[Cite as *Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp.*, 2012-Ohio-5986.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Transtar Electric, Inc.	Court of Appeals No. L-12-1100
Appellant	Trial Court No. CI0201006750
v.	
A.E.M. Electric Services Corporation	**DECISION AND JUDGMENT**
Appellee	Decided: December 14, 2012

* * * * *

Luther L. Liggett, Jr. and Heather Logan Melick, for appellant.

James P. Silk, Jr., for appellee.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals the award of summary judgment in a suit seeking payment on a contract for electrical subcontracting. Because we conclude that the purported pay-if-paid contract provision does not manifest the intent of the parties to shift the risk of owner non-payment from the general contractor to the subcontractor, we reverse.

{¶ 2} Appellee, A.E.M. Electric Services Corp., was general contractor on the construction of a swimming pool at a Holiday Inn in Maumee, Ohio. In January 2007, appellee entered into a subcontract agreement with appellant, Transtar Electric, Inc., for certain electrical work to be performed on the Maumee job.

{¶ 3} Section 4 (c) of the agreement between the parties provided as follows:

> (c) The Contractor [appellee] shall pay to the Subcontractor [appellant] the amount due [for work performed] only upon the satisfaction of all four of the following conditions: (i) the Subcontractor has completed all of the Work covered by the payment in a timely and workmanlike manner, * * * (ii) the Owner has approved the Work , * * * (iii) the Subcontractor proves to the Contractor's sole satisfaction that the Project is free and clear from all liens * * * and (iv) the Contractor has received payment from the Owner for the Work performed by Subcontractor. **RECEIPT OF PAYMENT BY CONTRACTOR FROM OWNER FOR WORK PERFORMED BY SUBCONTRACTOR IS A CONDITION PRECEDENT TO PAYMENT BY CONTRACTOR TO SUBCONTRACTOR FOR THAT WORK.** (Emphasis sic.)

{¶ 4} Appellant invoiced appellee for work performed in the amount of $186,709. Appellee paid appellant a total of $142,620.10. The remaining $44,088.90 was not paid.

{¶ 5} On September 27, 2010, appellant sued appellee for the unpaid amount on the contract, on account and in unjust enrichment. Appellee denied liability. Following

discovery, the matter was submitted to the trial court on cross-motions for summary judgment.

{¶ 6} Appellee supported its motion with the affidavit of its president who ratified the unpaid amount appellant sought, but averred that the project owner had failed to pay appellee that amount, as well as more. Appellee's president stated that appellee had and would continue to attempt to collect the money from the owner and pledged that appellant would be paid if collection efforts were successful. Absent such payment, however, appellee insisted it was not contractually obligated to pay. Moreover, appellee maintained, neither account nor unjust enrichment was a sustainable claim in the presence of an enforceable contract.

{¶ 7} Appellant argued that the contractual provision that appellee characterizes as a pay-if-paid should be deemed a pay-when-paid clause. Contractual language that shifts the risk of non-payment from the general contractor to a subcontractor is not favored in the law and provisions which effect such a transfer of risk must be carefully scrutinized and approved if, and only if, such risk-shifting is manifestly intended in clear and unequivocal form. Absent such language, the provision should be interpreted to govern only the time at which payment is to be made. If no specific time is stated, then it must be determined what period constitutes a reasonable delay.

{¶ 8} According to appellant, any other interpretation means that the subcontractor has promised to provide materials and labor and the general contractor has made no

promise to pay. In this circumstance, appellant reasoned, the contract failed for want of consideration.

{¶ 9} The trial court concluded that the contract clause at issue was a pay-if-paid provision. Since appellant did not dispute appellee's affidavit averring that, despite appellee's efforts, payment on this portion of the work had not been made, applying this portion of the contract meant that appellant had no present claim. Since a valid contract existed between the parties, claims on account and unjust enrichment were precluded. Accordingly, the court denied appellant's motion for summary judgment and granted appellee's motion. From this judgment, appellant now brings this appeal.

