Coastal Sheet Metal Corp. v Dierks Heating Co., Inc.
2013 NY Slip Op 32565(U)
October 18, 2013
Sup Ct, Kings County
Docket Number: 500129/2013
Judge: Carolyn E. Demarest
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At an IAS Term, Part Com-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of October, 2013

PRESENT:

HON. CAROLYN E. DEMAREST,
Justice.

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COASTAL SHEET METAL CORP., individually, and as representatives of all trust beneficiaries similarly situated,

Plaintiff,

- against -

Index No. 500129/13

DIERKS HEATING COMPANY, INC., et al.,

Defendants.

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The following numbered papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	51-55, 57, 58 -78, 80-93
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	97, 98-99, 102-103, 104-105
________ Affidavit (Affirmation)	
Other Papers Statement of Undisputed Material Facts	94
Response to Statement	100-101
Memoranda of Law	95, 106-107

Upon the foregoing papers, motion sequence numbers 1, 2 and 3 are consolidated for disposition. Plaintiff Coastal Sheet Metal Corp., individually, and as representatives of all trust beneficiaries similarly situated (Coastal), moves for an order, pursuant to CPLR 3212,

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granting it partial summary judgment against defendants Dierks Heating Company, Inc. (Dierks), and Safeco Insurance Company of America (Safeco), in the amount of $151,331.40, plus interest (motion sequence number 1). Dierks cross-moves for an order: (1) pursuant to CPLR 1001(a) and (b), requiring the Trustees of the Sheet Metal Workers Local 28 Benefit Funds (Local 28) to be joined as a necessary party to this action; and (2) holding plaintiff's motion for partial summary judgment in abeyance pending a decision on that issue (motion sequence number 2). Defendant T. A. Ahern Contractors Corp. (Ahern) and Safeco cross-move for an order, pursuant to CPLR 3212, granting them partial summary judgment against Coastal, dismissing a portion of those claims against the labor and material payment bond issued by Safeco as referred to in the ninth cause of action (motion sequence number 3).

Facts and Procedural History

Coastal commenced this action in Rockland County Supreme Court on April 10, 2012 against Dierks and its principal, John H. Dierks (hereinafter collectively referred to as Dierks, unless otherwise specified) seeking to recover damages in the amount of $644,090.46 premised upon claims of breach of contract, diversion of trust funds in violation of Article 3-A of the Lien Law, account stated, quantum meruit and unjust enrichment. On May 31, 2012, Coastal served an amended complaint adding Ahern and Safeco as defendants. Therein, as against Ahern, Coastal asserted causes of action for alleged trust fund diversion and breach of an agreement which pertains to certain limited extra work for which Coastal claims it is owed $75,000. As against Safeco, Coastal asserts a claim under the bond issued

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by the insurance company.

This action arises out of construction work performed at New York City Public School 665, which is located in Kings County (the Project). Ahern was hired by the New York City School Construction Authority (SCA) to work as the general contractor. On September 29, 2008, Ahern entered into a subcontract with Dierks pursuant to which Dierks was to perform HVAC work. Thereafter, Dierks entered into a Sub-Subcontract Purchase Order Agreement with Coastal pursuant to which Coastal agreed to provide mechanical services, including but not limited to the performance of sheet metal and duct work.

By notice of motion dated May 10, 2012, Dierks sought to have venue moved from Rockland County to Kings County, based upon the requirements of the Safeco bond, or to Queens County, based upon the convenience of the witnesses. On May 31, 2012, plaintiff filed its amended complaint. On June 28, 2012, Dierks re-filed its motion to change venue, directing it to the amended complaint. On November 14, 2012, before that motion was decided, Coastal filed the instant motion for partial summary judgment. By decision and order dated January 8, 2013, the motion to change venue was granted. Following transfer of the case, the motion for summary judgment was re-filed in this court. No discovery has yet taken place.

Coastal's Motion for Partial Summary Judgment

Coastal's Contentions

Coastal alleges that from September 2008 through April 2011, it performed all work, labor and services called for pursuant to its contract with Dierks and, in addition, performed

numerous items of extra work and change orders. Coastal further avers that the services performed were requested, accepted and approved by Dierks. To date, Coastal contends that a balance of $644,090.46 has become due and payable, which sum Dierks refuses to pay.

