

the statute applies to a subcontract that involves the provision of both goods and services. The court adopted the "predominant services" test—used to determine whether the Uniform Commercial Code applies to a mixed services/goods transaction—to conclude that this subcontract was predominately one for services and that the statute of frauds, therefore, did not apply. The court reasoned:

Subcontractor's bid included both labor and materials. Subcontractor was required to be licensed by the Arizona Registrar of Contractors in order to perform this work. See A.R.S. § 32-1151 (2002). Finally, Subcontractor's reason for refusing to perform the obligation was that it could not adequately staff the job, which further confirms that its bid involved the sale of services.

Finally, the court ruled that the plaintiff is not entitled to attorney's fees under Ariz. Rev. Stat. § 12-341.01 (A), which allows for the recovery of fees in actions that arise out of "express or implied" contracts. The court explained that, even though a promise made enforceable by promissory estoppel is similar to a binding contractual promise, promissory estoppel provides an equitable remedy and is not a theory of contract liability. In addition, the statute's reference to "implied" contracts means contracts that are implied in fact; promissory estoppel at most creates a contract implied in law.

Comment

As noted in the case summary, the court found the subcontract was predominately for services, and so avoided the question of whether the statute of frauds applies to promissory estoppel. However, the court noted in a footnote that the Restatement (Second) of Contracts § 139(1) takes the position that promissory estoppel may apply even in the face of a valid statute of frauds defense.

Delays

Delay Damages Caused by Unclear and Incomplete Design Are Not Recoverable Under the Spearin Warranty of Design Adequacy

*Time Extensions
Not Requested*

Dugan & Meyers Construction Co., Inc. v. Ohio Dept. of Admin. Servs., 162 Ohio App.3d 491, 834 N.E.2d 1 (2005)

Holdings

- Delay and cumulative impact damages caused by an unclear and incomplete design are not recoverable under an owner's implied warranty of design adequacy, where the defects did not prevent actual, proper construction of the project.
- A contractor's claim for delay damages is denied where it did not request time extensions as permitted by the contract.
- On a multi-prime contract, a contractor whose "lead contractor" duties were wrongfully terminated, may not recover the contract balance because it did not prove the cost savings from not having to perform those duties.
- State's wrongful deduction of liquidated damages, from payments otherwise due the contractor, is subject to statutory prejudgment interest, not the lower contract rate for late payments.

Summary of Decision

Ohio State University (OSU) sought to build three buildings on its campus using multi-prime contracts. In addition to contracts with the individual trade contractors, OSU hired an architect, a construction manager (CM), and plaintiff to both perform construction work and to act as "lead contractor." Plaintiff's lead-contractor duties consisted of coordinating the work of all the contractors, creating a critical path method schedule, and updating it monthly.

For the first year the project progressed on schedule; after that it became bogged down. Within

a four-month period, 176 Requests for Information (RFIs) were submitted to the architect; in response, 48 field work orders (change orders which included additional time and/or compensation) and 15 architect supplemental instructions (changes without increased time or cost) were issued. The project continued to be plagued by delays. Fearful that buildings would not be complete in time for school to begin, OSU replaced plaintiff as "lead contractor" and gave those duties to the CM. The owner also began to deduct liquidated damages from plaintiff's progress payments.

Plaintiff filed a claim seeking the contract balance, reversal of liquidated damages, and an award of delay damages. OSU rejected the claim and plaintiff filed suit in the Court of Claims. A referee conducted a 17-day hearing. He characterized the plans and specifications as "incomplete, inaccurate, and unconstructable." His 74-page decision recommended: that plaintiff receive the contract balance; a complete reversal of the liquidated damages; delay or "cumulative impact" damages; and statutory prejudgment interest. The trial court largely adopted the referee's recommendations and both parties appealed.

A divided Ohio Court of Appeals, Ten District, ruled that the lower court erred in awarding plaintiff delay damages based on the owner's implied warranty of design adequacy established in *United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918). The *Court of Claims* interpreted *Spearin* to mean that OSU warranted the plans and specifications "against any problem, need for clarification, minor deficiency, or subsequent deviation." Rejecting this view, the *court of appeals* admonished that "*Spearin* does not stand for the proposition that owners, by virtue of having furnished the plans and specifications for the job, will indemnify and hold contractors harmless for all delays occasioned by agreed changes in the work necessitated by some force not within the complete control of the contractor." Instead, the warranty extends to defects in the plans which cause a misrepresentation to the contractor, and prevent the project from being buildable. The sheer number of RFIs—

a factor relied upon by the referee in concluding the plans were defective—does not establish a breach of warranty, absent evidence the plans were unbuildable or otherwise inadequate to accomplish the purpose of the contract.