{¶ 10} Appellant sets forth the following two assignments of error:

> First Assignment of Error: The trial court erred in not determining the Subcontract clause to be a "pay-when-paid" clause, allowing A.E.M. a reasonable time to collect payment.
>
> Second Assignment of Error: The trial court erred when granting summary judgment without a fact determination as to the basis for the owner's non-payment and A.E.M.'s culpability, rendering the Subcontract void as without consideration, and leaving Transtar without a remedy.

{¶ 11} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as applied in trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d

127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 12} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826,

675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

{¶ 13} In this matter, there are no questions of material fact; the issue to be determined is the meaning of the contract between the parties.

{¶ 14} The cardinal principle in contract interpretation is to give effect to the intent of the parties. *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 274 (1974), paragraph one of the syllabus. Such intent is presumed to reside in the language the parties chose to employ in the agreement. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987), paragraph one of the syllabus. If the language of the contract is clear and unambiguous, the contract must be enforced as written. *Corl v. Thomas & King*, 10th Dist. No. 05AP-1128, 2006-Ohio-2956, ¶ 26. Ambiguity exists only when the terms of an agreement cannot be determined within the four corners of the contract or where the language of the agreement is susceptible to two or more reasonable interpretations. *United States Fid. & Guar. Co. v. St. Elizabeth Med. Ctr.*, 129 Ohio App.3d 45, 55, 716 N.E.2d 1201 (2d Dist.1998).

I. Pay *if* Paid or Pay *when* Paid

{¶ 15} In its first assignment of error, appellant maintains that the trial court erred when it concluded that the subcontractor payment provision was a pay-if-paid provision which, without payment by the owner, absolved appellee of any obligation to pay appellant for the labor and material expended on the job.

{¶ 16} Ordinarily, as between a general contractor and a subcontractor, the risk of the insolvency of the owner rests with the general contractor. The general contractor is in the best position to assess the owner's creditworthiness. The ability to best minimize the risk of an owner's default also resides with the general contractor. Thus, normally and legally the insolvency of the owner does not defeat the claim of a subcontractor against a general contractor. *Thos. A. Dyer Co. v. Bishop Internatl. Eng. Co.*, 303 F.2d 655, 660-661 (6th Cir.1962), *Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Inc.*, 196 Ohio App.3d 784, 2011-Ohio-4979, 965 N.E.2d 1007, ¶ 10 (10th Dist.), *Power & Pollution Servs. v. Suburban Piping*, 74 Ohio App.3d 89, 91, 589 N.E.2d 69 (8th Dist.1991).

{¶ 17} Pay-if-paid provisions in construction contracts seek to alter the distribution of risk of owner default between the contractor and subcontractor by contractually making the owner's payment to the contractor a condition precedent to the contractor's payment to the subcontractor. *Chapman Excavating Co. v. Fortney & Weygandt, Inc.*, 8th Dist. No. 84005, 2004-Ohio-3867, ¶ 22. Such provisions have been inserted into construction contracts for decades. 8 Lord, Williston on Contracts (4th Ed.2010) 633, Section 19:59.

{¶ 18} Pay-if-paid provisions are disfavored. Many jurisdictions, including North Carolina and Wisconsin, have enacted legislation voiding such clauses as against public policy. *Id.* at 637, fn. 5, N.C.Gen.Stat. § 22C-2, Wis.Stat.Ann. § 799.135(1). Illinois, Maryland and Missouri have also enacted legislation limiting such clauses. New York

and California have judicially declared pay-if-paid provisions to be against public policy as abrogating the states' lien laws. *West-Fair Elec. Constrs. v. Aetna Cas. & Sur. Co.*, 87 N.Y.2d 148, 153, 661 N.E.2d 967 (1995), *Wm. R. Clarke Corp. v. Safeco Ins. Co.*, 15 Cal.4th 882, 896, 938 P.2d 372 (1997).

{¶ 19} Ohio appeals courts, and many other courts, have generally followed the *Dyer* case. There an Ohio general contractor and subcontractor entered into an agreement for the subcontractor to provide materials and labor for plumbing in a horse racing track being built in Kentucky. The agreement between the parties called for the subcontractor to be paid $115,000 "no part of which shall be due until five (5) days after the Owner shall have paid the Contractor therefor * * *." *Dyer* at 656. When the owner declared bankruptcy, the subcontractor sued the contractor to obtain payment outstanding. The contractor defended, arguing it was not contractually obligated to pay until it was paid by the owner, an event unlikely to ever occur.

