

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

THE PAINTING COMPANY

Plaintiff

v.

THE OHIO STATE UNIVERSITY

Defendant

Case No. 2008-08531

Judge Joseph T. Clark

DECISION

{¶ 1} On August 27, 2008, defendant filed a motion to dismiss, pursuant to Civ.R. 12(B)(6), or in the alternative, a motion for summary judgment pursuant to Civ.R. 56. On September 9, 2008, the court scheduled an oral hearing on defendant's motion for October 29, 2008. On September 29, 2008, plaintiff filed a response to defendant's motion. Because defendant's motion presents material outside of the pleadings, the court shall treat it as a motion for summary judgment. See Civ.R. 12(B)(6).

{¶ 2} Civ.R. 56(C) states, in part, as follows:

{¶ 3} "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. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 4} On May 7, 2003, plaintiff was awarded a public works contract to furnish labor, materials and equipment for the painting and wall-covering work for the Ross Heart Hospital Project located on the Columbus campus of The Ohio State University. On May 9, 2003, defendant issued a notice to proceed on the project, with a completion date of 481 consecutive calendar days thereafter. Plaintiff alleges that defendant failed to maintain the schedule on the project which resulted in additional labor hours for out-of-sequence work and for work that was not included in the contract.

{¶ 5} Defendant asserts that plaintiff's claims are barred by the two-year statute of limitations found in R.C. 2743.16.¹ Defendant contends that under R.C. 153.16 plaintiff's administrative remedies are deemed exhausted 120 days after August 23, 2005, the date that plaintiff submitted its Article 8 demand. Defendant argues that the statute of limitations began to run on December 21, 2005, and expired two years later on December 21, 2007. Plaintiff did not file its complaint until July 29, 2008.

{¶ 6} In the alternative, defendant asserts that the statute of limitations began to run at the latest on January 6, 2006, the date that defendant issued its Article 8 decision regarding plaintiff's claims.

{¶ 7} Defendant submitted an affidavit of Bernard Constantino, University Architect, with its motion. That affidavit states, as follows:

{¶ 8} "1. I am employed as the University Architect for The Ohio State University ('OSU'). These statements are based on my personal knowledge and upon information that has come to my attention in the normal course of my duties for construction of OSU's Ross Heart Hospital, Project 315-1999-939.

¹R.C. 2743.16(A) states in pertinent part:

"[C]ivil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties."

{¶ 9} “2. I have personal knowledge of the Contract governing the Project.

{¶ 10} “3. The original amount of The Painting Company’s contract was \$370,225.

{¶ 11} “4. The Dispute Resolution Procedure (Article 8) of the Contract is not unique and is regularly used on other OSU construction projects. (A copy of Article 8 is attached hereto as EXHIBIT A-1.)

{¶ 12} “5. By letter dated January 27, 2005, The Painting Company submitted a claim for \$806,619.06. The claim was not certified as required by Article 8.1.2. (A copy of the January 27, 2005 letter is attached hereto as EXHIBIT A-2.)

{¶ 13} “6. By letter dated August 23, 2005, Plaintiff notified OSU of its request to appeal certain claims through the Dispute Resolution Procedure specified in Article 8.4 of the Contract’s General Conditions. (A copy of The Painting Company’s Article 8 Demand is attached hereto as EXHIBIT A-3.)

{¶ 14} “7. On November 30, 2005, in compliance with Article 8.4.2, OSU held a meeting with The Painting Company in an effort to settle the issues in dispute.

{¶ 15} “8. I am the author of OSU’s Article 8 Decision in this matter, issued on January 6, 2006. (A copy of the Article 8 Decision is attached hereto as EXHIBIT A-4).

{¶ 16} “9. The Article 8 Decision was issued pursuant to Article 8.4 of the Contract and communicated OSU’s final and conclusive determination of the issues in dispute, as provided in Article 8.4.2.2.

{¶ 17} “10. The Painting Company never submitted any additional information in response to OSU’s Article 8 Decision.

