

<b>Centre Fence Co., Inc. v Orland Co., LLC</b>
2012 NY Slip Op 32782(U)
November 16, 2012
Supreme Court, Richmond County
Docket Number: 150050/12
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.: 150050/12  
Motion No.: 001, 002**

**CENTRE FENCE CO., INC.,**

*Plaintiff*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

**THE ORLAND COMPANY, LLC,  
ORLAND CONSTRUCTION CO., INC.,  
INTERNATIONAL FIDELITY INSURANCE COMPANY,  
GRENADIER REALTY CORP., and  
HOWLAND HOOK HOUSING COMPANY, INC.,**

*Defendants*

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The following items were considered in the review of the following motion for partial summary judgment and cross-motion to compel discovery.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion	2
Replying Affidavits	3
Memorandum of Law in Reply	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-Motion is as follows:

The plaintiff moves for partial summary judgment on its first and second causes of action against the defendant International Fidelity Insurance Company (“International Fidelity”). The motion is denied. The defendant, International Fidelity cross-moves to compel discovery. The cross-motion is granted.

The plaintiff is a subcontractor hired by the defendant, The Orland Company LLC, to supply and install fencing in connection with a private construction project at Arlington Terrace, Staten Island, New York. The parties agreed to a payment of \$592,800 inclusive of materials and labor. The plaintiff contends that it submitted a total of nine applications for progress payments

to the general contract. The general contractor paid six of the payments in full without retaining any money. The final three applications of the total nine applications were forwarded to the general contractor on December 31, 2010, January 15, 2011 and January 31, 2011 requesting a total payment of \$158,693.79. The plaintiff maintains that the last date that work performed at the work site was on March 3, 2011 when it installed a fire gate.

However, in the Proof of Claim submitted as exhibit 6 to the plaintiff's motion for partial summary judgment, Elizabeth Yeterian states that the plaintiff conducted work at the site from April 29, 2010 through February 17, 2011. Furthermore, exhibit 3 shows that the last application for payment by the plaintiff includes work done up until January 31, 2011. In reply, Ms. Yeterian states that the reason for the different dates is as follows:

. . . We learned in February 2011 that the Owner and Grenadier were not paying the General Contractor. Plaintiff nonetheless continued working on work including work relating to safety. Plaintiff never billed for that work. That is why the payment applications only go through January 2011.

The surety bond executed between Orland Construction Co., Inc. and International Fidelity states:

No suit or action shall be commenced hereunder by any Claimant:

. . . b) After the expiration of one (1) year following the date upon which the Claimant last performed work or furnished materials under said contract, it being understood, however that if any limitation embodied in this bond is prohibited by any law controlling the construction hereof such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

On April 15, 2011 the plaintiff contacted International Fidelity for payment. On April 18, 2011 International Fidelity directed the plaintiff to submit a Proof of Claim form. On April 22, 2011 the plaintiff submitted the Proof of Claim form and International Fidelity acknowledged receipt on April 26, 2011. By letter dated August 24, 2011 International Fidelity sent a letter to plaintiff enclosing a partial release wherein it would pay the sum of \$110,315.60 less \$48,317.19 which it described as a “retainage.”

In opposition to the plaintiff’s motion for partial summary judgment and in support of its motion to compel, Attorney Genise Teich, a senior managing claims counsel for International Fidelity, submits an affirmation wherein she stated that:

Perhaps the term retainage as referenced and used by the parties may be somewhat of a misnomer. The monies withheld are for the final payment for work that has not been completed and/or has been completed improperly and/or without closeout requirements.

International Fidelity moves to compel discovery arguing that the plaintiff has not produced any materials to substantiate the positions set forth by Ms. Yeterian.

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”.<sup>1</sup> Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.<sup>2</sup> As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of

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<sup>1</sup> *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

<sup>2</sup> *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1<sup>st</sup> Dept 1994].

fact exist and the movant is entitled to judgment as a matter of law.<sup>3</sup> On a motion for summary judgment, the function of the court is issue finding, and not issue determination.<sup>4</sup> In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.<sup>5</sup>

Here, summary judgment must be denied as there is a genuine and material factual dispute as to when plaintiff last provided services at the project. To support its position that summary judgment is appropriate the plaintiff cites to State Finance Law § 137 entitled bond to secure payment of certain claims arising from public improvement; enforcement. First, it is uncontested that this was a private construction project. It has not been claimed that this project was a public improvement. Furthermore, the Court of Appeals decision in *Windsor Metal Fabrications v. General Acc. Ins. Co.*<sup>6</sup> concerned a public improvement construction project and resolved whether contractual provisions between a general contractor and subcontractor may toll a statute of limitations. The Court of Appeals concluded that

. . . the one year period starts to be counted as of the time when a subcontractor has demanded final payment from the general contractor with whom it contracted, and 90 days have passed since the subcontractor ceased work on the project.<sup>7</sup>

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<sup>3</sup> *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

<sup>4</sup> *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

<sup>5</sup> *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

<sup>6</sup> 94 NY2d 124 [1999].

<sup>7</sup> *Id.* at 128.

In arriving at this conclusion the Court of Appeals reviewed the legislative history of State Finance Law § 137 and found that

. . . the Legislature has clearly made a conscious policy decision with respect to public improvement projects. It defines and delimits the remedy by requiring prompt payment, pursuant to mandatory payment bonds, in a manner that is fair to claimants, as well as consistent and reasonably definitive as to the duration of the surety's litigation exposure.<sup>8</sup>

In addition, the Appellate Division, Second Department decision in *American Bldg. Contrs. Assoc., Inc. v. Mica & Wood Creations, LLC*<sup>9</sup> cited by the plaintiff involves a public works project, rather than a private construction project.

These cases are distinguishable from the facts before the court in this matter. First and foremost this case involves a private construction project. Secondly, unlike the factual setting in the *Windsor Metal Fabrications* case where the general contractor and subcontractor attempted to alter the statute of limitation, here the general contractor and the bond issuer limited the statute of limitations period. Therefore, the date where plaintiff ceased providing services at the construction site is material. Consequently, the plaintiff's motion for partial summary judgment is denied, and International Fidelity's cross-motion to compel discovery is granted.

Accordingly, it is hereby:

ORDERED, that the plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED, that the defendant, International Fidelity Insurance Company's motion to compel discovery is granted; and it is further

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<sup>8</sup> Id. at 135.

<sup>9</sup> 23 AD3d 322 [2d Dep't. 2005].

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3<sup>rd</sup> Floor,  
on **Tuesday, December 11, 2012 at 9:30 a.m.** for a Preliminary Conference.

ENTER,

DATED: November 16, 2012

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Joseph J. Maltese  
Justice of the Supreme Court