[Cite as *BLA-CON Industries, Inc. v. Miami Univ.*, 2007-Ohio-3869.]

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

BLA-CON INDUSTRIES, INC.

Plaintiff

v.

MIAMI UNIVERSITY

Defendant

Case No. 2007-01738

Judge J. Craig Wright

DECISION

{¶1} On February 15, 2007, defendant filed a motion to dismiss plaintiff's complaint pursuant to Civ.R. 12(B)(6), on the ground that plaintiff's claim is barred by the statute of limitations. On March 9, 2007, plaintiff filed an amended complaint and a response to defendant's motion to dismiss. On March 22, 2007, defendant filed a "renewed" motion to dismiss. On April 13, 2007, plaintiff filed a response. On April 20, 2007, the court conducted an oral hearing on defendant's motion.[1]

{¶2} In construing a motion to dismiss pursuant to Civ.R. 12(B)(6) for failure to state a claim, the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190. Dismissal under Civ.R. 12(B) based on a statute of limitations is proper only when the face of the complaint conclusively shows that the action is time-barred. *Leichliter v. Natl. City Bank of Columbus* (1999), 134 Ohio App.3d 26.

{¶3} Plaintiff alleges that it contracted with defendant to upgrade the fire alarm systems in defendant's residence halls and that, during the construction project, defendant provided more detailed diagrams requiring plaintiff to perform additional work. According to plaintiff, a dispute arose concerning the cost of the additional work and the parties

[1] As result of the hearing, plaintiff was granted leave to file a supplemental memorandum and defendant was granted leave to file a reply on or before May 2, 2007. Defendant filed a reply on May 4, 2007. Defendant's May 2, 2007, motion for an extension of time to file its reply is hereby GRANTED, instanter.

attempted to resolve the dispute using the procedure set forth in the contract. Plaintiff states in its complaint that it received a letter dated October 14, 2004, notifying it that Richard Norman, defendant's Vice President for Finance and Business Services, had approved "only a fraction of what [plaintiff] had demanded" for the additional work that was completed on September 17, 2001.

{¶4} Defendant contends that it is entitled to judgment as a matter of law because plaintiff's complaint was filed more than two years after the cause of action accrued, and thus, is barred by the statute of limitations. R.C. 2743.16(A) states in pertinent part:

{¶5} "[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."

{¶6} Defendant asserts that plaintiff's cause of action accrued when it had exhausted its administrative remedies under the contract and that pursuant to R.C. 153.16, plaintiff's administrative remedies were deemed to be exhausted 120 days after September 17, 2001, the date that the project was completed. R.C. 153.16 (B) provides, as follows:

{¶7} "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."

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

{¶9} "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."

{¶10} Plaintiff's March 9, 2007, response to defendant's initial motion to dismiss is accompanied by an affidavit of counsel to which counsel has attached a portion of the contract entered into by the parties. Article 11 of the contract states, in part: "Except as otherwise provided in this Contract, any dispute arising under this Contract shall be resolved, if possible, by agreement between the CONTRACTOR and the UNIVERSITY'S authorized representative(s) in the field, with concurrence of the UNIVERSITY Architect/Engineer. Should field resolution fail, the UNIVERSITY Architect/Engineer shall forward to the UNIVERSITY Associate Vice President within ten (10) days, all the information concerning the dispute including written comments from all parties involved. The Associate Vice President shall review the information and render a decision in writing to the Contractor. The decision of the Associate Vice President shall be final and conclusive, unless, within thirty (30) days from the date of receipt of the decision, the CONTRACTOR files a written appeal to the UNIVERSITY Vice President of Finance and Business Services, who shall review the dispute, conduct a hearing with the involved parties, and make a decision; which decision shall be final and binding upon all parties so concerned.

{¶11} "At no time shall the CONTRACTOR stop work on any item or area in dispute. The Contractor shall proceed and continue working as directed by the UNIVERSITY during the dispute process."

{¶12} Plaintiff first asserts that its claim in this case was not for work performed under a public works contact subject to R.C. sections 153.01 to 153.11. Plaintiff's assertion is predicated upon its characterization of this case as a quasi-contract claim

based upon the doctrine of unjust enrichment. However, the doctrine of unjust enrichment is "inapplicable if an express agreement existed concerning the services for which compensation is sought ***." *Pawlus v. Bartrug* (1996), 109 Ohio App.3d 796, 800; *Champion Contracting & Construction Co. v. Valley City Post No.* 5563, Medina App. No. 03CA0092-M, 2004-Ohio-3406, at ¶25-29 (finding that a contractor could not recover under the doctrine of unjust enrichment in a claim for additional work performed on a construction project where a written contract addressed the disputed subject matter). Inasmuch as plaintiff contends that it performed the work at issue pursuant to its obligations under the contract, and in light of the fact that plaintiff has submitted those claims for resolution under the Article 11 administrative remedies of the contract, the court finds that plaintiff's claim was "submitted under a public works contract" and subject to the provisions of R.C. 153.16 (B).

{¶13} It is undisputed that the Article 11 proceedings that were initiated by plaintiff constituted an administrative remedy under the contract. According to the complaint, plaintiff's claim for additional work arose no later than September 17, 2001, the date the project was completed. *Complete General Const. Co. v. Ohio Dept. of Transportation*, 94 Ohio St.3d 54, 62, 2002-Ohio-59, (finding that plaintiff's claim accrued when the contractor had "substantially completed its work on the project"). The court finds that, pursuant to R.C. 153.16, plaintiff's administrative remedies are deemed to have been exhausted on January 15, 2002, 120 days after its claims under the contract had accrued. Therefore, plaintiff had until January 15, 2004, to file its case in this court. Since plaintiff's complaint was not filed until January 26, 2007, the court finds that it was not timely filed.

{¶14} Plaintiff further asserts that the "savings" provision found in R.C. 2305.19(A) applies to its claim since this action was filed within one year of the filing of the notice of voluntary dismissal in Case No. 2005-10942. However, in order to avail oneself of the savings statute provided for in R.C. 2305.19, one must have timely filed an action.

{¶15} "[T]he savings statute, is not a statute of limitations. Neither is R.C. 2305.19 a tolling statute extending the period of a statute of limitations." *Reese v. Ohio State University Hospital* (1983), 6 Ohio St.3d 162, 163. Plaintiff filed its initial action more than two years after the cause of action accrued. Therefore, the court finds that since plaintiff's first action was not timely commenced pursuant to R.C. 2743.16(A), the savings statute in R.C. 2305.19 cannot be applied in this case.

{¶16} Accordingly, the court finds that the face of the complaint conclusively shows that the instant action filed on January 26, 2007, is time-barred.

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Plaintiff	Judge J. Craig Wright
v.	JUDGMENT ENTRY
MIAMI UNIVERSITY	
Defendant	

For the reasons set forth in the decision filed concurrently herewith, defendant's motion to dismiss is GRANTED and plaintiff's complaint is DISMISSED. 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.

_____
J. CRAIG WRIGHT
Judge

cc:

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