Ohio Declines to Extend the Spearin Doctrine

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Courts around the country have embraced the Spearin Doctrine on design bid build contracts to impose upon owners an implied warranty that the plans and specifications they provide will allow a contractor to successfully build a project. For decades, contractors have relied on the Spearin Doctrine as a source of recovery when they have incurred costs due to defective specifications. But according to the Ohio Supreme Court in Dugan & Meyers Construction Co., Inc. v. Ohio Department of Administrative Services, application of the Spearin Doctrine in Ohio is limited to erroneous indications of job site conditions.

Facts

Dugan & Meyers Construction Co., Inc. (Dugan & Meyers) was the successful bidder on a $20.9 million, three-building project at Ohio State University. The Ohio Department of Administration was the contracting agent for the owner, Ohio State University. The project was a design bid build project with a design furnished by the owner and prepared by Karlsberger Companies (Karlsberger).

The construction contract called for completion of the project within 660 days and provided for liquidated damages of $3,000 for each day of delay in completion by Dugan & Meyers. The contract also contained a “no damages for delay clause,” which limited Dugan & Meyers’ remedy for owner-caused delays to an extension of time only. Put another way, the contractor would not be entitled to receive any compensation for delays caused by the owner; rather, the sole remedy would be an extension of the contract time and thus avoidance of liquidated damages for that delay.

As the project progressed, Dugan & Meyers found the plans and specifications were inaccurate and incomplete. Dugan & Meyers sent over 700 requests for information. Karlsberger issued over 250 work orders and 85 supplemental instructions, which, according to Dugan & Meyers, directed them to perform work outside the contract. These problems led to delays as Dugan & Meyers waited for Karlsberger to provide proper guidance, which was not always timely. The owner ultimately terminated Dugan & Meyers for “failure to prosecute the work.” Dugan & Meyers sought payment for work performed prior to termination. When the owner responded, however, it deducted the costs paid to the completion contractor as well as liquidated damages for the delay in completing the work.

Procedural History

The contractor initially brought suit against the Ohio Department of Administrative Services and Ohio State University in the Court of Claims of Ohio, alleging that delays arose out of the defective plans and specifications and asserting the owner “had breached its duty to provide Dugan & Meyers with plans that were buildable, accurate, and complete, and had unreasonably rejected legitimate time-extension requests.” After a trial, a Court of Claims referee found that the plans and specifications were indeed defective and were the cause of the delay on the project, and that the owner had not presented any expert evidence to contradict the evidence provided by Dugan & Meyers. The referee concluded that the owner had breached the contract and was not entitled to withhold liquidated damages or the costs of completion. The referee went on to recommend that Dugan & Meyers be awarded damages for the cumulative delay caused by the large number of design changes. The referee relied on the Spearin Doctrine to support this recommendation, as well as federal General Services Administration Board of Contract Appeals decisions. The Court of Claims adopted the referee’s recommendations and entered judgment in favor of Dugan & Meyers.

The Ohio Court of Appeals, however, reversed the Court of Claims’ decision, holding in part that Ohio law did not allow for the recovery of cumulative impact damages. Dugan & Meyers appealed and the Ohio Supreme Court took up the case.

Supreme Court Decision

The Supreme Court at the outset framed the main issue in Dugan & Meyers’ appeal: “Dugan & Meyers suggests that an owner of a competitively bid construction project impliedly warrants that the plans issued are buildable, accurate, and complete and that a contractor may recover damages if the owner breaches that implied warranty, resulting in delay or increased cost to complete the contract.” The court acknowledged that Ohio has previously recognized the Spearin Doctrine in site conditions cases where there was an affirmative representation in the contract documents as to the site conditions. But the court then swiftly rejected the notion that the Spearin Doctrine should be extended to cases involving plan changes, without discussion as to why it would not do so. Rather, the court appeared to rely on the contract’s “no damages for delay clause,” which limited the remedy for any contractor claims that might cause a delay beyond an extension of the contract completion date.

