[Cite as *Grand Valley Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng., Inc.*, 2015-Ohio-5572.]

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

GRAND VALLEY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.

Plaintiffs/Counter Defendants

v.

BUEHRER GROUP ARCHITECTURE & ENGINEERING, INC., et al.

Defendants

and

JACK GIBSON CONSTRUCTION CO.

Defendant/Counter
Plaintiff/Third-Party Plaintiff

v.

J. WILLIAM PUSTELAK, et al.

Third-Party Defendants

and

BOAK & SONS, INC.

Third-Party
Defendant/Fourth-Party Plaintiff/Counter Defendant

v.

HIRSCHMANN CONSTRUCTION SERVICES, INC., et al.

Fourth-Party Defendants/Counter Plaintiffs

Case No. 2014-00469-PR

Judge Patrick M. McGrath

DECISION

{¶1} On July 15, 2014, plaintiffs/counter defendants Grand Valley Local School District Board of Education and Ohio Schools Facilities Commission (Grand Valley and OSFC or plaintiffs), filed a motion for judgment on the pleadings, or, in the alternative, a motion for summary judgment on Jack Gibson Construction Co.'s (Gibson) counterclaim. With leave of court, on September 29, 2014, Gibson filed a response. On October 8, 2014, plaintiffs filed a reply. The motion is now before the court for a non-oral hearing.

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

{¶3} "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 have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} Inasmuch as plaintiffs filed additional documents in support of their motion, the court shall address the motion pursuant to Civ.R. 56.

{¶5} According to plaintiffs' July 2, 2014 amended complaint, on April 22, 2002, plaintiffs entered into a contract with Buehrer Architecture and Engineering, Inc. (Buehrer) to serve as the architect and engineer of record for the design and construction of a new school building known as the "Grand Valley PK-12 New Building

Project" in Orwell, Ohio. (Plaintiffs' Exhibit A.) On October 14, 2003, plaintiffs entered into a separate contract with Gibson as the General Trades contractor for the project. (Plaintiffs' Exhibit B.) Construction on the project occurred between 2001 and 2005. The project included the design, engineering, construction, manufacturing, assembly, delivery, and installation of structural steel, roof, flashing, wall, windows, doors, insulation, and masonry systems, site development of storm sewer systems as well as site development, excavation, and preparation of the building.

{¶6} Plaintiffs assert that after construction was completed, problems were discovered with the parking lot and road design, as well as deficiencies in the exterior envelope design. According to plaintiffs' amended complaint, they discovered design deficiencies in 2011, after having received consultant's reports in June and October of that year. On February 25, 2014, plaintiffs filed a complaint in the Ashtabula County Court of Common Pleas against Buehrer, Gibson, and McMillan Construction Co.[1] On May 6, 2014, Gibson filed a counterclaim against plaintiffs, and on May 15, 2014, Gibson filed a petition for removal in this court pursuant to R.C. 2743.03(E)(1), which effected the removal of the common pleas action to this court.

{¶7} In its counterclaim, Gibson denies responsibility for any of the design or construction defects in the project that plaintiffs allege in their complaint. Gibson further asserts that in July 2013, it entered into a separate contract with OSFC on behalf of Grand Valley, titled "Memorandum of Understanding" (MUO) whereby Gibson agreed to perform certain remedial work and other repairs to the masonry, roofing, and asphalt on the project; that much of that repair work was necessitated by the poor workmanship of Buehrer or other contractors; and, that some of the remedial work was "betterment," which was outside of Gibson's original scope of work for the project. According to Gibson, the value of the work that it performed as betterment was at least

[1]Plaintiffs and McMillan have reached a settlement with regard to their claims and McMillan was dismissed as a party on August 14, 2014.