{¶ 18} “11. The Painting Company never submitted the close-out documents it was required to submit under the contract.

{¶ 19} “12. I received no communication from The Painting Company on this Project until I received its letter of September 20, 2007. (A copy of the September 20, 2007 letter is attached hereto as EXHIBIT A-5.)

{¶ 20} “13. I responded by letter dated October 3, 2007. (A copy of the October 3, 2007 letter is attached hereto as EXHIBIT A-6.)”

{¶ 21} In response to the motion, plaintiff submitted an affidavit of David Asman, who stated:

{¶ 22} “2. I am Vice President of The Painting Company and I am familiar with The Ohio State University’s Project No. 315-1999-939 for the Ross Heart Hospital, The Painting Company’s claims for that project, and the documents concerning that project and The Painting Company’s claims.

{¶ 23} “3. The Painting Company received a letter dated January 6, 2006, from Bernard Constantino concerning The Painting Company’s claims.

{¶ 24} “4. The Painting Company understood the January 6, 2006, letter to be The Ohio State University’s extension of the claim determination period under Section 8.4.2.1. of the General Conditions of the parties’ contract, requesting additional information and further discussion and consideration of the claims. The letter was not a final determination of The Painting Company’s claims.”

{¶ 25} R.C. 153.16 (B) provides:

{¶ 26} “Notwithstanding any contract provision to the contrary, any claim submitted under a public works contract that the state or any institution supported in whole or in part by the state enters into for any project subject to sections 153.01 to 153.11 of the Revised Code shall be resolved within one hundred twenty days. *After the end of this one hundred twenty-day period, the contractor shall be deemed to have exhausted all administrative remedies for purposes of division (B) of section 153.12 of the Revised Code.*” (Emphasis added.)

{¶ 27} R.C. 153.12 (B) states in pertinent part:

{¶ 28} “If a dispute arises between the state and a contractor concerning the terms of a public improvement contract let by the state or concerning a breach of the contract, and after administrative remedies provided for in such contract and any alternative dispute resolution procedures provided in accordance with guidelines established by the director of administrative services are exhausted, the contractor may bring an action to the court of claims in accordance with Chapter 2743 of the Revised Code. * * * As used in this division, ‘dispute’ means a disagreement between the state and the contractor concerning a public improvement contract let by the state.”

{¶ 29} With its motion, defendant submitted plaintiff’s August 23, 2005 letter, which states, in part: “We hereby submit this as an appeal of the decision of the University dated August 3, 2005, and pursuant to Article 8.4 of the contract.”

{¶ 30} Section 8.4 of the contract states, in part: “If the efforts of the Project Administrator do not lead to resolution of the claim, the Contractor may appeal to the State Architect in writing. The State Architect shall, within 30 days of receipt of the notice, render a decision or schedule a meeting, unless a mutual agreement is made to extend such a time limit. * * * The State Architect shall, within 60 days of any meeting scheduled pursuant to paragraph GC 8.3, render a decision on the claim, unless a mutual agreement is made to extend such time limit. The decision of the State Architect shall be the final and conclusive decision of the Department, as required by section 153.12(B), ORC.”

{¶ 31} Construing the evidence most strongly in favor of plaintiff, the court finds that there is no genuine issue as to any material fact. Regardless of the parties’ differing interpretations of the January 6, 2006 letter, pursuant to R.C. 153.16(B), plaintiff’s administrative remedies were deemed exhausted 120 days after its claim was submitted on August 23, 2005. See *R.E. Schweitzer Construction Co. v. University of Cincinnati* (Aug. 27, 2007), Ct. of Cl. No. 2007-02114; *Bla-Con Industries, Inc. v. Miami University*, Ct. of Cl. No. 2007-01738, 2007-Ohio-3869. Therefore, plaintiff had until December 21, 2007, to file its complaint in this court. The court finds that plaintiff failed to timely file its complaint, and, accordingly, defendant’s motion for summary judgment shall be granted.

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JUDGMENT ENTRY

An oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

JOSEPH T. CLARK
Judge

cc:

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HTS/cmd
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