

[Cite as *Accurate Elec. Constr., Inc. v. Ohio State Univ.*, 2017-Ohio-1132.]

ACCURATE ELECTRIC
CONSTRUCTION, INC.

Plaintiff

v.

THE OHIO STATE UNIVERSITY

Defendant

Case No. 2014-00961

Judge Patrick M. McGrath
Referee Dale A. Crawford

DECISION

{¶1} Now before the court are plaintiff's objections to the referee's August 18, 2016 and November 18, 2016 recommendations.¹

{¶2} In its objections filed on September 2, 2016, plaintiff raises the following six objections:

- 1) The referee erred by weighing the evidence;
- 2) The referee misunderstood Accurate's argument regarding the University's failure to comply with its contractual obligations;
- 3) The referee misapplied the contractual notice requirement;
- 4) Summary judgment was improper because Accurate presented evidence that the University failed to follow its own contract procedures and thereby waived the Article 8 requirements;
- 5) The referee erred in granting summary judgment as to the remaining contract balance;
- 6) The referee erred by granting the University's leave to file a reply brief but denying Accurate's motion for leave to file a sur-reply.

¹Plaintiff's motions for leave to exceed the page limitation filed on September 2, 2016 and December 1, 2016 are hereby GRANTED.

In its additional objection filed with leave from the court on December 1, 2016, plaintiff raises the following objection:

- 7) The referee erred in dismissing Counts III and IV because the University failed to meet its initial burden at summary judgment; and, because Accurate presented substantial evidence regarding the University's breach of express and implied warranties and its breach of good faith and fair dealing.

a. Objection #1: The Referee erred by weighing the evidence

{¶3} Accurate contends that the court is obligated to deny OSU's summary judgment because Accurate presents "some evidence" that, when viewed in a light most favorable to Accurate, demonstrates that reasonable minds may conclude that Accurate either complied with Article 8 or that OSU waived its right to enforce the Article 8 requirements.

{¶4} The referee may not weigh the evidence before him and Accurate argues that is exactly what the referee did in this case. See *Kunkler v. Goodyear Tire & Rubber Co.*, 36 Ohio St.3d 135, 522 N.E.2d 477 (1988); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, 919 N.E.2d 227 (10th Dist.). Accurate argues that the waiver issue, that is, whether or not Accurate waived its right to pursue claims by failing to comply with the Article 8 requirements and/or whether OSU waived the Article 8 requirements by its course of conduct throughout the project, is inherently fact-intensive and therefore ill-suited for summary judgment. Accurate argues that the referee ignored evidence that it complied with the Article 8 process and improperly weighed evidence that OSU waived the Article 8 process.

{¶5} The referee stated that "Plaintiff provides numerous examples of ways in which it believes that OSU did not comply with its own contract," and "Plaintiff includes a number or other examples that it believes demonstrates that OSU, by its conduct, waived the Article 8 requirements throughout the project." Accurate argues that the

referee applied a heightened burden of proof by finding that the “waiver of the claims process must be established by writing ‘or by such clear and convincing evidence as to leave no reasonable doubt about it.’” *Foster Wheeler Enterprises, Inc. v. Franklin County Convention Facilities Auth.*, 78 Ohio St.3d 353, 1997-Ohio-202, 678 N.E.2d 519, quoting *Ashley v. Henahan*, 56 Ohio St. 559, 47 N.E. 573 (1897). It argues that the referee inappropriately weighed the evidence in making the determination that there is no “such clear and convincing evidence as to leave no reasonable doubt” that the University waived the Article 8 process.

{¶6} The court finds, upon careful consideration, that the referee applied the correct standard and in doing so did not improperly weigh the evidence. The referee analyzed the record and found “no evidence that OSU waived the Article 8 requirements for this project.” He did not need to weigh the evidence to determine whether or not it was clear and convincing as there was no evidence of OSU’s waiver, be it clear and convincing or otherwise. There was evidence that OSU may have breached other portions of the contract. However, he clearly explains that “[a] breach of a portion of the terms of a contract does not discharge the obligations of the parties to the contract * * * Therefore, even if Defendant did breach other provisions of the General Conditions, which did not amount to material breaches, said breach does not, in turn, allow Plaintiff to breach Article 8 by failing to provide timely notice of its claims.” Upon independent review of the record the Court finds that Accurate did provide some evidence which it argued demonstrates OSU’s waiver of the Article 8 process. However, all of the assertions and evidence presented deal with other provisions of the contract and there is no evidence in the record that OSU waived the Article 8 process.