$54,476.66, and the value of the work that it performed to repair problems that were caused by other contractors was at least $101,799.47. Gibson asserts that the scope of the work was agreed to in advance by plaintiffs and their consultants, and that plaintiffs agreed to pay it "the total sum of $156,276.13 for 'betterment' and/or remedial work that [was] not the responsibility of [Gibson] or its subcontractors." (Paragraph 13 of counterclaim). According to Gibson, plaintiffs made a partial payment of $17,487, but refused to pay the balance of $138,789.13. Gibson asserts that plaintiffs' refusal to pay it the remaining balance is a breach of the MUO. Count II of the counterclaim is a claim for declaratory judgment. Gibson attached three documents to the counterclaim: the MUO (Exhibit 1); handwritten notes from July and August 2012, on letter head from Rudick Forensic Engineering, Inc., Damage Consultants, which purport to be from brick and masonry inspections (Exhibit A); and, a memo dated January 11, 2013, to William Nye, Superintendent of Grand Valley School District, from Mark Coulis, Vice President and Senior Design Consultant from Wheaton & Sprague Engineering, Inc., regarding a meeting that was held in January 2013 with representatives from Gibson and the co-owners (plaintiffs) to "discuss brick veneer issues, and subsequent review of Rudick Forensic Engineering (RFE) survey/assessment of vertical expansion joints at brick veneer." (Exhibit B).

{¶8} Plaintiffs assert that the MUO is not an enforceable contract, and any alleged breach thereof cannot be the basis of a valid counterclaim. Plaintiffs assert that the MUO is missing critical terms necessary for the formation of a contract, namely, price and scope of work. In addition, plaintiffs assert that there was no meeting of the minds. Finally, plaintiffs assert that although a purchase order in the amount of $20,000 was approved and paid to Gibson, no other purchase orders from either Grand Valley or from OSFC were approved and no other funds were encumbered for payments to Gibson. Plaintiffs assert that inasmuch as a public authority is obligated solely to payments approved and encumbered pursuant to R.C. 5705.41, Gibson's

claims for any additional compensation based on the MUO are without merit as a matter of law.

{¶9} "To prove a breach of contract claim, a plaintiff must show 'the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff.'" *Nilavar v. Osborn*, 137 Ohio App. 3d 469, 483, (2nd Dist.2000), quoting *Doner v. Snapp*, 98 Ohio App. 3d 597, 600, (2nd Dist.1994). "To prove the existence of a contract, a plaintiff must show that both parties consented to the terms of the contract, that there was a 'meeting of the minds' of both parties, and that the terms of the contract are definite and certain. *Id*., citing *McSweeney v. Jackson*, 117 Ohio App. 3d 623, 631 (4th Dist.1996). "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipeline Co.*, 53 Ohio St.2d 241 (1978), paragraph two of the syllabus.

{¶10} The MUO is signed by a representative for Gibson and a representative of the owners (plaintiffs), and is dated July 23, 2013. Relevant portions of the document state:

{¶11} "WHEREAS, Gibson has agreed to work with the Owners to identify and correct certain masonry and other work ('remedial work') that does not meet the Owners' expectations and the Owners have agreed that certain aspects of the remedial work will include betterment, and that *reasonable compensation will be due Gibson for such items and will need to be evaluated prior to and/or as work progresses, with payment after satisfactory completion of said work;* and

{¶12} "WHEREAS, the Owners have also identified certain remedial work that is not the responsibility of Gibson or its subcontractors and Gibson has agreed to correct this work; and

{¶13} "WHEREAS, it is the intent of the Owners to provide reasonable compensation for remedial work that is not attributed to Gibson or its subcontractors as agreed by the Parties; and

{¶14} "WHEREAS, Gibson and the Owners have retained consultants to determine the items of remedial work referenced herein, and the consultants have agreed as set forth in Attachments A and B to the approximate scope of the work; and

{¶15} "WHEREAS, the *Owners will provide the design, specifications and scope for the remedial work;* and

{¶16} "* * *

{¶17} "WHEREAS, upon Gibson's completion of any remedial work pursuant to this MOU, the Owners will release Gibson from any and all claims related to or addressed by the remedial work undertaken by Gibson on the Project, but reserving any claims for the remedial work itself; and

{¶18} "WHEREAS, the Parties desire to attempt to resolve the aforementioned issues in a good faith manner,

{¶19} "NOW THEREFORE, the Parties agree to proceed as follows:

{¶20} "1) The Parties agree to move forward in a good faith manner to resolve and/or clarify any issues as set forth in the attached documents or otherwise discovered during the remediation process regarding Gibson's subcontractor's work on the Project, or other issues not attributable to Gibson or its subcontractors. Good faith is construed to signify that discussions and negotiations are ongoing.

