

[Cite as Meighs Local School Dist Bd. of Edn. V. Riverside Masonry, L.L.C., 2004-Ohio-1923.]

IN THE COURT OF CLAIMS OF OHIO

MEIGS LOCAL SCHOOL DISTRICT	:	
BOARD OF EDUCATION, et al.	:	
	:	CASE NO. 2003-10716-PR
Plaintiffs/Counterclaim	:	Judge Fred J. Shoemaker
Defendants	:	
	:	<u>DECISION</u>
v.	:	
RIVERSIDE MASONRY, LLC, D/B/A	:	
C&R MASONRY OF MICHIGAN,	:	
et al.	:	
	:	
Defendants	:	
and	:	
	:	
GREENWICH INSURANCE COMPANY	:	
	:	
Defendant/Counterclaim	:	
Plaintiff	:	

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{¶1} On November 13, 2003, plaintiff/counterclaim defendant, Ohio School Facilities Commission (OSFC), filed a motion to dismiss the counterclaim asserted by Greenwich Insurance Company (Greenwich), pursuant to Civ.R. 12(B)(6) and a request for an oral hearing. Upon review, OSFC's request for an oral hearing is DENIED. On December 22, 2003, OSFC filed a response to the motion to dismiss.

{¶2} In construing a complaint upon a motion to dismiss for failure to state a claim, the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190. Then, before the court may dismiss the complaint, it must

appear beyond doubt that plaintiff can prove no set of facts entitling him to recovery. *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242.

{¶3} On August 18, 2003, plaintiffs Meigs Local School District Board of Education (Meigs) and OSFC filed a complaint against Greenwich and others in the Meigs County Court of Common Pleas. On September 24, 2003, plaintiffs filed an amended complaint alleging that Greenwich issued a performance bond to plaintiffs on behalf of defendant, Riverside Masonry L.L.C. dba C&R Masonry of Michigan (C&R), and that Greenwich is now liable to plaintiffs under the terms of that agreement for damages arising from C&R's breach of its contract with plaintiffs.

{¶4} On or about October 14, 2003, defendant Greenwich filed its answer and a counterclaim against plaintiffs claiming that under the terms of the bond, Greenwich is subrogated to the interest of C&R for the balance of the contract receipts owed to C&R.

{¶5} In Greenwich's brief in opposition to the motion to dismiss, Greenwich states that its counterclaim against OSFC is "**** based on the well-established rights of a surety to subrogation and its contractual rights arising by assignment."

{¶6} In *Community Ins. Co. v. Dept. of Transp.*, 92 Ohio St.3d 376, 2001-Ohio-208, the Supreme Court of Ohio held that an insurer who has been granted the right of subrogation by a person, on whose behalf the insurer has paid medical expenses incurred as the result of the negligent conduct of the state, is subject to the statute which mandates reduction in recoveries against the state by the "aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant." R.C. 2743.02(D). In so holding, the Supreme Court of Ohio reasoned that R.C. 2743.02(D) was made part of the Court of Claims Act in order to preserve public funds by preventing double recovery against the state. *Community Ins.*, supra at 378.

{¶7} In *American Ins. Co. v. Ohio Dept. of Admin. Serv.*, 120 Ohio Misc.2d 79, 2002-Ohio-5754, this court applied the reasoning of *Community Ins.*, supra, to a case arising from the same basic facts set forth in defendant's counterclaim. In that case,

defendant, Ohio Department of Administrative Services (ODAS), as the statutory contracting agent for Cuyahoga Community College District (CCC), entered into a contract with J.P. Sorma Construction Co., Inc. (Sorma), for the construction of a school building. Plaintiff, The American Insurance Company (AIC), entered into a general indemnity agreement with Sorma whereby AIC agreed to act as surety.

{¶8} Sorma's contract was terminated after ODAS learned that Sorma had failed to pay several subcontractors. ODAS did, however, pay Sorma the sum of \$150,000 for its pre-termination profit on the project. Sorma kept the funds and did not pay the subcontractors. The unpaid subcontractors asserted claims against the contract bond and AIC paid those claims.

{¶9} AIC sued Sorma in common pleas court to recover its losses under the general indemnity agreement. Judgment was entered in favor of AIC and against Sorma. When AIC was unable to collect from Sorma, it sued ODAS in this court to recover the pre-termination payments.

{¶10} AIC's primary argument was that ODAS was liable to it for the payments made to Sorma as an "account debtor" under R.C. 1309.37(C). This court found that R.C. 1309.37 did not apply to transactions with the State of Ohio and rejected AIC's argument. Additionally, in granting summary judgment in favor of ODAS, this court noted:

{¶11} "Plaintiff also asserts a common law claim for impairment of plaintiff's rights under the bond and the general indemnity agreement. *** Upon review, the court finds that plaintiff's claim is essentially a claim for equitable subrogation over which this court does not have jurisdiction. See *Community Ins. Co. v. Dept. of Transp.*, 92 Ohio St.3d 376, 2001-Ohio-208. (Claims for subrogation are not cognizable against the state in the Court of Claims.)"

{¶12} For the same reasons set forth in *American Insurance Company*, supra, this court lacks subject matter jurisdiction over Greenwich's subrogation claims whether they be predicated upon statute, contract, or common law. While Greenwich argues that public

policy demands that a surety retain the right to recover against the state, the court finds that the public policy regarding such recovery has been set forth in R.C. 2743.02(D) and *Community Ins.*, supra.

{¶13} Accordingly, plaintiff/counterclaim defendant's, Ohio School Facilities Commission, motion to dismiss the counterclaim shall be granted and said counterclaim shall be dismissed.

{¶14} A non-oral hearing was conducted in this case upon plaintiff/counterclaim defendant's, Ohio School Facilities Commission, motion to dismiss Greenwich Insurance Company's counterclaim. For the reasons set forth in the decision filed concurrently herewith, the motion is GRANTED and the counterclaim is hereby DISMISSED.

{¶15} Furthermore, upon review, the court finds that the state is no longer a defendant in this action. Accordingly, pursuant to R.C. 2743.03(E)(2), this case is REMANDED to the Meigs County Court of Common Pleas and the clerk is directed to return the original papers thereto. Court costs are assessed against defendant/counterclaim plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

FRED J. SHOEMAKER
Judge

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