{¶7} Accordingly, plaintiff’s first objection is OVERRULED.

b. Objection #2: The Referee misunderstood Accurate's argument regarding the University's failure to comply with its contractual obligations

{¶8} Accurate argues that, pursuant to Article 8.1.2.1, “a claim arising from a determination of the Contracting Authority concerning a Field Work Order begins to run on the date on which the Contracting Authority issues its determination.” The referee found that there is “no authority from which the Court can infer that this exception applies to untimely claims.” Accurate asserts that the Contracting Authority never issued a determination, therefore, the 10-day time period never started and Accurate's claim cannot be untimely. However, in its objections Accurate states, “[OSU] did not follow its contractual obligations to issue a Field Work Order such that the Contracting Authority did not issue a determination.” Accurate was aware of this alleged breach during the project, and certainly became aware of the breach at some point prior to the completion of the project. Accurate's claim regarding OSU's breach that resulted in a lack of a Field Work Order and subsequent lack of determination was therefore untimely. While the referee's verbiage may not be clear on this point, the court finds that the referee did understand the argument and found that Article 8.1.2.1 did not extend Accurate's time to file its claim indefinitely as Accurate seems to suggest.

{¶9} Accordingly, plaintiff's second objection is OVERRULED.

c. Objection #3: The Referee Misapplied the contractual notice requirement

{¶10} Accurate argues that the referee erroneously found that its claims “deal with matters that ‘arose’ prior to ten days before the assertion of claim,” ignoring the next sentence wherein the Referee stated that, “[s]ince the Plaintiff was off the project by August 2013, all of the matters that ‘arose’ must have taken place at least four months prior to the filing of the claim.” Accurate argues that the referee ignored the deposition testimony of Ms. Purtee who testified that when an issue arose is not

relevant for purposes of Article 8 because that is not the event giving rise to a claim. Accurate contends that the referee started the 10-day period based upon when the factual events occurred during the project, however, the correct method under the contract is to start the 10-day period when the claim arises.

{¶11} The court finds that the referee did not misapply the notice requirement. The referee makes no determination as to when, during the project, the individual claims actually arose. Rather, the referee finds that the claims had to have arisen at some point before plaintiff's first initiation of its Article 8 claim, which occurred four months after the completion of the project. There has to be some limit to claims brought related to public construction projects. Accurate admits that it initiated its claim four months after the completion of the project. Regardless of the reason why it felt entitled to do so, Accurate was bound by a contract which contains a 10-day limit on the initiation of claims. Even if Accurate argues that its claim did not arise until the last day of the project it does not excuse the filing of a claim four months later.

{¶12} Accordingly, plaintiff's third objection is OVERRULED

- d. Objection #4: Summary judgment was improper because Accurate presented evidence that the University failed to follow its own contract procedures and thereby waived the Article 8 requirements

{¶13} For the reasons stated above in objections one and two, plaintiff's fourth objection is OVERRULED.

- e. Objection #5: The Referee erred in granting summary judgment as to the remaining contract balance

{¶14} Accurate argues that the referee erred in granting summary judgment regarding the final unpaid balance of \$304,514.13, which according to Accurate is an amount that it is owed for work completed during the project. Accurate contends that

this amount is not in dispute. It admits that it never submitted a final pay application, as noted by the referee. However, for the first time, it provides an explanation for the failure to submit the application: it believes it is actually owed more, hence the present claim, and it did not wish to take the risk that it would waive its claims by submitting a final pay application. Accurate argues that the failure to submit the final pay application does not change the fact that it is still owed a significant amount of money for work that it completed on the project. The referee made his recommendation based on what was properly before him at the time. He found that, pursuant to Civ.R. 56(C), OSU established its burden of showing that there was an absence of evidence to support Accurate's case regarding whether or not it submitted a final pay application and Accurate failed to meet its reciprocal burden under Civ.R. 56(E). Therefore, the referee's recommendation was correct and consistent with the law.

{¶15} Accurate acknowledges that it did not submit a final pay application and still has yet to do so. It also seems to acknowledge that it understands that it must submit a final pay application in order to receive the unpaid contract balance. Based on its interpretation of Article 9.7.3, Accurate chose not to submit a final pay application out of a fear that it would waive its claims for an increase in the sum. Upon review of the record, the court finds that this argument was not raised at the summary judgment stage.

{¶16} Article 9.7.3 provides, "[t]he acceptance of final payment by the Contractor * * * constitutes the payee's waiver of all claims against the State except those previously made in writing under Article 8 and identified by that payee as unsettled at the time of the final Contractor Payment Request."

