[Cite as *Beasley v. Monoko, Inc.* , 2009-Ohio-5319.]

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

JAMES BEASLEY, DIRECTOR, OHIO DEPARTMENT OF TRANSPORTATION

Plaintiff/Counter Defendant

v.

MONOKO, INC., et al.

Defendants/Counter Plaintiffs
Case No. 2007-03391-PR

Judge Clark B. Weaver Sr.
Referee Jack R. Graf Jr.

REFEREE DECISION

{¶ 1} On November 24, 2008, plaintiff/counter defendant, Ohio Department of Transportation (ODOT), filed a motion for summary judgment against defendant/counter plaintiff, Monoko, Inc. (Monoko), and defendant/counter plaintiff, Peerless Insurance Company (Peerless). On January 23, 2009, Monoko and Peerless each filed cross-motions for summary judgment against ODOT.[1] A non-oral hearing on the respective motions was held on March 18, 2009.

{¶ 2} The facts relating to the case are as follows. In 1997, Monoko entered into a contract with ODOT to paint four bridges on U.S. Route 40 in Guernsey County. Monoko performed the painting work on the project pursuant to its contract with ODOT.

{¶ 3} Supplemental Specification 815 required Monoko to prepare the steel surfaces for painting and then to apply paint to those surfaces using a three-step process known as OZEU. Pursuant to R.C. 5525.16, Monoko 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 $619,000 was issued by Peerless on June 18, 1997. Work on the project was completed and Monoko was paid in accordance with the contract.

{¶ 4} On August 10, 2005, ODOT filed a complaint against Monoko in the Guernsey County Court of Common Pleas alleging breach of contract and unjust enrichment. ODOT contends that the painting work performed on the project was defective in that it was not performed in accordance with specifications and that ODOT is entitled to damages. ODOT later added Peerless as a defendant by filing an amended complaint seeking recovery under the terms of the performance bond. Monoko filed an amended answer and a counterclaim on March 22, 2007. The filing of the counterclaim against ODOT in the common pleas court, combined with the later mandatory filing of a petition for removal in this court on March 22, 2007, effected the removal of the case to this court pursuant to R.C. 2743.03(E). Peerless filed its answer and counterclaim on May 1, 2007.

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

{¶ 6} "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

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[1]The following motions for leave and extensions of time are GRANTED instanter: Monoko's December 16, 2008 motion; Monoko's January 9, 2009 motion; ODOT's February 3, 2009 motion;

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.

{¶ 7} ODOT contends that it is entitled to summary judgment against Monoko on its claim for breach of contract and its claim against the performance bond. In moving for summary judgment, ODOT asks this court to rule that Monoko is barred both by the terms of the parties' contract and Ohio law from asserting the defenses of waiver and estoppel.

{¶ 8} In its cross-motion for summary judgment, Monoko asserts that ODOT's final acceptance of the project forecloses any claim by ODOT that is based upon an alleged failure of performance. In support for this argument Monoko relies on two undisputed facts: 1) ODOT quality control inspectors determined that work was performed in accordance with project specifications at each of the ten quality control points identified in the contract; 2) ODOT's project engineer inspected and approved the completed project and, along with ODOT's director, issued a "Report of Final Inspection" in 1999.

{¶ 9} With regard to ODOT's claim against the performance bond, Peerless echoes Monoko's argument stating simply that "The Requirements of the Performance Bond Expire at Final Acceptance." (Peerless Memorandum, February 19, 2009, Page 7.) Peerless insists that if Monoko cannot be held liable to ODOT for a failure of performance then no claim against the performance bond may be made.

{¶ 10} Generally, final acceptance by the owner has the effect of releasing the contractor and the surety from liability. See 109 A.L.R. 625. There are, however, exceptions to this rule. These include any acceptance induced by fraud, express provisions of the bond or contract, latent defects, or a guarantee of maintenance. Id.

Monoko and Peerless' February 20, 2009 joint motion; and Monoko's April 10, 2009 motion.

ODOT contends that certain provisions of the contract and bond give rise to an exception to the general rule.

{¶ 11} ODOT's 1997 Construction and Material Specifications (CMS) and Supplemental Specifications are incorporated by reference into the contract between ODOT and Monoko (collectively "contract"). It is undisputed that the contract between ODOT and Monoko designated intermediate quality control points at which time ODOT and its agents inspected and reviewed the work. Quality Control Points (QCP) are defined as "points in time when one phase of the work is complete and ready for inspection by both the Contractor and the Engineer prior to continuing with the next operational step. At these points: The Contractor shall afford access to inspect all affected surfaces." Painting Supplemental Specification 815.03(B). However, if the inspection indicated a problem, "that phase of the work shall be corrected * * *." Id.

{¶ 12} Monoko argues that ODOT's final acceptance of Monoko's work on the heels of its previous inspection and approval of the work at each of the ten QCPs effectively extinguishes ODOT's right to later claim that any portion of the work was either not performed or was performed in a defective manner. ODOT claims that several provisions of the CMS give it the right to make performance-related claims even after final acceptance.

{¶ 13} Where a contract is clear and unambiguous, a court should apply and enforce the contract as written. *Latina v. Woodpath Dev. Co.* (1991), 57 Ohio St. 3d 212, 214. "It is not the responsibility or function of this court to rewrite the parties' contract in order to provide for a more equitable result." *Foster Wheeler Enviresponse v. Franklin County Conventional Facilities Auth.*, 78 Ohio St.3d 353, 362, 1997-Ohio-202.

{¶ 14} ODOT points to CMS Section 105.11, which states in pertinent part: "All materials and each part or detail of the work shall be subject to inspection by the Engineer. * * * Failure to reject any defective work or material shall not in any way

prevent later rejection when such defects are discovered, *or obligate the State of Ohio to final acceptance*." (Emphasis added.) Additionally, ODOT cites Painting Supplemental Specification Section 815.03(B) which provides: "Discovery of defective work or material after a Quality Control Point is past or failure of the final product before final acceptance, shall not in any way prevent rejection *or obligate the State of Ohio to final acceptance*." (Emphasis added.) Finally, ODOT relies on CMS Section 105.10, which states: "The Inspector is not authorized to alter or waive the provisions of the contract" and therefore cannot accept the work of Monoko.

{¶ 15} Contrary to ODOT's assertion, the above-cited provisions do not support its position. CMS Section 105.11, entitled "Inspection of Work," states only that an inspection by the engineer does not prevent ODOT from later rejecting the work or "obligate the State of Ohio *to final acceptance*." (Emphasis added.) This is made clear in Painting Supplemental Specification 815.03(B), which states that discovery of defective work or failure of the final product before final acceptance "shall not in any way *prevent rejection or obligate the State of Ohio into final acceptance.*" (Emphasis added.) Thus, these provisions speak to inspections conducted prior to final acceptance.

{¶ 16} Clearly, the parties contemplated that work would be inspected by ODOT and its representatives at intermediate points in the project. See Supplemental Specification 815.03. During these inspections, ODOT could accept or reject the work. The terms make clear that, prior to final acceptance, ODOT retains the right to reject the work and require corrective measures even though the engineer had previously inspected and accepted the work. However, the terms also make clear that ODOT does not have the right to reject the work subsequent to final acceptance.

{¶ 17} Pursuant to CMS 109.073, once the work was completed to the engineer's satisfaction, the engineer was to notify the director who would then make a final inspection. CMS Sections 109.08 and 109.09 establish a procedure for final acceptance of a contractor's work. Section 109.08, entitled "Acceptance and Final

Payment" provides: "Before the final estimate is allowed the Director may require the Contractor to submit an affidavit from each and every subcontractor showing that all claims and obligations arising in connection with the performance of his portion of the contract have been satisfactorily settled. The improvement shall be inspected by the Director, and if he finds the work is completed according to the contract, there shall be issued certificates of the amount of work done and the Contractor shall receive the balance due on the contract. It is expressly stipulated that the State of Ohio shall make *final acceptance* and payment promptly *after the contract has been fully completed and final inspection made*. No payment shall be made for any unauthorized work." (Emphasis added.) Section 109.09, which speaks to the termination of the contractor's responsibility states: "This contract will be considered complete when all work has been completed, and the final inspection made, the work accepted and the final estimate approved, in writing, by the Director. The Contractor *will then be released from further obligations* except as set forth in his bond. The date the final estimate is approved, in writing, by the Director shall constitute the acceptance contemplated by Section 5525.16 ORC." (Emphasis added.)

{¶ 18} Once the work was completed, ODOT performed a final inspection. ODOT provided Monoko with a "Report of Final Inspection" on the standard Form C-85 stating that it found the project was "completed in substantial conformity with the approved plans and specifications" and that Monoko was "relieved of responsibility for further maintenance," subject to provision of the CMS. Moreover, the report stated that the "Physical Work [was] Accepted."

{¶ 19} Notwithstanding the foregoing, ODOT maintains that CMS Section 107.20 authorizes it to reject work at any point in time, even after final acceptance. Section 107.20 states: "Neither the inspection by the Engineer; nor by any of his duly authorized representatives, nor any order, measurements, or certificate by the Director, or said representatives, nor any order by the Director for the payments of money, nor

any payment for, nor acceptance of any work by the Director, nor any extension of time, nor any possession taken by the State or its duly authorized representatives, shall operate as a waiver of any provision of this contract, or of any power herein reserved to the State, or any right to damages herein provided; nor shall any waiver or any breach of this contract be held to be a waiver of any other subsequent breach."

{¶ 20} A writing or writings executed as part of the same transaction must be read as a whole and the intent of each part must be gathered from a consideration of the whole. *Foster Wheeler,* supra, at 361. When read in isolation, CMS Section 107.20 could be interpreted as reserving in ODOT the right to assert performance-related contract claims at any time regardless of whether it previously issued final acceptance. However, when read in conjunction with the remainder of the contract, ODOT's interpretation of Section 107.20 would render meaningless each of the previously cited contract provisions. Moreover, CMS Section 107.20 is found in a section of the contract entitled "Legal Relations and Responsibility to Public" and not in Section 109 entitled "Acceptance, Measurement and Payment." Indeed, if ODOT had intended Monoko's liability for performance-related issues to be indefinite, ODOT would have no reason to send a letter to Monoko releasing it from any further responsibility and obligations.

{¶ 21} As part of ODOT's argument in support of summary judgment, ODOT asserts that defenses such as waiver and estoppel are unavailable to Monoko. For example, ODOT relies on *Hortman v. City of Miamisburg*, 110 Ohio St.3d 194, 199, 2006-Ohio-4251, wherein the Supreme Court of Ohio stated that "'as a general rule, the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function.'" Id. at 199; citing *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145-146.

{¶ 22} In the view of the court, equitable principles such as waiver and estoppel do not arise under the circumstances of this case inasmuch as the parties' agreement speaks directly to the effect of final acceptance. It is clear from the plain language of the contract that ODOT could not be estopped nor could it be deemed to have waived

the right of rejection at any time prior to final acceptance. It is also clear from the plain language of the contract that ODOT no longer had any right to reject Monoko's work following its issuance of final acceptance.

{¶ 23} Finally, while ODOT does not argue that the alleged defects in the performance of the work are latent, the existence of a latent defect has been held to relieve an owner of the preclusive effect of final acceptance. A latent defect is defined as a defect that is "hidden, concealed, and not discoverable by ordinary inspection." *Cummin v. Image Mart, Inc.*, Franklin App. No. 03AP-1284, 2004-Ohio-2840, ¶5.

{¶ 24} In support of its motion for summary judgment, ODOT has submitted the supplemental affidavit of Gary L. Tinklenberg, Vice President of Corrosion Control Consultants & Labs, Inc. In 2005, Tinklenberg inspected the bridges at issue, and on August 26, 2006, he issued a report containing his findings. In his supplemental affidavit, Tinklenberg describes the defects in the bridge as follows:

{¶ 25} "10. As further stated on page 5 of the Report, it is also my opinion, to a reasonable degree of scientific certainty, that surfaces of all four structures were not blasted to the specification requirements of an SSPC-SP 10 near white blast cleaning. Thus, there are substantial defects in the surface preparation and paint coatings for the bridges covered by ODOT Project Number 1997-0410.

{¶ 26} "11. As stated on page 6 of the Report, it is my opinion, to a reasonable degree of scientific certainty that thirty-three of the forty stripped areas were found to be out of compliance with the requirements of SSPC-SP 10. Thus, there are substantial defects in the surface preparation and paint coatings for the bridges covered by ODOT Project Number 1997-0410, and the contractor failed to perform according to the requirements set forth in the Painting Specification to wit, Supplemental Specification 815. * * *

{¶ 27} "12. It is also my opinion, to a reasonable degree of scientific certainty, that the frequency and distribution of problems on the bridges are so significant and

distributed over all of the painted surfaces that the paint system applied to the bridges are not repairable. The bridge structures must be reblasted and repainted in order to comply with Supplemental Specification 815. *See* Report at page 2. Due to the presence of significant lead on the structures, the reblasting and repainting of the structures will be considered a lead removal project. *See*, Id."

{¶ 28} Monoko has moved the court to strike portions of Tinklenberg's testimony and to strike Tinklenberg's supplemental affidavit on the grounds that his affidavit is allegedly at odds with his previous deposition testimony and contains errors with regard to its substance. Monoko has also raised questions regarding the propriety of the destructive testing performed by Tinklenberg, contending that such methods were not contemplated by the parties to the contract. However, the court finds that the arguments regarding inconsistences between the affidavit and deposition are relevant to the weight of the testimony rather than its admissibility. Moreover, the court, within its discretion, "may permit affidavits to be supplemented * * *." See Civ.R. 56(E). Inasmuch as the supplemental affidavit relies on Tinklenberg's findings during the course of his inspection, ODOT may properly rely on those facts. See *Chase Manhattan Mtg. Corp. v. Locker* (Dec. 12, 2003), Montgomery App. No. 19904, 2003-Ohio-6665, ¶28. In short, the court may consider the supplemental affidavit in ruling on ODOT's motion for summary judgment.

{¶ 29} It is undisputed that neither ODOT's quality control inspectors nor ODOT's engineer discovered the alleged defects in the surface preparation work.[2] It was not until several years after the work was accepted that ODOT's expert claims to have found defects in surface preparation. Clearly, the parties disagree whether Tinklenberg conducted an ordinary and reasonable inspection.

[2]The court acknowledges that correctable defects may have been detected at any of the ten quality control points but that such defects were remedied to ODOT's satisfaction before Monoko was permitted to move to the next phase of the work.

{¶ 30} However, as stated above, ODOT has not argued that the surface preparation defects are latent. Moreover, ODOT's insistence that Tinklenberg conducted an ordinary and reasonable inspection combined with Tinklenberg's conclusion that the defects in the surface preparation are both "substantial" and pervasive, convinces the court that latency of alleged defects is not a material issue.

{¶ 31} For the foregoing reasons, it is recommended that Monoko's motion for summary judgment be granted, that Peerless' motion for summary judgment be granted, and that ODOT's motion for summary judgment be denied.

A party may file written objections to the referee'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 lawunder 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

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

Jeremy M. Grayem
Joshua N. Stine
Roger L. Sabo
250 West Street
Columbus, Ohio 43215

Stephanie B. McCloud
Assistant Attorney General
Transportation Section
150 East Gay Street, 17th Floor
Columbus, Ohio 43215-3130

William H. Heywood III
North Courthouse Square
1000 Jackson Street
Toledo, Ohio 43604-5573

Referee Jack R. Graf, Jr.

LP/GWP/cmd
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To S.C. reporter *