

# Court of Claims of Ohio

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CERTEK, INC.

Case No. 2005-09138

Plaintiff

Judge Joseph T. Clark  
Referee Jack R. Graf Jr.

v.

## JUDGMENT ENTRY

THE OHIO STATE UNIVERSITY, et al.

Defendants

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{¶1} On May 2, 2007, the referee issued a decision recommending that plaintiff's motion for summary judgment be granted and that judgment be entered in plaintiff's favor in an amount yet to be determined. The referee stated that the only reasonable conclusion to draw from the evidence was that defendants had failed to provide written notice to plaintiff regarding the alleged defects associated with a laboratory that was built by plaintiff and delivered to defendants pursuant to a written purchase order. In addition, the referee noted that defendants paid on-site contractors to make modifications and improvements to the unit without first providing plaintiff with an opportunity to cure the alleged defects. The referee determined that the transaction between the parties was not governed by the UCC and that defendants violated the terms of the contract by withholding final payment of the full contract price.

{¶2} Civ.R. 53(D)(3)(b)(i) states, in part: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed." Defendants timely filed objections. Plaintiff filed an objection and a response to defendants' objections on May 29, 2007.

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{¶3} In their first objection, defendants argue that the referee granted judgment for plaintiff on grounds that were not presented in plaintiff’s motion for summary judgment. Plaintiff had asserted that although the contract between the parties was a mixed goods and services agreement, the predominant purpose of the agreement was for the sale of goods. As such, plaintiff asserted that R.C. Chapter 1302 governed the contract. In his decision, the referee held that “the transaction between the parties does not reflect predominately the sale of goods but rather that OSU executed a design-build construction contract that included both fabrication of goods and use of field labor. Ohio Revised Code Chapter 1302 does not apply where the evidence clearly indicates that the parties intended to create a construction contract for the erection of a building. As such, the court concludes that the UCC does not apply in the circumstances presented.”

{¶4} The referee also stated that “the evidence presented in a motion for summary judgment unequivocally establishes that neither a notice of defect was issued nor time for cure allowed. \* \* \* As a matter of law, the parties intended that written notice be given between them. While reviewing the evidence most strongly in favor of OSU; reasonable minds can come to but one conclusion in this case. Timely notice was not given to plaintiff of the alleged defects. Reasonable time to cure was not allowed to plaintiff. The contract terms did not allow OSU to undertake changes, enhancements, and alterations to the building and then to present a bill without negotiation.”

{¶5} In *Heider v. Unknown Heirs*, Wood App. No. WD-03-073, 2004-Ohio-3449, the appellate court found that the trial court erred by granting summary judgment on a ground not argued by the moving party. The court based its holding on *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, wherein the Supreme Court of Ohio held that when preparing a motion for summary judgment “the moving party must specifically give the basis of a summary judgment motion in order to allow the non-moving party an opportunity to fully respond.” In *Heider*, the court noted that the motion for summary judgment and the response to the motion addressed adverse possession; however, the trial court granted

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judgment on the basis of boundary law. The judgment was reversed because by granting the motion “on a ground not argued” the non-moving party was “not afforded a meaningful opportunity to respond.” *Heider* at ¶4.

{¶6} The rulings in *Mitseff* and *Heider* can be distinguished from this case. Plaintiff’s motion for summary judgment was premised upon both the lack of written notice and the failure to provide plaintiff with an opportunity to cure. Indeed, plaintiff asserted in its motion that defendants “hired several suppliers and contractors to perform alleged corrective work on the Laboratory. It did so without first notifying Certek of the alleged nonconformities or permitting Certek the opportunity to make the alleged necessary corrections as required by Ohio law.” Plaintiff also asserted that defendants had assumed control of the laboratory but that they refused to pay plaintiff the full contract price owed. Plaintiff maintained that defendants had no right or authority under the agreement to withhold funds for either corrective work or for enhancements to the building. The referee agreed.

{¶7} Upon review, the court finds that the referee decided the summary judgment motion on grounds that were clearly presented by plaintiff; that the referee based his analysis upon the contract terms and upon the deposition testimony of defendants’ senior project manager, Steve Middleton; and that the referee’s decision is consistent with the argument presented by both parties. For the foregoing reasons, defendants’ first objection is OVERRULED.

{¶8} Defendants also alleged that the referee erred because genuine issues of material fact exist regarding whether or not plaintiff breached the terms of its express warranty. Plaintiff maintains that the laboratory was constructed to specification and that any changes made by defendants either modified or enhanced the structure. The court finds that plaintiff’s position is supported by Middleton’s deposition testimony. In addition, the referee held that the contract “allows the purchaser to insist upon *further* compliance with all specifications when a defect is noticed. (Paragraph 5.) It also allows the purchaser

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at any time to make changes to the drawings and specifications upon written *notice*. (Paragraph 6.) It provides that when changes are demanded, a written equitable *adjustment* to cost was to be *negotiated* by purchaser and seller. (Paragraph 6.) As a matter of law, the parties intended that written notice be given between them.”

{¶9} Upon review, the court finds that pursuant to the terms of the contract, defendants were not permitted to make any changes that increase or decrease the cost without negotiating such with plaintiff.

{¶10} Plaintiff’s sole objection is that the contract was predominately one for the sale of goods and that, as such, the agreement is governed by the UCC. Plaintiff concedes, however, that such conclusion does not change the result, inasmuch as defendants were not entitled to impose a back-charge on plaintiff.

Upon review of the record, the magistrate’s decision and the objections, the court finds that the magistrate has properly determined the factual issues and appropriately applied the law. Therefore, the objections are OVERRULED and the court adopts the magistrate’s decision and recommendation as its own, including findings of fact and conclusions of law contained therein. The case will be set for trial on the issue of damages.

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JOSEPH T. CLARK  
Judge

cc:

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SJM/cmd

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