[Cite as *Proctor v. Am. Home Assur. Co.*, 2008-Ohio-3644.]

Court of Claims of Ohio

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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
Referee Jack R. Graf Jr.

MAGISTRATE DECISION

[Cite as *Proctor v. Am. Home Assur. Co.*, 2008-Ohio-3644.]

{¶1} On January 7, 2008, third-party defendant/fourth-party plaintiff NGM Insurance Company (NGM), filed a motion, pursuant to Civ.R. 12(C), for judgment on the pleadings as to the third-party complaint filed by defendant/counter plaintiff/third-party plaintiff, Kokosing Construction Company, Inc. (Kokosing). On January 24, 2008, both plaintiff/counter defendant, the Ohio Department of Transportation (ODOT), and Kokosing filed a response. NGM's February 8, 2008 motion for leave to reply is GRANTED instanter. On March 21, 2008, an oral hearing was held on the motion.

{¶2} 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 was $8,683,398.22. 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 pursuant to its subcontract with Kokosing for $229,040. NGM provided two surety bonds to Allstate and it is Kokosing's claims against these bonds that are the subject of the pending motion. The two bonds are: 1) a performance bond in the penal amount of $229,040; and 2) a maintenance bond in the penal amount of $120,816.

{¶3} 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 2000, such a bond was issued by American Home Assurance Company (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 which included 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.

{¶4} For its complaint against Kokosing, ODOT alleges that Kokosing committed a breach of contract and a breach of warranty. ODOT contends that the painting work performed on the project was defective both because it did not meet the warranty requirements *and* because the work was not performed in accordance with specifications. Accordingly, ODOT has also filed a claim against AHAC seeking recovery under the terms of both the maintenance bond and the performance bond. Kokosing filed an answer and a counterclaim on November 27, 2006. Kokosing also filed a third-party complaint against Allstate and NGM.[1]

{¶5} For its third-party complaint against NGM, Kokosing demands that NGM provide it with counsel to defend it against the claims asserted by ODOT and to indemnify it in the event that it is found liable to ODOT for damages due to Allstate's failure to adequately perform its work under the subcontract.

{¶6} A motion for judgment on the pleadings presents only a question of law and it may be granted only where no material factual issues exist and when the movant is entitled to judgment as a matter of law. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161.

PERFORMANCE BOND

{¶7} NGM argues that its potential liability upon the performance bond terminated when the project was completed and that, under no circumstance, did such liability extend past the date when NGM's liability upon the maintenance bond commenced. In the alternative, NGM contends that Kokosing failed to timely assert a claim under the performance bond. The relevant language of the bond is as follows:

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[1]Kokosing has obtained a default judgment against Allstate on its third-party complaint. The court's September 5, 2007entry states: "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."

{¶8} "Any suit under this bond must be instituted before the expiration of two years from date on which final payment under the subcontract *falls due*." (Emphasis added.)

{¶9} The parties disagree on the meaning of the term "falls due." NGM argues that payment falls due when Kokosing completes the work on the project and the warranty period begins. In this case, NGM asserts that the warranty became effective on October 15, 2003, and that Kokosing had two years from that date to commence an action on the performance bond. Kokosing contends that payment has not yet fallen due inasmuch as ODOT continues to make performance related claims against Kokosing.

{¶10} Although the term "falls due" is not specifically defined either in the performance bond or the subcontract, the meaning of the term is readily discernable from the language used in the subcontract.[2] Indeed, the date when final payment falls due is clearly set forth in the subcontract as follows:

{¶11} "13.3.3 Time of Payment

{¶12} "Final payment of the balance due of the subcontract price shall be made to the subcontractor within ten (10) calendar days after receipt by the Contractor from the Owner for such subcontract work."

{¶13} Generally, where the language used in an agreement is clear and unambiguous, its interpretation is a matter of law for the court. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246. The language contained in section 13.3.3 is clear and unambiguous. Final payment falls due no later than ten calendar days after receipt of final payment by the Contractor from the Owner for the subcontract work. If the court were to accept Kokosing's interpretation of the term "falls due,"

[2]The bond incorporates the language of the subcontract by reference.

NGM's liability upon the bond is potentially endless, at least with respect to latent defects. Such an interpretation is unreasonable, as a matter of law.

{¶14} In short, it is simply not reasonable to read into the language of the subcontract an intent to allow claims to be asserted on the NGM performance bond more than two years after final payment. There is no dispute that notice of a claim upon the bond was not provided to NGM within two years after payment was made to Allstate. Accordingly, as a matter of law, NGM is entitled to judgment with respect to the claims upon the performance bond, inasmuch as Kokosing failed to assert those claims within the two-year contractual limitations period.

MAINTENANCE BOND

{¶15} In its motion for judgment on the pleadings, NGM argues that the maintenance bond is not legally enforceable and that, therefore, NGM is entitled to judgment on the third-party complaint. Although NGM concedes that ODOT has a right to require a warranty from Kokosing, it contends that ODOT has no right to insist upon a bond to guarantee such a warranty.[3]

{¶16} Similarly, while NGM acknowledges that Kokosing may require a limited warranty from Allstate, NGM argues that Kokosing has no right to insist that such a warranty be guaranteed by a bond.

