IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

MERRILL IRON & STEEL, INC.,

Plaintiff,

v.

JESSE H. BECHTOLD, UNITED STATES FIDELITY & GUARANTY COMPANY and FEDERAL INSURANCE COMPANY,

Defendants.

and

HAVENS STEEL COMPANY,

Interested Party.

MEMORANDUM AND ORDER

06-C-110-S

Plaintiff Merrill Iron & Steel, Inc. commenced this civil action in Marathon County Circuit Court alleging: (1) breach of contract and violation of Wis. Stat. § 779.02(5) against interested party Havens Steel Company (Havens), (2) violation of Wis. Stat. § 779.02(5) against defendant Jesse H. Bechtold (Bechtold), (3) claim on a directors' and officers' policy of insurance against defendant Federal Insurance Company (Federal); and (4) breach of a surety bond against defendant United States Fidelity and Guaranty Company (USF&G). Additionally, plaintiff requests that defendant Bechtold be compelled to provide it with an accounting of all funds interested party Havens received in connection with the Honda Manufacturing of Alabama frame plant project based upon invoices or payment applications submitted by plaintiff. Defendants Federal

and USF&G removed this action pursuant to 28 U.S.C. §§ 1441 and 1446 citing 28 U.S.C. § 1332 as grounds for removal. Defendant Bechtold and interested party Havens had not been served with process when defendants Federal and USF&G filed their joint notice of removal. Jurisdiction is based on 28 U.S.C. § 1332. The matter is presently before the Court on defendant USF&G's motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) or for improper venue pursuant to Rule 12(b)(3). Also presently before the Court is defendant Bechtold's motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(3). Plaintiff failed to oppose defendant Bechtold's motion. The following facts relevant to defendants' pending motions are undisputed.

BACKGROUND

On or about May 25, 2000 interested party Havens (a Missouri corporation with its principal place of business in Kansas City, Missouri) contracted with HHG, A Joint Venture to serve as its general contractor for the Honda Manufacturing of Alabama frame plant project (hereinafter the project) located in Lincoln, Alabama.[1] Havens was named as an interested party in this action because it is currently involved in Chapter 11 bankruptcy

[1]Havens contracted with HHG as part of a tri-venture with Qualico Steel Company, Inc. and Fabaro Steel, Inc. However, Qualico and Fabaro were not named as parties to this action. Accordingly, in the interest of clarity the Court refers to said tri-venture as simply Havens.

proceedings in the United States Bankruptcy Court for the Western District of Missouri.

Defendant USF&G is a Maryland corporation with its principal place of business in St. Paul, Minnesota. On or about September 4, 2001 defendant USF&G issued Payment Bond #400SH7082 in the amount of $18,395,000.00 for "Contract No. HHG. 30016 Frame Plant (less Areas "E" and "F") Structural Steel - Fabrication and Erection, Honda Frame Plant, Lincoln, Alabama." Said Bond contained a notice of claim provision, a contractual limitation period provision and a forum selection clause all of which stated in relevant part as follows:

> ...4. The Surety shall have no obligation to Claimants under this Bond until:
>
> > 4.1 Claimants who are employed by or have a direct contract with the Contractor have given notice to the Surety...and sent a copy, or notice thereof, to the Owner, stating that a claim is being made under this Bond and, with substantial accuracy, the amount of the claim.
>
> ...11. No suit or action shall be commenced by a Claimant under this Bond other than in a court of competent jurisdiction in the location in which the work or part of the work is located or after the expiration of one year from the date (1) on which the Claimant gave the notice required by Subparagraph 4.1...

Plaintiff Merrill Iron & Steel is a Wisconsin corporation with its principal place of business in Schofield, Wisconsin. On or about November 22, 2002 plaintiff entered into a purchase order agreement with Havens in which plaintiff was to furnish approximately 389 pieces of roof trusses for incorporation into the

project. Plaintiff supplied its roof trusses to Havens in accordance with its obligation under the contract and Havens inspected and accepted the material. The total contract amount for plaintiff's scope of work was $1,037,803.00. However, despite demands from plaintiff Havens has failed to pay $108,588.19 of the contract amount.

On December 19, 2003 plaintiff provided notice to defendant USF&G of its claim against the Bond for the outstanding $108,588.19 balance. On or about January 8, 2004 defendant USF&G requested additional information from plaintiff concerning its claim which plaintiff in turn provided. Additionally, Mr. Michael Klussendorf who serves as plaintiff's chief financial officer submitted an affidavit in connection with this action in which he stated that throughout winter, spring and summer of 2004 he participated in several telephone conversations with Mr. Saleh Stevens (an employee of the Bond negotiator St. Paul Surety) who advised him that plaintiff's claim would be honored. Mr. Klussendorf further stated that Mr. Stevens specifically advised him that plaintiff's name was on a list of Bond claimants "where checks would be issued and paid."

