IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SPX CORPORATION, a Delaware corporation,	)	
Plaintiff,	)	
v.	)	C.A. No. N10C-10-162 WCC
GARDA USA, INC., a Delaware corporation and GARDA WORLD SECURITY CORPORATION, a corporation organized under the laws of Canada,	)	
Defendants.	)	

Submitted: September 5, 2012
Decided: December 6, 2012

On Defendants' Renewed Motion to Dismiss – DENIED

ORDER

John V. Fiorella, Esquire, and Jennifer L. Dering, Esquire, Archer & Greiner, 300 Delaware Avenue, Suite 1370, Wilmington, DE 19801. Attorneys for Plaintiff SPX Corporation.

Peter B. Ladig, Esquire, and Brett M. McCartney, Esquire, Morris James LLP, 500 Delaware Avenue, Suite 1500, P.O. Box 2306, Wilmington, DE 19899-2306. Attorneys for Defendants Garda USA, Inc. and Garda World Security Corporation.

Jeffrey A. Simes, Esquire, and Bryan F. Bertram, Goodwin Procter LLP, The New York Times Building, 620 Eighth Avenue, New York, NY 10018-1405. Attorneys for Defendants Garda USA, Inc. and Garda World Security Corporation.

CARPENTER, J.

Before this Court is Defendants Garda USA, Inc. and Garda World Security Corporation's ("Garda") Renewed Motion to Dismiss the Complaint brought by SPX Corporation ("SPX"). At issue is whether SPX's claims for reimbursement for certain workers' compensation liabilities (Count 1) and replacement letters of credit (Count 2) are time barred or, instead, stem from a continuing contract, which would effectively toll the three-year statute of limitations period. The Court finds that, at this juncture of the case, there is a reasonable assertion of a continuing contract that would affect the applicable statute of limitations. Accordingly, Garda's Motion to Dismiss the Complaint brought by SPX is hereby **DENIED**.

FACTUAL AND PROCEDURAL BACKGROUND

Garda's Renewed Motion to Dismiss arises from Garda's 2006 acquisition of SPX's wholly owned subsidiary, Vance. On or about January 13, 2006, Garda and SPX effectuated a Stock Purchase Agreement ("SPA") under which Garda acquired all outstanding common stock of Vance and, in exchange, Garda agreed to assume SPX's and Vance's respective obligations arising from or relating to the following claims: employee benefit plans, occupational health and safety, pay equity, workers' compensation, and accrued vacation pay benefits. Specifically, SPX agreed to administer the pre-existing claims that arose prior to the effective date of the SPA, and Garda agreed to reimburse and indemnify SPX for the costs

and expenses of these claims following the effective date of the SPA. Additionally, Garda agreed to replace all performance bonds, surety bonds, and letters of credit posted by SPX in connection with the various undertakings, insurance policies, and other obligations of Vance.

Shortly after the closing, SPX began invoicing Garda for Vance-related workers' compensation claims it paid that existed at the time of the acquisition. However, it appears shortly after closing that a dispute arose as to whether SPX had under-reserved Vance for those claims, causing Garda to believe that it paid an inflated purchase price for Vance. Since Garda believed that paying the invoices and replacing the letters of credit would permit SPX to double-dip, Garda refused to make any payment. As a result, the invoices continue to be unpaid to this day and the letters of credit have not yet been replaced.

Compliant with its obligations under the SPA, SPX has paid $1,232,758 of workers' compensation claims and benefits to Vance employees as of March 10, 2012. Additionally, SPX has continued to maintain letters of credit in favor of certain obligees and/or insurers of Vance totaling $700,362.50 plus costs and interest. Despite SPX's March 3, 2010 demand letter seeking payment, Garda has not fulfilled its obligation under the SPA to reimburse SPX for these amounts. Consequently, on October 19, 2010, SPX filed its Complaint against Garda, seeking reimbursement for workers' compensation liabilities and replacement of

the letters of credit pursuant to the parties' agreed upon obligations under the SPA. On November 29, 2010, the parties stipulated that Garda would respond to SPX's Complaint on or before December 23, 2010. However, Garda instead filed its motion to Stay and/or Dismiss on December 23, 2010. On March 16, 2011, the Court directed the parties to pursue mediation, dismissing Garda's initial Motion without prejudice.