Coastal further argues that in an email dated December 14, 2011 from Mr. Dierks, he acknowledged that the company is liable to Coastal for $151,331.40. More specifically, the email states that the total amount due on the agreement, including overages and extra work, was $2,408,70.38, of which only $2,257,238.98 had been paid. Coastal argues that although it is owed the sum of $644,090.46, it should be awarded summary judgment granting it that portion of the money that Dierks admitted is owed.

In addition, Coastal argues that since a surety's liability arises out of the liability of its principal, Safeco, as Ahern's surety on the labor and material payment bond, guaranteed payment to all contractors. Coastal thus concludes that Safeco is also liable to it for the amount of money that Dierks has admitted is due.

Dierks' Contentions

In opposition to Coastal's motion, Dierks alleges that Coastal breached the terms of its subcontract by failing and refusing to prosecute the work and by failing to provide Local 28 labor. After the breach, in order to mitigate damages, Dierks took over Coastal's work by entering into a job specific agreement with Local 28, placing Coastal's Local 28 workers on Dierks' payroll and paying the Local 28 benefits. Thus, since Dierks had to expend $318,527.21 to complete the work, Coastal's statement that it performed all work called for under the subcontract is not true.

Dierks goes on to argue that in seeking the entry of partial summary judgment based upon the December 14, 2011 email, Coastal omits the attachments, consisting of the Continuation Sheet from Coastal Requisition, and also fails to attach contemporaneous emails wherein Dierks states "read my emails again. Based on what I sent you Coastal has been overpaid." Dierks contends that these emails establish that Coastal was paid $2,285,957.81 under the contract, and not $2,257,238.98 as claimed by Coastal. Of this amount, Coastal had been paid $1,967,430.60. Thus, the correct amount due to Coastal is only $104,545.89, not $151,331.40. Further, Coastal fails to deduct retainage in the amount of $24,146.50, the cost of Dierks' supervision of the labor not provided by Coastal in the amount of $14,708.75, a payment in the amount of $100,000 that Ahern made to Coastal, the value of warranties and guarantees not provided by Coastal in the amount of $25,000 and the cost of as-built drawings not provided by Coastal in the amount of $10,000. Thus, only $69,545.89 remains due.

Dierks also points out that the email relied upon by Coastal states that "we have received 2 subpoenas from Local 28 which we are obligated to respond to" and that Coastal fails to recognize the claims of Local 28. In this regard, Dierks alleges that it is subject to collection procedures including restraining notices, executions and Sheriff's levies. More specifically, Dierks explains that in the action captioned *Trustees of the Sheet Metal Workers Local 28 Benefit Funds v Coastal Sheet Metal Corp.* (Bronx County Sup Ct, Index No. 304260/09) (the 2009 Bronx Action), Local 28 obtained a judgment against Coastal in the amount of $643,695.23, of which $493,924.44 remains due. With regard to this action, Local

28 served an Information Subpoena with Restraining Notice, dated October 4, 2011, in the amount of $643,695.23; and a Sheriff's Levy Notice to Garnishee dated December 12, 2012, in the amount of $873,604.90.

In addition, in the action captioned *Trustees of the Sheet Metal Workers, et al. v Coastal Sheet Metal Corp.* (Queens County Sup Ct, Index No. 307053/10) (the 2010 Queens Action), Local 28 obtained a judgment against Coastal in the amount of $1,271,699.43, of which $1,238,499.43 remains unpaid. With regard to this action, Local 28 served an Information Subpoena with Restraining Notice dated April 5, 2013 on the judgment; a Sheriff's Levy Notice to Garnishee, dated October 23, 2012, in the amount of $1,615,724.13; and an Execution with Notice dated October 3, 2012 in the amount of $1,271,699.43. Thus, Dierks concludes that any sum of money that Coastal claims is due from Dierks is not payable to Coastal, but is instead subject to the Sheriff's levies based on the outstanding judgments.

Further, Dierks argues that Coastal is not entitled to partial summary judgment at this stage of the proceeding, since the Project, including the work performed by Coastal, has not been fully completed and accepted by the SCA. In addition, the agreement between the parties provides that payment will be made to Coastal three days after receipt of payment from Ahern. In this regard, Ahern is withholding payment in an amount in excess of $69,545.89 from Dierks as a result of the instant litigation. Further, both the terms of the Dierks/Coastal subcontract and the Ahern/Dierks subcontract allow Dierks to withhold payments from Coastal for cause.

