[Cite as *R.B. Jergens Contrs., Inc. v. Ohio Dept. of Transp.*, 2013-Ohio-5967.]

Court of Claims of Ohio
The Ohio Judicial Center
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R.B. JERGENS CONTRACTORS, INC.

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2012-06823

Judge Dale A. Crawford

DECISION

{¶ 1} This cause comes to be heard on Defendant's October 8, 2013 Second Motion for Partial Summary Judgment.1

{¶ 2} Defendant moves for Partial Summary Judgment on what Defendant calls the "40-day delay claim" set forth in the original complaint and the Third Amended Complaint Count 2.2 Defendant asserts that (1) it issued Change Order No. 38 as full compensation for a delay from November 4 through November 17, 2009 inasmuch as Plaintiff failed to submit and certify costs related to any field office overhead; (2) a significant rain event occurred on November 18, 2009 making the construction site unsuitable for work through November 30, 2009, and that such an event is an "excusable non-compensatory delay" pursuant to the parties contract; and (3) the contract provides that Defendant is not responsible for any delay claims that occur between December 1 and April 30 (winter season) unless it affirmatively approves work on the critical path during that time period. Defendant asserts that it did not approve

1 On January 28, 2013, the Court granted Defendant's Motion for Partial Summary Judgment as to Plaintiff's "42-day delay claim" of Plaintiff's Amended Complaint.

any work on the critical path during December 1, 2009 through April 30, 2010.

{¶ 3} In support of its Motion, Defendant submits the affidavit of David Ley and various Exhibits attached thereto and portions of a deposition transcript of Victor Roberts.

{¶ 4} Plaintiff denies that Defendant is entitled to Summary Judgment on the "40-day delay claim" on the grounds that (1) Defendant cannot break Plaintiff's claim into three separate time frames; (2) Plaintiff did present all damages that were allowed under the Construction and Material Specification (CMS) manual during the Dispute Resolution and Administrative Claims Process; (3) R.C. 4113.62 precludes Defendant from denying a delay claim caused by the Ohio Department of Transportation (ODOT); and (4) Defendant knew through its own inspectors' tests that the subgrade was not too wet to work between November 18 through November 30, 2009; and (5) Defendant was on notice of Plaintiff's intent to work during the "winter season."

{¶ 5} In support of its position, Plaintiff submits the affidavit of Victor Roberts and portions of the deposition transcripts of David Ley and Rolland Karns and various Exhibits attached thereto.

{¶ 6} Under Civ.R. 56(C), summary judgment is proper "if the pleadings, depositions, answer 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." Thus, in order to determine whether Defendant is entitled to judgment as a matter of law pursuant to Civ.R. 56(C), the Court must ascertain whether the evidentiary materials presented by Defendant show that there is no genuine issue as to any material fact involved in the case. In making this determination it is necessary to analyze the landmark Ohio Supreme Court decision which addresses the

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[1] Plaintiff's Third Amended Complaint does not list a Count 1.

"standards for granting summary judgment when the moving party asserts that the nonmoving party has no evidence to establish an essential element of the nonmoving party's case." *Dresher v. Burt*, 75 Ohio St.3d 280, 285 (1996).

{¶ 7} In *Dresher*, the Ohio Supreme Court held:

{¶ 8} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. * * * [T]he moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. * * * The assertion must be backed by some evidence of the type listed in Civ.R. 56(C) which affirmatively shows that the nonmoving party has no evidence to support that party's claims." *Id*. at 292-293.

{¶ 9} In interpreting the United States Supreme Court decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the *Dresher* Court found no express or implied requirement in Civ.R. 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. *Dresher*, *supra*, at 291-292. Furthermore, the *Dresher* Court stated that it is not necessary that the nonmoving party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Id*. at 289, quoting *Celotex*, *supra*. In sum, the *Dresher* Court held that the burden on the moving party may be discharged by "showing"–that is, pointing out to the Court– that there is an absence of evidence to support the nonmoving party's case. *Id*.

