[Cite as *Transworld Systems v. Ohio Univ.*, 2003-Ohio-6590.]

IN THE COURT OF CLAIMS OF OHIO

TRANSWORLD SYSTEMS, INC. etc.	:	
Plaintiff	:	
v.	:	CASE NO. 2003-01873-AD
OHIO UNIVERSITY	:	MEMORANDUM DECISION
Defendant	:	

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{¶1} In 1968, defendant, Ohio University (OU), entered into a contract with John T. Cantlon & Associates, Inc. (Cantlon Associates) to provide Workers' Compensation services. A written contract was executed which provided for a one year agreement with an automatic renewal provision after the first year. Defendant OU and Cantlon Associates carried on this service relationship from 1968, until the end of March, 2000. In March, 2000, a representative of OU identified as Jimmy Matthews decided to engage another firm to provide the Workers' Compensation services supplied by Cantlon Associates. Matthews notified Cantlon Associates of his intent to change Workers' Compensation service providers.

{¶2} Under the terms of the 1968 original contract between Cantlon Associates and OU, either party had the option to terminate the contract by giving thirty (30) days notice. This thirty (30) day notice provision was contained in writing in the 1968 service agreement. Cantlon Associates maintained defendant, OU, did not properly terminate the service contract because defendant failed to comply with this thirty (30) day notice requirement. Apparently, Cantlon Associates had prepared several Workers' Compensation cases before receiving any indication OU wanted to terminate the contract. Cantlon Associates did not receive any payment for work performed on these pending

cases. Consequently, plaintiff, Transworld Systems, Inc., as assignee of Cantlon Associates, filed this complaint seeking to recover $2,500.00, representing fees for unpaid services rendered by Cantlon Associates. Plaintiff submitted the filing fee with the complaint. Plaintiff, as assignee of the contract, takes that contract with all rights of the assignor (Cantlon Associates) and subject to all defenses that the defendant may have had against the assignor. The assignee stands in the shoes of the assignor and has no greater rights against defendant than the assignor had. *Citizens Fed. Bank, F.S.B. v. Brickler* (1996), 114 Ohio App. 3d 401. Plaintiff insists entitlement to the damages claimed under a breach of contract basis. Alternatively, plaintiff claims recovery on a quantum meruit principle pending a finding of an absence of a specific contract between OU and Cantlon Associates.

{¶3} Defendant asserted the thirty (30) day notice of termination manifested in the 1968 written agreement was not applicable when services providers were changed in March 2000. OU acknowledged entering into a service agreement with Cantlon Associates in 1968. However, defendant OU contended this service contract was intended to operate for the 1968/69 school year only. Defendant related this written contract, "was not continued after its first year or years; and it certainly was not still in place by 1975." Furthermore, defendant insisted the contract was not in place by 1980. Defendant explained material terms of the contract with Cantlon Associates changed over the years from 1968 to 1980 and specific terms of the relationship between OU and Cantlon Associates changed during the years after the initial contract was executed. Defendant declared the payment fee structure and responsibilities of Cantlon Associates were changed after 1968. Therefore, defendant argued any terms of the 1968 contract had no force and effect after one year. Defendant stated, by 1980 its legal relationship with Cantlon Associates had changed. Defendant argued these changes were manifested in a new verbal contractual relationship being formed which was not an extension of the 1968 written agreement between the parties. Defendant cites mutual agreements to escalate fee structures from 1968 through the early 1970's and continuing to 1999/2000 as examples that new and separate contracts were being formed from 1968 to 1999/2000; the last year of the relationship between OU and Cantlon Associates. Essentially, defendant

has contended new contracts were being formed every time an agreement was made to increase fees and consequently, the terms of the 1968 written contract regarding receipt of thirty (30) days notice to end the contractual relationship had no effect on these subsequent contracts. According to defendant's reasoning, all terms of the 1968 contract were nullified once any amendment to terms was agreed upon. Defendant professed the 1968 contract expired and, therefore, the notice requirement to effect termination had no application to any further dealings or business conduct between OU and Cantlon Associates.

{¶4} Plaintiff asserted the 1968 written contract remained in full force and effect until either party gave the required thirty (30) days notice to terminate. Plaintiff maintained the contract was never cancelled until OU terminated its relationship with Cantlon Associates. Plaintiff asserted any negotiated fee increases did not terminate the effect of the written contract. Plaintiff implied subsequent verbal agreements to modify fee structures did not cancel the original written contract especially when the contract provided specific measures to effect termination.

{¶5} Defendant submitted a narrative characterized as an affidavit from Jimmy Matthews, who is identified as the former Director of Environmental Health and Safety at Ohio University. Matthews began work at OU in 1967, as Director of Environmental Health and Safety and in 1975, he assumed responsibility for the Workers' Compensation Programs at OU. In 1975, when Matthews started in the Workers' Compensation Programs at OU, Cantlon Associates, Inc. was the OU advisor on Workers' Compensation matters. Matthews seemingly related that at the time he began dealing with Cantlon Associates he was unaware of a written service contract between OU and Cantlon Associates. Matthews further related services fees to be paid Cantlon Associates were negotiated on a yearly basis and no reference was made by any party to an existing written contract. Defendant stated Matthews negotiated a fee increase with Cantlon Associates at sometime in 1980; with the parties setting payment increases of $2,000.00 per month. Cantlon Associates apparently served as defendant's advisor on Workers' Compensation subjects until March, 2000, when Matthews decided to replace Cantlon Associates with an entity identified as Frank Gates Services. Defendant asserted Matthews was unaware of a

contract notice requirement to effectively terminate the relationship with Cantlon Associates.

{¶6} Plaintiff offered an affidavit from William A. Lukcso, identified as the President of John T. Cantlon & Associates, Inc. On August 13, 2001, Lukcso, in his capacity as President of Cantlon Associates, assigned to plaintiff, Transworld Systems, Inc., the account rights to any monies owed to Cantlon Associates by defendant. Lukcso stated Cantlon Associates, "is in the business of representing entities before the Ohio Bureau of Workers Compensation and Industrial Commission of Ohio." Lukcso acknowledged Cantlon Associates entered into a written contract with defendant in 1968 involving representation on Workers' Compensation matters. Lukcso related it was his understanding the contractual agreement with defendant would continue to renew on a yearly basis and remain in effect unless either party upon thirty (30) days notice to the other party manifested an express intent to terminate the contractual relationship. Lukcso further related he first received defendant's notice terminating the contract with Cantlon Associates at the end of March, 2000. Furthermore, Lukcso professed, "it is customary practice in the industry of representing entities before the Ohio Bureau of Workers' Compensation to give at least (30) days notice prior to termination." Lukcso characterized Cantlon Associates as the authorized representative of OU in Workers' Compensation matters from the period 1968 through March, 2000. Lukcso explained fees for services rendered increased from $4,000.00 per year, during the first year of the contract, to $24,995.00 per year in 1996. Lukcso insisted Cantlon Associates performed work on cases for defendant subsequent to receiving notice of termination. Lukcso described the post termination work as the transfer of electronic data to the new service representative to further a smooth transition of representation responsibility from Cantlon Associates to Frank Gates Services.

{¶7} Notwithstanding any resolution regarding the existence of a contract, defendant has denied plaintiff has any basis for recovery under a quantum meruit theory. Defendant disputed plaintiff's claim that Cantlon Associates did not receive proper notice they were being replaced by Frank Gates Services and, consequently, prepared several Workers' Compensation cases before April, 2000. Payment for this disputed preparatory

work represents the amount claimed as damages in the instant action. Defendant submitted evidence in the form of a copy of a fax transmittal letter from Cantlon Associates to OU, dated March 28, 2000. This submission establishes Cantlon Associates knew they had been replaced as defendant's Workers' Compensation advisor by Frank Gates Services. The fax letter, directed to Jimmy Matthews, contained information mentioning a transfer of responsibility for attending ten Workers' Compensation hearings scheduled for the first week of April, 2000. Defendant seemingly has contended that because Cantlon Associates acknowledged they had been replaced as a service provider, the acknowledgment is sufficient proof Cantlon Associates had not performed any preparatory work on the ten pending Workers' Compensation cases. Therefore, defendant asserted no recovery can be had under quantum meruit since no evidence has established work was done by Cantlon Associates on the ten cases scheduled for hearing in April, 2000.