In addition, Dierks contends that discovery is necessary before Coastal should be afforded any relief, since numerous issues must be addressed, i.e., the basis of the calculations for the $643,695.23 judgment that Local 28 holds against Coastal, what portion of the above referenced levies are attributable to work on the Project, details regarding Coastal's relations with Local 28 and payments made by Dierks to Local 28. Dierks also claims that it needs to ascertain information with regard to the claims asserted against Coastal by Local 28, the funds paid to Coastal that constitute trust payments under Article 3-A of the Lien Law, whether Coastal diverted funds due to Local 28 on the Project to other jobs and the amount of benefits that remain due. Finally, Dierks contends that discovery is necessary regarding the acceptance of the work by the SCA and the payment requisition process.

Coastal's Reply

In reply, Coastal argues that in the December 14, 2011 email, Dierks admitted liability, without any reservation of rights, particularly since it referenced the two subpoenas served by Local 28 upon which Dierks now relies. Coastal also contends that Dierks should not now be permitted to raise defenses that should have been known to it at that time, i.e., the purported failure of the SCA to approve the work, the failure of Ahern to make payment and the alleged lack of certified payrolls. In this regard, Coastal argues that the case of *JC Ryan EBCO v Lipsky* (7 AD3d 788 [2010]) holds that provisions in a contract that make payment to a contractor contingent upon payment by the owner or general contractor are void as against public policy. In the alternative, if the court accepts Dierks' arguments, Coastal argues that it should be awarded summary judgment in the amount of $65,545.89, the amount

that Dierks admits is due and owing.

The Law

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The party moving for summary judgment "bears the initial burden of making a prima facie showing of its entitlement to judgment as a matter of law" (*Holtz v Niagara Mohawk Power*, 147 AD2d 857, 858 [1989]). Once such a showing has been established, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). It is equally well settled that on such a motion, the facts must be viewed in the light most favorable to the non-moving party (*see e.g. Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). Further, "the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002], citing *Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366 [1985]). Thus, the court is not to determine credibility, but whether a factual issue exists (*Capelin Assoc. v Globe Mfg.*, 34 NY2d 338 [1973]).

Discussion

The court finds that Dierks does not admit that any sum of money is due and owing to Coastal in the December 14, 2011 email. Although the email states that the balance due is $151,331.40, it goes on to assert that there is a Mechanical Technologies lien for $53,565;

references an attached requisition that includes a reduction of retainage, which indicates that Coastal should only be paid $2,107,500.14; and refers to the two subpoenas received from Local 28. Thus, this language does not support Coastal's assertion that the email constitutes an admission of a sum certain being due, since it clearly refers to open issues that may reduce the amount owed to Coastal under the contract.

In addition, as alleged by Dierks, a review of the other emails exchanged on December 14 and 15, 2011 indicate that Dierks believed that Coastal had already been overpaid and that the two subpoenas at issue pertain to $1.8 million that Coastal allegedly owed to Local 28. From this it follows that Dierks put Coastal on notice in those emails that there were other possible reductions in the amount of money due to Coastal that had yet to be determined. There is therefore no indication in the emails that a final payment of any amount was owed to Coastal.

Finally, as argued by Dierks in support of its cross motion seeking to add Local 28 as a defendant in this action, Dierks has already been served with restraining orders that prohibit it from transferring any funds to Coastal. For the reasons more fully discussed in addressing that cross motion, this court will not issue a judgment in Coastal's favor that would direct Dierks to make a payment that is prohibited under the restraining orders.

Accordingly, Coastal's motion for partial summary judgment is denied.

Dierks' Cross Motion to Add Local 28 as a Necessary Party

Dierks' Contentions

In support of this branch of its cross motion, Dierks argues that unless the union is joined as a defendant, both it and Local 28 may be inequitably affected by a judgment in this action. More specifically, Dierks asserts that it may be open to double liability from both Coastal and Local 28 and that funds to which Local 28 may be entitled may be lost if a judgment is granted to Coastal herein. Dierks further contends that it cannot recover complete relief unless Local 28 is joined, since it may be subject to additional litigation with regard to amounts due to Coastal regarding the Project. Succinctly stated, Dierks argues that Coastal's failure to provide Local 28 labor and to make Local 28 contributions pervades this matter.

Coastal's Contentions

In opposition, Coastal argues that each of the restraining notices and Sheriff's levies served upon Dierks have expired pursuant to CPLR 5232 because Local 28 did not take any steps to perfect the liens within 90 days from the date of service. Similarly, pursuant to CPLR 5222, the restraining notice served with regard to the 2009 Bronx Action, which was served on October 4, 2011, expired one year after it was served, so that it is no longer valid. Further, the restraining order served under the 2010 Queens Action was served in April 2013. Since Local 28 had already served a levy on Dierks with regard thereto and that levy expired, Local 28 cannot levy on the restrained funds and the levy should be vacated pursuant to CPLR 5240. Coastal also asserts that the judgments referred to are against

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Coastal, and not Dierks, so that Dierks is not prohibited from paying any funds to Coastal.

Dierks

In reply, Dierks alleges that the arguments raised by Coastal in its opposition papers confirm the assertion that Local 28 is a necessary party in this action. More specifically, Coastal argues that the restraining notices, executions and Sheriff's levies referenced by Dierks have lapsed and become void, or should be deemed void; that Local 28 has exhausted its collection procedures against Dierks; and that the retraining notice served under the 2010 Queens Action should be vacated and deemed invalid and improper pursuant to CPLR 5240. Each of these assertions seek to adjudicate Local 28's right to collect its judgments, without Local 28 being before this court, so that granting Coastal the relief that it requests herein could result in the rights of Local 28 being inequitably affected.

Further, with regard to Coastal's assertion that the Sheriff's Levies have lapsed, in the case of *Kitson & Kitson v City of Yonkers (*10 AD3d 21, 26 [2004]), the court held that "[a] motion for an extension of a levy may be made after the levy has expired, since there is no provision in the CPLR prohibiting an extension after the levy has expired" (*id.*, citing CPLR 5240; *Kalman v Neuman*, 71 AD2d 996 [1979]; *Seider v Roth*, 28 AD2d 698, 699 [1967]; *Amoco Overseas Oil Co. v Compagnie Nationale Algerienne de Navigation*, 605 F2d 648 [2d Cir 1979]). Thus, even if the levies have expired, Local 28 can move to extend them, so that Local 28 has not exhausted its collection proceedings against Dierks.

Dierks goes on to aver that the Restraining Notice dated April 5, 2013 in the 2010 Queens Action was served on that day, so that one year has not yet expired since its service.

In addition, since the case of *Briarpatch Ltd., L.P. v Briarpatch Film Corp.* (89 AD3d 425, 426 [2011]) held that a restraining notice may be extended by motion pursuant to CPLR 5240, the restraining Notice dated October 4, 2011 and served in the 2009 Bronx Action can similarly be extended.

The Law

It is well settled that:

> "A court may always consider whether there has been a failure to join a necessary party (*First Nat. Bank v Shuler*, 153 NY 163, 170 [1897]; *Matter of Lezette v Board of Educ.*, 35 NY2d 272, 282 [1974]). Necessary parties are defined as '[persons] who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action' (CPLR 1001, subd [a]). An action is subject to dismissal if there has been a failure to join a necessary party (CPLR 1003). The rule serves judicial economy by preventing a multiplicity of suits. It also insures fairness to third parties who ought not to be prejudiced or 'embarrassed by judgments purporting to bind their rights or interest where they have had no opportunity to be heard' (*First Nat. Bank v Shuler, supra*, p 170; *see* 2 Weinstein-Korn-Miller, NY Civ Prac, par 1001.01)."

(*New York v Long Is. Airports Limousine Serv.*, 48 NY2d 469, 475 [1979]). "'These compulsory joinder provisions are intended "not merely to provide a procedural convenience but to implement a requisite of due process--the opportunity to be heard before one's rights or interests are adversely affected"'" (*Mahinda v Board of Collective Bargaining*, 91 AD3d 564, 564-565 [2012], quoting *Matter of 27th St. Block Assn. v Dormitory Auth. of State of N.Y.*, 302 AD2d 155, 160 [2002], quoting *Matter of Martin v Ronan*, 47 NY2d 486, 490 [1979]). Finally, it must also be recognized that CPLR 1001 and CPLR 1003 give a court

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wide latitude and are to be liberally construed (*Micucci v Franklin General Hosp.*, 136 AD2d 528, 529 [1988], citing *McDaniel v Clarkstown Cent. Dist. No. 1*, 83 AD2d 624 [1981]).

Discussion

As the above discussion of the facts reveal, Coastal owes a large sum of money to Local 28, as is evidenced by the judgments obtained in 2009 Bronx Action and the 2010 Queens Action. Further, Local 28 has served information subpoenas, Sheriff's levies and restraining notices on Dierks with regard to these judgments. Coastal does not deny Dierks' assertion that the money due under those judgments is attributable, at least in part, to work done by Coastal on the Project at issue in the instant action. From this is follows that Local 28 must be joined as a defendant in this action if Dierks is to be protected from the inequitable result of being held liable to Local 28 pursuant to an enforcement proceeding after already having paid the money to Coastal in this action.

That Local 28 is a necessary party in this action is also supported by Coastal's claims that the levies and restraining notices served on Dierks have expired. In this regard, it would not be appropriate for this court to decide issues pertaining to Local 28's right to enforce the judgments that it obtained in the 2009 Bronx Action and the 2010 Queens Actions in this proceeding, when this court does not have jurisdiction over Local 28 so that it can be afforded the opportunity to be heard on the issues.

Accordingly, Dierks' motion to add Local 28 as a necessary party defendant is granted.

Dierks's Request to Hold Coastal's Motion for Partial Summary Judgment in Abeyance

In view of the court's finding that Coastal fails to establish a right to partial summary judgment, this branch of Dierks' cross motion is denied as moot.

Ahern and Safeco's Cross Motion for Summary Judgment

Ahern and Safeco's Contentions

In support of their cross motion for partial summary judgment dismissing the ninth cause of action against Safeco based upon the bond, Ahern and Safeco argue that pursuant to the terms of Ahern's contract with the SCA, Ahern was required to procure a labor and material bond in connection with the Project. On June 26, 2008, the bond was obtained from Safeco, naming Ahern as principal and the SCA as obligee. The bond provides, as is relevant to the instant dispute, that any claimant who does not have a direct contract with Ahern is required to provide notice of its claim to two or more of Ahern, Safeco and the SCA within 120 days of the last date on which it provided labor or materials to the Project. In this respect, the bond provides that:

> "No suit or action shall be commenced hereunder by any claimant:
>
> "Unless claimant, other than one having a direct contract with the Principal, shall have given written notice to any two (2) of the following: 1) the Principal, 2) the SCA, 3) the Surety named above, within one hundred twenty (120) days after such claimant did or performed the last of the work or labor, or furnished the last of the material for which said claim is made, stating with substantial accuracy the amount claimed and the

> name of the party to whom the materials were furnished, or for whom the work or labor was done or performed. Such notice shall be served by mailing the same by registered mail or certified mail, postage pre-paid, in an envelope addressed to the Principal, the SCA or Surety . . ."

Dierks asserts that Coastal last provided labor and/or materials for the Project on August 20, 2010. All of the Coastal work, including that directly performed by Dierks, was completed no later than March 1, 2011. Ahern and Safeco further assert that they did not receive notice of Coastal's claim against the bond until served with the Supplemental Summons and Amended Complaint, dated May 31, 2012, which added them as defendants. Accordingly, movants contend that since Coastal did not provide timely notice of its claim to Ahern and Safeco within 120 days of the completion of its work, its claim under the bond is defective. Ahern and Safeco therefore conclude that their cross motion for partial summary judgment dismissing Coastal's claim under the bond should be granted.

By way of background, Ahern and Safeco explain that during the course of the Project, Ahern was required to operate the Building Management System (BMS), which contains certain airflow and temperature controls. Dierks advised Ahern that it needed full time personnel from Coastal to operate the BMS. Although Ahern did not agree, it passed the request for a change order through to SCA. In August 2010, Dierks advised Ahern that Coastal was no longer able to staff the Project. Subsequently, Dierks advised Ahern that it had received a restraining notice in connection with a judgment taken against Coastal by Local 28 in the amount of $643,695.23, which judgment had $493,924.44 outstanding; as a result, Dierks could no longer pass on payments to Coastal. Further, since Coastal could no

longer provide manpower for the project, and the work was required of Dierks under its subcontract with Ahern, Dierks retained some of Coastal's employees on its own payroll so that the work could be completed. The negotiations concerning this work have provided Coastal with an argument regarding the application of State Finance Law § 137.

