

[Cite as *Am. Pavements, Inc. v. Ohio Dept. of Transp.*, 2021-Ohio-1530.]

AMERICAN PAVEMENTS, INC.

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2019-00973JD

Judge Patrick E. Sheeran

DECISION

{¶1} Defendant Ohio Department of Transportation (ODOT) moves for a summary judgment in its favor against plaintiff American Pavements, Inc. (API). For reasons set forth below, the Court concludes that a summary judgment should be issued in ODOT's favor.

I. Background

{¶2} API is a paving contractor that performs micro-surfacing on asphalt pavements—a process in which a thin layer of a composition of aggregate, emulsion, water, and cement is applied to asphalt pavements. (Scodeller Deposition, 12.) In 2018, during API's performance of certain contracts entered into by API and ODOT, the parties disputed whether API was complying with federal prevailing wage law under the Davis Bacon Related Acts.

{¶3} API held a view that a person who steers a paver should be classified as a laborer, while the person in the rear of a paver—who controls the speed of the machine, the application mixture of the materials, the width of a spreader box, and all other functions, excepting the steering wheel and emergency brake—should be classified as an operator. ODOT did not agree with API's view. (Scodeller Deposition, 26-27; Purdy Deposition, 56-57.)

{¶4} The parties also disputed the wages for API's employees who met in staging yards at the beginning of the workday and returned to staging yards at the end of the

workday. According to API's President, "The laborers that would meet there in the morning to go out to the job site were not getting paid prevailing wage. The person or persons working in that yard that were performing functions in that yard that stayed in that yard were getting paid prevail -- were getting paid operator's rates." (Scodeller Deposition, 29.)

{¶5} After representatives of API and ODOT met, in September 2018 API agreed to pay wages in accordance with ODOT's interpretation of law. (Scodeller Deposition, 50-51; Ahlgren Deposition, 41-42.) However, API maintained that ODOT's estimated calculation of \$719,972.00 owed to employees was not correct. (Exhibit 11, Purdy Deposition.) And API generally contended that the total amount that could be owed was \$272,273.96, even with ODOT's assumption that hours worked by certain employees must be paid at the local prevailing wage rates for a given trade. (Exhibit 11, Purdy Deposition.) Despite API's disagreement with ODOT, API paid wages at the rate that ODOT required until about late October 2018, which coincided with API's seasonal work schedule. (Scodeller Deposition, 65.)

{¶6} At some point, ODOT contacted the United States Department of Labor (DOL) about API's wage practices. (Exhibit 11, Purdy Deposition; see Purdy Deposition, 57-58; see also Exhibit 4, Purdy Deposition.) ODOT's complaint to DOL was partially substantiated. (Exhibit 11, Purdy Deposition.) The DOL issued a determination in May 2019 wherein it noted:

* * *

In regard to the specific violations:

Misclassification of Equipment Operator Group 2 vs. Laborer.

The firm agreed to reclassify the line driver on the continuous paver machine to an Equipment Operator Group 2, and pay the respective prevailing wage rates and fringes * * *

Site of the work to include the staging yards that are ‘adjacent or virtually adjacent’ to the site of the work: the firm agreed with the WHI that some of the loading yard equipment staging areas should have been regarded as part of the site of the work, and prevailing wages should have been paid. Moving forward, the firm will ensure that any staging areas that are ‘adjacent or virtually adjacent’ to the site of the work as called for in the contract will be compensated for at Davis Bacon prevailing wages * * *.

* * *

Back wages were discussed. The lawyers argued that because of ODOT’s demand to pay for all hours at DB prevailing wage their client overpaid during the months of September and October of 2018 and wanted to apply the amounts of overpayment retroactively to the months prior. WHI explained to the attorneys that as a matter of hours worked principles, each work week stands alone and no cross-crediting of overpayments can be made to weeks or months prior. The lawyers understood. * * * Firm agrees to pay the back wages in full: \$87,956.06 due 51 employees. * *

Recommendations: administrative closure after processing of back wage payment matters. Debarment is not recommended. * * *

{¶7} On September 20, 2019, API brought a complaint against ODOT in this Court. API later filed a first amended complaint, asserting claims of breach of contract and declaratory judgment. API has alleged that ODOT’s demand that API should pay prevailing wages “was a change in contract terms in writing for which ODOT has not paid the Overpayment Amount. The Project Contracts define a Change Order to include a written order issued by ODOT covering changes to the terms and conditions of those contracts which should be compensated.” (First Amended Complaint, ¶ 22.) And API

further alleges: “By ODOT withholding payments due to API pursuant to the Project Contracts and the failure to pay the Overpayment Amount, ODOT has materially breached the Project Contracts without privilege to do so.” (First Amended Complaint, ¶ 23.) API also seeks a declaration from this Court that the DOL’s decision is controlling and that ODOT improperly forced API to make an overpayment amount or, alternatively, that ODOT’s directive to pay prevailing wages constituted a change to the contracts to which API is entitled to compensation. (First Amended Complaint.)

