

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

OHIO DEPARTMENT OF
TRANSPORTATION

Plaintiff/Counter Defendant

v.

FEDERAL INSURANCE COMPANY

Defendant/Counter
Plaintiff/Cross-Claim Plaintiff

and

KTA-TATOR, INC.

Defendant/Cross-Claim
Defendant

and

A.P. O'HORO COMPANY

Defendant/Counter
Plaintiff/Cross-Claim
Plaintiff/Third-Party Plaintiff

v.

DEVELOPERS SURETY AND
INDEMNITY COMPANY

Third-Party Defendant

[Cite as *Ohio Dept. of Transp. v. Fed. Ins. Co.*, 2008-Ohio-5731.]

Case No. 2006-05691-PR

- 3 -

DECISION

Case No. 2006-05691-PR

Judge Clark B. Weaver Sr.

DECISION

{¶ 1} On August 18, 2008, third-party defendant, Developers Surety and Indemnity Company (Developers), filed a motion pursuant to Civ.R. 56 for summary judgment as to defendant/counter plaintiff/cross-claim plaintiff/third-party plaintiff's, A.P. O'Horo Company (O'Horo), July 9, 2008 second amended third-party complaint. On September 4, 2008, O'Horo filed a motion for leave to file a response. O'Horo's motion for leave is GRANTED instanter.

{¶ 2} The facts pertinent to the motion are set forth in the pleadings and in the documents attached thereto. In 2001, O'Horo was awarded a contract to perform construction work on State Route 11 in Ashtabula County. In addition to resurfacing, the contract included bridge painting. The total contract price, including bridge painting, was \$1,295,000. O'Horo, as a prime contractor for the project, subsequently contracted with Skyway Industrial Painting and Contracting, Inc. (Skyway), a painting contractor approved by plaintiff/counter defendant, Ohio Department of Transportation (ODOT). Skyway performed the painting work on the project pursuant to its subcontract with O'Horo.

{¶ 3} Supplemental Specification 885 required O'Horo 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, O'Horo 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." (See ODOT's Original Complaint, Exhibit C, Incorporated by Reference in ODOT's January 4, 2007 Amended Complaint at ¶15.) In December 2000, such a bond was issued by defendant/counter plaintiff/cross-claim plaintiff, Federal Insurance Company (FIC), in the amount of \$252,658. (See ODOT's Original Complaint, Exhibit D, Incorporated by Reference in ODOT's January 4, 2007 Amended Complaint at ¶22.) Additionally, pursuant to R.C. 5525.16, O'Horo and its surety, FIC, executed a performance bond covering all of O'Horo's work on the project, including the bridge painting work. (ODOT's January 4, 2007 Amended Complaint at ¶53.) Furthermore, on May 24, 2002, Skyway and its surety, Developers, provided O'Horo a subcontract performance bond in the penal amount of \$149,751. (O'Horo's July 9, 2008 Amended Third-Party Complaint, Exhibit

B.) Work on the project was completed in June 2002, and O'Horo was paid in accordance with the contract.

{¶ 4} For its complaint against O'Horo, ODOT alleges that O'Horo 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 FIC seeking recovery under the terms of both the maintenance bond and the performance bond. O'Horo filed an amended answer and an amended counterclaim on July 9, 2008. O'Horo also filed an amended third-party complaint against Developers.

{¶ 5} In its third-party complaint against Developers, O'Horo alleges that Developers refused to comply with the terms of its performance bond after having received notice from O'Horo's legal counsel concerning facts that give rise to a defense to the ODOT claims. Accordingly, O'Horo demands that Developers provide it with legal counsel to defend the claims asserted by ODOT and that Developers indemnify it in the event that it is found liable to ODOT for damages due to Skyway's failure to adequately perform its work under the subcontract.

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

{¶ 7} "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.

{¶ 8} Developers argues that O'Horo failed to timely assert a claim under the performance bond. The relevant language of the bond is as follows:

{¶ 9} "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.)

{¶ 10} The parties disagree on the meaning of the term "falls due." Developers argues that payment falls due when O'Horo completes the work on the project and the warranty period begins. In this case, Developers asserts that the warranty became effective on February 21, 2003, and that O'Horo had two years from that date to commence an action on the performance bond. O'Horo contends that payment has not yet fallen due inasmuch as ODOT continues to make performance related claims against O'Horo.

{¶ 11} 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.¹ Indeed, the date when final payment falls due is clearly set forth in the subcontract as follows:

{¶ 12} "7. PAYMENT OF FINAL ESTIMATE - RELEASE:

{¶ 13} * * * Contractor shall pay to Subcontractor its final estimate under this Agreement within ten (10) working days after receipt of the final estimate by Contractor for the Owner."

{¶ 14} 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*

¹The bond incorporates the language of the subcontract by reference.

Pipe Line Co. (1978), 53 Ohio St.2d 241, 246. The language contained in section 7(A) is clear and unambiguous. Final payment falls due no later than ten working days after receipt of the final estimate by the Contractor for the Owner for the subcontract work. If the court were to accept O'Horo's interpretation of the term "falls due," Developers' liability upon the bond is potentially endless, at least with respect to latent defects. Such an interpretation is unreasonable as a matter of law.

{¶ 15} In short, it is simply not reasonable to read into the language of the subcontract an intent to allow claims to be asserted on Developers' 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 Developers within two years after final payment was made to Skyway. Accordingly, Developers is entitled to judgment as a matter of law as to the claims upon the performance bond inasmuch as O'Horo failed to assert those claims within the two-year contractual limitations period.

{¶ 16} For the foregoing reasons, Developers' motion for summary judgment shall be granted and Developers shall no longer be a party to this action.



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

OHIO DEPARTMENT OF
TRANSPORTATION

Plaintiff/Counter Defendant

v.

FEDERAL INSURANCE COMPANY

Defendant/Counter
Plaintiff/Cross-Claim Plaintiff

and

KTA-TATOR, INC.

Defendant/Cross-Claim
Defendant

and

A.P. O'HORO COMPANY

Defendant/Counter
Plaintiff/Cross-Claim
Plaintiff/Third-Party Plaintiff

v.

DEVELOPERS SURETY AND
INDEMNITY COMPANY

Third-Party Defendant

Case No. 2006-05691-PR

Judge Clark B. Weaver Sr.

JUDGMENT ENTRY

[Cite as *Ohio Dept. of Transp. v. Fed. Ins. Co.*, 2008-Ohio-5731.]

An oral hearing was conducted in this case upon third-party defendant's, Developers Surety and Indemnity Company (Developers), motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, the motion for summary judgment is GRANTED and Developers is no longer a party to this action.

CLARK B. WEAVER SR.
Judge

cc:

Jeffrey L. Maloon
Kristin S. Boggs
Steven C. McGann
William C. Becker
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Jeffrey W. Hutson
Scott A. Fenton
Thomas E. Switzer
Two Miranova Place, Suite 500
Columbus, Ohio 43215-7052

Jeremy M. Grayem
250 West Street
P.O. Box 165020
Columbus, Ohio 43216-5020

John N. Rocray
Lee M. Brewer
501 West Schrock Road, Suite 104
Westerville, Ohio 43081

Richard J. Makowski
Assistant Attorney General
Transportation Section
150 East Gay Street, 17th Floor
Columbus, Ohio 43215

Roger L. Sabo
250 West Street
Columbus, Ohio 43215-2538

LP/cmd
Filed October 20, 2008
To S.C. reporter November 3, 2008