

[Cite as *Romanoff Elec. Corp. v. Ohio Dept. of Admin. Serv.*, 1992-Ohio-284.]

IN THE COURT OF CLAIMS OF OHIO

ROMANOFF ELECTRIC CORPORATION :

Plaintiff : CASE NO. 91-02567

v. : DECISION

OHIO DEPARTMENT OF : Judge Fred J. Shoemaker  
ADMINISTRATIVE SERVICES,  
et al. :

Defendants/Third-Party :  
Plaintiffs :

v. :

DUGAN & MEYERS CONSTRUCTION :  
COMPANY, INC. :

Third-Party Defendant :

: : : : : : : : : :

ROMANOFF ELECTRIC CORPORATION :

Plaintiff : CASE NO. 91-11922-PR

v. :

DUGAN & MEYERS CONSTRUCTION :  
COMPANY, INC. :

Defendant/Third-Party :  
Plaintiff :

v. :

THE OHIO DEPARTMENT OF :  
ADMINISTRATIVE SERVICES,  
et al. :

Third-Party Defendants :



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These matters were consolidated for purposes of trial and relate to a dispute arising from the construction of the Wexner Center for the Visual Arts (Wexner Center) located on the campus of the Ohio State University. The multi-prime contracts were awarded in the latter part of 1986 through the Department of Administrative Services (DAS) and on behalf of the Ohio State University (OSU).

Dugan & Meyers Construction Company, Inc. (Dugan & Meyers), was to perform the general construction trades work while Romanoff Electric Corporation (Romanoff) was awarded the contract to perform all electrical work on the project. Separate prime contracts were awarded to Radico, Inc. (Radico), for the plumbing work and ATF Mechanical, Inc. (ATF), for all mechanical work at the site.

The circumstance precipitating these law suits center around an early morning rain storm on July 20, 1988, during which 1.43 inches of rain fell on the Central Ohio area. As a result of this storm, there was an accumulation of approximately forty inches of water in room 007. This accumulation of water ruined the electrical switch gear that had been purchased and installed by Romanoff. Romanoff replaced the switch gear at its own cost and is seeking reimbursement for its losses from DAS, OSU or Dugan & Meyers.

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There were no contractual ties between the prime contractors. The requirements of the prime contractors are stated in the plans and specifications. The plans and specifications for the project were prepared by the Associate Architect, Trott & Bean/Eisenman Robertson Architects, Inc. (Trott/Eisenman). Trott/Eisenman obtained the services of C.F. Bird and R.J. Bull, Inc. (Bird & Bull), to design the sanitary and storm sewer system as part of the plans and specifications for the project. Jerry Turner, an employee of Bird & Bull, was assigned the task of designing a sanitary and storm sewer system to handle a rain fall run-off that could be expected from a "two-year" storm.

The construction area was serviced by an eighteen-inch combination system handling the storm and sanitation flows from adjoining buildings, Weigel Hall and Mershon Auditorium. While in the design stage of the project, Jerry Turner calculated the flows and determined that the existing eighteen-inch combination system was inadequate to handle the anticipated run-off during a "two-year" storm. This finding of inadequate capacity was relayed to both the associate architect and the state architect during at least one of a series of design review meetings.

Jerry Turner then began a design to route the new storm sewer from the project to a proposed thirty-inch storm sewer that

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had been identified in an engineering master plan of the area previously designed and provided to the state defendants by the engineering firms of Jones Stuckey, Ltd. After review of Turner's design, the state defendants directed Turner to route the storm water from the project to the preexisting eighteen-inch combined sewer and to make provisions for a future tie-in to the thirty-inch proposed system.

Since he recognized a potential flooding problem caused by the excessive flow into the eighteen-inch sewer, Jerry Turner recommended to the state defendants that water-tight floor drains be installed inside the Wexner Center to prevent back-up and potential damage to the project. The state did not follow Turner's recommendations and did not incorporate them into the design. The state failed to disclose these important material facts to the bidders on the project at all phases of the bidding and construction of this project.

It is well-established that the owner is required to furnish sufficient plans and specifications to enable the contractor to perform. ***Bates and Rogers Construction Co. v. Board of Commissioners*** (1920), 274 F. 659. Further, the architect is the agent of the owner and the owner is liable for any omissions that created extra cost. ***Mason Tire & Rubber Co. v. The Cummins-Blair Co.*** (1927), 116 Ohio St. 554.

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As recently held by this court in *Valentine Concrete, Inc., et al. v. Ohio*

*Department of Administrative Services, et al.* (1991), Ct. of Claims Nos. 87-06987

and 89-09550, unreported, where a public owner prepares or has prepared the plans and specifications for the project, he impliedly warrants that those plans and specifications are suitable for the intended purpose. Therefore, a failure by the owner to provide plans and specifications which are buildable, accurate and complete would constitute a breach of contract.

