

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Cleveland Construction, Inc., :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 11AP-1096
 : (Ct. of Cl. No. 2003-10724)
 Kent State University, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on September 13, 2012

Daniel R. Wireman; Chamberlain Hrdlicka White Williams & Aughtry, and Seth Price, for appellee.

Mike DeWine, Attorney General, William C. Becker and James E. Rook, for appellant.

APPEAL from the Court of Claims of Ohio.

DORRIAN, J.

{¶ 1} In this contract case, defendant-appellant, Kent State University ("Kent State" or "university"), appeals from a judgment entered by the Court of Claims of Ohio in the amount of \$2,257,660.46 in favor of plaintiff-appellee,¹ Cleveland Construction, Inc. ("CCI" or "contractor"). The trial court entered judgment after remand of the case pursuant to this court's decision in *Cleveland Constr., Inc. v. Kent State Univ.*, 10th Dist. No. 09AP-822, 2010-Ohio-2906 ("*Kent State I*"). As directed by this court in *Kent State I*, the trial court examined its prior record and determined that Kent State had proven affirmative defenses of waiver and exhaustion of remedies as to some, but not all, of CCI's claims. The trial court reduced its original judgment accordingly.

¹ This amount includes prejudgment interest awarded on damages totaling \$1,564,409.29.

{¶ 2} Kent State raises two assignments of error, as follows:

1. A statutory requirement to follow a contractual claims resolution process is not an affirmative defense.
2. Even if a statutorily mandated contractual claims process is in the nature of an affirmative defense, appellant, Kent State University proved this defense at trial.

{¶ 3} For the following reasons, we affirm.

Facts and Procedural History

{¶ 4} In February 2002, Kent State and CCI entered into a contract in which CCI agreed to serve as the lead contractor for the construction of four residence halls on Kent State's main campus. The parties set separate deadlines for completion of each of the four buildings. Because of poor weather, a strike, and other circumstances, the project did not proceed according to schedule, and none of the four buildings was timely completed.² On April 29, 2004, Kent State barred CCI from performing any more work on the project except for landscaping and warranty-related work. Kent State did not remit to CCI the full balance of the contract amount.

{¶ 5} On October 23, 2003, CCI filed an action against Kent State in the Court of Claims of Ohio. CCI sought to recover the full contract amount and damages for delay and inefficiency caused by alleged breach of contract by Kent State. CCI further asserted that Kent State had wrongfully rejected change order requests ("CORs") that CCI had submitted during the course of the construction project, causing CCI to incur additional costs. Kent State filed a counterclaim seeking damages for CCI's allegedly defective and incomplete work.

{¶ 6} On February 4, 2008, the Court of Claims issued a 60-page liability decision in which it found that both CCI and Kent State had breached the contract. On July 23, 2009, the court issued a second decision relative to damages and set CCI's damages in the amount of \$3,382,612.32.³ It further found that Kent State was entitled to damages in the amount of \$352,879.72 on its counterclaims.

² The facts surrounding the progress of the building construction project are more fully described in our first opinion, *Kent State I* at ¶ 3-21.

³ This amount includes prejudgment interest awarded on damages totaling \$3,029,732.60.

{¶ 7} Kent State appealed to this court and asserted four assignments of error. We overruled Kent State's third and fourth assignments of error. We sustained in part, however, Kent State's first assignment of error, holding that "[t]he Court of Claims erred by [f]ailing to apply binding law requiring Cleveland Construction Inc. ('CCI') to adhere to the written terms of the Contract." *Kent State I* at ¶ 25. We also sustained Kent State's second assignment of error, holding that "[t]he Court of Claims erred by [r]uling that CCI did not have to exhaust its administrative remedies by submitting its claims through Article 8, the dispute resolution provisions of the Contract, prior to filing suit." *Id.* We found that these two assignments of error were interrelated and concerned two related, but distinct, affirmative defenses.

{¶ 8} The first of those defenses was that CCI had failed to invoke a mandatory administrative dispute resolution process established in Article 8 of the contract. Specifically, Article 8.1.1 of the General Conditions of the contract provided:

Any claim against the State shall be made in writing to the Associate * * * and filed prior to Contract Completion, provided the Contractor notified the Associate no more than ten (10) days after the initial occurrence of the facts, which are the basis of the claim. To the fullest extent permitted by law, failure of the Contractor to timely provide such notice shall constitute a waiver by the Contractor of any claim for additional compensation or for mitigation of Liquidated Damages.