{¶ 20} The *Dyer* court found that the disputed provision was a pay-when-paid clause rather that a pay-if-paid.

> [W]e see no reason why the usual credit risk of the owner's insolvency assumed by the general contractor should be transferred from the general contractor to the subcontractor. It seems clear to us under the facts of this case that it was the intention of the parties that the subcontractor would be paid by the general contractor for the labor and materials put into the project. We believe that to be the normal

construction of the relationship between the parties. If such was not the intention of the parties it could have been so expressed in unequivocal terms dealing with the possible insolvency of the owner. *Id*. at 661.

{¶ 21} *Dyer* was followed in *Power & Pollution Servs.,* 74 Ohio App.3d 89, 589 N.E.2d 69, which concluded that similar provisions[1] constituted a pay-when-paid clause. "If the parties intended to shift the risk of solvency of the owner to the subcontractor, such intention should have been unambiguously expressed in the contract." *Id.* at 91.

{¶ 22} In *Kalkreuth Roofing & Sheet Metal, Inc. v. Bogner Const. Co.*, 5th Dist. No. 97 CA 59, 1998 WL 666765 (Aug. 27, 1998), the court treated the following provision as a pay-if -paid clause:

> The parties to this purchase order specifically acknowledge and agree that a condition precedent to the obligation of the Contractor to pay Subcontractor is the payment to Contractor by Owner of monies due. This provision does not merely set forth the time at which payment must be made to the Subcontractor. Subcontractor expressly acknowledges that Subcontractor may never be paid in full, or at all, to the extent Contractor is not paid by the Owner.

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[1] "5(d) * * * Company [Suburban] shall not be required to pay any such monthly billing of the subcontractor prior to the date Company receives payment of its corresponding monthly billing from the Owner.

"5(e) * * * Within ten (10) days after said final payment by the Owner, Company shall pay the subcontractor the balance of the subcontract sum."

{¶ 23} The court nonetheless found the provision ambiguous as to the meaning of the phrase "monies due," reversed a summary judgment and remanded the matter for further hearings.

{¶ 24} The following provision in a contractor/subcontractor "work order" was treated as a pay-when-paid clause:

> 4. a. All progress payments are conditioned upon the Sub furnishing to F & W 1) a signed copy of this work order * * * Partial payments of the Subcontract Sum shall be made within ten (10) days after payment is received by F & W from Owner[.] *Chapman Excavating Co*, 8th Dist. No. 84005, 2004-Ohio-3867, at ¶ 4.

{¶ 25} Perhaps the most exhaustive discussion of the topic appears *Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Inc.*, 196 Ohio App.3d 784, 2011-Ohio-4979, 965 N.E.2d 1007. There an architectural firm hired a consulting engineering firm to provide civil engineering services on a project. The contract between the architects and the consultant contained the following provisions:

> § 12.5 Payments to the Consultant shall be made promptly after the Architect is paid by the Owner under the Prime Agreement. The Architect shall exert reasonable and diligent efforts to collect prompt payment from the Owner. The Architect shall pay the Consultant in proportion to amounts received from the Owner which are attributable to the Consultant's services rendered.

§ 13.4.3 * * * The Consultant shall be paid for their services under this Agreement within ten (10) working days after receipt by the Architect from the Owner of payment for the services performed by the Consultant on behalf of their Part of the Project. *Id*. at ¶ 4.

{¶ 26} The consulting firm substantially completed its work on the project and billed the architect. When the owner cancelled the project and refused to pay the architect, the architect denied any obligation to pay the consulting firm because of what it characterized as the pay-if-paid contractual clauses. *Id.* at ¶ 5. The consulting firm sued.

{¶ 27} The trial court ruled in favor of the architect, granting its motion for summary judgment.

