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United States District Court, E.D. Pennsylvania.
C.C. INSULATORS, INC., Plaintiff,
v.
SCHNABEL ASSOCIATES, INC., Defendant,
and
Insurance Company of North America, Additional Defendant.
Civ. A. No. 90-7640.

April 11, 1991.

Gary C. Chiumento, Pennington & Thompson, P.C., Cherry Hill, N.J., for plaintiff.

William c. Nugent, Wolf, BVlock, Schorr and Solis-Cohen, Philadelphia, Pa., for defendants.

MEMORANDUM

NEWCOMER, Senior District Judge.

***1** This is a construction contract action over which the Court has diversity jurisdiction. Presently before the Court is a Motion for Summary Judgment filed by Defendant, Insurance Company of North America, pursuant to Fed.R.Civ.P. 56. For the reasons that follow, the motion shall be granted.

I. *Background.*

This dispute arises over alleged non-payment for work performed by plaintiff, C.C. Insulators on two construction projects. On March 25 and April 7 of 1986 plaintiff C.C. Insulators ("C.C."), a New Jersey corporation, entered into two written contracts with Schnabel Associates, Inc. ("Schnabel"), a Pennsylvania corporation, whereby plaintiff, as subcontractor, would provide materials and labor to perform certain work at the R.W Brown Community Center in Philadelphia and the West Philadelphia Crime Prevention Center. As the general contractor, Schnabel executed a construction payment bond with Insurance Company of North America ("INA") to guarantee its payment and performance obligations on the two projects.

C.C., claiming that it fulfilled its obligations for the completion of the projects in a timely and a workmanlike manner, brought suit against Schnabel for the alleged outstanding amount of $55,252.02. On March 14, 1990, after learning that Schnabel was no longer in active existence, C.C. amended its complaint to assert its claim for non-payment against additional defendant INA. The suit was originally filed in the United States District Court for the District of New Jersey where it was dismissed as a result of a forum selection clause in the payment bond and later transferred to this Court. Presently before the Court for consideration is defendant INA's Motion for Summary Judgment based primarily on the expiration of the limitation period for filing a claim on the payment bond.

II. *Rule 56 Summary Judgment Standard*

A trial court may enter summary judgment if, after review of all evidentiary material in the record, there is no genuine issue as to any material facts, and the moving party is entitled to judgment as a matter of law. *Long v. New York Life Insurance Co.,* 721 F.2d 118, 119 (3d Cir.1983); *Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates,* 595 F.Supp. 800, 802 (E.D.Pa.1984). Where no reasonable resolution of the conflicting evidence and inferences therefrom, when viewed in a light most favorable to the nonmoving party, could result in a judgment for the nonmoving party, the moving party is entitled to summary judgment. *Tose v. First Pennsylvania Bank, N.A.,* 648 F.2d 879, 883 (3d Cir.), *cert. denied* 454 U.S. 893 (1981); *Vines v. Howard,* 676 F.Supp. 608, 610 (E.D.Pa.1987).

The moving party must initially show an absence of a genuine issue concerning any material facts. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986); *Childers v. Joseph,* 842 F.2d 689, 694 (3d Cir.1988). The moving party discharges this burden by demonstrating that there is an absence of evidence to support the nonmoving party's case. *Celotex,* 477 U.S. at 325; *Vines,* 676 F.Supp. at 610. Once the moving party satisfies this burden, the burden then shifts to the nonmoving party, who must go beyond his pleadings and designate specific facts by the use of affidavits, depositions, admissions and answers to interrogatories showing that there is a genuine issue for trial. *Celotex,* 477 U.S. at 324. Moreover, Fed.R.Civ.P. 56 mandates that when

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the nonmoving party bears the burden of proof it must "make a showing sufficient to establish [every] element essential to that party's case." *Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp.,* 812 F.2d 141, 144 (3d Cir.1987) (quoting *Celotex,* 477 U.S. at 322.

III. *Discussion.*

***2** A. *Plaintiff's Claim for Discovery.*

Plaintiff, in its response, contends that the granting of INA's motion at this stage would be premature because it has not been afforded the opportunity to conduct discovery. Plaintiff asserts that discovery is necessary to support its argument that INA is estopped from raising contractual and statutory limitation defenses because I.N.A.'s allegedly deceptive conduct prevented C.C. from actively pursuing its claim against INA within the permissible limitation period.

If a party opposing a summary judgment believes that they need additional time for discovery, Rule 56(f) of the Federal Rules of Civil Procedure specifies the procedure to be followed. *Dowling v. City of Philadelphia,* 855 F.2d 136, 139-40 (3d Cir.1988). Rule 56(f) provides that if it appears "from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify [his] opposition," the Court may order a continuance to permit discovery. Plaintiff has not executed a Fed.R.Civ.P. 56(f) affidavit demonstrating why discovery is essential to their opposition. The only affidavit supplied by C.C. was one executed by C.C.'s own attorney, Mr. Gary C. Chiumento. However, Mr. Chiumento's affidavit is deficient because it is not based on personal knowledge as required by Fed.R.Civ.P. 56(e), but is instead based on second-hand information derived from conversations with another attorney regarding another case. By failing to submit a Rule 56(f) affidavit, C.C. has failed to demonstrate what particular information is sought; how if uncovered, it would preclude summary judgment; and why it has not been previously obtained. *See, Hancock Industries v. Schaeffer,* 811 F.2d 225, 229-30 (3d Cir.1987). Furthermore, C.C. has not specifically averred in its response the nature of INA's alleged misconduct with regard to its handling of C.C.'s claim against Schnabel. It is well settled that when a motion for summary judgment is filed, the nonmoving party has no right to discovery unless and until it files either a response raising a genuine issue of material fact or an affidavit showing that discovery is essential for framing a response. *See, e.g., Dowling v. City of Philadelphia,* 855 F.2d 136, 139-40 (3d Cir.1988); *Hancock Industries v. Schaeffer,* 811 F.2d 225, 229-30 (3d Cir.1987). Because C.C. has not satisfied the affidavit procedure set forth under Rule 56(f), its request for additional discovery shall be denied.

B. *Estoppel of Defendant's Statutory and Contractual Limitation Defenses.*

INA has based its present motion for summary judgment on the undisputed fact that both the contractual limitations period and the statute of limitations period for C.C.'s claim on the INA payment bond have expired. Condition clause 3(b)(1) of the payment bond provides for a one-year limitations period for any suit or action by a claimant. Furthermore, Pennsylvania law provides for a one-year statute of limitations on "an action upon any payment or performance bond." 42 Pa.C.S.A. § 5523(3). C.C. finished its subcontractor work on the last project for Schnabel on June 22, 1987 and Schnabel completed its work on both projects by October of 1987. Plaintiff did not commence this action against INA until March 14, 1990, more than two years after Schnabel, the principal on the payment bonds, had completed construction on the two projects. Plaintiff's claim for payment on the INA bond is therefore clearly time-barred by both the limitation period clause in the payment bond itself, and by the Pennsylvania Statute of Limitations on payment bond claims.

***3** C.C. argues that INA is estopped from asserting its limitation defenses because it lulled C.C. into believing that its claim against INA was being taken under advisement when in actuality it had no intention of processing C.C.'s claim. A plaintiff asserting estoppel or waiver bears the burden of establishing the fraud or concealment, which lulled it into a false sense of security, by evidence that is clear, precise and convincing. *Visor Builders, Inc. v. Devon E. Tranter, Inc.,* 470 F.Supp. 911, 918 (M.D.Pa.1978). The key inquiry to be made is what INA did during the time the statute was running to induce the plaintiff to sit on its rights. *Huber v. McElwee-Courbis Const. Co.,* 392 F.Supp. 1379 (E.D.Pa.1974). More precisely, the question is not whether

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plaintiff relied upon representations of INA, but whether the behavior of INA was such that it could reasonably induce such reliance. *See,* *Visor Builders,* 470 F.Supp. at 918-19. Here the only alleged misconduct constituting the inducement was a statement by an INA claims representative that the claim was being taken under advisement. This statement was alleged in C.C.'s deficient affidavit of Mr. Chiumento, and in an additional affidavit of C.C. President, Mr. Richard Muckridge, supplied by C.C. after it had already filed its response to INA's motion. Even if C.C.'s second affidavit is accepted as timely and the information contained in it true, it still falls short of clear and convincing evidence of INA's alleged attempt to induce C.C. into sitting on its legal rights against INA. INA's affidavit of its claims adjuster, Mr. George C. Eichelberger indicates no other statements which could be construed to further induce C.C. into sitting on its rights and plaintiff's affidavit of Mr. Muckridge sets forth no additional evidence supporting its claim that INA should be estopped from raising its limitation defenses.

Plaintiff C.C., in an apparent attempt to cure its own lack of prosecution and tardiness, has, as a last resort, tried to estop INA's time-bar defense. Such a use of estoppel is illfounded and will not suffice to toll the applicable one-year limitation periods at issue here. A plaintiff's mere mistake, misunderstanding or lack of knowledge do not toll the running of the statute of limitations. *See* *Id.* at 918. *See also,* *Schaffer v. Larzerlere,* 410 Pa. 402, 405, 189 A.2d 267 (1963). For these reasons defendant INA's motion for summary judgment will be granted.

An appropriate order follows.

ORDER

AND NOW, this 11th day of April, 1991, upon consideration of Defendant Insurance Company of North America's Motion for Summary Judgment, the response thereto, and consistent with the foregoing Memorandum, it is hereby ORDERED that said motion is GRANTED and that Plaintiff's Complaint as it applies to Defendant Insurance Company of North America is DISMISSED with prejudice.

AND IT IS SO ORDERED.

1991 WL 58496 (E.D.Pa.)

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