SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

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Re: ***Delaware Department of Transportation v. Amec E & I, Inc. and Figg Bridge Engineers, Inc.***
C.A. No. S11C-01-031 RFS

Motion for Protective Order. Granted.

Submitted: October 19, 2011
Decided: January 3, 2012

Dear Counsel:

Defendant, Amec E & I, Inc., ("Amec E & I"), f/k/a Mactec Engineering and Consulting, Inc., has moved for a protective order to stay discovery pending resolution of

a statute of limitations defense. The other Defendant, Figg Bridge Engineers, Inc. ("Figg"), joins in the request. Plaintiff, State of Delaware Department of Transportation, ("State") opposes this motion.

The case is a breach of contract claim for defective work performed during construction of a State project for bridge, road and embankments at the Indian River Beach Inlet. The complaint, filed on January 28, 2011, made contractual and negligence claims. Amec E & I filed a motion to dismiss, arguing that the State was not a third party beneficiary under the contract between Figg and Amec E & I. Also, Amec E & I attacked the claim based upon negligent provision of information. The motion was denied as to the third party beneficiary count but granted on the negligence allegation. The background is discussed in two rulings, a Memorandum Opinion dated November 9, 2011 and a Letter Order dated December 7, 2011 denying Amec E & I's motion for reargument.

Amec E & I filed a second motion to dismiss based upon statute of limitations grounds. Figg joined in the motion and pled the same defense in its answer. The parties stipulated to a briefing schedule. Under Rule 12(g), a second motion to dismiss was not appropriate as this defense should have been consolidated with the first motion. Given the parties' agreement, the issue will be decided now. No suggestion is made that the omission of the limitations defense from the initial motion was intended to harass Plaintiff. Further, this approach promotes judicial economy as a successful statute of

limitations argument may end the litigation.[1]

On August 5, 2011, Plaintiff filed discovery requests consisting of interrogatories and requests for production to Amec E & I and Figg following an earlier exchange of insurance information. Further, on August 17, 2011, the State filed letters and notices of non-testimonial depositions *duces tecum* under Civil Rule 45 to eight non-parties who were involved in the project. Previously, these non-parties had provided information to the State. However, the letters accompanying the notices advised that the requests were broader. The personal appearance of non-parties was not required; they were to supply the information by September 26, 2011.

The Court oversees discovery and, in its discretion, can "make any order which justice requires to protect a party or person from . . . undue burden or expense," including those that contain "specified terms and conditions."[2] The filing of a dispositive motion does not automatically stay discovery.[3]

Although discovery may be stayed for good cause, discretion is exercised "sparingly and with real discretion" to prevent the development of an absolute rule.[4] A

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[1] 5 C *Wright and Miller, Federal Practice & Procedure: Civil* § 1385 at 483 (2004).

[2] *Anderson v. Airco, Inc.,* 2004 WL 2828208 (Del. Super.).

[3] *Gatz v. Ponsoldt*, 2005 WL 820604 (Del. Ch.).

[4] *Voege v. Arduser,* 1978 WL 4975 (Del. Ch.).

party should not be burdened with expenditures of time and money to satisfy broad discovery requests that may be superfluous. Yet, this singular concern is not conclusive.[5] A court must be satisfied that the administration of justice will be impeded if discovery is allowed to proceed. The burden to show good cause lies with the party seeking a stay.[6]

When there is a pending motion to dismiss, various factors are considered to grant or deny a stay of discovery.[7] The potential benefits of efficiency and conservation of resources must be weighed against the risk of unfair prejudice to the non-moving party.[8] If discovery is inevitable, a stay would not be granted because any discovery taken would not be wasted. The length of a stay is significant.[9] If the motion will be decided in a relatively short time, then a stay is more likely indicated absent undue prejudice.[10]

Further, the basis for the motion to dismiss may be taken into account.[11] If the

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[5] *Id.*

[6] *Szeto v. Schiffer*, 1993 WL 513229 (Del. Ch.)

[7] *Anderson, supra.*

[8] *Id., Orman v. General Cigar Holdings, Inc. et al.,* 2002 WL 31678689 (Del. Ch.)

[9] *Anderson, supra.*

[10] *Anderson, supra.*

[11] *Szeto, supra,* at *3. "For example, a stay of discovery is more appropriate in the context of a motion to dismiss that, at least facially, indicates that the entire suit may be dismissed." In federal practice, the likelihood of success may be a pertinent factor, *see, Grenig and Kinsler, Handbk. Fed. Civ. Disc & Disclosure*, § 1:68 (3d.ed.). Somewhat similarly, Superior Court judges apply the concept of likelihood of success when deciding whether to stay execution of judgments pending appeals. This type of evaluation asks "if the petitioner has raised a serious legal question that raises a 'fair ground for litigation and thus for more deliberative investigation.'" *Kirpatrick v. Delaware Alcoholic Beverage Control Comm.*, 471

argument appears to be bona fide and potentially conclusive, then a court may be more inclined to stay discovery. Conversely, dilatory efforts are not rewarded.[12]

Following review, Defendants have shown good cause to stay discovery between the parties for the following reasons:

a) On its face, the motion, if successful, would be dispositive. The suit appears to have been filed after the normal three-year limitations period had run unless saved by narrow exceptions to the bar.[13] In this context, discovery can be restricted completely or limited to permit the development of facts critical to decide a limitations defense.[14]

b) This motion was not filed as a delaying tactic. The parties stipulated to a briefing schedule. Accordingly, comprehensive briefs were filed, and the motion is ready for oral argument. Oral argument is scheduled for January 27, 2012. The time from then

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A.2d 356, 358 (Del. 1998). This concern is evident here.

[12] *See, Electra Investment Trust PLC v. Crews,* 1999 WL 1204844 (Del. Ch.) (stay of discovery is not justified where the moving party has not demonstrated urgency or the willingness to prosecute a motion to dismiss).

[13] For example, the State contends the contract is a specialty contract under seal which would permit suit to be filed within twenty years. *See Whittington v. Dragon Group, LLC*, 991 A.2d 1 (Del. 2009).

[14] *See, Defensive Instruments, Inc. v. RCA Corp.*, 385 F.Supp 1053 (W.D. Pa. 1974), *aff'd,* 530 F.2d 963 (3d Cir. 1976). In that case, discovery was restricted to preliminary fact questions necessary to determine the validity of a limitations defense. Discovery on the merits was not permitted. Here, the statute of limitations defense primarily presents a legal question. The principal issue is whether the State, suing in its sovereign capacity, is subject to a statute of limitations defense. Defendants argue that assuming all of the State's factual contentions are true, the claim is barred except for the doctrine of *Nullem Tempus Occurrit Regi* (no lapse of time bars the king). Thus, no discovery would be necessary to decide the objection.

to decision will not be prolonged.

c) The requests for production and interrogatories against Amec E & I and Figg on the merits are broad, as may be expected for a five-year project. Interests of efficiency and conservation of resources of Amec E & I and Figg outweigh the countervailing interests of the State not to lose any time. The defense expenses to respond would be substantial. A response would also be a waste because discovery is not inevitable. If Figg did not have a limitations defense, then discovery could proceed against Amec E & I. Figg has a cross claim against Amec E & I and would be subject to discovery.

d) The State will not suffer unfair prejudice. Already, the State has substantial information about the case after participating with Figg in lengthy mediation type procedures where data were exchanged. The State has obtained more detail from the eight non-parties. The material supplied from the Rule 45 discovery will require time to digest. A genuine fear of loss of evidence by a pause in the discovery process is not presented.

e) As indicated, this litigation covers five years and has complex aspects. Overall, the effect of a stay on the ultimate trial date is negligible.

f) The prejudice suffered by Plaintiff in the additional time lost by a stay if Plaintiff prevails is slight. The prejudice is substantially less than what Defendants would incur if they have to respond to broadly based discovery and, thereafter, succeed on the

motion to dismiss.

Considering the foregoing, the administration of justice will be impeded if discovery is not put on hold. Therefore, a protective order will be entered to stay discovery between the parties. Non-party discovery, like Civil Rule 45 depositions and notices *duces tecum,* will not be stayed. Should discovery be ongoing, Defendants would not necessarily be involved in them.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv

cc: Prothonotary
John Anthony Wolf, Esquire
John F. Morkan, III, Esquire
James F. Lee, Jr., Esquire
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