[Cite as *Cleveland Constr. Co. v. Kent State Univ.*, 2009-Ohio-4019.]

Court of Claims of Ohio
The Ohio Judicial Center
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Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

CLEVELAND CONSTRUCTION, INC.

Plaintiff

v.

KENT STATE UNIVERSITY

Defendant
Case No. 2003-10724

Judge Joseph T. Clark

DECISION

{¶ 1} On February 4, 2008, the court rendered judgment in favor of plaintiff on the complaint and in favor of defendant on the counterclaim. The court found that plaintiff was entitled to damages on its breach of contract claim arising out of the construction of four residence halls on defendant's campus. The court further found that defendant was entitled to damages for certain defective and incomplete work that was to be performed by plaintiff. The case proceeded to trial on the issue of damages.

PLAINTIFF'S CLAIMS

Contract Balance

{¶ 2} On September 18, 2008, prior to the trial on damages, the court issued an entry approving the parties' stipulation regarding damages associated with certain pending claims. The parties stipulated to the following amounts:

Contract balance	$1,620,191.00
Unexecuted change orders (CO)	148,765.00

CO 64	9,901.60
CO 206	33,329.00
Credit for temporary parking lot	(10,000.00)
Total amount due to plaintiff	$1,802,186.60

Delay and Inefficiency Due to Weather and Labor Strike

{¶ 3} In its liability decision, the court determined that plaintiff was entitled to damages caused by defendant's failure to grant an extension of time as a result of unusually severe weather encountered during the winter of 2002 -2003, May 2003, and July 2003. The court also determined that plaintiff was entitled to damages caused by defendant's failure to grant an extension of time for the labor strike in June 2003. Furthermore, the court determined that plaintiff was entitled to recover damages for acceleration costs and inefficiencies arising from defendant's failure to properly grant extensions of time.

{¶ 4} In support of its claims for delay and inefficiency, plaintiff offered the testimony of David Pattillo, an expert in civil engineering and forensic analysis. According to Pattillo, the damages that resulted from the inefficiencies that were attributable to defendant's failure to grant extensions of time were "incremental" and impossible to "capture" using standard cost codes. Consequently, Pattillo relied upon the "modified total cost" method of computing damages. In performing his computations, Pattillo referred to plaintiff's job-cost records which he found to be reliable and typical of those used by other contractors of plaintiff's size. Pattillo verified the accuracy of plaintiff's job-costing system and he adjusted the actual hours to ensure that costs included in his calculation were reasonable and related to defendant's liability. Pattillo testified that his damages calculations did not include any cost associated with plaintiff's claims either for the balance of the contract or for outstanding change order requests (COR).

{¶ 5} Pattillo identified the source documents that he used in his analysis and he testified that he calculated plaintiff's damages in accordance with the findings of fact in the court's liability decision. Pattillo's damages calculations were quantified in three categories: 1) additional labor costs attributable to delay and acceleration; 2) overtime premium costs; and 3) additional supervision resulting from acceleration.

{¶ 6} 1. Additional labor costs

{¶ 7} As a result of his analysis, Pattillo determined plaintiff had incurred additional labor costs for the following activities due to acceleration on the project: framing, $160,620; drywall, $410,464; acoustical ceiling, $40,638; EIFS, $95,877; and cleaning/punchlist items, $115,373. (Plaintiff's Exhibit 404, tab 2.) The direct costs were marked up an additional ten percent for overhead, ten percent for profit, and one percent for bond costs for a total cost of additional labor of $1,005,755.

{¶ 8} 2. Overtime premium costs

{¶ 9} During February 2003 to August 2003, plaintiff accelerated its work on the project, in part, through the use of overtime. Pattillo calculated the "premium" or "half-time" cost of overtime pay during the period of acceleration by referring to plaintiff's prevailing wage reports. According to Pattillo, the total cost for the overtime premium amounted to $54,731, including markups of ten percent for overhead, ten percent for profit, and one percent for bond costs.

{¶ 10} 3. Additional supervision

{¶ 11} When plaintiff was directed to accelerate its work to complete the project prior to the beginning of the fall 2003 semester, additional supervision was required in order to help manage the acceleration efforts. Pattillo calculated the additional supervision costs by comparing plaintiff's "as-planned" monthly supervision costs to the costs that were actually incurred. The as-planned cost was adjusted to account for additional supervision that resulted from the early site delay so that the amount of plaintiff's supervision claim was appropriately reduced. Pattillo's calculations included related expenses that plaintiff incurred in addition to personnel costs such as the cost of travel and living expenses. The total of the direct personnel costs and the related expenses were marked up an additional ten percent for overhead, ten percent for profit, and one percent for bond costs, for a total of $145,232.

{¶ 12} The court finds that Pattillo's testimony was credible with regard to both the accuracy of plaintiff's job-costing system and the analysis and methodology that he used to calculate plaintiff's damages. Accordingly, the total amount of damages arising from defendant's failure to properly grant time extensions, including additional labor, overtime, and supervision costs amounts to $1,205,718.

PLAINTIFF'S CHANGE ORDER REQUESTS

COR 39/160

{¶ 13} As the court noted in its liability decision, Michael Bruder, the project manager in the Office of the University Architect, conceded that defendant owed plaintiff additional compensation for work required to install a "hat channel" to accommodate plumbing that was installed between bathrooms in several buildings.

{¶ 14} Although defendant contends that plaintiff has not provided any documentation to support this COR, John Small, plaintiff's president, testified that he reviewed the 31-page COR and that he consulted with his operations staff to verify the accuracy of the documents. The COR contains a letter dated November 13, 2002, from Rick Snoddy, a construction administrator for Braun & Steidl Associates, Inc. (BSA), the associate architect for the project, wherein Snoddy directs plaintiff to proceed on the work that was the subject of COR 39. Plaintiff's calculation of the cost for the work was based upon the unit price per square foot that was referenced in the November 13, 2002 letter from BSA. Defendant did not present any evidence to contest the accuracy of the COR. Accordingly, the court finds that $60,723.77 represents a fair and accurate cost for the work related to COR 39/160.

COR 44R

{¶ 15} Plaintiff was directed to install control joints that were not specified in the project documents and defendant approved installation of additional control joints. Small testified that the work was priced based upon a "unit cost" quote from a masonry subcontractor. According to Small, the unit costs and markups that were included in plaintiff's calculations were reasonable and accurate.

{¶ 16} Although defendant contends that plaintiff has failed to satisfy its burden of proof in the absence of an invoice for the work, Small testified that, at the time of the project, defendant argued only that the work was not authorized under the contract and that defendant did not disagree with the pricing of the work. The court finds that Small's testimony was credible and persuasive.

{¶ 17} Accordingly, the court finds that $174,358.12 represents a fair and accurate cost for the work related to COR 44R.

COR 93

{¶ 18} Plaintiff submitted COR 93 seeking compensation for work performed to install an "EIFS sill" that was not depicted in the original contract drawings. Small testified that the request was submitted during the project and that the work was priced

using accurate labor and material costs. According to Small, the cost summary that was presented to defendant was a fair and accurate statement of plaintiff's costs and markups associated with the EIFS work. (Plaintiff's Exhibit 398A, 93.)

{¶ 19} Accordingly, the court finds that plaintiff is entitled to damages in the amount of $49,345.43 regarding COR 93.

COR 128

{¶ 20} COR 128 is a "pass through" claim from plaintiff's subcontractor, Frank Novak & Sons, for touch-up painting necessitated by the accelerated work schedule prior to the 2003 school year. The COR was originally submitted in the amount of $25,312.58; however, during the course of litigation, plaintiff settled the claim with the subcontractor for a lesser amount. (Plaintiff's Exhibit 398A, 128.) Small testified that the amount actually paid to the subcontractor plus the markup allowed by the contract was $21,100. (Plaintiff's Exhibit 426A.)

{¶ 21} Accordingly, the court finds that plaintiff is entitled to damages in the amount of $21,100 regarding COR 128.

COR 148

{¶ 22} Plaintiff submitted COR 148 to recover costs associated with storing doors that were to be installed in building 152 so that plaintiff could meet the completion date that had been specified in CO 33. In its liability decision, the court found that plaintiff had attempted to mitigate the storage costs. Small testified that the additional costs included rental of the storage building, expenses for moving equipment, and labor. Small identified the invoices that document the storage costs and the purchase order that was prepared by plaintiff's project manager. (Plaintiff's Exhibit 398B, 148.) Although defendant asserts that plaintiff did not offer any justification for plaintiff's use of management-level employees in calculating its storage costs, Small testified that foremen and project supervisors were required to inventory and verify the materials that were stored.

