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| Trustees of the N.Y. City Dist. Council of Carpenters Pension Fund v Arch Ins. Co. |
| 2018 NY Slip Op 30578(U) |
| April 2, 2018 |
| Supreme Court, New York County |
| Docket Number: 162642/2014 |
| Judge: Melissa A. Crane |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 15

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TRUSTEES OF THE NEW YORK CITY DISTRICT
COUNCIL OF CARPENTERS PENSION FUND,
WELFARE FUND, ANNUITY FUND, APPRENTICESHIP,

Index No. 162642/2014 and
150051/2015

JOURNEYMAN RETRAINING, EDUCATIONAL AND
INDUSTRY FUND, CHARITY FUND, AND THE
NEW YORK CITY AND VICINITY CARPENTERS
LABOR-MANAGEMENT CORPORATION, TRUSTEES
OF THE PAVERS AND ROAD BUILDERS DISTRICT
COUNCIL WELFARE, PENSION, ANNUITY and
APPRENTICESHIP, SKILL IMPROVEMENT AND
SAFETY FUNDS,

Motion Sequence No. 001,

ORDER AND DECISION

Plaintiffs,

-against-

ARCH INSURANCE COMPANY,

Defendant.

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Melissa A. Crane, J.S.C.,

In these consolidated cases, plaintiffs move for summary judgment in their favor. For the following reasons, plaintiffs' motions are granted.

This is yet another action to collect on a bond due to the bankruptcy of Recine Materials Corp ("Recine"). Arch Insurance Company ("Arch") had issued payment bonds for work plaintiffs performed on the Myrtle Avenue Subway Line in Brooklyn, New York ("Myrtle Ave Project"). Plaintiffs seek to collect in place of what they claim Recine owes them for the Myrtle Ave Project. Arch does not dispute its liability under the bond. It does, however, dispute the amount it owes. Arch makes several arguments in that regard.

Citing Labor Law § 220-g, Arch claims most of the employees plaintiff claims were working on the Myrtle Ave project failed to take legal action within one year from the date of the last underpayment to that employee. As a result, Arch argues, the bulk of the claims are time-barred. Labor Law § 220-g allows an employee organization to commence an action on behalf of a member employee “against the contractor, the subcontractor, or the issuer of such bond, without prior notice, within one year of the date of the last alleged underpayment.” Plaintiffs are such employee organizations. Arch does not cite a single case to support the proposition that the statute runs per individual employee when an entire employee organization has sued. Rather, it would appear that the last date on the project for the trade organization as a whole controls for statute of limitation purposes (*see Rochez v Traveler’s Cas & Sur Co., of Am.*, 8 AD3d 121, 122 [1st Dept 2004]). This result comports with the remedial nature of the statute (*see Bricklayers Ins. and Welfare Fund v Speranza Brickwork, Inc.* 2015 WL 1529579 at *9 [EDNY March 31, 2015] [“it is clear that the legislature passed and amended Section 220-g in order to provide additional protection and broader avenues of recovery for underpayments to public improvement project employees and their collective bargaining units”]).

Looking at the organization as a whole, the last date a carpenter performed work, whom Recine had employed on the Myrtle Ave Project, was March 10, 2014. The last date of work a paver performed work, whom Recine had employed on the Myrtle Ave Project, was February 28, 2014. Accordingly, the claims are timely as plaintiffs filed them within one year of those dates.

Arch also argues that collective bargaining agreements required Recine to post surety bonds. This is irrelevant. There is no question that Arch issued a bond covering materials and labor performed on the Myrtle Ave project. There is also no question that Recine failed to pay for that very same work and declared bankruptcy. Accordingly, Arch is liable to pay in its place.

Arch argues it needs discovery and that it plans to add a third-party defendant (Forte) to this action, such that summary judgment is premature. Arch's argument lacks candor. This case is over four years old. If Arch was going to implead some other entity, it should have done so long ago. As of date of this decision, Arch has not impleaded Forte. Arch can still start a new action against Forte and anyone else appropriate. The time for summary judgment in this action has arrived.

Arch also claims that plaintiffs have failed to show any employees actually worked on the Myrtle Ave Project, because plaintiffs have only relied on the certified payroll reports from the bankrupt Recine. Arch speculates, without support, that "Recine improperly manipulated its certified payroll reports in its waning days prior to its bankruptcy" and claims to need discovery to confirm whether "various employees who claim that benefits were not paid" actually worked on the Myrtle Ave Project. To the contrary, plaintiffs have turned over certified payroll records Recine submitted for work on the Myrtle Ave Project that identifies: (1) the employees who performed the work; (2) the days on which they performed the work and (3) the number of hours each employee worked. Certified payroll records are subject to the penalties of perjury and are required in New York (*see* NY Labor Law 220(3-a)(a)(iii)). Defendant offers nothing more than speculation to negate the validity of the certified payroll records. This is insufficient to defeat summary judgment (*see Brown v Transcare NY Inc.*, 27 AD3d 350, 352 [1st Dept 2006]; *see also, Perez v City of New York*, 41 Misc3d 1213[A] [Sup Ct, Kings County 2013]). Moreover, despite claiming the need for discovery, in the four years this case has existed, Arch has never served a subpoena or sought discovery in an effort to establish Recine falsified payroll records. Arch only raises this issue now in response to this summary judgment motion. Clearly, this is not enough to defeat it (*see Trails West v Wolff*, 32 NY2d 207, 221 [1973] [where plaintiffs made

no showing of knowing or reckless falsity, “the same absence of proof to raise an issue of knowing or reckless falsity likewise deprives the plaintiffs of any right to further pretrial discovery”)).

Accordingly, it is

ORDERED that the court grants plaintiff the Trustees of the New York City District Council of Carpenters Pension Fund’s motion for summary judgment; and it is further

ORDERED that the court grants plaintiff the Trustees of the Pavers and Road Builders Council Welfare Funds’ motion for summary judgment; and it is further

ORDERED that the parties are directed to attend an inquest on June 6, 2018 at 9:30AM to determine the amount to which Arch is liable under the bonds.

DATED: 4/2, 2018

NON RECUSARE


J.S.C