STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

EGW TEMPORARIES, INC.,

Plaintiff,

MEMORANDUM DECISION

vs.

Index No. 9010/06

RLI INSURANCE COMPANY and
ENVIROCLEAN SERVICES, INC.,

Defendants.

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **BLOCK, COLUCCI, NOTARO & LAING, P.C.**
Attorneys for Plaintiff
Mark J. Longo, Esq., of Counsel

HURWITZ & FINE, P.C.
Attorneys for Defendant RLI Insurance Company
Andrea Schillaci, Esq., of Counsel
Earl K. Cantwell, Esq., of Counsel

CURRAN, JOHN M.

This matter came before the Court upon a pre-answer motion to dismiss by Defendant RLI Insurance Company (RLI). The motion was heard on April 29, 2007 and the Court reserved decision.

After due consideration, the Court denies the motion to dismiss.

BACKGROUND

RLI issued a payment bond on behalf of Titan Wrecking and Environmental, LLC (hereinafter Titan) as principal. Titan obtained the bond in connection with a public

improvement project concerning which it was purportedly about to enter into a contract with the Buffalo Municipal Housing Authority (hereinafter BMHA) for abatement of lead based paint and asbestos (the Project) (*see* Longo Affirm., Exhibit B [hereinafter Payment Bond or Bond]). Lebis Enterprises Inc. (hereinafter Lebis) was engaged as general contractor for the Project (*see* Longo Affirm., Exhibit J). According to the Verified Complaint in this matter, Lebis and Titan are alter egos of one another (*see* Longo Affirm., Exhibit A [hereinafter Verified Complaint] ¶ 6).

The Payment Bond by its terms covers all claims of Titan and other subcontractors "to whom work under this Contract is sublet". The "Contract" is defined as the "BMHA JOB #2-40 CF @ FERRY GRIDER" (Payment Bond at 1). The covered claims are defined as claims for:

> **Wages and compensation for labor performed and services rendered by all persons engaged in the prosecution of the work under said Contract**, and any amendment or extension thereof or addition thereto, **whether such persons be agents, servants, or employees of the Principal [Titan] or of any subcontractor, including all persons so engaged who perform the work of laborers or mechanics at or in the vicinity of the site of the project regardless of any contractual relationship between the Principal and such subcontractors**, or they or their successors or assigns, on the one hand **and such laborers or mechanics on the other**, but not including office employees not regularly stationed at the site of the project, * * *

(Payment Bond at 1 [emphasis supplied]). The Bond is subject to several additional "conditions, limitations and agreements", including:

> a) The Principal and Surety agree that this Bond shall be for the benefit of any * * * laborer having just claim, as well as for the Owner [BMHA] itself.

> b) **All persons who have performed labor, [or] rendered services * * * as aforesaid, shall have a direct right of action against the Principal** and they [sic], or their successors and assigns, **and the Surety herein**, or against either or both or any of them and their successors and assigns. Such persons may sue in their own name, and may prosecute the suit to judgment and execution without the necessity of joining with any other person or party plaintiff.

(*id*.). In addition, the Bond has a limitation period, stating that "[i]n no event shall the Surety * * * be subject to any suit, action or proceeding thereon that is instituted by any person, firm or corporation hereunder, later than two [2] years after the complete performance of said Contract and final settlement thereof" (Payment Bond at 2).

In the course of the Project, Lebis entered into a subcontract with Enviroclean Services LLC (hereinafter Enviroclean) for a lump sum payment of $597,226 (hereinafter the Subcontract) (*see* Longo Affirm., Exhibit D). According to the Verified Complaint, on November 25, 2002, Plaintiff entered into an agreement with Enviroclean to provide laborers to perform the work under the Subcontract (*see* Verified Complaint ¶ 9). As evidence of that Agreement, Plaintiff submits a letter on its letter head, under the signature of John D. Rosenhahn, Sales Manager (*see* Longo Affirm., Exhibit E). The letter lists the "Man Rate" and the "Bill Rate"; states that "**EGW Employees** are covered for: FICA Unemployment Insurance Workman's Compensation"; and further provides that EGW provided other types of services, such as Disability Insurance, the processing of I-9s, W-4s and W-2s, along with recruiting and scheduling of interviews (*id*. Exhibit E [emphasis supplied]). In addition, the letter states:

> EGW will invoice Client for services provided in accordance with this agreement on a weekly basis. Client's signature on EGW's time sheet certifies that the hours shown are correct and authorizes EGW to bill Client for the hours worked by the named payrolled employee. Client agrees that, in the event a payrolled employee works for more than forty (40) hours in any work week, they will be paid time and a half and client will be billed accordingly.