{¶ 9} Kent State asserted that CCI had waived its right to seek damages in the Court of Claims because CCI had not complied with Article 8.1.1; i.e., it had failed to timely give notice of its claims arising from Kent State's alleged delays and denials of requests for extensions and change orders and file them with the project associate. We characterized that defense as the affirmative defense of waiver.

{¶ 10} The second defense was based on R.C. 153.12(B), which precludes a contractor from bringing a breach of contract action against the state unless "administrative remedies provided for in [[the] public improvement] contract * * * are exhausted." *Kent State I* at ¶ 28.

{¶ 11} We held in *Kent State I* that the university had asserted both of these defenses; they were viable affirmative defenses; and the trial court had erred in failing to

evaluate the evidence to determine whether Kent State had met its burden of proof on the defenses. More specifically, we found that the trial court erred in (1) disregarding the Article 8 dispute resolution procedures mandated by the contract based on the court's belief that the procedures were "inherently unfair"⁴; and (2) refusing to recognize that R.C. 153.12(B) imposed a burden on CCI to exhaust the administrative remedies of Article 8, i.e., the "administrative remedies provided for in [[the] public improvement] contract." Accordingly, both defenses required determination of the factual question whether CCI had timely attempted to resolve its disputes by employing the administrative dispute resolution process established in Article 8 of its contract with Kent State.

{¶ 12} We therefore remanded the case to the trial court with instructions that it review the record of the trial and determine "whether Kent State should prevail on its waiver and exhaustion of administrative remedies defenses given the evidence in the record." *Kent State I* at ¶ 48. We noted that Kent State "had only preserved these defenses against the breach of contract claims arising from the weather and strike delay and the denial of change order requests 39/160, 44-R, 64, 93, 128, 148, 154, and 206." *Id.* at ¶ 48, fn. 4.

{¶ 13} On July 26, 2011, the parties submitted an "agreed judgment entry" which the trial court construed as a stipulation regarding the amount of the damages Kent State owed CCI as a result of Kent State not having paid the full contract amount. The agreed amount was \$1,406,076.28, plus unpaid interest. The court calculated prejudgment interest and entered judgment in favor of CCI in the amount of \$2,086,868.69, leaving for resolution only "the remaining portion of the case that is subject to the remand order"; i.e., claims arising from Kent State's delay and inefficiency in responding to requests for extensions due to weather and strike delays and the denial of CORs 39/160, 44-R, 64, 93, 128, 148, 154, and 206.

{¶ 14} On August 12, 2010, CCI appealed our decision in *Kent State I* to the Supreme Court of Ohio. In its memorandum in support of jurisdiction, CCI argued, *inter alia*, that this court should not have overruled *Conti Corp. v. Ohio Dept. of Adm. Serv.*, 90 Ohio App.3d 462 (10th Dist.1993). Kent State filed a memorandum in response, opposing

⁴ The Court of Claims had reached its conclusion based on this court's holding in *Conti Corp. v. Ohio Dept. of Adm. Serv.*, 90 Ohio App.3d 462 (10th Dist.1993). In *Kent State I*, this court overruled *Conti Corp.*

exercise of jurisdiction by the Supreme Court, but did not file a cross-appeal in that court. On December 1, 2010, the Supreme Court denied jurisdiction to hear the case.

{¶ 15} On remand, the trial court issued the judgment that is the subject of this appeal. In its November 10, 2011 decision, the court reviewed the record and found that Kent State had established that CCI had failed to timely initiate Article 8 claims as to some, but not all, of the disputes that underlay CCI's claims still at issue, thereby waiving them. The court found that Kent State had proven the affirmative defense of failure to exhaust administrative dispute resolution procedures as to CORs 64 and 93. It found that Kent State had not proven that CCI failed to invoke Article 8 procedures concerning CORs 44-R, 128, 148, 154, 206, and 39/160. The court further found that Kent State had not proven that CCI had failed to invoke Article 8 procedures during construction as to CCI's claims that it had been damaged by the university's delay and inefficiency in failing to grant extensions of time sought by CCI due to unusually severe weather and strike delay. The trial court thus found that Kent State had proved the two affirmative defenses, i.e., waiver under common law contract principles and exhaustion of remedies as statutorily required by R.C. 158.12, as to only CORs 64 and 93.

{¶ 16} The court accordingly reduced the total damages awarded to CCI, based on Kent State's denial of the remaining CORs and its delay and inefficiency in granting extensions to \$1,564,409.29, excluding prejudgment interest. The revised damage award reduced the court's original award of damages to CCI in an amount of approximately \$60,000, excluding prejudgment interest.⁵

{¶ 17} Kent State timely appealed the judgment of the Court of Claims, and the case is now before us for disposition.

