SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

ROLAND'S ELECTRIC, INC.,

Plaintiff,

INDEX No. 016841/07

MOTION DATE: Sept. 9, 2008
Motion Sequence # 001

-against-

TECHCON CONTRACTING, INC. &
CONTRACTOR BONDING AND
INSURANCE COMPANY,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation/Affidavit in Opposition..... XX
Reply Affirmation X
Memorandum of Law..... X

This motion, by defendant, for an order dismissing the Complaint as against defendant, Contractors Bonding and Insurance Company, is determined as hereinafter set forth.

This action for work, labor and services arises out of a public improvement project known as the Renovation of Sports Facility at the State University College at Old Westbury ("Project"). This part of the contract for the Project between the plaintiff and Techon

amounted to $410,000. The plaintiff acknowledges payment of $317,439.50, and the remainder due is $92,560.50. Demand was made for that sum and not paid by the movant bonding company, CB/C. It was not paid because of back charge claims in excess of the plaintiff's claimed amount.

The movant asserts that the complaint under the bond was untimely, in that litigation should have been commenced within one year and 90 days of the date when final payment became due, i.e., one year and 90 days from May 31, 2006, or August 30, 2007. Because the complaint was not filed until September 20, 2007, it was untimely pursuant to statutory law.

In opposition, the plaintiff, by its principal, asserts that final payment was contractually due when the subcontract was fully completed and performed and that the defendant Techcon repeatedly took the position that the plaintiff's work was not completed at last as late as March 26, 2007, and because the complaint was filed on September 20, 2007, it is timely under the statute. The plaintiff argues, through its attorney, that the motion is procedurally defective because an answer to the complaint has been interposed prior to the instant motion to dismiss. Counsel also argues that because of issues of fact and discovery issues regarding completion of the plaintiff's work, summary judgment should be denied. Counsel avers that the movant should be estopped from asserting the Statute of Limitations defense.

The movant's attorney asserts that the statutory limitations period is calculated from when the final payment became due under the contract, and the plaintiff issued its final payment requisition on May 31, 2008, from which the applicable Summons and Complaint is calculated. He argues that the plaintiff's own actions triggers the final payment invoice and certification for the purposes of the Statute of Limitations. Counsel also argues that repairs and charge backs and punch-list items do not extend the statutory period and the written acceptance by the owner's architect provides the proof of the finality of the plaintiff's work. Counsel contends that the movant is not precluded from making this motion, as plaintiff's attorney has clearly misinterpreted statutory and applicable case law. Counsel also contends that the movant's request for more information, before the expiration of the statutory period does not act to estop the plaintiff from asserting the Statute of Limitations defense.

DECISION

Addressing the plaintiff's procedural objection, i.e., that the movant's interposition of its answer acts as a waiver of its right to make this motion to dismiss, discussion is appropriate. CPLR 3211(e) provides, in pertinent part, as follows:

> "At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading". (Emphasis supplied)

CPLR 3211(a) 5 provides:

> "5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of fruads".

The movant's answer contains the following affirmation defense:

> "AS AND FOR A FIRST AFFIRMATIVE DEFENSE
>
> 4. Plaintiff is barred from any recovery against Defendant CBIC

> under the provisions of the New York State Finance Law Section 137(4) (b) in that the action herein was not commenced prior to the expiration of one year from the date on which final payment became due under Plaintiff's subcontract agreement with Techcon Contracting".

There is no assertion that the answer was untimely served.

This Court has perused the case law cited by the plaintiff in its opposition, **inter alia**, **Matter of Abramov v Board of Assessors, Town of Burley, Ulster County** (257 AD2d 958, 684 NYS2d 326, 3d Dept., 1999), particularly that part of the opinion which states:

> "An objection based on the failure to timely commence a proceeding may be raised in one of two ways: in the answer as an affirmative defense, or in a motion to dismiss pursuant to CPLR 3211(a)(5). Such a motion must be made prior to the time in which to serve an answer, and the failure to do so will result in a waiver of the defense unless raised in the responsive pleading". (**supra**, p.328). (emphasis supplied).

Clearly, the meaning of the statute and the accepted interpretation is contradictory to the plaintiff's position. Therefore, the instant motion is procedurally correct.

Substantively, dismissal is sought pursuant to State Finance Law §137(4)(b), which provides: "(b) 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". The defendant has submitted the following documents: the plaintiff's application and Certification for payment dated and notarized May 31, 2006

and the acceptance by the Project Architect dated May 15, 2006. The plaintiff's proof describes certain repairs, labeling, replacements and punch-list that, the plaintiff argues, amounts to a completion date extension to at least March 30, 2007. Those items, the movant asserts, do not define a final payment date, but, instead, describe items for repair and work that was alleged to have been completed, or had to be re-done. Paragraph 6.1 of the plaintiff's contract with the defendant Techcon provides:

> "Final payment, constituting the entire unpaid balance of the contract sum, shall be due when the work described in the sub-contract is fully completed and performed in accordance with the contract documents and is satisfactory to the Owner's representative, and all necessary inspections and approval are documented and completed. Payment shall be made in accordance with article 5 of this subcontract".

The documentation which forms the basis of this motion to dismiss does not contradict the plaintiff's assertion that it did not cease working on the project until March 30, 2007. The Court of Appeals, in **Windsor Metal Fabrications, Ltd. v General Accident Insurance Company of America** (94 NY2d 124, 700 NYS2d 90, 93, 1999), ruled:

> "Our holding focuses principally on when the one-year limitations period begins to run, within the meaning of State Finance Law §137(4)(b). We conclude that it starts at a point when a subcontractor who has directly contracted with the general contractor has submitted an invoice for final payment (or given the functional equivalent thereof) and 90 days have passed since the subcontractor has

ceased to work on the project. Contractual provisions between the subcontractor and general contractor cannot modify this starting-point date. The necessity to incorporate and satisfy all these considerations is supported by the statute, as well as precedent of this Court". (emphasis supplied)

Accordingly, in conformity with **Windsor**, the Statute of Limitations set forth in State Finance Law §137(4)(b) does not bar this action and the motion is **denied**.

A Preliminary Conference has been scheduled for February 3, 2009 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated NOV 20 2008

Stephen A. Bucaria
J.S.C.

ENTERED

NOV 25 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE