

**Ditmars Roofing & Sheetmetal Contr., Inc. v
Reliance Ins. Co.**

2007 NY Slip Op 32107(U)

June 29, 2007

Supreme Court, New York County

Docket Number: 0602144/2004

Judge: Barbara Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK

PRESENT: _____

Justice

PART 12

Index Number : 602144/2004
DITMARS ROOFING & SHEETMETAL
 vs.
RELIANCE INSURANCE
 SEQUENCE NUMBER : 002
 SUMMARY JUDGMENT

INDEX NO. 602144/04
 MOTION DATE _____
 MOTION SEQ. NO. 002
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 09 2007

NEW YORK COUNTY CLERKS OFFICE

and cross-motion are
**DECISION IS DECIDED IN ACCORDANCE WITH
 ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S): _____

Dated: 6/29/07


BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 12

-----x
DITMARS ROOFING AND SHEETMETAL
CONTRACTORS, INC.,

Plaintiff,

- against -

RELIANCE INSURANCE COMPANY,

Defendant.

-----x
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 602144/04

Motion Seq. No. 002

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COUNTY CLERK'S OFFICE

Plaintiff Ditmars Roofing and Sheetmetal Contractors, Inc. ("Ditmars") seeks in this action to recover payment in the total amount of \$91,536.07 plus interest, reasonable attorneys' fees and costs under a Labor and Material Payment Bond involving the performance of certain construction work for the New York City School Construction Authority ("SCA") at P.S. 99 in Queens.

At some point prior to March 23, 2001, Shroid Construction, Inc. ("Shroid"), a general contractor, entered into a contract with the SCA for the P.S. 99 project. Defendant Reliance Insurance Company ("Reliance"), as surety, executed and furnished the Bond dated June 25, 1999, guaranteeing prompt payment to all claimants for labor, material and equipment furnished for use in the performance of the project.

On or about March 23, 2001, Ditmars entered into a subcontract with Shroid to provide certain labor and furnish certain materials, including roofing, for the project. Ditmars claims that there is

additional money due and owing to it under its subcontract with Shroid.

Shroid subsequently filed for bankruptcy protection in the United States Bankruptcy Court for the Southern District of New York.

Pursuant to paragraph 3 of the Payment Bond,

[n]o suit or action shall be commenced hereunder by any claimant:

* * *

(b) After the expiration of two (2) years following the date on which Principal ceased work of said Contract, however, if any limitation embodied in this bond is prohibited by any law controlling the construction hereof such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

Defendant now moves for summary judgment dismissing plaintiff's Complaint which was filed on July 7, 2004, on the grounds that it is untimely under the applicable two-year contractual statute of limitations period, because this action was not commenced within two years following February 5, 2002, the date on which defendant claims Shroid and its subcontractors "ceased work" on the project.

Plaintiff argues in opposition that the instant action is timely because it was brought within one year of "when final payment under the claimant's subcontract became due" as required by State Finance Law § 137(3) and (4), and requests that this Court grant summary judgment in its favor.

Pursuant to State Finance Law § 137(3),

Every person who has furnished labor or material, to the contractor or to a subcontractor of the contractor, in the prosecution of the work provided for in the 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 or material was furnished by him for which the claim is made (emphasis supplied), 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;...

State Finance Law § 137(4) (b) provides that

Except as provided in section two hundred twenty-g of the labor law, no action on a payment bond furnished pursuant to this section shall be commenced after the expiration of one year from the date on which final payment under the claimant's subcontract became due (emphasis supplied).

The Court of Appeals has held that

[t]ogether, subdivisions (3) and (4) set the beginning and end-point measurements for a lawsuit against a surety in these circumstances. They establish a date upon which the claim against a surety becomes ripe (State Finance Law § 137[3]) and a date after which time has run out for an action on the claim (State Finance Law § 137[4] [b]).

Windsor Metal Fabrications, Ltd. v. General Accident Insurance Co. of America, 94 N.Y.2d 124, 131 (1999). See also, Phelps Guide Rail v. United States Fidelity & Guaranty Co., 26 A.D.3d 838 (4th Dep't 2006); Jess F. Howes, Inc. v. Hudson Valley District Council of Carpenters, 146 A.D.2d 163 (3rd Dep't 1989).

The date on which "final payment under the claimant's subcontract became due" (State Finance Law § 137[4][b]) "is critical because the lawsuit must be started within one year from that fixed point." Windsor Metal Fabrications, Ltd. v. General Accident Insurance Co. of America, *supra* at 131.

Plaintiff claims that final payment under its subcontract did not become due until October 8, 2003 when an agreement on an adjusted subcontract balance was allegedly reached after negotiations at a conference between Ditmars, Shroid and the SCA. Thus, plaintiff argues that there is at least an issue of fact as to the commencement date of the period of limitations. See, Swing Staging, Inc. v. Hartford Fire Insurance Co., 269 A.D.2d 193 (1st Dep't 2000).

However, defendant contends that such negotiations constitute mere "administration" of the contract and do not extend the limitations period. See, SeaCrest Construction Corp. v. Amwest

Surety Ins. Co., 263 A.D.2d 433 (1st Dep't 1999); Whiteacre Constr. Specialties v. Aetna Cos. & Sur. Co., 86 A.D.2d 972 (4th Dep't 1982; aff'd 57 N.Y.2d 1018 (1982)).

Moreover, Reliance has submitted a copy of a notarized "Application and Certificate for Payment" dated July 31, 2001, prepared by Ditmars and sent to Shroid, in which plaintiff represented as follows:

The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due (emphasis supplied).

There is no dispute that the lawsuit was started more than one year after that date.

Further, plaintiff has failed to submit any evidence showing that this lawsuit was commenced within two years following the date on which Shroid "ceased work" under its Contract, the extended limitations period provided by paragraph 3(b) of the payment bond.¹

¹ The period in which to commence an action can be extended by agreement, thus providing even greater protection than the statute affords. See, A.C. Legnetto Construction, Inc. v. Hartford Fire Insurance Co., 92 N.Y.2d 275 (1998); Swing Staging, Inc. v. Hartford Fire Ins. Co., supra; Scaccia Concrete


Accordingly, based on the papers submitted and the oral argument held on the record on September 20, 2006, this Court finds that this lawsuit was not commenced within either the minimum period of limitations set forth in the State Finance Law or the contractual two-year period of limitations provided in the payment bond.

Defendant's motion for summary judgment is, therefore, granted, and plaintiff's cross-motion for summary judgment is denied.

The Clerk may enter judgment dismissing plaintiff's Complaint with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Date: June 29, 2007


Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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Corp. v. Hartford Fire Ins. Co., 212 A.D.2d 225 (2nd Dep't 1995).