

Gill v. Grafton Corr. Inst., 10th Dist. Franklin No. 09AP-1019, 2010-Ohio-2977, ¶ 13 (citations omitted). The Tenth District has explained,

Civ.R. 53(D)(3)(b)(i) provides that "[a] party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i)." If a party objects to a factual finding, "whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii)," the objection "shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available." Civ.R. 53(D)(3)(b)(iii).

In the absence of a transcript or an affidavit, the trial court is required to accept the magistrate's findings of fact and may only determine the legal conclusions drawn from those facts. *Forth v. Gerth*, 10th Dist. No. 05AP-576, 2005 Ohio 6619, P19, quoting *Carter v. Le*, 10th Dist. No. 05AP-173, 2005 Ohio 6209, P11.

Because plaintiff failed to file a transcript of the hearing with the trial court, our review is limited to whether the trial court correctly applied the law to the facts set forth in the magistrate's decision. *Id.*, citing *Compton v. Bontrager*, 10th Dist. No. 03AP-1169, 2004 Ohio 3695, P6. As a result, even though plaintiff filed in the appellate court the transcript of the proceedings before the magistrate, we are precluded from considering it, as the trial court did not have the opportunity to review it before determining whether to adopt the magistrate's decision. *Id.* at P8, citing *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 1995 Ohio 272, 654 N.E.2d 1254.

Haynes v. Straub, 10th Dist. Franklin No. 09AP-1009, 2010-Ohio-4089, ¶ 9-10 (emphasis ours).

Civ.R. 53(D)(3)(b)(iii) is particularly important in this case because many of OSFC's objections relate to findings of fact. For example, the Referee's determination that TA suffered damages as a result of OSFC's breach of contract is a **finding of fact** that may be challenged only through compliance with Civ. R. 53(D)(3)(b)(iii). *See, e.g., Telxon Corp. v. Smart Media of Del., Inc.*, 9th Dist. Summit Nos. 22098 & 22099, 2005-Ohio-4931, ¶ 56 (plaintiffs required to prove as a factual matter that Telxon's breach of non-disclosure agreement actually damaged plaintiffs). OSFC's failure to comply with Civ. R. 53(D)(3)(b)(iii) in objecting to this factual finding amounts to a waiver of its objection.

Likewise, the Referee's calculation of TA's damages is also a factual finding that may be challenged only through compliance with Civ. R. 53(D)(3)(b)(iii). "Because the extent of damages suffered by a plaintiff is a **factual issue**, it is within the jury's [or fact finder's] province to determine the amount of damages to be awarded." *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468 (Ohio 2007)(emphasis ours). Thus, OSFC has also waived its right to challenge the Referee's calculation of damages.¹

Moreover, even if it were true that TA failed to strictly follow the Article 8 process, the Referee's factual findings that TA substantially complied with Article 8, that OSFC disregarded its own obligations under Article 8, and that OSFC had actual notice of TA's claim are all **findings of fact**. The Court must also take those facts as established.

Civ.R. 53(D)(3)(b)(iii) "seeks to set forth an orderly procedure governing a party's objection to or waiver of a referee's findings of fact." *Schofield v. Benton*, 10th Dist. No. 92AP-161, 1992 Ohio App. LEXIS 4275, at *7 (Aug. 20, 1992). The Rule requires an objecting party to substantiate its objections with relevant evidence introduced at trial, so that the Court may review the evidence that the Referee had at its disposal in making his findings of fact. Where the objecting party fails to provide that evidence, the Court is precluded from disrupting the Referee's factual findings.

Nowhere is Civ.R. 53(D)(3)(b)(iii) more important than it is in this case, where OSFC asserts many general objections that directly conflict with the evidence offered at trial and with the Referee's express factual findings. This conflict is shown in the tables below.

¹ TransAmerica filed its own objections to some of the Referee's calculation of damages but unlike OSFC complied with Civ.R. 53(d)(3)(b)(iii) and provided relevant evidence, including applicable provisions of the trial transcript.

OSFC Objection:	Reality:
<p data-bbox="159 961 716 1083"> “There is no run up to either of [TA]’s multi-million dollar claims.” (OSFC’s Objections, pg. 6). </p>	<p data-bbox="756 289 878 317">Evidence²:</p> <p data-bbox="756 352 1438 474">TA first gave notice on February 17, 2011 (weeks before it mobilized to the Project) that it intended to submit a claim once it received the updated drawings that were repeatedly promised. (TA-0245, TA-0256/1)</p> <p data-bbox="756 506 1414 627">Wilhelm testified that TA sent this letter 10 days after a meeting in which LL promised updated drawings would be provided by the end of the week. (Wilhelm Transcript, vol. 6, 46:6-47:4³)</p> <p data-bbox="756 659 1409 747">Wilhelm testified that through TA’s letter, TA endeavored to follow Article 8 exactly. (Wilhelm Transcript, vol. 5, 30:9-31:13)</p> <p data-bbox="756 779 1446 867">TA continued throughout the project to notify OSFC/LL on a frequent basis and in writing of the impact the lack of revised drawings was having on its work. (TA-0294, TA-305, TA-0325)</p> <p data-bbox="756 898 1430 987">For example, Wilhelm testified that he provided another notice on October 7, 2011, again following Article 8 guidelines. (Wilhelm Transcript, vol. 5, 195:11-199:7)</p> <p data-bbox="756 1018 1406 1083">Wilhelm testified about another notice provided on March 1, 2012. (Wilhelm Transcript, vol. 5, 243:12-244:7)</p> <p data-bbox="756 1115 1382 1203">Wilhelm explained that TA continued to provide Article 8 notices even after TA submitted its certified claim in early March 2012. (Wilhelm Transcript, vol. 5, 251:3-18)</p> <p data-bbox="756 1234 1373 1323">That impact was a regular subject of progress meetings throughout construction which OSFC/LL attended. (JX-I-21/10-12, JX-I-22/12)</p> <p data-bbox="756 1354 1422 1419">OSFC/LL knew the importance of getting revised drawings to TA to minimize impact to the project. (TA-0236, TA-0237)</p> <p data-bbox="756 1451 1430 1572">Disregarding Article 8, LL responded to TA’s notices by prematurely rejecting TA’s claim, and advising TA drawings would be provided that day, which never happened, and which LL had no reason to believe would occur. (TA-0194)</p> <p data-bbox="756 1604 1430 1726">OSFC/LL/SHP had actual notice of the impact on TA. (TA-0217/1, TA-0236, TA-0237, TA-0245, TA-0280, TA-292, TA-0304, TA-0325, TA-0352, TA-0354, TA-0359, TA-0361, TA-0380, TA-0394, TA-0403, TA-0410, TA-0497, TA-0514)⁴</p>

² This is but a small portion of the evidence underlying the Referee’s factual findings.

