

[Cite as *Transamerica Bldg. Co., Inc. v. Ohio School Facilities Comm.*, 2015-Ohio-5651.]

TRANSAMERICA BUILDING COMPANY,
INC.

Plaintiff/Counter Defendant

v.

OHIO SCHOOL FACILITIES
COMMISSION, etc.

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

v.

LEND LEASE (US) CONSTRUCTION,
INC.

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

and

STEED HAMMOND PAUL INC., etc.

Third-Party
Defendant/Fourth-Party Plaintiff

v.

BERARDI PARTNERS, INC., et al.

Fourth-Party Defendants

Case No. 2013-00349

Referee Samuel Wampler

DECISION OF THE REFEREE

{¶1} On October 13, 2015, plaintiff TransAmerica Building Company, Inc. (“TA”) filed its Motion In Support of Prejudgment Interest and Authority For Court To Issue

Final Appealable Order (“Motion”). On October 27, 2015, defendant Ohio School Facilities Commission (“OSFC”) filed its State of Ohio’s Response to TransAmerica’s Motion for Pre-judgment Interest and a Final Appealable Order (“Response”). The Motion is now before the referee for a non-oral hearing pursuant to L.C.C.R. 4(D).¹

{¶2} OSFC objects to the referee deciding the issue of prejudgment interest and making a recommendation for the award of prejudgment interest. However, R.C. 2743.03(C)(3) provides in part that:

- a. Proceedings governing referees shall be in accordance with Civil Rule 53, except as modified by this division. The referee or panel of referees shall submit its report, which shall include a recommendation and finding of fact, to the judge assigned to the case by the chief justice, within thirty days of the conclusion of the hearings. (Emphasis added.)

{¶3} TA’s motion for prejudgment interest is a motion within the proceedings governed by Civil Rule 53 and R.C. 2743.03(C)(3). The consideration of this motion is by non-oral hearing pursuant to L.C.C.R. 4(D). In the DECISION OF THE REFEREE filed on September 17, 2015 in this action (“Decision”), the referee recommended that TA be awarded prejudgment interest “according to proof.” TA’s Motion is nothing more than an extension of the process to complete the referee’s recommendation for prejudgment interest in a specified amount. Both parties have a remedy if they are dissatisfied with this decision as they can each file objections under Civ.R. 53.

I. Motion for Prejudgment Interest.

{¶4} Prejudgment interest is not only allowed by statute in an action against the state, it is mandatory, except to the extent the court determines that the moving party was responsible for unduly delaying the proceedings and upon such determination

¹On October 27, 2015, OSFC filed its State of Ohio’s Motion to Have Pre-judgment Interest and the Appealability of a Final Judgment in this Case Determined by a Judge (“OSFC’s Motion”). OSFC’s Motion will be decided by the Judge.

prejudgment interest shall only be disallowed for the period of the undue delay.² Specifically, R.C. 2743.18(A) provides as follows:

- i. Prejudgment interest shall be allowed with respect to a civil action on which a judgment or determination is rendered against the state for the same period of time and at the same rate as allowed between private parties to a suit.
- ii. The court of claims, in its discretion, may deny prejudgment interest for any period of undue delay between the commencement of the civil action and the entry of a judgment or determination against the state, for which it finds the claimant to have been responsible.

{¶5} The Supreme Court of Ohio's opinion in *Royal Electric* provides further authority and guidance for the award of prejudgment interest, particularly as it applies to a construction contract.

- b. . . . [W]e hold that in a case involving breach of contract where liability is determined and damages are awarded against the state, the aggrieved party is entitled to prejudgment interest on the amount of damages found due by the Court of Claims. The award of prejudgment interest is compensation to the plaintiff for the period of time between accrual of the claim and judgment, regardless of whether the judgment is based on a claim which was liquidated or unliquidated and even if the sum due was not capable of ascertainment until determined by the court.
- c. *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 117, 1995-Ohio-131, 652 N.E.2d 687

²*Fouty v. Ohio Dep't of Youth Servs.*, 167 Ohio App.3d 508, 534, 2006-Ohio-2957, 855 N.E.2d 909 (10th Dist.). OSFC's contention that TA is responsible for undue delay of the proceedings is addressed separately below.

