[Cite as *Proctor v. Am. Home Assur.*, 2007-Ohio-5154.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

GORDON PROCTOR, DIRECTOR OF THE OHIO DEPARTMENT OF TRANSPORTATION

Plaintiff/Counter Defendant

v.

AMERICAN HOME ASSURANCE COMPANY

Defendant/Counter Plaintiff

and

KOKOSING CONSTRUCTION CO., INC.

Defendant/Counter Plaintiff/Third-Party Plaintiff

v.

ALLSTATE PAINTING AND CONTRACTING COMPANY

Third-Party Defendant

and

NGM INSURANCE COMPANY

Third-Party Defendant/Fourth-Party Plaintiff

v.

ELIAS KAFANTARIS, et al.

Fourth-Party Defendants

Case No. 2006-08046-PR

Judge J. Craig Wright

DECISION

{¶1} On May 24, 2007, plaintiff/counter defendant, the Ohio Department of Transportation (ODOT), filed a combined motion to dismiss the counterclaims of defendant/counter plaintiff/third-party plaintiff, Kokosing Construction Company, Inc. (Kokosing), and defendant/counter plaintiff, American Home Assurance Company (AHAC). On June 14, 2007, Kokosing and AHAC filed a motion for leave to file a memorandum contra in excess of 15 pages.[1] For good cause shown, the motion for leave is GRANTED, instanter. On June 19, 2007, ODOT filed a motion for leave to reply. The motion for leave is GRANTED, and ODOT's reply shall be filed instanter. An oral hearing was conducted upon the motion to dismiss on June 20, 2007.

{¶2} ODOT has moved for a dismissal of the counterclaims pursuant to Civ.R. 12(B)(1) and (6). ODOT argues that the counterclaims asserted by Kokosing and AHAC either state claims for declaratory relief or simply allege affirmative defenses. As such, ODOT seeks a remand of this case to the common pleas court on the ground that this court lacks subject matter jurisdiction.

{¶3} 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, Inc.* (1975), 42 Ohio St.2d 242. The standard to apply for a dismissal pursuant to Civ.R. 12(B)(1) is whether plaintiff has alleged any cause of action cognizable by the forum. See *Avco Financial Services Loan, Inc. v. Hale* (1987), 36 Ohio App.3d 65.

{¶4} The facts pertinent to the motion are set forth in the pleadings and in the documents attached thereto. In 2000, Kokosing was awarded a contract to paint several bridges on State Route (SR) 30 in Ashland County. The total contract price for the bridge surface preparation work was $875,000. Kokosing, as a prime contractor for the project, subsequently contracted with Allstate Painting and Contracting Co. (Allstate), a painting contractor approved by ODOT. Allstate performed the painting work on the project

[1]Kokosing's June 5, 2007 motion for an extension of time to file the response was unopposed and the same is hereby GRANTED.

pursuant to its contract with Kokosing.[2] National Grange Mutual (NGM) provided a surety bond for Allstate.

{¶5} Supplemental Specification 885 required Kokosing to prepare the steel surfaces for painting and then to apply paint to those surfaces using a three-step process known as OZEU. As the successful bidder, Kokosing was required to execute a maintenance bond guaranteeing its work on the project for a period of five years "against defects in the materials or workmanship as governed by the relevant Supplemental Specification listed on the title sheet of the plans." (Amended Complaint, Exhibit C.) In June 2003, such a bond was issued by AHAC, in the amount of $1,695, 780.13. (Amended Complaint, Exhibit D.) Additionally, pursuant to R.C. 5525.16, Kokosing was required to execute a performance bond covering all of its work on the project, including the painting work on the bridge. A performance bond in the penal amount of $9,575,000 was issued by AHAC on June 23, 2000. (Amended Complaint, Exhibit E.) Work on the project was completed on August 31, 2002, and Kokosing was paid in accordance with the contract.

