

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Ohio Farmers Insurance Company,	:	
Plaintiff-Appellant,	:	
v.	:	
Ohio School Facilities Commission and State of Ohio,	:	No. 11AP-547
Defendants-Appellees,	:	(C.C. No. 2007-08767)
v.	:	(REGULAR CALENDAR)
Northern Valley Contractors, Inc.,	:	
Third-Party Defendant- Counterclaimant-Appellant.	:	

D E C I S I O N

Rendered on March 6, 2012

McDonald Hopkins LLC, Jerome W. Cook, and Erin K. Walsh, for appellant Ohio Farmers Insurance Company and Third-Party Defendant-Counterclaimant-Appellant Northern Valley Contractors, Inc.

Michael DeWine, Attorney General, and *James E. Rook*, for appellees.

APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶ 1} Plaintiff-appellant, Ohio Farmers Insurance Company ("OFI"), and third-party defendant-appellant, Northern Valley Contractors, Inc. ("NVC"), collectively referred to as appellants, appeal from a judgment of the Court of Claims of Ohio in favor

of defendants-appellees, state of Ohio and Ohio School Facilities Commission ("OSFC"). For the reasons that follow, we affirm that judgment.

{¶ 2} The central issue before us concerns a June 29, 2004 contract entered into between NVCI and OSFC and the Cleveland Municipal School District ("CMSD") for the masonry trades work of a public improvement project known as the A.J. Rickoff School ("Rickoff project"). OFI issued performance/payment bonds on the Rickoff project with NVCI as the bond principal and CMSD and OSFC as obligees. Due to financial difficulties experienced by NVCI, its surety, OFI, made financial accommodations and became the assignee of NVCI.

{¶ 3} On November 14, 2007, OFI filed a complaint against the state of Ohio and OSFC asserting claims for breach of contract, unjust enrichment, and quantum meruit. The breach of contract claims sought: (1) damages incurred as a result of the acceleration and compression of the construction schedule; and (2) damages for OSFC's failure to remit the remaining contract balance and retainage amounts. In response, OSFC filed an answer, counterclaim, and third-party complaint against NVCI.

{¶ 4} Despite the lengthy procedural history contained in the record before us, the issue presented is relatively narrow and pertains to the arguments raised by OSFC in the motion for summary judgment filed on June 25, 2010. In this motion, OSFC asserted appellants were barred from pursuing the breach of contract claim for additional compensation because they failed to file a claim pursuant to the dispute resolution procedure set forth in Article 8 of the contract between the parties. Article 8.1.1 of the contract states:

Any request for equitable adjustment of Contract shall be made in writing to the Architect, through the Construction Manager, and filed prior to Contract Completion, provided the Contractor notified the Architect, through the Construction Manager, no more than ten (10) days after the initial occurrence of the facts which are the basis of the claim. To the fullest extent permitted by law, failure of the Contractor to timely provide such notice and a contemporaneous statement of damages shall constitute a waiver by the Contractor of any claim for additional compensation or for mitigation of Stipulated Damages.

{¶ 5} Article 8.1.2 provides that in every written claim filed in accordance with 8.1.1, the contractor shall provide, inter alia, the nature and amount of the claim, "which the Contractor shall certify before a notary public is a fair and accurate assessment of the damages suffered by the Contractor."

{¶ 6} Article 8.2.3 of the contract provides:

If no agreement can be reached between the Contractor, the Construction Manager, the Architect, the CEO and the Commission, as a result of implementing the process the parties agreed to for job site dispute resolution, the Construction Manager shall provide a written recommendation about a Change Order for the request pursuant to paragraph GC 7.2.3.

{¶ 7} Article 8.3.1 of the contract states:

The Contractor may appeal the recommendation of the Construction Manager about a Change Order by providing written notice to the Commission within 30 days of the date of the Construction Manager's recommendation.

{¶ 8} Relying on the deposition testimony of NVCI's former in-house counsel, Joseph Isabella, appellee argued that appellants' noncompliance with Article 8 was indisputably established. According to appellee, Isabella's testimony, that no Article 8 claim was filed, established that NVCI not only failed to file an Article 8 claim at the project level, but, also, failed to appeal any decision as required by Article 8.1.1 and 8.3.1, respectively.

{¶ 9} In response to appellees' motion for summary judgment, appellants filed a memorandum contra supported by a 24-page affidavit of Isabella. Appellants argued Isabella's affidavit clarified his deposition testimony and created an issue of fact regarding the filing of an Article 8 claim. According to appellants, when Isabella testified at his deposition that no Article 8 claim was filed, he was referring to the filing of an appeal pursuant to Article 8.3.1, not the filing of a claim for additional compensation pursuant to Article 8.1.1.

