

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Selective Insurance Company of America,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-597 (C.C. No. 2009-07407)
Ohio Department of Rehabilitation and Correction,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on March 27, 2012

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*Alber Crafton, PSC, Lee M. Brewer and Justin D. Owen, for appellant.*

*Michael DeWine, Attorney General, James E. Rook and Kristin S. Boggs, for appellee.*

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APPEAL from the Court of Claims of Ohio

KLATT, J.

{¶ 1} Plaintiff-appellant, Selective Insurance Company of America ("Selective"), appeals a judgment of the Court of Claims of Ohio dismissing its suit against defendant-appellee, the Ohio Department of Rehabilitation and Correction ("ODRC"), for lack of subject matter jurisdiction. For the following reasons, we reverse and remand.

{¶ 2} 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. The state accepted DDC's bid, and DDC entered into a contract with ODRC to serve as the principal contractor on the project.

{¶ 3} 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.

{¶ 4} 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.

{¶ 5} 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.

{¶ 6} 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.

{¶ 7} 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.

{¶ 8} 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.

{¶ 9} After discovery, Selective and ODRC each filed motions for summary judgment on the other's claims. Instead of ruling on the merits of those motions, the 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.

{¶ 10} Selective now appeals the June 9, 2011 judgment, and it assigns the following errors:

1. The Court of Claims erred in concluding, contrary to law, that Selective's action for money damages against an agency of the State is governed by Ohio's Mechanic's Lien statute codified in R.C. §1311.32.
2. The Court of Claims erred in concluding, contrary to law, that prior to the enactment of R.C. §2743.02(A)(1) the State of Ohio consented to be sued for money damages arising from a public authority's failure to comply with R.C. §1311.28 in the common pleas court.
3. The Court of Claims erred in dismissing, contrary to law, Selective's second cause of action against the State of Ohio for money damages, which is unrelated to Buckeye's assignment of its lien claim.

{¶ 11} By its first assignment of error, Selective argues that the trial court misconstrued its first claim, *i.e.*, its claim for violation of R.C. 1311.28. Selective maintains

that the first claim is not an attempt to enforce Buckeye's lien rights. Instead, by its first claim, Selective seeks money damages from ODRC for its failure to comply with its statutory duty to detain from the contractual balance due to DDC sufficient funds to cover Buckeye's entire claim.

{¶ 12} Usually, to accomplish a public improvement project, a public authority contracts with a principal contractor alone. The principal contractor then contracts with subcontractors, material suppliers, and laborers for certain work and materials. To protect subcontractors, material suppliers, and laborers from a defaulting principal contractor, R.C. 1311.25 to 1311.32 allows them to file mechanic's liens on payments due to the principal contractor under its contract with the public authority. *State ex rel. Gen. Elec. Supply Co. v. Jordano Elec. Co., Inc.*, 53 Ohio St.3d 66, 69 (1990). Unlike a typical mechanic's lien, a mechanic's lien arising from a public improvement project attaches not to the property itself, but to a fund that the public authority must create from contractual payments withheld from the principal contractor. *Poenisch v. Kingsley-Dunbar, Inc.*, 64 Ohio App.3d 699, 704 (10th Dist.1990); *Basic Constr. Materials Div. of Davon, Inc. v. Seiter*, 10th Dist. No. 88AP-796 (June 6, 1989). R.C. 1311.25 to 1311.32 "afford[s] a species of garnishment to protect a subcontractor, laborer or materialman against the risk of loss of the payments due him should such payments reach his principal contractor in whose hands they may be subject to the creditors or caprice of the latter." *Lee Turzillo Contracting Co. v. Cincinnati Metro. Housing Auth.*, 10 Ohio St.2d 5 (1967), paragraph one of the syllabus.

{¶ 13} A subcontractor, material supplier, or laborer establishes a mechanic's lien by "serv[ing] the public authority an affidavit stating the amount due and unpaid for the labor and work performed and material furnished, when the last of the labor or work was performed and when the last of the material was furnished with all credits and setoffs thereon, and the post-office address of the claimant." R.C. 1311.26. Upon receiving the affidavit:

[T]he public authority shall detain 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 or claims.

\* \* \*

The public authority shall place any detained funds in an escrow account as provided for under section 153.63 of the Revised Code, to be released at the times, in the amounts, and to the persons ordered by a court of competent jurisdiction or by agreement of the principal contractor and the subcontractor, material supplier, or laborer who filed the affidavit provided for in section 1311.26 of the Revised Code.

R.C. 1311.28. Thus, an affidavit of claim constitutes a "stop notice" to the public authority, preventing the payment of moneys due to a principal contractor. *Turzillo* at paragraph two of the syllabus. Through R.C. 1311.26 and 1311.28, a subcontractor, material supplier, or laborer can "secure[ ] an assignment pro tanto of the moneys remaining due from the owner to the principal contractor, with the right to control and direct its payment to himself." *Id.*

{¶ 14} Receipt of an affidavit of claim also triggers an obligation to serve the principal contractor with a copy of the affidavit and a notice that the principal contractor must notify the public authority whether it intends to dispute the claim within 20 days. R.C. 1311.31. "If the principal contractor fails within twenty days after receipt of the affidavit to serve the public authority written notice of his intention to dispute the claim, he has assented to its correctness." *Id.* If the principal contractor assents to all affidavits filed on the same public improvement project, then "the amount detained from the principal contractor shall be applied by and payment made by the public authority, in the order of preference provided in section 1311.29 of the Revised Code, pro rata, upon the claims on which affidavits have been filed." *Id.*

{¶ 15} The purpose of R.C. 1311.31 "is to provide the method for determining the extent of the fund 'assigned' or the amount of moneys to which the subcontractor is entitled." *Turzillo* at 10. R.C. 1311.31 provides the principal contractor with "the opportunity to dispute either an unreasonable claim or an asserted excess over the agreement between him and his subcontractor." *Id.*

{¶ 16} Pursuant to R.C. 1311.32:

The duty to pay to claimants the amounts and in the order of preference, as provided in sections 1311.29 and 1311.31 of the Revised Code, may be enforced by an action in the court of common pleas or the subcontractor, material supplier, or

laborer may, when the amounts are due, recover through the public authority in the court of common pleas the whole or a pro rata amount of the subcontractor's, material supplier's, or laborer's claim or estimate, not exceeding in any case the balance due to the principal contractor.

Through filing an action under R.C. 1311.32, a subcontractor, material supplier, or laborer may enforce its mechanic's lien and seek recovery of the amounts that the public authority detains under R.C. 1311.28. This kind of action is separate and distinct from an action against a public authority for negligently failing to preserve a fund on which a mechanic's lien can attach. *Miller-Yount Paving, Inc. v. Freeman Cargo Carrier, Inc.*, 7th Dist. No. 98 C.A. 226 (Mar. 30, 2000); *Basic Constr.* While R.C. 1311.32 governs a cause of action to enforce a mechanic's lien, it does not control a cause of action against a public authority for disregarding the strictures of R.C. 1311.28. *Id.*

{¶ 17} Here, Buckeye enforced its mechanic's lien through an action in the Franklin County Court of Common Pleas against ODRC. Ultimately, Buckeye recovered from ODRC the \$24,111.85 yet to be paid DDC when Buckeye filed its action. In the instant action filed in the Court of Claims of Ohio, Selective seeks a different remedy. Selective alleged in its amended complaint that "[p]ursuant to R.C. 1311.28, upon its receipt of the Affidavit of Claim, [O]DRC was required to detain from DDC or from the balance of funds remaining in the Contract, an amount sufficient to cover a properly filed claim. [O]DRC failed to do so." First Amended Complaint, at ¶ 19. Selective further alleged that "[t]o the extent that [O]DRC failed to adhere to its duties under R.C. §1311.28 and retain funds remaining in DDC's contract up to Buckeye's properly filed claim," ODRC damaged Buckeye. *Id.* at ¶ 24. As Buckeye's assignee and subrogee, Selective demanded monetary damages from ODRC for its violation of R.C. 1311.28.

{¶ 18} Given the allegations in Selective's complaint, we conclude that the trial court erred in characterizing Selective's claim. Selective is pursuing a claim for failure to comply with R.C. 1311.28, not a claim to enforce a lien under R.C. 1311.32. Accordingly, we sustain Selective's first assignment of error.

