru JX-G-15). Pay applications 16 and 17 were not signed by the OSFC. However, Bill Koniewich, through TA-0732, provided testimony as to the wrongful withholding of sums and when such amounts were due. In accordance with TA-0732 and consistent with the dates reflected in pay applications 10 thru 15, the dates of July 20, 2012 and August 20, 2012 have been used as the dates the OSFC should have signed pay applications 16

and 17. This results in an average of 37 days between the date the pay application was signed by TA and the OSFC.¹ Accordingly, TA's prejudgment interest for the liquidated damage amounts wrongfully withheld during the years 2012 and 2013 totals \$42,557.11 (= \$19,136.56 + \$23,420.55). See the calculations below for details:

Pay App No.	Period To	Date Signed By TA	Date Signed By OSFC	Amount	01-2012	02-2012	03-2012	04-2012	05-2012	06-2012	07-2012	08-2012	09-2012	10-2012	11-2012	12-2012	Total	2013	2014	2015	Grand Total
10	12/10/2011	12/28/2011	1/30/2012	296,000.00	24.26	703.61	752.13	727.87	752.13	727.87	752.13	727.87	752.13	727.87	752.13	8,152.13	8,880.00	1,680.00	1,680.00	20,392.13	
11	1/10/2012	1/25/2012	3/20/2012	90,000.00			81.15	221.31	228.69	221.31	228.69	228.69	221.31	228.69	221.31	228.69	2,109.84	2,700.00	2,700.00	2,700.00	10,209.84
12	2/10/2012	2/21/2012	4/19/2012	90,000.00				81.15	228.69	221.31	228.69	228.69	221.31	228.69	221.31	228.69	1,888.52	2,700.00	2,700.00	2,700.00	9,988.52
13	3/10/2012	3/23/2012	5/18/2012	90,000.00					95.90	221.31	228.69	228.69	221.31	228.69	221.31	228.69	1,674.59	2,700.00	2,700.00	2,700.00	9,774.59
14	4/10/2012	4/25/2012	5/18/2012	90,000.00					95.90	221.31	228.69	228.69	221.31	228.69	221.31	228.69	1,674.59	2,700.00	2,700.00	2,700.00	9,774.59
15	5/10/2012	5/25/2012	6/19/2012	90,000.00					88.52	228.69	228.69	221.31	228.69	221.31	228.69	221.31	1,445.90	2,700.00	2,700.00	2,700.00	9,545.90
16	6/10/2012	6/25/2012	7/20/2012	90,000.00						81.15	228.69	221.31	228.69	221.31	228.69	221.31	1,209.84	2,700.00	2,700.00	2,700.00	9,309.84
17	7/10/2012	7/25/2012	8/20/2012	90,000.00							81.15	221.31	228.69	221.31	228.69	581.15	2,700.00	2,700.00	2,700.00	9,081.15	
				926,000.00	24.26	703.61	833.28	1,030.33	1,401.31	1,701.64	1,976.72	2,205.41	2,277.05	2,352.95	2,277.05	2,352.95	19,136.56	27,780.00	20,580.00	20,580.00	88,076.56
		AVG Days Elapsed	36.875																		
		05-24-2013	(240,000.00)																		(4,359.45)
				686,000.00	24.26	703.61	833.28	1,030.33	1,401.31	1,701.64	1,976.72	2,205.41	2,277.05	2,352.95	2,277.05	2,352.95	19,136.56	23,420.55	20,580.00	20,580.00	88,076.56

These calculations take into account the respective amounts withheld month-to-month during 2012 and the \$240,000.00 payment from the OSFC to TA that occurred on May 24, 2013. These calculations are reflected in TA-0732, which was properly authenticated and admitted into evidence on the basis of the testimony of Bill Koniewich.

Starting in 2014, the per diem rate stays constant, and is simply based on the 3% interest rate applied to the \$686,000.00. Accordingly, the per diem rate after January 1, 2014 is \$56.38 and the calculation supporting this rate is shown below:

<p>2014 Per Diem Rate</p> $3\% \times 686,000.00 = \$20,580.00$ $\$20,580 / 365 \text{ days} = \56.38

Based on the above calculations, TA is entitled to prejudgment interest in the amount of \$42,557.11 for years 2012 and 2013 due to the OSFC's wrongful assessment of liquidated damages. Starting

¹ In most instances, SHP signed TA's pay application a few days after it was signed by TA, which is further support that the thirty-day (30) time period expired on the date the OSFC signed the pay application in light of R.C. 153.12.

on January 1, 2014, TA is entitled to a per diem amount of \$56.38 attributable to prejudgment interest for the \$686,000.00 in wrongfully assessed liquidated damages.