{¶ 23} Accordingly, the court finds that plaintiff is entitled to damages in the amount of $12,505.40 regarding COR 148.

COR 154

{¶ 24} Plaintiff submitted COR 154 seeking compensation for scheduling extra work, including additional management costs incurred by plaintiff and costs incurred by

plaintiff's scheduling consultant, TG Consulting, Inc. (Plaintiff's Exhibit 398B, 154.) Defendant has acknowledged that the payments to the subcontractor were reasonable. Small testified that plaintiff absorbed any scheduling cost that was reasonably anticipated under the contract and that it billed defendant for only a portion of the additional scheduling costs which resulted from defendant's failure to grant extensions of time.

{¶ 25} Based upon the testimony and the evidence, the court finds that plaintiff is entitled to damages in the amount of $56,675 regarding COR 154.

KSU'S COUNTERCLAIMS

Masonry Veneer, Cleaning, and Site Walls

{¶ 26} In its liability decision, the court determined that defendant was entitled to damages for masonry cleaning and veneer work that was not completed in a satisfactory manner. The court further determined that a seat wall and canopy piers were defectively constructed.

{¶ 27} At the damages trial, Robert Kudder, defendant's masonry expert, testified that the mortar joints on the masonry veneer of the buildings should be re-pointed to achieve a uniform appearance and that the masonry veneer would need to be "cleaned" after the new mortar was applied. Robert Kelly, who is certified as an estimator, testified regarding the cost of performing the work recommended for Kudder. Although Kelly testified that the mortar joints on the masonry veneer should be both re-pointed and "scrub coated" before being cleaned, neither Kudder nor Kelly provided any credible testimony as to the need for scrub coating. Rather, the testimony established that scrub coating is a process that is used instead of, rather than in addition to, re-pointing.

{¶ 28} Phillip Sumang, plaintiff's masonry expert, testified regarding the cost of cleaning the masonry veneer. According to Sumang, the type of masonry cleaning that would be appropriate following re-pointing could be performed for $0.50 per square foot in the Cleveland market. Subsequent to the trial, defendant reduced its demand with respect to cleaning to represent a cost of $0.50 per square foot.

{¶ 29} Based upon the testimony and other evidence, the court finds that defendant is entitled to damages in the amount of $228,794 which represents the cost both to re-point and to clean the masonry veneer.

Air Shaft Repair

{¶ 30} The court found that defendant is entitled to damages for repairs to air shafts that were not sealed in accordance with the contract specifications. In support of its counterclaim, defendant presented the testimony of Jerry Craver, a foreman who supervised the work crew for Summit Interiors, the company that was hired by defendant to complete the air shaft repairs. Craver explained the process that was used to inspect the air shafts and to determine the proper method to seal any leaks that were discovered. According to Craver, the repairs included installing dry wall and spraying a fireproof compound to seal the gaps in the structure. Craver testified that he was not instructed to keep any record regarding either the inspection or the repairs that were completed on the air shafts.

{¶ 31} Mary Richards, a certified public accountant and the senior business manager for defendant, testified that she was familiar with the project and that she was responsible for reviewing invoices that had been submitted by the contractors for approval. Richards testified that the invoices submitted by Summit Interiors for the air shaft repairs totaled $276,256.79.

{¶ 32} Plaintiff asserts that defendant cannot recover the entire cost of repairs performed by Summit Interiors inasmuch as there were several causes for the leaks in the air shafts and that defendant has failed to prove that all of the leaks were attributable to plaintiff. The court agrees.

{¶ 33} In its liability decision, the court noted that "Wheeler testified that the prime contractors were responsible for sealing any penetrations into the air shafts" and "that those penetrations included both an air return penetration and a sanitary piping access that were to be sealed by Comunale (HVAC) and Golub (plumbing), respectively." The court determined that Wheeler's testimony substantiated plaintiff's assertion that other contractors were responsible for sealing air shaft penetrations. Nevertheless, defendant did not instruct Summit Interiors to identify and record the cause of the leaks that it repaired, nor did defendant present any evidence as to what portion of the remediation costs were attributable to plaintiff's actions or inactions.

{¶ 34} "The injured party cannot recover damages for breach of contract beyond the amount that is established by the evidence with reasonable certainty, and generally courts have required greater certainty in the proof of damages for breach of contract than for a tort." *Kinetico, Inc. v. Independent Ohio Nail Co.* (1984), 19 Ohio App.3d 26, 30, citing Restatement of the Law 2d, Contracts (1981) 144, Section 352.