{¶ 10} The trial court reviewed the deposition and affidavit of Isabella. After such review, the trial court concluded the evidence established appellants complied with the ten-day notice provision of Article 8, and that the issue revolved around whether there

was an actual filing of an Article 8 claim. The trial court reasoned that if a claim was not filed under Article 8, appellants failed to initiate, let alone exhaust, the contractual dispute resolution procedures.

{¶ 11} The trial court, citing *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, stated that an affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, be used to create a genuine issue of material fact to defeat a motion for summary judgment. Finding that Isabella's affidavit contradicted rather than explained or supplemented his prior deposition testimony, the trial court held reasonable minds could only conclude that appellants failed to "file" the claim as that term is used in 8.1.1 of Article 8. Thereafter, stipulations were entered into the record, and the trial court entered judgment in favor of appellants on their claim for contract balance and retainage. All other pending claims were dismissed and the matter was timely appealed to this court.

{¶ 12} On appeal, appellants bring the following two assignments of error for our review:

1. To the extent that the trial court is found, by this Court of Appeals, to have actually granted summary judgment on the original motion of Appellee Ohio School Facilities Commission ("OSFC") or subsequently by virtue of the ruling on the Motions for Clarification, on the original grounds asserted in OSFC's principal brief in support of its Motion for Summary Judgment (*i.e.*, contractual waiver and/or failure to exhaust administrative remedies), then the trial court erred where the documentary evidence presented to the trial court in support of and in opposition to OSFC's Motion for Summary Judgment and Appellants Ohio Farmers Insurance Company and Northern Valley Contractors, Inc.'s (hereinafter collectively "Appellant OFIC") Motion for Reconsideration, when construed in a light most favorable to Appellant OFIC, does not support the trial court's ruling that "reasonable minds could not conclude upon the evidence that OFIC and NVCI subsequently "filed" a written claim as required by paragraph GC 8.1.1" as set forth in the trial court's May 2, 2011 ruling on the Motions for Clarification.
2. To the extent that this court may revisit the September 16, 2010 order granting summary judgment to OSFC, and the order granting Appellant OFIC's Motion for Reconsideration,

then Appellant OFIC asserts that it was error for the trial court to grant summary judgment on statute of limitations grounds where O.R.C. § 153.12 (B) and O.R.C. § 153.16 (B) do not apply to the contract in this case and no G.C. 8.2.3 recommendation was ever issued by OSFC in response to Appellant OFIC's Article 8 claim.

{¶ 13} We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38 (9th Dist.1995). Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the non-moving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181 (1997).

{¶ 14} Under summary judgment motion practice, the moving party bears an initial burden to inform the trial court of the basis for its motion, and to point to portions of the record that indicate that there are no genuine issues of material fact on a material element of the non-moving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280 (1996). Once the moving party has met its initial burden, the non-moving party must produce competent evidence establishing the existence of a genuine issue for trial. *Id.*

{¶ 15} In the first assignment of error, appellants call into question the basis for the trial court's granting of summary judgment. According to appellants, in the September 16, 2010 decision, the trial court granted summary judgment in favor of appellees on the basis that this suit was barred by the applicable statute of limitations and that the trial court did not actually decide whether the claims failed for noncompliance with Article 8 procedures. Because the statute of limitations argument was raised only in appellees' reply brief filed in support of its motion for summary judgment, appellants sought reconsideration from the trial court. Concluding that the statute of limitations argument was not properly before it, the trial court granted appellants' motion for reconsideration. Based on this action, appellants contend the trial court did not actually grant judgment in favor of appellees on the Article 8 claim.

{¶ 16} However, the trial court's May 2, 2011 entry of clarification removes any doubt regarding the court's actions and upon what basis it granted summary judgment. In that clarification entry, the trial court stated that the statute of limitations was an alternate basis for granting judgment as a matter of law in favor of appellees. The trial court made clear that "[t]he primary basis for the decision [granting summary judgment] was that although OFIC and NVC I had complied with the ten-day notice provision in Article 8 with respect to their claim, reasonable minds could not conclude upon the evidence that OFIC and NVC I subsequently 'filed' a written claim as required by paragraph GC 8.1.1." (May 2, 2011 Entry, 2.) Accordingly, we conclude the trial court granted summary judgment in favor of appellees on appellants' Article 8 claims and did so on the basis of appellants' noncompliance with the Article 8 provisions, i.e., that no Article 8 claim had been filed.