³ Wilhelm’s Transcript was previously filed as an Exhibit to TA’s Objections.

⁴ The Referee described these exhibits on pages 19-22 of his Decision.

OSFC Objection:	Reality:
<p>(continued...)</p>	<p>Referee’s Factual Findings:</p> <p>“TA continued to notify OSFC/LL by email during construction that it was being impacted by a lack of revised drawings” and “issuance of drawings was a regular subject of discussion in progress meetings for months.” (Decision, pg. 35)</p> <p>“OSFC knew throughout construction that TA would be making a claim and that it could not make a claim until it could capture its costs” and “any delay in certifying and submitting a claim was OSFC’s fault, not TA’s and that OSFC was not prejudiced.” (Decision, pgs. 36-37)(emphasis ours)</p> <p>“TA’s ability to submit a certified claim on the basis of its notice of claim was within the exclusive control of OSFC/LL/SHP.” (Decision, pg. 35)</p> <p>“[T]here was more than actual notice of the basis of TA’s intent to make a claim . . . OSFC, through its agent, LL, continually led TA to believe that it would be furnished updated/revised drawings, not just once, but regularly for over five months after TA first gave written notice that it intended to file a claim.” (Decision. pg. 40)(emphasis ours)</p>
<p>“TransAmerica did not and could not dispute that they didn’t meet the roof and enclosure deadline.”</p> <p>(OSFC’s Objections, pgs. 7-8).</p>	<p>Evidence:</p> <p>Almost three months before LL began assessing LDs for OSSB5, at a Core & Executive Core Team meeting (at which LL was present) it was reported that OSSB5 had achieved “Permanent Enclosure Complete.” (JX-H-39/3)</p> <p>“LL/Keith testified [(i.e. he conceded)] at trial that the roofs were complete in terms of installation” by the enclosure deadline. (Decision, pg. 114)</p> <p>Wilhelm testified that the “roof and window enclosure” milestone had two responsible contractors, an elementary scheduling error. (Wilhelm Transcript, vol. 5, 226:8-17)</p> <p>“Almost three months [before LDs were assessed] at a Core & Executive Team meeting (at which Keith was present) it was reported that OSSB5 had achieved ‘Permanent Enclosure Complete.’” (Decision, pg. 114, fn. 137, citing JX-H-39/3)</p> <p>Enclosure was also not relevant to occupancy, as the end-user School Districts could not occupy the dorms until the Campus-wide Bid Packages were complete, and OSFC did not bid those packages until much later due to their own poor planning. (TA-0260/5, TA-260/11, TA-0440/3)</p>

OSFC Objection:	Reality:
<p>(continued...)</p>	<p>Referee’s Factual Findings:</p> <p>While LL assessed liquidated damages based on “Recovery Schedule 3” that recovery schedule was never made part of the Contract by change order. (Decision, pg. 114, f.n. 137)</p> <p>“TA did not fail to achieve the milestones upon which OSFC assessed liquidated damages.” (Decision, pg. 115)(emphasis ours)</p>
<p>“[T]he Referee excused the contractor’s late performance by creating hypothetical applications of the liquidated damages in order to claim that they were in the nature of a penalty which should not be enforced.”</p> <p>“Courts can’t create evidence to support their findings.”</p> <p>(OSFC’s Objections, pgs. 9).</p>	<p>The Referee concluded that the Liquidated Damages provision is unenforceable as a “penalty” after finding:</p> <ul style="list-style-type: none"> • “Based on what was known to OSFC and TA as of the time they executed the Contract, OSFC would incur little or no damages due to loss of occupancy in January 2012.” (Decision, pg. 109)(emphasis ours) • “TA did not have any obligation to furnish warranties for any of the roofs until the date of substantial completion, which, according to OSFC, was on June 1, 2012.” (Decision, pg. 115) • “The earliest milestone according to Recovery Schedule 2 was OSSB5 Complete on November 17, 2011. By that time OSFC had severely disrupted TA’s work, had failed to obtain approved plans for construction, let alone completion of the dorms, had prevented TA from obtaining final inspection even if it had completed OSSB5 and had failed to furnish TA with full and complete plans to build the dorms.” (Decision, pg. 116) • “OSFC did not present any evidence to support a determination that the amount of the liquidated damages, not only as compared with the value of the subject of the contract, but also in proportion to the probable consequences of the breach, was reasonable. The evidence is to the contrary.” (Decision, pg. 110)(emphasis ours)

OSFC Objection:	Reality:
<p>(continued...)</p>	<ul style="list-style-type: none"> • “Because of the way the bid schedule was set up and because of the cumulative effect of the liquidated damages (GC 8.7.1.1) it must be said that, at the time the Contract was executed, the liquidated damages provisions were <u>manifestly unreasonable, disproportionate in amount and had no relationship to the probable consequences of a breach.</u>” (Decision, pg. 114)(emphasis ours)
<p>“Plaintiff never put on any evidence of what its current contract balance was”</p> <p>(OSFC’s Objections, pg. 10).</p>	<p>The Referee described the evidence TA presented to establish its current contract balance:</p> <ul style="list-style-type: none"> • “TA <u>did</u> present evidence of its present contract balance (TA-0732 and testimony of Koniewich).” (Decision, pg. 117)(emphasis ours) • “According to the testimony of Koniewich, net change orders added \$211,163.93 for an adjusted Contract Sum of \$4,186,163.93 (TA-0732).” (Decision, pg. 118) • “OSFC <u>did not dispute these numbers or offer any evidence contrary thereto.</u>” (Decision, pg. 118)(emphasis ours) • “Koniewich also testified that TA received payments in the amount of \$3,361,558.51.” (Decision, pg. 118) • “The court could not find any evidence in the record that SHP provided written notice to TA to correct this work . . . nor did OSFC direct the court’s attention to such evidence in its closing argument or post-trial brief.” (Decision, pg. 120)

OSFC Objection:	Truth/Reality:
<p>Don McCarthy “did not connect any of scheduling criticisms with damages suffered by TransAmerica”</p> <p>(OSFC’s Objections, pgs. 11-12).</p>	<p>The Referee was correct to disagree:</p> <ul style="list-style-type: none"> • “McCarthy’s forensic schedule analysis provides a month by month view of how LL manipulated the schedule and a narrative of the effects of this manipulation.” (Decision, pg. 55)(emphasis ours) • “[A]ccording to McCarthy, to meet the schedule TA and the other contractors would have had to perform their work with military precision” (Decision, pg. 54) • “McCarthy also pointed out the problem of not including additional work at the dorms in the schedule such as the Campus-Wide Bid Packages, and particularly the casework” and “[e]veryone in the design/construction management teams were well aware that these issues and others would have a significant, negative impact on completion of the dorms” (Decision, pgs. 55-56) • “The only schedule analysis submitted at trial was performed by McCarthy. McCarthy testified that TA was required to remain on the Dorm Project for an additional 197 days beyond the bid schedule duration . . . The court finds this to be established by the greater weight of the evidence.” (Decision, pgs. 63-64)(emphasis ours)
<p>TA failed to “show causation” or “proximate cause” and that without such proof, OSFC’s breaches are “not relevant”</p> <p>(OSFC’s Objections, pgs. 11-12).</p>	<p>The Referee understood what TA was actually required to prove under Ohio law:</p> <ul style="list-style-type: none"> • “[B]ecause the court is satisfied to a reasonable degree of certainty based on all of the evidence that TA’s work was substantially disrupted by OSFC and its agents, the court must award damages so long as they can be calculated with reasonable certainty.” (Decision, pg. 84)

Not only are OSFC’s objections inconsistent with the findings of the Referee, OSFC fails to cite any portion of the record, any trial transcript, or any affidavit of evidence that would tend to corroborate or even tangentially support any of its objections.

Without citing **any evidence** in support, the Court must overrule the OSFC's objections related to the Referee's findings of fact. The Court's must limit itself to reviewing OSFC's legal arguments.

III. Responses To OSFC's Objections:

Mostly without citation to authority, OSFC raises several objections to the Referee's legal conclusions. None of OSFC's legal arguments are persuasive.

A. Referee's Calculation of Damages for Loss of Productivity.

OSFC's first legal argument is that the Referee has no authority to "assume the non-judicious role of an advocate by actually putting together an alternative loss of productivity claim for the contractor." (OSFC's Objections, pg. 3). This is a mischaracterization of the Referee's damages award, and OSFC's argument is not consistent with relevant law.

OSFC's objection should be overruled for two reasons. First, as stated above, OSFC did not preserve its right to object to factual findings of the Referee. "Because the extent of damages suffered by a plaintiff is a factual issue, it is within the jury's [or fact finder's] province to determine the amount of damages to be awarded." *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468 (Ohio 2007). Because the appropriate amount of damages to be awarded is a "finding of fact," and because OSFC failed to cite any evidence which would refute the Referee's calculation, the Court must overrule OSFC's objections to the Referee's calculation of damages.

Second, even if OSFC's objection were considered, the Referee was entitled to weigh the evidence in his capacity as fact finder and calculate an appropriate damages award, so long as his calculations were consistent with applicable law and with the evidence in the case. While the Referee was not perfect in his analysis and misinterpreted a portion of the evidence and misinterpreted the law in relatively minor respects (discussed in TA's Objection No. 1), OSFC has

not come close to proving that the Referee erred by using an alternative method to calculate loss of productivity damages. OSFC offers no substantive legal argument at all, and relies only on the general proposition that the Referee was “non-judicious”—which, as any fair reading of the 140 page decision will show, is plainly not the case.

In calculating the damages award, the Referee was required to follow applicable law and to apply that law to the evidence in the case. The Court must satisfy itself after “an independent review” “that the [referee] has properly determined the factual issues and appropriately applied the law.” Civ.R. 53(D)(4)(d). However, the Referee was not required to calculate damages with absolute precision:

Where a right to damages has been established, such right will not be denied merely because a party cannot demonstrate with mathematical certainty the damages due.

Geygan v. Queen City Grain Co., 71 Ohio App.3d 185, 195, 593 N.E.2d 328 (1991).

Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.

Eastment Kodak Co. v. S. Photo Materials Co., 273 U.S. 359, 379, 47 S.Ct. 400 (1927).

Thus, even if it were considered, OSFC’s argument as to the Referee’s calculation of damages should not be persuasive to the Court. The Referee’s damages calculation should be upheld by the Court, but appropriately modified to make TA whole in a manner that is consistent with the evidence in this case and with applicable law.⁵

⁵ TA objects to the Referee’s calculation of lost productivity damages on the sole basis that the Referee, after calculating TA’s damages using a modified total cost method, then mistakenly reduced that calculated amount by \$533,770.47. That error came from confusion over whether “discrete changes” should be credited against TA’s damages, and TA’s objection is unrelated to the Referee’s use of a “modified total cost” methodology. **Those “discrete changes” were set forth only as proof of causation—to show how quickly labor inefficiencies “add up” over a large project.** As set forth in TA’s Objections, the Referee erred in reducing TA’s damages by \$533,770.47. The Court should fix that error before entering judgment.

