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7-22-2009

Order on Third-Party Defendant Bonitz of Georgia  
Inc.'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,

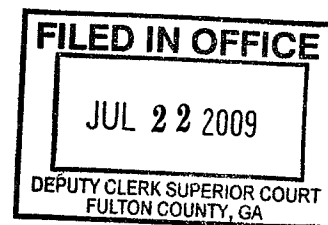
and

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  
COMPANY

CIVIL ACTION FILE NO.  
2007CV128025



**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  
BONITZ OF GEORGIA INC.'S MOTION FOR SUMMARY JUDGMENT**

On July 10, 2009, Counsel appeared before this Court to present oral argument on Third-Party Defendant Bonitz of Georgia Inc.'s Motion for Summary Judgment. After hearing the arguments made by counsel and reviewing the briefs submitted on the motion 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. Fireman’s Fund Insurance Company (“Fireman’s Fund”) is the performance bond surety for LPS. Bonitz of Georgia (“Bonitz”) is the subcontractor of LPS that provided labor and materials for the installation of suspended acoustical grid ceilings and “glue-up” tiles. Defendant Perkins & Will (“P&W”) was hired by GSFIC as the Project architect, and was in charge of contract administration.

GSFIC has filed suit against LPS, P&W, and Fireman’s Fund complaining of extensive construction defects throughout the Project. In turn, LPS and Fireman’s Fund have filed third-party complaints against all of LPS’s subcontractors on the Project.

## **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). The moving party need only eliminate one essential element of a party’s claim to prevail on summary judgment. Real Estate Int’l Inc. v. Buggah, 220 Ga. App. 449, 451 (1996).

## **III. Bonitz’s Motion for Summary Judgment**

Bonitz is moving for summary judgment in its favor both on the cross claim by LPS and on the third party complaint by Fireman’s Fund on the ground that no party has shown any affirmative proof that Bonitz performed its work negligently and that there are alternative

explanations for the damages to the ceiling. LPS and Fireman's Fund have responded that there are genuine issues of material fact and that Bonitz, at least partially, caused the ceiling system to fail.

Bonitz provided labor and materials for the installation of the suspended acoustical grid ceilings on the Project (\$66,000) and for the installation of "glue up" tiles (\$129,000). Bonitz began working on the Project in late 2001 and finished in October, 2002. P&W inspected and approved the work before the ceiling tiles were placed in the grids. P&W did not see any missing, improperly spaced or improperly anchored hanger wires. Garry Colson, on behalf of LPS, walked through the Project with LPS's superintendent and saw the hanger wires before the ceiling tiles were installed. He noticed no improper spacing.

In May 2003, P&W conducted another inspection and issued a certificate that the Project was completed and accepted by P&W, except for works listed on a "punch list." None of the items on the punch list related to the quality or spacing of the hanger wires

David Moore, a representative of GSFIC, was sent by GSFIC in early 2005 to inspect the Project. He walked the Project for 3 or 4 days and did not recall seeing any collapsed or dropped ceilings. Mr. Colson left the Project in January 2005 but prior to that time he also saw no collapse or dropped ceilings.

In August 2005, James Bell with GSFIC saw that the ceilings were deflecting. In 2006, the Syska Hennessy Group issued an inspection report noting a failed suspended ceiling system apparently caused by insufficient support and by wire hangers randomly and widely spaced contrary to the Project plans and specifications.

Between the time the ceiling tiles were installed and August 2005, various trades and investigatory firms performed works or inspections above the suspended ceilings.

LPS points out that on a motion for summary judgment, the evidence and all reasonable inferences must be construed in favor of the non-movant, citing Dyer v. Honea, 252 Ga. App. 735 (2001). Here it alleges that the inference should be drawn that Bonitz improperly constructed the suspended ceilings. In addition to the Syska Hennessy Report and the testimony of others who saw the sagging ceilings after August 2005, LPS relies on the affidavit of Bonitz's president, James Coleman. Mr. Coleman testified that industry standards contemplate that other trades will complete their works above the suspended ceiling. Thus, LPS argues, if the hanger wires were sufficient and properly anchored the ceiling would not have sagged even though other trades worked above the ceiling. LPS and Fireman's Fund declare that whether the alleged improper installation of the ceilings caused or partially caused the sagging of the ceilings remains a question of fact.

Bonitz contends that more than two years passed between the time P&W accepted Bonitz's work in May 2003 and August 2005 when the ceilings were first observed to be sagging. Mr. Coleman testified that if the hanger wires were insufficient in number or improperly spaced, or if the anchorage was improper, the ceiling would begin to deflect almost immediately when other trades performed work above the grids. This did not happen for over two years. Bonitz argues that there is no affirmative evidence that Bonitz performed its works on the Project negligently or that there were any apparent or latent defects or deficiencies in its works.

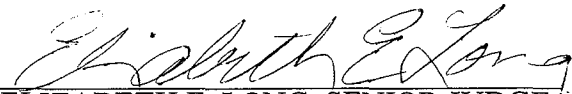
The Court finds that no evidence has been presented that Bonitz negligently performed its work or that the work was defective in any way. The inference that Fireman's Fund and LPS

want the Court to draw from the sagging ceilings in August 2005 is not a reasonable inference.

Therefore, as a matter of law, the Court finds no question of fact with respect to Bonitz and

**GRANTS** Bonitz's motion for summary judgment.

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

  
ELIZABETH E. LONG, SENIOR JUDGE  
Superior Court of Fulton County  
Atlanta Judicial Circuit

**Copies to:**

**Georgia State Financing and Investment Commission**

George C. Reid, Esq.  
georgereid@mindspring.com  
Building One—Suite 200  
4200 Northside Parkway  
Atlanta, GA 303027

Teri D. Fields, Esq.  
[tfields@law.ga.gov](mailto:tfields@law.ga.gov)  
Assistant Attorney General  
State Law Department  
40 Capital Square, S.W.  
Atlanta, GA 30334

David R. Cook, Jr., Esq.  
cook@ahclaw.com  
Autry, Horton & Cole, LLP  
2100 East Exchange Place  
Suite 210  
Tucker, GA 30084  
404.365.5694 ext. 3335

**LPS Construction Co., Inc.,**

John C. McManus, Esq.  
[jcm@jcmpc.com](mailto:jcm@jcmpc.com)  
George Warlick, Esq.  
[g.warlick@jcmpc.com](mailto:g.warlick@jcmpc.com)  
Alex Yusupov, Esq.  
[alex@jcmpc.com](mailto:alex@jcmpc.com)  
McManus & Warlick, LLP  
5901-A Peachtree Dunwoody Road  
Suite 510  
Atlanta, GA 303028  
678.397.1010

**Wallace H. Wiggins, Jr.,**

John C. McManus, Esq.  
[jcm@jcmpc.com](mailto:jcm@jcmpc.com)  
George Warlick, Esq.  
[g.warlick@jcmpc.com](mailto:g.warlick@jcmpc.com)  
Alex Yusupov, Esq.  
[alex@jcmpc.com](mailto:alex@jcmpc.com)  
McManus & Warlick, LLP  
5901-A Peachtree Dunwoody Road  
Suite 510  
Atlanta, GA 303028  
678.397.1010

**Perkins & Will, Inc.,**

William Wildman, Esq.  
[bill.wildman@sablaw.com](mailto:bill.wildman@sablaw.com)  
Kent W. Collier, Esq.  
[kent.collier@sablaw.com](mailto:kent.collier@sablaw.com)  
Sutherland  
999 Peachtree Street, NE  
Atlanta, GA 30309-3996

**American Motorists Insurance Co.,**

**Fireman's Fund Insurance Co.,**

John V. Burch, Esq.  
[jvb@boviskyle.com](mailto:jvb@boviskyle.com)  
Marc H. Bardack, Esq.  
[mhb@boviskyle.com](mailto:mhb@boviskyle.com)  
Bovis, Kyle & Burch, LLC



200 Ashford Center North  
Suite 500  
Atlanta, GA 30338

**XL Specialty Insurance Co.,**  
DeWitte Thompson, Esq.  
dthompson@tshlawyers.com  
Robert Steinberg, Esq.  
rsteinberg@tshlawyers.com  
Thompson Slagle & Hannan, LLC  
1200 Findley Road, Suite 250  
Duluth, GA 30097-1411

**Southwestern Communications Inc.** (Third Party Defendant to Complaint filed by Third Party Plaintiff Perkins & Will, Inc., and Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)  
G. Lee Welborn, Esq.  
welborn@downeycleveland.com  
Downey & Cleveland  
288 Washington Avenue  
Marietta, Georgia 30060

**Southeast Roofing Solutions** (Third Party Defendant to Complaint filed by Third Party Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)  
Michael J. Classens, Esq.  
michael@ecbcpc.com  
Edenfield, Cox, Bruce & Classens, P.C.  
115 Savannah Avenue  
Statesboro, GA 30459

**Mock Plumbing and Mechanical Inc.,**  
Edward H. Lindsey Jr., Esq.  
elindsey@gmlj.com  
David M. Abercrombie, Esq.  
dabercrombie@gmlj.com  
Goodman McGuffey Lindsey & Johnson, LLP  
3340 Peachtree Road, NE  
Suite 2100  
Atlanta, GA 30326