{¶ 19} By its second assignment of error, Selective argues that the trial court erred in concluding that it lacked subject matter jurisdiction over Selective's claim for violation of R.C. 1311.28. We agree.

{¶ 20} Through the Court of Claims Act, effective January 1, 1975, the state waived its sovereign immunity from liability. R.C. 2723.02(A)(1). The Act also created the Court of Claims and invested that court with exclusive, original jurisdiction over all civil actions permitted by the waiver of immunity. R.C. 2743.03(A)(1). However, the Act excludes some types of civil actions from its purview. In R.C. 2743.02(A)(1), the Act provides that, "[t]o the extent that the state has previously consented to be sued, this chapter has no applicability." Thus, if the state had consented to suit on a claim prior to the enactment of the Court of Claims Act on January 1, 1975, the Court of Claims lacks jurisdiction over that claim.<sup>1</sup> *Windsor House, Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 09AP-584, 2010-Ohio-257, ¶ 10; *Parsons v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 03AP-772, 2004-Ohio-4552, ¶ 12.

{¶ 21} Prior to the enactment of the Court of Claims Act, the mechanic's lien statutes applied to the state. *Poenisch* at 703, citing *State ex rel. Nixon v. Merrell*, 126 Ohio St. 239 (1933). Thus, sovereign immunity did not prevent a subcontractor with a mechanic's lien from pursuing an action in mandamus to attain funds the state withheld from a principal contractor. *Nixon* at 246-47. The state, as the stakeholder of the fund, was a necessary party to the action. *Id.* at 244. Because such an action existed before January 1, 1975, a court of common pleas—not the Court of Claims—has jurisdiction over actions against the state for enforcement of a mechanic's lien. *Poenisch* at 703; *Basic Constr.*

{¶ 22} 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. The foregoing rule of law, therefore, does not apply.

{¶ 23} The Court of Claims has exclusive jurisdiction over civil actions against the state for money damages that sound in law. *Measles v. Indus. Comm.*, 128 Ohio St.3d 458, 2011-Ohio-1523, ¶ 7; *Boggs v. State*, 8 Ohio St.3d 15, 17 (1983). Consequently, an action seeking money damages for the state's negligent failure to preserve a fund on which

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<sup>1</sup> R.C. 2743.03(A)(2) excepts from this rule claims for declaratory or equitable relief when they are ancillary to claims for money damages. *State ex rel. Blackwell v. Crawford*, 106 Ohio St.3d 447, 2005-Ohio-5124, ¶ 20. That exception does not apply to this case.

a mechanic's lien can attach belongs in the Court of Claims, not a court of common pleas. *Basic Constr.* As Selective has asserted this type of cause of action, the Court of Claims has exclusive jurisdiction over it.

{¶ 24} To persuade this court otherwise, ODRC argues that "[t]he question \* \* \* is not whether the State of Ohio consented to be sued for money damages arising from its failure to comply with R.C. §1311.28. Instead, the question is whether the Court of Claims has jurisdiction to determine if Buckeye is entitled to payment from funds escrowed pursuant to its affidavit of claim." Appellee brief, at 5-6. Essentially, ODRC asserts that the Court of Claims lacks jurisdiction to consider issues relevant to the amount of damages Selective could collect due to ODRC's failure to establish a fund. Such issues include whether Buckeye correctly stated the amount due to it and whether the state retained priority over the funds at issue because it deserved a setoff against DDC. ODRC, however, never explicitly states a legal rationale for this assertion. From what we can discern, ODRC believes that because a court of common pleas would consider these issues to decide a lien enforcement action, the Court of Claims cannot consider them in resolving a claim for negligent failure to retain funds as required by R.C. 1311.28.

