

Court of Claims of Ohio

The Ohio Judicial Center
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SELECTIVE INSURANCE COMPANY OF AMERICA

Plaintiff/Counter Defendant

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant/Counter
Plaintiff/Third-Party Plaintiff

v.

DDC+, INC., et al.

Third-Party Defendants

Case No. 2009-07407

Judge Dale A. Crawford

DECISION

{¶1} This cause comes to be heard on Third-Party Defendants', DDC+, Inc. and Pete Tudela (DDC), Motion for Summary Judgment. On April 11, 2014, Defendant/Counter Plaintiff/Third-Party Plaintiff, Ohio Department of Rehabilitation and Correction (ODRC), filed a response. On April 18, 2014, DDC filed a Motion for Leave to file a reply in support, which is GRANTED.

{¶2} The procedural history of this litigation and many of the relevant facts are set forth in the opinion of the Tenth District Court of Appeals in *Selective Insurance Company of America v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-597, 2012-Ohio-1314.

{¶3} "In February 2007, DDC+, Inc. ('DDC') submitted a bid to the state of Ohio to upgrade the generator at the Northeast Pre-Release Center. Prior to the bid submittal, DDC secured a bid guaranty and contract bond from [Selective Insurance

Company of America (Selective)]. The state accepted DDC's bid, and DDC entered into a contract with ODRC to serve as the principal contractor on the project.

{¶4} "DDC subcontracted with Buckeye Power Sales Company, Inc. ('Buckeye') for the purchase and installation of a new generator. DDC, however, failed to completely pay Buckeye. To attain the monies due it, Buckeye commenced the process to establish a mechanic's lien on payments due to DDC under the contract between DDC and ODRC. On March 12, 2008, Buckeye served ODRC and Pete Tudela, president of DDC, with an affidavit of claim in the amount of \$359,059.

{¶5} "Pursuant to R.C. 1311.28, upon receiving the affidavit, ODRC should have 'detain[ed] from the principal contractor or from the balance of the funds remaining in the contract with the principal contractor, an amount, up to the balance remaining in the contract, that does not in the aggregate exceed the claim.' When it received Buckeye's affidavit, ODRC had yet to pay DDC \$400,242.84 under the contract. Despite the mandate of R.C. 1311.28, ODRC did not detain \$359,059.00 of the \$400,242.84 as amounts became due to DDC. Rather, during July through December 2008, ODRC issued payments to DDC totaling \$376,130.99. After issuing those payments, ODRC had only \$24,111.85 in unpaid contract funds.

{¶6} "In addition to establishing a mechanic's lien on payments due DDC, Buckeye also filed a claim against the bond. In July 2008, Selective issued a \$100,000 payment to Buckeye. Selective issued a subsequent payment of \$27,466 to Buckeye in January 2009.

{¶7} "On February 27, 2009, Buckeye filed suit against ODRC, DDC, Tudela, and Selective in the Franklin County Court of Common Pleas. Against DDC and Tudela, Buckeye alleged claims for breach of contract, violation of the Ohio Prompt Payment Act, fraud, and theft. Against Selective, Buckeye alleged a breach of contract claim for failure to pay its entire claim against the bond. Against ODRC, Buckeye sought recovery under R.C. 1311.32 of the \$24,111.85 remaining in the contract between ODRC and DDC.

{¶8} "Ultimately, Buckeye settled its claims against ODRC and Selective. In the resulting settlement agreement, ODRC agreed to pay Buckeye \$24,111.85 in exchange for Buckeye's dismissal of its claims against ODRC. Selective agreed to pay Buckeye an additional \$30,000. In return, Buckeye agreed to dismiss its claim against Selective and assign its claims against DDC and ODRC to Selective.

{¶9} “On September 3, 2009, Selective initiated the instant lawsuit against ODRC in the Court of Claims of Ohio. In its complaint, Selective asserted two claims: (1) violation of R.C. 1311.28, which required ODRC to retain funds remaining in DDC’s contract up to the amount of Buckeye’s claim, and (2) failure to protect Selective’s collateral, i.e., the contract balance remaining when ODRC received Buckeye’s affidavit of claim. ODRC responded by filing a counterclaim, alleging that Selective was obligated to indemnify it from any damage suffered due to DDC’s failure to pay Buckeye. ODRC also filed a third-party complaint against DDC and Tudela, alleging claims for fraud, indemnity and contribution, and breach of contract.” *Id.* at ¶ 2-8.

