

**Sea Crest Dev. Corp. v St. Paul Fire &  
Mar. Ins. Co.**

2007 NY Slip Op 33308(U)

October 10, 2007

Supreme Court, Nassau County

Docket Number: 1858-06/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice  
TRIAL/IAS, PART 6  
NASSAU COUNTY

SEA CREST DEVELOPMENT CORP. and  
SEVILLE CENTRAL MIX CORP.,

Plaintiffs,

INDEX No. 1858/06

MOTION DATE: Aug. 31, 2007  
Motion Sequence # 003

-against-

ST. PAUL FIRE & MARINE INSURANCE  
COMPANY,

Defendant.

The following papers read on this motion:

Notice of Motion.....	X
Reply Affirmation .....	X
Memorandum of Law.....	XX
Reply Memorandum of Law.....	X

This motion, by defendant St. Paul Fire & Marine Insurance Company (St. Paul), for summary judgment pursuant to CPLR 3212 dismissing plaintiffs' consolidated action is **granted** and the action is hereby **dismissed**.

In this consolidated action, plaintiffs Sea Crest Development Corp. (Sea Crest) and Seville Central Mix Corp. (Seville), respectively a subcontractor and material supplier to E. Oliveira Construction, Inc. (Oliveira) on a project known as 2002/2003 Roadway Improvement Program Phase II, Form A103, seek to recover monies [Sea Crest: \$88,415. and Seville: \$103,875.44] allegedly due and owing under payment bond no. JX2474 dated December 3, 2002 (furnished by defendant surety) for labor and materials supplied by said plaintiffs and unpaid by Oliveira which filed for bankruptcy protection in October, 2004 and is not a party to this action.

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Defendant St. Paul seeks summary judgment dismissing the plaintiffs' respective actions contending the claims asserted against it are time barred by both the limitation of suit provision set forth in the payment bond under which plaintiffs seek recovery and § 137 of the State Finance Law.

Insofar as is relevant to disposition of this motion, condition 3 of the bond provides, in relevant part, that:

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

\* \* \*

(b) After the expiration of one (1) year following the date on which Principal ceased Work on said Contract, it being understood, however, that 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 limitations permitted by such law."

With respect to actions on a payment bond, § 137(4)(b) of the State Finance Law provides that:

"[n]o 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."

Plaintiffs do not dispute the following facts set forth in Defendant's Statement of Undisputed Facts:

- 1) Oliveira last performed work under the contract on November 26, 2003;
- 2) Final payment was due Sea Crest under its contract with Oliveira for work done in connection with the project on September 30, 2003; see, Sea Crest's Proof of Claim and answer to defendant's interrogatories;

- 3) Final payment was due Seville under its contract with Oliveira in connection with the project on November 13, 2003; see Seville's Proof of Claim and answer to defendant's interrogatories..

Given these facts, the latest date on which an action could have been timely commenced on the bond was November 27, 2004. Plaintiffs, however, did not file their respective complaints against defendant until February 8, 2006 which was in clear violation of the bond's limitations period as well as that set forth in § 137 of the State Finance Law pursuant to which plaintiff Sea Crest was required to commence suit by October 1, 2004 and plaintiff Seville by November 14, 2004.

Rather than dispute the relevant facts, plaintiffs argue in opposition to defendant's motion, that defendant is estopped from asserting a statute of limitations defense predicated on the allegedly false and misleading oral assurances made by said surety and its senior surety claim attorney, that plaintiffs would be paid on their claim.

Contrary to plaintiffs' contention, they may not invoke the doctrine of equitable estoppel to preclude defendant from asserting the statute of limitations as a defense. The doctrine of equitable estoppel is an extraordinary remedy (Garcia v Peterson, 32 AD3d 992, 2<sup>nd</sup> Dept., 2006), which provides that a defendant may be estopped from pleading the statute of limitations as a defense where, by fraud, misrepresentation or deception, it has induced a plaintiff to refrain from filing a timely action (Zumpano v Quinn, 6 NY3d 666, 673 [2006]), or engaged in conduct which was calculated to mislead plaintiff, and, in reliance thereon, plaintiff failed to timely commence the action. The elements of fraud that must be pleaded and asserted in detail include a misrepresentation of a material fact, falsity, scienter, deception and injury. (Dowdell v Green County, 14 AD3d 750, 3<sup>rd</sup> Dept., 2005 [citations and internal quotation markets omitted]).

Due diligence on the part of the plaintiff in ascertaining the facts, and in commencing an action, is an essential element when a plaintiff seeks to invoke the doctrine. (Pahlad ex rel. Berger v Brustman, 33 AD3d 518, 519, 1<sup>st</sup> Dept., 2006, *aff'd*, 8 NY3d 901, 2007). The plaintiff must establish that subsequent and specific actions by the defendant somehow kept it from timely bringing suit. (Robare v Fortune Brands, Inc., 39 AD3d 1045, 1046, 3<sup>rd</sup> Dept., 2007). If a plaintiff possesses sufficient knowledge of the possible existence of a claim, it is under a duty to make inquiry and ascertain all the relevant facts before the statute of limitations expires. (Estate of Kandel v Helmsley Spear, Inc., 276 AD2d 267, 1<sup>st</sup> Dept., 2000; Gleason v Spota, 194 AD2d 764, 765, 2<sup>nd</sup> Dept., 1993).

Here, although the limitations period set forth in both §137 of the State Finance Law and the payment bond required plaintiff to file suit by, at the very latest, approximately December 2004, and notwithstanding defendant's unequivocal denial of plaintiffs' claims as untimely in April 2005, plaintiffs delayed filing suit until February 2006. The mere fact that settlement negotiations had been ongoing between the parties is not a basis to estop defendant St. Paul from asserting the statute of limitations as a defense. Settlement negotiations do not give rise to estoppel where, as here, there is no evidence that the defendant intended thereby to lull the plaintiff into inactivity until after expiration of the statute of limitations. (**Kiernan v Long Island R.R.**, 209 AD2d 588, 589, 2<sup>nd</sup> Dept., 1994). Investigation of a claim by an insurance company does not constitute a waiver of its limitations defense. (**Phillips v Dweck**, 300 AD2d 969, 3<sup>rd</sup> Dept., 2002; **Grumman Corp. v Travelers Indem. Co.**, 288 AD2d 344, 345, 2<sup>nd</sup> Dept., 2001).

It has been repeatedly held that in order to obtain summary judgment, a movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 1986). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. (**Zuckerman v City of New York**, 49 NY2d 557,562, 1980). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient for this purpose. (**Spyropoulos v Hirsh**, 21 AD3d 818, 1<sup>st</sup> Dept., 2005).

The plaintiffs have failed to adduce sufficient evidentiary facts to establish that they were induced to delay commencement of this action as a result of any affirmative misconduct by the defendant (actual misrepresentation, affirmative wrongdoing). The record is devoid of any basis to conclude that defendant St. Paul ever advised plaintiffs not to commence suit, engaged in conduct which can be considered misleading or deceptive or otherwise lulled the plaintiffs into sleeping on their rights. Plaintiffs' own lack of diligence in pursuing their claims, rather than any conduct on defendant's part, is responsible for plaintiffs' present plight.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated OCT 10 2007

**ENTERED**

*Stephen A. Ducarme*  
 XXX J.S.C.

OCT 12 2007

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 NASSAU COUNTY  
 COUNTY CLERK'S OFFICE