

IN THE SUPREME COURT OF OHIO

Transtar Electric, Inc., :
: Case No. 2013-0148
Appellee, :
: On Appeal from the
v. : Lucas County Court of Appeals,
: Sixth Appellate District
A.E.M. Electric Services Corp., :
: Case No. G-4801-CL-02012-01100
Appellant. :

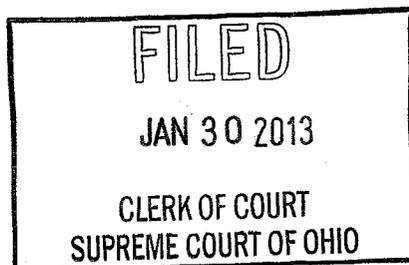
MEMORANDUM IN RESPONSE OPPOSING JURISDICTION
OF APPELLEE TRANSTAR ELECTRIC

Luther L. Liggett, Jr. (0004683)
Heather Logan Melick (0068756)
Luper Neidenthal & Logan
50 West Broad Street, Suite 1200
Columbus, OH 43215-3374
(614) 229-4423, telephone
LLiggett@LNLattorneys.com
(614) 229-4444, telephone
HMelick@LNLattorneys.com
(866) 345-4948, facsimile

James P. Silk (0062463)
Spengler, Nathanson P.L.L.
Four Seagate, Suite 400
Toledo, OH 43604-2622
(419) 252-6210, telephone
jsilk@snlaw.com
(419) 241-8599, facsimile

Counsel for Appellant A.E.M. Electric

Counsel for Appellee Transtar Electric



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Explanation of Why This Case DOES NOT Involve a Substantial Constitutional
Question and IS NOT a Case of Public or Great General Interest

Appellant A.E.M. brings a discretionary appeal on a factual determination, in which the Sixth District Court of Appeals applied the law as consistently enunciated in the last five decades by various courts of appeals.

A.E.M. begins by implying an appellate conflict by stating that, “the Sixth District’s interpretation as to acceptable language to transfer risk differs from the Tenth District as set forth in *Evans, Mechwart, Hamilton & Tilton, Inc. v. Triad Architects, Inc.* 196 Ohio App.3d 784, 2011-Ohio-4979.”[sic]¹ Appellant’s Memorandum, p. 1. But there is no actual conflict on an issue of law. The determination is one of agreed-to law applied to the particular facts of the Subcontract language.

The *Evans* Court focused on the need to understand the parties’ exact intent, so as to reduce any risk of forfeiture. “In the face of this ambiguity, courts avoid forfeiture by construing the pay-when-paid provision as a promise to pay and making payment due within a reasonable time.” [emphasis added.] *Evans*, supra, para. 17. Similar to the case at bar, the *Evans* Court then held, “We find that the language of section 12.5 is not explicit enough to indicate that the parties intended to create a condition precedent.” *Evans*, supra, para. 20.

¹ The correct name and citation is: *Evans, Mechwart, Hambleton & Tilton, Inc.*, 196 Ohio App.3d 784, 2011-Ohio-4979, 965 N.E.2d 1007 (10th Dist.).

Likewise, the Sixth District Court of Appeals came to the same conclusion by holding, "In the present matter, we find no language sufficient to clearly and unambiguously indicate that the parties intended to transfer the ultimate risk of nonpayment to the subcontractor." [emphasis added.] Decision and Judgment, para. 31.

Both Courts agree on the legal analysis required, followed by a fact determination as to whether the contract provision supports A.E.M.'s theory. The Sixth District reasoned differently on a phrase than the *Evans* Court on the law, but arrives at the identical result. At most, the Sixth District's analysis is a refinement after applying fifty years of consistent law.

Both Courts begin by relying upon the historic *Thos. J. Dyer Co. v. Bishop Internatl. Eng. Co.* (C.A.6, 1962), 303 F.2d 655. That case holds that a pay-when-paid provision is "designed to postpone payment for a reasonable period of time after work [is] completed, during which the general contractor will be afforded the opportunity of procuring from the owner the funds necessary to pay the subcontractor". *Evans*, supra, para. 9; Decision and Judgment, para. 16. So the law enunciated in all of the cited cases is neither new nor in conflict.