{¶6} In approving the court of claims' award of prejudgment interest, the court explained:

- d. An award of prejudgment interest encourages prompt settlement and discourages defendants from opposing and prolonging, between injury and judgment, legitimate claims. Further, prejudgment interest does not punish the party responsible for the underlying damages as suggested by appellees, but, rather, it acts as compensation and serves ultimately to make the aggrieved party whole. (Citations omitted.)
- e. *Royal Elec.* at 116.

{¶7} The court finds that under the Contract a claim to recover liquidated damages wrongfully withheld from progress payments accrued on the date when such progress payments became due pursuant to an approved application for payment ("Pay App.") or upon substantial completion, whichever occurred first.³ The General Conditions (GC) of the Contract establish when payments are due pursuant to an approved Pay App. Specifically, GC 9.2.2 provides as follows:

- f. Subject to GC paragraph 9.6, payment of an approved Application for Payment shall be made within thirty (30) days from the date of approval by the Construction Manager, the Commission and the Architect.

{¶8} GC 9.2.2.2 provides that if the payment is not made within the 30 day period it earns interest from the date the payment is due at the applicable statutory rate. Specifically, GC 9.2.2.2 provides as follows:

³In the DECISION OF THE REFEREE filed herein on September 17, 2015 (Decision) it was determined that OSFC wrongfully withheld liquidated damages from TA in the total amount of \$926,000, but that \$240,000 of such wrongfully withheld liquidated damages was released to TA on May 24, 2013 (Decision, p. 103 and Exhibit TA-0732). Payments for some of the Pay Apps. were due prior to substantial completion.

- g. Payments due and not paid to the Contractor, through no fault of the Contractor, within such thirty (30) day period shall, from the date payment is due, bear simple interest at the applicable statutory rate.

{¶9} Here, the Contract recognizes that a progress payment is due when it is approved, because GC 9.2.2.2 provides that “[p]ayments due and not paid . . . within such thirty (30) day period” bear interest from the date payment is due, inferring that the payment is due from the date approved and during the thirty day period, but such amount only earns interest during that thirty day period if it is not paid on time. In other words, a payment must be both due and unpaid for thirty days before interest accrues, but if it is not paid within thirty days it accrues interest when it first became due, i.e. when it was approved for payment. Accordingly, prejudgment interest is calculated from the date a Pay App. was approved for payment.

A. Denial of Prejudgment Interest Because of Trial Continuance

{¶10} OSFC contends that, pursuant to R.C. 2743.18(A)(2), the court must reduce the amount of prejudgment interest by any undue delay caused by the moving party. The statute clearly states that such a reduction is in the court's discretion. Here, it was OSFC, not TA, who moved for the continuance of the December 8, 2014 trial date and TA vigorously opposed the continuance.⁴ Moreover, OSFC's counsel stated as grounds for the continuance not only the supplemental expert report of McCarthy, but also the fact that OSFC's defense counsel was going to trial in a significant environmental spill case on November 10, the implication being that he could not be ready for trial on December 8, 2014. Over TA's objection the court granted OSFC's request for a continuance.

{¶11} The court finds that the continuance of the trial in this action did not result in undue delay for which TA was responsible. Accordingly, it is not recommended that

⁴OSFC moved for a continuance of the December 8, 2014 trial date on October 28, 2014.

the amount of prejudgment interest be reduced for the period between December 8, 2014 and May 18, 2015.