{¶8} On January 13, 2021, ODOT moved for a summary judgment in its favor. ODOT urges that it is entitled to summary judgment because, according to ODOT, API now admits that no funds are being withheld and ODOT had an obligation to withhold funds due to the parties’ prevailing wage dispute. ODOT further alleges that it is entitled to summary judgment because, according to ODOT, API cannot point to any term in the parties’ contracts that would obligate ODOT to refund API for the prevailing wage amounts it paid to its certain API employees.

{¶9} API maintains that no dispute exists whether the project contracts incorporated (1) Form FHWA-1273 - Required Contract Provisions Federal-Aid Construction Contracts (FHWA-1273), and (2) ODOT’s Construction and Material Specifications (General Provisions), which define a “change order” in Section 101.03 as “a written order issued by [ODOT] to the Contractor, covering changes to the terms and conditions, plans and/or quantities, within or beyond the scope of the Contract and establishing the basis of payment and time adjustments for the work affected by the changes.” (Purdy Dep. at 41; API Response to Request for Admission No. 27.)”

{¶10} API maintains that ODOT’s summary-judgment motion fails to answer whether ODOT’s demand to API to pay prevailing wages to certain employees constitutes a “change order” pursuant to Section 101.03 of the contracts’ General Provisions. And API maintains that factual disputes exist whether ODOT exceeded its authority by requiring API to pay prevailing wages to certain employees. API asserts:

“Whether the ODOT Demand is a Change Order under the Project Contracts must be determined by the trier of fact.”

II. Law and Analysis

A. Legal Standard

{¶11} A summary judgment terminates litigation to avoid a formal trial in a case where there is nothing to try. *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2, 433 N.E.2d 615 (1982); *Schroeder v. Nationwide Mut. Ins. Co.*, 10th Dist. Franklin No. 92AP-1728, 1993 Ohio App. LEXIS 2319, *3 (Apr. 27, 1993). Civ.R. 56(C) “provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.” *State ex rel. Grady v. State Emp. Rels. Bd.*, 78 Ohio St.3d 181, 183, 677 N.E.2d 343 (1997).

{¶12} Under Civ.R. 56 a party who moves for summary judgment “bears the initial responsibility of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.” *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). A party who moves for summary judgment “must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment.” *Dresher* at 292-293. See Civ.R. 56(C).¹ If a party who moves for summary judgment has satisfied

¹Pursuant to Civ.R. 56(C), 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.”

its initial burden, then a nonmoving party “has a reciprocal burden outlined in the last sentence of Civ.R. 56(E).” *Dresher* at 293. See Civ.R. 56(E) (“[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party’s pleadings, but the party’s response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party”).

B. API’s Declaratory-Judgment Claim essentially is subsumed into API’s Breach-of-Contract Claim.

{¶13} A declaratory judgment generally is defined as a “binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement.” *Black’s Law Dictionary* 1007 (11th Ed.2019). Because API seeks a judgment that (1) establishes the parties’ rights under their and (2) enforces the parties’ contracts, API’s declaratory-judgment claim essentially is subsumed into API’s breach-of-contract claim. See *Ambulatory Care Affiliates, Ltd. v. OhioHealth Corp.*, 10th Dist. Franklin No. 10AP-30, 2010-Ohio-3035, ¶ 10 (actions for declaratory judgment are special proceedings but when a declaratory judgment claim is asserted within the context of an ordinary civil action for breach of contract, the underlying action governs an appellate court’s analysis); see also R.C. 2743.03(A)(2) (generally providing that, if a claimant also files a claim for declaratory judgment, injunctive relief, or equitable relief that arises out of the same circumstances that gave rise to the claimant’s civil action against the state, this Court has exclusive, original jurisdiction to hear and determine