{¶6} On October 24, 2006, ODOT filed a complaint against Kokosing alleging breach of contract and breach of warranty. ODOT contends that the painting work performed on the project was defective and that ODOT is entitled to damages. ODOT also filed a claim against AHAC seeking recovery under the terms of the maintenance bond. Kokosing filed an answer and a counterclaim on November 27, 2006. The filing of the counterclaim against ODOT in the common pleas court combined with the later mandatory filing of a petition for removal on December 28, 2006, effected the removal of the case to this court pursuant to R.C. 2743.03(E).

[2]Kokosing has filed a third-party complaint against Allstate seeking indemnity and contribution. Kokosing's motion for default judgment as to the third-party complaint will be discussed, infra.

{¶7} ODOT filed an amended complaint on April 9, 2007, asserting claims against both the maintenance bond *and* the performance bond. Thus, as a result of the amendment, ODOT now alleges that the work was defective both because it did not meet the warranty requirements *and* because the work was not performed in accordance with specifications. On May 7, 2007, Kokosing filed an amended answer and a 12-count counterclaim. On that same date, AHAC filed an amended answer and a five-count counterclaim.

{¶8} In their respective counterclaims, both Kokosing and AHAC have alleged that ODOT waived any claim based upon allegedly defective workmanship when it gave Kokosing a passing grade at all contractually mandated inspection points and subsequently accepted the work as a finished product. These allegations are contained in Counts One and Five of Kokosing's counterclaim and Counts One and Three of AHAC's counterclaim. ODOT argues that these counts are declaratory and/or defensive in nature and that, therefore, they do not state a claim for monetary relief. The court agrees.

{¶9} In Counts Three, Four, and Nine of Kokosing's counterclaim, Kokosing seeks monetary relief based upon ODOT's alleged breach of certain warranties. The warranty claims asserted in the proposed amended counterclaim are premised upon ODOT's implied representations that: 1) Subcontractors approved by ODOT, including Allstate, are qualified to perform the work required by the specifications; and 2) project specifications drafted by ODOT, including the OZEU paint system and its ten-step inspection process, were designed to produce a finished product that would stand up to a reasonable inspection through the warranty period.

{¶10} According to these counts of the amended counterclaim, if Allstate performed defective work, then ODOT should be held liable to Kokosing for damages due to a breach of ODOT's warranty as to Allstate's fitness. Similarly, if the specifications are flawed, ODOT should be held liable to Kokosing for damages due to the breach of ODOT's warranty as to the quality of its project specifications.

{¶11} ODOT argues that it made no such representations or warranties to Kokosing. However, even if the court were to accept Kokosing's allegations that warranties were made, those warranties provide Kokosing with nothing more than a defense to ODOT's claims against the bonds.

{¶12} In Counts Two, Six, Eleven and Twelve of Kokosing's counterclaim, it is alleged that ODOT's inspectors applied a standard more stringent than that required by the contract when they reinspected the work in 2004 and declared it to be defective. The essence of these counterclaims is that if ODOT is permitted to change the contract specifications after the work has been completed, then Kokosing should be permitted to seek additional compensation for the extra work necessary to meet the new specifications. Kokosing reasons that, had ODOT changed the specifications during the course of the project, the contract would have permitted Kokosing to seek additional compensation for the extra work associated with those changes. Kokosing sets forth a similar claim in Count Eight wherein it contends that ODOT's elevated standard of acceptance constitutes a "cardinal change" to the contract for which Kokosing would be entitled to damages. ODOT argues that these counterclaims state nothing more than a defense to ODOT's claims and that the facts alleged in the counterclaim do not support a claim for monetary relief. The court agrees.

{¶13} The relevant documents pertinent to the contract clearly establish that there is no set of facts upon which Kokosing could recover such costs.

{¶14} Supplemental Specification §885.03 provides:

{¶15} "885.03 Warranty Item and Remedial Actions. The paint warranty items the Contractor is responsible for are listed below and will be determined by visual inspection, destructive inspection and paint thickness measurements of the applied paint system for the period of years as specified in 885.02 of this specification.

{¶16} "The paint system will be considered defective if any of the following conditions are discovered within the specified warranty period.

{¶17} "1. The occurrence of visible rust or rust breakthrough, paint blistering, peeling, scaling or un-removed slivers.

{¶18} "2. Paint applied over dirt, debris, blasting debris, or rust products not removed during blast cleaning.

{¶19} "3. Incomplete coating or coating thicknesses less than the minimums specified in the paint system specifications.

{¶20} "4. Damage to the coating system caused by the Contractor while removing scaffolding, forms, or performing other work.

{¶21} "Exclusion to the warranty will be damage to the coating resulting from vehicle damage, fire, or other damage not caused by the Contractor or subcontractor."

{¶22} The maintenance bond executed by Kokosing provides in relevant part:

{¶23} "WHEREAS, the said principal is required to guarantee the items of work for this project against defects in materials or workmanship as governed by the relevant Supplemental Specification listed on the title sheet of the plans of this contract, beginning with the date the Ohio Department of Transportation issues the Form C-85 accepting the improvement after all of the items of work, are completed and ending the number years required from that date.

{¶24} "In no event shall losses paid under this bond aggregate more than the amount of this bond.

{¶25} "NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if said Principal shall faithfully carry out and perform the said guarantee, and shall, on due notice, repair and make good at its own expense any and all defects in materials or workmanship in the said work which may develop during the period specified above or shall pay over, make good and reimburse to the State all loss which it may sustain by reason of failure or default of said Principal so to do, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

{¶26} The performance bond provides in relevant part:

{¶27} "WHEREAS, said Director of Transportation has accepted said bid or proposal and has awarded to said principal the contract for the construction and completion of the aforesaid work: Now, if the said principal shall well, truly and faithfully comply with and perform each and all of the terms, covenants and conditions of such contract on his (its) part to be kept and performed, according to the tenor thereof, and within the time prescribed and will perform the work embraced therein upon the terms proposed and within the time prescribed and in accordance with the plans, specifications and estimates furnished therefor, to which reference is here made, the same being a part hereof, as if fully incorporated herein, and will indemnify the State, County, Municipality and Township, and in case of a railroad grade separation, the railroad company (or companies) involved against any damage that may result by reason of the negligence of the contractor in making said improvement or doing said work, then this obligation shall be void, otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any or all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

{¶28} "The said sureties hereby stipulate and agree that any failure to complete work at the time named in the contract, or extensions of time for completion, or modifications, omissions or additions in or to the terms of said contract, or in or to the plans, specifications and estimates, shall not in any wise affect the obligation of said sureties on their bond."

{¶29} Given the language of the contract and the terms of both the maintenance bond and performance bond, the threshold issue in this case is whether the work performed by Kokosing is "defective" as that term is defined in the relevant specifications. If ODOT fails to prove that the work is defective, there can be no recovery awarded to ODOT under either the contract or the bonds. In other words, if the evidence shows that ODOT is now asking Kokosing to "foot the bill" for a better paint job than that which

Kokosing agreed to provide, then neither the contract nor the bonds can support such recovery. Conversely, if ODOT proves that the work performed by Kokosing is defective, Kokosing must bear the cost of any corrective work.[3] Simply stated, the allegations of the counterclaim do not allege a set of facts that would entitle Kokosing to damages from ODOT. While these allegations, if proven, may provide a complete defense to ODOT's claims against Kokosing and AHAC, they do not state a claim for monetary relief.

{¶30} Kokosing alleges in Count Seven of its counterclaim that it is entitled to damages from ODOT for its "arbitrary and capricious" conduct of filing an action seeking damages in an amount in excess of the amount guaranteed by the maintenance bond. In Count Four of AHAC's complaint, it is alleged that ODOT's decision to belatedly make a claim on the performance bond well beyond the date when the project was completed is both a breach of its duty of good faith and fair dealing and a breach of express and implied warranties.