Merely applying the consistent law to the facts is not typically subject to review in a discretionary appeal to the Supreme Court. Appellant A.E.M. does not allege that the decision is against the manifest weight of the evidence. Accordingly, the Ohio

Supreme Court is not asked to review the factual findings below. See, e.g.: *Eastley v. Volkman*, 132 Ohio St.3d 328; 2012-Ohio-2179; 972 N.E.2d 517.

Appellant A.E.M.'s sole argument is that the Sixth District Court of Appeal's legal reasoning is at fault, even though consistent with the law used by other appellate courts, with the same result when applying the facts.

Statement of the Case and Facts

Absent from Appellant A.E.M.'s statement of facts is any evidence of the parties' intent to shift the risk of owner's payment to Appellee Transtar.

A.E.M. offered no remedy to Transtar. In its most glaring omission, A.E.M. did not interplead the owner into this case; nor did A.E.M. authorize Transtar to proceed against the owner, even though contemplated in the Subcontract:

At Contractor's option, Contractor may submit any such claim to Owner and prosecute the same on behalf of Subcontractor, with full cooperation of Subcontractor at Subcontractor's expense, or at Contractor's option, may authorize Subcontractor to pursue such claim in Contractor's name. Subcontract Agreement, page 12, Section 16, para. (iii).

A.E.M. also controls the parties' interaction with the owner: "Subcontractor [Transtar] shall... conduct any discussions with the Owner's representative through Contractor [A.E.M]." Subcontract Agreement, page 1.

Because Transtar is not in privity of contract for its Subcontract work, Transtar cannot sue the owner. *Floor Craft Floor Covering, Inc. v Parma Comm. Gen'l Hospital Assn.* (1990), 54 Ohio St.3d 1, 560 N.E.2d 206.

By doing nothing, A.E.M. effectively and affirmatively prevented Transtar from reaching the owner, even though insisting that A.E.M. had shifted the risk of non-payment to Transtar.

Nothing in the Subcontract contemplates not paying Transtar. Even if the owner terminated early, the Subcontract insured payment to Transtar:

In the event that the Prime Contract is terminated by Owner prior to completion, Contractor shall have the right to terminate this Subcontract and Subcontractor shall be entitled only to payment for that portion of the Work which is actually completed.... Subcontract Agreement, page 17, Section 32(jjjj).

A.E.M. benefitted by accepting Transtar's work. Yet A.E.M. offered no fact proof that the parties intended that Transtar provide its work for free. Hypothetically, if A.E.M.'s theory that the "pay-if-paid" clause is of the essence to this Subcontract, the Subcontract fails for lack of consideration.

It is A.E.M.'s thesis that the Subcontract language allows A.E.M. to not pay Transtar, with no recourse. But neither the factual record below, nor the language on the face of the Subcontract, offer any evidence of the parties' intent to shift the risk of non-payment to Transtar.

For A.E.M. to prove its thesis, numerous fact issues remain:

- 1) whether A.E.M. invoiced for Transtar's work;
- 2) whether the owner has not paid for Transtar's particular work, or just generally has not paid A.E.M. for other work;

- 3) the parties' intent as to types of risk to be shifted to Transtar;
 - 4) the reason that owner has not paid A.E.M., and whether it is the same as the parties' intent (or otherwise such as on A.E.M.'s own failure;)
 - 5) the efforts A.E.M. is taking to obtain payment; and
- the parties' intent as to Transtar's remedy in the event of non-payment.

Without such evidence, the Subcontract does not support A.E.M.'s claim merely on the face of its boilerplate language.

Argument in Support of Propositions of Law

Proposition of Law No. I: The language in the contract between A.E.M. and Transtar is a "pay-if-paid" provision, which without payment by the owner, does not require A.E.M. to pay Transtar.

Appellant A.E.M. offers no legal support for review of this case.