{¶8} In summary, defendant argued the written contract with Cantlon Associates expired in 1970 due to some unspecified changes in the relationship between Cantlon Associates and OU. According to defendant's reasoning this written contract had definitely terminated by 1975 or 1980 because of increases in fees paid and changes in services. Defendant characterized the relationship with Cantlon Associates after 1970 as a series of verbal contracts effectively terminating on April 1, 2000. Defendant disputed the contention Cantlon Associates performed any service work on cases after April 1, 2000 which should merit any payment let alone the $2,500.00 claimed. Defendant did not pursue any additional defenses to this action.

{¶9} From a review of all documentation, the court finds the cause of action in this claim accrued after March, 2000 when Cantlon Associates received notice from OU about the change in service representation to Frank Gates Services. The cause of action in this claim certainly accrued within a reasonable time after notice was received of termination and defendant failed to remit any funds for any services rendered prior to termination of the agreement between Cantlon Associates and OU. Plaintiff filed its complaint on January 27, 2003. R.C. 2743.16(A), the statute of limitations for commencing actions in this court states:

{¶10} "Subject to division (B) of this section, civil actions against the state permitted

by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties."

{¶11} It has been previously held that the two-year statute of limitations under R.C. 2743.16 applies to claims based on contract, either express or implied in fact. See *Waits v. Ohio Dept. of Transp.* (1987), 61 Ohio Misc. 2d 139; *Humphrey v. State* (1984), 14 Ohio App. 3d 15. In practice the provisions of R.C. 2743.16(A) apply to all actions against the state filed in this court. *Fellman v. Ohio Dept. of Commerce* (Sept. 29, 1992), No. 92AP-457 unreported (1992 Opinions 4341). "Absent legislative definition, it is left to the judiciary to determine when a cause 'arose'." *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St. 3d 84, 87 citing *Harig v. Johns-Manville Products Corp* (1978), 284 Md. 70 at 75. In the instant claim, the cause arose at the time Cantlon Associates either submitted or should have submitted a request for final payment when notice of termination was received. The particular cause of action arose by the end of April, 2000. Plaintiff filed the instant action on January 27, 2003. It would appear plaintiff failed to meet the applicable statute of limitations.

{¶12} However, defendant failed to raise the defense of statute of limitations at any time after the commencement of this action. Where the bar of statute of limitations is not raised as an affirmative defense then the defense is waived. *Mills v. Whitehouse Trucking Co.* (1974), 40 Ohio St. 2d 55. Consequently, defendant in the present claim is estopped from asserting a statute of limitations defense and this action will proceed on the merits.

{¶13} Both defendant and plaintiff submitted a copy of the written Ohio Workmen's Compensation Service Contract entered into between Cantlon Associates and OU. This contract, executed on July 23, 1968, outlined the services to be provided concerning Workers' Compensation matters with specific items enumerated. The listed services to be provided by Cantlon Associates apparently did not change from the time the written contract was executed until 2000 when OU changed service providers by engaging Frank Gates Services. The 1968 contract specifically states:

{¶14} "We, John T. Cantlon & Associates, Inc., Columbus, Ohio, propose to act as your consulting actuaries and representatives before The Bureau of Workmen's

Compensation and the Industrial Commission of Ohio in the handling of your Workmen's Compensation Insurance premium cost. Our service will consist of a personal actuarial service to record, compute and control all of the factors affecting the classification of your operations by the Bureau, the computation of your annual premium rate, and the compilation of your industrial accident and disease experience.

{¶15} "It is agreed that our fee be:

{¶16} "$2.00 per non-academic employe per year and $1.00 per academic employe per year, except that for the first year, the fee be only $4,000.00; payable quarterly.

{¶17} "It is further proposed that this agreement shall remain in force for one year after its effective date. The agreement shall thereafter automatically continue in effect with the provisions that it may be terminated at any time after the first year by either party upon 30 days' notice to the other party."

{¶18} As a general rule, the goal of the court in construing written contracts is to arrive at the intent of the parties, which is presumed to be stated in the document itself. See *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St. 3d 353, 1997-Ohio-202; *Graham v. Drydock Coal Co.*, 76 Ohio St. 3d 311, 1996-Ohio-393. Where the terms of a contract are clear and unambiguous, the court cannot find different intent from that expressed in the contract. *E.S. Preston Assoc., Inc. v. Preston* (1986), 24 Ohio St. 3d 7.

{¶19} If there is no ambiguity in the language of a contract, it is not the court's place to interpret words beyond their plain meaning. *Werner v. Cincinnati Ins. Co.* (1991), 77 Ohio App. 3d 232. The court may not rewrite a contract by reading into it language or terms that the parties omitted. *Porter v. Columbus Bd. of Indus. Relations* (1996), 111 Ohio App. 3d 238.

{¶20} From a reading of the contract in the instant claim, it is apparent the parties intended the contract to continue and renew after the first year unless termination was effected by submitted requisite notice. Based on the language of this written contract, defendant was entitled to terminate the contract, but was required to abide by the thirty (30) day notice provision. As a corollary to receiving notice, Cantlon Associates was entitled to receive payment for services rendered for a thirty (30) day period after being served notice

of defendant's intent to terminate the contract.

{¶21} Considering defendant's argument is correct that the 1968 written agreement was long nullified and a separate and distinct contract was formed every time money terms were renegotiated, some reasonable notice requirement concerning contract termination should be expected to be incorporated into each new contract. Indeed each party to a contract has a right to expect some reasonable notice when contract termination is contemplated. Contrary to defendant's position, sufficient evidence has not been presented to show the notice provision of the 1968 agreement was voided by subsequent conduct. Its reasonable to conclude Cantlon Associates performed unpaid services on assignments after receiving notice of defendant's intent to terminate the relationship. Defendant is not excused from payment for work performed by Cantlon Associates encompassing a thirty (30) day period after receiving notice of defendant's intent to terminate the service agreement.

{¶22} Recission, abandonment, or other change in a contract must be by mutual consent of the parties and does not include unilateral termination or cancellation. *American Bronze Corp. v. Streamway Products* (1982), 8 Ohio App. 3d 223. Not every change to an agreement constitutes a new contract; the issue is not whether changes were made to an existing agreement, but rather whether existing rights were significantly altered. *In re Kerry Ford, Inc.* (1995), 106 Ohio App. 3d 643. Concomitantly, in the instant claim, the fact payment terms for services were periodically increased did not significantly alter the existing written 1968 instrument between OU and Cantlon Associates. A contract cannot be unilaterally modified. In order to modify a contract the parties to that contract must mutually consent to that modification. *Nagle Heating & Air Conditioning Co. v. Heskett* (1990), 66 Ohio App. 3d 547. There is no evidence in the present action showing defendant and Cantlon Associates mutually agreed to modify the written contract in respect to the thirty (30) day termination notice provision. No evidence has established Cantlon Associates agreed to waive this provision. "Subsequent acts and agreements may modify the terms of a contract, and, unless otherwise specified, neither consideration nor a writing is necessary." *Software Clearing House, Inc. v. Intrak Inc.* (1990), 66 Ohio App. 3d 163, 172. There is no dispute, in the present claim, that defendant and Cantlon Associates

orally agreed to modify payment terms of the contract on multiple occasions. However, these oral modifications had no effect on any other terms expressed in the written agreement which remained in full force and effect having never been subject to modification. No evidence has shown the parties intended to abandon all terms of the 1968 written agreement when subsequent modification regarding payment rates were negotiated. There has been no proof offered that either party intended to nullify or terminate the 1968 written agreement by subsequent act until Cantlon Associates received notice in March, 2000. Conversely, the acts of both parties indicate an intent to observe the terms of the 1968 written agreement with the exception of payment rates modifications.

{¶23} Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, and in accordance with the limits of R.C. 2743.10, judgment is rendered in favor of plaintiff in the amount of $2,500.00, which includes the filing fee. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

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