Any evidence that is not specifically listed in Civ.R. 56(C) “is only proper if it is incorporated into an appropriate affidavit under Civ.R. 56(E).” *Pollard v. Elber*, 2018-Ohio-4538, 123 N.E.3d 359, ¶ 22 (6th Dist.) However, courts “may consider other evidence if there is no objection on this basis.” *State ex rel. Gilmour Realty, Inc. v. City of Mayfield Hts.*, 122 Ohio St.3d 260, 2009-Ohio-2871, 910 N.E.2d 455, ¶ 17; *Pollard* at ¶ 22.

that claim). API's underlying cause of action for breach of contract therefore will govern the Court's analysis in this case as to API's declaratory-judgment claim.

C. ODOT is entitled to a summary judgment on API's breach-of-contract claim.

{¶14} A cause of action for breach of contract “requires the claimant to establish the existence of a contract, the failure without legal excuse of the other party to perform when performance is due, and damages or loss resulting from the breach.” *Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, ¶ 41. The word, “‘breach,’ is primarily defined to be ‘an act of breaking; the violation of a law, contract or any other engagement.’ * * * ‘failure without legal excuse, to perform any promise which forms the whole or part of a contract * * * and may be inferred from the “refusal of a party to recognize the existence of a contract, or the doing of something inconsistent with its existence.”’”. *Natl. City Bank v. Erskine & Sons, Inc.*, 158 Ohio St. 450, 461, 110 N.E.2d 598 (1953), quoting *Friedman v. Katzner*, 139 Md., 195, 114 A., 884; 5 Words and Phrases (Perm. Ed.), 761.

{¶15} The parties do not dispute that Form FHWA-1273 was incorporated into the parties' contracts. And ODOT does not seem to dispute that Section 101.03 of Construction and Material Specifications (General Provisions) define a “change order” as “a written order issued by [ODOT] to the Contractor, covering changes to the terms and conditions, plans and/or quantities, within or beyond the scope of the Contract and establishing the basis of payment and time adjustments for the work affected by the changes.”

1. Form FHWA-1273

{¶16} Form FHWA-1273 contains this provision: “A breach of any of the stipulations contained in these Required Contract Provisions may be sufficient grounds

for withholding of progress payments, withholding of final payment. termination of the contract, suspension/ debarment *or any other action determined to be appropriate by the contracting agency and FHWA.*” (Emphasis added.) Section IV of Form FHWA-1273 is labeled “Davis-Bacon and Related Actions Provision.” The United States Court of Appeals for the Sixth Circuit has described the Davis-Bacon Act as follows:

The Davis-Bacon Act requires that government contractors pay the prevailing wages set by the Secretary of Labor to employees working on government projects, 40 U.S.C. § 3142, with the underlying dual purpose being to “give local laborers and contractors fair opportunity to participate in building programs when federal money is involved and to protect local wage standards by preventing contractors from basing their bids on wages lower than those in the prevailing area.” *L.P. Cavett Co. v. U.S. Dep’t of Labor*, 101 F.3d 1111, 1113 (6th Cir. 1996). Government contracts must contain stipulations that the contractor or subcontractor shall pay its employees the wage determinations listed in the contract, 40 U.S.C. § 3142(c), and “insert in any subcontracts the clauses contained in 29 C.F.R. § 5.5(a)(1) through (10) [regarding wage determinations and payroll certifications] and such other clauses as the [federal agency] may by appropriate instructions require.” 29 C.F.R. § 5.5(a)(6). Laborers “shall be paid not less than the appropriate wage rate and fringe benefits in the wage determination for the classification of work actually performed[.]” 48 C.F.R. § 52.222-6(b)(3); *see also* 48 C.F.R. § 52.222-6(c)(4).

United States ex rel. Wall v. Circle C. Constr., L.L.C., 697 F.3d 345, 354-355 (6th Cir.2012). *See generally* 29 C.F.R. 5(a) and (b) (provisions and procedures under the Davis Bacon and Related Acts Provisions).

{¶17} Subsection 2 of Section IV of Form FHWA-1273 provides:

The contracting agency shall upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor under this contract, or any other Federal contract with the same prime contractor, or any other federally assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, *the contracting agency may, after written notice to the contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.*

(Emphasis added.)

