

Court of Claims of Ohio

The Ohio Judicial Center
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CERTEK, INC.

Case No. 2005-09138

Plaintiff

Judge Joseph T. Clark
Referee Jack R. Graf Jr.

v.

REFEREE REPORT

THE OHIO STATE UNIVERSITY, et al.

Defendants

{¶1} On September 29, 2006, plaintiff filed a motion for summary judgment. On October 31, 2006, defendants filed a memorandum in opposition to which a reply was filed on November 14, 2006. The case came before the court for oral hearing on January 4, 2007.

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

{¶3} “*** 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, *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶4} Plaintiff alleges that defendant, The Ohio State University (OSU), failed to remit the full purchase price for an airborne contamination BL+ laboratory module that was

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constructed by plaintiff, delivered to defendants' site, and installed by plaintiff on foundations provided by defendants. Plaintiff claims that it manufactured the module based upon drawings and specifications agreed to by OSU. According to the record, OSU issued two purchase orders in March and in April 2003. The module was shipped to OSU in August 2004 and thereafter installed. OSU took control of the unit in December 2004. Plaintiff insists that although it had fulfilled its obligations as of December 2004, OSU withheld a portion of the sum owed.

{¶15} OSU asserts that it withheld funds because there were problems with the lab; specifically, that the wiring was not compatible with defendants' security system and had to be replaced, and that the door locking mechanism needed to be adapted to operate in conjunction with the OSU electronic proximity card used to gain admittance to the laboratory. According to OSU, contractors who were already on site were hired to perform the necessary modifications. OSU also decided to renovate the HVAC system. OSU alleges that it merely deducted these costs from the purchase price owed to plaintiff, and that it was well within its rights to do so under commonly accepted principles of contract law and interpretation. In response, plaintiff maintains that OSU was required to notify it in the event that the work product did not conform to specifications. Plaintiff further asserts that it was entitled to a reasonable period of time within which to cure any defects.

{¶16} Only after it made modifications to the lab did OSU notify plaintiff of its concerns. (Middleton Deposition at 96.) By letter dated April 29, 2005, OSU wrote there had been serious problems with the sterilizer and that the unit needed an altered exhaust hood to funnel steam away from the electrical components. In addition, OSU complained that the exhaust stack needed to be lengthened to ensure the proper release of exhaust fumes. OSU informed plaintiff that it had accomplished the work and that it would be deducting these and other additional costs from the final payment owed to plaintiff. Plaintiff argues that the changes required by OSU were not part of the original approved design and that they consisted of improvements, enhancements, and upgrades to the unit as

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ordered. Plaintiff also notes that OSU did not reject the laboratory and return it. The testimony of the OSU project manager was that notice was not given of alleged defects because “*** it was part of speed. *** They were trying to get it open ***.” (Middleton Deposition at 46-47.)

{¶7} The issue before the court is whether OSU has a right to back charge plaintiff for costs OSU incurred to cure the alleged defect where the evidence presented in a motion for summary judgment unequivocally establishes that neither a notice of defect was issued nor time for cure allowed.

{¶8} Plaintiff asserts that the transaction involved primarily the sale of goods such that the dispute is governed by the UCC as codified in R.C. 1302, et seq. The court disagrees. The threshold question for applicability of the UCC is what is known as the predominant purpose test. “[T]he issue is whether the predominant factor and purpose of the contract is the rendition of service, with goods incidentally involved, or whether the contract is for the sale of goods with labor incidentally involved.” *Allied Erecting & Dismantling Co. v. Auto Baling Co.* (1990), 69 Ohio App.3d 502, 508 quoting *Allied Indus. Serv. Corp. v. Kasle Iron & Metals* (1977), 62 Ohio App.2d 144, 147. Thus, as applied, the disputed contract and performance must concern the sale of goods. Labor may also be involved but only incidentally to the contractual purpose of transferring goods.

{¶9} The court finds that the transaction between the parties does not reflect predominately the sale of goods but rather that OSU executed a design-build construction contract that included both fabrication of goods and use of field labor. Ohio Revised Code Chapter 1302 does not apply where the evidence clearly indicates that the parties intended to create a construction contract for the erection of a building. As such, the court concludes that the UCC does not apply in the circumstances presented.

{¶10} A court is not required to go beyond the plain language of an agreement to determine the parties’ rights and obligations if a contract is clear and unambiguous. *Custom Design Technologies, Inc. v. Galt Alloys, Inc.* Stark App. No. 2001CA00153, 2002-

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Ohio-100. “If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321,322. See, also, *Davis v. Loopco Industries, Inc.* 66 Ohio St.3d 64, 66, 1993-Ohio-195; *Latina v. Woodpath Development Co.* (1991), 57 Ohio St.3d 212, 214. Indeed, “the interpretation of a written contract is a question of law, absent patent ambiguity.” *P & O Containers, Ltd. V. Jamelco, Inc.* (1994), 94 Ohio App.3d 726, 731.

{¶11} In reviewing the contract in this case, the court notes the following language:

{¶12} “2. Acceptance and Confirmation

{¶13} “*** No additional terms may be added and Purchase Order may not be changed except by written instrument executed by Purchaser.

{¶14} “5. Time Is Of The Essence

{¶15} “*** Seller further agrees that undiscovered delivery of nonconforming goods and/or services is not a waiver of the Purchasers right to insist upon further compliance with all specifications.

{¶16} “6. Changes

{¶17} “Purchaser may at any time and by written notice make changes to drawings and specifications. *** Should any such change increase or decrease the cost *** an equitable adjustment in the price will be negotiated by the Purchaser and Seller.”

{¶18} The court finds that the purchase order was intended to memorialize the final agreement between the parties. It is clear and it is unambiguous. The contract describes the obligation of plaintiff to design, ship, install, and test a Modular BL+ Laboratory. It requires written *notice* of any change in terms by the purchaser. (Paragraph 2.) It allows the purchaser to insist upon *further* compliance with all specifications when a defect is noticed. (Paragraph 5.) It also allows the purchaser at any time to make changes to the drawings and specifications upon written *notice*. (Paragraph 6.) It provides that when

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changes are demanded, a written equitable *adjustment* to cost was to be *negotiated* by purchaser and seller. (Paragraph 6.) As a matter of law, the parties intended that written notice be given between them. While reviewing the evidence most strongly in favor of OSU; reasonable minds can come to but one conclusion in this case. Timely notice was not given to plaintiff of the alleged defects. Reasonable time to cure was not allowed to plaintiff. The contract terms did not allow OSU to undertake changes, enhancements, and alterations to the building and then to present a bill without negotiation.

{¶19} In construing the terms of the contract, the court finds that OSU is precluded from imposing any back charge to plaintiff. Therefore, the court finds that there are no genuine issues of material fact and it is recommended that plaintiff be entitled to judgment on the issue of liability.

A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

JACK R. GRAF, JR.
Referee

cc:

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