(*id*.).

According to the Verified Complaint, EGW billed Enviroclean $69,133.75, of which Enviroclean paid $15,000, with a balance due of $54,133.75. Although an attorney's affirmation alleges that the last date of labor performed by EGW temporaries was January 2, 2003 (*see* Longo Affirm. ¶ 11), the Verified Complaint states that labor was provided from December 2002 until February 2003 (*see* Verified Complaint ¶ 10). The Project was substantially completed on or about April 25, 2003 (*see* Verified Complaint ¶ 20).

Plaintiff made a claim to Titan and Lebis when Enviroclean failed to pay in full. Plaintiff's responding papers include a copy of a letter under date of January 15, 2003 addressed to "Tony" at "Titan Wrecking/Lebris" [sic] at a single Kenmore address, which stated that it enclosed "the certified payroll" and that copies of the underlying invoices directed to Enviroclean had been faxed over to Titan (*see* Longo Affirm., Exhibit F). In addition, there is a fax cover sheet dated March 13, 2003, to Frank Bodami indicating that the fax included 23 pages of invoices for Enviroclean, for a total due of $69,133.75 (*see id*.; *see also* Schillaci Affirm., Exhibit D to Exhibit 1 [invoice from Plaintiff to Enviroclean June 2003]). In an attorney's affirmation, RLI asserts that, because the payment terms for Plaintiff's invoices were

net 30 days, payment was due under them on March 28, 2003 (*see* Schillaci Affirm. ¶ 23 & Exhibit D to Exhibit 1). Plaintiff does not dispute that allegation.

Plaintiff filed a mechanic's lien with respect to the public improvement project on or about June 15, 2003 (*see* Schillaci Affirm. ¶ 16 & Exhibit 3; *see also* Longo Affirm. ¶ 14). In addition, a claim was made against the Payment Bond in January 2004 (see Schillaci Affirm., Exhibit 4). In February 2004, RLI denied Plaintiff's claim, because Plaintiff's contract was with Lebis, not with Titan (*see id*. Exhibit 4).

Several actions were filed in Supreme Court, Erie County with respect to the Project (*see* Longo Affirm. Exhibit J [Lebis Enterprises v Enviroclean, 2003-3711; Abatement Cooperatives v Enviroclean, Buffalo Municipal Housing Auth., RLI Insurance Co., Lebis Enterprises & Titan Wrecking and Environmental LLC, Index No. 2003-9014, among others]). John Rosenhahn, Sales Manager of EGW, avers in an affidavit that he was advised by the Bodamis, principals of Titan and Lebis, to cooperate with them, including certifying their payroll to satisfy the Department of Labor, after which EGW would be paid as part of a settlement (*see* Rosenhahn Affid. ¶¶2-4). Although RLI did enter into a settlement with Enviroclean, Lebis, Titan, and the BMHA in October 2004 to settle certain lawsuits, EGW was not part of that settlement (*see* Longo Affirm. Exhibit J [Settlement Agreement]). The Settlement Agreement provides for two payments to Enviroclean, i.e., a payment of $296,253 by the BMHA through Lebis and Titan and a payment of $36,247 by Lebis and Titan directly.

The Settlement Agreement also states:

> * * * Lebis and Titan shall indemnify, defend and hold harmless, BMHA, and RLI from and against and [sic] all claims, obligations and costs, including attorney fees, incurred by BMHA

> and /or RLI arising from (1) breach by Lebis and Titan of any obligation hereunder and (2) any contractor, subcontractor or materials supplier in connection with the Project.
> * * * Lebis and Titan release RLI from any claim Lebis and Titan may have as a beneficiary of the Payment Bond * * *

(*id*. at p. 2). There is a similar provision with respect to Enviroclean:

> Enviroclean * * * shall indemnify, defend and hold harmless, BMHA, Lebis and Titan from and against and [sic] all claims, obligations and costs including attorney fees, incurred by BMHA, Lebis and/or Titan arising from (1) breach by Enviroclean of any obligation hereunder and (2) any contractor, subcontractor or material supplier engaged by Enviroclean in connection with the Project [with certain exceptions not here relevant]
> * * *
> Enviroclean releases RLI from any claim Enviroclean may have as a beneficiary of the Payment Bond * * *

(*id.* at p. 3).

Plaintiff filed the instant action on September 22, 2006, and Defendants' time to answer has been extended. The Verified Complaint asserts three causes of action, the first of which alleges breach of contract by Enviroclean, and is not at issue on this motion. The second cause of action, although it purports to be asserted against EGW, in actuality seeks recovery against RLI under the Payment Bond (*see* Verified Complaint at pp 4-6). That cause of action alleges that Titan and Lebis are "alter egos" and, therefore, by virtue of EGW's direct contractual relationship with Enviroclean, which contracted with Lebis, Plaintiff is a proper claimant under the Bond (*see id*. ¶¶18-19). The third cause of action seeks reformation of the Payment Bond: in the event that the Bond is interpreted to exclude coverage for Plaintiff for claims related to its work on the Project, Plaintiff alleges, the issuance of the Bond without such

coverage was a result of a mutual or unilateral mistake on the part of Titan and/or Lebis and/or RLI, or fraud on the part of Titan and/or Lebis (*see* Verified Complaint ¶ 31).

DISCUSSION

RLI alleges (1) that Plaintiff as a temporary employment agency does not have standing to sue under the Bond both because Plaintiff did not provide labor or materials under the Project, is not an intended third-party beneficiary, and is not in privity with RLI; (2) Plaintiff's complaint was filed after the running of a one-year statute of limitations under the State Finance Law, and also after the two-year limitations period in the Bond; (3) Plaintiff has failed to provide notice to Titan as required under State Finance Law § 137 (3); (4) because Plaintiff lacks privity, it has no standing to seek reformation of the Bond; and (5) because certain parties have agreed in settlement of lawsuits to indemnify RLI, Plaintiff must seek compensation from those parties instead.

PAYROLL SERVICES NOT COMPENSABLE

Initially, RLI asserts that companies providing administrative payroll services are not entitled to recover under the Payment Bond. It cites the case of *Tri-State Employment Services Inc. v Mountbatten Surety Co.* (99 NY2d 476 [2003]), in which the Court of Appeals considered a certified question from the Second Circuit concerning the right of a so-called professional employer organization to sue against a payment bond under New York law. Under the circumstances presented in that case, the Court of Appeals found that that employer was not a proper claimant under that bond (*see id*. at 487). The Court concluded that a professional employer organization's sole or primary role as a provider of human resource services and as a financier of payroll for other contractors and subcontractors, gives rise to a presumption that the

employer does not provide labor to a contractor for the purpose of a payment bond claim (*see id*. at 486). The Court recognized, however:

> that the inquiry is essentially factual and that a [professional employer organization] may exercise sufficient direction and control over work site employees so as to overcome the presumption and qualify as a provider of labor within the language of the bond.
>
> In determining whether a [professional employer organization] is a provider of labor, a Court should consider factors * * * including: the [professional employer organization's] involvement in selecting and screening the workers for hire, and whether it used its own criteria in doing so; the [professional employer organization's] affirmative representations to the workers that it is their employer; the nature of the documentation exchanged between the workers and the [professional employer organization] at the start of the working relationship * * *; the [professional employer organization's] involvement in training, supervising and disciplining the workers and in otherwise retaining control over the workers or directing their behavior; whether the [professional employer organization] rather than the contractor determined which workers could be terminated; and whether the [professional employer organization] withheld workers, rather than its services, upon nonpayment by the contractor

(*id*. at 486-487).

Looking at those factors, this Court determines that, unlike in the case considered by the Court of Appeals, the evidence submitted by Defendant on the motion to dismiss fails to give rise to a presumption that EGW did not provide labor within the meaning of a payment bond claim. Plaintiff alleges that it is a proper claimant under the Bond because it hired the workers itself, set their wages, and treated them as its employees. On a motion to dismiss, the Court is required to treat those allegations as true, and therefore the motion, insofar as it relied upon the *Tri-State Employment* case, is denied.

PRIVITY/THIRD-PARTY BENEFICIARY

RLI alleges that, in order for Plaintiff to be an intended third-party beneficiary, "the intention to benefit the third party must appear from the four corners of the instrument and the intention to cover [that party] must be that of both parties to the insurance contract" (*see State of New York v Liberty Mut. Ins. Co.*, 23 AD23d 1084, 1085 [4th Dept 2005] [internal citations omitted]). Here, RLI asserts, Plaintiff is neither in privity with it, nor with any company to which the Payment Bond was issued, nor an intended third-party beneficiary. However, the Bond appears to cover laborers of subcontractors despite a lack of privity between that subcontractor and the Principal, because it states that it covers all claims of subcontractors "to whom work under this Contract is sublet":

> *** * * whether such persons be agents, servants, or employees of the Principal [Titan] or of any subcontractor**, including all persons so engaged who perform the work of laborers or mechanics at or in the vicinity of the site of the project **regardless of any contractual relationship between the Principal and such subcontractors**, or they or their successors or assigns, **on the one hand and such laborers or mechanics on the other**

(*see* Payment Bond at 1 [emphasis supplied]). Because the Bond was procured pursuant to State Finance Law §137, and the purpose of such a bond is "to guarantee payment to contractors and subcontractors for all labor and materials provided on public improvement projects" (*A. Servidone, Inc. v Bridge Technologies, LLC*, 280 AD2d 827, 830 [3rd Dept 2001], *lv denied* 96 NY2d 712 [2001]), there is at least a question of fact whether Plaintiff is a third-party beneficiary on the Bond. Therefore, the motion to dismiss is denied on this ground.

In any event, Plaintiff also asserts that because Titan is the alter ego of Lebis, the contractor for whom Enviroclean and therefore Plaintiff were subcontractors, Plaintiff is in privity with Titan. To support this contention, Plaintiff submits evidence that Titan and Lebis have the same mailing address (*compare* the Payment Bond *with* Longo Affirm., Exhibit C [Contract with BMHA]). Plaintiff also submits two corporate resolutions issued in September 2002, one by Lebis and one by Titan (*see* Longo Affirm., Exhibits H & I). The Lebis corporate resolution states that Lebis is materially interested in transactions for which Titan was applying for bonds; that Anthony Bodami, Managing Partner of Titan, was the proper officer of Lebis to execute an indemnification agreement required by RLI as a prerequisite to its issuance of a bond on behalf of Titan (*see id*. Exhibit H).. Similarly, the Titan resolution states that Titan is materially interested in transactions involving Lebis and for which Lebis had applied for bonds; that Anthony and Josephine Bodami, respectively, Managing Partner of Titan and President of Lebis, were the officers authorized to execute agreements of indemnity to RLI as a prerequisite to the execution of bonds on behalf of Titan or Lebis (*see id*. Exhibit I).

The Court dismisses as without merit RLI's contention that the two resolutions are incompetent evidence on this point, absent evidence in the record that RLI was aware of them, because it appears that the "resolution" forms were provided by RLI itself (*see* Longo Affirm. Exhibit I [letterhead "Surety Division" with RLI's address]). RLI also has offered no explanation for issuing a bond for a project in which its apparent principal (Titan) was not involved, except of court for its principal's relationship with Lebis.

In any event, on a motion to dismiss the Court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and

determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Although there is a heavy burden to prove that one entity is the alter ego of another (*see e.g. TNS Holdings, Inc. v MKI Securities, Corp.,* 92 NY2d 335, 339 [1998]), Defendant has failed to show that Plaintiff can prove no set of facts to establish that these two entities are the "alter ego" of each other. Defendant's motion to dismiss the complaint, insofar as it is based on lack of privity, is denied.

REFORMATION

RLI contends that Plaintiff lacks standing to seek reformation of the Bond because it is neither a party to the Bond nor a third-party beneficiary (*see* RLI Memo of Law at 5, citing *Cole v Metropolitan Life Ins. Co.*, 273 AD2d 832 [4th Dept 2000]; *see also Ferry v Ferry*, 13 AD2d 765 [3rd Dept 2004]). As noted earlier, there is at least a question of fact whether Plaintiff is a third-party beneficiary of the Bond. The complaint alleges that, "[i]n the event that the bond is interpreted to exclude coverage for Plaintiff for claims related to its work on the project, the issuance of the bond without such coverage was the result of a mutual mistake of the parties thereto, a unilateral mistake on the part of Titan and/or Lebis, a unilateral mistake on the part of RLI, or fraud on the part of Titan and /or Lebis, and in that event, Plaintiff, as a bond claimant, is entitled to a reformation of the bond" (Verified Complaint § 31).

To the extent that Plaintiff is deemed an intended third-party beneficiary of the Bond, reformation would be unnecessary. However, because RLI has not asserted any valid basis at this stage to dismiss the cause of action for reformation, the motion insofar as it seeks to dismiss the third cause of action is denied.

STATE FINANCE LAW

RLI contends that the instant action was untimely under State Finance Law § 137 (4) (b), which provides that no action on a payment bond furnished under that section in connection with a public improvement project "shall be commenced after expiration of one year from the date on which final payment under the claimant's subcontract became due" (State Finance Law § 137 [4] [b] [with exceptions not hereto relevant]). The instant action was not filed until September 22, 2006.

Plaintiff asserts, correctly, that under precedent from the Court of Appeals, if there is a longer period of limitations contained in a payment bond obtained pursuant to State Finance Law §137, that longer limitations period controls over the State Finance Law's one-year rule (*see Windsor Metal Fabrications, Ltd. v General Accid. Ins. Co of America*, 94 NY2d 124, 134 [1999]; *A. C. Legnetto Construction, Inc. v Hartford Fire Ins. Co.*, 92 NY2d 275, 278-279 [1998]).

The Payment Bond at issue here provides:

> In no event shall the Surety, or its successors or assigns, be liable for a greater sum than the penalty of this Bond or be subject to any suit, action or proceeding hereon that is instituted by any person, firm or corporation hereunder, **later than two [2] years after the complete performance of said Contract and final settlement thereof**.

(Payment Bond at 2 [emphasis supplied]). The "Contract" is defined in the Bond as the "BMHA Job # 02-40 CF @ Ferry Grider", the same job with respect to which the settlement agreement noted earlier pertained, which is dated October 1, 2004 (*see* Longo Affirm., Exhibit J [settlement agreement]). Plaintiff asserts that the action is timely, because commenced within

two years of the date of the settlement agreement, or September 22, 2006. RLI does not contradict that assertion. Therefore, the motion to dismiss, insofar as it is based upon State Finance Law § 137 (4) (b), is denied.

RLI further contends that Plaintiff failed to comply with State Finance Law § 137(3), which requires that notice of any claim for recovery on the Bond be provided to a contractor with whom a provider of labor does not have a direct contract, within 120 days of the last date of labor furnished. The subsection provides:

> **Every person who has furnished labor** * * * to the contractor or to a subcontractor of the contractor, **in the prosecution of the work provided for in the [public benefit] contract and who has not been paid in full therefor** before the expiration of a period of ninety days after the day on which the last of the labor was performed * * * by him for which the claim is made, **shall have the right to sue on such payment bond in his own name for the amount, or the balance thereof, unpaid at the time of commencement of the action; provided, however, that a person having a direct contractual relationship with a subcontractor of the contractor furnishing the payment bond but no contractual relationship express or implied with such contractor shall not have a right of action upon the bond unless he shall have given written notice to such contractor within one hundred twenty days from the date on which the last of the labor was performed** * * *, for which his claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or for whom the labor was performed. **The notice shall be served by delivering the same personally to the contractor or by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place where he maintains an office or conducts his business or at his residence; provided, however, that where such notice is actually received by the contractor by other means, such notice shall be deemed sufficient**

(State Finance Law § 137 [3] [emphasis supplied]; *see also Specialty Products & Insulation Company v St. Paul Fire & Marine Ins. Co.*, 99 NY2d 459, 465-466 [2003]). As noted, Plaintiff submits evidence of sending notice of its claim to Lebis and Titan as early as January 2003. Although RLI contends that there is no evidence that the notice was personally delivered or sent by registered mail, the statute also provides that actual notice is deemed sufficient, and in this procedural context, the burden is on Defendant to establish as a matter of law that there was no proper notice, and Defendant has failed to do so.

INDEMNIFICATION

Finally, it is clear that Plaintiff is not a party (perhaps to its chagrin) to the Settlement Agreement, under which inter alia Lebis, Titan and Enviroclean agreed to indemnify RLI against certain claims, and thus that agreement is not a defense to this action against RLI. It is up to RLI to enforce any indemnification agreements in its favor.

Plaintiff to submit order on notice to Defendants.

DATED: July 3, 2007

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HON. JOHN M. CURRAN, J.S.C.