

ORIGINAL

IN THE SUPREME COURT OF OHIO

TRANSTAR ELECTRIC, INC.)
 Appellee) Case No.: 2013-0148
 vs.) On Appeal from the Lucas County
 Court of Appeals,
 A.E.M. ELECTRIC SERVICES CORP.) Sixth Appellate District
 Appellant.)

REPLY BRIEF OF APPELLANT, A.E.M. ELECTRIC SERVICES CORPORATION

James P. Silk, Jr. (0062463)
 SPENGLER NATHANSON P.L.L.
 Four Seagate, Suite 400
 Toledo, Ohio 43604-2622
 Telephone: 419-252-6210
 Facsimile: 419-241-8599
 jsilk@snlaw.com

COUNSEL FOR APPELLANT, A.E.M. ELECTRIC SERVICES CORPORATION

Luther L. Liggett, Jr. (0004683)
 Heather Logan Melick (0068756)
 Luper Neidenthal & Logan
 50 West Broad St., Suite 1200
 Columbus, OH 43215-3374
 Telephone: 614-229-4423
 Email: Liggett@lnlattorneys.com
 Telephone: 614-229-4444
 Email: hmelick@lnlattorneys.com
 Facsimile: 614-345-4948

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TABLE OF AUTHORITIES

CASES

Suter v. Farmers' Fertilizer Co. (1919), 100 Ohio St. 403, 126 N.E. 3045

Werner v. Biederman (1940), 64 Ohio App. 423, 28 N.E.2d 9575

Transtar Electric, Inc. (“Transtar”) and the amicus entities essentially advance two arguments. First, the parties assert that the “pay-if paid” provision in the subcontract agreement is ambiguous as to the transfer of risk of non-payment by the owner from A.E.M. to Transtar. The parties do admit that under certain circumstances a “pay-if-paid” provision may be enforceable. The appellate court made this finding when it determined the contract provision at issue was a “pay-when-paid” provision as the court found the provision did not clearly and unambiguously indicate that the parties intended to transfer the risk of non-payment of the owner. The second argument, advanced primarily by the amicus entities, is that no “pay-if-paid” provision should be enforceable as they are against public policy.

Transtar asserts that this Court must review the parties’ intent as well as the operative facts leading to non-payment. (Merit Brief of Transtar, p. 1) This argument fails for two reasons. First, the language of the provision is unambiguous and the intent of the parties is clearly defined. The language of the provision dictates that payment to A.E.M. by the owner is a condition precedent to payment by A.E.M. to Transtar. The language is capitalized and bolded. If the language of the agreement is unambiguous, it is unnecessary and inappropriate to consider parol or extrinsic evidence of contrary intent. Secondly, Transtar has offered no evidence of the parties’ intent or the operative facts leading to non-payment. Transtar had the opportunity to submit such evidence before the trial court, but failed to do so.

The appellate court erred when it found the contingent payment provision ambiguous. The appellate court made the determination that “While the words “condition precedent” may be helpful, the term is not sufficiently defined to impart that both parties understand that the provision altered the fundamental custom between a general contractor and a subcontractor.” (Appellant’s Appendix, Decision and Judgment at ¶30.) The meaning of the provision is clear

and defined. Additionally, its significance is further emphasized by the capitalization and bolding of the provision. No contracting party would be confused by the effects of this provision. As set forth in detail in A.E.M.'s merit brief, courts throughout the country have consistently held that such language is sufficient to qualify as a pay-if-paid provision.

Transtar makes several factual allegations that are not supported by the record. Transtar claims that A.E.M. did nothing to collect from the owner. In fact, A.E.M. did submit evidence in the trial court, by way of affidavit of its President, David Schoenrock. (**Supp. 1**). Mr. Schoenrock indicated that the owner had failed to pay A.E.M. the amount of \$44,088.90 that had been invoiced by A.E.M. (**Supp. 2**, Schoenrock Aff., ¶6) Mr. Schoenrock indicated that the owner had also failed to pay A.E.M. for work that it had performed on the project. (Id., at ¶8). Schoenrock further noted that A.E.M. had and would continue to pursue payment from the owner for work performed by A.E.M. as well as work performed by Transtar. (Id., at ¶9). These statements are uncontradicted.