B. Article 8 Does Not Bar TA's Claim.

OSFC next argues that the Referee erred in determining that the State waived Article 8, and goes on to assert that TA's failure to comply with Article 8 is an absolute waiver of its claim. (OSFC's Objections, pg. 3-6).

In concluding that TA's claim is not barred by Article 8, the Referee adopted several alternative legal basis, any one of which are sufficient on their own to overcome OSFC's objection. Again, OSFC's objections to factual findings cannot be considered. The Court is limited to reviewing only the following legal conclusion: that OSFC is not entitled to insist on strict compliance with Article 8 because:

1. TA substantially complied with Article 8; and/or
2. OSFC waived its right to enforce Article 8; and/or
3. OSFC prevented TA's strict compliance with Article 8.

[While the Referee explains his reasoning in detail, some emphasis and further support may be useful and is provided below.]

i. TA Substantially Complied With Article 8

First, the Referee correctly found that TA substantially complied with Article 8 and that any technical deviation from Article 8 cannot bar TA's right of recovery. (Decision, pgs. 34-37.) "Where there is evidence of actual notice, a technical deviation from a contractual notice requirement will not bar an action for breach of contract brought against a party that had actual notice." *Stonehenge Land Co. v. Beazer Homes Invs., LLC*, 177 Ohio App. 3d 7, 11, 2008-Ohio-148, 893 N.E.2d 855 (10th Dist.)(citing *Interstate Gas Supply, Inc. v. Callex Corp.*, 10th Dist. Franklin No. 04AP-980, 2006-Ohio-638).

Ohio courts apply this rule to avoid the injustice of allowing an owner to insist upon strict compliance with notice requirements as an absolute bar to the contractor's claim where (1) the contractor substantially complied (2) the owner had actual notice of the claim and (3) the owner is not prejudiced by the contractor's failure to strictly follow the notice provisions in its contract. *See, e.g., Craft Gen. Contractors, Inc. v. City of Urbana*, 10th Dist. No. 81AP-346, 1982 Ohio App. LEXIS 13164, at *23 (Feb. 2, 1982)(boilerplate notice provision did not preclude claim where owner had "independent knowledge of the condition complained of and . . . [was] not prejudiced by lack of earlier notice"); *see also Roger J. Au & Son, Inc. v. Northeast Regional Sewer Dist.*, 29 Ohio App.3d 284, 504 N.E.2d 1209 (8th Dist. 1986)(failure to give formal notice did not bar claim because responsible officials were aware of the facts giving rise to claim).

Here, assuming for the sake of argument that TA did not comply with Article 8, the Referee correctly found that (1) TA substantially complied with Article 8, (2) the OSFC had actual notice of TA's claim, and (3) OSFC was not prejudiced by a technical departure from the Article 8 process. This is made all the more true by the fact that OSFC itself failed to follow Article 8. These factual findings are consistent with the law and with the evidence introduced at trial.

TransAmerica substantially complied with Article 8 by notifying OSFC/LL/SHP of its claim early and often. Indeed, TA first notified OSFC of its intent to submit a claim weeks before it mobilized to the Project on February 17, 2011. TA's first notice was based on its lack of complete drawings for the construction of the dorms. (Decision, pg. 34, citing TA-0245.) At that time, TA advised OSFC that it could not realistically estimate its impact until the promised, updated drawings were received. TA also advised LL/OSFC that new drawings that had been promised for months would minimize impact to the Project. (*Id.*) Throughout construction, TA continued to notify OSFC/LL in writing that it was being impacted by a lack of drawings

throughout construction, and impact on TA and other contractors was a regular topic of weekly progress meetings. (Decision, pg. 35, citing TA-0294, TA-305, TA-0325, JX-I-21/10-12, JX-I-22/12.)

OSFC/LL had actual notice of TA's claim. LL acknowledged the difficulties involved in estimating impact two weeks later on March 1, 2011. (Decision, pg. 34, citing TA-0256/1.) It was clear to OSFC/LL that TA could not submit a certified claim under Article 8 until it received the revised drawings. (Decision, pg. 34, citing TA-0236, TA-0237.) TA's ability to submit a claim was contingent on OSFC/LL/SHP following through on their repeated promises to issue updated drawings.

In other words, TA's ability to submit a certified claim on the basis of its notice of claim was within the exclusive control of OSFC/LL/SHP.

(Decision, pg. 35.)

OSFC was not prejudiced by any technical departure from Article 8. Despite being fully aware of the importance of the updated plans, OSFC/LL/SHP never provided those promised, updated plans. Instead, early in the project, LL sent TA a letter listing the reasons why it felt TA did not have a claim and, once again, promised TA that completed, updated drawings would be provided that day. Those plans were never provided. OSFC's agent, LL, made that promise even though it had no reasonable basis for believing updated drawings would be provided at any date in the near future. (Decision, pg. 35, fn. 62, citing TA-0194.)

OSFC was not prejudiced by any technical departure from Article 8 by TA, because OSFC failed to follow Article 8 itself. For example, LL prematurely denied TA's claim, informing TA that its claim was "closed" before TA even submitted its claim.⁶ Also, in early March of 2012, TA

⁶ See Decision of the Referee on OSFC's motion for summary judgment, filed on October 1, 2014, pgs. 18-19, "**the best example of [OSFC's actions inconsistent with Article 8] is OSFC's preemptive rejection of TA's notice of**

submitted a certified claim to OSFC, then far along enough in the construction that it could begin to quantify, certify, and submit its claim—though its damages would continue to climb. (Decision, pg. 36.) Despite the requirement to do so within 30 days, OSFC/SHP/LL failed to schedule a job site resolution meeting to address TA’s claim until much later. (Decision, pg. 36.)

The Referee also correctly understood that, without good faith participation from OSFC/LL/SHP (which was non-existent at any time throughout the Project), “**the Article 8 process was on the road to nowhere.**” (Decision, pg. 36.) Everyone knew the impact the lack of updated plans was having on TA on the other contractors throughout the Project. TA’s certified claim came as a surprise to no one.