Consistent with the general and special conditions of the project, each prime contractor was responsible for the coordination of its work efforts with the other primes while Dugan & Meyers was further responsible for the scheduling of the weekly progress meetings. Dugan & Meyers conducted the prime contractor coordination meetings on Mondays and advised the state defendants, who attended these meetings, of areas where direction was needed to be given to the other primes.

Dugan & Meyers was responsible for the "dewatering" operations of the project pursuant to the plans and specifications, which included pumping water from the site in general and specifically from a sump pit located in room 007 and into the preexisting eighteen-inch combination sewer. Both Dugan & Meyers and Romanoff had requested the prime plumbing

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contractor, Radico, to install the permanent pumps in room 007 or as an alternative to "direct wire" the temporary pumps to prevent unplugging or disruption of service from the ground fault circuit interrupters. Radico did not install the permanent pumps and the state did not order the work performed because the owner would not waive or change the warranty period on the permanent pumps.

Prior to July 18, 1988, Dugan & Meyers had maintained only one two-inch electrical submersible pump in the sump hole located in room 007. After rains on July 18, 1988, and July 19, 1988, Dugan & Meyers installed a second two-inch electrical submersible pump, suspended in a series, to assist the first or bottom pump when and if the water reached a certain height. With the installation of the second pump, the capacity was similar to that of the designed permanent pumps.

With a forecast of rain for the night of July 19, 1988, Dugan & Meyers assigned an employee named Doug Cooper to visit the site after normal working hours to verify that the pumps were operational and that no water was accumulating in room 007. When Mr. Cooper visited the site shortly after midnight on July 20, 1988, he found no problems. However, the rain that

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caused the flooding of room 007 did not occur until after 1:00 a.m. on  
July 20, 1988.

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The storm of July 20, 1988, during which 1.43 inches of rain fell between the hours of 1:00 a.m. and 4:00 a.m. in the Central Ohio area, was classified as a "one year storm." At 6:30 a.m. on July 20, 1988, an estimated forty inches of water was found in room 007. The electrical service to the pumps had failed, and the accumulation of water caused permanent damage to the switch gear that had been installed by Romanoff.

It was determined that, as a result of the rainfall, water entered the eighteen-inch combined system from the roof drains for Mershon Auditorium, Weigel Hall and the Wexner Center from the loading dock trench and yard drains, and from the canopy and walkway on the south and east portions of Mershon. The gutters and axial walkway drains of the Wexner Center mechanical room also emptied into the eighteen-inch combined sewer.

The water flow created by the storm caused the system to surcharge, which resulted in water flowing back through the sanitary sewer system and through the floor drains to seek relief. The primary avenue for water to enter room 007 on July 20, 1988, was through the sump pit located in room 007 and from any water that backed up through the floor drain in the adjacent room 008. After reviewing the evidence submitted as to the conditions on site as

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of July 20, 1988, the court finds that the eighteen-inch combined system that  
Dugan & Meyers was

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expected to use to dewater the site was of inadequate size to handle the flow of water generated by the 1.43 inches of rainfall, thereupon causing the water to back up into the sanitary sewer system and seek the nearest points of relief flowing into the lowest elevation in room 007, where it damaged the electrical switching equipment of Romanoff.

The state, through both OSU and DAS, was, or should have been, aware of the inadequate capacity within the system prior to the awarding of any bids on the project. No contractors were appraised of this potential problem prior to submission of the bids. After the July 20, 1988, flood, no state representative informed Dugan & Meyers of the under capacity of the system. Dugan & Meyers was finally informed of the under capacity problem after a second flood in April 1989, when Jerry Turner of Bird & Bull informed them that he made OSU and DAS aware of the need for a system other than the eighteen-inch combination system in his original proposal prior to any plans or specifications being released.

Romanoff had the responsibility to provide all temporary and permanent electrical services to the Wexner Center project. On the morning of July 20, 1988, when the flood was detected in room 007, there were no electrical

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services to the two submersible pumps of Dugan & Meyers and the resulting  
water

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rendered the electrical switch gear previously installed by Romanoff

inoperative. Due to damage to the switch gear, and at the direction of the state, Romanoff removed the equipment and proceeded to purchase and install the new replacement switch gear.

Two further flooding incidents occurred after the July 20, 1988, flood.

On April 4, 1989, after another rain storm, water again backed up in the system through the sanitary floor drains. As a result of this event, the state issued a change order to Radico to install backflow preventers in order to prevent overflow from the toilets, urinals and floor drains that were not watertight. The state issued change orders to Dugan & Meyers to repair the damage caused by the third flood, and Ms. Carole Olshavsky, Deputy Director of DAS, advised the associate architect in a letter dated August 7, 1989, that there was an emergency situation at the Wexner Center due to insufficient storm drainage from the university facilities. As a result, the state authorized and built the thirty-inch College Avenue storm sewer system, as originally recommended by the Jones Stuckey report, and connected the Wexner Center facility to that system. No further flooding occurred thereafter. The court finds that the thirty-inch storm sewer should have been constructed in conjunction with the Wexner project.