III. Prejudgment Interest for TA's Contract Balance and Claim

With respect to prejudgment interest for TA's Contract Balance (\$131,667.00) and Claim (\$1,019,736.95) the same 3% interest rate would apply and results in per diem rates of \$10.82 and \$83.81 (a collective per diem rate of \$94.63). Based on the Ohio Supreme Court's finding in *Royal Elec. Constr. Corp. v. Ohio State Univ.*, interest would begin to accrue when substantial completion was achieved. See *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 1995-Ohio-131, 652 N.E.2d 687 (1995). In *Royal Elec. Constr. Corp. v. Ohio State Univ.*, the court determined that a contractor suffering significant monetary losses as a result of delays and disruptions involving a state construction project was entitled to prejudgment interest from the time that contractor substantially completed the project. In this case, substantial completion was achieved on August 16, 2012 based on when the occupancy permit was issued for the dormitories (TA-0632). Based on *Royal Elec. Constr. Corp. v. Ohio State Univ.*, TA is entitled to prejudgment interest on its Contract Balance (\$131,667.00) and Claim (\$1,019,736.95) in the per diem amount of \$94.63 and such interest begins to accrue on August 16, 2012.

Alternatively, prejudgment interest on TA's Contract Balance and Claim would begin to accrue no later than December 7, 2012, which is thirty (30) days after TA's November 7, 2012 Supplemental Certified Claim was submitted (TA-0659). This would be consistent with GC subparagraph 9.2.2, which states payment is to be made within thirty (30) days from the date of approval by the Construction Manager, the Commission, and Architect. In TA's Supplemental Claim, TA sought payment for both its contract balance and the additional costs incurred due to the OSFC's delays and disruptions, including those caused by its agents. As acknowledged by the Referee's Decision, the OSFC should have released the remaining contract balance and

compensated TA, for at least a portion of its claim, following the submission of its November 7, 2012 claim. Using GC subparagraph 9.2.2 and R.C. 153.14 as guides, such sums should have been released no later than thirty (30) days after the Supplemental Claim submission. This analysis would also be consistent with Referee Yocum's February 10, 2012 Decision in *J&H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Facilities Comm'n.*, Ohio Court of Claims Case No. 2010-07644, where he found in response to a prime contractor's claim that the "OSFC should be allotted a reasonable amount of time to evaluate the claim; however, in this instance, the evidence indicates that there was no good faith effort to evaluate the claim." Referee Yocum went on to find the "due date shall be 30 days from the date of submittal of the certified claim." Applying such reasoning here – should the Referee elect not to apply prejudgment interest at substantial completion, at a minimum TA would be entitled to prejudgment interest on its Contract Balance (\$131,667.00) and Claim (\$1,019,736.95) in the per diem amount of \$94.63 and such interest would begin to accrue no later than December 7, 2012.

IV. Trial Court Has The Discretion To Issue A Final Appealable Order with Respect to the Claims Involving TA and the OSFC

The Referee should recommend that the Court certify its final judgment addressing the claims between TransAmerica and OSFC pursuant to Civ.R. 54(B), such that its final judgment is immediately appealable.² This would save TransAmerica the additional burden of having to wait the many months or years it will take to conclude the trial between the OSFC and its third-party agents before the parties may appeal and TransAmerica can ultimately recover its damages incurred years ago.

Civ.R. 54(B) provides,

² Referee Wampler has indicated that the issue of recovery of costs shall be reserved for the Court to decide. Accordingly, TA reserves its right to recover its costs as the prevailing party in a subsequent hearing before Judge McGrath.

When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, **the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay.**

Civ.R. 54(B) gives the Court the **discretion** to make its judgment immediately appealable, even where its judgment is entered as to fewer than all of the parties to the case. With respect to the claims involving TransAmerica and OSFC that were the subject of the Referee's September 17, 2015 Decision, the Court's review of that Decision and its forthcoming Judgment Entry would be a "final order" as defined by R.C. 2505.02 because it will dispose of all of the rights and damages between TransAmerica and OSFC. See, e.g., *Whipps v. Ryan*, 10th Dist. No. 07AP-232, 2008-Ohio-1216, P19 ("For an order to determine the action and prevent a judgment for the party appealing, **it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court.**"); see also *Noble v. Colwell*, 44 Ohio St.3d 92, 95 (Ohio 1989) (explaining that "an order fully adjudicating a claim and accompanied by a Rule 54(b) determination and direction is final and appealable despite the fact that a counterclaim, either compulsory or permissive, remains pending."). For all of the reasons that follow below, the Referee should recommend that the Court exercise its discretion here and include language in its forthcoming Judgment Entry that "there is no just reason for delay" regarding the claims between TA and the OSFC in accordance with Civ. R. 54(B).