{¶17} The provision cited by Accurate as its reason for failing to file a final pay application contains a specific exception for waiver of claims made pursuant to Article 8. Accurate made its Article 8 claim on January 3, 2014 and later included its claim for the unpaid funds in its substantiation letter. Considering the fact that Article 9.7.3 effectively

saves claims made pursuant to Article 8, the court sees no reason why Accurate chose not to submit its final pay application. It seems the legislature has specifically expressed its intention to ensure that a contractor's claims could not be extinguished based on the state paying an outstanding contract balance. See R.C. 4113.62.

{¶18} Accurate knows that it must submit a final pay application for payment. It has not done so. Therefore, there are no issues of material fact regarding the unpaid contract balance. This matter is not properly before the court because the condition subsequent to payment, the submission of the final pay application, has not occurred.

{¶19} Regardless of the appropriate application of Article 9.7.3 or R.C. 4113.62, the court finds that the referee's recommendation was consistent with the law given what was properly before him on summary judgment, pursuant to Civ.R. 56.

{¶20} Accordingly, plaintiff's fifth objection is OVERRULED.

- f. Objection #6: The Referee erred by granting the University leave to file a reply brief but denying Accurate's motion for leave to file a sur-reply

{¶21} The referee clearly states in his recommendation that he did "not interpret this reply as positing any new arguments, rather clarifying previously made arguments. Therefore, a surreply from Plaintiff on issues already addressed is unnecessary." In light of the fact that plaintiffs were granted leave to file a memorandum contra in excess of the page limitation and subsequently filed a memorandum contra in excess of the 15-page limit by more than 23 pages, the court finds the referee's position that a surreply was unnecessary on issues already addressed to be reasonable.

{¶22} The court reviewed OSU's reply brief and agrees with the referee that it does not contain any new arguments necessitating a surreply and that the arguments made in the 38-page memorandum contra more than adequately addressed any clarification made by OSU in its reply.

{¶23} Accordingly, plaintiff's sixth objection is OVERRULED.

- g. Objection #7: The Referee erred in dismissing Counts III and IV because the University failed to meet its initial burden at Summary Judgment; and, because Accurate presented substantial evidence regarding the University's breach of express and implied warranties and its breach of good faith and fair dealing.

{¶24} Accurate argues that the referee's recommendation regarding Counts III and IV was a rush to judgment and not based on law. The court disagrees. The referee's decision appears to be based on a thorough analysis of the facts and applicable law. The referee ordered the parties to file additional briefs in support of their positions prior to rendering his decision. Therefore, it can hardly be said that his recommendation was a rush to judgment.

{¶25} Accurate argues that OSU's summary judgment should have been denied because it failed to meet its initial burden, pursuant to Civ.R. 56 and it was error to allow additional briefing on the matter. However, it provides no support for this position and the court finds no authority forbidding a trial court from requesting and considering additional briefs in support of a motion for summary judgment.

Count III

{¶26} Accurate argues that it offered substantial support for its claim regarding OSU's breach of express and implied warranties.² Plaintiff describes the alleged breach of warranties in paragraphs 42-45 of its Complaint:

42. OSU breached its obligation to Accurate to provide Accurate with a site upon which Accurate could perform its work without hindrance,

²Accurate argues that OSU's reliance on the deposition testimony is misplaced and the court should not give any credence to the testimony. It asserts that, pursuant to Civ.R. 30(B)(5), the notices of depositions were not sufficiently particular such that Bob Beal's testimony would bind Accurate as a corporation. Therefore, there is no testimony that can be properly attributed to Accurate that there were no express or implied warranties breached by OSU on this project. The court finds that the inclusion of Mr. Beal's testimony did not affect the referee's decision as there is no reference to the testimony in the recommendation.

interference, or delay and to do those things which it promised to do at such time and in such manner as would not hinder, interfere, or delay accurate.

43. OSU breached its obligation to Accurate by unreasonably denying Accurate's legitimate claims for additional compensation necessary to meet the mandated contractual end dates.

44. OSU breached its obligation to Accurate to promote teamwork, cooperation, and respect amongst all of the contractors on the Project.

45. OSU breached its obligations to Accurate when it failed to schedule and coordinate the Project so as not to make the performance more difficult and costly than anticipated.

{¶27} In its brief filed on September 2, 2016, Accurate described in detail the evidence that purportedly supports its position of its breach of warranty claims. Accurate incorporated those arguments in its December 1, 2016 objections and expanded upon them.