The Sixth District Court of Appeals did not find the Subcontract or its payment clause to be vague or ambiguous. Instead, the Court of Appeals found that neither the proof nor the Subcontract language evidenced a clear intent to shift the risk of payment to Appellee Transtar, as Appellant A.E.M. insists. "Consequently, absent language making manifest the intent to shift risk of payment, the provision must be construed as a pay-when-paid clause." Decision and Judgment, para. 30.

Therefore, the Court found A.E.M.'s proof lacking to support its interpretation on the face of the Subcontract language. Such is not a case for further review.

A.E.M.'s Proposition of Law offers a tautological conclusion with no support in

the citations that follow. All of the cases outline the same law: the process by which to measure each particular subcontract clause.

The Sixth District Court of Appeals advances the law by holding insufficient the mere use of “magic words” without actual proof of the parties’ intent. On this point, the Sixth District may reason differently than the Tenth District precedent; but the underlying rationale and result are identical.

The *Evans, Mechwart* case, quoting a federal case, suggests that the provision may state that it is a condition precedent or a shift of risk. In our view, this is insufficient. It must be made plain, in plain language, that a subcontractor must ultimately look to the owner of the project for payment. While the words “condition precedent” may be helpful, the term is not sufficiently defined to impart that both parties understand that the provision alters a fundamental custom between a general contractor and a subcontractor. Decision and Judgment, para. 30.

A.E.M. cites another court with a similar clause as not shifting the risk: “Company shall not be required to pay any such monthly billing of the subcontractor prior to the date Company receives payment of its corresponding monthly billing from the Owner.” *Power & Pollution Services, Inc. v. Suburban Power Piping Corp.*, 74 Ohio App.3d 89, 598 N.E.2d 69 (8th Dist. 1991). A.E.M. Memorandum, p. 4. There is nothing here to debate.

A.E.M. also cites another court which described what constitutes a “reasonable time” to await payment, not a bar to payment. *Chapman Excavating Co. v. Fortney & Weygandt, Inc.*, 8th Dist. Case No. 84005, 2004-Ohio-3867, 2004 Ohio App. LEXIS 3500. A.E.M. Memorandum, pp. 3-4. This case offers no contest, either.

A.E.M. also cites *Kalkreuth Roofing & Sheet Metal v. Bogner Constr. Co.*, 5th Dist. Case No. 97 CA 59, 1998 Ohio App. LEXIS 4694, unreported, in which case the court found the contract provision unenforceable as too ambiguous, just as in this case.

A.E.M. offers nothing else for the Supreme Court to review. A.E.M. merely wants a second chance to argue the same appeal as below.

Conclusion

The reasonable interpretation of the Subcontract provision at issue is one in which both parties secure payment, constituting consideration to both. Alternatively, to constitute a penal forfeiture to Transtar, the Subcontract failed to evidence the express intent of the parties. Such is the holding of the Sixth District Court of Appeals, which offers no issue for review.

Respectfully submitted,



Luther L. Liggett, Jr. (0004683)

Heather Logan Melick (0068756)

Luper Neidenthal & Logan
50 West Broad Street, Suite 1200
Columbus, OH 43215-3374
(614) 229-4423, telephone
LLiggett@LNLattorneys.com
(614) 229-4444, telephone
HMelick@LNLattorneys.com
(866) 345-4948, facsimile

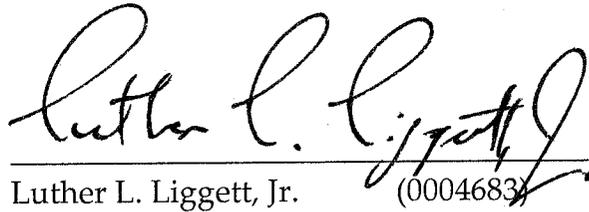
Counsel for Appellant Transtar Electric

CERTIFICATE OF SERVICE

The original of the foregoing Transtar Electric's Memorandum in Response has been served upon the following persons by e-mail to the Court and to counsel, and by placing a true copy in the U.S. Mail, postage pre-paid, this 30th day of February, 2013:

James P. Silk
Spengler, Nathanson
Four Seagate, Suite 400
Toledo, OH 43604

Counsel for Appellant A.E.M. Electric


Luther L. Liggett, Jr. (0004683)