The court held that the terms of the “no damages for delay clause” would not be trumped by the Spearin Doctrine, stating the Ohio position that since Dugan & Meyers had agreed at the outset that its only remedy for delay and disruption would be an extension of contract time, “it is not the province of the courts to relieve parties of improvident contracts.” The court posited that “In order to hold in favor of [contractor], we would need, first, to find that the state had implicitly warranted that its plans were buildable, accurate, and complete, and, second, to hold that the implied warranty prevails over express contractual provisions. To do so would contravene established precedent, which we will not do.” In support of its position regarding the primacy of the “no
damages for delay clause,” the court cited several other jurisdictions that similarly held that the “no damages for delay clause” precludes recovery for defective plans and specifications. The court then affirmed the judgment in favor of the Ohio Department of Administration and Ohio State University.5

The dissent took issue with the majority’s ruling, finding that the fault in this case rested with the state’s plans and that it should be no “leap” that the state warranted the plans were buildable and that such a warranty would prevail over the “no damages for delay clause.” According to the dissent’s view, “The majority seems to suggest that an owner need not be concerned with preparing accurate plans, since any deficiencies must be corrected by the contractor. As it turns out, the state could have saved a lot of money on blueprints and just submitted some sketches on the backs of a few cocktail napkins.”

According to the dissent, the Ohio cases cited by the court for the proposition that the Spearin Doctrine should not apply were cases in which the claims arose out of matters outside the contract, not from defects in the plans and specifications that were part of the contract. In the Dugan & Meyers case, however, the root cause of the problem was the design documents that were part of the contract, which squared directly with the facts in Spearin. Thus, the dissent argued, the trial court correctly applied the Spearin Doctrine.

Conclusion

The Ohio Supreme Court rejected the application of the Spearin Doctrine to design bid build projects where the claims do not involve site conditions. The court’s reasoning relied heavily, almost exclusively, on the contract’s “no damages for delay clause,” which, as noted by the court, is no longer valid in Ohio. Whether the court will take up the opportunity to revisit the matter in a case without a “no damages for delay clause” remains to be seen. In the meantime, according to the dissent, it appears owners in the state of Ohio provide no warranty that their plans and specifications are buildable.

Editor’s Note

Cumulative impact claims continue to be hotly contested in a number of courts, including those at the federal level, so while contractors and owners are well aware of the existence of cumulative delays, a number of adjudicative bodies reject recovery for such damages. It is surprising that the Supreme Court of Ohio desired the state to explicitly warrant that its plans were buildable, when this should be implied. Apparently, different states and jurisdictions advance at different speeds, with some still applying laws that are 100 years old and obviously need changing. It is also apparent that numerous judges cannot grasp contract administration or technical issues, take for instance the Court of Appeals’ rejection of the cumulative impact claim, thus returning deficient judgments.

List of Cases

Dugan & Meyers Construction Co., Inc. v. Ohio Department of Administrative Services, 113 Ohio St.3d 226, 864 N.E.2d 68 (2007).

Endnotes

1The Spearin Doctrine is derived from United States v. Spearin, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed.2d 166 (1918), which held that “if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications,” thus permitting the contractor to recover those additional costs associated with the defective plans and specifications. The Spearin case is controlling in federal contract cases, but it is up to the courts in the individual states to decide whether their is adopted in their jurisdiction.
2113 Ohio St.3d 226, 864 N.E.2d 68 (2007).
3As explained by the court, in cases before the Ohio Court of Claims, a party may request that a referee be appointed who will then prepare a report for the judge assigned to the case; see 863 N.E.2d 72 n. 3.
4Such no damages for delay clauses have since been declared void and unenforceable in Ohio pursuant to a 1998 law enacted by the Ohio legislature; see Ohio Rev. Code 4113.62.
5Given that this case solely addressed state law matters, the court’s decision on the matter is not subject to appeal to federal courts.