{¶21} "2) Gibson agrees that it will enter into mediation within 60 days of a request to do so to resolve any dispute arising under this Agreement.

{¶22} "3) The OSFC agrees that as long as Gibson is involved in good faith negotiations with the OSFC on the dispute, that this matter will not be used by the

OSFC in any determination by the OSFC that Gibson is not a responsible bidder." (Emphasis added.)

{¶23} The plain language of the MUO does not contain any price term, rather, there are only references to "reasonable compensation." To support their argument that the MUO is not an enforceable contract, plaintiffs submitted the affidavit of Lisa Moodt, Treasurer of the Grand Valley Local School District Board of Education (Exhibit 1), who avers as follows:

{¶24} "3. As the Treasurer for the School District, I am responsible for the issuance and payment of purchase orders to contractors and vendors for any work, goods or services provided to the School District.

{¶25} "4. Purchase orders cannot be issued to vendors or contractors unless the legal requirements for issuance can be met, including the certification from the Treasurer of the School District that funds exist for the purpose of payment on any purchase order.

{¶26} "5. On or about May 22, 2013, I approved, as Treasurer of the School District, along with the School District's Superintendent, the issuance of Purchase Order No. 3301018 to Jack Gibson Construction Company in an amount not to exceed $20,000. The purchase order to Gibson was for work to be performed in remediating defective construction work at the Grand Valley K-12 School which was not caused directly by Gibson.

{¶27} "6. Attached as Exhibit 2 to this Affidavit is a true and accurate copy of Purchase Order No. 3301018.

{¶28} "7. Purchase Order No. 3301018 is the only purchase order, or commitment of any funds, to Gibson subsequent to the completion of Gibson's prime general trades contract for the K-12 Project.

{¶29} "8. No amendments or change orders have been given to Gibson on Purchase Order 3301018, nor has Gibson had any approval or had funds encumbered in excess of the $20,000 of the Purchase Order.

{¶30} "9. Gibson has been fully paid the $20,000 on Purchase Order No. 3301018."

{¶31} Exhibit 2 to plaintiffs' motion is Purchase Order No. 3301018. The description of work states: "Payments for enhancements to flashing/brick remediation – not to exceed $20,000." The purchase order is signed by Moodt and the superintendent. The purchase order also contains the following language: "It is hereby certified that the above amount required to meet the contract, agreement obligation, payment or expenditure for the above, has been lawfully appropriated or authorized or directed for such purpose and is in the treasury or in process or collection to the credit of the funds of the board of education free from any obligation or certification now outstanding."

{¶32} Plaintiffs assert that the MUO was generated as a "road map" in an attempt to negotiate reasonable compensation to Gibson for remediation work necessitated by the project, and that although plaintiffs approved and paid for $20,000 of work that Gibson performed for enhancements to flashing/brick remediation, no other purchase orders were issued. Plaintiffs assert that Gibson has not brought forth evidence to show that any funds in excess of the $20,000 purchase order were ever approved and encumbered through the lawful process set forth in R.C. 5705.41. Therefore, plaintiffs argue that Gibson's counterclaim regarding an additional $136,000 of work that was allegedly performed by Gibson but not approved for payment by plaintiffs or certified pursuant to R.C. 5705.41 is void as a matter of law.

{¶33} Article 5 of the original contract between plaintiffs and Gibson states: "5.1 It is expressly understood by the Contractor that none of the rights, duties and obligation[s] described in the Contract Documents shall be valid and enforceable *unless*

the School District Board Treasurer first certifies there is a balance sufficient to pay the obligations set forth in the Contract." (Exhibit B, page K-3.) (Emphasis added.) In addition, the last page of the original contract is a "certificate of funds (Section 5705.41 ORC)" which states that the moneys required to meet the obligations of the Board of Education of the Grand Valley Local School District under the contract have been lawfully appropriated for such purposes and are in the treasury of the Grand Valley Local School District and are free from any previous encumbrance. (Exhibit B, page K-5.)

