



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

LEE TESTING & ENGINEERING INC., et al.

Plaintiffs

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2012-03930

Judge Dale A. Crawford

DECISION

{¶ 1} This cause comes to be heard on a Complaint that alleges, in part, discrimination under Title VI of the Civil Rights Act, due process violations under the Fourteenth Amendment, and negligence by Defendant Ohio Department of Transportation (ODOT) in failing to issue a Disadvantaged Business Enterprise (DBE) certificate to Plaintiffs.

{¶ 2} The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability. At the commencement of trial, Plaintiffs withdrew all claims against Defendant other than claims resulting from Defendant's action and/or inaction subsequent to June 17, 2010, the date on which an ODOT hearing examiner recommended that Plaintiff, Lee Testing & Engineering Inc. (Lee Testing), be granted a DBE certification. During the hearing, Plaintiffs appeared to change their claims and alleged that Plaintiffs are only seeking damages as a result of Defendant's actions and/or inaction subsequent to October 19, 2010, the date on which Defendant granted Lee Testing its DBE certification. The Court will address Plaintiffs'

negligence and constitutional claims resulting from any of Defendant's actions and/or inactions subsequent to June 17, 2010. The following constitutes the Court's Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

{¶ 3} Lee Testing, a corporation fully owned by Plaintiff Verna Lee, was¹ a corporation engaged in the business of geotechnical and environmental engineering and materials testing.

{¶ 4} On or about December 10, 2008, Lee Testing's DBE Unified Certification Application was submitted by President and CEO Verna Lee (Lee) on behalf of Lee Testing. The Office of Contracts for DBE Services received the application on December 12, 2008 (Joint Exhibit K).

{¶ 5} On May 8, 2009, Defendant denied Lee Testing's application in a letter which stated that the information provided in its application did not meet the criteria for a DBE as required in 49 C.F.R. 26.69(e) and 26.71(g). The letter further stated that Plaintiffs had the option of appealing the decision within thirty days of receipt of the notice of denial (Joint Exhibit J).

{¶ 6} Plaintiffs filed an appeal to then-Director of ODOT, Jolene Molitoris, on May 27, 2009, and a hearing on the appeal took place on November 12, 2009 (Joint Exhibits B & I).

{¶ 7} On June 17, 2010, the hearing examiner, Fitzgerald Murraine, recommended that the Director approve Lee Testing's application in its entirety, and on October 19, 2010, Molitoris approved and adopted the hearing examiner's recommendation and ordered the permit application approved (Joint Exhibits H & B).

¹Lee Testing went out of business sometime in October 2010. There was insufficient evidence presented to determine whether Lee Testing went out of business before or after the October 19, 2010 certification decision by Defendant. However, all of Lee Testing's employees were laid off in mid-August of 2010.

CONCLUSIONS OF LAW

A. Verna Lee's Individual Claim

{¶ 8} Lee has no individual claim in this matter. A plaintiff-shareholder does not have an independent cause of action as a result of a wrongful action of a third party directed toward the corporation where there is no violation of a duty owed directly to the shareholder. *Adair v. Wozniak*, 23 Ohio St. 3d 174 (1986). Lee Testing is a corporation under the laws of the State of Ohio (R.C. 1701 et seq.), and as the President, CEO, and sole shareholder for the corporation, Lee can only assert an individual claim if Defendant owed her a duty specifically. Lee did not apply for a DBE certification as an individual, but instead on behalf of Lee Testing. Therefore, Lee has no standing for the claims of her company. Accordingly, any claims asserted by Lee shall be dismissed.

B. Lee Testing's Claim

1. Negligence

{¶ 9} In order to prove negligence, Plaintiff must prove the existence of a duty, a breach of such duty, proximate cause and damages. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573. A duty can be found under common law or statute. *Stark Cty. Agricultural Soc. v. Brenner*, 122 Ohio St. 560, 566-67 (1930). Plaintiff claims that Defendant owed it a duty after June 17, 2010 to immediately approve its application and that Defendant additionally had a duty after October 19, 2010 to take some action beyond the approval of the application by Molitoris in her letter (Joint Exhibit B). It appears that Plaintiff believes that it should have received a document in the form of a certificate, which it could then show to contractors to prove that it was an approved DBE. Plaintiff also asserts that it should have been placed on a "master list" so that contractors could go online to determine if it was an approved DBE. Plaintiff has provided this Court with no evidence or statutory authority that required Defendant to do

anything further in the certification process after the October 19, 2010 letter from Molitoris. Accordingly, the Court finds that there was no duty on the part of Defendant or its employees to do anything further than that which was done. Finding no duty, there was no breach of duty.