With those facts established, the Referee was correct to find that TA substantially complied with its obligations under Article 8, that OSFC had actual notice of TA’s claim, and that OSFC was not prejudiced by any technical departure from Article 8. With those facts established, the Referee was correct in his legal conclusion that OSFC could not insist upon strict compliance with Article 8 as an absolute bar to TA’s claim.

ii. OSFC Waived Its Right To Enforce Article 8.

The Referee also correctly held that OSFC, through its own conduct and the conduct of its agents, waived its right to insist upon strict compliance with Article 8. While waiver is generally a voluntary relinquishment of a known right, the doctrine of waiver by estoppel allows a party’s inconsistent conduct, rather than a party’s intent, to establish a waiver of rights. *See Aggressive Mech., Inc. v. Ohio Sch. Facilities Comm’n*, Ct. of Cl. No. 2010-12745, 2012-Ohio-6332, ¶¶23-25 (OSFC waived 10-day notice requirement by acting in a manner inconsistent with an intent to

claim on March 1, 2011.” Judge McGrath agreed with this conclusion in his April 9, 2015 entry affirming the Referee’s Decision on summary judgment with one slight modification not applicable here.

claim strict compliance)(citing *Lewis & Michael Moving and Storage, Inc. v. Stofcheck Ambulance Serv., Inc.*, 10th Dist. No. 05AP-662, 2006-Ohio-3810, ¶29-30).

The Referee correctly recognized,

[W]aiver of a contract provision may be express or implied. *Lewis & Michael Moving & Storage, Inc. v. Stofcheck Ambulance Serv., Inc.*, 10th Dist. No. 05AP-662, 2006-Ohio-3810, ¶ 29, quoting *Natl. City Bank v. Rini*, 162 Ohio App. 3d 662, 2005-Ohio-4041, ¶ 24, 834 N.E.2d 836, citing *Griffith v. Linton* (1998), 130 Ohio App.3d 746, 751, 721 N.E.2d 146. **[W]aiver by estoppel exists when the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon it.** (Emphasis omitted.) *Id.*, quoting *Natl. City Bank* at ¶ 24, quoting *Mark-It Place Foods* at ¶ 57. Waiver by estoppel allows a party's inconsistent conduct, rather than a party's intent, to establish a waiver of rights. *Id.*, quoting *Natl. City Bank* at ¶ 24.

Whether a party's inconsistent conduct amounts to waiver involves a factual determination within the province of the trier of fact.

(Decision, pg. 38, citing *EAC Props. LLC v. Brightwell*, 2011-Ohio-2373, ¶ 22 (10th Dist))(emphasis ours).

OSFC prevented TA from strictly complying with Article 8. OSFC/LL knew throughout construction that until TA had the revised drawings in hand, as OSFC/LL/SHP had promised repeatedly, TA could not reasonably determine impact to its schedule or costs. (Decision, pg. 37.) One way OSFC/LL knew this was because TA advised them of this fact repeatedly. (Decision, pg. 37.) Everyone on the Project knew it was in the best interest of all parties involved—including the best interests of the owner of the project, OSFC—that the updated drawings be issued to TA and the other contractors as soon as possible. LL acknowledged that TA could not reasonably anticipate its costs without updated drawings. (Decision, pg. 37, citing TA-0245.)

Knowing the importance of the updated plans, OSFC/LL promised updated drawings to TA from day one, and throughout construction. Yet, through their own shortcomings, failures,

mismanagement, in-fighting, and poor planning, OSFC/LL/SHP never followed through on their repeated promises. Those failures prevented TA from realizing its costs early on in the Project, and prevented TA from submitting a formal claim until months later.

OSFC also ignored its own obligations under Article 8. Even after TA submitted its certified claim, OSFC/LL disregarded Article 8 by failing to schedule a job site meeting within the contractually-required 30 days. (Decision, pg. 37.) Instead, OSFC/LL scheduled a meeting over 130 days after TA submitted its claim, and thereafter failed to provide a written analysis of TA's claim within the contractually-required 45 days. (Decision, pg. 37-38.) OSFC/LL also prematurely denied TA's claim on March 1, 2011, when it advised TA that its claim was "closed at this time," and promised to provide updated plans that day despite having no reasonable basis to make that promise to TA. (Decision, pg. 35, f.n. 62, citing TA-0194.)

OSFC also inconsistently applied Article 8. For example, OSFC issued change orders to other contractors to compensate them for delay-related costs, but did not require those other contractors to comply with Article 8. "They just paid them." (Decision, pg. 38.)

The Referee was correct to find that OSFC acted in a manner inconsistent with an intent to insist upon strict compliance with Article 8 by (1) preventing TA from strictly complying with the Article 8 process, (2) by ignoring its own obligations under Article 8, and (3) by applying Article 8 inconsistently on the Project. Thus, the Referee was correct to make the legal conclusion that OSFC waived its rights to enforce Article 8 under the doctrine of waiver by estoppel.

iii. OSFC Prevented TA's Strict Compliance With Article 8.

The Referee also properly concluded that OSFC prevented TA's strict compliance with Article 8, which, on its own, also precludes OSFC from insisting on strict compliance. It is well-established, "[a] party who prevents performance of another cannot take advantage of such

noncompliance or nonperformance.” *Suter v. Farmers Fertilizer Co.*, 100 Ohio St. 403 (1919), Syllabus 4. “If a party prevents the occurrence of a condition, the condition is excused.” *Crawford v. By Lamb Builders*, 10th Dist. Franklin No. 93AP-282, 1993 Ohio App. LEXIS 3949 (August 10, 1993). This rule has been applied universally by Ohio courts.⁷

OSFC prematurely denied TA’s claim. The Referee correctly found, and this Court has agreed⁸, that OSFC prevented TA from more fully complying with Article 8 by prematurely denying TA’s claim on March 1, 2011. On that date, LL advised TA that it considered TA’s February 17, 2011 notification “closed at this time,” thereby rejecting TA’s claim before it was submitted. This directive—on its own—precludes OSFC from insisting upon strict compliance with Article 8. *See J&H Reinforcing & Structural Erectors, LLC v. Ohio Sch. Facilities Comm’n*, 10th Dist. No. 12AP-588, 2013-Ohio-3827 (OSFC waived notice provisions where construction manager directed contractor to stop writing notice letters).

OSFC’s failure to produce the promised, updated drawings also prevented TA from submitting a claim. The Referee is correct that OSFC had more than actual notice of TA’s intent to make a claim, and indeed prevented TA from following Article 8. (Decision, pg. 40.) OSFC/LL “continually led TA to believe that it would be furnished updated/revised drawings, and not just once, but regularly over five months after TA first gave written notice that it intended to file a

⁷ *Wajda v. M&J Auto., Inc.*, 7th Dist. No. 10-MA-7, 2010-Ohio-2583 at ¶22; *Walsh v. Patitucci*, 8th Dist. No. 93717, 2009-Ohio-6829, ¶31; *Blake Homes, Ltd. V. FirstEnergy Corp.*, 173 Ohio App.3d 230, 2007-Ohio-4604, 877 N.E.2d 1041 (6th Dist.); *First Energy Solutions v. Gene B. Glick Co.*, 9th Dist. No. 23646, 2007-Ohio-7044, at ¶35; *Lakes v. Mayo*, 12th Dist. No. CA-2006-01-003, 2006-Ohio-6072, at ¶7; *Tucker v. Young*, 4th Dist. No. 04CA10, 2006-Ohio-1126, at ¶25; *Stone Excavating, Inc. v. Newmark Homes, Inc.*, 2nd Dist. No. 20307, 2004-Ohio-4119; *Nious v. Griffin Constr., Inc.*, 10th Dist. No. 03AP-980, 2004-Ohio-4103, at ¶16; *Thorn v. Schneiderman-Welch*, 5th Dist. Stark No. 98-CA-00261, 1999 Ohio App. LEXIS 3674, *17 (Aug. 2, 1999); *Gary Crim, Inc. v. Rios*, 114 Ohio App. 3d 433, 436, 683 N.E.2d 378 (7th Dist. 1996); *Dynes Corp. v. Seikel, Koly & Co., Inc.*, 100 Ohio App. 3d 620, 654 N.E.2d 991 (8th Dist. 1994); *Wittrock v. Paragon Paper Co.*, 1st Dist. App. No. C-840883, 1985 Ohio App. LEXIS 9676, at *11 (Dec. 18, 1985).

⁸ See Judge McGrath’s Judgment Entry, April 9, 2015, pg. 5, agreeing with reasoning of Referee with one modification inapplicable here. See also Decision of the Referee, October 1, 2014, pgs. 18-19, “the best example of [OSFC’s actions inconsistent with Article 8] is OSFC’s preemptive rejection of TA’s notice of claim on March 1, 2011.”

claim.” (Decision, pg. 40.) OSFC/LL continuous misrepresentations prevented TA from filing a formal claim earlier in the Project.

Thus, OSFC prevented TA from strictly following the Article 8 process by (1) rejecting TA’s claim prematurely and (2) by unreasonably leading TA to believe updated drawings would be provided, and then never following through on those repeated promises. The Referee was correct to conclude that TA has not waived its right to recover from OSFC.

iv. Other Basis: First Breach.

The doctrine of first breach also supports the Referee’s legal conclusion. “Under Ohio law, a non-breaching party to a contract is excused from complying with conditions of the contract, when the party for whose benefit the condition operates has already materially breached the contract.” *Brakefire, Inc. v. Overbeck*, 144 Ohio Misc. 2d 35, 58 (Ohio C.P. 2007). *See also N.L. Constr. Corp. v. Ohio Dep’t of Admin. Servs.*, Ct. of Cl. No. 2011-08318, 2012-Ohio-6328, ¶27 (owner’s premature termination of contract was a material breach which excused contractor from future performance).

The Referee correctly found “that OSFC was in material breach of the Contract from the moment TA mobilized on site and failed to cure its breach throughout construction.” (Decision, pg. 116.) Thus, under the doctrine of first breach, OSFC lost its right to insist on TA’s strict compliance with Article 8.

v. Other Basis: TA Complied With All Provisions Of Its Contract, Including Article 8.

In any event, the evidence proved that TA fully complied with the Article 7 change order and Article 8 claim process.

While TA provided many notices putting OSFC on notice of the impact caused by the defective plans, TA had no reason to believe that OSFC/LL’s repeated promises that updated

drawings would be provided were untrue. Indeed, it was not until July 18, 2011, in a weekly progress meeting, and already months into construction, when OSFC/LL finally revealed to TA that the updated drawings would not be provided as promised. (JX-I-23/12-13.)

On that same date, OSFC/LL represented to TA that it would be compensated for the impact caused by its defective plans through the Article 7 Change Order process. OSFC/LL provided TA with several Proposal Requests seeking pricing from TA for—among many other items—“revisions to fire separation walls” and “additional draft stopping and fire wall and ceiling termination requirements” per attached “sketches.” (See PR 18 (fire walls) at TA-0395 and PR 25 (draft shopping, etc.) at TA-0477)

Believing that OSFC/LL would act in good faith and reasonably compensate TA for its impact to date, TA submitted pricing, and then re-submitted its pricing as OSFC/LL attempted to negotiate down TA’s costs. TA priced PR18 and PR18r **four** total times from August 22 to September 27, 2011. (TA-484/1.)

OSFC and TA were ultimately able to agree on some issues and some amount of additional compensation, and Change Order 25 was executed. However, OSFC/LL “kicked the can down the road” and left TA’s delay related claim to be resolved at a later date. Change Order 25 notes specifically that TA’s claim for additional time would be “**determined per delay claim resolution.**” (JX-F-25/2.)

Even if TA had already initiated an Article 8 claim by the date Change Order 25 was issued, Article 8.3.4 allowed for the thirty day “period for substantiation of a Claim” to be extended in writing by OSFC and TA. (GC 8.3.4 at JX-B/62.) OSFC/LL agreed to extend the certification period by executing Change Order 25.

On December 5, 2011, OSFC/LL asked TA to price all of its schedule-related impacts associated with a recovery schedule, and provided TA an additional Proposal Request, PR 39. (TA-519/1.) TA's pricing was to be "all inclusive." (*Id.*)

In response to that Proposal Request, TA priced its delay-related impact—including its extended general conditions and other similar impact-related costs—and provided that pricing to OSFC/LL in a timely basis on January 6, 2012. (TA-525/1.) However, OSFC/LL balked at TA's prices and would not agree to pay them.

Only when it became clear that TA was not going to be treated fairly, and that OSFC/LL would not fulfill their promises to compensate TA in good faith, TA felt it was appropriate to submit a formal Article 8 claim. TA submitted formal notice of its Article 8 claim on February 7, 2012. (TA-0539/1⁹.) Following the Article 8 process exactly, TA then submitted its certified claim on March 8, 2012—within the thirty day period for substantiating its claim. (TA-0563/1-3.) Thus, TA complied with all provisions of its contract, including Article 8.

Under any one of these several alternative legal bases, the Referee's conclusion that TA's claim is not barred by Article 8 should be adopted by the Court.

C. Liquidated Damages Assessment.

OSFC's next argument is that the Referee erred in striking down OSFC's liquidated damages assessment against TA. (OSFC's Objections, pgs. 6-9). OSFC disagrees with the Referee's factual findings that (1) TA achieved enclosure by applicable milestone dates (Decision, pgs. 114-115); and (2) OSFC delayed the project and thus was prevented from assessing liquidated damages (*Id.*, pgs. 116-117). Again, because OSFC failed to cite any evidence in support of its argument, these objections must be overruled.

⁹ Note that the February 7, 2011 date was a typo—this letter was actually sent on February 7, 2012 as established at trial. Wilhelm Transcript, vol. 5, 234:1-12.

To the extent OSFC objects to the legal reasoning of the Referee, those arguments are also not persuasive.

i. The Liquidated Damages Provisions Are A Penalty.

The Referee correctly concluded that the liquidated damages provision in TA's contract, both as it was written and as it was applied by OSFC, was unenforceable as a penalty.

Reasonable liquidated damages provisions will be enforced in Ohio, while liquidated damages provisions that are manifestly "inequitable" or "unrealistic" will be struck down as unenforceable. *See Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St. 27, 28, 465 N.E.2d 392 (1984). When asked to review a liquidated damages provision, Ohio courts must look to: (1) the whole instrument; (2) its subject matter; (3) the ease or difficulty of measuring the breach in damages; (4) the amount of the stipulated sum; and (5) also to the intent of the parties ascertained from the instrument itself in light of the particular facts surrounding the making and execution of the contract. *Jones v. Stevens*, 112 Ohio St. 43, Syllabus 1, 146 N.E. 894 (1925).

The Referee did exactly what was required of him. First, the Referee reasoned that the liquidated damages provision must "provide for a stipulated sum that is reasonably proportional to the probable consequence of the breach." (Decision, pg. 108.) Citing evidence and Ohio authority in support, the Referee made the following correct and fully-supportable findings:

- (1) "Based on what was known to OSFC and TA as of the time they executed the Contract, OSFC would incur little or no damages due to loss of occupancy in January 2012" (Decision, pg. 109);
- (2) While contractor claims due to delay caused by TA could arise, "such claims would not be difficult to measure because the other prime contractor's contracts were much smaller than TA's in dollar amount, [and] the probable consequences of such claims was not significant" (*Id.*, pgs. 109-110); and
- (3) "OSFC did not present any evidence to support a determination that the amount of the liquidated damages . . . [was] in proportion to the probable consequences of the breach" (*Id.*, pg. 110).

When viewed in light of what the Referee was required to review under *Samson Sales and Jones*, the liquidated damages provision in TA's contract simply failed the smell test for an enforceable liquidated damages provision under Ohio law. As the Referee put it,

“Because of the way the bid schedule was set up and because of the cumulative effect of the liquidated damages [provisions] . . . it must be said that, at the time the Contract was executed, the liquidated damages provisions were manifestly unreasonable, disproportionate in amount[,] and had no relationship to the probable consequences of a breach.”

(Decision, pg. 114.)

OSFC takes issue with the Referee's reasoning, arguing again that his approach was “non-judicious” in that the Referee “created evidence” to support his findings. (OSFC's Objections, pg. 8.) This is not the case. Instead, the Referee presented realistic hypothetical situations and used deductive reasoning to conclude that the liquidated damages provision in TA's contract was unenforceable as it was written. (Decision, pgs. 109-114.) The Referee's reasoning is meticulous and sound, and OSFC's argument to the contrary is not persuasive.

ii. TA Achieved Applicable Milestones.

The Referee's conclusion is further supported by the fact that TA complied with applicable milestones in its contract. The Referee recognized the inconsistency in OSFC's position which, on one hand, insists TA failed to meet milestone dates for roof and window enclosure, but on the other, admits (through LL/Keith) that the roofs were complete in terms of installation. (Decision, pgs. 114-115.) Meeting minutes from a “Core & Executive Core Team meeting” also reveal that OSSB5 achieved “Permanent Enclosure Complete” **almost three months before** OSFC began assessing liquidated damages for that same building. (Decision, pg. 114, f.n. 137, citing JX-H-39/3.) The Referee was correct to conclude that TA met all applicable enclosure milestone dates.

OSFC also takes the tenuous position that TA failed to meet roof *enclosure* milestones, solely based on TA's alleged failure to procure warranties for the finished installation of the roofs. Of course, providing warranties has nothing to do with whether the roofs were in fact enclosed. The Referee was also correct that TA was not required under its contract to furnish a roof warranty as part of an enclosure milestone. (Decision, pg. 115.)

iii. OSFC Delayed The Project Which Bars Assessment of Liquidated Damages.

The Referee's conclusion is also supported by Ohio case law which prohibits owners from assessing liquidated damages against a contractor where that owner delayed the project.

[I]f the party seeking to impose a liquidated damages clause can be deemed by his actions . . . to have contributed to an unreasonable delay, a liquidated damages clause is not available to him.

