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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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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,

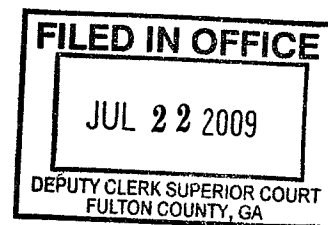
and

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.

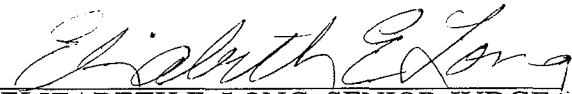
The Court finds that no evidence has been presented that Bonitz negligently performed its work or that the work was defective in any way. The inference that Fireman's Fund and LPS

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

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