

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

The Painting Company,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-78 (C.C. No. 2008-08531)
The Ohio State University,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on October 29, 2009

Mason Law Firm Co., L.P.A., William H. Dulaney, III, and Aaron T. Tulencik, for appellant.

Richard Cordray, Attorney General, *Lisa J. Conomy* and *William C. Becker*, for appellee.

APPEAL from the Court of Claims of Ohio.

BRYANT, J.

{¶1} Plaintiff-appellant, The Painting Company, appeals from a judgment of the Court of Claims of Ohio granting the summary judgment motion of defendant-appellee, The Ohio State University, on plaintiff's claim for breach of a contract arising out of the

painting and wall covering trade work plaintiff rendered during construction of the Ross Heart Hospital at The Ohio State University. Plaintiff assigns a single error:

The Court below erred by ruling that The Painting Company's ("TPC") Complaint was not filed within the statute of limitations and thereby granting The Ohio State University's (the "University") Motion for Summary Judgment. The University failed to demonstrate that it was entitled to judgment as a matter of law. Additionally, the University failed to show that the statute of limitations runs on undisputed and uncontested amounts. Moreover, Painting Company's remaining causes of action were indeed timely.

Because the two-year statute of limitations had expired when plaintiff filed suit on July 29, 2008, we affirm.

I. Procedural History

{¶2} On or about May 7, 2003, defendant executed a public works contract under which plaintiff agreed to perform painting and wall covering work for the specified price of \$370,225 (the "contract") as part of the construction of the Ross Heart Hospital. Plaintiff asserts that, after it signed the contract with defendant, the law governing the ratio of journeymen to apprentices changed, causing plaintiff unanticipated expenses. Moreover, according to plaintiff, defendant failed to maintain the agreed construction schedule, made numerous design changes, and required additional work not in the contract, all with assurances of compensation. As a result, pursuant to the dispute resolution procedure set forth in Article 8 of the contract, plaintiff submitted a written claim to the project administrator on January 27, 2005 both requesting payment of the outstanding balance owed under plaintiff's contract with the state and seeking compensation for additional work and expenses not covered under the contract, including

\$155,175.10 in outstanding change order requests and \$115,000 in "additional compensation."

{¶3} Although the project administrator was the first to consider plaintiff's claims, Section 8.4.1 of the contract's dispute resolution procedures provides that plaintiff may appeal in writing to the State Architect for a final administrative decision if the project administrator's efforts do not resolve the claim. The contract requires the State Architect to render a decision or schedule a meeting within 30 days of receiving notice of plaintiff's appeal, "unless a mutual agreement is made to extend such time limit. The purpose of this meeting shall be to settle the dispute." Section 8.4.2. The contract further requires that within 60 days of the scheduled meeting, the State Architect must render a decision on the claims, unless such time limit is extended through mutual agreement. Section 8.4.2.1. According to the contract terms, "[t]he decision of the State Architect shall be the final and conclusive decision of the Department, as required by Section 153.12(B), ORC." Section 8.4.2.2.

{¶4} Here, when the project administrator rejected plaintiff's claims, plaintiff filed a written appeal with the State Architect on August 23, 2005 for a final administrative decision pursuant to Section 8.4 of the contract. In an effort to settle the issues and resolve the dispute, the parties had a meeting on November 30, 2005 in compliance with Section 8.4.2 of the contract. Pursuant to Section 8.4.2.2, the State Architect sent plaintiff a letter on January 6, 2006 summarizing plaintiff's claims and presentation at the November 30, 2005 meeting and notifying plaintiff that "[b]ased on the information submitted, I find that there is insufficient information in your presentation and submission to justify additional compensation." The letter then addressed and resolved each claim

individually, with the State Architect either denying the claim, requesting revisions or additional information regarding the claim, or postponing a ruling on the claim pending a review of its validity. Apparently understanding the letter to be merely a request for information rather than a final decision, plaintiff contemplated defendant's continuing consideration of its claim but did not provide the information or revisions the State Architect requested.

{¶5} Plaintiff contends it unsuccessfully attempted several times to schedule a follow-up meeting with defendant; defendant avers it was not aware of the attempts. Plaintiff ultimately sent a letter to defendant dated September 20, 2007 concerning the status of its claims for additional compensation and the outstanding contract balance; plaintiff requested that the claims be submitted to alternative dispute resolution as provided in the contract. Defendant responded on October 3, 2007, stating the State Architect's letter of January 6, 2006 was defendant's final decision and advising plaintiff the outstanding contract balance would be released once plaintiff submitted its final close-out documents. According to the record, plaintiff never submitted the final close-out documents to defendant for release of the outstanding contract balance.

{¶6} Instead, plaintiff filed a complaint in the Court of Claims of Ohio on July 29, 2008 asserting a breach of contract claim against defendant for "failing to pay [plaintiff] the amount due under the Contract" and "denying [plaintiff's] request for equitable adjustment to the Contract[.]" Defendant submitted a motion to dismiss pursuant to Civ.R. 12(B)(6) or, alternatively, for summary judgment under Civ.R. 56, contending the statute of limitations in R.C. 2743.16 time-barred plaintiff's action. After the parties filed briefs

supporting and opposing the motion, the trial court granted the motion for summary judgment, concluding plaintiff's action was time-barred. Plaintiff appeals.

II. Assignment of Error

{¶7} Plaintiff's single assignment of error asserts the trial court erred in granting defendant's summary judgment motion and, in particular, in determining the statute of limitations began to run 120 days after plaintiff submitted its claims to the State Architect on August 23, 2005 for a final administrative decision. Because defendant's motion to dismiss required material outside the pleadings, the Court of Claims properly treated it as a Civ.R. 56(C) motion for summary judgment rather than a Civ.R. 12(B)(6) motion to dismiss. Civ.R. 12(B). We review its decision accordingly.

{¶8} An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; see also, *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108 (determining that ascertaining when a cause of action accrues is a matter of law and is reviewed de novo). Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are 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, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 1997-Ohio-221.

{¶9} In waiving its immunity from liability pursuant to the terms of R.C. 2743.02(A)(1), the state consented to be sued and to have its liability determined subject to limitations set forth in R.C. Chapter 2743. According to R.C. 2743.16(A), "civil actions against the state * * * 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."

{¶10} Here, employing the administrative remedies set forth in Article 8 of its public works contract with defendant, plaintiff appealed to the State Architect for resolution of its claims. Pursuant to R.C. 153.12(B), plaintiff had to exhaust those administrative remedies before filing an action on the disputed claims. More particularly, R.C. 153.12(B) states in relevant part that "[i]f 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 * * * are exhausted*, the contractor may bring an action to the court of claims in accordance with" R.C. Chapter 2743. (Emphasis added.)

{¶11} R.C. 153.16(B), in turn, sets a time limitation for the administrative remedies and procedures, specifying when they are deemed exhausted. According to R.C. 153.16(B), "[n]otwithstanding any contract provision to the contrary, any claim submitted under a [state] public works contract" subject to R.C. 153.01 to 153.11 "shall be resolved within one hundred twenty days." After the conclusion of the 120-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." R.C. 153.16(B).

{¶12} The parties here dispute the effect of R.C. 153.12(B) and 153.16(B) in determining when plaintiff's breach of contract action accrued and the statute of limitations period commenced. Defendant argues that plaintiff's cause of action accrued 120 days after plaintiff's claim was submitted to the State Architect, or December 21, 2005. Alternatively, defendant contends plaintiff's claim accrued no later than January 6, 2006 when the State Architect sent the final decision letter denying plaintiff's claim. Plaintiff, by contrast, maintains that R.C. 153.12(B) and 153.16(B) do not concern accrual, but rather prescribe a jurisdictional prerequisite for plaintiff's cause of action. According to plaintiff, the State Architect's January 6 letter was not a final decision. As a result, plaintiff asserts it suffered no actual damages, a necessary precondition for its cause of action to accrue, until October 3, 2007 when defendant advised it denied plaintiff's claim.

{¶13} If, as plaintiff asserts and defendant argues in the alternative, only an actual final decision from the state could be deemed a rejection for purposes of when a cause of action accrues, then the parties would be permitted to delay a decision indefinitely, preclude the exhaustion of administrative remedies, and either forestall final resolution of the claim through litigation or, at the least, render dubious the date the cause of action accrued. Such an interpretation nullifies the ostensible purpose of R.C. 153.16(B): to ensure a remedy against the state for claimants such as plaintiff by defining when administrative remedies are exhausted, the cause of action accrues, and a cause of action may be filed in the Court of Claims. Under the statutory provisions at issue, the state is aware it must resolve disputes within 120 days or face legal action, so its failure to determine a claim before that 120-day period lapses, in effect, rejects the claim, withholds

money allegedly owed to the plaintiff, and permits the plaintiff to institute an action against the state.

{¶14} Plaintiff, however, responds that its cause of action did not accrue until defendant finally rejected its claim, since only then did plaintiff suffer injury. "Ordinarily, a cause of action does not accrue until actual damage occurs; when one's conduct becomes presently injurious, the statute of limitations begins to run." *Children's Hosp. v. Ohio Dept. of Public Welfare* (1982), 69 Ohio St.2d 523, 526. A cause of action for money wrongfully withheld accrues when it is actually withheld. *Id.*, paragraph two of the syllabus; *Osborn Co. v. Dept. of Admin. Servs.* (1992), 80 Ohio App.3d 205, 208. Consistent with those principles, R.C. 153.12(B) and 153.16(B), construed together, provide that any claim submitted under a public works contract with the state necessarily will accrue, at the latest, by the end of the 120-day statutory period when, by operation of law, all administrative remedies are deemed exhausted under R.C. 153.16(B), the claim is deemed rejected, and money the state allegedly owes is deemed withheld. See *Children's Hosp.; Osborn.*

{¶15} Plaintiff submitted its appeal to the State Architect on August 23, 2005 for administrative review of its claims for payment of the outstanding balance due on the contract and payment of additional compensation for work and expenses not covered under the contract. Plaintiff's breach of contract action in the Court of Claims was grounded on the same claims. Under the terms of R.C. 153.12(B) and 153.16(B), plaintiff's cause of action for breach of contract accrued by December 21, 2005, when the 120-day period lapsed after plaintiff's appeal to the State Architect, regardless of whether the State Architect subsequently issued a final decision on the validity of plaintiff's claims.

According to R.C. 2743.16(A), plaintiff had two years, or until December 21, 2007, to file its complaint in the Court of Claims. Because plaintiff did not file its complaint until July 29, 2008, the Court of Claims properly granted summary judgment to defendant on plaintiff's breach of contract claims.

{¶16} Plaintiff notes the Court of Claims determined all of plaintiff's claims are time-barred. Plaintiff suggests that even if the Court of Claims is correct concerning plaintiff's claims for additional compensation, the court erred regarding the uncontested outstanding balance owed under the original terms of plaintiff's contract with the state. Indeed, a portion of defendant's letter to plaintiff on October 3, 2007 states that "[o]ur records indicate a final payment of \$26,666.49, plus escrow of \$15,272.28, and any accrued interest by Huntington Bank." The letter instructs that "to release these funds we need an Affidavit of Contractor, Contract Completion Certificate, Certificate of Warranty of Commencement, and the final payment." According to the letter, "[o]nce we receive these approved documents plus prevailing wage approval, the funds can be released for contract 315-1999-939-707 to The Painting Company."

{¶17} Despite the instructions, plaintiff never submitted the close-out documents to defendant. Instead, plaintiff filed its complaint in the Court of Claims asserting a breach of contract action based, in part, on defendant's alleged failure to pay plaintiff "the amount due under the Contract," including "the remaining balance of its Contract in the amount of \$14,829.09" and "the retainage withheld from its Contract in the amount of \$15,272.28." (Complaint.) Plaintiff thus merged its claims for amounts due under the contract into the breach of contract action filed in the Court of Claims.

{¶18} Because (1) plaintiff exhausted its administrative remedies and its breach of contract action accrued by operation of law no later than December 21, 2005, and (2) the Court of Claims properly granted summary judgment against plaintiff's breach of contract action as statutorily time-barred, plaintiff is barred from seeking further administrative or judicial review of its claims under the contract, including its claims for the outstanding balance due under the contract. Section 8.4.2.2 of the contract; R.C. 153.12(B), 153.16(B), and 2743.16(A).

{¶19} In the final analysis, plaintiff's claims accrued 120 days after plaintiff submitted them to the State Architect. Because plaintiff did not commence its action against the state within two years after the expiration of the 120 days, the trial court did not err in granting defendant's motion for summary judgment. Plaintiff's single assignment of error is overruled, and the judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

SADLER and TYACK, JJ., concur.