{¶18} Accordingly, under the provisions of Form FHWA-1273, ODOT, as the contracting agency, had authority to take any action that ODOT determined to be appropriate. And, after ODOT provided written notice to API, ODOT had authority to take “such action as may be necessary” to cause the suspension of any further payment, advance, or guarantee of funds until violations of prevailing wage requirements had ceased.

2. Section 101.03 of ODOT’s Construction and Material Specifications (General Provisions)

{¶19} API asserts that ODOT’s directive for API to pay prevailing wages to certain employees constitutes a “change order” under the parties’ agreements. API represents that Section 101.03 defines a “change order” as “a written order issued by

[ODOT] to the Contractor, covering changes to the terms and conditions, plans and/or quantities, within or beyond the scope of the Contract and establishing the basis of payment and time adjustments for the work affected by the changes.’ (Purdy Dep. at 41; API Response to Request for Admission No. 27.)” (API Memorandum in Opposition, 2.)

{¶20} The interpretation of a contract involves a question of law to be decided by a judge. See *Leber v. Smith*, 70 Ohio St.3d 548, 553, 639 N.E.2d 1159 (1994) (interpretation of an insurance contract involves a question of law to be decided by judge); *Hanna v. Groom*, 10th Dist. Franklin No. 07AP-502, 2008-Ohio-765, ¶ 9 (interpretation of contracts is a question of law). How to construe a contract’s terms presents a question of contract interpretation, which also presents a question of law. See *Badders v. Century Ins. Co.*, 2d Dist. Montgomery No. 28170, 2019-Ohio-1900, ¶ 13; *491 N. Park Real Estate LLC v. Spice Partners, LLC*, 10th Dist. Franklin No. 14AP-304, 2014-Ohio-5164, ¶ 10. A contract is to be interpreted “so as to carry out the intent of the parties, as that intent is evidenced by the contractual language.” *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), paragraph one of the syllabus. When the terms in a contract are clear and unambiguous, a court “cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties.” *Alexander v. Buckeye Pipeline Co.*, 53 Ohio St.2d 241, 246, 374 N.E.2d 146 (1978). A contract “‘does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties thereto.’” *Foster Wheeler Enviresponse*, 78 Ohio St.3d 353, 362, 678 N.E.2d 519 (1997), quoting *Ohio Crane Co. v. Hicks*, 110 Ohio St. 168, 172, 143 N.E. 388, 389 (1924).

{¶21} Here, ODOT’s written directive to API to pay prevailing wages to certain workers is consistent with the authority under Form FHWA-1273, as incorporated into the parties’ contracts, which permitted ODOT, as a contracting agency, to take “any other action” that ODOT determined to be appropriate. See Exhibit 4, Purdy Deposition. Thus, ODOT’s written directive to API is not, as a matter of law, a change to the “terms

and conditions” of the parties’ contracts under Section 101.03 of Construction and Material Specifications. Neither is ODOT’s directive to API a change to the “plans and/or quantities, within or beyond the scope of the Contract and establishing the basis of payment and time adjustments for the work affected by the changes” under Section 101.03.

{¶22} After viewing the evidence most strongly in favor of API, it appears from the evidence that reasonable minds can come to but one conclusion, namely, that no genuine issue as to any material fact remains to be litigated and that ODOT is entitled to judgment as a matter of law.²

III. Conclusion

{¶23} For reasons set forth above, the Court concludes that ODOT’s summary-judgment motion should be granted.

PATRICK E. SHEERAN
Judge

²A fact “is ‘material’ if it ‘might affect the outcome of the suit under the applicable substantive law.” *Dipenti v. Park Towers Condominium Assn.*, 10th Dist. Franklin No. 19AP-384, 2020-Ohio-4277, ¶ 16, quoting *Mitchell v. Mid-Ohio Emergency Servs., L.L.C.*, 10th Dist. No. 03AP-981, 2004-Ohio-5264, ¶ 12.

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AMERICAN PAVEMENTS, INC.

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Defendant

Case No. 2019-00973JD

Judge Patrick E. Sheeran

JUDGMENT ENTRY

{¶24} For the reasons set forth in the decision filed concurrently herewith, the Court GRANTS Defendant Ohio Department of Transportation's summary-judgment motion filed on January 13, 2021. Judgment is rendered in favor of Defendant Ohio Department of Transportation. Court costs are assessed against Plaintiff American Pavements, Inc. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK E. SHEERAN
Judge

Filed March 10, 2021
Sent to S.C. Reporter 4/30/21