Coastal's Contentions

In opposition, Coastal argues that the requirement in the bond that Coastal give notice to two parties is void as against public policy pursuant to State Finance Law § 137, which provides that notice need be given only to the contractor. Further, pursuant to State Finance Law § 137(3), even if a notice is not served by registered or certified mail, service is sufficient where the notice is actually received. In so arguing, Coastal relies upon the case of *Dutchess Quarry & Supply Co. v Firemen's Ins. Co.* (190 AD2d 36 [1993]), which provides that:

> "[A]s to the furnishing of labor and materials on public projects covered by State Finance Law § 137, we are of the view that a labor and materials payment bond cannot dilute the protection of the statute by imposing notice conditions precedent to payment which are more onerous than that required by State Finance Law § 137(3). The Federal courts have held, in construing the Miller Act (40 USC § 270a *et seq.*), the model for State Finance Law § 137 (*see*, *Russo Trucking & Excavating v Pennsylvania Resource Sys.*, 169 AD2d 239, 243 [1991]), that the purpose of the statutory notice provision is secondary and subordinate to the primary statutory objective of protecting persons furnishing labor and materials on Federal public works projects (*see*, *United States v Andrews*, 406 F2d 790, 794 (4th Cir Va 1969]; *Noland Co. v Allied Contrs.*, 273 F2d 917, 920-921 94th Cir Md 1959]). Thus, any such more burdensome notice provision having the effect of weakening the financial protection afforded statutory beneficiaries would be void as violative of the

> public policy embodied in State Finance Law § 137 as amended (*see*, *Loomis v Maguire's Equip. Sales*, 124 AD2d 82, 85 [1987], *lv denied* 70 NY2d 606 [1987]; *Rivers v Ben Constr. Corp.*, 29 AD2d 1048 [1968]; *Matter of Dobbs Ferry Union Free School Dist. [Dobbs Ferry United Teachers]*, 90 Misc 2d 819, 828 [1977])."

(*id.* at 38-39).

Coastal further argues that in this case, correspondence was exchanged on numerous occasions concerning the work performed and the money due. Coastal thus concludes that on the record now before the court, there remains an issue of fact as to when Ahern received notice of Coastal's claims. Moreover, although Ahern argues that Coastal's work on the Project ended in August 2010, the Certification of Payroll relied upon does not indicate that Coastal's work had been completed on that day or that it covered the last day that Coastal performed work on the Project. Coastal does not, however, provide an affidavit from anyone with knowledge as to when it last provided work upon the Project, but relies exclusively upon an affirmation by counsel.

Discussion

The court agrees that pursuant to State Finance Law § 137, Coastal need only give notice of its claim to Ahern, as the contractor. This finding is not conclusive, however, since the email that Coastal relies upon to demonstrate that it corresponded with Ahern with regard to the Project is dated October 16, 2009, over three years before Ahern claims that it received notice of the claim and prior to the August 2010 date Ahern identifies as the last date Coastal performed.

The court finds, however, that Ahern, Safeco and Dierks do make a prima facie showing with respect to when Coastal last performed work on the Project through the affidavit of Timothy Ahern, made upon his personal knowledge, that plaintiff "last provided labor and/or materials for the Project on August 20, 2010." Plaintiff has not refuted this representation with competent evidence. Relying upon a copy of a payroll statement that he represents pertains to the last work performed by Coastal, Dierks also asserts that Coastal's performance ended in August 2010, although, on its face the document does not state that it represents a final payment to Coastal on the Project. As the supporting affidavit of John Dierks appears merely to rely upon the equivocal documentation submitted, it would not, alone, be dispositive. Plaintiff has failed, however, to provide copies of the written notice required under State Finance Law § 137(3), although it has provided communications alerting Ahern to its claim. The statute provides that "where such notice is actually received by the contractor by other means, such notice shall be deemed sufficient." Thus, an issue of fact has been created regarding notice to the contractor.

Accordingly, the cross motion by Ahern and Safeco seeking summary judgment dismissing the ninth cause of action against them on the ground that they did not receive timely notice of the claim is denied.

Conclusion

That branch of Dierks' cross motion seeking to add Local 28 as a necessary party is granted. Coastal shall serve a second supplemental summons and second amended complaint

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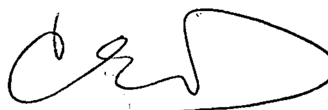
upon Local 28 adding it as a party defendant within 30 days of service upon it of a copy of this order and decision with notice of entry. Plaintiff's motion for partial judgment and the cross motion of Ahern and Safeco for partial summary judgment dismissing the ninth cause of action are denied. The parties shall appear for conference following joinder of Local 28, on February 5, 2014.

The foregoing constitutes the order and decision of this court.

E N T E R,



J. S. C.

HON. CAROLYN E. DEMAREST