COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

ODOM INDUSTRIES, INC.	:	
		CASE NO. 2010 CVH 02727
Plaintiff	:	
vs.	:	
		Judge McBride
SHARED SYSTEMS TECHNOLOGY, INC.	:	
	:	
Defendant		**DECISION/ENTRY**
	:	

W. Kelly Lundrigan, 1262 U.S. Highway 50, Milford, Ohio 45150, and Strauss & Troy, Nicole M. Lundrigan and John M. Levy, The Federal Reserve Building, 150 East Fourth Street, Cincinnati, Ohio 45202, attorneys for the plaintiff ODOM Industries, Inc.

Reminger Co., LPA, Kevin P. Foley, 65 East State Street, 4th Floor, Columbus, Ohio 43215, and Benjamin, Yocum & Heather, LLC, Charles F. Hollis, 300 Pike Street, Suite 500, Cincinnati, Ohio 45202, attorneys for the defendant Shared Systems Technology, Inc.

Rendigs, Fry, Kiely & Dennis, LLP, Jonathan P. Saxton, attorney for the defendants Harbison-Walker Refractories Co. and ANH Refractories Co., 600 Vine Street, Suite 2650, Cincinnati, Ohio 45202-3688.

Isaac, Brant, Ledman & Teetor, LLP, Donald L. Anspaugh, attorney for the third-party defendant Hotwork USA, LLC, 250 E. Broad Street, Suite 900, Columbus, Ohio 43215.

This cause is before the court for consideration of a motion for partial summary judgment filed by defendant the Shared Systems Technology, Inc.

The court scheduled and held a hearing on the motion on April 29, 2013. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

The plaintiff Odom Industries, Inc. ("Odom Industries") entered into two purchase orders with the defendant Shared Systems Technology, Inc. ("Shared Systems Technology") for delivery on September 25, 2009 and October 1, 2009.[1] These purchase orders were for such services as heat curing and refractory work.[2] This particular job was known as "Husky Crossover and Stack Sections" and "Odom Job No. 2178."[3] Shared Systems Technology was hired as a subcontractor by Odom Industries, which was hired by Husky Energy, Inc. Lima to perform duct work.[4]

Odom Industries made several payments for the services rendered pursuant to the purchase orders.[5] These payments were made under a payment plan whereby Odom Industries would pay Shared Systems Technology in eighteen monthly payments.[6] Although Odom Industries made these payments after the job was

[1] Affidavit of Eric Swyers, filed November 15, 2012, at ¶ 3 and Exhibits A and B.
[2] Id.
[3] Id. at ¶ 2.
[4] Deposition of Timothy C. Odom at pgs. 14-16 and 19.
[5] Id. at ¶ 5.
[6] Odom Depo. at pg. 143.

completed, there were several problems with Job No. 2178 from the plaintiff's view, which were as follows: (1) issues with being late and struggling with getting pours done, which interfered with work being done by another contractor Flex Tech; (2) there were some areas where the refractory fell out or was insufficient and had to be repaired; and (3) failure to provide documentation as required by Husky that the job was done correctly with the correct materials or that testing was performed.[7] Eric Swyers, President of Shared Systems Technology, also recalled some issues with the refractory falling out in some areas.[8]

After significant issues arose on another job, Odom Industries subcontracted with Shared Systems Technology to work on (Odom Job No. 2251), the plaintiff ceased making payments for the services rendered in Job No. 2178.[9] Timothy Odom, CEO of Odom Industries, stated in his deposition that the plaintiff withheld further payment "as a set-off because we knew we were going to have huge damages" for Job No. 2251, and he also noted that these projects were similar in that the both involved Husky, refractory issues, and issues with quality and documentation.[10]

WHAT IS THE STANDARD FOR REVIEW ON A MOTION FOR SUMMARY JUDGMENT?