{¶ 28} The appeals court reversed. The court concluded that the contract language created pay-when-paid, an unconditional obligation to pay within a reasonable amount of time. *Id.* at ¶ 25. In reaching this conclusion, the court attempted to define the characteristics of a pay-if-paid clause:

A pay-if-paid provision must clearly and unambiguously condition payment to the subcontractor on the receipt of payment from the owner. *Kalkreuth Roofing & Sheet Metal, Inc. v. Bogner Constr. Co.* (Aug. 27, 1998), 5th Dist. No. 97 CA 59, 1998 WL 666765. See also 8 Lord, Williston on Contracts (4th Ed. 2010) 636, 19:59 ("[I]f the parties clearly do intend that the risk of nonpayment be borne by the subcontractor and clearly express that intent by making the right of the subcontractor to be

paid expressly conditional on the receipt of such payment by the contractor from the owner, they may by contract allocate that risk, and the courts will enforce that freely bargained-for allocation of risk"). Payment provisions qualify as pay-if-paid provisions if they expressly state that (1) payment to the contractor is a condition precedent to payment to the subcontractor (as in the above example[[2]]), (2) the subcontractor is to bear the risk of the owner's nonpayment (as in the above example), or (3) the subcontractor is to be paid exclusively out of a fund the sole source of which is the owner's payment to the subcontractor. *Sloan & Co.* [*v. Liberty Mut. Ins. Co.*], 653 F.3d [175] at 187, fn. 9. See also *LBL Skysystems (USA), Inc. v. APG-America, Inc.* (Aug. 31, 2005), E.D.Pa. No. 02-5379, 2005 WL 2140240, at *32 ("A pay-if-paid condition generally requires words such as 'condition,' 'if and only if,' or 'unless and until' that convey the parties' intention that a payment to a subcontractor is contingent on the contractor's receipt of those funds"); *Main Elec., Ltd. v. Printz Servs. Corp.* (Colo.1999), 980 P.2d 522, 528, fn. 6 ("Typically a payment clause that creates a condition precedent uses the phrase 'as a condition precedent' or other words indicating that the

[2] "A typical 'pay-if-paid' clause might read: 'Contractor's receipt of payment from the owner is a condition precedent to contractor's obligation to make payment to the subcontractor; the subcontractor expressly assumes the risk of the owner's nonpayment and the subcontract price includes this risk.'" *Evans, Mechwart* at ¶ 11, quoting *MidAmerica Constr. Mgmt. v. Mastec N. Am., Inc.*, 436 F.3d 1257, 1261-62 (CA 10 2006).

owner's failure to pay was reasonably foreseen and that the purpose of the payment provision was to address this possibility"). Id. at ¶ 12.

{¶ 29} In our view, the language in the *Evans, Mechwart* case goes beyond what was necessary to resolve that case and beyond the position Ohio courts have used to resolve whether a contract provision is pay-if-paid or pay-when-paid. Going back to *Dyer*, Ohio courts have held that, if a contract provision is to be construed as a pay-if-paid clause, the language must clearly and unambiguously indicate that the intent of the parties was to shift the risk of payment from the general contractor to the subcontractor. The sine qua non of such a provision is a clear unambiguous statement that the subcontractor will not be paid if the owner does not pay.

{¶ 30} The *Evans, Mechwart* case, quoting a federal case, suggests that the provision may state that it is a condition precedent or a shift of risk. In our view, this is insufficient. It must be made plain, in plain language, that a subcontractor must ultimately look to the owner of the project for payment. While the words "condition precedent" may be helpful, the term is not sufficiently defined to impart that both parties understand that the provision alters a fundamental custom between a general contractor and a subcontractor. Consequently, absent language making manifest the intent to shift risk of payment, the provision must be construed as a pay-when-paid clause.

{¶ 31} In the present matter, we find no language sufficient to clearly and unambiguously indicate that the parties intended to transfer the ultimate risk of nonpayment to the subcontractor. Consequently, the clause at issue must be interpreted

as a pay-when-paid provision. Accordingly, appellant's first assignment of error is well-taken. Appellant's second assignment of error is moot.

{¶ 32} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings consistent with this decision, including the determination of a reasonable time for payment. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE