

**Peri Formwork Sys., Inc. v Lumbermens Mut. Cas.
Co.**

2008 NY Slip Op 33679(U)

March 24, 2008

Sup Ct, Westchester County

Docket Number: 16146/05

Judge: Kenneth W. Rudolph

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED ON 3/26 2008 WESTCHESTER COUNTY CLERK QC

SUPREME COURT OF THE STATE OF NEW YORK COMMERCIAL DIVISION, WESTCHESTER COUNTY

Present: HON. KENNETH W. RUDOLPH Justice.

FILED MAR 26 2008 TIMOTHY C. ICONI COUNTY CLERK COUNTY OF WESTCHESTER

-----X PERI FORMWORK SYSTEM, INC.,

Plaintiff, :

Index No. 16146/05 (Consolidated)

-against-

DECISION

LUMBERMENS MUTUAL CASUALTY COMPANY, Defendant. :

-----X

The following papers numbered 1 to 56 read on these motions.

PAPERS NUMBERED

Notice of Motion/Affirmation/Pleadings, Exhibits AA-MM/Memorandum of Law/ Exhibits A-P	1-32
Notice of Cross Motion/Affidavit/Affirmation/Exhibits A-S/Memorandum of Law	33-55
Reply -Opposition/Memorandum of Law, Peri	56

Upon the foregoing papers, it is ORDERED that this motion by plaintiff, Peri Formwork Systems, Inc. ("Peri") for an order granting Peri partial summary judgment against certain named defendants in four actions, now consolidated, and the cross motion of defendants, LC White Plains, LLC, George A. Fuller Co., Inc., Cappelli Enterprises, Inc. ("Fuller defendants") and Arch Insurance Company, American Motorists Insurance Company and Lumbermens Mutual Casualty Company ("surety defendants") for an order granting said defendants summary judgment dismissing Peri's payment bond and surety bond claims, and claim for attorneys fees, are decided as follows.

The instant actions arise out of the construction of the White Plains City Center ("project/City Center") in White Plains, New York. The City Center is a mixed-use real estate development owned by several private entities containing retail, entertainment and residential space. George A. Fuller, Inc. ("Fuller") was the general contractor for the six buildings comprising City Center, which were constructed between 2002 and 2004, pursuant to agreements with the separate owners of the buildings.

At issue in the four actions brought by Peri are claims by Peri for monies alleged to be owed Peri for materials furnished to the project: framework for concrete pouring, rented by Peri to subcontractors Carlton Concrete, Inc. ("Carlton") and Rogers & Sons Concrete, Inc. ("Rogers"). Peri has filed claims against four surety bonds issued by Arch Insurance Company ("Arch") to bond four mechanics' liens. Peri interposes additional claims against payment bonds issued by Lumbermen's Mutual Casualty Company ("Lumbermens") and American Motorists Insurance Company ("AIMC") and Arch.

On March 8, 2005, Peri commenced an action under Index No. 3320/05 entitled Peri Formwork Systems, Inc. v. Arch Insurance Company, Cappelli Enterprises, Inc., George A. Fuller Company, Inc., Rogers & Sons Concrete, Inc., and Rogers and Sons Construction Co. ("Rogers").

In that action, Peri seeks to recover against Arch's lien bond no. SU 1001713 and to recover \$423,905.97 money damages against defendants, Rogers for breach of contract. Herein, Peri seeks summary judgment against Arch foreclosing Peri's lien bonded by Arch's lien bond, supra.

On May 19, 2005, Peri, a named defendant, in an action commenced February 17, 2005 in this Court, under Index No. 2487/05 entitled Naber Electric Corp. V. George A. Fuller Company, Inc. et al., interposed an answer with cross claims, including a claim against defendants, AMIC and Lumbermens on the retail building payment bond 3SM029472; a claim for attorney fees; a claim against LC White Plains, LLC ("LC") and Fuller to foreclose Peri's November 4, 2004 mechanics' lien in the amount of \$57,966.89; a claim against LC and Fuller to foreclose Peri's November 24, 2004 mechanics' lien in the amount of \$346,177.27; and a claim against LC and Fuller to foreclose Peri's February 15, 2005 mechanics' lien in the amount of \$116,646.51.

Herein, Peri seeks summary judgment against AMIC and Luberms, jointly and severally, for the full amount owed under the Rogers contracts in the amount of \$502,612.60, plus all additionally accrued interest, in the actions, Naber Electric Corp. v. George A. Fuller Company, et al., Index No. 2487/05 (consolidated 04-15887) and the

action commenced by Peri on September 26, 2005 entitled, Peri Formwork Systems, Inc. v. Lumbermens Mutual Casualty Company, Index No. 16146/05 relative to Peri's claims against payment bonds nos. 3SM029370, 3SM029371 and 3SM029372.

On December 30, 2005, Peri commenced an action in this Court under Index No. 22518/05 entitled Peri Formwork Systems, Inc. V. Arch Insurance Company LC, White Plains LLC, George A. Fuller Company, Inc., White Plains Residential II, LLC and Cappelli Enterprises, Inc. Plaintiff's first claim was against Arch and Fuller on the South Tower Payment Bond (SU1001097). The second claim sought attorney's fees. The third claim was against three Arch Surety Bonds (Nos. SU1008976, SU1008977, and SU1008978, respectively) which bonded the November 4, 2004, Rogers' contract lien in the amount of \$57,996.89, the November 24, 2004 lien in the amount of \$346,177.27, and the February 14, 2005 lien in the amount of \$116,646.51 bonding the Carlton contract.

Herein, Peri seeks summary judgment against Arch on Arch's bond no. SU1001097 in the amount of \$462,823.78, plus accrued interest owed under the Carlton contracts.

In June 2006, Peri amended its pleadings in the actions under Index No. 2487/05 and 16146/05 to assert claims against AMIC/Lumbermens Garage Payment Bond (3SM029470) and against the AMIC/Lumbermens North Tower Payment Bond (3SM029471).

Herein, Peri seeks summary judgment granting Peri attorney's fees against LC for its failure to file its payment bonds with the Clerk of Westchester County in the actions entitled Naber Electric Corp. v. George A. Fuller Company, et al., Index No. 2487/05 (consolidated 04-15887), Peri Formwork Systems, Inc. V. Lumbermens Mutual Casualty Company, Index No. 16146/05 and Peri Formwork Systems, Inc. v. Arch Insurance Co., et al., Index No. 22518/05.

The Fuller defendants contend that Peri's motion for summary judgment, supported only by an affirmation of an attorney with no personal knowledge of the facts involved, should be denied because there are multiple issues for a trier of the facts herein, including the validity of Peri's rental charges to Carlton and Rogers pursuant to their respective contracts.

Defendant, Fuller contends the total amount of Peri's rental charges for the formwork supplied are disproportionate to the amount of concrete work involved in the pertinent construction. A large amount of Peri's charges appear to be for unsubstantiated damages to formwork returned to Peri by Carlton or Rogers, as opposed to actual rental

charges. Too, there were unresolved disputes between Peri and Rogers concerning Peri's rental charges for formwork that had already been returned. Fuller also contends Peri's total claim is inflated by alleged late charges and interest charges.

Additionally, the lien bond claims should be dismissed because the mechanic liens were not filed on the properties for which Peri claims it was not paid the rental charges at issue. The payment bond claims should be dismissed because Peri's claims are asserted against payment bonds that are unrelated to the construction of the buildings for which Peri claims its invoices were not paid, and also because Peri did not timely comply with the notice of claim provisions in the respective payment bonds. In addition, all of Peri's bond claims should be dismissed based on Fuller's payment in full to its two sub-contractors, Carlton and Rogers.

Peri's attorney contends that Peri timely filed four notices of mechanics' liens and notified the general contractor, Fuller and the respective property owners of Peri's claims for unpaid amounts due. The notices were received by Fuller and within 90 days of Peri's last providing work to the project on October 28, 2004. Peri made timely claims against the project's four payment bonds. Peri fully performed under its subcontracts with Carlton and Rogers.

Peri argues further that it is owed undisputed amounts of money for materials and services it undisputedly supplied to the project. Peri undisputedly performed its sub-contracts with concrete subcontractors, Carlton and Rogers. Peri's actions consist of claims against four labor and materialmen, payment bonds posted by Fuller on the project and foreclosure on four mechanic's liens filed by Peri on the project's attendant property. The four liens were bonded by the owners of the property: LC .

The cross motion of the Fuller defendants and the surety defendants is supported by the affidavit of Fuller's controller, Louis Cantarella ("Cantarella"); who avers that he has personal knowledge of the facts and circumstances of these actions. Fuller had no contractual relationship with Peri, which subcontracted for rentals of concrete pouring formwork with Carlton in connection with the South Tower building and with Rogers in connection with the Air Rights building.

The contract for the South Tower was between LC White Plains Residential II ("owner, Residential II) and Fuller as general contractor, bonded by payment bond No. SU1001097 in the amount of \$76,250,000.00 obtained by Fuller from Arch. The subcontract between Fuller and Carlton was priced at \$11,025,000. Fuller paid Carlton \$10,274,662.01, an additional \$668,714.24 to cover Carlton's defaults to unions and service

companies and an additional \$300,319.95 directly to suppliers and contractors, in all \$11,243,696.20, exceeding the contract price by \$218,696.20. Carlton abandoned its uncompleted work in September, 2004; Fuller incurred \$580,825.00 in costs to complete Carlton's work.

The contract for the Air Rights building was between LC White Plains Recreation LLC ("owner, Recreation") and Fuller as general contractor; there was no payment bond. A subcontract agreement between Rogers and Fuller was priced at \$2,750,000.00. As a result of approved changes; Fuller paid Rogers, certain of Rogers subcontractors and unions and Peri directly, \$4,768,057,29.

Peri filed mechanics liens as follows: March 19, 2004, \$423,905.97 for monies owed by Rogers; November 4, 2004, \$57,966.89 for additional monies owed by Rogers; November 24, 2004, \$316,449.53 for monies owed by Carlton and February 15, 2005, \$116,646.51, for monies owed by Carlton. The liens were filed against the real property located at 206 Main Street, White Plains, New York. Cantarella depicts that address as the Retail building averring that none of Peri's invoices were for materials used in the construction of any form of the Retail building. The four mechanics liens were discharged and bonded by the Arch surety bonds. Cantarella questions the validity of Peri's claims based on its invoices, including those to Carlton and to Rogers as follows. The total amount Peri charged for renting the formwork appears to be disproportionate to the amount of concrete work involved on either of these buildings. In addition, a large amount of Peri's charges appear to be for unsubstantiated "damaged" returned formwork as opposed to actual rental charges. There were also unresolved disputes between Peri and Rogers concerning rental charges for materials that had already been returned. Peri's total claim appears to be further inflated by alleged late charges and interest charges.

With respect to Peri's payment bond claims, Cantarella avers that Peri's November 14, 2005 claim letter to Arch on the South Tower payment bond SU 1001097 claiming \$462,823.00, not paid by Carlton and \$502,612.60 not paid by Rogers, was sent more than one year after Peri last furnished materials to Carlton and Rogers, and not within 90 days as required by paragraph 4.2.1 or attach a copy of requisite notice to the contractor and owner Residential II with its claim letter as required by paragraph 4.2.3; Fuller never received the requisite notice. Peri's alleged unpaid invoices to Rogers are unrelated to the construction of the South Tower.

Cantarella avers further that Peri's March 24, 2005 claim letter to AMIC and Lumbermens on the Retail building payment bond SM029372 claiming \$462,823.00 not paid by Carlton and \$481,872.00 not paid by Rogers was sent more than nine months after Peri last furnished materials to Rogers: June 7, 2004 and not within 90 days as required by paragraph 4.2.1. to the contractor and owner with its claim letter, and did not attach a copy

of requisite notice paragraph 4.2.3. Fuller never received the requisite notice. The Peri claim letter with respect to Carlton: October 28, 2004 was not sent within 90 days as required by paragraph 4.2.1. and did not attach a copy of a requisite notice to the contractor and owner with its claim letter, paragraph 4.2.3. Fuller never received the requisite notice. Peri's alleged unpaid invoices to both Rogers and Carlton are unrelated to construction of the Retail building.

Peri replies that it timely filed four notices of mechanic's liens and notified Fuller and the project owner of its claim and the unpaid amounts due. Too, Peri made timely claims against the four payment bonds provided by Fuller for the amounts owed Peri by Carlton and Rogers. It is not disputed that Peri provided concrete framework systems to the South Tower by virtue of its contract with Carlton, which has admitted that at least \$420,000 is due and owing Peri. Fuller and Cappelli knew that Carlton was not paying its suppliers and contractors, including Peri. Peri argues that defendants' argument that Peri's failure to serve Fuller with a notice of claim pursuant to the terms of the Arch payment bond and that Carlton has been paid in full are without factual or legal merit.

Too, Fuller and the surety companies are unconditionally bound to pay for labor, materials and equipment furnished for use in the performance of the project. Peri may recover from the sureties unless Fuller or LC has paid Peri all amounts owed. The purpose of the payment bond is to pay claimants when the preceding contractor does not pay them. Peri has not been paid directly or otherwise and has not benefited by any payments defendants may have paid to others for supplies Peri supplied to the project. The subject bonds provide for the unconditional payment of laborers and materialmen which make a timely claim regardless of whether there is a fund payable to a subcontractor. Arch is accordingly liable to Peri for the undisputed principal amounts owed to Peri under the Carlton contracts: \$424,170.90. Lumbermens and AMIC are jointly and severally liable for the undisputed amounts owed to Peri under the contracts: \$44,707.94.

With respect to the notices of mechanics liens filed for monies alleged to be owed by Rogers to Peri: March 19, 2004 lien for \$423,055.97 and November 4, 2004 lien for \$57,966.89, Peri contends defendants do not have a provable payment defense nor is there any dispute as to amounts owed Rogers by Fuller. LC and Cappelli timely received copies of the lien notices, the liens and actions to foreclose the lien were timely filed and Peri fully performed its subcontracts with Rogers.

It is well established that summary judgment is a drastic remedy and should only be granted if there are no material and triable issues of fact. Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395. In evaluating a motion for summary judgment, a court should not determine credibility but whether there exists such issues. S. J. Capelin Assoc. v. Globe Manufacturing Corp., 34 NY2d 338. When reviewing a motion the papers

must be scrutinized carefully in the light most favorable to the party opposing the motion. Robinson v. Strong Memorial Hosp., 98 AD2d 976. The party moving for summary judgment has the burden initially of coming forward with admissible evidence to support the motion so as to warrant the Court's directing judgment in movant's favor as a matter of law; the burden then shifts to the opposing party to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. See, Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc., 46 NY2d 1065, 1067. Alvarez v. City of New York, 68 NY2d 320; Zuckerman v. City of New York, 49 NY2d 557.

Payment Bonds

The Court notes the following provisions of the payment bonds:

"4. The Surety shall have no obligation to claimants under this Bond until:

4.2 Claimants who do not have a direct contract with the Contractor:

.1 Have furnished a written notice to [Fuller] and sent a copy, or notice thereof, to the owner within 90 days after having...last furnished materials or equipment included in the claim stating, with substantial accuracy, the amount of the claim and the name of the party to whom the materials were furnished or supplied or for whom the labor was done or performed; and

.2 Have either received a rejection in whole or in part from [Fuller], or not received within 30 days of furnishing the above notice any communication from [Fuller] by which [Fuller] has indicated that the claim will be paid directly or indirectly; and

.3 Not having been paid within the above 30 days, have sent a written notice to the Surety (at the address described in Paragraph 12) and sent a copy, or notice thereof, to the Owner, stating that a claim is being made under this Bond and enclosing a copy of the previous written notice furnished to [Fuller]."

The Court finds that movant Peri has failed to establish its entitlement to summary judgment as a matter of law with respect to the performance bonds. Specifically, Peri has failed to demonstrate prima facie its compliance with the requirements of the performance bonds with respect to notice. On the other hand, cross movants have established their entitlement to summary judgment dismissing the payment bond claims and Peri has not raised any genuine issues for a trier of the facts with respect thereto. Failure to comply with the strictly enforceable notice conditions precedent of the payment bonds warrants dismissal of Peri's causes of action with respect thereto. See, National Fuel Gas Distribution Corp. V. Hartford Fire Insurance Co., 28 AD 3d, 1169; Lynbrook Glass and Architectural Metals Corp. V. Elite Associates, Inc., et al., 225 AD2d 525.

Attorneys' Fees

The branch of Peri's motion seeking an award of attorneys' fees against defendant, LC for its failure to file with the Clerk of Westchester County its payment bonds in the actions entitled Naber Electric Corp. V. George A. Fuller, et al., Index No. 2487/2005 (consolidated 04-15887), Peri Formwork Systems, Inc. V. Lumbermens Mutual Casualty Company, Index No 16146/05 and Peri Formwork Systems, Inc. V. Arch Insurance Co., et al, Index No. 22518/2005, is premised on General Obligations Law ("GOL") 5-322.3 which provides as follows:

"A copy of any **payment bond** executed in connection with a contract for the improvement of real property other than a contract for a public improvement, shall be filed within thirty days of such execution by the owner of the improvement in the office of the county clerk in the county in which the improvement is to be undertaken; provided, however, that such filing shall be required only when the contract for the improvement of real property is for an amount in excess of one hundred thousand dollars. Any owner failing to file such payment bond as provided herein shall be liable for the reasonable attorney's fees, as determined by the court, of any claimant successfully bringing an action or proceeding on the bond."

The record before the Court does not establish that LC filed the subject performance bonds with the Westchester County Clerk. However, Peri has not successfully brought an action or proceeding on the bonds.

This branch of Peri's motion is denied, as academic, in accord with the dismissal of Peri's payment bonds causes of actions, supra.

Surety Bonds

The Court finds that Peri has established its entitlement to summary judgment as to the Arch surety lien bonds filed with respect to the amounts alleged to be due under the Rogers' contracts; defendants have raised no genuine issues of fact with respect thereto. Accordingly, Peri is granted summary judgment with respect to Arch surety bonds Nos. SU1001713 and SU1008976.

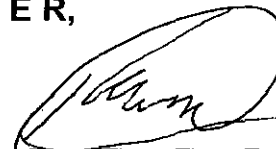
However, genuine issues for a trier of the facts, including a dispute as to whether Carlton was paid in full, preclude summary judgment for either Peri or defendants with respect to Arch surety bond Nos. SU1008977 and SU1008978. Peri's motion and defendant's cross motion for summary judgment are denied with respect thereto.

The attorneys are directed to attend a conference with the Court on April 16, 2008 at 11 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
March 24, 2008

ENTER,



HON. KENNETH W. RUDOLPH
Justice of the Supreme Court

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