Mount Olivet Baptist Church, Inc. v. Mid-State Builders, Inc., 10th Dist. Franklin No. 84AP-363, 1985 Ohio App. LEXIS 9120, *19 (October 31, 1985). The evidence proved that the actions and inactions of OSFC and its agents caused the delay on the Project. Under Ohio law, the liquidated damages provision in TA's contract is not available to OSFC.

D. Liquidated Damages Assessment Properly Returned to TA.

OSFC next argues that TA was required to submit a formal Article 8 claim seeking the return of its liquidated damages assessment. (OSFC's Objections, pg. 3-6.) OSFC has cited no authority for this position, "nor has it directed the court to any evidence or reference to any contractual provisions to support such a contention." (Decision, pg. 41.) OSFC did not correct either of those shortcomings in its objections.

Unlike construction contracts addressed in other cases cited below, TA's contract simply did not require TA to assert a claim to recover wrongfully-withheld liquidated damages.

- See *Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Servs.*, 113 Ohio St. 3d 226, 2007-Ohio-1687, ¶41, 864 N.E.2d 68 (contract unambiguously made D&M's ability to mitigate liquidated damages contingent on its provision of written notice);
- See also *Tritonservices, Inc. v. Univ. of Cincinnati*, Ct. of Cl. Nos. 2009-02324, 2011-Ohio-7010, ¶22 (contractor precluded from seeking return of liquidated damages where contract unambiguously conditioned recovery of wrongfully withheld liquidated damages on provision of formal notice).

OSFC's argument simply has no basis in the language of TA's contract, which does not include the contractual provisions addressed in *Dugan & Meyers* and *Tritonservices*.

The Referee also correctly found that TA did seek return of the wrongfully withheld liquidated damages assessment, through its certified claims. (Decision, pg. 41.) Wilhelm testified that TA contested OSFC's liquidated damages assessment in writing on February 7, 2012. (Wilhelm Transcript, vol. 5, 234:1-16)

E. Return of Contract Balance and Proper Return.

OSFC's next argument also fails. OSFC suggests that TA did not introduce evidence of its "current contract balance" and that the Referee erred in "creating evidence."

The Referee was entitled to use the evidence available to him and introduced at trial to determine the contract balance owed to TA. That evidence included the testimony of TA's President, William Koniewich, who testified directly as to TA's present contract balance, the net change orders added, and the amounts paid to date by OSFC. (Decision, pgs. 117-120.)

OSFC also argues that TA was required to file a claim seeking the remainder of its contract balance. This argument also has no basis in Ohio law, or in the language of TA's contract.

F. Proximate Cause/Causation.

OSFC next argues that TA has not proven "proximate cause" or "apportionment," or that TA has not proved "what damages flowed from each breach." (OSFC's Objections, pg. 12.) OSFC suggests, as it did intermittently during trial and in closing argument, that "[c]onstruction claims

are no different than any other lawsuits. In order for a Plaintiff to prevail, it must show **duty, breach, proximate cause, and damages.**” (*Id.*)(emphasis ours).

This argument confuses the law of negligence with the law of contract. A breach of contract case requires a plaintiff to prove by a preponderance of the evidence four distinct elements:

[i]n order to establish a claim for breach of contract, the following elements must be demonstrated: the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff.

Allstate Prop. & Cas. Ins. Co. v. Am. Family Ins. Co., 10th Dist. Franklin No. 14AP-955, 2015-Ohio-3978, ¶ 10 (citations omitted). “Proximate cause” is not an element of a breach of contract case, and neither is apportionment.

To be clear, TA was required to prove that it suffered damages. *See, e.g., Telxon Corp. v. Smart Media of Del., Inc.*, 9th Dist. Summit Nos. 22098 & 22099, 2005-Ohio-4931, ¶ 56 (requiring proof of actual damages where corporation breached a non-disclosure agreement). The Referee was satisfied that TA met this burden, concluding “to a reasonable certainty by the greater weight of the evidence that OSFC breached the Contract and that TA was damaged by such breach of contract.” That factual finding is supported by abundant evidence in this case unequalled in similar construction disputes.

G. Apportionment of Damages.

Finally, OSFC suggests that “Mr. McCarthy [TA’s damages expert] also admitted that he did not connect any of his scheduling criticisms with damages suffered by TransAmerica.” (OSFC’s Objections, pg. 12.) Again, the law does not require McCarthy connect with absolute precision all of OSFC/LL/SHP’s many shortcomings to specific damages suffered by TA.

Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.

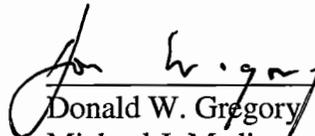
Eastment Kodak Co. v. S. Photo Materials Co., 273 U.S. 359, 379, 47 S.Ct. 400 (1927).

But, even assuming TA was required to “apportion” its damages, TA did spend three weeks at trial establishing the damages it suffered as a direct result of OSFC’s actions and inactions. Mr. McCarthy played an important role in that effort, and described in detail the extent and cause of TA’s damages. Indeed, “McCarthy’s forensic schedule analysis provide[d] a month by month view of how LL manipulated the schedule and a **narrative of the effects of this manipulation.**” (Decision, pg. 55, emphasis ours.) As the Referee correctly found, TA proved by a greater weight of the evidence that it is entitled to damages.

CONCLUSION:

The Referee used his vast wealth of knowledge and construction experience to digest a mountain of evidence and to come to findings of fact and conclusions of law that should be adopted by the Court, almost without exception. OSFC's Objections should be overruled in their entirety, the Referee's decision as to damages should be modified by the Court consistent with TA's Objections filed on November 2, 2015, and the Court should enter judgment in favor of TA.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true copy of the foregoing was served via U.S. Mail, postage prepaid, this 12 day of November, 2015 upon:

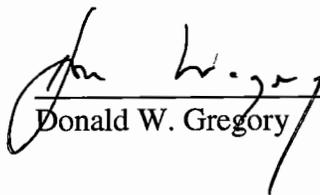
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