{¶ 35} Based upon the testimony and evidence, the court finds that defendant has not demonstrated that plaintiff was responsible for more than 40 percent of the cost of repairs to the air shafts. Accordingly, the court finds that defendant is entitled to damages in the amount of $110,502.72, which represents 40 percent of the amount that was paid to Summit Interiors for repairs to the air ducts.

Tower Grilles

{¶ 36} Plaintiff began construction on tower grilles which were designed to provide a decorative screen for the mechanical equipment that had been installed on the roofs of the dormitories. In its liability decision, the court summarized the dispute regarding the tower grilles, as follows:

{¶ 37} "According to defendant, the grilles were not built 'weather-tight' as required by the contract specifications and plaintiff refused to correct the alleged defects. It is undisputed that defendant notified plaintiff that it had rejected plaintiff's work on the grilles.

{¶ 38} "Bruder testified that defendant paid to have another contractor perform remedial work on the grilles. During cross-examination, Bruder conceded that plaintiff did not refuse to perform corrective work on the grilles and that plaintiff was terminated from the project when it was in the process of making the repairs, albeit not as quickly as defendant would have liked.

{¶ 39} "Having determined that, pursuant to Article 13.2 of the general conditions, defendant was entitled to terminate plaintiff without cause, plaintiff was likewise 'entitled to a fair and reasonable profit for all work performed and all reasonable expenses directly attributable to the termination of the contract.

{¶ 40} "Accordingly, the court finds in favor of defendant with regard to remedial work that was performed on the tower grilles to the extent that it can prove at the damages trial that plaintiff was paid in excess of a 'fair and reasonable profit' for the work it performed on those structures." (Liability Decision, Pages 48-49.)

{¶ 41} Although Bruder testified that additional work was performed on the tower grilles after plaintiff had been terminated from the project, the court finds that defendant has failed to establish by a preponderance of the evidence that it is entitled to damages for such work.

Bridge Between Buildings 151 and 152

{¶ 42} Defendant had issued CO 050-01 to plaintiff to "non-perform installation of masonry and EIFS" on the bridge between buildings 151 and 152 for a credit in the amount of $9,292.28. In its liability decision, the court determined that defendant approved plaintiff's "good faith" offer of "labor only credits" and that plaintiff would "not warrant the construction of this work."

{¶ 43} The court further found "that both the change order and the quote upon which it was based establish that the parties agreed that the contract amount due to plaintiff would be reduced by $9,292.28 to account for its labor savings associated with not having to perform the referenced work; that defendant would use the material that was 'on site' to perform the work; and, that plaintiff did not warrant the work it had already performed on that area of the project. The court further finds that defendant was entitled to the material that was intended to be used for the referenced work that was on site on August 21, 2003." (Liability Decision, Page 52.) The court concluded that defendant was entitled to damages in an amount equal to the reasonable value of any such material to the extent that it could prove that the material was removed by plaintiff on or after August 22, 2003.

{¶ 44} Bruder testified that a contractor was hired to complete the bridge in the late summer and early fall of 2003, after plaintiff had been terminated from the project. According to Bruder, there was insufficient material on site to finish the bridge and defendant was required to purchase additional material at a cost of $9,619.63. However, on cross-examination, Bruder conceded that he was not aware what materials were on site on August 21, 2003, or whether any bridge material had been removed on or after August 22, 2003.

{¶ 45} Inasmuch as defendant failed to present any evidence to show that plaintiff had removed bridge material on or after August 22, 2003, the court finds that defendant has not proved that it is entitled to any damages relating to this counterclaim.

Unfinished Landscaping

{¶ 46} The court determined that defendant was entitled to a credit for landscaping work that had not been completed after plaintiff had been terminated from the project. However, in its liability decision, the court also found that "pursuant to Article 13.2.3.2, plaintiff 'shall be entitled to a fair and reasonable profit for all work performed' on the landscaping and 'all reasonable expenses directly attributable to the termination of the contract.'" (Liability Decision, Page 58.)

{¶ 47} On cross-examination, Bruder acknowledged that he had received a May 14, 2004 memorandum from plaintiff advising both defendant and the landscaping subcontractor that the balance owed to the subcontractor for completing landscaping for the project was $13,583. According to Bruder, defendant contracted with another landscaping company to complete the work for a total cost of $58,000.

{¶ 48} Upon review, the court finds that the testimony and evidence supports plaintiff's assertion that the landscaper who began the work was ready and able to complete the work and that defendant failed to mitigate its damages when it engaged another contractor to complete the landscaping at a cost that was greater than the balance of the contract price. Accordingly, the court finds that defendant is entitled to damages in the amount of $13,583 on its counterclaim for unfinished landscaping.

SUMMARY OF DAMAGES

{¶ 49} In summary, the court finds that plaintiff has proved by a preponderance of the evidence that it is entitled to damages as follow:

Contract balance (and other stipulated amounts)	$1,802,186.60
Delay and inefficiency	1,205,718.00
Plaintiff's change order requests	374,707.72
Plaintiff's damages	$3,382,612.32
Defendant's counterclaims	(352,879.72)
Plaintiff's total damages (less counterclaims)	$3,029,732.60

PREJUDGMENT INTEREST

{¶ 50} Plaintiff also asserts a claim for prejudgment interest. R.C. 2743.18(A)(1) provides that interest shall be allowed with respect to any civil action upon which a judgment or determination is rendered against the state for the same period of time and

at the same rate as allowed between private parties to a suit. The award of prejudgment interest is controlled by R.C. 1343.03(A) which provides, in pertinent part, as follows: "[W]hen money becomes due and payable upon any * * * instrument of writing * * * the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code * * * unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract." The parties have not identified, nor is the court aware of, a provision in the contract that provides a rate of interest for money that becomes due and payable.

{¶ 51} "The language in R.C. 1343.03(A), providing for prejudgment interest rates to be determined according to the annual variable interest rate determined by the Ohio Department of Taxation pursuant to R.C. 5703.47, represents a change from the prior version of that statute, which set the interest rate at ten percent per annum. The change, embodied in Sub.H.B. No. 212, 125 Ohio Laws 63, took effect on June 2, 2004. The uncodified portion of H.B. 212 provided that for court actions pending on the effective date, interest would be awarded at the old statutory rate of ten percent per annum from the date when the money became payable until the effective date, and would accrue at the new variable rates beginning on the effective date." *Jones v. Progressive Preferred Ins. Co.*, 169 Ohio App.3d 291, 2006-Ohio-5420, ¶ 20.

{¶ 52} A government contractor's money becomes due and payable when the contractor substantially completes its work on the project. *Royal Electric Const. Corp. v. The Ohio State University*, 73 Ohio St.3d 110, 117, 1995-Ohio-131.

{¶ 53} In its liability decision, the court determined that buildings 151, 153, and 154 were substantially completed in August 2003 and that building 152 was substantially completed in February 2004. (Liability Decision, Page 22.) Consequently, under *Royal Electric,* supra, plaintiff is entitled to prejudgment interest on the award of damages from March 1, 2004, to the date of this court's judgment entry as follows:

94 days (03/01/2004 to 06/02/2004) @ 10% of $3,029,732.60 =	$ 78,025.99
212 days (06/03/2004 to 12/31/2004) @ 4% of $3,029,732.60 =	$ 70,389.40
365 days (01/01/2005 to 12/31/2005) @ 5% of $3,029,732.60 =	$ 151,486.63
365 days (01/01/2006 to 12/31/2006) @ 6% of $3,029,732.60 =	$ 181,783.96

365 days (01/01/2007 to 12/31/2007) @ 8% of $3,029,732.60 = $ 242,378.61
365 days (01/01/2008 to 05/27/2008) @ 8% of $3,029,732.60 = $ 242,378.61
160 days (01/01/2009 to 07/23/2009) @ 5% of $3,029,732.60 = $ 84,251.47
Total Prejudgment Interest = $1,050,694.67

{¶ 54} Accordingly, judgment shall be rendered in favor of plaintiff in the amount of $4,080,452.27 which includes the filing fee paid by plaintiff.

Court of Claims of Ohio

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65 South Front Street, Third Floor
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CLEVELAND CONSTRUCTION, INC.

Plaintiff

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KENT STATE UNIVERSITY

Defendant
Case No. 2003-10724

Judge Joseph T. Clark

JUDGMENT ENTRY

This case was tried to the court on the issue of plaintiff's damages. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount $4,080,452.27, which includes the filing fee paid by plaintiff and prejudgment interest from March 1, 2004, to the date of journalization of this entry. Court costs are assessed

against defendant. 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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