[Cite as *Peterman Plumbing & Heating, Inc. v. Pickerington Local School Dist., Bd. of Edn.*, 2010-Ohio-6587.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PETERMAN PLUMBING and HEATING, INC.

Plaintiff-Appellant

-vs-

BOARD OF EDUCATION PICKERINGTON LOCAL SCHOOL DISTRICT

Defendant-Appellee

JUDGES:
Hon. Julie A. Edwards, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 10 CA 9

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 08 CV 1382

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 30, 2010

APPEARANCES:

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Wise, J.

{¶1} Appellant Peterman Plumbing and Heating, Inc., appeals the decision of the Court of Common Pleas, Fairfield County, which granted a Civ.R. 41(B)(2) dismissal in favor of Appellee Board of Education, Pickerington Local School District, in a construction contract dispute. The relevant facts leading to this appeal are as follows.

{¶2} In January 2008, Appellee Board commenced the bidding process for two new school facilities: Sycamore Creek Elementary School and Toll Gate Road Elementary-Middle School. Appellant Peterman thereafter submitted a bid for the plumbing work on the two school projects.

{¶3} On March 14, 2008, the Board awarded appellant the plumbing contract, which incorporated by reference additional documents, particularly the "Project Manual." Of particular note in the contract are Paragraphs 9 and 10, which state as follows:

{¶4} "This Contractor [Peterman Inc.] will make connections to the Sanitary and Storm main piping which have been left terminated 5 feet outside of the Building lines by the Site Contractor.

{¶5} "This Contractor [Peterman Inc.] will furnish and install downspout boots per Specification Section 055000. This Contractor [Peterman Inc.] will also furnish and install storm sewer laterals from the downspout boots to the existing storm lines as shown on the civil drawings."

{¶6} As the project commenced, a dispute arose concerning appellant's contractual duty as to certain storm collection installation extending more than five feet beyond the school buildings' parameters. In essence, appellant took the position that

said installation was within the scope of the site work and site utilities contracts, rather than the scope of appellant's plumbing contract.

{¶7} On or about August 11, 2008, the Board sent appellant a 48-hour notice of default concerning the storm collection installation. Appellant responded via a letter on August 13, 2008, wherein it denied being in default, but agreed under protest, pursuant to Section 2.7.4 of the General Conditions, to complete the disputed installation pending a resolution.

{¶8} On September 12, 2008, appellant submitted a claim for additional compensation and time for the disputed installation, pursuant to Article 4.7 of the General Conditions. However, on October 10, 2008, the Board's agent, the architectural firm of Steed Hammond Paul, Inc., sent a letter to appellant stating that the claim for additional compensation and time was being denied. Appellant thereupon responded via letter that it disagreed with the analysis of Steed Hammond Paul, and that it would continue to assert its claims.

{¶9} On November 7, 2008, appellant filed a lawsuit against the Board, seeking additional compensation and damages for unjust enrichment in the amount of approximately $125,000.00. In essence, appellant has argued that it is not responsible for "storm main piping," even though the Board has taken the position that this work falls under the scope of appellant's duty to complete the "storm sewer laterals."

{¶10} The Board filed an answer on December 8, 2008 and an amended answer on February 26, 2009. In addition, on November 16, 2009, the Board filed a motion for summary judgment; however, the trial court denied same on December 24, 2009.

{¶11} The case proceeded to a bench trial on January 26, 2010. At the close of appellant's case, the Board orally moved to dismiss under Civ.R. 41(B)(2). The Board argued that (1) the contractual documents allocated the disputed work to appellant, (2) appellant had a contractual obligation to clarify or correct any ambiguities, and (3) appellant failed to comply with the contractual requirements for a contractor to provide notice of any claim to the Board and the managing contractor.

{¶12} On January 27, 2010, after taking the matter under advisement, the trial court granted the Board's motion to dismiss appellant's action.

{¶13} On February 26, 2010, appellant filed a notice of appeal. It herein raises the following four Assignments of Error:

{¶14} "I. THE TRIAL COURT ERRED IN HOLDING THAT THE CONTRACT BETWEEN THE PARTIES ALLOCATES THE WORK IN QUESTION TO PETERMAN.

{¶15} "II. THE TRIAL COURT ERRED IN APPLYING THE PATENT AMBIGUITY DOCTRINE AND IN HOLDING THAT PETERMAN HAD A CONTRACTUAL DUTY TO CLARIFY OR CORRECT AMBIGUITIES IN THE CONTRACT.

{¶16} "III. THE TRIAL COURT ERRED IN HOLDING THAT PETERMAN DID NOT COMPLY WITH NOTICE PROVISIONS CONTAINED IN THE CONTRACT.