Legal Analysis

{¶ 18} In its first assignment of error, Kent State argues that failure of a contractor to comply with "a statutory requirement" to follow a contractual claims resolution process, i.e., R.C. 153.12, is not an affirmative defense. In its second assignment of error, Kent State argues that it proved at trial the affirmative defense of non-compliance with a "statutorily mandated contractual claims [resolution] process." Accordingly, this appeal does not raise

⁵ The trial court had ascertained in its first decision that damages resulting from denial of COR 64 totaled \$9,901.60, and from denial of COR 93, \$49,345.43.

issues concerning application of the common law of contracts regarding waiver of contractual obligations to which the parties agreed. Rather, Kent State has raised only issues relative to R.C. Chapter 153 generally, and R.C. 153.12 specifically, in the context of this case.

{¶ 19} R.C. 153.12 provides:

(B) If a dispute arises between the state and a contractor concerning the terms of a public improvement contract let by the state or concerning a breach of the contract, and *after administrative remedies provided for in such contract* and any alternative dispute resolution procedures, provided in accordance with guidelines established by the director of administrative services *are exhausted*, the contractor may bring an action to the court of claims in accordance with Chapter 2743. of the Revised Code.

(Emphasis added.)

{¶ 20} R.C. 153.16(B) provides that "any claim submitted under a public works contract * * * shall be resolved within one hundred twenty days. After the end of this one hundred twenty-day period, the contractor shall be deemed to have exhausted all administrative remedies for purposes of division (B) of section 153.12 of the Revised Code." Accordingly, a contractor that fails to submit a claim for resolution pursuant to a dispute resolution process established in the contract necessarily has failed to exhaust its administrative remedies.

{¶ 21} We observed in *Kent State I* that "R.C. 153.12(B) presents a rare instance where a statute requires a plaintiff to exhaust its administrative remedies before bringing suit." *Kent State I* at ¶ 37. We also noted that R.C. 153.12(B) does not include any exceptions to its mandate.

{¶ 22} In support of its first assignment of error, Kent State argues that non-compliance with R.C. 153.12(B) is not an affirmative defense but, rather, that compliance with R.C. 153.12(B) should be deemed a "jurisdictional pre-requisite that the contractor must prove before it can proceed with its claim." (Appellant's brief at 3-4.) It further argues that the burden of proving exhaustion of "administrative remedies provided for in such contract" should rest with the contractor; that Article 8 of its contract with CCI constituted administrative remedies provided for in its contract with CCI; and that CCI

should, accordingly, bear the burden of proving that it complied with the Article 8 procedures of its public improvement contract with the state.

{¶ 23} But in so arguing, Kent State asks us to accept a premise that directly conflicts with our express determination in *Kent State I* that a defense based on R.C. 153.12(B) is an affirmative defense. Our conclusion that noncompliance with R.C. 153.12(B) is an affirmative defense has become the law of this case, and we therefore refuse to entertain Kent State's argument or comment on the merits of its legal position.

{¶ 24} We have long recognized that:

The law of the case precludes a litigant from attempting to rely on arguments which were pursued, or available to be pursued, in a first appeal. New arguments are barred by issue preclusion. * * * [T]he law of the case doctrine is defined as follows:

"[A] decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels."

(Citations omitted; emphasis sic.) *Enyart v. Columbus Metro. Area Community Action Org.*, 115 Ohio App.3d 348 (10th Dist.1996).

{¶ 25} In *Kent State I*, this court expressly stated that:

Waiver is an affirmative defense. Civ.R. 8(C). * * * *Likewise, we conclude that a defense based on R.C. 153.12(B) is also an affirmative defense. Like all other affirmative defenses, Kent State's exhaustion of administrative remedies defense admits that if CCI has a claim, i.e., CCI's breach of contract claim, Kent State has a legal reason, i.e., R.C. 153.12(B), why CCI cannot recover on that claim. State ex rel. Plain Dealer Publishing Co. v. Cleveland* (1996), 75 Ohio St.3d 31, 33 (holding that an affirmative defense "admits that the plaintiff has a claim (the 'confession') but asserts some legal reason why the plaintiff cannot have any recovery on that claim (the 'avoidance')").

(Citation omitted; emphasis added.) *Id.* at ¶ 47.