Additionally, the parties completed a related arbitration proceeding, which Garda contended in its prior Motion to Stay and/or Dismiss required final disposition prior to the commencement of this action. Because of the arbitration's October 11, 2011 decision to disallow Garda's claims, Garda filed suit in the Chancery Court to set aside the arbitration decision. The parties completed a mediation on January 31, 2012, without success. As such, Garda filed this Renewed Motion to Dismiss and its Opening Brief in Support of the Motion to Dismiss.

STANDARD OF REVIEW

Defendants have filed a Motion to Dismiss under Superior Court Civil Rule 12(b)(6), alleging failure to plead facts sufficient to avoid application of the relevant statute of limitations.[1] When evaluating a motion to dismiss based on the timeliness of claims pursuant to Rule 12(b)(6), the Court must proceed without the

[1] *See* Super. Civ. R. 12(b)(6).

benefit of a factual record and assume as true the well-pleaded allegations in the complaint.[2] The Court may dismiss a complaint under Rule 12(b)(6) only where the Court determines with "reasonable certainty" that no set of facts can be inferred from the pleadings upon which the plaintiff could prevail.[3] Although the Court need not blindly accept as true all allegations nor draw all inferences in the plaintiff's favor, "it is appropriate . . . to give the pleader the benefit of all reasonable inferences that can be drawn from its pleading."[4]

DISCUSSION

In support of its Motion to Dismiss, Garda argues that: 1) the three-year statute of limitations precludes the *majority* of SPX's claims as time barred; and 2) no exception exists to toll the statute of limitations. Generally, "the defendant bears the burden of proving that a limitations period has lapsed and that claim is time-barred."[5] "When a complaint asserts a cause of action that on its face accrued outside the statute of limitations, however, the plaintiff has the burden of pleading facts leading to a reasonable inference that one of the tolling doctrines adopted by Delaware courts applies."[6] At the motion to dismiss stage, therefore, the Court typically conducts a three-part analysis to determine whether a claim is time barred. From the pleadings, the Court looks to determine: 1) the cause of action's

[2] *See Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38-39 (Del. 1996).
[3] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).
[4] *In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991).
[5] *Winner Acceptance Corp. v. Return on Capital Corp.*, No. 3088-VP, 2008 WL 5352063, at *14 (Del. Ch. Dec. 23, 2008).
[6] *Id.* (citing *Yaw v. Talley,* 1994 WL 89019, at *6 (Del. Ch. Mar. 2, 1994)).

accrual date based on the allegations; 2) whether the plaintiff has plead facts sufficient to create a reasonable inference that the statute of limitations has been tolled; and 3) "assuming a tolling exception[7] has been pleaded adequately, when the plaintiff was on inquiry notice of a claim based on the allegations."[8]

Although the allegations set forth in SPX's complaint superficially appear to have accrued outside the applicable statute of limitations without a plead exception, the Court's ability to apply the three-part analysis in this case is frustrated by SPX's assertion that the SPA is a continuing contract. As a result, the Court's inquiry is simply whether sufficient pleadings of Garda's continuing obligation exist to support SPX's assertion. In other words, SPX's complaint can only be saved if the Court finds that the allegations set forth in the complaint are sufficient to support that the SPA is a "continuing contract" and Garda's obligations to reimburse are ongoing.

Delaware courts have generally held that "a cause of action for a breach on contract accrues at the time of the breach."[9] However, "[w]hether a contract is continuous or severable impacts the accrual date."[10] Therefore, "[i]f the Court

---

[7] *See Certainteed Corp. v. Celotex Corp.*, No. 471, 2005 WL 217032, at *7 (Del. Ch. Jan. 24, 2005) (citations omitted) (listing "fraudulent concealment," "inherently unknowably injury," and "equitable tolling" as exceptions that toll statute of limitations).

[8] *Winner*, 2008 WL 5352063, at *14 (citing *In re Dean Witter P'ship Litig.*, No. 14816, 1998 WL 442456, at *19 (Del. Ch. July 17, 1998)).

[9] *Kaplan v. Jackson*, No. 90C-JN-6, 1994 WL 45429, at *2 (Del. Super. Jan. 20, 1994) (citing *Nardo v. Guido DeAscanis & Sons,* 254 A.2d 254, 256 (Del. Super. 1969)).