{¶28} Accurate contends that in his attempt to distinguish *Valentine Concrete, Inc. v. Dept. of Adm. Serv.*, 62 Ohio Misc.2d 591, 617 (Ohio Ct. Cl. 1991) the referee erroneously states that the case was decided on summary judgment. The court agrees that this was a misstatement as the *Valentine* decision was rendered after a lengthy trial on the merits. Accurate also contends that *Valentine* upholds the long-standing duty of the state to provide a construction site to the contractor so that it can perform without hindrance, interference, or delay and the court should not disturb that sound reasoning to protect the referee's decision. The court agrees that there is well-established case law supporting Accurate's position that the state has a duty to provide a site upon which contractors can perform their work. However, the referee found that Accurate's breach of warranty claims, even those related to providing a site free from hindrance, interference, or delay is ultimately just a breach of contract claim – of which Accurate waived its right to pursue by failing to give timely notice.

{¶29} Upon a thorough review of the record, the court agrees with the referee that “Plaintiff was aware of the claim described in paragraph 42, throughout the project, yet failed to give timely notice of its claim pursuant to Article 8.” The court also agrees that “Accurate has failed to demonstrate how its breach of warranty claim is any different than its breach of contract claim as it pertains to the changes in schedule referenced in paragraphs 43 and 45 of its Complaint.” Likewise, the court agrees that plaintiff has failed to demonstrate how its alleged breach of warranty described in paragraph 44 is separate and distinct from its breach of contract claim.

{¶30} There is no evidence in the record that OSU breached any implied or express warranties. Accurate argues that OSU’s unilateral issuance of a zero-cost change order (CO 363) is a breach of an implied warranty. However, by signing the contract, Accurate agreed that in the event of a claim (like the above-mentioned alleged breaches) it would give timely notice to OSU and follow the agreed upon process to resolve the dispute. According to Accurate, CO 363 resulted in higher costs because milestone activities were pushed, requiring predecessor activities to be completed near the end of the project and Accurate had to wait to work and then rush to complete the follow-up tasks. This is the type of claim specifically addressed in Article 8. Accurate was required to give notice of its claim when it decided not to sign CO 363 or at least at some point when it realized that the project costs would increase.

{¶31} OSU’s alleged breach of Article 4.4.3 in failing to coordinate a stakeholder meeting or develop a partnering agreement is a breach of the contract. It does not give rise to a separate breach of warranty claim for failing to conduct the meeting, nor does Accurate provide any evidence that the lack of the partnering meeting directly results in any damages save for its blanket assertion that the end result was Accurate incurring expenses for which OSU is liable. If Accurate incurred additional expenses at any time during the project, whether or not directly attributable to the breach of Article 4.4.3, it should have put OSU on notice of its claim.

{¶32} Accurate did not give timely notice of its claims and now it wants the court to overlook that failure and re-characterize the breaches of contract as breaches of warranties in order to proceed with its untimely claims. The court is not inclined to do so.

{¶33} Accordingly, plaintiff's seventh objection related to Count III is OVERRULED.

Count IV

{¶34} The court finds that the referee's interpretation of the law is accurate and therefore agrees with his recommendation. The court agrees that the "[c]ovenant of good faith is part of a contract claim and it does not stand alone as a separate cause of action from a breach of contract claim." The referee properly recommended that all of Accurate's claims were waived as it failed to give timely notice under Article 8. Therefore, in the absence of a contract claim, the claim of OSU's breach of good faith and fair dealing is properly dismissed.

PATRICK M. MCGRATH
Judge

[Cite as *Accurate Elec. Constr., Inc. v. Ohio State Univ.*, 2017-Ohio-1132.]

ACCURATE ELECTRIC
CONSTRUCTION, INC.

Plaintiff

v.

THE OHIO STATE UNIVERSITY

Defendant

Case No. 2014-00961

Judge Patrick M. McGrath
Referee Dale A. Crawford

JUDGMENT ENTRY

{¶35} Upon review of the record, the referee's decisions and the objections, the court finds that the referee has properly determined the factual issues and appropriately applied the law. Therefore, the objections are OVERRULED and the court adopts the referee's decision and recommendation as its own, including findings of fact and conclusions of law contained therein. 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.

PATRICK M. MCGRATH
Judge

cc:

Jason R. Harley
Peter D. Welin
250 West Street, Suite 550
Columbus, Ohio 43215

James E. Rook
William C. Becker
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Filed February 15, 2017
Sent to S.C. Reporter 3/28/17