**H.A. Sack Co., Inc.** (Third Party Defendant to

Complaint filed by Third Party Fireman's Fund  
Ins. Co. & LPS Construction Co., Inc.)  
Ronald J. Garber, Esq.  
rgarber@shapirofussell.com  
Shapiro, Russell, Wedge & Martin, LLP  
One Midtown Plaza, Suite 1200  
1360 Peachtree Street, NE  
Atlanta, GA 30309-3214

Kenneth Sisco, Esq.  
ksisco@hplegal.com  
Hawkins & Parnell LLP  
3030 Peachtree Street, NE  
400 SunTrust Plaza  
Atlanta, GA 30308

**Bonitz of Georgia, Inc.** (Third Party  
Defendant to Complaint filed by Third Party  
Fireman's Fund Ins. Co. & LPS Construction  
Co., Inc.)  
Alan S. Lowe, Esq.  
alowe@savlawgroup.com  
Ellen Schoolar, Esq.  
ellen@savlawgroup.com  
Alan S. Lowe & Associates P.C.  
311 W. Broughton Street  
Savannah, GA 31401

**Rightway Drywall, Inc.** (Third Party  
Defendant to Complaint filed by Third Party  
Fireman's Fund Ins. Co. & LPS Construction  
Co., Inc.)  
James T. Budd  
jbudd@m-mlegal.com  
Mabry & McClelland, LLP  
2200 Century Parkway  
Tenth Floor  
Atlanta, GA 30345

**Old Capitol Glass Company, Inc.** (Third  
Party Defendant to Complaint filed by Third  
Party Fireman's Fund Ins. Co. & LPS  
Construction Co., Inc.)  
Stacey K. Hydrick, Esq.  
Hydrick Law LLC

2408 Mt. Vernon Road  
Atlanta, Georgia 30338

**May Specialty Fabricators, Inc.** (Third Party Defendant to Complaint filed by Third Party Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)

Jerald R. Hanks, Esq.  
jrhanks@hanksbrookes.com  
Hanks & Brookes, LLC  
The Peachtree  
1355 Peachtree Street, NE  
Suite 1900  
Atlanta, GA 30309

**Larry Gunn,** (Third Party Defendant to Complaint filed by Third Party Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)

P.O. Box 54  
Nunex, GA 30448

**Charlie Johnson** (Third Party Defendant to Complaint filed by Third Party Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)

213 Forest Avenue  
Soperton, GA 30457

**Central Fence Co., Inc.** (Third Party Defendant to Complaint filed by Third Party Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)

Kirk Susong, Esq.  
ksusong@gadisputes.com  
Robert P. Marcovitch, Esq.  
bmarcovitch@gadisputes.com  
Gaslowitz Frankel, LLC  
4500 SunTrust Plaza  
3030 Peachtree Street, NE  
Atlanta, GA 30308-3243

**Sprinkler Contractors, Inc.** (Third Party Defendant to Complaint filed by Third Party Fireman's Fund Ins. Co. & LPS Construction Co., Inc.)

Melinda Moseley  
Melinda.moseley@nelsonmullins.com

Nelson Mullins Riley & Scarborough, LLP  
201 17<sup>th</sup> Street, N.W.  
Suite 1700  
Atlanta, GA 30363

Thyssenkrupp Elevator Corp. (Third Party  
Defendant to Complaint filed by Third Party  
Fireman's Fund Ins. Co. & LPS Construction  
Co., Inc.)

Terry L. Dagenhard  
19412 Makayla Lane  
Cornelius NC 28031-6533

Paul Crabtree  
Continental Lightning Protection, Inc.  
2912 Millwood Lane, NW  
Lilburn, GA 30047

**Zurich American Ins. Co.** (Fourth Party  
Defendant)

Frederick W. Stearns, Esq.  
fred.stearns@swiftcurrie.com  
Swift Currie McGhee & Hiers LLP  
1355 Peachtree Street NE  
Suite 300  
Atlanta, GA 30309-3238

**National Fire Insurance Company of  
Hartford f/k/a Transcontinental Ins. Co.,  
Continental Casualty Ins. Co., and Valley  
Forge Ins. Co.**

Michael J. Athans, Esq.  
mathans@fieldshowells.com  
Matthew A. Barrett, Esq.  
mbarrett@fieldshowell.com  
Fields Howell, Athans & McLaughlin LLP  
191 Peachtree Street, NE  
Suite 4600  
Atlanta, GA 30303-1740

**Simplex Grinnell LP** (Fourth Party  
Defendants)

Raymond L. Deluca, Esq.  
Wendy F. Klein Keane, Esq.

kleinkew@pepperlaw.com  
Pepper Hamilton LLP  
3000 Two Logan Square  
Eighteenth & Arch Streets  
Philadelphia, PA 19103

C. Bradford Marsh, Esq.  
bradford.marsh@swiftcurrie.com  
Swift, Currie, McGhee & Hiers LLP  
1355 Peachtree Street NE  
Suite 300  
Atlanta, GA 30309