

# Court of Claims of Ohio

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T&F SYSTEMS, INC.

Plaintiff/Counter Defendant

v.

OHIO SCHOOLS FACILITIES COMMISSION

Defendant/Counter Plaintiff

v.

CINCINNATI INSURANCE COMPANY COMMISSION

Counter Defendant

Case No. 2010-10572

Judge Patrick M. McGrath  
Referee Jeffrey W. Hutson

## JUDGMENT ENTRY

{¶1} On May 20, 2014, the referee issued a decision recommending judgment for defendant/counter plaintiff, Ohio School Facilities Commission (OSFC), and against plaintiff/counter defendant, T&F Systems, Inc. (T&F), and counter defendant, Cincinnati Insurance Company Commission (CIC). The referee recommended judgment in OSFC's favor in the amount of \$420,379.66.

{¶2} Civ.R. 53(D)(3)(b)(i) states, in part: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i)." OSFC filed its objections to the referee's decision on June 3, 2014. On June 13, 2014, T&F and CIC jointly filed a response to OSFC's objections. With leave of court, T&F and CIC jointly filed their objections to the referee's decision

on June 13, 2014. On June 23, 2014, OSFC filed a response to T&F and CIC's jointly filed objections.

{¶3} Following competitive bidding, T&F was awarded a contract by OSFC to perform roofing work on a public improvement known as the Elyria High School Construction Project. On April 2, 2009, the parties executed a contract for such work. In accordance with the contract, and as required by R.C. 153.54, T&F obtained a bid guarantee and performance bond pursuant to an agreement with CIC.

{¶4} In January 2010, a dispute arose over T&F's pay application number 7 in the amount of \$156,818.90. Approximately \$70,000 of the compensation requested pursuant to pay application number 7, was for stored materials. OSFC's construction manager, Regency Construction Services, Inc. (Regency), refused to authorize payment of application number 7 until such time as T&F provided proper documentation regarding the stored materials pursuant to Article 9.4 of the contract. When efforts to resolve the dispute regarding pay application number 7 and the parties conflicting interpretations of Article 9.4 proved unsuccessful, T&F left the job site. Thereafter, on March 23, 2010, T&F President, Brian Stenger, sent a correspondence to Scott Wagner at Regency which concludes with the following: "[w]e will not return to the \* \* \* project until we have received our payment in full for pay application #7. This isn't open for discussion. Pay us what we are due and we will return to the jobsite."

{¶5} On March 29, 2010, Regency sent a correspondence to T&F, pursuant to Article 5.3 of the parties' agreement, directing T&F to return to work within five days of its receipt thereof. Subsequent discussion between counsel for T&F and counsel for OSFC did not result in a resolution of the outstanding issues. T&F did not return to the job by April 5, 2010, which was the last day of the 5-day notice period.

{¶6} Rather, T&F filed suit in common pleas court at 3:17 p.m. on April 5, 2010, seeking both a declaration regarding Article 9.4 and an order enjoining OSFC from terminating the roofing contract. Later that same day, at 3:45 p.m., OSFC sent a

correspondence to T&F stating that the roofing contract had been terminated, effective immediately.

{¶7} When T&F personnel returned to the job site on April 6, 2010, they were turned away by Regency. On April 7, 2010, the common pleas court denied T&F's motion for a Temporary Restraining Order and Preliminary Injunction. Following termination of T&F, OSFC contracted with JB Roofing to complete T&F's contract and to replace what OSFC determined to be defective roofing installed by T&F.

{¶8} T&F filed a complaint in the court of claims against OSFC on September 16, 2010. T&F alleged that OSFC wrongfully terminated its roofing contract without providing the required notice and opportunity to cure. OSFC subsequently filed a counterclaim against T&F and a third-party complaint against CIC. OSFC denied liability to T&F and asserted a counterclaim for breach of contract for defective work. OSFC also asserted a third-party complaint against CIC seeking recovery of its damages pursuant to the surety agreement.

{¶9} On January 3, 2012, T&F and CIC filed a joint motion for summary judgment. The court subsequently determined that "a contractor who fails to prosecute the work, 'shall begin to cure such failure within 5-days of receipt of the notice.'" The court further held that the "lock-out was lawful" but that material facts remained regarding whether OSFC prematurely declared default before the close of the business day on April 5, 2010 and whether inclement weather prevented T&F from returning to the job site. Accordingly, the court denied T&F and CIC's joint motion for summary judgment. The case then proceeded to trial before a referee.

{¶10} Following a trial, the referee determined that "when [T&F] walked off the job claiming something to which he was not entitled to, the result was a repudiation of the Contract." Referee's Decision, page 15. The referee also determined that (1) T&F did not retract the repudiation through negotiations; (2) T&F's return to work on the sixth day was untimely; (3) alleged inclement weather conditions were insufficient to extend

the five-day window; (4) lack of scheduled work did not excuse T&F's failure to return work; (5) miscellaneous equipment and supervisory personnel on site did not meet OSFC's condition to return to work; (6) OSFC did not act prematurely in terminating T&F prior to the close of business on the fifth day; (7) T&F's repudiation was not justified by any alleged prior breach by OSFC; (8) the termination was for cause not for convenience; (9) former R.C.153.17, which was in effect when the five-day notice was given, does not apply to this case; (10) OSFC has standing to recover damages; (11) CIC is liable in full for any damages to which OSFC is entitled; (12) OSFC failed to prove its damages regarding the cost of replacing defective work; (13) OSFC is entitled to recover damages for the cost of completing the work in the amount of \$553,899.60; (14) T&F is entitled to \$133,519.94 for unpaid labor for pay application number 7 and miscellaneous equipment and supplies. Accordingly, the referee concluded that OSFC is entitled to \$420,379.66.

{¶11} The parties have interposed a number of objections challenging the referee's factual findings and conclusions of law. T&F and CIC jointly advance a number of objections; however, the objections can be broadly grouped into three categories: (1) objections challenging OSFC's standing to recover; (2) objections challenging the referee's rulings regarding whether T&F repudiated the contract and circumstances surrounding the termination of the contract; and (3) objections challenging the referee's findings regarding OSFC's damages as a result of T&F's repudiation. OSFC also objects to (1) the referee's conclusion permitting a setoff for various expenses incurred by T&F; (2) the referee's finding that OSFC failed to prove its damages for defective work; and (3) the referee's decision of January 15, 2013 wherein OSFC was not allowed to amend its complaint against CIC.

{¶12} In reviewing a party's objections, the "court must conduct an independent analysis of the underlying issues, undertaking the equivalent of a de novo determination and independently assessing the facts and conclusions contained in the magistrate's

decision.” *Shihab & Assoc. Co. v. Ohio Dept. of Transp.*, 168 Ohio App.3d 405, 2006-Ohio-4456, ¶ 13 (10th Dist.); *City of Dayton v. Whiting*, 110 Ohio App.3d 115, 118 (2nd Dist.1996).

{¶13} As an initial matter, the court notes that neither party filed a transcript of the proceedings before the referee. Civ.R. 53(D)(3)(b)(iii) states that “[a]n objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available.”

{¶14} “If an objecting party fails to submit a transcript or affidavit, the trial court must accept the magistrate’s factual findings and limit its review to the magistrate’s legal conclusions.” *Triplett v. Warren Corr. Inst.*, 10th Dist. Franklin No. 12AP-728, 2013-Ohio-2743, ¶ 13. Accordingly, the court is required to accept the referee’s factual findings, and the court’s review is limited to the referee’s legal conclusions. To the extent the parties challenge the referee’s factual findings, such objections are without merit.

{¶15} T&F and CIC challenge “all Findings that Were Premised on the School District Being a Counter-Claimant or Party in the Captioned Case.” However, the referee expressly acknowledged that Elyria City School District was dismissed as a party in a pre-screening entry of September 21, 2010. Additionally, the referee determined that, pursuant to the contract, OSFC had standing to recover from T&F and CIC for damages. Such findings were based upon contract language providing that the contract was entered into by “the State of Ohio \* \* \* through the President and Treasurer of the Elyria City School District Board \* \* \* ” and that “termination shall not affect any rights or remedies of the School District Board or the Commission against the Contractor then existing or which may thereafter accrue.” Moreover, the referee noted

that pursuant to R.C. 3318.30, "The commission may, in its own name, sue and be sued \* \* \*." Upon review, such objections are overruled.

{¶16} In the next set of objections, T&F and CIC challenge the referee's determination that (1) T&F repudiated the contract, (2) T&F was properly terminated, and (3) T&F was not excused from performance by any prior breach. The referee determined that "the written refusal of T&F to continue working unless the State accepted its wrongful interpretation of the Contract was a repudiation of its Contract with the State." Referee Decision, page 16. The referee further determined that T&F did not retract the repudiation; that alleged inclement weather did not extend the five-day window to cure; and that OSFC did not prematurely terminate the contract prior to the close of the business day on the fifth day.

{¶17} T&F argues that the March 23, 2010 email sent by Stenger was not a repudiation of the contract in that the letter is conditional. The letter provides, in relevant part "[w]e will not return to the \* \* \* project until we have received our payment in full for pay application #7. This isn't open for discussion. Pay us what we are due and we will return to the jobsite." The referee's determination that T&F repudiated the contract was based upon the Restatement of the Law 2d, Contracts, Section 250 (1981), which provides: "A repudiation is (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach \* \* \*." Comment d provides: "where a party wrongfully states that he will not perform at all unless the other party consents to a modification of his contract rights, the statement is a repudiation even though the concession that he seeks is a minor one, because the breach that he threatens in order to exact it is a complete refusal of performance."

{¶18} T&F sought payment for materials delivered to the site but not yet incorporated into the project. Article 9.4.2 of the General Conditions provides that T&F shall be paid "at the rate of 92 percent of the invoice cost \* \* \* for materials delivered to

the site.” Article 9.4.1 provides that T&F shall be paid “at the rate of 100 percent of the invoice cost \* \* \* for materials incorporated into the Project.” The parties disagreed about the amount due under pay application number 7 and rather than avail itself of the dispute resolution process outlined in the contract, T&F chose to demand OSFC recognize its interpretation of Article 9.4.2 and refused to return to the job site. Such actions resulted in a repudiation of the contract. The referee further determined that T&F did not retract the repudiation. The factual findings made by the referee support such conclusions. The court agrees with the referee’s analysis.

{¶19} T&F next argues that it was not properly terminated under the contract and that prior breaches by OSFC excused its performance under the contract. In rejecting such an argument, the referee noted that the only alleged breach of which T&F complained at the time of repudiation was a “failure to pay for material stored on the site but not incorporated in the building in accordance with its understanding of the contract.” Referee Decision, page 23. Furthermore, the referee noted that a “repudiation gives rise to a claim for total breach.” As a result, the referee determined that OSFC did not have to “literally comply” with the provisions of the contract and that the termination was proper. Moreover, the court previously determined that Regency’s refusal to allow T&F access to the job site after the close of the 5-day window for cure was lawful. The court agrees with the referee’s analysis. T&F and CIC’s objections regarding repudiation of the contract and contract termination are overruled.

{¶20} Next, T&F and CIC allege that the referee erred in finding CIC liable for contract damages. In determining that CIC was liable for damages awarded to OSFC, the referee noted that CIC did not attempt to “commence performance of the Contract within ten (10) days of Contract termination” pursuant to 12.3.4 of the General Conditions. Referee Decision, page 33. Additionally, the referee found that CIC had notice that T&F had walked off the job and that OSFC intended to proceed with work immediately. Finally, the referee noted that there was no evidence that CIC was

precluded from taking over the job. Accordingly, the referee rejected T&F and CIC's argument that CIC did not have proper notice and it was not given the opportunity to perform the work. In recommending that CIC be held liable for damages, the referee reasoned that the contract "places a burden upon [CIC] to act particularly in this situation where the school board has stated an intention to proceed with the work immediately, and the bonding company had notice from the 29th that its principal had walked off the job." Referee's Decision, page 33. Finding that CIC failed to act, the referee recommended that CIC be "liable in full for any damages to which [OSFC] may be entitled." *Id.* The court agrees with the referee's conclusion.

{¶21} In their final set of objections, T&F and CIC challenge the referee's recommendations regarding damages in this case. T&F argues that the referee should have awarded it additional damages. Similarly, in its first objection, OSFC challenges the setoff the referee applied to OSFC's damages. OSFC's second objection challenges the referee's determination that it was not entitled to recover the costs of replacing the defective work. Inasmuch as the parties' objections are interrelated, they will be addressed simultaneously.

{¶22} The referee noted that damages are governed by 12.3 of the parties' contract, which provides, in part, as follows: "If the Contractor is terminated, the Contractor shall not be entitled to any further payment. If the unpaid balance of the Contract Sum exceeds the costs of finishing the Work \* \* \* Contractor or the Contractor's Surety shall immediately pay the amount of the insufficiency to the School District Board. The obligation for payment shall survive termination of the Contract." The referee then determined that OSFC was entitled to recover \$553,899.60 to complete the project less an offset of \$133,519.94 for the uncompensated labor portion of pay application number 7 and various out-of-pocket costs T&F incurred to continue working in adverse winter conditions. The referee disallowed an award to T&F for the costs related to pay application number 8 stating that "the final status of these materials



(stored or incorporated on the job) at the time of termination was not in evidence, and the invoice costs and the formula for determining the amounts owed were in dispute. These costs, as they involved an interpretation of the Contract, should have been submitted to Article 8.” Referee Decision, page 36.

{¶23} Regarding \$367,387.03 in damages to correct defective work, the referee noted that the parties submitted competing expert opinions regarding the cause of the water damaged roof. However, the referee determined that OSFC failed to meet its burden regarding the cause of such roofing damage. As a result, the referee rejected OSFC’s claimed damages of \$367,387.03 to correct defective work.

{¶24} Without the benefit of the transcript the court is unable to review the parties’ objections that require a review of the factual basis for an award of damages. As a result, the court is confined to the referee’s factual findings and may only review the legal conclusions drawn by the referee. *Triplett* at ¶ 13. Therefore, the court will limit its review to the “offset” allowed by the referee.

{¶25} Regarding an award of damages to T&F, 12.3.4 of the parties’ contract provides “If the Contractor is terminated, the Contractor shall not be entitled to any further payment.” In awarding damages to T&F, the referee reasoned as follows: “[OSFC] argues that even if some of [T&F’s claims for damages] were recoverable, they were based on labor and materials expended in doing the ‘defective work.’ This is a reference to the saturated roofing, which [OSFC] failed to prove was probably caused by the workmanship of the roofer. While the Court will not award payment to the Contractor, it will allow an offset for some of its out of pocket costs.” Referee Decision, page 35.

{¶26} In its objection, OSFC argues that an “offset” to T&F and CIC is prohibited under 12.3.4 of the contract. T&F and CIC argue that they proved that they were entitled to an even greater “offset” for labor costs billed in pay application number 8. However, 12.3.4 of the contract is clear and provides that the contractor is not “entitled

to any further payment” after termination. 12.3.4 is unequivocal and does not provide for any exceptions. As a result, whether by judgment, setoff or otherwise, T&F and CIC are not entitled to any further payment. OSFC’s objection is SUSTAINED.

{¶27} In its final objection OSFC argues that the referee erred in a January 15, 2013 entry denying OFSC’s motion for leave to amend its third party complaint against CIC. However, OSFC previously objected to such a ruling and the court ruled on the objection by entry dated March 1, 2013. OSFC’s objection is OVERRULED.

{¶28} On a final matter, on June 3, 2014, OSFC filed a combined motion for prejudgment interest and costs pursuant to Civ.R. 54(D). On June 17, 2014, T&F and CIC filed a joint brief in opposition.

{¶29} The referee did not make any findings regarding prejudgment interest. Nevertheless, 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.” An award of prejudgment interest is designed to compensate an aggrieved party. *Royal Elec. Const. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110 (1995). Once a favorable judgment has been awarded, that party has a right to prejudgment interest. *Tharo Sys. v. cab Produkttechnik GmbH & Co. KG*, 196 Fed.Appx. 366, 377 (6th Cir.2006). “[M]oney damages become due and payable on a contract at the time of the breach.” *Id.* at 378. Based upon the referee’s decision, the court finds that money damages became due and payable on April 5, 2010. Therefore, the court awards OSFC prejudgment interest as follows:

- a. 270 days (04/05/2010 to 12/31/2010) @ 4% of \$553,899.60 = \$16,389.36

- b. 365 days (01/01/2011 to 12/31/2011) @ 4% of \$553,899.60 = \$22,155.98
- c. 365 days (01/01/2012 to 12/31/2012) @ 3% of \$553,899.60 = \$16,616.99
- d. 365 days (01/01/2013 to 12/31/2013) @ 3% of \$553,899.60 = \$16,616.99
- e. 310 days (01/01/2014 to 11/07/2014) @ 3% of \$553,899.60 = \$14,113.06

1. Total Prejudgment Interest =  
\$85,892.38

{¶30} OSFC also seeks costs of the trial transcript and witness fees for three witnesses who testified at the trial. Civ.R. 54(D) provides that “costs shall be allowed to the prevailing party unless the court otherwise directs.” The referee did not order the parties to purchase a trial transcript nor was a trial transcript filed with the court. However, as the prevailing party, the court shall award OSFC its witness fees as costs in the amount of \$312.90. Accordingly, OSFC’s motion is GRANTED, in part and DENIED in part.

{¶31} Upon review of the record, the referee’s decision and the objections, the court finds that the referee has properly determined the factual issues and appropriately applied the law with the exception outlined above. Therefore, the objections are OVERRULED with the exception noted above and the court adopts the referee’s decision and recommendation as its own, including findings of fact and conclusions of law contained therein. Judgment is rendered in favor of OSFC in the amount of \$640,104.88 (\$553,899.60 + \$85,892.38 + \$312.90). Court costs are assessed against T&F and CIC. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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PATRICK M. MCGRATH  
Judge

cc:

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