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# Order Granting XL Specialty Insurance Company's Motion for Summary Judgment (GEORGIA STATE FINANCING AND INVESTMENT COMMISSION)

Elizabeth E. Long
*Superior Court of Fulton County*

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COPY

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIA STATE FINANCING AND INVESTMENT COMMISSION,

Plaintiff,

v.

LPS CONSTRUCTION CO., INC., WALLACE H. WIGGINS, JR., PERKINS & WILL, INC., FIREMAN'S FUND INSURANCE CO., and XL SPECIALTY INSURANCE CO.

Defendants,

and

LPS Construction Co., Inc.
Third Party Plaintiff

v.

ZURICH AMERICAN INSURANCE CO. and NATIONAL FIRE INSURANCE COMPANY OF HARTFORD

Third-Party Defendants,

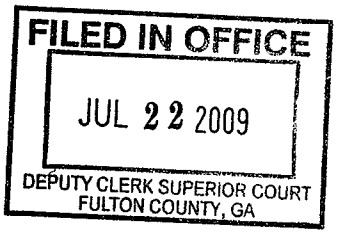
and

LPS CONSTRUCTION CO., INC., FIREMAN'S FUND INSURANCE COMPANY. and
PERKINS & WILL, INC.,
Third-Party Plaintiffs

v.

SOUTHWESTERN COMMUNICATIONS, INC., SOUTHEAST ROOFING SOLUTIONS, INC., MOCK PLUMBING AND MECHANICAL, INC., H. A. SACK CO., INC. d/b/a THE SACK COMPANY, BONITZ OF GEORGIA, INC., RIGHTWAY DRYWALL, INC., OLD CAPITOL GLASS COMPANY, INC., MAY SPECIALTY FABRICATORS, INC., LARRY GUNN, CHARLIE JOHNSON, CENTRAL FENCE COMPANY, INC., SPRINKLER CONTRACTORS, INC.,
and H. A. SACK CO., INC. d/b/a THE SACK

CIVIL ACTION FILE NO.
2007CV128025



**COMPANY**

**Third-Party Defendants,**

**and**

**SOUTH WESTERN COMMUNICATIONS, INC.,**

**Fourth-Party Plaintiff,**

**v.**

**SIMPLEXGRINNELL, LP, f/k/a SIMPLEX TIME RECORDER CO.,**

**Fourth-Party Defendant**

**and**

**H. A. SACK CO., INC. d/b/a THE SACK COMPANY**

**Fourth-Party Plaintiff,**

**v.**

**CONTINENTAL LIGHTNING PROTECTION, INC. AND TERRY L. DAGENHART**

**Fourth-Party Defendants.**

**ORDER GRANTING XL SPECIALTY INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT**

On July 10, 2009, Counsel appeared before this Court to present oral argument on XL Specialty Insurance Company's Motion for Summary Judgment. After hearing the arguments made by counsel and reviewing the briefs submitted on the motions and the record in the case, the Court finds as follows:

## I. Facts

This case arises out of the construction of a 192-bed state forensics hospital in Milledgeville, Georgia ("the Project"). The Project was designed for the State Department of

Human Resources to be used to house detainees awaiting adjudication as to their competence to stand trial. Plaintiff, Georgia State Financing and Investment Commission ("GSFIC"), is the State agency that procures projects for use by other State agencies. Defendant LPS Construction Company, Inc. ("LPS") was hired by GSFIC to construct the Project, and served as the general contractor. XL Specialty Insurance Company ("XL") is the 5-year roof and wall bond surety for LPS. Defendant Perkins & Will ("P&W") was hired by GSFIC as the Project architect, and was in charge of contract administration.

GSFIC has filed suit complaining of extensive construction defects throughout the Project. XL has filed a Motion for Summary Judgment arguing that it should be dismissed from this case because the bond it issued to LPS never became effective.

## II. Standard

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

## III. XL Specialty's Motion for Summary Judgment

On May 7, 2003, XL issued a five-year roof and wall bond (the "Bond") which LPS executed as principal. The Bond, which pertained to the Project, was drafted by the State and was required by GSFIC as part of the "closeout" documents package.

XL argues that the explicit terms of the Bond set the issuance of a final certificate by the architect as a condition precedent to any liability of XL under the Bond. The parties agree that the architect never issued a final certificate and therefore, XL contends that summary judgment should be granted in its favor.

GSFIC contends that a condition precedent must be clearly stated and that the provision in Section 3 of the Bond describes a period of time which is the end-point of XL's liability under the bond, not a condition precedent. If it were intended as a condition precedent, it would contain explicit language, such as "as a condition of the obligation." Additionally, GSFIC argues that Section 3 of the Bond conflicts with Section 4 describing the remedies available if there are leaks or defects. Thus, Section 3 does not clearly state a condition precedent.

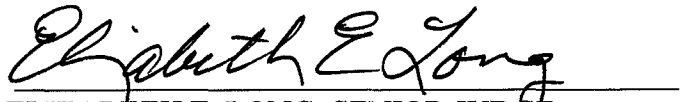
However, one must look from Section 4 to Section 3 in order to determine when the remedy is available. Thus, we are back to the requirement of Section 3, that of a final certificate of the architect.

Finally, GSFIC argues that XL has waived its right to assert the condition precedent of a final certificate because LPS, its principal, by its defective and deficient work, prevented the final certificate from being issued.

