

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: July 30, 2014)

CARDI CORPORATION, :
Plaintiff, :

v. :
:

C.A. No. PB 08-7787

STATE OF RHODE ISLAND AND :
PROVIDENCE PLANTATIONS, :
DEPARTMENT OF ADMINISTRATION, :
DIVISION OF PURCHASES and THE :
HANOVER INSURANCE GROUP, INC., :
Defendants. :

DECISION

SILVERSTEIN, J. Cardi Corporation (Cardi) brings this suit against The Hanover Insurance Group, Inc. (Hanover), among others, for declaratory judgment and breach of contract. Currently before the Court is Hanover’s Motion for Summary Judgment (Motion) pursuant to Super. R. Civ. P. 56 as to both counts. Cardi opposes Hanover’s Motion as to both counts.

I

Facts and Travel

The instant case revolves around a highway construction project which included the construction of the Providence River Bridge (the Project), a new 900 foot bridge over the Providence River. In the contract (the Contract) between the Rhode Island Department of Transportation (RIDOT) and Cardi, Cardi was the Prime Contractor for the Project. Cardi later entered into a subcontract agreement (the Subcontract) with National Eastern Company (NEC) to supply structural steel beams and other steel materials required for construction of the bridge. The Subcontract required NEC to perform its work in accordance with the requirements and

specifications of the Contract. NEC agreed to indemnify Cardi for all losses incurred by Cardi on account of NEC's work.

In furtherance of the Subcontract, Cardi required that NEC obtain a payment bond and a performance bond covering the work. Hanover issued Performance Bond #1735673 and Payment Bond #1735672 (the Bonds). Under the terms of the Bonds, Hanover bound itself to Cardi and agreed to pay Cardi, up to the value of the Bonds, for any damages suffered by Cardi as a result of any payment or performance failure on the part of NEC.

The Bonds are standard American Institute of Architects (AIA) A312 bonds¹. The Bonds name NEC as the contractor, Cardi as the owner, and Hanover as the surety. The performance bond provides that the surety's obligation under the bond shall arise after:

- “3.1 The Owner has notified the Contractor and the Surety . . . that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract . . . ; and
- “3.2 The Owner has declared a Contractor Default and formally terminated the Contractor's right to complete the contract. Such Contractor Default shall not be declared earlier than twenty days after the Contractor and the Surety have received notice as provided in Subparagraph 3.1.” See Performance Bonds, attached to the Aff. of John A. McDevitt.

Under the requirements of the Contract, NEC was to coat the steel with a specific thickness of zinc coating in order to protect the steel from corrosion. RIDOT engaged a quality assurance consultant to inspect each piece of steel at NEC's facility before it was permitted to leave. NEC coated the steel with zinc, and thereafter, the steel was delivered and installed.

¹ The A312T-1984 Performance Bond is a commonly used form bond issued by AIA that details a surety's liability if a contractor fails to perform under a construction contract.

RIDOT paid Cardi for the steel and the zinc coating, which amounted to \$779,400. Cardi then paid NEC for NEC's application of the zinc coating, which equaled a sum of \$649,500. About one year later, in May 2006, RIDOT raised questions as to whether the zinc coating had been properly applied to the steel. RIDOT engaged a consultant to examine the sufficiency of the coating. That consultant found that the coating on approximately fifty percent of the steel was not in accordance with the specifications as set forth in the Contract.

In early 2008, RIDOT provided its consultant's report to Cardi. Thereafter, RIDOT deducted the \$779,400 it previously paid Cardi from other monies due to Cardi on the Project along with the expenses for the inspector—which equaled \$38,100—for a total sum of \$817,500. Cardi immediately provided the consultant's report to NEC.

On December 11, 2008, Cardi filed its original Complaint against Hanover (Complaint). On April 10, 2012, Hanover filed its Motion on grounds that Cardi's claim was barred by the two-year statute of limitations as contained in the Bonds. Hanover claimed that NEC completed performance on the Project in August 2006 and thus, when the suit was brought in December 2008, it was outside the two-year period that Cardi had to bring its claim. As a response, Cardi provided the Court with evidence that demonstrated that NEC performed work past August 2006. See Aff. of Paul J. Grimaldi ¶¶ 2-5 (Grimaldi Aff.). Hanover withdrew its Motion in order to conduct additional discovery. After conducting such discovery, Hanover renewed its Motion.