Transtar also asserts that the owner is solvent. Transtar did not raise this allegation nor present evidence in support of the allegation in the trial court. This allegation is also not supported by any admissible evidence. Further, a review of the pleadings in that matter would suggest that the owner is indeed insolvent. (See *Transtar Electric, Inc., v. Image Hospitality Group, LLC, et al.*, Lucas C.P. No. G-4801-CI-2010-006145 (Nov 3, 2010); See also Motion to Vacate attached to A.E.M.'s appellate court brief.) A public record search for the liens on the owner indicates the existence of multiple liens. In fact, Transtar's judgment lien has not been released. The owner's insolvency is the reason that A.E.M., Transtar, and other contractors have not been paid.

Transtar's proposition of law is as follows:

A contingent payment clause may be enforceable only if a subcontractor expressly accepts risk of an owner's non-payment for specific reason, based on review of the entire contract, if operative facts meet that reason, and if other consideration exists.

This proposition of law would create significant confusion and uncertainty in the construction industry as well as courts seeking to interpret such provisions. Apparently, Transtar is acknowledging that certain "pay-if-paid" provisions would be acceptable. However, before such a provision would be acceptable, many conditions would have to be met. First, the subcontractor would have to expressly accept the risk of an owner's non-payment. Further, a court would have to review the entire contract in order to determine the clause's enforceability. Finally, a court would have to ascertain whether other consideration exists. Such a proposition provides very little guidance to contracting parties or courts as to what type of clause may be enforceable.

Transtar was granted summary judgment by the appellate court. As such, it is Transtar's burden to establish that there are no genuine issues of material fact. Ironically, throughout its brief, Transtar suggests that there are numerous issues of fact. (For example, see pages 6-7 of Merit Brief of Appellee Transtar.) In support of its Memorandum in Support of its Motion for Summary Judgment, A.E.M. submitted the Affidavit of David Schoenrock. The assertions in Mr. Schoenrock's affidavit are not contradicted by any evidence submitted by Transtar. As such, based on the "pay-if-paid" provision A.E.M. is entitled to summary judgment.

Transtar argues that A.E.M.'s interpretation of the pay-if-paid provision is contrary to Revised Code §2305.31. First, this argument is waived because Transtar did not argue this before the trial court. Second, it is without merit. The statute pertains to "damage arising out of

bodily injury to persons or damages to property.” It does not apply to the present case, where the parties have agreed how to allocate the risk of the non-payment by the owner.

Transtar also asserts that there are issues of fact as to whether A.E.M. was “culpable” for the owner’s failure to pay. This argument is without merit. First, whether A.E.M. was culpable in the owner’s failure to pay is not relevant as to whether there was a breach of contract. The undisputed facts are that A.E.M. was not paid by the owner for the work performed by Transtar. As such, it was not obligated to pay Transtar. Second, Transtar did not set forth any facts demonstrating that A.E.M. was culpable in any respect. In fact, Mr. Schoenrock indicated that A.E.M. had pursued payment from the owner for both money owed A.E.M. as well as Transtar

Transtar also asserts that it is left without a remedy in violation of the Ohio Constitution. This argument also fails. First, this argument is waived as it was not asserted in the trial court. Second, Transtar pled a breach of contract action. It should not recover, however, from A.E.M. due to the pay-if-paid provision. Transtar agreed to the contract language which allocated the risk of non-payment of the owner to Transtar. Lastly, Transtar could have sued the owner for unjust enrichment. As such, Transtar did have remedies available to it.

Transtar refers to several cases in which courts have refused to shift the risk of the owner’s non-performance from the general contractor to the subcontractor unless the language clearly indicates the parties intended to do so. In the present case, the language of the parties clearly indicates that the parties intended to transfer the risk of non-payment to Transtar. As noted in A.E.M.’s merit brief, courts have consistently found similar language to be a “pay-if paid” provision.

The amicus entities assert that “pay-if-paid” provisions should not be enforced regardless of the language. This argument is not persuasive. First, there is not support for many of the

conclusory statements made by the amicus entities. The amicus entities assert that permitting such provisions would be catastrophic. (Amicus brief, p. 31) These so-called “boiler plate” provisions have not been a significant problem in Ohio. Moreover, the vast majority of other states permit such pay-if-paid provisions in contracts between contractors and subcontractors. Likewise, it has not been catastrophic in other states, nor does it place Ohio at any competitive disadvantage.

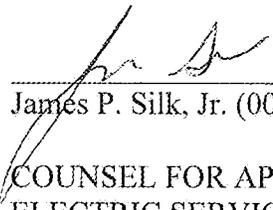
The amicus entities claim that “in many circumstances where such clauses are present, the subcontractors never receive payment”. The amicus entities also claim that A.E.M. presented Transtar with a take-it-or-leave it form contract. (Amicus brief p. 5) There is no evidence to support their conclusory allegations. Moreover, the amicus entities ignore the fact that in the present case, Transtar also contracted directly with the owner. As such, Transtar was in as good a position as A.E.M. to evaluate the owner’s creditworthiness and to determine that it would be willing to accept the risk of non-payment for its work.

The amicus entities also assert that “pay-if-paid” provision acts as a forfeiture. In *Suter v. Farmers’ Fertilizer Co.* (1919), 100 Ohio St. 403, 126 N.E. 304, this court found when the enforceability of a contract “depends upon a condition precedent, one cannot avoid his liability by making the performance of the condition precedent impossible, or by preventing.” *Id.* at 411; see also *Werner v. Biederman* (1940), 64 Ohio App. 423, 428, 28 N.E.2d 957. As such, contractors cannot simply withhold payment from subcontractors, nor can they seek to prevent payment. In the present case, A.E.M. affirmatively sought payment from the owner.

A.E.M. submits that there are no factual issues and that it is entitled to summary judgment based on the clear language of the agreement. Pursuant to the subcontract, Transtar, not A.E.M. assumed the risk of non-payment by the owner. The provision is a classic “pay-if-

paid” provision. In their briefs, Appellees have ignored a fundamental concept, the freedom of contracting between parties. The appellate court decision and A.E.M.’s proposition of law undermine the contractors’ ability to contract in Ohio and would serve to provide great uncertainty to contractors, subcontractors and courts as to the validity of such payment provisions in their contracts.

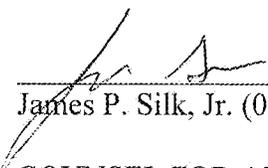
Respectfully submitted,


James P. Silk, Jr. (0062463)

COUNSEL FOR APPELLANT, A.E.M.
ELECTRIC SERVICES, CORP.

CERTIFICATE OF SERVICE

I certify that a copy of this REPLY BRIEF OF APPELLANT, A.E.M. ELECTRIC SERVICES CORP., was sent by ordinary U.S. Mail, postage prepaid, this 10th day of July, 2013 to Counsel for Appellant, Luther L. Liggett, Jr., Esq., and Heather Logan Melick, Esq., Luper Neidenthal & Logan, 50 West Broad St., Suite 1200, Columbus, OH 43215-3374, and to Counsel for the Amicus Parties, R. Russell O'Rourke, Esq., and Debra J. Horn, Esq., Meyers, Roman, Friedberg & Lewis, 28601 Chagrin Blvd., Suite 500, Cleveland, Ohio 44122,


James P. Silk, Jr. (0062463)

COUNSEL FOR APPELLANT, A.E.M.
ELECTRIC SERVICES CORP.