

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

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TRANSAMERICA BUILDING
COMPANY, INC. :

Plaintiff, :

v. :

OHIO SCHOOL FACILITIES
COMMISSION, :

Defendant. :

CASE NO. 2013-00349

JUDGE PATRICK M. MCGRATH

REFEREE SAMUEL WAMPLER

**STATE OF OHIO'S RESPONSE TO TRANSAMERICA'S
MOTION FOR PRE-JUDGMENT INTEREST
AND A FINAL APPEALABLE ORDER**

I. INTRODUCTION.

The award of pre-judgment interest and determination whether or a not a judgment is final and appealable are both controlled by statute. And they are decisions beyond the jurisdiction of the Referee in this case (see the State of Ohio's Motion for these matters to be heard by a Judge of the Court of Claims).

II. PRE-JUDGMENT INTEREST.

R.C. §2743.18(A) governs the award of pre-judgment interest and states in pertinent part:

- (A) (1) Prejudgment 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.
- (2) The court of claims, in its discretion, may deny prejudgment interest for any period of **undue delay** between the commencement of the civil action and the entry of a judgment or determination against the state, **for which it finds the claimant to have been responsible.**

(Emphasis added)

As applied to State of Ohio public construction contract cases, the Ohio Supreme Court has held that pre-judgment interest runs from the date of substantial completion. At the first paragraph of the syllabus, the Court in *Royal Electric Const. Corp. v. Ohio State University*, 73 Ohio St. 3d 110, 1995-Ohio-131, 652 N.E.2d 687 (1995) held:

In a case involving breach of contract where liability is determined and damages are awarded against the state, the aggrieved party is entitled to prejudgment interest on the amount of damages found due by the Court of Claims. The award of prejudgment interest is compensation to the plaintiff for the period of time between accrual of the claim and judgment, regardless of whether the judgment is based on a claim which was liquidated or un-liquidated and even if the sum due was not capable of ascertainment until determined by the court. (R.C. 2743.18[A] and 1343.03[A], construed and applied.) p. 688.

The Court further held that the damages sustained “accrued (became due and payable) at the time that [the contractor] had substantially completed each of the projects.” P. 693.

The rate of interest is statutorily set and posted by the Treasurer of the State of Ohio. The interest is simple and non-compounding. Exhibit A (attached), shows the calculations as to what pre-judgment interest Transamerica is entitled to based on the Referee’s recommendation in this case.¹

Transamerica confuses the statute involving interest on late payments for that involving interest on a payment not made because there is a disputed claim. It is the latter which is at issue in this case and governed by the preceding statute and Supreme Court authority.

The statute is also clear that any award of pre-judgment interest must be reduced by any delay caused by the moving party. R.C. 2743.18(A)(2), supra. In this case, the trial of this matter had to be delayed and continued from December 8, 2014 to May 18, 2015 due to the late

¹ Another reason why pre-judgment interest is a matter for the Judge is that the amount recommended by the Referee may change by the Judge’s ruling on the objections filed to the Referee’s recommendation.

filing by Transamerica of a second expert report. (See State of Ohio's Motion for Continuance filed on October 28, 2014). This deduction is also reflected in the attached calculation.

III. THE FINAL JUDGMENT ENTERED ON BEHALF OF THE PLAINTIFF WILL NOT BE APPEALABLE.

Conspicuously absent from Plaintiff's Motion that the judgment in this case be final and appealable is any reference to the statute, R.C. 2505.02 which governs such a determination and states in pertinent part:

(A) As used in this section:

- (1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

* * *

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

- (1) An order that affects a substantial right in an action that in effect **determines the action** and prevents a judgment;

(Emphasis added)

* * *

Any judgment rendered to Transamerica will not result in a resolution of all of the claims of all of the parties in this case. What remains for decision is the State's claims against the architect and construction manager and their fourth party claims against their consultants.

Indeed, Plaintiff Transamerica based their claim for relief on breaches by the architect and construction manager. Ironically, once added, Plaintiff moved for their severance. That was their choice. The State of Ohio warned at the time that this would result in a non-final appealable order. Transamerica must now live with the consequence of their choice.

When the State of Ohio attempted to appeal the severance of the third and fourth parties, Transamerica moved to dismiss the appeal and the Court of Appeals agreed that it was not a final appealable order. If it wasn't final and appealable then, it certainly isn't now.

Thus, there can be no doubt that the Court of Appeals won't find this judgment for Transamerica to be final and appealable. To hold otherwise will result in multiple appeals from the same case; a situation which the Court of Appeals will not tolerate. The same case cannot proceed in both the Court of Appeals and Trial Court at the same time.

Transamerica argues it will be prejudiced if it is not permitted to proceed with its appeal. However, to the extent that prejudice to a party is an issue, then the Court needs to look at the prejudice to all parties. In this case, the State is prejudiced by the appeal moving forward on a nearly multi-million dollar judgment which even Plaintiff Transamerica didn't argue is entirely the fault of the State.²

Respectfully submitted,

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² In fact, Transamerica argued very little fault of the State of Ohio rather choosing to blame the architect for bad plans and the construction manager for bad scheduling.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the *State Of Ohio's Response to Transamerica's Motion for Pre-Judgment Interest and a Final Appealable Order* was served upon via electronic and regular U.S. Mail, postage pre-paid, this 27 day of October, 2015 upon the following:

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EXHIBIT A

Total damages per decision \$1,837,404.36

Annual simple interest 3%

August 16, 2012 (Substantial completion date) to December 31, 2012

137 days \$20,670.80

2013 \$55,122.13

2014 \$55,122.13

2015 – to September 17, 2015 (Date of Referee Decision)

260 days \$39,246.96

TOTAL \$170,162.02

Less delay by contractor due to new expert report causing trial
continuance from December 8, 2014 – May 18, 2015

160 days \$24,143.49

Net Total PJI \$146,018.53

Daily Interest Accruing \$151.02