In December 2006, questions were raised as to NEC's original work on certain access hatches, specifically whether the access hatches were strong enough to hold the weight of people standing on them. See Grimaldi Aff. ¶ 2. NEC inspected the access hatches and proposed a retrofit that would reinforce the existing mesh with steel reinforcement clips. Grimaldi Aff. ¶¶ 2-3 & Ex. A. NEC had previously worked on the access hatches pursuant to the approved shop

drawings. See id. Therefore, NEC characterized the reinforcement work as “extra work” that “would be done at no additional cost to the State of Rhode Island.” Id. at Ex. A. In January 2007, NEC submitted its proposal and sent it to Cardi, who then sent it to RIDOT for approval. Id. at ¶ 3 & Ex. A. The work was completed after RIDOT approved NEC’s proposal. However, NEC’s proposed and approved work was not the work that was performed. Photographs show that the mesh was welded to the steel rather than attached using the reinforcement clips proposed by NEC. See Grimaldi Dep. 91:2-5, Sept. 11, 2013. It is disputed if NEC conducted the work on the access hatches.

Hanover raises three main issues in its present Motion: (1) whether Cardi’s claim is barred by the two-year limitations period; (2) whether Cardi qualifies as a “Claimant” under the Bonds; and (3) whether Cardi satisfied the conditions precedent to seeking recovery outlined in the Bonds.

II

Standard of Review

“Summary judgment is a proceeding in which the proponent must demonstrate by affidavits, depositions, pleadings and other documentary matter . . . that he or she is entitled to judgment as a matter of law and that there are no genuine issues of material fact.” Palmisciano v. Burrillville Racing Ass’n, 603 A.2d 317, 320 (R.I. 1992) (citing Steinberg v. State, 427 A.2d 338 (R.I. 1981)). The court, during a summary judgment proceeding “does not pass upon the weight or the credibility of the evidence but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion.” Id. (citing Lennon v. MacGregor, 423 A.2d 820 (R.I. 1980)). Moreover, “the justice’s only function is to determine whether there are any issues involving material facts.” Steinberg, 427 A.2d at 340. The court’s purpose during the

summary judgment procedure is issue finding, not issue determination. O'Connor v. McKanna, 116 R.I. 627, 359 A.2d 350 (1976). Therefore, the only task for the judge in ruling on a summary judgment motion is to determine whether there is a genuine issue concerning any material fact. Id.

“When an examination of pleadings, affidavits, admissions, answers to interrogatories and other similar matters, viewed in a light most favorable to the party opposing the motion, reveals no such issue, the suit is ripe for summary judgment.” Indus. Nat’l Bank v. Peloso, 121 R.I. 305, 307-08, 397 A.2d 1312, 1313 (1979). “[T]he opposing parties will not be allowed to rely upon mere allegations or denials in their pleadings. Rather, by affidavits or otherwise they have an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact.” Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998). However, it is not an absolute requirement that the nonmoving party file an affidavit in opposition to the motion. Steinberg, 427 A.2d at 338. If the affidavit of the moving party does not establish the absence of a material factual issue, the trial justice should deny the motion despite the failure of the nonmoving party to file a counter-affidavit.

III

Discussion

A

Two-Year Statute of Limitations Period

This action centers on a standard AIA A312 Performance Bond. Hanover first argues that Cardi has not demonstrated any issues of material fact that would prevent summary judgment from entering in regard to its Complaint being barred by the two-year limitations period described within the performance bond. Our General Laws provide that no action on

performance bonds shall be commenced after the expiration of two years “after the day on which the last of the labor was furnished or performed or material or equipment was furnished or supplied by any person claiming under the section.” See G.L. 1956 § 37-12-5. Hanover argues that because NEC last furnished work or material on the Subcontract in August 2006, any claim against Hanover or NEC later than August 2008 would be barred. Although Cardi has attempted to present evidence to demonstrate that NEC performed work as late as February 2007, Hanover claims that such evidence does not create a material dispute because: (1) the evidence was recanted, so there is no evidence that NEC performed the work; (2) the alleged work was outside the scope of the bonded contract and cannot restart the limitation period; and (3) the alleged work is merely corrective or repair work and, therefore, is legally insufficient to affect the running of the limitations period.