{¶ 26} In its brief in this appeal, CCI has responded to Kent State's contention that a defense based on R.C. 153.12(B) should not be deemed an affirmative defense. CCI asserts that "it is simply too late [for Kent State] to raise this argument for the first time on this appeal, when the proper action [for Kent State] would have been to take a

discretionary appeal to the Supreme Court [of Ohio] in [*Kent State I*]. An unappealed appellate decision settles the issue of law decided by the appellate court for all purposes of a particular lawsuit. *Hawley v. Ritley*, 35 Ohio St.3d 157, 159-160 (1988)." (CCI Brief, at 6-7.) We agree and again note that Kent State appeared in the Supreme Court in opposition to CCI's request that the court exercise jurisdiction but did not file a cross-appeal challenging our holding in *Kent State I* that "a defense based on R.C. 153.12(B) is also an affirmative defense." *Id.* at ¶ 47.

{¶ 27} Kent State posits that we should in this case apply a recognized exception to the law of the case doctrine. In a 2008 case, this court acknowledged, consistent with several prior Ohio decisions, that " '[a]n appellate court may choose to re-examine the law of the case it has itself previously created *if that is the only means to avoid injustice.*' " (Citations omitted.) (Emphasis added.) *Koss v. Kroger Co.*, 10th Dist. No. 07AP-450, 2008-Ohio-2696, ¶ 19. Kent State contends that reliance on the law of the case doctrine would cause an injustice in this case because the trial court in its first decision "found that CCI failed to initiate" the Article 8 process and further argues that it would be unjust to allow the trial court to conclude differently on remand. It bases its contention on the trial court's observation in its first opinion that it would be " 'inherently unfair' to bar [*CCI's*] claims for failing to initiate a process wherein 'the very agencies and agents that are parties to the dispute allow those of their employees with the most personal involvement in the dispute to act as adjudicators of the issues.' " (Emphasis added.) (Court of Claims Feb. 4, 2008 Decision at 4, quoting *Conti Corp. v. Ohio Dept. of Adm. Serv.*, Ct. of Cl. No. 88-14568 (July 13, 1992).)

{¶ 28} We reject Kent State's premise that the trial court determined in its first decision that CCI had failed to initiate and pursue the Article 8 process concerning all of its claims. In fact, that premise is inconsistent with our observation in *Kent State I* that the trial court, relying on *Conti Corp.*, "never evaluated the evidence to determine whether Kent State met its burden" of proving its defenses. *Kent State I* at ¶ 48. Moreover, the trial court in its first decision acknowledged that the evidence at trial did show that "CCI did submit certain claims for Article 8 processing." (Court of Claims Feb. 4, 2008 Decision at 4.)

{¶ 29} In support of its argument that application of the law of the case doctrine to

this case would be unjust or unfair, Kent State asserts only that the trial court determined as fact in its first decision that CCI had not presented any claims for Article 8 resolution during construction. We reject this interpretation of the record and, therefore, further reject Kent State's argument that the only means to avoid injustice in this case would be to refuse to apply the law of the case doctrine.

{¶ 30} Accordingly, we overrule Kent State's first assignment of error.

{¶ 31} In its second assignment of error, Kent State contends that it should nevertheless prevail even if this court finds that the law of the case doctrine applies and that Kent State bore the burden of proof of establishing that CCI had failed to exhaust its administrative remedies. Kent State argues that the trial court should have found that CCI failed to submit Article 8 claims as to all of its remaining CORs and its delay and inefficiency claims. That is, it argues that the trial court should have found on remand that Kent State had proven at trial that CCI had failed to timely initiate the Article 8 administrative process as to its claims based on CORs 44-R, 128, 148, 154, 206, and 39/160, as well as CCI's breach of contract claims arising from weather and strike delays. The university argues that the record lacks competent, credible evidence to support the trial court's finding to the contrary, thereby invoking the criteria used in reviewing a manifest weight of the evidence challenge to a trial court's findings of fact. *See Eckel v. Bowling Green State Univ.*, 10th Dist. No. 11AP-781, 2012-Ohio-3164, ¶ 52 ("If some competent, credible evidence going to all the essential elements of the case supports the trial court's judgment, a reviewing court will not reverse it as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus."). We therefore construe Kent State's second assignment of error as presenting a manifest-weight challenge to the trial court's finding that CCI had failed to invoke Article 8 dispute procedures only as to CORs 64 and 93.

{¶ 32} " 'A trial court's findings of fact are presumed to be correct and will not be reversed as being contrary to the manifest weight of the evidence if there is competent and credible evidence supporting the finding.' * * * 'Further, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to decide.' * * * 'This presumption arises because the trial judge had an opportunity "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these

observations in weighing the credibility of the proffered testimony." * * * Mere disagreement over the credibility of witnesses or evidence is not sufficient reason to reverse a judgment." (Citations omitted.) *Gordon v. Ohio State Univ.*, 10th Dist. No. 10AP-1058, 2011-Ohio-5057, ¶ 74.

{¶ 33} In its decision on remand, the Court of Claims noted that Kent State's project manager testified that he recalled that CCI had submitted some Article 8 requests. The project manager testified that CCI had not submitted a claim pursuant to Article 8 as to COR 64 and that CCI had filed an Article 8 request as to COR 93 but had not timely filed it. Consistent with that testimony, the trial court held that Kent State had demonstrated that CCI had failed to exhaust its administrative remedies as to those two change orders, thereby waiving its claims of damages flowing from the failure of Kent State to grant CORs 64 and 93.

{¶ 34} In addition, the trial court noted that the record included no evidence regarding the filing or non-filing of Article 8 requests as to CORs 128, 148, 154, 206, and 39/160. Had the record contained testimony that CCI had failed to timely file Article 8 notices and claims as to those CORs, it is reasonable to assume that the trial court would have found that Kent State had met its burden of proving waiver as to the remaining CORs, just as it did for CORs 64 and 93. Kent State bore that burden based on our holding in *Kent State I* that both the common law defense of waiver and the statutory exhaustion of remedies provision of R.C. 153.12(B) are affirmative defenses. "Because both waiver and failure to exhaust administrative remedies are affirmative defenses, Kent State bore the burden of proving both defenses at trial." *Kent State I* at ¶ 48. That holding is now the law of the case.

{¶ 35} As to COR 44-R, the following testimony was provided by the project manager:

Q. Do you know * * * whether Cleveland undertook any Article 8 procedures with respect to 44-R.

A. I don't know.

Q. Do you recall any Article 8 procedures?

A. I recall that there were some requests for some Article 8s, yes.

Q. With respect to Change Order Request 44-R, you don't recall any? * * *

A. I don't recall on this instance.

(Tr. 2338.)

{¶ 36} The trial court concluded that this testimony was not enough to fulfill Kent State's burden to prove that that CCI had failed to file an Article 8 claim as to COR 44-R. We agree.

{¶ 37} Kent State points only to the following exchange during the testimony of CCI's president and co-owner in support of its contention that it had proven that CCI waived all of CCI's claims rather than just the claims based on CORs 64 and 93:

Q. You have claims for change orders, correct?

A. Yes.

Q. You have claims for delay and inefficiency, correct?

A. We do.

Q. Why did you not formally pursue those through the Article 8 procedures?

A. Well, the judge and jury on the Article 8 is basically [the Kent State architect], and [the associate's representative], possibly [the project manager]; they already had strong positions in it. We already knew what their positions were, it was a waste of time. It was—the process was judge and jury was aware of the job, they let their feelings known.

(Tr. 476.)

{¶ 38} Kent State asserts that this testimony affirmatively demonstrates that CCI failed to initiate *any* Article 8 claims. This testimony, however, does not conclusively establish that CCI failed to employ the Article 8 administrative dispute resolution procedures as to all of CCI's claims. It was counsel that framed the question to which the witness responded, and counsel did not suggest in his question that CCI had failed to file *any* Article 8 notices and claims. Moreover, the trial court on remand specifically addressed this argument and rejected it. It observed that the testimony "regarding

plaintiff's reluctance to submit all claims through Article 8 processing was a general statement expressing [CCI's] belief that such review would be futile" and was insufficient to satisfy Kent State's burden of proving the affirmative defense of waiver. (Nov. 10, 2011 Decision, at 5.) We find that the trial court's interpretation of the above-quoted testimony is a reasonable one, and we therefore defer to its evaluation of the import and meaning of the testimony. *Compare Burchfield v. McMillian-Ferguson*, 10th Dist. No. 10AP-623, 2011-Ohio-2486, ¶ 22 (rejecting a manifest weight of the evidence argument where "appellant has given us no sound reason to question the trial court's credibility determination").

{¶ 39} In *Kent State I*, we charged the trial court to determine on remand whether Kent State had proven the affirmative defenses of waiver and exhaustion of administrative remedies as to CCI's claims based on Kent State's delay and inefficiency and its actions relative to CORs 39/160, 44-R, 64, 93, 128, 148, 154, 165, and 206. *Kent State I* at ¶ 48, fn. 4. The trial court found that Kent State had failed to prove those affirmative defenses as to all of those claims except those based on CORs 64 and 93. We do not find that finding to be manifestly against the weight of the evidence.

{¶ 40} Accordingly we overrule Kent State's second assignment of error.

{¶ 41} For the foregoing reasons, we overrule both of Kent State's assignments of error and affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

BROWN, P.J., and BRYANT, J., concur.