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When an owner has knowledge of conditions which are material to the performance of the contract, it has an affirmative duty to disclose such information. The failure to disclose such material information constitutes a breach of contract. ***Helene Curtis Industries, Inc. v. U.S.*** (Ct. Cl. 1963), 312 F. 2d 774.

After reviewing the competent and credible evidence presented at this proceeding, the court finds that both OSU and DAS were fully aware of the recommendation and need for a larger storm sewer system to serve the Wexner Center Complex and chose not to include this requirement in the plans and specifications. Therefore, Romanoff is entitled to any extra costs incurred as a result of the damages caused by discrepancies within the plans and specifications for the Wexner Center Complex. ***Valentine Concrete Inc., et al. v. Ohio Department of Administrative Services, et al.*** (1991), *supra*.

As to the dewatering requirement of Dugan & Meyers, the public owner has a duty to provide plans and specifications which are accurate, complete and suitable for the purpose intended and a failure to do so constitutes a breach of contract. ***Valentine, supra.*** The refusal or failure of OSU and DAS to design a storm sewer system that was adequate to handle the anticipated flow

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from the Wexner Center relieves Dugan & Meyers from a duty to perform a  
virtually impossible act.

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Therefore, based upon the evidence presented and the applicable law, in Case No. 91-02567 judgment shall be rendered for plaintiff, Romanoff, in an amount to be determined substantially by the change order policy guidelines of the contract for their costs incurred to replace the damaged equipment and against both DAS and OSU, jointly and severally. Further, judgment shall be rendered for third-party defendant, Dugan & Meyers, in Case No. 91-02567.

Judgment for Romanoff in Case No. 91-02567 is itemized as follows:

- 1) \$115,814.05 to Romanoff from DAS and OSU, jointly and severally, for the material cost of the replacement switch less salvage;
- 2) \$19,903.35 to Romanoff from DAS and OSU, jointly and severally, for labor costs consisting of \$13,392.02 for general labor, \$2,011.33 for supervisory labor and \$4,500 for additional project manager costs (computed for sixty hours at \$75 per hour);
- 3) \$2,985.50 to Romanoff from DAS and OSU, jointly and severally, for overhead computed at fifteen percent of the labor costs;
- 4) \$13,870.29 to Romanoff from DAS and OSU, jointly and severally, for lost profits computed at ten percent of the labor material and overhead;

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In addition to the above losses totaling \$152,573.19, Romanoff is entitled to interest on their losses from the date of the completion of the reinstallation of the equipment. Interest shall be computed at a rate of ten percent per annum from January 1, 1989, until October 26, 1992, consistent with R.C. 1343.03(A) which provides that:

(A) In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate of ten percent per annum, and no more, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract;

5) \$67,153.87 to Romanoff from DAS and OSU, jointly and severally, for interest on their losses computed as follows:

- a) 1/1/89 - 12/31/89 (\$152,573.19 @ 10%) = \$15,257.32
- b) 1/1/90 - 12/31/90 (\$167,830.51 @ 10%) = \$16,783.05
- c) 1/1/91 - 12/31/91 (\$184,613.56 @ 10%) = \$18,461.36
- d) 1/1/92 - 10/26/92 (\$203,074.92 @ 10%) = \$16,652.14

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Summarizing the itemized items, Romanoff in Case No. 91-02567 will be granted judgment in the amount of \$219,727.06 against DAS and OSU, jointly and severally.

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In Case No. 91-11922-PR judgment will be granted for defendant, Dugan & Meyers, and against the plaintiff, Romanoff. The third-party matter against DAS and OSU is therefore moot.

On a final procedural matter, Romanoff Exhibits Number 30 and 31 that were submitted after the completion of trial and by agreement of the parties, are admitted over the objection of Dugan & Meyers, DAS and OSU.

FRED J. SHOEMAKER  
Judge

0344A/1-13/WLH

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et al. :  
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Plaintiffs :  
v. :  
DUGAN & MEYERS CONSTRUCTION :  
COMPANY, INC. :  
Third-Party Defendant :

: : : : : : : : :

Upon consideration of all the evidence and for the reasons set forth in the decision rendered concurrently herewith, judgment is rendered for plaintiff, Romanoff Electric Corporation, and against defendants the Ohio Department of Administrative Services and the Ohio State University. Judgment is further rendered in favor of the third-party defendant Dugan & Meyers Construction Company, Inc.

It is hereby ORDERED that plaintiff take \$219,727.06 upon the claims against defendants, the Ohio Department of

Administrative Services and the Ohio State University, jointly  
and severally. Court costs in this case and in Case No.



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Upon consideration of all the evidence and for the reasons set forth in the decision rendered concurrently herewith, judgment is rendered for defendant, Dugan & Meyers Construction Company, Inc., and against plaintiff, Romanoff Electric Corporation. The third-party claims against defendants, the Ohio Department of Administrative Services and the Ohio State University, are rendered moot.

The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

FRED J. SHOEMAKER  
Judge