Hanover relies on Sims Corp. v. The Hartford Accident & Indem. Co., No. 76-2466, 1979 WL 195994, at *1 (R.I. Super. Feb. 22, 1979) (Cochran, J.), a decision that laid out a legal test for determining the last day upon which labor or materials are performed or furnished. The test is whether the work that allegedly extended the deadline was either part of the original contract or was performed for the purpose of correcting defects or the making of repairs following the inspection of the project. Id.; see also D.D.S. Indus., Inc. v. C.T.S., Inc., No. 11-11561, 2012 WL 2178962, at *3 (D. Mass. June 13, 2012) (finding that the limitations period begins running once work under the contract is completed, and repairs and corrections do not affect the running of the limitations period).

The U.S. Court of Appeals for the Sixth Circuit has stated, “[t]he majority of circuits that have addressed this issue have held that remedial or corrective work or materials, or inspection of work already completed . . . will not toll the Miller Act’s one-year statute of limitations.” U.S.

v. Int'l Fid. Ins. Co., 200 F.3d 456, 460 (6th Cir. 2000)². To constitute the last day of work, the work must have been “part of the original performance of the contract.” U.S. ex rel. Austin v. W. Elec. Co., 337 F.2d 568, 572-73 (9th Cir. 1964) (stating that work such as closing holes and correcting errors in work already performed does not extend the date on which labor or materials were last furnished).

In the case at hand, Hanover stresses that there is no concrete evidence demonstrating that NEC ever performed the work on the access hatches in 2007. In fact, Cardi’s witness said that he *thinks* NEC added extra welds to the hatches but has no personal knowledge of whether it was NEC or another company involved. See Grimaldi Dep. 90:1-92:9, Sept. 11, 2013 (emphasis added). Therefore, Hanover asserts that Cardi cannot satisfy its burden of proving that NEC, in fact, performed the work on the access hatches.

Cardi, on the other hand, asserts that a reasonable jury can find that no one else would have performed the work other than NEC, given that it was NEC’s obligation under the Subcontract. NEC allegedly: (1) took part in discussions regarding the work; (2) proposed hatch modifications; and (3) scheduled hatch modifications. Cardi asserts that these allegations are enough to create a genuine dispute of a material fact. The hatch modifications were performed even though the performance was not in accordance with NEC’s proposals. Although Cardi and RIDOT had access to the hatches, there is no record indicating that either of them performed the work. Hanover has presented a conflicting inference concerning the entity that performed the work, which creates an issue of material fact.

Alternatively, even if Cardi proved that NEC did perform the work on the access hatches, Hanover asserts that such work is immaterial and legally incapable of extending the limitations

²The Miller Act (40 U.S.C.A. § 3133 et. seq. (2006)) provides a private cause of action for anyone supplying labor or materials to certain government contracts.

period. Since the extra work was not called for in the original shop drawings or in the payment and performance bonds, it cannot affect the running of the limitations period. In fact, the Bonds explicitly state that they cover only the work required under the Contract. Therefore, it is Hanover's position that work not covered by the Bonds is not Hanover's responsibility and cannot extend its liability period.

Assuming Hanover's arguments are deemed to be valid, Cardi asserts that there is a clear dispute over a specific date which NEC last performed work on the Project. Hanover claimed that the work was completed in August 2006; however, deposition testimony indicates that NEC may have supplied materials to the Project as late as November 2006. See Grimaldi Dep. 53:19-59:1, Sept. 11, 2013. Therefore, an issue of material fact exists as to the precise date that NEC last supplied materials to the Project.

Furthermore, Cardi claims that NEC did not "cease work" on the Project until 2007. It is well established that Rhode Island Courts strictly construe performance bonds, and the nature and extent of surety liability under such bonds is governed by the express terms of the bond. Marshall Contractors, Inc. v. Peerless Ins. Co., 827 F. Supp. 91, 94 (D.R.I. 1993); Narragansett Pier R.R. Co. v. Palmer, 70 R.I. 298, 302, 38 A.2d 761, 763-64 (1944). Cardi notes that the performance bond provides that all actions under the bond must be instituted "within two years after Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first." See Aff. John A. McDevitt, Ex. B, ¶ 9.

"Cease work" has been interpreted to indicate that the statute of limitations does not begin to run until the project is completed. See S. Cnty. Sand & Gravel Co. v. Nat'l Bonding & Accident Ins., No. 82-327, 1989 WL 1110278, at *4 (R.I. Super. May 17, 1989) (Caldarone, J.).

After December 11, 2006, NEC inspected the Project, proposed a retrofit for the access hatches, and allegedly performed the now-existing welds on the access hatches. Thus, NEC did not “cease working” on the Project until after December 11, 2006.