{¶31} Although neither Kokosing nor AHAC employs the term "frivolous conduct" in its pleading, the only plausible legal theory upon which monetary relief could be premised is contained within R.C. 2323.51. R.C. 2323.51 defines two types of frivolous conduct: 1) conduct that obviously serves to harass or maliciously injure another party to the civil action; or 2) conduct that is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law. R.C. 2323.51(A)(2)(a)(i) and (ii). To the extent that the counterclaims attempt to set forth a claim for frivolous conduct, the allegations of fact contained in the pleadings are insufficient to support such a claim. See *Shaw v. Tyrrell* (1994), 96 Ohio App.3d 117 (sanctions are generally not available where the only basis is a party's overestimation of damages).

[3]Whether Kokosing has a contractual right to perform corrective work at its own expense is a question that is not before the court at this time.

{¶32} In Count Ten of Kokosing's counterclaim and in Count Two of AHAC's counterclaim it is alleged that ODOT's conduct in demanding that AHAC "correct deficiencies" in Kokosing's performance and its conduct in making a claim upon the performance bond unlawfully interfered with the contractual/suretyship relationship between Kokosing and AHAC. However, upon review of the relevant factual allegations of the pleadings, the court is unable to discern a viable cause of action, in tort, upon which either Kokosing or AHAC may recover against ODOT.

{¶33} Having determined that the counterclaims fail to state a claim for monetary relief against ODOT, the court must address ODOT's request for a remand.[4] R.C. 2743.03(E) provides in relevant part:

{¶34} "(2) The court of claims shall adjudicate all civil actions removed. *The court may remand* a civil action to the court in which it originated upon a finding that the removal petition does not justify removal, or upon a finding that the state is no longer a party." (Emphasis added.)

{¶35} Although the court has determined that the counterclaims do not state a claim for monetary relief against ODOT, the counterclaims do contain a prayer for declaratory relief as to which ODOT remains a party. As such, the decision to remand an action to the court in which it originated is permissive in nature. See *State ex rel. Newton v. Court of Claims*, 73 Ohio St.3d 553, 1995-Ohio-117. Therefore, it is the determination of this court that the action shall not be remanded to the court of common pleas and that this court shall adjudicate all remaining claims.

{¶36} Having determined that this court retains jurisdiction of this matter, the court will now consider Kokosing's motion for default judgment as to the third-party complaint. There is no question but that Allstate was served with the summons and complaint and that

[4]AHAC's final count, Count Five, is purely defensive in nature as no claim for monetary relief is alleged.

Allstate has failed to answer or otherwise appear. Consequently, a judgment by default shall be granted in favor of Kokosing and against Allstate. Third-party defendant NGM, Allstate's surety, has filed an answer in this matter and has argued that the default judgment against Allstate should not bar NGM from asserting any defenses to the third-party complaint that may have been available to Allstate. The court agrees. Accordingly, the default judgment against Allstate shall not have the effect of precluding NGM from asserting any defenses to the third-party complaint that may have been available to Allstate.

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Case No. 2006-08046-PR

Judge J. Craig Wright

JUDGMENT ENTRY

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For the reasons set forth in the decision filed concurrently herewith, plaintiff/counter defendant's May 24, 2007 motion to dismiss the counterclaims is GRANTED, in part, as to the claims for monetary relief. The motion is DENIED as to the remaining claims and this case shall not be remanded to the Ashland County Court of Common Pleas.

Defendant/third-party plaintiff's May 10, 2007 motion for default judgment is GRANTED. Judgment is hereby entered against Allstate Painting Company (Allstate) as to the third-party complaint. Defendant/third-party plaintiff's damages, if any, will be determined following the determination of the claims that have been asserted against defendant/third-party plaintiff. The judgment against Allstate shall not preclude its surety, National Grange Mutual, from asserting any defenses to the third-party complaint that may have been available to Allstate. Additionally, in consideration of the jurisdictional issues presented by ODOT's request for a remand, the court makes a finding pursuant to Civ.R. 54 that there is no just cause for delay.

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J. CRAIG WRIGHT
Judge

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LP/cmd
Filed September 5, 2007
To S.C. reporter September 28, 2007