{¶ 17} Appellants next contend that OSFC failed to preserve the affirmative defenses relied upon by the trial court to grant summary judgment in appellees' favor. According to appellants, both contractual waiver and failure to exhaust administrative remedies are affirmative defenses that appellees failed to assert in its answer to the complaint.

{¶ 18} Appellants are correct that this court has recognized that both waiver and failure to exhaust administrative remedies are affirmative defenses. *Cleveland Constr., Inc. v. Kent State Univ.*, 10th Dist. No. 09Ap-822, 2010-Ohio-2906, ¶ 47. In general, an affirmative defense is deemed waived if it is not asserted in an answer or amended answer. Civ.R. 8(C); *Telsat, Inc. v. Micro Ctr., Inc.*, 10th Dist. No. 10AP-229, 2010-Ohio-5628, ¶ 16. Appellees' answer contains a list of affirmative defenses that includes the assertion that appellants "fail[ed] to comply with the Contract's Dispute Resolution Procedures." (Dec. 28, 2007 Answer, 4.) Governing the contract's dispute resolution procedure is Article 8, which, as noted above, states that to avoid waiver of a claim for additional compensation, both notice and filing of a claim for equitable adjustment is required. Accordingly, we find appellees asserted the affirmative defense of waiver for failure to comply with the dispute resolution procedure of Article 8 of the contract.

{¶ 19} We now turn to the arguments surrounding the Article 8 claim. As noted previously, the trial court concluded appellants complied with the ten-day notice

provision of Article 8.1.1, but failed to file a claim as required by that section. On appeal, appellants assert this finding is in error because genuine issues of material fact remain as to whether an Article 8 claim was filed.

{¶ 20} In *Cleveland Construction*, the plaintiff pursued claims arising from delay and denied change order requests arising from a public improvement contract like that at issue before us. The defendant argued the plaintiff's claims were waived because the plaintiff failed to initiate the administrative dispute resolution process set forth in Article 8 of the parties' contract. That section of the contract contained language similar to that at issue here. Specifically, the *Cleveland Construction* contract stated:

Any claim against the State shall be made in writing to the Associate and filed prior to Contract Completion, provided the Contractor notified the Associate no more than ten (10) days after the initial occurrence of the facts, which are the basis of the claim. To the fullest extent permitted by law, failure of the Contractor to timely provide such notice shall constitute a waiver by the Contractor of any claim for additional compensation or for mitigation of Liquidated Damages.

Id. at ¶ 27.

{¶ 21} The court in *Cleveland Construction* found the contract's language unambiguously provided a waiver of all claims for additional compensation that were not filed with the associate of the project. Relying on *Cleveland Construction*, appellees contend appellants waived all claims that were not filed pursuant to Article 8 of the parties' contract. Because, according to appellees, Isabella's undisputed testimony establishes that appellants did not file an Article 8 claim, appellees contend the trial court was correct in granting summary judgment in its favor. In contrast, it is appellants' position that Isabella's affidavit submitted with its memorandum contra to summary judgment creates a genuine issue of material fact regarding whether or not a claim for additional compensation was filed under Article 8.

{¶ 22} It is well-settled under Ohio law that when a party has given clear answers to unambiguous questions that negate the existence of any genuine issues of material fact, such party may not thereafter create an issue of fact with an affidavit that merely contradicts, without explanation, previously clear testimony. See *Purcell v. Norris*, 10th Dist. No. 04AP-1281, 2006-Ohio-1473, ¶ 12, citing *Medina v. Harold J. Becker Co., Inc.*,

163 Ohio App.3d 832, 2005-Ohio-5438, ¶ 24 (1st Dist.); *see also Basha v. Ghalib*, 10th Dist. No. 07AP-963, 2008-Ohio-3999, ¶ 36 (to the extent appellant filed the second affidavit in an attempt to alter or clarify his deposition testimony, it is clear that such a contradictory affidavit cannot create an issue of fact). However, an affidavit does not contradict a deposition if it explains, supplements or clarifies the earlier testimony, and such affidavit testimony can be considered to create genuine issues of material fact sufficient to defeat a motion for summary judgment. *Purcell* at ¶ 12.

{¶ 23} Upon review of both the deposition and the affidavit, we conclude Isabella's affidavit contradicts his prior deposition testimony. During his deposition, the following exchanges occurred:

A. No. I had no belief. The documents called for everything to be in writing. Tight notice provisions. You lose your claim if you're not compliant with notice. So I'm trying to prompt them, and no response. I didn't even file a formal claim under Article 8 because it was unresolved. We were still trying to get a handle on it. The job still had to be complete.

For example, * * * [a]nd Northern Valleys' work just went throughout the whole job.