B. Prejudgment Interest Rate

{¶12} Prejudgment interest is calculated at the interest rate established by the Ohio Tax Commissioner during each year it accrues pursuant to R.C. 5703.47. Here, the annual interest rate is constant at 3% for each year as established by the Ohio Tax Commissioner for the years 2012-2016.⁵ Accordingly, all calculations herein are based on an annual interest rate of 3%, although the daily rates vary between a regular calendar year and leap year and this is reflected in the calculations below.⁶

C. Prejudgment Interest Calculation

{¶13} Following the holding in *Royal Electric*, the total amount of damages recommended in the Decision became due upon substantial completion for purposes of calculating prejudgment interest. In its proposed findings of fact, OSFC proposed that substantial completion occurred on June 1, 2012 (STATE OF OHIO'S PROPOSED FINDINGS OF FACT filed on July 20, 2015, p. 6, Proposed Finding of Fact No. 23). However, TA, in its motion for prejudgment interest asserts that substantial completion occurred on August 16, 2012. OSFC obtained its certificate of occupancy on August 16, 2012 and immediately began plans to make full beneficial use of the dormitories (TA-0632 and TA-0630). The Court finds that for purposes of calculating prejudgment interest, August 16, 2012 is the date of substantial completion and that all of TA's claims

⁵http://www.tax.ohio.gov/ohio_individual/individual/interest_rates.aspx

⁶2012 and 2016 are leap years. See the example at the bottom of the webpage cited in the preceding footnote.

for damages had accrued as of that time, except for progress payments for Pay App. Nos. 10-15, which accrued earlier.⁷

{¶14} In order to calculate the total amount of prejudgment interest, the court has calculated prejudgment interest during three distinct periods of time:

- h. **January 30, 2012 to August 16, 2012** - during this period of time progress payments became due at varying times until substantial completion at which time they were all due and incorporated into the total damages recommended in the Decision. Accordingly, each progress payment had varying daily rates or days during which they earned interest (except Pay App. Nos. 13 and 14, which are nevertheless calculated separately as shown in Table 1, below).
- i. **August 17, 2012 to May 24, 2013** - during this period of time all damages recommended in the Decision were due and in addition there was \$240,000 being withheld by OSFC until it was paid on May 24, 2013. Accordingly, the sum of the damages recommended in the Decision when added to the \$240,000 being withheld result in a higher daily rate until payment of the \$240,000. The prejudgment interest during this time period is reflected in Table 2.
- j. **May 25, 2013 to October 29, 2015** - during this period of time the damages recommended in the Decision remain constant as does the daily rate of prejudgment interest.

{¶15} For each of the three periods of time prejudgment interest is calculated as follows:

- k. **January 30, 2012 to August 16, 2012**

⁷It is noted that all of the damages recommended in the Decision were based on the adjusted Contract Sum and TA's Job Cost Report for labor furnished prior to the date of substantial completion.

- I. Table 1 reflects prejudgment interest on all Pay Apps. for progress payments from which liquidated damages were wrongfully withheld through the date of substantial completion.⁸

| Pay App No. | Due Date (Date Pay App. Approved) | Amount Approved (Due) | Liquidated Damages Wrongfully Withheld | Daily Interest @ 3% for 2012 (366 days/yr) | Days from Due Date to Substantial Completion on August 16, 2012 | Prejudgment Interest |
|--|-----------------------------------|-----------------------|--|--|---|----------------------|
| 10 | 1/30/2012 | \$295,842.92 | \$295,842.92 | \$24.25 | 198 | \$4,801.50 |
| 11 | 3/20/2012 | \$505,754.75 | \$90,157.08 | \$7.38 | 149 | \$1,099.62 |
| 12 | 4/19/2012 | \$442,249.03 | \$90,000.00 | \$7.38 | 119 | \$878.22 |
| 13 | 5/18/2012 | \$327,257.44 | \$90,000.00 | \$7.38 | 90 | \$664.20 |
| 14 | 5/18/2012 | \$150,008.82 | \$90,000.00 | \$7.38 | 90 | \$664.20 |
| 15 | 6/19/2012 | \$76,832.82 | \$76,832.82 | \$6.30 | 58 | \$365.40 |
| Prejudgment interest on wrongfully withheld liquidated damages through the date of substantial completion | | | | | | \$8,473.14 |

Table 1

August 17, 2012 to May 24, 2013

{¶16} The total damages recommended in the Decision is \$1,837,404.35. In addition to the prejudgment interest as calculated in Table 1, above, TA is entitled to prejudgment interest on the sum of the total damages awarded plus \$240,000 in

⁸As reflected in TA-0732, JX-G-10/1 and JX-G-15/1, liquidated damages were assessed for more than the amount due under Pay App. Nos. 10 and 15, respectively. Prejudgment interest is only allowed on the amount due, not on the amount of liquidated damages assessed. The amounts assessed as liquidated damages as reflected in TA-0732, but not due as established by a Pay App., are accounted for when calculating prejudgment interest on the total damages due upon substantial completion as determined in the Decision.

liquidated damages that OSFC continued to withhold until it released it on May 24, 2013. Table 2 reflects the prejudgment interest from the day following substantial completion through May 24, 2013.⁹

| | Substantial Completion | Damages Recommended Plus \$240,000 | 2012 Daily Rate (366 days) | 2013 Daily Rate (365 days) | Days | |
|---|------------------------|------------------------------------|----------------------------|----------------------------|------|--------------------|
| 2012 | 8/16/2012 | \$2,077,404.35 | 170.28 | | 136 | \$23,158.08 |
| 2013 | 8/16/2012 | \$2,077,404.35 | | 170.75 | 143 | \$24,417.25 |
| Prejudgment Interest On Damages Recommended plus \$240,000 withheld from TA until it was paid on 5/24/2013 | | | | | | \$47,575.33 |

Table 2

May 25, 2013 to October 29, 2015

{¶17} After May 24, 2013, prejudgment interest accrued on \$1,837,404.35, the total damages recommended in the Decision, at the annual rate of 3%, or \$151.02 per day. From May 25, 2013 through October 29, 2015 (887 days) prejudgment interest accrued in the amount of \$133,954.74. On October 30, 2015, prejudgment interest continues to accrue at the daily rate of \$151.02 for the balance of 2015 and at the daily rate of \$150.61 during 2016 until entry of final judgment.¹⁰

Total Prejudgment Interest Recommended

{¶18} The total prejudgment interest recommended is summarized as follows:

| | |
|--|--------------------|
| Table 1 - Liquidated Damages Wrongfully Withheld from Progress Payments Until Substantial Completion | \$8,473.14 |
| Table 2 - Damages Accruing Prejudgment Interest from Substantial Completion through Payment of \$240,000 on 5/24/2015 | \$47,575.33 |

⁹Two daily rates are used because 2012 is a leap year and 2013 is a regular year.

¹⁰The Ohio Tax Commissioner has not set an interest rate after 2016.

| | |
|---|---------------------|
| Prejudgment Interest Accruing on Damages Recommended in Decision of the Referee from 5/25/2013 through 10/29/2015 | \$133,954.74 |
| Total Prejudgment Interest Through 10/29/2015 | \$190,003.21 |

Table 3

II. Request for Recommendation that Court Certify that Judgment is Final.

{¶19} TA requests that the referee recommend certification of the court's judgment under Civ.R. 54(B). Because the referee is not authorized to enter judgment in this action by either Civ.R. 53 or R.C. 2743.03(C)(3) and because TA's request is not a motion as such, the Referee declines to consider this request. TA can address this to the court through objections to this decision under Civ.R. 53.

III. Decision and Recommendation

{¶20} TA's Motion for Prejudgment Interest is WELL-TAKEN and is therefore GRANTED. It is recommended that prejudgment interest be awarded through October 29, 2015 in the sum of \$190,003.21 and thereafter until entry of final judgment at the daily rate of \$151.02 for the balance of 2015 and at the daily rate of \$150.61 during 2016.¹¹ The court declines to consider TA's request for a recommendation that a final judgment be certified by the court under Civ.R. 54(B).

{¶21} A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely

¹¹2016 is a leap year and daily interest is less than during a regular year. The Ohio Tax Commissioner has not set an interest rate for 2017.

and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

SAMUEL WAMPLER
Referee

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