{¶ 10} In addition, Plaintiff has failed to prove that any alleged breach of duty caused Plaintiff damage. In cases where a trial is bifurcated into separate liability and damages phases, Plaintiff still must prove in the liability phase that some damage was reasonably certain to occur as a proximate result of Defendant's negligence. *Hunter v. State Dept. of Mental Retardation & Dev. Disabilities*, 10th Dist. No. 95API09-1184, 1996 Ohio App LEXIS 552 (Feb. 15, 1996). While Plaintiff speculated that the lack of a document entitled "certificate" caused it to lose work, there was no production of credible evidence that any alleged breach of a duty proximately caused Lee Testing to lose a contract. As Lee testified, Lee Testing had no employees after August 2010 and went out of business sometime in October 2010. Consequently, it would have been impossible to perform any testing work even if it had won a contract. Finding no duty, breach of duty, or damages proximately caused, the Court finds that Plaintiff has failed to prove its negligence claim.

{¶ 11} However, even assuming Plaintiff proved damages, the economic loss rule bars Plaintiff's negligence claim. "The well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." *Corporex Dev. & Constr. Mgmt. v. Shook, Inc.*, 106 Ohio St. 3d 412, 2005-Ohio-5409, ¶ 6. "Thus, where only economic losses are asserted, damages may be recovered only in contract; there can be no recovery in negligence due to the lack of physical harm to persons and tangible things." *RWP, Inc. v. Fabrizi Trucking & Paving Co.*, 8th Dist. No. 87382, 2006 Ohio App LEXIS 4958, 21 (Sept. 28, 2006). Plaintiff does not claim that Defendant has

caused it to suffer more than just economic harm, and accordingly, Plaintiff's negligence claim fails in this regard as well.

2. Immunity of Defendant ODOT

{¶ 12} Defendant asserts that it is immune from liability pursuant to R.C. 2743.02(A)(3)(a), which provides in part that the state is "immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty." The definition of public duty includes certifying. R.C. 2743.01(E)(1)(a). Under the circumstances of this case, it is difficult for the Court to determine whether the issuance of a certificate is an official part of Defendant's certifying process of DBE applications as Plaintiff claims. However, assuming that Defendant was required to take further action to certify Plaintiff's DBE application, the action, on its face, must be part of a "certifying" process and covered under the public duty definition in R.C. 2743.01.

{¶ 13} Plaintiff claims that the certification process created a "special relationship" and that Defendant is not immune from liability for its actions subsequent to June 17, 2010. R.C. 2743.02(A)(3)(b) provides in part that:

{¶ 14} "[a] special relationship under this division is demonstrated if all of the following elements exist:

{¶ 15} "(i) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who was allegedly injured;

{¶ 16} "(ii) Knowledge on the part of the state's agents that inaction of the state could lead to harm;

{¶ 17} "(iii) Some form of direct contact between the state's agents and the injured party;

{¶ 18} "(iv) The injured party's justifiable reliance on the state's affirmative undertaking."

{¶ 19} This relationship is only created through an affirmative duty to act, which Plaintiff has not shown. Accordingly, the Court finds that Plaintiff has failed to prove that a “special relationship” existed between Lee Testing and ODOT on or after June 17, 2010 that would qualify Plaintiff’s DBE application process as an exception to the public duty rule created pursuant to R.C. 2743.02(A)(3)(a).

3. Constitutional Claims

{¶ 20} Plaintiff alleges that the Defendant violated its due process rights under Title VI of the Civil Rights Act and the Fourteenth Amendment to the United States Constitution. While it is not clear what constitutional or statutory right Defendant owed Plaintiff, constitutional or federal civil rights claims are not cognizable in this Court and shall be dismissed. *Baker v. Dept. of Rehab. and Corr.*, 10th Dist. No. 11AP-987, 2012-Ohio-1921, ¶ 4.

CONCLUSION

{¶ 21} The Court finds that Plaintiff Verna Lee has no standing to bring any individual claims, and consequently, her claims shall be dismissed. The Court further finds that Plaintiff Lee Testing has failed to prove its negligence claim against Defendant. The Court also finds that Plaintiff’s constitutional and civil rights claims were not proved and are not cognizable in this Court and shall be dismissed. Judgment shall be rendered in favor of Defendant.

DALE A. CRAWFORD
Judge



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JUDGMENT ENTRY

{¶ 22} This case was tried to the Court on the issues of liability. The Court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of Defendant. Plaintiff Verna Lee's individual claims are DISMISSED. Plaintiff Lee Testing's negligence, constitutional and civil rights claims are DISMISSED. Court costs are assessed against Plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DALE A. CRAWFORD
Judge

Case No. 2012-03930

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DECISION

cc:

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