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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

COSCO FIRE PROTECTION,
INC.,

Plaintiff,

v.

NEI CONTRACTING &
ENGINEERING, INC.,
PHILADELPHIA INDEMNITY
INSURANCE COMPANY,

Defendant.

Case No.: 17-cv-2078-BTM-RBB

**ORDER GRANTING
DEFENDANT’S MOTION TO
DISMISS AND STRIKE [ECF NO.
4]**

Pending before the Court is Defendant Philadelphia Indemnity Insurance Company’s (“Defendant Philadelphia”) motion to dismiss Plaintiff Cosco Fire Protection, Inc.’s third claim for relief and to strike its request for recovery of attorney’s fees. (ECF No. 4.) For the reasons discussed below, Defendant Philadelphia’s motion to dismiss and strike is granted.

I. BACKGROUND

In 2014, Plaintiff and Defendant NEI Contracting & Engineering, Inc. (“NEI”) entered into subcontract agreements relating to the federal construction at the USMC Camp Pendleton in the County of San Diego. (ECF No. 1, Complaint, ¶

1 4.) Plaintiff agreed to perform construction services and provide labor and
2 materials to construct fire protection systems at USMC Camp Pendleton. (Id.) In
3 return, Defendant NEI promised to pay Plaintiff for the services it rendered. (Id.)
4 On March 16, 2016, Plaintiff issued its last invoice to Defendant NEI. (Id. ¶ 15.)
5 Defendant NEI allegedly received Plaintiff's invoices but failed and refused to pay
6 a total of \$47,609.07. (Id. ¶ 6.)

7 Defendant Philadelphia had previously issued to Defendant NEI a payment
8 bond relating to the construction project. (Id. ¶ 5.) The payment bond was
9 issued pursuant to the Miller Act, 40 U.S.C. § 101 et seq. (Id.) After Defendant
10 NEI refused to pay Plaintiff, Plaintiff made a claim to Defendant Philadelphia in
11 early November 2016. (Id. ¶ 7.) Defendant Philadelphia allegedly acknowledged
12 Plaintiff's claim and requested further information, which Plaintiff provided. (Id. ¶
13 7.) On September 19, 2017, Defendant Philadelphia denied Plaintiff's claim to
14 honor Defendant NEI's payment bond. (Id. ¶ 8.) On October 10, 2017, Plaintiff
15 brought this action against Defendant NEI for breach of contract and common
16 counts and against Defendant Philadelphia to recover under the Miller Act. (Id.
17 ¶¶ 12–26.)

18 II. DISCUSSION

19 **A. Motion to Dismiss**

20 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should
21 be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or
22 sufficient facts to support a legal claim. *Balistreri v. Pacifica Police Dept.*, 901
23 F.2d 696, 699 (9th Cir. 1988). When reviewing a motion to dismiss, the
24 allegations of material fact in a plaintiff's complaint are taken as true and
25 construed in the light most favorable to the plaintiff. *Parks Sch. of Bus., Inc. v.*
26 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). In deciding a motion to dismiss,
27 a court may consider the facts alleged in the complaint, exhibits attached to the
28 complaint, and documents whose authenticity are not questioned and upon

1 which the plaintiff's complaint necessarily relies on, even if not physically
2 attached to the complaint. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).

3 "A claim may be dismissed as untimely pursuant to a 12(b)(6) motion 'only
4 when the running of the statute [of limitations] is apparent on the face of the
5 complaint.'" *United States ex rel. Air Control Techs. V. Pre Con Indus.*, 720 F.3d
6 1174, 1178 (9th Cir. 2013) (citing *Von Saher v. Norton Simon Museum of Art at*
7 *Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010)).

8 "An action under the Miller Act 'must be brought no later than one year
9 after the day on which the last of the labor was performed or material was
10 supplied by the person bringing the action.'" *Air Control Techs.*, 720 F.3d at
11 1175 (citing 40 U.S.C. § 3133(b)(4)). Defendant Philadelphia argues that
12 Plaintiff's third claim under the Miller Act is barred because Plaintiff filed this
13 action more than one year after it last provided its labor and material.

14 Plaintiff, on the other hand, relies on *Air Control Technologies* to argue that
15 its action under the Miller Act is timely because it *made a claim* to Defendant
16 Philadelphia within one year of last providing labor or material. However, the
17 Ninth Circuit in *Air Control Technologies* merely held that the Miller Act's statute
18 of limitations is a procedural requirement, rather than a jurisdictional requirement.
19 720 F.3d at 1178. The Ninth Circuit's holding does not change the one-year
20 statute of limitations for filing an action under the Miller Act, it merely recognizes
21 that it is subject to considerations of equitable estoppel and equitable tolling.
22 *See, e.g., U.S. for Use of E.E. Black Ltd. V. Price-McNemar Constr.*, 320 F.2d
23 663, 666 (9th Cir. 1963); *see also Lukovsky v. City and Cnty. of San Francisco*,
24 535 F.3d 1044, 1051 (9th Cir. 2008) ("[T]here are two doctrines which may apply
25 to extend the limitations period or preclude a defendant from asserting the
26 defense—equitable tolling and equitable estoppel."). Here, Plaintiff's last invoice
27 was dated May 16, 2016 and it filed this action on October 10, 2017, more than
28 sixteen months after it last provided labor and services. Plaintiff does not argue

1 or allege facts to support an application of equitable exceptions. Even in its
2 opposition to Defendant’s motion to dismiss Plaintiff does not argue any facts
3 that would support equitable estoppel or equitable tolling. Thus, it is apparent
4 from the Complaint that Plaintiff failed to file this action within the Miller Act’s one-
5 year statute of limitations. *See Air Control Techs.*, 720 F.3d at 1178.
6 Accordingly, the Court grants Defendant’s motion to dismiss Plaintiff’s third claim
7 for relief.

8 **B. Motion to Strike**

9 Federal Rule of Civil Procedure 12(f) authorizes courts to order stricken
10 “from any pleading any insufficient defense or any redundant, immaterial,
11 impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). A motion to strike may
12 be granted if “it is clear that the matter to be stricken could have no possible
13 bearing on the subject matter of the litigation.” *LeDuc v. Kentucky Central Life*
14 *Ins. Co.*, 814 F. Supp. 820, 830 (N.D. Cal. 1992). “[T]he function of a 12(f)
15 motion to strike is to avoid the expenditure of time and money that must arise
16 from litigating spurious issues by dispensing with those issues prior to trial”
17 *Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). However,
18 “[m]otions to strike are generally disfavored.” *Leghorn v. Wells Fargo Bank, N.A.*,
19 950 F. Supp. 2d 1093, 1122 (N.D. Cal. 2013).

20 Defendant Philadelphia moves to strike Plaintiff’s request for attorney’s
21 fees. Because Plaintiff is in agreement, the Court grants Defendant’s motion to
22 strike Plaintiff’s request for attorney’s fees.

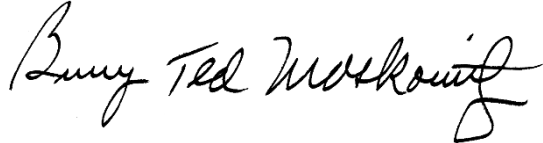
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1 **III. CONCLUSION**

2 For the reasons discussed above, Defendant Philadelphia's motion to
3 dismiss and strike (ECF No. 4) is **GRANTED**.

4 **IT IS SO ORDERED.**

5 Dated: July 17, 2018



6
7 Barry Ted Moskowitz, Chief Judge
8 United States District Court

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