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Order on Third-Party National Fire Insurance Company of Hartford's Motion for Summary Judgment (GEORGIA STATE FINANCING AND INVESTMENT COMMISSION)

Elizabeth E. Long
Superior Court of Fulton County

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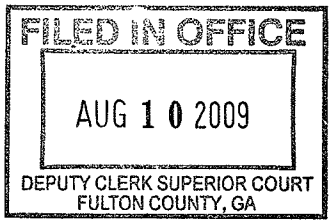
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



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 ON THIRD-PARTY DEFENDANT NATIONAL FIRE INSURANCE COMPANY OF HARTFORD'S MOTION FOR SUMMARY JUDGMENT

On July 10, 2009, Counsel appeared before this Court to present oral argument on Third-Party Defendant National Fire Insurance Company of Hartford'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. Defendant Wallace H. Wiggins ("Wiggins") is the CEO of LPS. National Fire Insurance Company of Hartford ("National Fire") insured LPS for general liability from November 1, 2000 – November 1, 2001. 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. National Fire has filed a motion for summary judgment contesting its duty to defend and indemnify LPS for the claims asserted against LPS in this case.

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. National Fire's Motion for Summary Judgment

LPS filed a third-party complaint against National Fire Insurance Company of Hartford f/k/a Transcontinental Insurance Company ("National Fire") which issued a general liability insurance policy listing LPS as the named insured from November 1, 2000 through November 1,

2001 (the "Policy"). LPS alleges that National Fire must provide it with a defense and indemnity in connection with GSFIC's claims against LPS in this case.

National Fire filed a motion for summary judgment on several different grounds. First, the Policy requires LPS to notify National Fire "as soon as practicable" of an "occurrence . . . that may result in a claim." National Fire contends that LPS knew of claims of alleged defects in the Project in 2004 and 2005, but did not notify National Fire until April, 2008. National Fire argues that this delay is unreasonable and warrants summary judgment in its favor.

In opposition, LPS argues that it was only after it received the GSFIC complaint and after discovery revealed that GSFIC was claiming property damage that occurred during the Policy period that it had reason to report this claim and lawsuit to National Fire. LPS contends that before the complaint was filed there were no claims of negligence asserted by GSFIC, and even after the complaint it was not until sometime during discovery that LPS learned that there were claims arising in the Policy period.

Clearly a question, or questions, of fact have been raised which must be considered by a jury. Norfolk & Dedham Mut. Fire Ins. Co. v. Cumbaa, 128 GA.App. 196 (1973).

Second, National Fire contends that no "property damage" occurred during the Policy period, and therefore, National Fire has no duty to defend or indemnify LPS as a matter of law. It points to the complaint that alleges that numerous latent defects have been discovered after May 7, 2003, well after the Policy expired.

LPS argues that GSFIC has complained about defects and damages attributable to the structural steel work and roofing work on the Project, which work was performed before November 1, 2001. If a jury were to find that defective work occurred during the Policy period, it could reasonably infer that damages to other property also occurred during the Policy period.

Again, there are questions of fact for a jury to decide.

Third, National Fire argues that under the terms of the Policy it provides coverage only for sums that LPS becomes "legally obligated to pay as damages" because of "property damage" caused by an "occurrence." "Occurrence" is defined as "an accident" under the Policy and National Fire contends that the work done by LPS or its subcontractors was intentional; that is, they intended to perform the work and therefore the work cannot be an accident.

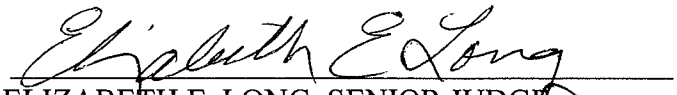
In the Georgia case of Sawhorse, Inc. v. Southern Guaranty Ins. Co., 269 Ga. 493 (2004), the insurer made a similar argument which the Court of Appeals rejected. This Court will follow the ruling of the Court of Appeals.

Finally, National Fire argues that in order for the Policy to apply in this case, the faulty workmanship must cause damage to other property, not just the "work" itself. National Fire relies on Custom Planning & Dev. v. American Nat'l. Fire Ins. Co., 270 Ga. App. 8 (2004). Although Custom Planning does indicate that there must be damage to other property, it does not deal with a situation such as this one where the damage allegedly occurred to the work of other subcontractors.

Although there does not appear to be a Georgia case directly on point, exclusion j. (8) of the Policy which excludes "property damage" to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it" is instructive. The only reasonable interpretation is that the damage to the work of the subcontractor whose faulty work caused damage will not be covered, but the damage caused to other work is not excluded. Logically, it would follow that the other property might be the work of other subcontractors as well as the work of an unrelated third party.

National Fire is not entitled to summary judgment. The motion for summary judgment is hereby **DENIED.**

SO ORDERED this 10th day of August, 2009.



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

Copies to:

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