The court contrasted the facts in this case with *Sherman R. Smoot Co. of Ohio v. State*, 136 Ohio App.3d 166, 736 N.E.2d 69 (2000), 21 CLR 241 (2000), in which the court applied *Spearin*, where the contract permitted the use of trench footings, but actual soil conditions necessitated the installation of more expensive form footings. Application of *Spearin* was justified because (1) the design misrepresented the adequacy of the footings and (2) the job site did not exist at the time of bidding, so the contractor could not have made its own inspection. By contrast, in this case, plaintiff did not show design defects "that proved to be so unassailable that the contractor's mere performance of the contract served to undermine the basic purpose thereof."

The court separately found that delay damages were barred by plaintiff's failure, under the contract, to make written requests for time extensions "no more than ten (10) days after the initial occurrence of any condition which, in the Contractor's opinion, entitles the Contractor to an extension of time." The court rejected on factual grounds plaintiff's assertion that it did not request an extension of time because doing so would have been futile. In addition, plaintiff failed to file a claim with the architect as required by the contract's "claims" scheme. The court concluded:

In light of the foregoing provisions, it can hardly be said that any request for an extension of time would have been a vain act. Though the parties might still have ultimately disagreed as to the causes of specific delays, or as to the appropriate measure of additional time required to complete a given element of the construction schedule affected thereby, the contract clearly provided a mechanism to foster prompt notice of expected delays, as well as documented communication regarding any resolution sought or considered by any party.

The court turned to the issue of damages. The Court of Claims awarded plaintiff the contract balance, premised on its finding that removal of plaintiff as lead contractor was wrongful. Reversing, the court ruled that—even if termination of the lead-contractor duties was wrongful—plaintiff did not prove its damages because it did not establish the cost savings it realized from not having to perform that part of the contract. Damages for breach of contract include “the further compensation plaintiff would have received under the contract if it had been performed, less the value to plaintiff of his being relieved of the obligation of completing performance,” citing *Allen, Heaton & McDonald, Inc. v. Castle Farm Amusement Co.*, 151 Ohio St. 522, 86 N.E.2d 782, 782 (1949). Under this formulation, plaintiff has the burden of proving not only what he would have received under the contract, but also “what such performance would have cost him (or the value to him of relief therefrom).” *Id.* at 783. Plaintiff did not provide evidence of its cost savings. In addition, the amount OSU paid to the CM to take over the lead-contractor duties includes the CM’s overhead and profit; thus, that figure cannot be used to determine plaintiff’s cost savings. Without evidence of those savings, plaintiff is not entitled to award of the contract balance.

Finally, the Court of Claims had ruled that OSU impermissibly deducted liquidated damages from payments otherwise due the plaintiff, and awarded plaintiff statutory interest of ten percent as prejudgment interest. The owner apparently did not contest the impropriety of the deductions, but challenged solely the choice of the prejudgment interest rate. According to OSU, the lower contract interest rate for “[p]ayments due and not paid to the Contractor within such thirty (30) day period,” rather than the higher statutory rate, should have been used. The court disagreed:

We are unable to find any authority that deals with the precise issue presented here; that is, whether deductions from contractor payments, which are taken to satisfy a liquidated damages assessment later judicially determined to be unwarranted, are

subject to the contract’s late-payment interest provision, or whether they are subject to the statutory prejudgment interest amount. We see some legitimacy in both positions. However, we think the better choice is to apply the statutory interest rate because a payment made following entry of a judgment awarding return of wrongfully assessed liquidated damages, rendered sometimes years after the fact, strains the definition of “late payment,” even when the liquidated damages were originally assessed by deducting the amount from a contractor payment.

A dissent would have permitted the recovery of delay and cumulative impact damages under the *Spearin* doctrine, and also would have permitted plaintiff to recover the contract balance, less the amount OSU had paid to the CM to assume the lead-contractor duties.

Economic Loss Rule

Ohio Supreme Court: Economic Loss Rule Bars Owner’s Tort Claim Against Subcontractor

Vigorous Dissent Filed

Corporex Development & Construction Mgt., Inc. v. Shook, Inc., 106 Ohio St.3d 412, 835 N.E.2d 701 (2005)

Holding

The economic loss rule precludes an owner’s negligence and implied warranty claims against a subcontractor; neither the Restatement (Second) of Torts § 552 nor the near-privity exception applies.

Summary of Decision

Upon completion of a hotel project, the owner (DSI) sued the concrete subcontractor (Shook) under theories of negligence and breach of implied warranty. The trial court entered a judgment on the pleadings in favor of the sub based on the economic loss rule (ELR).