First, an immediate appeal would further the interests of judicial economy. The OSFC's recovery against its agents is contingent on TransAmerica's ability to recover against the OSFC. If TransAmerica cannot recover from the OSFC, or if TransAmerica's recovery is significantly limited, the second trial may not be necessary at all. Put simply, if the Court's judgment is to be modified or reversed on appeal, this should be known **before** a lengthy trial is held between the

OSFC and its third-party agents. By certifying its final judgment pursuant to Civ.R. 54(B), the Court can reduce this risk.

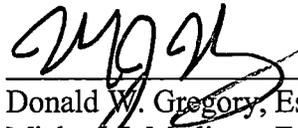
Certification under Civ.R. 54(B) would also be consistent with *Dywidag Sys. Internatl., USA, Inc. v. Ohio Dept. of Transp.*, 10th Dist. No. 10AP-270, 2010-Ohio, 3211. In *Dywidag Sys.*, the Court of Claims granted a motion for summary judgment brought by a material supplier for an ODOT bridge project near Toledo. With its summary judgment ruling, the trial court released the supplier as a party to the case. Before trial, an appeal was filed by the subcontractor (Dywidag) in the Tenth District, seeking to have the supplier reinstated as a third-party defendant. The supplier brought a motion to dismiss the appeal arguing that the Tenth District lacked jurisdiction but the Tenth District disagreed, holding that the Court of Claims properly certified the case under Civ.R. 54(B). The Tenth District explained that **“if the trial court did in fact err in granting summary judgment with respect to the third-party complaint, [hearing the appeal before the trial] would allow one trial with all of the parties present.”** *Id.* at ¶31 (emphasis added).³ Because an immediate appeal was in the interests of judicial economy, the Tenth District upheld the certification and denied the supplier’s motion to dismiss. “Where the record indicates that the interests of sound judicial administration could be served by a finding of ‘no just reason for delay,’ the trial court’s certification determination must stand.” *Id.* at ¶27. As in *Dywidag Sys.*, it would further the interests of judicial economy to identify and correct any error in the Court’s judgment **before** the second trial is heard between the OSFC and its agents. Because an immediate appeal would best serve the interest of judicial economy, certification under Civ.R. 54(B) is proper in this case.

³ Judge McGrath, serving on the Tenth District Court of Appeals panel, concurred with this decision.

Next, requiring TransAmerica to wait for the second trial to be heard and decided would be in conflict with Civ.R. 14(A), the Rule that expressly permitted TransAmerica's claims against the OSFC to be separated from the OSFC's claims against its third-party agents in the first place. Civ.R. 14(A) ensures that plaintiffs like TransAmerica are not prejudiced when a defendant impleads its employee, servant, or agent into the case as a third-party defendant. If TransAmerica and the OSFC cannot immediately appeal the Court's final judgment, but instead must wait until the second bifurcated trial is heard, the benefit of holding separate trials is diminished considerably.

Finally, certifying an immediate appeal would be consistent with the fundamental purpose underlying Civ.R. 54(B) – to prevent unnecessary delays in litigation. While the second trial will likely be hotly contested between the OSFC and its agent architect and construction manager, TransAmerica has no stake in its outcome. TransAmerica will neither be prosecuting or defending claims in the litigation and its rights will not be implicated. All claims and counterclaims between the OSFC and TransAmerica have been concluded. The litigation involving the OSFC's third party agents could take months or years as the litigation is only in its beginning stages. Civ.R. 54(B) was designed to prevent that type of unnecessary delay or burden to a party's recovery. *See Noble v. Colwell*, 44 Ohio St.3d 92, 97 (Ohio 1989) (explaining that Civ.R. 54(B)'s general purpose is to avoid the possible prejudice of delayed appeals and to avoid "undue prejudice, hardship or injustice"). The Referee heard much evidence about the hardship the OSFC's actions and inactions have caused TransAmerica, which will only increase the longer TransAmerica is deprived of its recovery. This being the case, TransAmerica requests that the Referee recommend certification of the Court's final judgment under Civ.R. 54(B).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via e-mail and regular U.S. mail, postage prepaid, this 13th day of October, 2015 to:

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