

[Cite as *Schnippel Constr., Inc. v. Profitt et al.*, 2008-Ohio-4214.]

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

SCHNIPPEL CONSTRUCTION, INC.

Plaintiff

v.

JIM PROFITT, et al.

Defendants

and

SERVICE CONTRACT ADMINISTRATORS, INC.

Defendant/Third-Party Plaintiff

v.

OHIO DEPARTMENT OF COMMERCE

Third-Party Defendant

Case No. 2008-03742-PR

Judge Joseph T. Clark

DECISION

{¶ 1} On May 2, 2008, pursuant to Civ.R. 12(B)(1) and (6), third-party defendant Ohio Department of Commerce (ODOC) filed a motion to dismiss the third-party complaint filed by Service Contract Administrators, Inc. (SCA). On May 16, 2008, SCA filed a motion for leave to respond. The motion for leave is GRANTED instanter.

{¶ 2} The standard to apply for dismissal for lack of subject matter jurisdiction pursuant to Civ.R. 12(B)(1) is whether plaintiff has alleged any cause of action cognizable in this forum. See *Avco Financial Services Loan, Inc. v. Hale* (1987), 36 Ohio App.3d 65. In ruling upon a motion to dismiss pursuant to Civ.R. 12(B)(6) 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, 192. Then, before the court may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts entitling it to recovery. *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, 245.

{¶ 3} The pertinent facts related to this case are as follows. Plaintiff contributed a portion of hourly wages paid to employees on prevailing wage projects into a fund administered by SCA to cover the fringe benefit portion of payment. In 2006, the Iron Workers Union (Union) filed suit against plaintiff alleging a series of prevailing wage violations, including improper classification of employees and improper credit for payment to the fund administered by SCA. At some point during the suit, plaintiff was informed by Robert Kennedy, Superintendent, Division of Labor and Worker Safety, ODOC, that SCA's calculations were incorrect. Eventually, plaintiff and the Union

settled the litigation for \$60,000 in damages, penalties, and attorney fees, plus an agreement to abstain from submitting any bids on Ohio prevailing wage projects within the territorial jurisdiction of the Union for three calendar years. (Plaintiff's Complaint, ¶17.) Plaintiff, in the case at bar, alleges that the majority of the damages paid to the Union were directly related to SCA's miscalculation of fringe benefit credits for contribution to the plan.

{¶ 4} On December 19, 2007, plaintiff filed suit against SCA and others alleging negligent misrepresentation, fraud, breach of contract, and tortious breach of duty arising via contract.¹ Subsequently, SCA filed a third-party complaint against ODOC seeking: 1) a declaration that the method utilized by SCA in determining plaintiff's contributions to the fund was valid; and 2) indemnification from ODOC in the event SCA is found liable to plaintiff. (SCA's Third Party Complaint, ¶10-17.)

{¶ 5} Indemnity arises from either an express or implied contract thereby giving a party the right to complete reimbursement for a judgment compelling that party to pay what another should have paid. *Allstate Ins. Co. v. U.S. Assoc. Realty, Inc.* (1983) 11 Ohio App.3d 242, 246. Ohio law recognizes an implied contract of indemnity in situations where the parties are closely related. *Reynolds v. Physicians Insurance Co.*, 68 Ohio St.3d 14, 16, 1993-Ohio-57. Relationships that have been found to meet the close relationship standard required for an implied contract for indemnity are those of wholesaler/retailer, master/servant, independent contractor/employer and abutting property owner/municipality. *Id.* In reviewing the third-party complaint, the court finds that SCA does not allege any contractual relationship with ODOC that would give rise to an indemnity claim.

{¶ 6} Moreover, the question in this case is whether the fringe benefit calculation SCA provided to plaintiff was correct. SCA claims that the proper method for

¹The action was originally filed in the Shelby County Court of Common Pleas. On March 25, 2008, the case was removed to the Court of Claims pursuant to R.C. 2743.03(E).

calculating fringe benefits is to include only employee hours worked on public projects, as against all employee hours worked on both public and private projects. According to plaintiff, ODOC disagrees with SCA's methods.² However, regardless of the answer to this question, the complaint fails to state a claim for relief against ODOC.

{¶ 7} If it is determined that the calculation at issue was correct, SCA cannot be liable to plaintiff; thus, ODOC cannot be liable to SCA. Conversely, if it is determined that the calculation at issue was incorrect, SCA, not ODOC, will be liable to plaintiff for the miscalculation. Liability cannot be imposed upon ODOC for providing accurate information. Under either scenario, ODOC cannot be held liable to SCA.

{¶ 8} With regard to SCA's prayer for a declaration that its methods were sound, such allegations, if proven, may give rise to a defense to the claims asserted by plaintiff but they do not state a claim for relief.

{¶ 9} After careful consideration of the motion and for the reasons stated above, the court finds that SCA can prove no set of facts that would entitle it to relief from ODOC. Accordingly, ODOC's motion for dismissal of SCA's third-party complaint shall be granted.

{¶ 10} Having determined that the third-party complaint fails to state a claim upon which relief may be granted, and that the third-party complaint shall be dismissed, the court finds that the state is no longer a party to this action. Accordingly, pursuant to R.C. 2743.03(E)(3) this case shall be remanded to the Shelby County Court of Common Pleas.

²The complaint does not allege that ODOC directly informed SCA that it miscalculated the fringe benefit credits in question; rather, ODOC informed plaintiff that SCA's calculations were incorrect and ODOC requested that plaintiff communicate this to SCA. See SCA's Third-Party Complaint at ¶17.



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DECISION

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JUDGMENT ENTRY

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For the reasons set forth in the decision filed concurrently herewith, the third-party complaint is DISMISSED. Court costs are assessed against defendant/third-party plaintiff. Pursuant to R.C. 2743.03(E)(3) this case shall be remanded to the Shelby County Court of Common Pleas and the clerk is directed to return the original papers thereto. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

JOSEPH T. CLARK
Judge

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cc:

Douglas R. Folkert Assistant Attorney General 150 East Gay Street, 18th Floor Columbus, Ohio 43215-3130	Jill A. May Timothy G. Pepper 110 North Main Street, Suite 900 Dayton, Ohio 45402-1786
Roger L. Sabo 250 West Street Columbus, Ohio 43215-2538	Prevailing Wage Contractors Association, Inc. 3990 Old Town Avenue, Suite 103-a San Diego, California 92110

LP/JRO/cmd
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