{¶10} “[T]he trial court sua sponte dismissed the entire case for lack of subject matter jurisdiction. The trial court concluded that Selective’s and ODRC’s claims arose from Buckeye’s efforts to enforce its mechanic’s lien. Because subcontractors could sue the state to enforce mechanic’s liens prior to the enactment of the Court of Claims Act, the trial court held that it lacked jurisdiction over the action. The trial court entered judgment dismissing the complaint, counterclaim, and third-party complaint on June 9, 2011.” *Id.* at ¶ 9.

{¶11} In reversing that judgment and concluding that this Court did have subject matter jurisdiction of Selective’s complaint, the Court of Appeals stated:

{¶12} “In the case at bar, Selective is not attempting to enforce Buckeye’s mechanic’s lien. Instead of seeking recovery from a fund held by the state, Selective is seeking money damages for the state’s failure to retain contract payments following its receipt of Buckeye’s affidavit of claim.” *Id.* at ¶ 22.

{¶13} The Court of Appeals further stated:

{¶14} “Selective has ‘repeatedly tweaked’ the legal basis for its second claim. Before this court, Selective contends that its claim is premised on an alleged breach of the construction contract, as well as the common-law duty an obligee owes a surety to protect the collateral. Whether Selective proceeds under either or both of these

theories, it has alleged a legal claim for money damages. As we stated above, the Court of Claims has exclusive jurisdiction over civil actions against the state for money damages that sound in law.” (Citations omitted.) *Id.* at ¶ 31.

{¶15} Subsequent to the Decision of the Tenth District Court of Appeals, the Court granted Selective’s Motion for Summary Judgment concluding that “ODRC wrongfully impaired Selective’s suretyship rights and that Selective is entitled to judgment against ODRC on its claim of equitable subrogation, as a matter of law.” Decision, Nov. 16, 2012. The Court further stated that “there are no genuine factual issues as to the validity of Buckeye’s lien.” *Id.* As a result, only the claims asserted by ODRC against DDC remain.

{¶16} DDC argues that ODRC’s claims of breach of contract, fraud, and indemnity and contribution fail as a matter of law inasmuch as ODRC cannot prove that any conduct of DDC damaged ODRC. Furthermore, DDC argues that ODRC cannot prove that it performed its contract or justifiably relied upon DDC’s pay applications. In support of its Motion, DDC attached ODRC’s response to its interrogatories and requests for admissions. ODRC alleges that the damages it has suffered are an extension of the Court’s November 16, 2012 decision holding ODRC liable to Selective on the project in dispute. ODRC further alleges that its reliance upon DDC’s pay applications was reasonable and that DDC breached the contract. In support of its position, ODRC has attached the affidavit of Lisa Huang and various exhibits attached thereto.

{¶17} 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 “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); see also *Saxton v. Navistar, Inc.*, 10th Dist. No. 11AP-923, 2013-Ohio-352, ¶ 7.

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

{¶19} "[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." *Dresher, supra*, at 292-293.

{¶20} In interpreting the United States Supreme Court decision in *Celotex 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.*

{¶21} "If the moving party fails to satisfy its initial burden, the motion for summary judgment must 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):

{¶22} "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 his

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."

BREACH OF CONTRACT

{¶23} To prevail on a claim for breach of contract, ODRC must prove: (1) the existence of a contract; (2) performance by ODRC; (3) breach by DDC; and (4) damage as a result of the breach. *O'Brien v. Ohio State Univ.*, 10th Dist. Franklin No. 06AP-946, 2007-Ohio-4833, ¶ 44.

{¶24} DDC argues that ODRC did not fulfill its obligations under the contract. The Court agrees. There is no dispute that ODRC received Buckeye's lien but failed to escrow contract balances pursuant to R.C. 1311.28. As set forth in Section 15.6.4 of the Contract, upon receipt of Buckeye's Affidavit "The Department shall detain the amount stated in the Claim Affidavit from subsequent Contractor Payment Request and Deposit said amount in an escrow account in accordance with a general escrow agreement between the Department and a bank in the State." As stated in the Court's previous decision, "[t]here is no doubt that ODRC violated Article 15.6 of the underlying construction contract by making progress payments to DDC after receiving notice of Buckeye's claim affidavit." Decision, Nov. 16, 2012.

{¶25} Additionally, DDC argues that ODRC has not suffered any damages as a result of a breach by DDC. ODRC argues that it has incurred damages as an extension of the Court's November 16, 2012 decision holding ODRC liable to Selective. DDC's breach is premised upon Article 15.5 entitled: "PROMPT PAYMENT" which states in part:

{¶26} "15.5.1 If a Subcontractor or Material Supplier requests payment in time to allow the Contractor to include the request in the Contractor's Contractor Payment Request, the Contractor shall pay within ten (10) days after receipt of payment from the State * * *

{¶27} "15.5.3 If the Contractor fails to comply with the provision of Paragraph GC 15.5, the Contractor shall pay to the applicable Subcontractor or Material Supplier eighteen (18) percent interest, compounded annually, on any unpaid amount."

{¶28} In the November 16, 2012 decision, the Court concluded that “ODRC wrongfully impaired Selective’s suretyship rights and that Selective is entitled to judgment against ODRC on its claim of equitable subrogation, as a matter of law.” Therefore any “damages” that ODRC has suffered are a direct result of its own wrongful impairment of Selective’s suretyship rights. Moreover, as stated in the Court’s previous decision, the “remedy for a breach of Article 15.5 is that interest shall accrue and be owed to the subcontractor on the unpaid balance.” *Id.* Accordingly, ODRC cannot prove damages as a result of DDC’s breach.

FRAUDULENT MISREPRESENTATION

{¶29} The elements of fraud are:

{¶30} “(a) a representation or, where there is a duty to disclose, concealment of a fact,

{¶31} “(b) which is material to the transaction at hand,

{¶32} “(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,

{¶33} “(d) with the intent of misleading another into relying upon it,

{¶34} “(e) justifiable reliance upon the representation or concealment, and

{¶35} “(f) a resulting injury proximately caused by the reliance.” *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 169 (1984) (internal citations omitted).

{¶36} DDC argues that ODRC cannot prove justifiable reliance and damages. There is no dispute that ODRC was served with Buckeye’s affidavit, which acted as a stop payment order to ODRC who had yet to pay DDC \$400,242.84 under the contract.

ODRC, however, continued to pay DDC in amounts totaling \$376,130.99. Such payments were made pursuant to pay applications submitted by DDC who represented that DDC was not aware of any mechanic’s lien for work performed. ODRC cannot claim that it justifiably relied upon DDC’s representation when it had previously been

served with Buckeye's affidavit. "A person cannot claim to have justifiably relied on something that he knew to be false." *N. Shore Neurological Servs., Inc., v. Midwest Neurosciences, Inc.*, 9th Dist. Lorain No. 08CA009373, 2009-Ohio-2429, ¶ 13. Moreover, as previously stated, ODRC cannot prove that it suffered damages.

INDEMNIFICATION

{¶37} The grounds for indemnification are that DDC breached Article 15.5 of the underlying construction contract by failing to pay Buckeye. As the Court has previously stated, "the scope of the indemnity provision upon which ODRC relies is limited by R.C. 2305.31 to circumstances where the harm is not caused by the sole or concurrent negligence of the owner." Decision, Nov. 16, 2012. See *Kovach v. Warren Roofing & Illuminating Co.*, 8th Dist. Cuyahoga No. 88430, 2007-Ohio-2514 (May 24, 2007). "Basically the statute says that a subcontractor may not indemnify a general contractor for the general contractor's own negligence." *Kemmeter v. McDaniel Backhoe Serv.*, 89 Ohio St.3d 409, 411 (2000). Inasmuch as ODRC's "damages" are the result of its own failure to escrow funds pursuant to Buckeye's lien, ODRC is not entitled to indemnification or contribution from DDC. Therefore, DDC's Motion for Summary Judgment shall be granted.

DALE A. CRAWFORD
Judge

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JUDGMENT ENTRY

{¶38} A non-oral was conducted in this case upon Third-Party Defendants' Motion for Summary Judgment. For the reasons set forth in the decision filed concurrently herewith, the Motion for Summary Judgment is GRANTED and judgment is rendered in favor of Third-Party Defendants. All previously scheduled events are VACATED. All pending motions are DENIED as moot. Court costs are assessed against Defendant/Counter Plaintiff/Third-Party Plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DALE A. CRAWFORD
Judge

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