Additionally, if the work is determined to be included under the Bonds, Hanover characterizes the work as “corrective or remedial” work. Such work does not affect the running of the limitations period. See Int’l Fid. Ins. Co., 200 F.3d at 460 (discussing “bright-line rule” separating original performance of contract work from remedial or corrective work, with latter not affecting limitations period); see also W. Elec. Co., 337 F.2d at 572-73.

The First Circuit and at least one Rhode Island Superior Court have adopted the view that the statute of limitations begins to accrue on the full performance of the contract, which is the date when the last of the labor was performed or the material was supplied. See D.D.S. Indus., Inc., 2012 WL 2178962, at *3; see also S. Cnty. Sand & Gravel Co. 1989 WL 1110278, at *4 (finding that bond claim was timely where subcontractor’s work had not reached final completion). Further, in Sims Corp., part of the legal test for determining the last day of work is whether the work was performed for the purpose of making repairs following the inspection of the project. 1979 WL 195994, at *1. The Sims Corp. court rejected the surety’s claims that the plaintiff’s work in labeling switches and making final adjustments constituted corrective or remedial work because the court determined a genuine issue of material fact existed as to whether the work performed was part of the original contract. Id., at *1-2.

When interpreting the Miller Act, federal courts have stated that work that is minor or inexpensive may still toll the statute of limitations so long as the work was performed as part of the original contract. See U.S. ex. rel. Allied Assocs. Commercial Floors, Inc. v. Farr Builders, Inc., No. SA-13-CV-0897, 2014 WL 280396, at *3 (W.D. Tex. Jan. 23, 2014) (Rodriguez, J.)

(stating that installation of ceramic tile not corrective where necessary to complete the project). Similarly, “extra work” may still impact the statute of limitations if that work was performed as part of the original subcontract. See Precision Stone, Inc. v. Arch Ins. Co., 472 F. Supp. 2d 577, 581 (S.D.N.Y. 2007) (holding that punch list established that work had not ceased and the statute of limitations had not run yet). The key distinction is whether the work is more properly characterized as an uncompleted requirement of the original subcontract or as a mere correction of an already performed aspect of the subcontract. See United States of America f/b/o Hussmann Corp. v. Fid. and Deposit Co. of Maryland, 999 F. Supp. 734, 745-46 (D.N.J. 1998).

If NEC performed work after December 2006, the work was part of its original scope of work because NEC was required to adhere to any and all Project specifications and regulations governing the scope of work, including safety regulations. NEC’s work on the Project could not be complete until the work complied with the safety regulations expressly stated in the Subcontract. Therefore, the work cannot be characterized as mere corrective or repair work.

Accordingly, Cardi has established that there is an issue of material fact regarding whether the work on the access hatches was within the scope of NEC’s Subcontract, whether the work was corrective or remedial, and whether NEC worked on the Project past August 2006.

B

Cardi as a “Claimant” Under the Bonds

Hanover argues that it is entitled to summary judgment because Cardi did not furnish NEC with labor, materials, or equipment and, therefore, Cardi does not qualify as a “Claimant” under the Bonds. The payment bond states that a “Claimant” is an individual or entity that furnished labor, materials, or equipment for use in the performance of the Construction Contract and has not been paid. See Payment Bond # 1735673, at ¶ 15.1 and Payment Bond #1735672, at

¶ 15.1. Hanover asserts that Cardi is not a “Claimant” under the Bonds because (1) its Complaint does not allege that NEC ever failed to pay Cardi for Cardi’s providing of labor or material to NEC and, more specifically, (2) Cardi did not furnish NEC with labor and materials.

While Hanover’s suggestion that Cardi is not a “Claimant” under the payment bond may be accurate, the present dispute essentially arises solely out of the performance bond. Cardi’s initial suit stems from defective performance on the Project rather than a failed payment under the payment bond. Under the performance bond, there is no express definition of a “Claimant” included in the document. In fact, the term “Claimant” is not mentioned anywhere in the text of the performance bond. The performance bond states that if the owner has satisfied the conditions in Paragraph 3, the surety has the obligation to take one of the actions described in Paragraph 4, which pertain to the surety’s right to perform and complete the construction contract. See Performance Bond # 1735672, at ¶ 4. A surety can waive its rights and deny any liability in whole or in part. See id. at ¶ 4.4.2. In that event, the owner, here Cardi, is entitled to enforce any remedy available to it. See id. at ¶ 5. Therefore, the performance bond allows Cardi to state a claim for relief.

C

Conditions Precedent to Seeking Recovery Under the Bonds

Hanover claims that it should be discharged of liability under the Bonds because Cardi failed to satisfy the conditions precedent to seeking recovery under the Bonds. It relies on a case of this Court that dealt with the same AIA A312 bonds at issue here. See Raito, Inc. v. Cardi Corp., No. PB 07-3225, 2010 WL 1422002 (R.I. Super. Apr. 5, 2010) (Silverstein, J.) (Raito I). Raito I similarly involved an alleged lack of compliance, on the part of the plaintiff, with regard to the conditions precedent outlined in the performance bond. Id. This Court held that

Paragraph 3 of the performance bond contained various conditions precedent which had to be satisfied before a surety's obligations under the bond could arise. Id. The plaintiff could not remedy its failure to comply with the conditions precedent by taking actions required under Paragraph 3.1 of the performance bond years after the contractor completed performance and after the lawsuit on the bond was commenced. Id.; see also Raito, Inc. v. Cardi Corp., No. PB 07-3225, 2010 WL 2811410 (R.I. Super. July 14, 2010) (Silverstein, J.) (Raito II) (denying plaintiff's motion for reconsideration). Here, it is alleged that it was not until three years after NEC completed its work that Cardi attempted to comply with the conditions precedent through its attempt to declare a default and arrange for a conference with Hanover.

Cardi suggests that Hanover's reliance on the Raito cases is misplaced. Because the defects of NEC's work were latent defects, Hanover cannot show prejudice from any lack of notice. See Raito II, 2010 WL 2811410 (noting there is no analogue between latent defects or defective work and the type of delay and indemnity claims presented). Both Raito courts held that there must be prejudice to the surety arising from lack of notice. Raito I, 2010 WL 1422002; Raito II, 2010 WL 2811410. However, the court concluded that the surety's bond liability was discharged only after finding that the bond surety was prejudiced by the lack of notice. Raito I, 2010 WL 1422002; Raito II, 2010 WL 2811410. The court stated that a lack of notice deprived the surety of an opportunity to limit its liability under the bond; therefore, the surety was not liable under the bond. Raito I, 2010 WL 1422002; Raito II, 2010 WL 2811410.

The present case is distinguishable from the Raito cases because where the Raito cases involved delay and indemnity claims, Cardi's claims here arise out of latent defects in NEC's work. In fact, the Raito II court stated, "[i]t is understandable that courts would hold

performance bond sureties liable after completion of the project because latent defects and defective work often are not discerned until after the project is completed.” 2010 WL 2811410.

This is, in fact, a latent defect case. Cardi asserts that it was not possible to give notice of a default because NEC’s defective work was only discovered after it was performed, completed, and inspected. A number of cases fall within this body of law, as noted in the Raito II decision. See 2010 WL 2811410 (citing AgGrow Oils, LLC v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA, 276 F. Supp. 2d 999, 1016 (D.N.D. 2003) aff’d by 420 F.3d 751 (8th Cir. 2005); Sch. Bd. of Escambia Cnty. v. TIG Premiere Ins. Co., 110 F. Supp. 2d 1351 (N.D. Fla. 2000); Hunters Pointe Partners Ltd./P’ship v. U.S. Fid. & Guar. Co., 486 N.W.2d 136 (Mich. Ct. App. 1992). Cardi correctly suggests that Hanover remains liable on the Bonds even after the completion of NEC’s work.

Cardi has established more than one genuine issue of material fact. First, there is a dispute concerning the exact date that NEC completed the Project and such a determination will affect the start date of the two-year limitations period. Second, Cardi has established a dispute concerning whether NEC’s work on the access hatches was part of NEC’s original Subcontract as well as if NEC actually completed the work on the access hatches. Lastly, Cardi has demonstrated that Hanover could still be liable under the Bonds even after NEC completed the work due to the latent nature of the defects.

IV

Conclusion

Based on the foregoing analysis, this Court denies Hanover’s Motion as to both counts. Counsel for Cardi may present an order consistent herewith which shall be settled after due notice to counsel of record.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

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CASE NO: **PB 08-7787**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **July 30, 2014**

JUSTICE/MAGISTRATE: **Silverstein, J.**

ATTORNEYS:

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