{¶ 10} "If the moving party fails to satisfy its initial burden, the motion for summary judgment most be denied." *Id*. at 293. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden as outlined in Civ.R. 56(E):

{¶ 11} "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶ 12} On July 21, 2009, the parties entered into a contract for ODOT Project 1060(09) (the Project), a highway construction project involving the reconstruction of over 2,053 feet of pavement in Vandalia, Ohio. The original completion date for the contract was May 31, 2010, and the Project had an interim completion date of October 15, 2009. A preconstruction meeting was held on September 1, 2009.

{¶ 13} In its Third Amended Complaint, Plaintiff alleges that it incurred construction delays that were caused by ODOT. At issue in Defendant's Motion for Partial Summary Judgment is Plaintiff's allegation that ODOT prevented Plaintiff from performing subgrade work between November 4, 2009 and December 18, 2009. Plaintiff alleges that on November 4, 2009, the parties discovered that there was more soft subgrade than previously anticipated. Accordingly, Plaintiff was prohibited from working on the subgrade pending a decision by ODOT regarding the subgrade issue. Plaintiff alleges that on December 18, 2009, after ODOT changed the stabilization process contemplated under the original project documents, Plaintiff began implementing ODOT's new stabilization plan. The delay from November 4 through December 18, 2009 has been referred to by the parties as the "40-day delay claim."

{¶ 14} Defendant argues that it is entitled to judgment as a matter of law on Plaintiff's "40-day delay claim," which is contained in Count 2 of Plaintiff's Third Amended Complaint.

{¶ 15} As an initial matter, Plaintiff argues that Defendant cannot deconstruct the 40-day delay claim into three separate time frames. However, there is no dispute that

the contract expressly excludes increased contractor costs associated with weather delays or delays during the winter season. Additionally, Plaintiff points to no provision of the contract or any statute that prohibits such an analysis.

{¶ 16} With respect to the first time frame, Defendant argues that it fully compensated Plaintiff for the delay claim of November 4 through November 17, 2009, inasmuch as Plaintiff failed to include any claim for field office overhead during the dispute resolution process. In support of this assertion, David Ley, the District Construction Administrator for ODOT District 7, avers in his affidavit, in part:

{¶ 17} "6. During the dispute resolution process between the parties, [Plaintiff] presented a delay claim for expenses it incurred from November 4, 2009 through November 17, 2009. [Plaintiff's] claim included an amount for home office overhead but it did not include an amount for field office overhead. ODOT issued Change Order No. 38 and paid the claim which was in the amount of $5,743.00.

{¶ 18} "* * *

{¶ 19} "8. ODOT's Dispute Resolution and Administrative Claims Process consists of three levels. The first level, which is known as Step 1, is considered the on-site level during which claims are attempted to be resolved at the local level. Any claim that remains unresolved after Step 1 can be presented to the District Dispute Resolution Committee which is known as Step 2. Any claim that remains unresolved at the district level can be taken to the Director's Claim Board which is known as Step 3.

{¶ 20} "9. Proposal Note 109 requires a contractor such as [Plaintiff] to exhaust its remedies through ODOT's Dispute Resolution and Administrative Claims Process before initiating litigation in the Ohio Court of Claims.

{¶ 21} "10. Further, according to Proposal Note 109, if a contractor such as [Plaintiff] fails to present a claim during Step 1 and/or Step 2 of ODOT's Dispute Resolution and Administrative Claim Process, the contractor is deemed to have waived the claim in that it cannot be presented during Step 3. In presenting its delay claim from

November 4, 2009 through November 17, 2009, [Plaintiff] failed to submit a claim for field office overhead at Step 2 and Step 3 of ODOT's Dispute Resolution and Administrative Claim Process.

{¶ 22} "11. When submitting a claim during Step 3 of the ODOT Dispute Resolution Process, Proposal Note 109 requires the contractor to submit and certify all costs related to a delay claim."

{¶ 23} Defendant submitted a copy of Proposal Note 109 with its Motion for Partial Summary Judgment. Proposal Note 109 provides, in part:

{¶ 24} "When submitting the Claim Documentation, the Contractor must certify the claim in writing and under oath. Such certification shall attest to the following:

{¶ 25} "1. The claim is made in good faith.

{¶ 26} "2. To the best of the Contractor's knowledge, all data offered to support the claim is accurate and complete.

{¶ 27} "3. The claim amount accurately reflects the Contractor's actual incurred costs and additional time impacts."

{¶ 28} In response to Defendant's motion, Plaintiff argues that it presented all delay damages that were allowed under the CMS and that R.C. 4113.62(C)(1) prohibits ODOT from including a contractual provision that waives or precludes liability for delay caused by ODOT.

{¶ 29} In support of its position, Plaintiff presented the affidavit of Victor Roberts, Vice President of R.B. Jergens Contractors, Inc., who avers that "During ODOT's Dispute Resolution and Administrative Claim Process, I presented all damages allowed by ODOT under the Construction and Material Specifications manual during the Step 2 and Step 3 stages." Plaintiff, however, does not rebut Defendant's assertion that Plaintiff did not submit a claim for field office overhead during the dispute resolution process. Plaintiff only states that it presented a claim for all damages "allowed" under the CMS. Additionally, there is no dispute that Plaintiff never submitted a claim for

damages "not allowed" under the CMS. Therefore, Defendant is entitled to judgment as a matter of law regarding any claim for field office overhead from November 4, 2009 through November 17, 2009.

{¶ 30} Even assuming Plaintiff had submitted a claim for damages "not allowed" under the CMS, such a claim ultimately fails. Plaintiff asserts that the CMS includes a contractual provision that waives or precludes liability for delay.

{¶ 31} R.C. 4113.62(C)(1) provides:

{¶ 32} "Any provision of a construction contract, agreement, or understanding, or specification or other documentation that is made a part of a construction contract, agreement, or understanding, that waives or precludes liability for delay during the course of a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, or that waives any other remedy for a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, is void and unenforceable as against public policy."

{¶ 33} CMS 109.08 entitled "Unrecoverable Costs" provides: "The Contractor is not entitled to additional compensation for costs not specifically allowed or provided for in 109.05 including, but not limited to, the following:

{¶ 34} "A. Loss of anticipated profit.

{¶ 35} "B. Consequential damages, including loss of bonding capacity, loss of bidding opportunities, insolvency, and the effects of force account work on other projects, or business interruption.

{¶ 36} "C. Indirect costs.

{¶ 37} "D. Attorneys fees, claim preparation expenses, and the costs of litigation."

{¶ 38} R.C. 4113.62(C)(1) precludes a waiver of liability for delay. *Cleveland Constr., Inc. v. Ohio Pub. Employees Ret. Sys.*, 2008-Ohio-1630, 10th Dist. No. 07AP-574. CMS 109.08, by its own language, does not include a "no cause for delay" provision or a waiver of liability for a delay. Indeed, CMS 109.08 expressly

contemplates compensation as provided for pursuant to 109.05. Accordingly, CMS 109.08 does not violate R.C. 4113.62(C)(1) and Plaintiff cannot claim delay damages "not allowed" under the CMS.

{¶ 39} Regarding the second time frame, Defendant argues that weather delays from November 18 through November 30, 2009 are non-compensable under the CMS and that Plaintiff is therefore not entitled to recover for any delay during that time period.

{¶ 40} In his affidavit, David Ley avers that "ODOT maintains a daily record of events on its highway construction projects. These records are referred to as the daily diaries. According to the daily diaries maintained by ODOT, a significant rain event occurred on November 18, 2009 and the construction site was wet and unsuitable for work through December 1, 2009. Additionally, in his deposition, Victor Roberts testified that "Once we had a half inch of rain - - I think that's what it was on the 18th - - the subgrade was wet for the rest of the winter."

{¶ 41} Plaintiff does not dispute that weather delays are non-compensable under the CMS; however, Plaintiff disputes Defendant's contention that the delay from November 18 through November 30, 2009 related to weather.

{¶ 42} In support, Victor Roberts avers as follows:

{¶ 43} "10) My testimony given during deposition on July 11, 2013 was given prior to extensive document exchange with ODOT. During document discovery, [Plaintiff] discovered a nuclear gauge density test taken on November 24, 2009 which indicated the soil on the Project site was dry of optimum. [Plaintiff] had no knowledge of this nuclear gauge density test taken on November 24, 2009 during ODOT's Dispute Resolution and Administrative Claim Process.

{¶ 44} "11) On November 24, 2009, the ODOT inspector on site was Paul Roach.

{¶ 45} "12) All soil has a moisture-density relationship. Soil can be compacted to its optimum density when the soil is at its optimum moisture content. If the soil's actual moisture content is above its optimum moisture content, the soil is considered to be too

wet and must be dried. If the soil's actual moisture content is below its optimum moisture content, the soil is considered to be too dry and can hold more water before reaching its optimum level of moisture. The November 24, 2009 nuclear gauge density test, attached as Exhibit 23 to the Deposition of Rolland Karns, indicates that the moisture content of the soil was below optimum, meaning that the soil was too dry and could hold more water."

{¶ 46} Additionally, Rolland Karns testified in his deposition that some of the reports from November 24, 2009, indicate that the soil was dry of optimum, meaning the soil could take on more water to reach optimum moisture.

{¶ 47} Based upon the affidavit of Victor Roberts and the deposition testimony of Rolland Karns, the Court must conclude that genuine issues of fact remain regarding whether the delay from November 18 through November 30, 2009 constituted a non-compensable weather delay.

{¶ 48} Regarding the remaining time frame of Plaintiff's delay claim, Defendant argues that the contract does not recognize delay claims for events that occur between December 1 and April 30, otherwise known as winter season.

{¶ 49} In support of its position, Defendant relies upon the affidavit of David Ley, wherein he avers:

{¶ 50} "14. Pursuant to Section 108.06(A) of the Construction and Material Specifications, ODOT highway projects enter into the winter season on December 1 of each year and the season continues until April 30 of the following year. Section 108.06(A) recognizes a delay claim in limited circumstances. In order to be eligible for a compensable delay claim, the contractor must have submitted, and ODOT accepted, a progress schedule that indicated work on the critical path would occur during the winter season. With regard to ODOT Project 1060(09), ODOT did not accept [Plaintiff's] initial progress schedule because the schedule violated certain contract requirements.

[Plaintiff] ultimately submitted a progress schedule that ODOT accepted but that schedule did not include any work on the critical path during the winter season."

{¶ 51} CMS 108.06(A) provides, in relevant part, "The Engineer will not grant an extension of time for delays incurred from December 1 to April 30 unless the Contractor's accepted progress schedule depicts work on the critical path occurring during this period."

{¶ 52} Plaintiff does not dispute that CMS 108.06(A) prohibits a delay claim in the winter season; however, Plaintiff argues that ODOT was aware of Plaintiff's intent to continue to work through the winter season. Victor Roberts avers that "On several occasions, [Plaintiff] put ODOT on notice of its intent to continue work through the winter months, from December 1, 2009 through April 30, 2010." However, Plaintiff did not present any evidence that ODOT accepted a progress schedule depicting work on the critical path during December 1, 2009 and April 30, 2010. Accordingly, there are no genuine issues of material fact regarding Plaintiff's delay claim between December 1 and December 18, 2009.

{¶ 53} Therefore, Defendant's Second Motion for Partial Summary Judgment shall be granted, in part, with respect to Plaintiff's delay claim for November 4 through November 17, 2009, and its delay claim between December 1 and December 18, 2009. Defendant's motion shall be denied with respect to Plaintiff's delay claim from November 18 through November 30, 2009.

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DALE A. CRAWFORD
Judge

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OHIO DEPARTMENT OF TRANSPORTATION

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Case No. 2012-06823

Judge Dale A. Crawford

JUDGMENT ENTRY

{¶ 54} A non-oral hearing was conducted in this case upon Defendant's Second Motion for Partial Summary Judgment. For the reasons set forth in the decision filed concurrently herewith, Defendant's Second Motion for Partial Summary Judgment is GRANTED, in part, with respect to Plaintiff's delay claim from November 4 through November 17, 2009, and its delay claim between December 1 and December 18, 2009. Defendant's motion shall be DENIED with respect to Plaintiff's delay claim from November 18 through November 30, 2009.

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DALE A. CRAWFORD
Judge

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