

[Cite as *Berkley Ins. Co. v. Kent State Univ.*, 2018-Ohio-5453.]

BERKLEY INSURANCE COMPANY

Plaintiff

v.

KENT STATE UNIVERSITY

Defendant

Case No. 2018-00579JD

Judge Dale A. Crawford

ENTRY GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

{¶1} Before the Court is Defendant Kent State University's (KSU) Civ.R. 56 motion for summary judgment which asserts Plaintiff Berkley Insurance Company (Berkley) waived its claims in this case because it failed to comply with the mandatory requirements of the Article 8 dispute resolution process contained in the parties' contract. In support of its motion, KSU relies on Plaintiff's complaint as well as facts set forth in the affidavit of Michael Bruder, which it submitted with its motion. Berkley filed its brief in opposition, asserting that its obligation to utilize Article 8 never arose because KSU has not completed the back-charge and project close-out process. In support, Berkley submitted the affidavit of Nancy Manno, including several exhibits comprised of correspondence between the parties.

{¶2} Civ.R. 56(C) states, in part, as follows:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

See also *Dresher v. Burt*, 1996-Ohio-107, 75 Ohio St.3d 280 (1996). In *Dresher*, the Ohio Supreme Court held, “the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.” *Id.* at 292.

{¶3} When the moving party has satisfied its initial burden, Civ.R. 56(E) imposes a reciprocal burden on the nonmoving party. It states:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleadings, but the party’s response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶4} Berkley’s Complaint seeks damages arising out of a June 9, 2014 construction contract between KSU and R & M Electric Co., Inc. dba Summit Electric (Summit), to whom Berkley issued surety bonds. The contract obligated Summit to provide electrical construction work as part of project KSU-12B949D, which involved renovations and additions to KSU’s School of Art. (Complaint ¶ 5-6; Bruder Aff. ¶ 3-5). Work commenced on or around June 16, 2014. (Bruder Aff. ¶ 6). In November of 2015, KSU found Summit in default and terminated it after Summit abandoned the project. *Id.* at ¶ 7. Berkley, pursuant to its performance bond, engaged a take-over contractor who finished the work. Berkley also reviewed and paid valid claims under its payment bond, subrogating Berkley to Summit’s interest in the remaining contract funds. (Complaint ¶ 7-10; Bruder Aff. ¶ 8). After completion of construction, KSU issued back-charges and asserted withholding claims against contract amounts. (Complaint ¶ 11; Bruder Aff. ¶ 9-11). Berkley asserts that KSU’s back-charges and withholdings were improper in several respects including a lack of supporting documentation and that “KSU did not complete * * * its initial back-charge/withholding

accounting process until June of 2017.” (Complaint at ¶ 11-19). Though Berkley delineates four separate counts in its Complaint, all are based on the alleged improper back-charges and withholdings.

{¶5} The parties contract, in Article 8 of the General Conditions, contained a mandatory dispute resolution process. Article 8 provides, in pertinent part, “the Contractor shall initiate every Claim by giving written notice of the Claim to the A/E and the Contracting Authority within 10 days after the occurrence of the event giving rise to the claim.” (Ex. A-3 to Defendant’s Motion for Summary Judgment at 8.1.2). The contract further provides, “[t]he Contractor’s failure to initiate a Claim as and when required under this Section 8.1 shall constitute the Contractor’s irrevocable waiver of the Claim.” *Id.* at 8.1.4. Per the contract, claims “shall accrue upon the date of occurrence of the event giving rise to the Claim.” *Id.* at 8.1.1.

{¶6} It is undisputed that KSU sent Berkley a letter on June 8, 2017 which clearly detailed KSU’s intention to withhold amounts from the contract balance. (Bruder Aff. ¶ 10; Ex. A-2 to Defendant’s Motion for Summary Judgment). It is also undisputed that Berkley has never initiated the Article 8 dispute resolution process. (Bruder Aff. ¶ 12). Therefore, per section 8.1.4, the Court finds Berkley waived the claims asserted in its Complaint in this case.

{¶7} It appears to the Court that Berkley takes the position that the Court should disregard the mandatory provisions of Article 8 and/or should disregard the provisions under the circumstances of the case. As stated in *Cleveland Construction v. Kent State Univ.*, 10th Dist. No. 09AP-822, 2010-Ohio-2906, 2010 Ohio App. Lexis 2407, ¶ 29:

When construing the terms of a contract, a court’s principal objective is to determine the intent of the parties. A court must presume that the intent of the parties resides in the language that they used in the contract. If a court is able to determine the intent of the parties from the plain language of the contract, then the court must apply the language as written and refrain from further contract interpretation. When “the terms in a contract are unambiguous, courts will not in effect create a new contract by finding

an intent not expressed in the clear language employed by the parties.”
(internal cites omitted).

In *Cleveland Construction*, the trial court held that the contractor’s failure to utilize Article 8 procedures did not result in a waiver of the contractor’s claims. The trial court reached this holding after finding that the Article 8 process was “inherently unfair” because it required the contractor “to pursue a dispute resolution process wherein individuals who were personally involved in the dispute acted as adjudicators.”

{¶8} In reversing the trial court’s decision, the 10th District found “the language of Article 8.1.1 is unambiguous.” (¶ 30). The 10th District reasoned further:

the trial court rewrote the contract to provide for a more equitable result. However, courts cannot decide cases of contractual interpretation on the basis of what is just or equitable. When a contract is unambiguous, a court must simply apply the language as written. Here, the language of Section 8.1.1 is plain and unambiguous. Consequently, we conclude that the trial court erred when it, in effect, deleted the second sentence of Section 8.1.1 from the parties’ contract.

{¶9} The June 8, 2017 letter clearly advised Plaintiff of KSU’s intent to withhold contract funds. Moreover, there is no legal authority or contractual requirement that KSU advise Berkley of its mandatory obligation to avail itself of the Article 8 dispute resolution process. While Berkley seems to feel it is superfluous to pursue its Article 8 claims and/or that the application of Article 8’s waiver provision is unfair since the parties continued to discuss and negotiate the amount of back-charges after the June 2017 letter, the contract required Berkley to initiate an Article 8 claim. Though Plaintiff objected to KSU’s withholdings and/or its imposition of back charges, through written and other communications to KSU, these negotiations do not constitute claims under Article 8. The Court cannot rewrite the parties’ contract by relieving Plaintiff of its contractual obligations based on assertions of unfairness or inequity. Thus, Plaintiff’s reasons for failing to comply with Article 8 are irrelevant and, having failed to initiate the Article 8 process at any point, Berkley waived its claims.

{¶10} The Court finds there are no genuine issues of material fact in that Berkley as surety for Summit waived its right to pursue its claims herein and KSU is entitled to judgment as a matter of law. KSU's Motion for Summary Judgment is GRANTED and judgment is rendered in favor of KSU. In addition, the Court DENIES KSU's Motion for Leave to File a Reply. Court costs are assessed against Berkley. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DALE A. CRAWFORD
Judge

Filed December 6, 2018
Sent to S.C. Reporter 1/14/19