{¶17} "IV. WHERE ALL OF THE EVIDENCE DEMONSTRATED THAT PETERMAN HAD A RIGHT TO RECOVERY, THE TRIAL COURT ERRED IN DISMISSING PETERMAN'S CLAIM PURSUANT TO OHIO CIVIL RULE 41(B)(2)."

Civ.R. 41(B)(2) Standard of Review

{¶18} Civ. R. 41(B)(2) provides, in pertinent part:

{¶19} “After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff’s evidence, the defendant, * * * may move for a dismissal on the grounds that upon the facts and the law, the plaintiff has shown no right to relief.”

{¶20} Civ.R. 41(B)(2) thus permits a defendant in a nonjury action to move for dismissal of the action after the close of the plaintiff's case. Dismissals under Civ.R. 41(B)(2) are similar in nature to directed verdicts in jury actions; however, because a Civ.R. 41(B)(2) dismissal is used in nonjury actions, it requires the trial court and reviewing court to apply different tests. See *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App.2d 34, 48, 409 N.E.2d 258. Civ.R. 41(B)(2) specifically provides the trial court may consider both the law and the facts. Therefore, under the rule, the trial judge, as the trier of fact, does not view the evidence in a light most favorable to the plaintiff, but instead actually determines whether the plaintiff has proven the necessary facts by the appropriate evidentiary standard. See *L.W. Shoemaker, M.D., Inc. v. Connor* (1992), 81 Ohio App.3d 74, 610 N.E.2d 470; *Harris v. Cincinnati* (1992), 79 Ohio App.3d 16. Even if the plaintiff has presented a prima facie case, dismissal is still appropriate where the trial court determines that the necessary quantum of proof makes it clear that plaintiff will not prevail. *Fenley v. Athens Cty. Genealogical Chapter* (May 28, 1998), Athens App.No. 97CA36, citing 3B Moore, Federal Practice (1990), Paragraph 41.13(4), at 41-177. Where the plaintiff's evidence is insufficient to sustain plaintiff's burden in the matter, the trial court may dismiss the case. *Levine v. Beckman* (1988), 48 Ohio App.3d 24, 27, 548 N.E.2d 267, (citations and emphasis omitted). However, if the judge finds the plaintiff has proven the relevant facts by the necessary quantum of proof, the motion

must be denied and the defendant is required to put on evidence. *Central Motors Corp,* supra.

{¶21} A trial court's ruling on a Civ.R. 41(B)(2) motion will be set aside on appeal only if it is erroneous as a matter of law or against the manifest weight of the evidence. *Ogan v. Ogan* (1997), 122 Ohio App.3d 580, 583, 702 N.E.2d 472, (citation omitted).

III.

{¶22} As we find appellant's Third Assignment of Error to be dispositive, we will address it first. Appellant contends the trial court erred in holding that appellant had not complied with the claim notice provisions of the school construction contract. We disagree.

{¶23} Sections 4.7.3 and 4.7.7 of the contract state as follows in pertinent part:

{¶24} "The Contractor shall submit all claims within 21 days after occurrence of the event giving rise to such Claim[.] The failure to submit the Claim Form properly completed and within the 21-day period shall be an irrevocable waiver of the Claim.

{¶25} "***

{¶26} "If the Contractor wishes to make [a] Claim for an increase in the Contract Sum, the Contractor shall give written notice to the Construction Manager and the Owner that it intends to make a Claim for an increase in the Contract Sum before processing to execute the work, and the Contractor shall submit the Claim Form as required by Sections 4.7.1 and 4.7.3."

{¶27} At the trial in this matter, Douglas Peterman testified that he had a conversation with Bill Cam, the superintendent for Ruscilli Construction, the managing general contractor, about the scope of the work as to the storm drainage requirements.

Mr. Peterman recalled that this discussion took place in late March or early April of 2008. According to Mr. Peterman, Cam told him he (Peterman) "was responsible for all the storm." Tr. at 67. Peterman responded to Cam that he interpreted the contract differently. Peterman also informed Brian Weiss and Roger McLoney, project managers for Ruscilli, of his disagreement about the requirements of the storm drainage work at this time.

{¶28} Appellant presently maintains that Douglas Peterman essentially believed he was taking a "work things out" approach to the disagreement, and thus did not immediately submit a claim for an increase in the contract sum for the plumbing work. It further asserts that Peterman was never provided a blank claim form with his packet of documents, and that he received letters from Ruscilli in August 2008 (about five months later) inviting him to submit a claim for additional compensation at that time. Appellant finally did so in September 2008, well outside the 21-day time limit for doing so.

{¶29} Although we have found little significant Ohio case law addressing time-certain contractual clauses for contract sum adjustments, our research indicates that other jurisdictions have required contractors in appellant's position to strictly comply with these clauses, absent waiver. See, e.g., *Anderson v. Golden* (D.C.Ga.,1982), 569 F.Supp. 122, 135 (finding that "[f]ailure to comply with the stipulated procedure [for submitting claims for an increase in the contract sum] would render the claim invalid."); *Rosick v. Equipment Maintenance and Service, Inc.* (Conn.App.,1993), 33 Conn.App. 25, 39, 632 A.2d 1134 (where evidence demonstrated that the contract provided a procedure for the plaintiff to make a claim for additional work on manhole covers, plaintiff is barred from raising a claim in quantum meruit); *Strand Hunt Const., Inc. v.*

Lake Washington School Dist., No. 414 (Wash.App. Div. 1, 2006), 134 Wash.App. 1053, 2006 WL 2536315 (stating "common sense dictates that an 'event' giving rise to a claim is an occurrence that required [appellant contractor] to incur an expense, not some subsequent moment of realization that it had incurred an expense in the past.")

{¶30} The present appeal exemplifies the importance of "change in contract sum" clauses in large construction projects, where the likelihood of disagreements over subcontractor duties increases with the project's complexity. The drafters of the public school construction contract at issue wisely put in a provision to require timely submission of claims in case of such disagreements, in order to encourage early resolution thereof while the project is ongoing, rather than to allow cost overruns and further burdens on taxpayer resources.

{¶31} Upon review of the record, we find no error as a matter of law in the enforcement of the 21-day claim clause, and we are not inclined to find the court's application of the clause to the evidence presented under Civ.R. 41(B)(2) was against the manifest weight of the evidence. *Ogan*, supra. The trial court therefore did not err in granting 41(B)(2) dismissal in favor of appellee.

{¶32} Appellant's Third Assignment of Error is overruled.

I, II, IV.

{¶33} Based upon our redress of appellant's Third Assignment of Error, we find the remainder of the assigned errors to be moot under the circumstances of this case.

{¶34} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Fairfield County, Ohio, is hereby affirmed.

By: Wise, J.

Edwards, P. J., concurs.

Hoffman, J., dissents.

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JUDGES

JWW/d 1116

Hoffman, J., dissenting

{¶35} I respectfully dissent from the majority opinion.

{¶36} I begin by noting my uncertainty as to when Appellant's "claim" arose. While it is certain a dispute existed concerning Appellant's obligations under the contract during the late March or early April, 2008 meeting, the existence of a dispute does not necessarily mean a claim arose at that time.[1] It seems equally or more plausible to me the event giving rise to the claim occurred either on August 11, 2008, when the Board sent Appellant a 48-hour notice of default, or on August 13, 2008, when Appellant notified the Board it denied being in default but agreed, under protest pursuant to Section 2.7.4 of the General Conditions, to complete the disputed installation.

{¶37} It is undisputed Appellant did not submit the required claim form until September 12, 2008. That alone constitutes more than 21 days from either August 11, or August 13, 2008; therefore, appears to support the trial court's finding of non-compliance with the notice provision. However, Appellant asserts the 21 day period did not begin to run until August 22, 2008, when the Board provided Appellant with a Statement of Claim Form, which Appellant submits was not included with the original Contract Documents provided to Appellant. Using August 22, 2008, as the date when the 21 day time limit commenced, Appellant maintains it "substantially" complied with the notice provision.

{¶38} The Board does not directly dispute in its brief to this Court – or identify where the record affirmatively demonstrates otherwise - it failed to provide the

[1] I recognize Appellant asserts its claim arose on July 22, 2008. For the reason discussed infra, I find the actual date the claim arose does not end the inquiry.

Statement of Claim Form to Appellant with the Contract Documents. Rather, the Board asserts, because Appellant was on notice of its need to submit a Statement of Claim Form, but did not timely request one, Appellant violated the notice provision. I disagree.

{¶39} Given the Board's failure to provide Appellant a Statement of Claim Form until August 22, 2008 (on which date the project manager invited Appellant to file its' claim), despite the fact the Board was aware of the dispute as early as April, 2008, I disagree with the decision of the majority to overrule this assignment of error.

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HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PETERMAN PLUMBING AND HEATING, INC.	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
BOARD OF EDUCATION PICKERINGTON LOCAL SCHOOL DISTRICT	:	
Defendant-Appellee	:	Case No. 10 CA 9

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed.

Costs assessed to appellant.

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JUDGES