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable

[7] Id. at pgs. 142-144.
[8] Deposition of Eric Swyers at pgs. 35-37.
[9] Odom Depo. at pg. 145.
[10] Id.

minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[11]

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[12] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[13]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[14]

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[15] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be

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[11] Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.
[12] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.
[13] *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.
[14] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.
[15] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.

resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[16]

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[17] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[18]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[19] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.[20] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[21]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[22] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the

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[16] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[17] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[18] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.
[19] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.
[20] Id.
[21] Id.
[22] Id.

allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[23] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[24] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[25]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[26] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[27]

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[28]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[29]

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[23] Id.
[24] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[25] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.
[26] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[27] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.
[28] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.
[29] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[30] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[31] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[32]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of

[30] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.
[31] *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[32] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.

evidence, a claim to survive a summary judgment motion must be more than merely colorable.[33]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[34]

LEGAL ANALYSIS

" 'A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.'"[35] " 'Breach as applied to contracts is defined as a failure without legal excuse to perform any promise which forms a whole or part of a contract, including the refusal of a party to recognize the existence of the contract or the doing of something inconsistent with its existence.' "[36] " 'To prove a breach of contract, a plaintiff must establish the existence and terms of a contract, the plaintiff's performance of the contract, the defendant's breach of the contract, and damage or loss to the plaintiff.' "[37]

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[33] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[34] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.
[35] *Hanna v. Groom* (Feb. 26, 2008), 10th Dist. No. 07AP-502, 2008-Ohio-765, ¶ 13, quoting *Kostelnik v. Helper*, 96 Ohio St.3d 1, 770 N.E.2d 58, 2002-Ohio-2985, at ¶ 16, reconsideration denied, 96 Ohio St.3d 1489, 774 N.E.2d 764, 2002-Ohio-4478.
[36] Id. at ¶ 14, quoting *Natl. City Bank of Cleveland v. Erskine & Sons* (1953),158 Ohio St. 450, 110 N.E.2d 598, paragraph one of the syllabus.
[37] Id., quoting *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 798 N.E.2d 1141, 2003-Ohio-5340, at ¶ 27.

" 'A breach of a portion of the terms of a contract does not discharge the obligations of the parties to the contract, unless performance of those terms is essential to the purpose of the agreement.' "[38] "Whether a material breach has occurred ordinarily is a question of fact for the fact-finder."[39]

In examining the purchase orders executed in relation to Job No. 2178, one purchase order is for various delineated refractory work. Timothy Odom testified in his deposition that there were some areas where the refractory fell out or was insufficient and had to be repaired. Eric Swyers also recalled in his deposition that there were some issues with the refractory falling out, although he did not remember those issues in detail.

A failure to properly perform the refractory work at issue in the Purchase Order could constitute a material breach of the contract between the parties. Whether this work was or was not properly performed and whether such an alleged failure constitutes the failure to perform a term that is essential to the agreement between the parties is a question of fact to be tried to the jury as a genuine issue of material fact remains with regard to this subject. While Shared Systems argues that these are merely "general allegations," Timothy Odom's testimony specifically states that there were areas where refractory fell out or was insufficient and repair was required. This testimony is sufficient to raise a genuine issue of material fact.

Shared Systems also argues that the existence of a payment agreement between the parties and the fact that Odom Industries made payments under the

[38] Id. at ¶ 15, quoting *Software Clearing House, Inc. v. Intrak, Inc.* (1990), 66 Ohio App.3d 163, 170, 583 N.E.2d 1056.
[39] Id. at ¶ 16, citing *Ahmed v. University Hospitals Health Care System, Inc.*, Cuyahoga App. No. 79016, 2002-Ohio-1823, at ¶ 41.

agreement would foreclose the plaintiff's ability to argue that Shared Systems breached the contract. However, there is no allegation that the plaintiff waived any claims or defenses with regard to Job No. 2178. Instead, the partial payment on Job No. 2178 is simply another factual issue to be raised to the trier of fact.

As the court has determined that a genuine issue of material fact remains with regard to the defendant's breach of contract claim for Job No. 2178, partial summary judgment on this claim is not appropriate.

CONCLUSION

The defendant Shared Systems Technology's motion for partial summary judgment is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 5th day of June 2013 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride