

IN THE COURT OF CLAIMS OF OHIO

FILED
COURT OF CLAIMS
OF OHIO

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TRANSAMERICA BUILDING
CO., INC.

Plaintiff,

v.

OHIO SCHOOL FACILITIES
COMMISSION

Defendant.

ORIGINAL

Case No. 2013-00349

Judge Patrick McGrath

Referee Samuel Wampler

**STATE OF OHIO'S OBJECTIONS TO REFEREE'S REPORT
AND RECOMMENDATION ON PREJUDGMENT INTEREST**

I. INTRODUCTION.

The State of Ohio objects to the calculation of prejudgment interest provided in the Referee's Decision dated October 29, 2015.

II. THE REFEREE ADOPTS TRANSAMERICA'S LEGAL ERROR OF APPLYING THE STATUTE FOR INTEREST ON LATE PAYMENTS INSTEAD OF THE STATUTE FOR INTEREST ON A PAYMENT NOT MADE BECAUSE THERE IS A DISPUTED CLAIM.

The leading case of *Royal Electric Construction Corporation v. Ohio State University*, 73 Ohio St.3d 110, 1995-Ohio-131, 652 N.E.2d 687, (1995), governs calculating prejudgment interest on a disputed claim. The holding is very clear and precise:

"In a case involving breach of contract when 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.) Id. at 688.

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

The State withheld payments from Plaintiff during the project because of the State’s position that Plaintiff failed to meet milestones under the contract. This was part of the disputed claim tried before this Court. The accrual date should remain the date of substantial completion, August 16, 2012, with the accompanying PJI calculations filed by the State and hereby attached.

III. THE REFEREE MISAPPLIES THE FACTS UNDER REVISED CODE 2743.18(A)(2) IN THAT THE REASON FOR THE CONTINUANCE BETWEEN DECEMBER 8, 2014 AND MAY 18, 2015 WAS COMPLETELY THE RESPONSIBILITY OF THE PLAINTIFF.

While the telephone conferences with the Referee are not a matter of record, the Referee simply was wrong about the sequence of events. In fact, what occurred was that on October 24, 2014, Plaintiff’s counsel served Defendant with an 160 page supplemental opinion of its primary expert witness. Defendant sought an oral conference with the Referee to exclude the late report. Said conference was held on Tuesday, October 25, 2014. At that point the Referee ruled that he was going to permit this late report but that he would entertain a motion to continue the trial date of December 8, 2014. It was discussed that further discovery was going to be required both by a second discovery deposition of Plaintiff’s expert and a further report from defense expert, with a second discovery deposition by Plaintiff’s counsel of Defendant’s expert.

It was only in this context that the defense counsel’s jury trial scheduled for November 10, 2014 was discussed. In other words, much discovery was required in the instant case between October 25, 2014 and December 8, 2014, which could not be completed within that short time frame. Plaintiff alone caused the need for additional discovery necessitating the continuance.

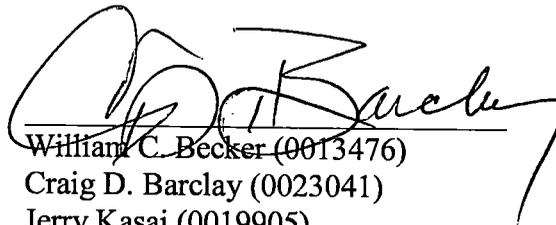
Without question the delay between December 8, 2014 and May 18, 2015 was completely the fault of the Plaintiff. In this context, the Court is referred to Defendant's Motion for Continuance filed with the Court on October 28, 2014 (copies attached without the expert report) and the Defendant's Response to Transamerica's Motion for Prejudgment Interest filed with the Court on October 27, 2015. Under the authority of 2743.18(A)(2) the deduction of approximately \$24,000 should be charged back against any finding of prejudgment interest on behalf of the Plaintiff.

IV. CONCLUSION.

Therefore, consistent with the State's filing of its response on the prejudgment interest issue (attached), the State objects and asserts that the maximum PJI which this Court should award is \$146,018.53 with daily interest accruing at the rate of \$151.02 per day.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *State of Ohio's Objection to Referee's Report and Recommendation on Prejudgment Interest* was sent by electronic mail and regular U.S. mail, postage prepaid, this 11th day of November, 2015 to:

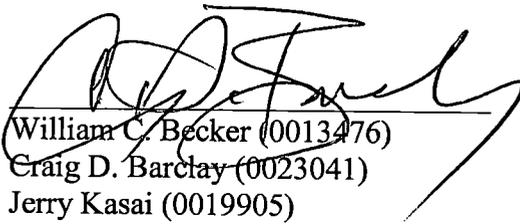
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IN THE COURT OF CLAIMS OF OHIO

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

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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.

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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

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Case No. 2013-00349

Referee Samuel Wampler

DEFENDANT'S MOTION FOR CONTINUANCE

Plaintiff has filed a new expert report with regard to scheduling. (See attached Exh. A).

Defendant previously filed a Motion *in Limine* to prevent Plaintiff from introducing testimony from an expert report that was nine months late.

This Court, through Referee Sam Wampler, indicated that it was going to let the parties try their case – that it would not likely grant Defendant's Motion *in Limine* but would entertain a Motion for Continuance by the Defendant.

This issue was discussed with the Court and Referee Wampler on Tuesday, October 25, 2014. At that time, defense counsel indicated that he did not want to continue the trial but at the same time could not prejudice the defense of his client. Defense counsel also informed the Court that he has a significant environmental spill jury case going to trial on November 10th.

Having now received a new expert report from the Plaintiff, and after consulting with its own expert, Defendant has no choice but to ask for a continuance of the trial date in this matter if Plaintiff insists on going forward and introducing evidence from this nine month late expert report.

ON COMPUTER

Respectfully submitted,

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I hereby certify that a copy of the foregoing Motion for Continuance was sent by electronic mail, postage prepaid, this 28 day of October, 2014 to:

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