The reason a final certificate is required before a surety is liable on such a bond is because the surety is warranting the walls and roof for a period of five years. It would be silly to issue such a warranty unless the architect had declared the work to be completed and final.

Summary judgment is hereby **GRANTED** to XL.

**SO ORDERED** this 21st day of July, 2009.



ELIZABETH E. LONG, SENIOR JUDGE
FULTON COUNTY SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

**Copies to:**

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| **Georgia State Financing and Investment Commission**<br>George C. Reid, Esq.<br>georgereid@mindspring.com<br>Building One—Suite 200<br>4200 Northside Parkway<br>Atlanta, GA 303027<br><br>Teri D. Fields, Esq.<br>tfields@law.ga.gov<br>Assistant Attorney General<br>State Law Department<br>40 Capital Square, S.W.<br>Atlanta, GA 30334<br><br>David R. Cook, Jr., Esq.<br>cook@ahclaw.com<br>Autry,Horton & Cole, LLP<br>2100 East Exchange Place<br>Suite 210<br>Tucker, GA 30084<br>404.365.5694 ext. 3335 | **LPS Construction Co., Inc.,**<br>John C. McManus, Esq.<br>jcm@jcmpc.com<br>George Warlick, Esq.<br>g.warlick@jcmpc.com<br>Alex Yusupov, Esq.<br>alex@jcmpc.com<br>McManus & Warlick, LLP<br>5901-A Peachtree Dunwoody Road<br>Suite 510<br>Atlanta, GA 303028<br>678.397.1010<br><br>**Wallace H. Wiggins, Jr.,**<br>John C. McManus, Esq.<br>jcm@jcmpc.com<br>George Warlick, Esq.<br>g.warlick@jcmpc.com<br>Alex Yusupov, Esq.<br>alex@jcmpc.com<br>McManus & Warlick, LLP<br>5901-A Peachtree Dunwoody Road<br>Suite 510<br>Atlanta, GA 303028<br>678.397.1010<br><br>**Perkins & Will, Inc.,**<br>William Wildman, Esq.<br>bill.wildman@sablaw.com<br>Kent W. Collier, Esq.<br>kent.collier@sablaw.com<br>Sutherland<br>999 Peachtree Street, NE<br>Atlanta, GA 30309-3996<br><br>**American Motorists Insurance Co.,**<br><br>**Fireman's Fund Insurance Co.,**<br>John V. Burch, Esq.<br>jvb@boviskyle.com<br>Marc H. Bardack, Esq.<br>mhb@boviskyle.com<br>Bovis, Kyle & Burch, LLC<br>200 Ashford Center North |

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| | Ins. Co. & LPS Construction Co., Inc.)<br>Ronald J. Garber, Esq.<br>rgarber@shapirofussell.com<br>Shapiro, Russell, Wedge & Martin, LLP<br>One Midtown Plaza, Suite 1200<br>1360 Peachtree Street, NE<br>Atlanta, GA 30309-3214<br><br>Kenneth Sisco, Esq.<br>ksisco@hplegal.com<br>Hawkins & Parnell LLP<br>3030 Peachtree Street, NE<br>400 SunTrust Plaza<br>Atlanta, GA 30308<br><br>**Bonitz of Georgia, Inc.** (Third Party Defendant to Complaint filed by Third Party Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)<br>Alan S. Lowe, Esq.<br>alowe@savlawgroup.com<br>Ellen Schoolar, Esq.<br>ellen@savlawgroup.com<br>Alan S. Lowe & Associates P.C.<br>311 W. Broughton Street<br>Savannah, GA 31401<br><br>**Rightway Drywall, Inc.** (Third Party Defendant to Complaint filed by Third Party Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)<br>James T. Budd<br>jbudd@m-mlegal.com<br>Mabry & McClelland, LLP<br>2200 Century Parkway<br>Tenth Floor<br>Atlanta, GA 30345<br><br>**Old Capitol Glass Company, Inc.** (Third Party Defendant to Complaint filed by Third Party Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)<br>Stacey K. Hydrick, Esq.<br>Hydrick Law LLC<br>2408 Mt. Vernon Road |

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| | Atlanta, Georgia 30338<br><br>**May Specialty Fabricators, Inc**. (Third Party Defendant to Complaint filed by Third Party Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)<br>Jerald R. Hanks, Esq.<br>jrhanks@hanksbrookes.com<br>Hanks & Brookes, LLC<br>The Peachtree<br>1355 Peachtree Street, NE<br>Suite 1900<br>Atlanta, GA 30309<br><br>**Larry Gunn,** (Third Party Defendant to Complaint filed by Third Party Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)<br>P.O. Box 54<br>Nunex, GA 30448<br><br>**Charlie Johnson** (Third Party Defendant to Complaint filed by Third Party Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)<br>213 Forest Avenue<br>Soperton, GA 30457<br><br>**Central Fence Co., Inc.** (Third Party Defendant to Complaint filed by Third Party Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)<br>Kirk Susong, Esq.<br>ksusong@gadisputes.com<br>Robert P. Marcovitch, Esq.<br>bmarcovitch@gadisputes.com<br>Gaslowitz Frankel, LLC<br>4500 SunTrust Plaza<br>3030 Peachtree Street, NE<br>Atlanta, GA 30308-3243<br><br>**Sprinkler Contractors, Inc.** (Third Party Defendant to Complaint filed by Third Party Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)<br>Melinda Moseley<br>Melinda.moseley@nelsonmullins.com<br>Nelson Mullins Riley & Scarborough, LLP |

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