[10] *Kaplan*, 1994 WL 45429, at *2 (citing *Burger v. Level End Dairy Investors,* 125 Bankr. 894 (Bankr. D. Del. 1991)).

finds a contract continuous in nature, Delaware's statute of limitations does not typically begin to run until the termination of the entire contract."[11] Conversely, "if the Court finds the contract severable in nature, the statute of limitations generally begins to run on each severable portion when a party breaches that portion of the contract."[12] As a result, the nature of the contract must first be determined before the accrual date can be established and, in turn, the timeliness of the claim can be evaluated.

To determine whether a contract is continuous or severable, the Court analyzes the intent of the parties.[13] Specifically, "[t]he Court must ascertain this intent through the terms and subject matter of the contract, taken together with pertinent facts and circumstances surrounding the contract."[14] However, this Court previously held in *Am. Tower Corp. v. Unity Commc'ns, Inc.*[15] that "the question of the parties' intent cannot be resolved on a motion to dismiss, as it is a factual issue that must be resolved by trial."[16] In *Am. Tower Corp.*, this Court declined to decide the case "on a motion to dismiss because dismissal would [have] be[en] appropriate only if 'plaintiff would not [have] be[en] able to recover

[11] *Kaplan*, 1994 WL 45429, at *2 (citing *Burger,* 125 Bankr. at 901-02)).
[12] *Kaplan*, 1994 WL 45429, at *2 (citing *Worrel v. Farmers Bank of State of Del.,* 430 A.2d 469, 474-75 (Del. 1981)).
[13] *See Kaplan*, 1994 WL 45429, at *3 (citing *Tracey v. Franklin,* 67 A.2d 56, 61 (Del. 1949)).
[14] *Kaplan*, 1994 WL 45429, at *3 (citing *Equitable Trust Co. v. Delaware Trust Co.,* 54 A.2d 733, 738 (Del. 1947)).
[15] No. 09C-03-122 PL, 2010 WL 1077850 (Del. Super. Mar. 8, 2010).
[16] *Am. Tower Corp. v. Unity Commc'ns, Inc.*, No. 09C-03-122 PL, 2010 WL 1077850, at *2 (Del. Super. Mar. 8, 2010).

under any reasonably conceivable set of circumstances.'"[17] This Court in *Am. Tower Corp.* reasoned that dismissing the complaint based on the defendant's argument would have required the Court "to make factual determinations concerning the parties' intent, taken together with the relevant circumstances surrounding the negotiations and execution of the contract, which [wa]s clearly inappropriate at th[at] stage of the litigation."[18]

The Court finds the present litigation is in a similar litigation posture. While there appears to be no dispute that SPX provided a monthly invoice of compensation payments that had been made, the Court is not convinced, as Garda argues, that this billing ends the inquiry regarding the nature of Garda's obligation. It is equally clear based on the complaint that during this timeframe, the claims of individual workers were ongoing and the compensation paid for each claim may have continued for months or years. Garda contractually obligated itself to pay such claims and there is at least an arguable position that its obligation had not matured until these individual compensation payments had been completed. Additionally, the same rationale extends to the letters of credit. Just as the unpaid compensation claims create a continuing obligation until they are reimbursed, the letters of credit continue to obligate Garda until they are replaced. Specifically, the letters of credit continue to accrue further costs and

[17] *Am. Tower. Corp.*, 2010 WL 1077850, at *2 (citing *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 405 (Del. 1995)).
[18] *Am. Tower. Corp.*, 2010 WL 1077850, at *2.

interest, thereby reaffirming that Garda's obligation is ongoing and will only fully mature when the letters of credit are replaced.

As such, the Court is not in a position to find that there are no reasonably inferable facts under which SPX would be unable to prevail. Further, the Court finds that a dismissal prior to additional discovery regarding the nature of the contract beyond the bare allegations of the complaint would be premature at this stage of the proceedings and against the mountain of caselaw[19] that disputes should be resolved on the merits and not on the clever technical allegations of a party.

For the foregoing reasons, Defendants' Renewed Motion to Dismiss is hereby **DENIED**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[19] *See e.g., Steiner v. Meyerson*, 1997 WL 349169, at *5 (Del. Ch. June 13, 1997) (stating that "[m]oreover, and perhaps more importantly, equity and justice require that whenever possible disputes between parties should be resolved on their merits"); *Williams v. Hall*, 176 A.2d 608, 616 (Del. Super. 1961) (discussing how "cases are decided on their merits and not on technicalities"); *Latocha v. D.O.W. Fin. Corp.,* 1999 WL 1847335, at *1 (Del. Com. Pl. Mar. 29, 1999) (citing "public policy of resolving disputes on the merits").