{¶ 25} In this case, the relevant question for determining whether Selective's claim belongs in a court of common pleas or the Court of Claims is whether "the state ha[d] previously consented to be sued" on Selective's claim. R.C. 2743.02(A)(1). If the answer had been "yes," then the Court of Claims would not have had subject matter jurisdiction. Because the answer is "no," the Court of Claims has subject matter jurisdiction. *Windsor House* at ¶ 10; *Parsons* at ¶ 12. ODRC would have us abandon this statutory analysis and determine jurisdiction based on the substance of the issues presented by an action. We, however, must look to statute to determine the extent of the Court of Claims' jurisdiction. *See State ex rel. DeWine v. Court of Claims of Ohio*, 130 Ohio St.3d 244, 2011-Ohio-5283, ¶ 19, quoting *State ex rel. Johnson v. Perry Cty. Court*, 25 Ohio St.3d 53, 54 (1986) (because the Court of Claims is a statutorily created court, it " 'has only limited jurisdiction, and may exercise only such powers as are directly conferred by legislative action' ").

{¶ 26} Additionally, ODRC argues that the trial court lacked jurisdiction over Selective's cause of action because Selective acquired it through subrogation, and such

causes of action are not cognizable in the Court of Claims. We are not persuaded by this argument either.

{¶ 27} Pursuant to R.C. 2743.02(D), "[r]ecoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant." Interpreting this provision, the Supreme Court of Ohio has held that the amount of damages a plaintiff can recover on a subrogation claim is reduced by the amounts the subrogor received in insurance proceeds, disability award, or other collateral recovery. *Community Ins. Co. v. Ohio Dept. of Transp.*, 92 Ohio St.3d 376, 379 (2001). In *Community Insurance*, an insurance company paid its insured's medical and hospital expenses and then filed a complaint, as the insured's subrogee, against the state for the alleged negligence that resulted in the subrogor's injury. The court held that the insurer was not a "claimant" separate and apart from its subrogor, and it had no right to recovery greater than that of the subrogor. Thus, the court concluded that:

R.C. 2743.02(D) mandates that medical benefits [the subrogor] received from [the insurer] must be deducted from the amount due her from the state. She could not transfer to [the insurer], by way of subrogation, a right to recover damages representing incurred medical expenses that she herself did not possess pursuant to R.C. 2743.02(D).

*Id.* at 378.

{¶ 28} Contrary to ODRC's assertion, *Community Insurance* does not stand for the blanket proposition that subrogation claims against the state are not cognizable in the Court of Claims. *Meigs Local School Dist. Bd. of Edn. v. Riverside Masonry, L.L.C.*, 10th Dist. No. 04AP-482, 2005-Ohio-2332, ¶ 16. Rather, *Community Insurance* holds that R.C. 2743.02(D) limits the extent to which a subrogee may recover damages. If the collateral compensation that a subrogor receives satisfies the subrogor's entire loss, R.C. 2743.02(D) would reduce the subrogee's damages to zero. However, nothing in R.C. 2743.02(D) divests the Court of Claims of the power to adjudicate a subrogation claim. Although R.C. 2743.02(D) impairs a subrogee's ability to prove damages, it does not deprive the Court of Claims of jurisdiction over a subrogation claim.

{¶ 29} We reject each of ODRC's arguments and conclude that the trial court had jurisdiction over Selective's claim for violation of R.C. 1311.28. Accordingly, we sustain Selective's second assignment of error.

{¶ 30} By Selective's third assignment of error, it argues that the trial court erred in dismissing its second claim, by which Selective seeks direct recovery from ODRC for its failure to protect Selective's collateral. We agree.

{¶ 31} After a review of the record, we concur with ODRC that Selective has "repeatedly tweaked" the legal basis for its second claim. Appellee brief, at 8. 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. *Measles* at ¶ 7; *Boggs* at 17. We conclude, therefore, that the trial court had jurisdiction over Selective's second claim.

{¶ 32} Although ODRC presents this court with multiple arguments, all of them address why Selective's second claim should fail on its merits. As none of these arguments address the actual question before this court—whether the trial court had jurisdiction—we will not consider them. Because the trial court possessed jurisdiction to adjudicate Selective's second claim, we sustain Selective's third assignment of error.

{¶ 33} For the foregoing reasons, we sustain Selective's three assignments of error, and we reverse the judgment of the Court of Claims of Ohio and remand this matter to that court for further proceedings consistent with law and this decision.

*Judgment reversed; cause remanded.*

FRENCH and TYACK, JJ., concur.

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