UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STEWARD MACHINE CO., INC.	:	
	:	
v.	:	Civ. Action No.
	:	3:00 CV 834 (SRU)
WHITE OAK CORP., et al.	:	

RULING ON MOTION FOR SUMMARY JUDGMENT

Defendant National Union Fire Insurance Company ("National Union") moves for summary judgment on the basis that plaintiff Steward Machine Co., Inc. ("Steward") was untimely in serving notice of claim on the bond that is the subject of Steward's claim against National Union.

When ruling on a summary judgment motion, the court must construe the facts in a light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Nonetheless, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252.

FACTS

On June 6, 1994, the State of Connecticut contracted with the White Oak Corporation ("White Oak") to replace the Tomlinson Bridge over the Quinnipiac River in New Haven, Connecticut. On the same date, in accordance with Conn. Gen. Stat. § 49-41, White Oak, purchased a payment bond, with National Union as the surety, for protection of all materials furnished and labor used or employed on the project. In August of 1994, White Oak entered into a purchase order with Steward. Under the purchase order, Steward agreed to "furnish and deliver" specially manufactured machinery for raising and lowering the replacement bridge.

Steward proceeded on schedule with preparing the machinery, but, in August of 1996, White Oak directed Steward not to ship the machinery because of general delays on the project. Instead, White Oak requested that Steward store the machinery. Steward advised White Oak and the State that the cost of storage and maintenance would be more than $50,000 per month. (DeBardeleben Aff.'d ¶¶ 17-20). Steward alleges that storage of the machinery was burdensome and entailed active maintenance.[1]

Steward further alleges that, starting in November, 1994, White Oak made insufficient payments to Steward. White Oak's practice of making only partial payments continued for years. On March 7, 1997 Steward sent White Oak a letter explaining, "To date, we have received no response to our repeated inquiries requesting payment of past due invoices.... Please be advised that as of this date, we are discontinuing all work on this job.... All material for which title has passed will be moved out of our shop and onto a yard area as not to conflict and restrict our shop flow on other work. WE TAKE NO RESPONSIBILITY FOR ANY DAMAGES WHATSOEVER TO THIS MATERIAL. Handling costs and storage fees will continue to be assessed for your account." (emphasis in original). A month later, on April 11, 1997, Steward sent White Oak a second letter explaining that, because of White Oak's failure to pay Steward in full under the purchase order, Steward considered White Oak in default. Steward also advised White Oak that it intended to mitigate any damages by "selling, scrapping, [or] otherwise conveying any material which can be conveyed and thereby crediting White Oak's account." Still, by spring of 1998, the machinery had not been sold and Steward, anticipating

---

[1] National Union disputes the assertion that any maintenance work was performed, but that dispute cannot be resolved on summary judgment.

open time on its manufacturing line, asked White Oak if it wanted Steward to complete work on the machinery. White Oak instructed Steward to proceed. (DeBardeleben Af'd. 34-38). White Oak paid Steward for this work on September 21, 1998. White Oak failed to make any additional payments, though Steward maintains that, as of September 1998, White Oak had a outstanding balance of $3,000,000. In the summer of 1999, National Eastern Corporation requested that Steward ship a portion of the machinery to Connecticut. By letter dated July 6, 1999 Steward responded that they could not and would not ship the items until "the storage and interest on the storage costs have been paid." Defs.' Ex. 10. As late as March 2000, Steward continued to store the machinery and charge White Oak a monthly storage fee. (Defs' Ex. 8-9).

On December 20, 1999, Steward sent National Union written notice of a claim on the bond, pursuant to Conn. Gen. Stat. § 49-42. National Union received the notice on December 29, 1999. On May 5, 2000 Steward commenced this action against White Oak and National Union for payment on the bond. On November 17, 2001, Steward delivered the last of the machinery.

The parties do not dispute that the provisions of Connecticut General Statutes section 49-42 as in effect on June 6, 1994 govern this action. The pre-October 1994 revision of section 49-42 provides, in pertinent part,

> (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under the provisions of section 49-41 and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which the claim is made, *may enforce his right*

> *to payment under the bond by serving a notice of claim within one hundred eighty days after the date on which he performed the last of the labor or furnished the last of the material for which the claim is made*...
> (b) ... no such suit [under this section] may be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by the claimant.

Conn. Gen. Stat. § 49-42 (1994) (emphasis added).

National Union moves for summary judgment on the grounds that Steward's storage of machinery does not constitute labor or furnishment of materials. National Union contends that, at the latest, Steward discontinued work under the purchase order on March 7, 1997, when Steward sent White Oak the letter stating it was stopping work on the project.[2] Steward served notice in December of 1999, a year and a half after National Union alleges Steward stopped work. Therefore, under National Union's argument, Steward's claim is barred by the statute of limitations in § 49-42.

To support its general contention that Steward stopped work well before 180 days of serving notice, National Union also argues that, "Steward's treatment of the machinery is irrelevant for purposes of the notice and suit requirements" because "the alleged storage and maintenance occurred after Steward invoked rights under the Uniform Commercial Code [on April 11, 1997]" and that, Steward was not "furnishing" the machinery as required by contract because Steward refused to ship the machinery when White Oak requested delivery.

Steward disagrees with National Union's characterization of the facts. Steward contends that

---

[2] Although these statements will likely be admissible at trial as admissions of a party opponent, they do not conclusively resolve the factual question of what work was performed thereafter.

its storage of the specialty machinery constituted labor or furnishing of materials under section 49-42, that they continued to store the machinery until at least September 20, 1999, and that, therefore, the December 20, 1999 service of claim and May 2000 commencement of suit were timely. Furthermore, Steward argues that its April 11, 1997 letter, electing a remedy under the Uniform Commercial Code ("UCC"), does not estop Steward from seeking relief under the bond.

DISCUSSION

Section 49-42 requires plaintiffs to give notice of a claim within one hundred eighty days after the plaintiff's last day of work, or the furnishment of the last of "the material for which the claim is made" in order that potential defendants timely address the claim before litigation and to force plaintiffs to bring their claims in a timely fashion. The issue before the court is when, if ever, did Steward stop performing under the purchase order. National Union argues that performance stopped either March 7, 1997 or at the latest September 1998. Steward argues at the earliest September 1999.

The purchase order required Steward to "make all deliveries in accordance with the Buyer's schedule." In August of 1996, White Oak directed Steward not to ship the machinery and requested that Steward store the machinery. Steward complied and in doing so, was prepared to make delivery, or hold delivery, in accordance with White Oak's schedule, thus performing under the terms of the agreement. In the April 1997 letter, Steward threatened White Oak that it would seek remedy under the UCC by selling or scrapping the machinery in order to mitigate damages incurred by White Oak's

failure to pay. The record indicates that Steward did not carry through on its threat, but instead continued to store the machinery and charge White Oak for storage. In 1998, Steward recommenced manufacturing the machinery. Based on the evidence, it appears Steward had furnished and was prepared to deliver the specified machinery at least up through September 1998, and may have performed additional labor associated with maintenance of the machinery thereafter.

On July 6, 1999, however, Steward refused to ship requested portions of the machinery. In a letter to National Eastern Corporation, Jerry Shivers, project manager for Steward explained, "we cannot and will not ship any other further items on this job until the storage and interest on the storage costs have been paid. Please discuss this with the White Oak Corporation and as soon as this issue has been resolved, Steward Machine Co., will be happy to ship the stored equipment." Defs.' Ex 10. From this letter, it appears that Steward was no longer performing under the contract and was no longer willing to furnish material. Instead, starting on July 6, 1999,

Steward retained the machinery as collateral to insure White Oak's payment.[3] A reasonable jury,

---

[3] Article 2 of the UCC, codified at Conn. Gen. Stat. § 42a-2-703 provides: "Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery... the aggrieved seller may (a) withhold delivery of such goods." By withholding delivery of the machinery in July 1999, Steward elected remedy under § 42a-2-703. Election of remedy did not prevent Steward from filing notice of a claim on the bond within 180 days of election of this remedy, nor did it prevent Steward from resuming performance at a later date and subsequently serving notice of claim. See United States for use of P.A. Bourquin & Co. v. Chester Constr. Co., 104 F.2d 648 (2d Cir. 1939) (when a supplier of labor leaves the construction site with the intention of returning to finish

therefore, could find that Steward furnished material up until July 6, 1999. Steward served notice of claim on December 29, 1999, 177 days after the latest possible date of its performance under the contract.[4] Because a jury could reasonably find that Steward served notice within 180 days after the date Steward last preformed labor of furnished material, National Union's motion for summary judgment [doc. # 29] is denied.

It is so ordered.

Dated at Bridgeport this ____ day of January 2003.

_____

one part of the work, and later returns to do so, the 90-day notice period does not begin to run until he returns and completes the work).

[4] Following the filing of this action, Steward delivered the machinery at issue. National Union argues that the parties' August 2000 agreement resolving a related lawsuit precludes consideration of facts occurring after the August 2000 agreement when considering the timeliness of Steward's claims. The August 2000 agreement provides that damages accruing after the execution of that agreement will not be sought in this action and that all parties reserve "any and all rights, positions, claims, defenses and counterclaims" in this action. National Union reads too much into the agreement, however, when it argues that the parties agreed that the agreement "would not affect or impair any of National Union's defenses as they existed at the time that Steward commenced this action." (Doc. # 30 at 11.) The agreement does not say this. Nor can the agreement be construed as holding that the delivery of the machinery cannot be considered when resolving the statute of limitations defense. Certainly it is difficult for National Union to argue that this action was filed too late when it was filed before the machinery at issue was furnished to the project. See Chester Constr. Co., 104 F.2d 648.

Stefan R. Underhill
United States District Judge