Q. So you didn't file an Article 8 claim?

A. I did not file it because I never received a response on the change for time. I mean, there were conditions precedent. Article 7, then you go to Article 8, and here we can't even have a meeting. He refused to meet. Didn't want to address the issues. It was still open-ended as I saw it.

* * *

Q. Can you read the – starting with "OHGR" –

A. "OHGR has rejected NVC's claim, stating that NVC must provide additional information to support its claim."

Q. So you did believe OHGR rejected Northern Valley's claim when you wrote this letter?

A. That's what it says.

Q. And you never filed an Article 8 with the Ohio Schools Facilities Commission?

A. No, I did not.

One [sic] another point. I sent numerous requests for information to Mr. Adrain Thompson, and he failed to respond to any of those. I was trying to get a meeting to address these issues and a good-faith attempt to mediate or discuss this prior to filing the Article 8. But the way I viewed this, the way these guys butting their heads in sand, failing to respond, left us in an unsettled or compromised position.

* * *

So I don't think holding my hand to the fire, or Northern Valley, and saying, "There was a formal rejection here," or, "You acknowledge a formal rejection," and then you go to Article 8 under section 2.3, come on. They did not play by the rules of the contract document.

(Depo. 129-132.)

{¶ 24} Appellants contend Isabella's affidavit clarifies what he meant by an Article 8 claim and demonstrates an issue of fact regarding whether one was filed. We disagree.

{¶ 25} In his affidavit, Isabella states:

By testifying that no Section 8 claim had been made, I certainly was not intending to suggest that NVC had not asserted claims for additional compensation associated with the multitude of delays that had been documented throughout the job. NVC, more than any other contractor to my knowledge, meticulously documented and provided notice to OSFC, OHGR, and CMSD regarding the continuing and developing status and nature and quantification of its claims throughout the project.

(Affidavit at 17.)

{¶ 26} Isabella's affidavit also incorporates numerous correspondences, about which many were testified at his deposition. According to Isabella's affidavit, the letter he drafted on February 2, 2005 provides evidence of a claim for additional compensation

being submitted in accordance with Article 8 of the contract. However, again, his deposition testimony reflects otherwise. While the letter and its attachments indicate it is being submitted in accordance with the "project's contract documents, which include, but are not limited to Article 6 – Time, and Article 7 – Changes in the Work," Isabella testified at his deposition, "I want to state something here. This wasn't a final claim. It was giving notice of the potential of a claim because the damages were ongoing. I don't know if it actually addressed the issue of overhead and profit and general conditions and some other factors we incurred." (Depo. at 117.) Moreover, neither the letter nor the attachments contain a certification as required under Article 8.1.2.

{¶ 27} For these reasons, we conclude Isabella's affidavit does not explain, supplement or clarify his earlier deposition testimony that consisted of clear answers to unambiguous questions, but, rather, contradicts it. Therefore, such affidavit testimony cannot be considered to create genuine issues of material fact sufficient to defeat a motion for summary judgment. *Burt v. Harris*, 10th Dist. No. 03AP-194, 2004-Ohio-756, ¶ 18, citing *Luft v. Perry Cty. Lumber & Supply Co.*, 10th Dist. No. 02AP-559, 2003-Ohio-2305, ¶ 59, discretionary appeal not allowed, 99 Ohio St.3d 1542, 2003-Ohio-4671 ("Where a [non-moving party] testifies to something in a deposition, inconsistent statements in a later affidavit cannot establish a genuine issue of material fact."); *Zacchaeus v. Mt. Carmel Health Sys.*, 10th Dist. No. 01AP-683 (Feb. 5, 2002) (" '[A] non-moving party cannot defeat a motion for summary judgment by creating an issue of fact through a contradictory affidavit,' " quoting *Schaeffer v. Lute*, 6th Dist. No. L-96-045 (Nov. 22, 1996).

{¶ 28} Accordingly, we conclude the trial court did not err in granting summary judgment in favor of appellees on appellants' Article 8 claims. Consequently, we overrule appellants' first assignment of error.

{¶ 29} In the second assignment of error, appellants take issue with the trial court's initial September 16, 2010 ruling that was based on the statute of limitations and portions of R.C. Chapter 153. Not only did the trial court grant appellants' motion for reconsideration on this issue, our disposition of appellants' first assignment of error render this assignment of error moot.

{¶ 30} For the foregoing reasons, appellants' first assignment of error is overruled, appellants' second assignment of error is rendered moot, and the judgment of the Court of Claims of Ohio is hereby affirmed.

Judgment affirmed.

CONNOR and DORRIAN, JJ., concur.