{¶17} The court disagrees.

{¶18} NGM's argument is based upon its interpretation of several related provisions of Chapter 5525 of the Ohio Revised Code. R.C. 5525.25 which speaks to the requirement of warranties on a public improvement provides in relevant part:

[3]NGM contends that the R.C. 5525.25 "precluded a bridge-painting warranty of more than two years." See NGM's Memorandum in Support at page 9.

{¶19} "(A) For each fiscal year, not more than one-fifth of the department of transportation's capital construction projects shall be bid requiring a warranty as specified in the bidding documents and in division (B) of this section.

{¶20} "(B) A warranty period under this section shall be:

{¶21} "* * *

{¶22} "(2) Not more than five years, in the case of bridge painting and pavement resurfacing and rehabilitation; * * *."

{¶23} With respect to contractor bonding requirements, R.C. 5525.01 requires contractors to "furnish a *contract performance bond and a payment bond,* as provided for in section 5525.16 of the Revised Code * * *." R.C. 5525.16 (A) states: "Before entering into a contract, the director of transportation shall require a *contract performance bond and a payment bond* with sufficient sureties."

{¶24} NGM insists that the failure of the General Assembly to expressly require contractors to furnish a maintenance bond as a guarantee of their warranty, evidences an intent that ODOT shall not be entitled to such a bond for contractors.

{¶25} Although NGM presents the court with an interesting question of statutory interpretation, the court need not answer that question in order to resolve the present motion. Even if the court were to determine that ODOT exceeded its statutory authority by requiring that a maintenance bond be provided to it as obligee, such a determination is not dispositive of the NGM furnished maintenance bond. The NGM bond was furnished as a matter of contract to Kokosing as obligee. It is true, that ODOT is a creation of statute and that, as such, it has only those powers granted to it by the general assembly. See *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172. Thus, agreements made by ODOT in contravention of a statutory limitation upon its authority are generally unenforceable due to the lack of capacity. See *Benefit Services of Ohio, Inc. v. Trumbull County Commrs.*, Trumbull App. No. 2003-T-0045, 2004-Ohio-5631.

{¶26} Kokosing, however, is not a state agency. According to the pleadings, Kokosing is a for-profit corporation organized under the laws of Ohio. Kokosing's contractual capacity is not therefore, limited by the provisions of R.C. 5525. Kokosing is generally free to negotiate favorable contract terms, including the execution of a maintenance bond to guarantee a contractual warranty. Thus, while statutory limitations upon ODOT's contractual capacity may affect the validity of bonds issued by AHAC, such limitations do not affect the validity of the bonds issued by NGM.

{¶27} NGM argues, in the alternative, that certain language in the Kokosing subcontract with Allstate, prohibits Kokosing either from obtaining a five-year warranty from Allstate or requiring Allstate to furnish a bond as a guarantee of such a warranty.

{¶28} Kokosing's contract with Allstate provides at §4.1.1:

{¶29} "Subcontractor shall furnish to the Contractor appropriate surety bonds to secure performance of the Subcontract Work and to satisfy all Subcontractor payment obligations arising thereunder. The surety bond shall provide that the terms of the Contract and Subcontracted Documents are incorporated by reference therein. Regardless of such express incorporation, any bond provided by Subcontractor pursuant to this provision is hereby deemed to so incorporate the Contract and Subcontract Document and it is understood that the surety is accepting each and every responsibility and obligation which the Subcontractor has assumed toward Contractor under said Contract and Subcontract Documents, including but not limited to liability for indemnity, attorneys' fees and delay damages. The surety bond requirements, applicable to this Subcontract are as follows:"

{¶30} The subcontract goes on to identify only the "subcontract performance bond and payment bond" as "required."

{¶31} The maintenance bond issued by NGM provides in relevant part:

{¶32} "WHEREAS, the Principal and the Obligee entered into a written contract for the Bridge Painting, Ashland/Wayne County USR 30 ODOT Project 000302 all in accordance with plans and specifications drawn.

{¶33} "WHERAS, said contract provides that the Principal will furnish a bond to guarantee, for the period of 5 yr(s) against all defects in workmanship and materials which may become apparent during such period.

{¶34} "NOW THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH that, if the Principal shall indemnify the Obligee for all loss that the Obligee may sustain by reason of any defective materials or workmanship which becomes apparent during the period of 5 yr(s) from and after October 15, 2001, then this obligation shall become null and void; otherwise to remain in full force and effect."

{¶35} NGM argues that a maintenance bond could not have been contemplated by Kokosing and Allstate when they executed their subcontract inasmuch as such a bond was not specifically mentioned in their agreement. NGM also contends that the subcontract expressly limits the warranty period to two years. However, given the inconsistencies in the language of §4.1.1 of the subcontract and the relevant language used by Allstate and NGM in the maintenance bond, it is reasonable to conclude that the execution of such a bond was an intended condition of the subcontract. It also appears at this stage of the proceedings, without evidence having been presented, that the bond was actually furnished and accepted between the parties.

{¶36} For the foregoing reasons, it is recommended that NGM's motion for judgment on the pleadings be granted, in part, as to the claims upon the performance bond but denied, as to the remaining claims.

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).

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JACK R. GRAF, JR.
Referee

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