{¶34} Plaintiffs assert that if Gibson alleges that the MUO is a change order to the original contract, any claim for payment in excess of the $20,000 purchase order is barred as there was no signed change order authorizing any alleged extra work in excess of the $20,000 purchase order. *See Foster Wheeler v. Franklin County Convention Center Authority*, 78 Ohio St.3d 353 (1997).

{¶35} In response to plaintiffs' motion, Gibson submitted an affidavit of Jim Breese, Gibson's president, who avers, in part, as follows:

{¶36} "3. Between 2001 and 2005, Jack Gibson served as the general trades contractor to build a new K through12 school construction project for plaintiff Grand Valley School District ('Grand Valley') located in Orville, Ohio. Jack Gibson did not perform any design or site work.

{¶37} "4. Attached as Exhibit 1 to Jack Gibson's Answer and Counterclaim is a true and accurate copy of a Memorandum of Understanding ('MOU') executed by Jack Gibson on July 3, 2013.

{¶38} "5. The MOU states that plaintiffs would pay Jack Gibson for remedial work that was 'betterment' or improvements to the plaintiffs' original contracts or for work that was outside of the scope of work contained in Jack Gibson's original contract.

{¶39} "6. Jack Gibson performed the work identified by the parties' consultants, attached as Exhibits A and B to the MOU.

{¶40} "7. The value of the work that was classified as 'betterment', or outside the original scope of Jack Gibson's work, was $156,276.13. Plaintiffs admit in their motion that they only paid $20,000 of this amount which leaves a balance of $136,376.13 owned [sic] to Jack Gibson. At no time prior to signing the MOU or performing the remedial work were we told by plaintiffs that they only intended to pay Jack Gibson $20,000 for 'betterment' or work outside of Jack Gibson's original contract. Jack Gibson has suffered a substantial economic hardship by plaintiffs' breaking their promise in the MOU to pay for this work.

{¶41} "8. As explained in Jack Gibson's Counterclaim, plaintiffs breached the MOU by failing to pay Jack Gibson for remedial work performed that was 'betterment' and for work that was outside of Jack Gibson's original scope of work.

{¶42} "9. We believe that both the original construction and remedial work may have been paid for by funds obtained from local bond levies and through state construction assistance provided through the OSFC. We further believe that these funds may have been maintained in accounts separate and apart from Grand Valley's general operating funds. Although we believe that the statements contained in this paragraph are true, Jack Gibson's employees lack 'personal knowledge' to offer sworn testify [sic] on these matters. Therefore, we need to seek sworn testimony directly from Grand Valley concerning the source of the funding for the original construction and remedial work." (Gibson's Exhibit 1.)

{¶43} Although Breese avers that Gibson performed work in the amount of $156,276.13, based upon the scope of work contained in the consultant's handwritten notes attached as Exhibits A and B, Gibson has not submitted any document to substantiate its claim that plaintiffs evaluated Gibson's work prior to and/or as work progressed, determined that Gibson's work was completed to their satisfaction, and determined that $156,276.13 was "reasonable compensation" per the plain language of the MUO. Neither the MUO nor the attachments submitted therewith have any certain

price terms. Gibson has not produced any evidence upon which a reasonable inference could be drawn that plaintiffs approved or authorized work for Gibson to perform in excess of the $20,000 purchase order but then failed to pay. Indeed, the language of the purchase order shows that plaintiffs approved "flashing/brick remediation – not to exceed $20,000."

{¶44} Moreover, a fiscal certificate pursuant to R.C. 5705.41 was attached to the original contract between plaintiffs and Gibson. The $20,000 purchase order contained a substantially similar fiscal certification, and states that the purchase order is void unless the treasurer's certificate is signed. Article 5 of the original contract between plaintiffs and Gibson states that none of the rights, duties and obligations described in the Contract Documents shall be valid and enforceable unless the School District Board Treasurer first certifies that there is a balance sufficient to pay the obligations set forth in the Contract. Construing the evidence most strongly in Gibson's favor, the only reasonable conclusion is that plaintiffs did not evaluate or approve any work performed by Gibson in excess of the $20,000 purchase order, which was required per the plain language of the MUO.

{¶45} Furthermore, with regard to Gibson's contention that a certificate of funds was not required for any work performed under the MUO, because that work would have been paid for by funds obtained from local bond levies and construction assistance provided through the OSFC, Grand Valley explains in response to Gibson's Interrogatory Number 5 that the types of expenditures that can be made from the fund referenced in the $20,000 Purchase Order "are limited by the purpose clause of the bond issue which was 'to pay the local share of school construction under the State of Ohio Classroom Facilities Assistance Program.' The project agreement further provides that *no funds can be spent from [that] fund without OSFC approval.*" (Emphasis added.)

{¶46} Construing the evidence most strongly in favor of Gibson, the only reasonable conclusion is that plaintiffs did not approve any expenditure of funds, from any source, in excess of the $20,000 purchase order. In addition, R.C. 3313.46 requires that if a board of education of any school district seeks to build or repair any school building, and the cost will exceed $25,000, the school district must either comply with competitive bidding statutes or declare an "urgent necessity." Gibson has not presented any evidence to support an inference that either of these two scenarios occurred with regard to the MUO. Contracts entered into by public authorities in disregard of statutes are void and no recovery can be had for the value of any work performed. *See Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406 (1899). The only reasonable conclusion is that there was no meeting of the minds with regard to any "reasonable compensation" over $20,000 for Gibson's work under the MUO. Therefore, even if the court construes the MUO as a contract, plaintiffs did not breach the MUO. Plaintiffs are entitled to judgment as a matter of law on Gibson's counterclaim for breach of contract.

{¶47} R.C. 2743.03(E)(2) states: "The filing (of the petition for removal) effects the removal of the action to the court of claims * * * The court of claims shall adjudicate all civil actions removed. The court may remand a civil action to the court in which it originated upon a finding that the removal petition does not justify removal, or upon a finding that the state is no longer a party."

{¶48} Inasmuch as Gibson's counterclaim was the sole claim against the state in this matter, the court finds that the removal petition does not justify removal. Accordingly, the case shall be remanded to the Ashtabula County Court of Common Pleas.

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PATRICK M. MCGRATH
Judge

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Judge Patrick M. McGrath

JUDGMENT ENTRY

{¶49} A non-oral hearing was conducted in this case upon plaintiffs' motion for summary judgment on Gibson's counterclaim. For the reasons set forth in the decision filed concurrently herewith, plaintiffs' motion for summary judgment is GRANTED and judgment is rendered in favor of plaintiffs on Gibson's counterclaim. All other pending motions are DENIED. The court finds that it has no jurisdiction over the claim asserted in the original papers received from Ashtabula County. Accordingly, pursuant to R.C. 2743.03(E)(2) this case is REMANDED to the Ashtabula County Court of Common Pleas and the original papers shall be returned thereto. Court costs are assessed against Gibson. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____

PATRICK M. MCGRATH
Judge

cc:

Amanda M. Leffler
388 South Main Street, Suite 500
Akron, Ohio 44311

Brian C. Lee
Jason D. Winter
Riannon A. Ziegler
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115-1093

Brian L. Buzby
41 South High Street, 30th Floor
Columbus, Ohio 43215-6194

Carl A. Anthony
65 East State Street, Suite 800
Columbus, Ohio 43215

David A. Beals
Jerry K. Kasai
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

David C. Comstock Jr.
100 Federal Plaza East, Suite 926
Youngstown, Ohio 44503-1811

David J. Riley
24502 Cornerstone Drive
Westlake, Ohio 44145

Gordon D. Arnold
One Dayton Centre, Suite 1800
1 South Main Street
Dayton, Ohio 45202-2017

Joseph A. Gerling
Scott A. Fenton
Two Miranova Place, Suite 500
Columbus, Ohio 43215-7052

Patrick F. Roche
1200 Fifth Third Center
600 Superior Avenue East
Cleveland, Ohio 44114

Paul K. Schneider
1501 Euclid Avenue
Bulkley Building, 6th Floor
Cleveland, Ohio 44115

Robert C. Kokor
48 West Liberty Street
Hubbard, Ohio 44425

Velotta Asphalt Paving Company, Inc
c/o Carter H. Donohoe
3413 East Monmouth Road
Cleveland Heights, Ohio 44118

Filed March 11, 2015
Sent To S.C. Reporter 12/31/15