According to Mr. Klussendorf in spring of 2005 plaintiff and defendant USF&G entered into negotiations and settlement discussions concerning: (1) plaintiff's claim against the Bond at issue in this action, (2) its bond claim involving Philadelphia Phillies stadium; and (3) its bond claim known as the "National

Riggers" claim. Mr. Klussendorf stated that such discussions and negotiations included an informal mediation of the Philadelphia Phillies claim in which payment of the Bond claim at issue in this action was also discussed. Said mediation occurred in April of 2005. Additionally, Mr. Klussendorf stated that the parties resolved both the Philadelphia Phillies claim and the "National Riggers" claim in mid-September of 2005. However, according to plaintiff's complaint defendant USF&G never officially accepted or denied plaintiff's claim against the Bond at issue in this action. Accordingly, on January 19, 2006 plaintiff commenced this action with the Marathon County Circuit Court.

On March 1, 2006 defendants USF&G and Federal filed their joint notice of removal and plaintiff's action was removed to this Court. On March 7, 2006 defendant USF&G filed its motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) or for improper venue pursuant to Rule 12(b)(3). Additionally, on April 3, 2006 defendant Bechtold filed his motion to dismiss for lack of personal jurisdiction.

MEMORANDUM

Defendant USF&G asserts plaintiff's complaint against it is time-barred by the one year contractual limitations period established by the express terms of the Bond. It asserts that plaintiff was required to commence its action by December 19, 2004 because it provided its notice of claim against the Bond on December 19, 2003. Accordingly, defendant argues plaintiff's

complaint against it must be dismissed for failure to state a claim upon which relief can be granted because it did not commence this action until January 19, 2006 some thirteen months after the limitations period expired. Additionally, defendant USF&G asserts the forum selection clause contained within the Bond expressly requires that litigation against it must be initiated in Lincoln, Alabama because it served as the location of the work. Accordingly, defendant USF&G also argues that plaintiff's complaint against it must be dismissed for improper venue. It argues dismissal rather than transfer is proper because it is the only defendant subject to the forum selection clause contained within the Bond.

Plaintiff concedes that it failed to commence its action within the one year contractual limitations period expressed in the Bond. However, plaintiff asserts it did not commence its suit immediately because it relied upon defendant USF&G's repeated assurances that its claim would be honored. Accordingly, plaintiff argues defendant USF&G is estopped from raising a contractual limitations defense and its motion to dismiss for failure to state a claim upon which relief can be granted should be denied. Additionally, plaintiff asserts venue is proper in this district because the forum selection clause contained within the Bond failed to specifically identify Lincoln, Alabama as the sole proper forum. It asserts the phrase "in which the work or part of the work is located" is ambiguous because work was never defined in the bond

and all of plaintiff's "work" was "located" in Wisconsin. Accordingly, plaintiff argues defendant USF&G's motion to dismiss for improper venue should be denied.

Defendant Bechtold asserts as a resident of the State of Missouri he: (1) has never conducted business in the State of Wisconsin, (2) does not own any assets in the State of Wisconsin, (3) has never solicited or advertised his services in the State of Wisconsin; and (4) was never personally involved in the negotiation of the purchase order agreement at issue in this action. Accordingly, defendant Bechtold argues he lacks sufficient contacts with the State of Wisconsin which would justify exercising either specific or general personal jurisdiction over him and as such plaintiff's complaint against him should be dismissed. The Court will first address defendant Bechtold's motion.

Defendant Bechtold's motion to dismiss for lack of personal jurisdiction.

General personal jurisdiction is proper when a defendant has "continuous and systematic general business contacts" with the forum which allows said defendant to be amenable to suit within that forum regardless of the subject matter of the suit. Steel Warehouse of Wis., Inc. v. Leach, 154 F.3d 712, 714 (7th Cir. 1998)(*quoting* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416, 104 S.Ct. 1868 (1984)). Specific jurisdiction refers to jurisdiction over a defendant in a suit arising from or related to said defendant's contacts with the forum. Id. (*citing*

Id. at 414 n.8). Plaintiff bears the burden of demonstrating that personal jurisdiction exists. Mid-Am. Tablewares, Inc. v. Mogi Trading Co., Ltd., 100 F.3d 1353, 1359 (7th Cir. 1996)(citations omitted). Additionally, once it is challenged with evidence which tends to demonstrate that personal jurisdiction does not exist plaintiff "has the obligation to establish jurisdiction by competent proof." Kohler Co. v. Kohler Int'l., Ltd., 196 F.Supp.2d 690, 695 (N.D.Ill. 2002)(*quoting* Sapperstein v. Hager, 188 F.3d 852, 855 (7th Cir. 1999)). Plaintiff failed to meet this burden.

Defendant Bechtold is a resident of the state of Missouri. He submitted an affidavit in connection with this action in which he states that: (1) he never conducted any business in the State of Wisconsin, (2) he does not own any assets nor have any offices or employees in the State of Wisconsin, (3) he has never solicited or advertised his services in the State of Wisconsin, (4) he has never entered into a contract with plaintiff in the State of Wisconsin; and (5) he was not involved in the negotiation of the purchase order agreement at issue in this action. Defendant Bechtold's affidavit demonstrates that he is not amenable to suit in the State of Wisconsin in connection with this action on the basis of either general or specific personal jurisdiction. Plaintiff failed to oppose defendant Bechtold's motion to dismiss or present competent proof establishing jurisdiction. Accordingly, plaintiff failed to meet its burden of demonstrating personal jurisdiction exists and defendant Bechtold's motion to dismiss is granted.

Defendant USF&G's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) challenges the sufficiency of the complaint for failure to state a claim upon which relief can be granted. Gen. Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080 (7th Cir. 1997)(*citing* Fed. R. Civ. P. 12(b)(6)). Dismissal is appropriate only if it appears beyond doubt that plaintiff cannot prove any set of facts in support of its claim which would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)(citations omitted). When ruling on a motion to dismiss for failure to state a claim courts are restricted to an analysis of the complaint. Hill v. Trustees of Ind. Univ., 537 F.2d 248, 251 (7th Cir. 1976)(*citing* Grand Opera Co. v. Twentieth Century-Fox Film Corp., 235 F.2d 303 (7th Cir. 1956)). Accordingly, courts accept all well-pleaded facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff. Jackson v. E.J. Brach Corp., 176 F.3d 971, 977-978 (7th Cir. 1999)(*citing* Mallett v. Wis. Div. of Vocational Rehab., 130 F.3d 1245, 1248 (7th Cir 1997)).

However, when "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ.

P. 12(b); Wilkow v. Forbes, Inc., 241 F.3d 552, 555 (7th Cir. 2001). Plaintiff submitted and relied upon the affidavit of Mr. Michael Klussendorf in support of its opposition to defendant USF&G's motion to dismiss. Defendant USF&G in turn relied upon Mr. Klussendorf's affidavit in support of its motion to dismiss on reply. Said affidavit is outside the pleadings and is sufficient for the Court to decide the motion at this time. Accordingly, the Court treats defendant USF&G's motion to dismiss as a motion for summary judgment pursuant to Rule 56.

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

A fact is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Disputes over unnecessary or irrelevant facts will not preclude summary judgment. Id. Further, a factual issue is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the non-moving party. Id. A court's role in summary judgment is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249, 106 S.Ct. at 2511.

To determine whether there is a genuine issue of material fact for trial courts construe all facts in the light most favorable to the non-moving party. Heft v. Moore, 351 F.3d 278, 282 (7th Cir. 2003)(citation omitted). Additionally, a court draws all reasonable inferences in favor of that party. Id. However, the non-movant must set forth "specific facts showing that there is a genuine issue for trial" which requires more than "just speculation or conclusory statements." Id. at 283 (citations omitted).

Defendant USF&G argues plaintiff's complaint against it is time-barred by the one year contractual limitation period established by the Bond because under its express provisions plaintiff was required to commence its action by December 19, 2004. Additionally, defendant USF&G argues plaintiff cannot rely on equitable estoppel as justification for its tardy filing because defendant USF&G did not promise to honor plaintiff's claim at any point after 2004 which was approximately sixteen months before plaintiff commenced its action. Accordingly, defendant USF&G argues such delay was unreasonable. Plaintiff concedes that it failed to commence its action within the one year contractual limitation period expressed in the Bond. However, plaintiff argues it did not immediately commence suit because it relied upon defendant USF&G's repeated assurances that its claim would be paid.

As a preliminary matter, the parties failed to suggest which law governs their dispute. Plaintiff filed a five count complaint in this action in which it alleges one count against defendant

USF&G that it committed a breach of a surety bond. While plaintiff is a Wisconsin corporation and its scope of work on the project was performed in Wisconsin defendant USF&G is a Maryland corporation with its principal place of business in St. Paul, Minnesota. Additionally, the Bond at issue in this action involved an Alabama construction project and said bond was executed between an Alabama owner and a Missouri contractor. Accordingly, this action presents itself as a textbook example of a law school hypothetical conflicts of law question. However, both parties cite to federal law in support of their respective equitable estoppel arguments. Accordingly, because parties are permitted to designate what law shall control their case, whether defendant is equitably estopped from raising its contractual limitations defense will be decided under federal law. Casio, Inc. v. S.M.& R. Co., Inc., 755 F.2d 528, 531 (7th Cir. 1985).

The dominant view in contract law is that "contractual limitations periods shorter than the statute of limitations are permissible, provided they are reasonable." Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d 869, 874 (7th Cir. 1997). Principles of contract interpretation apply to bonds. *See* Mass. Bonding & Ins. Co. v. U.S., 54 F.2d 1039, 1040 (7th Cir. 1931). Accordingly, defendant USF&G was permitted to include a contractual limitations period in its Bond and plaintiff failed to argue such one year period was unreasonable. Accordingly, because plaintiff concedes it failed to commence its action within the one year

period established by the Bond summary judgment will be granted in favor of defendant USF&G unless plaintiff demonstrates that said defendant is estopped from raising its contractual limitations defense.

Equitable estoppel is based on the principle that "no man will be permitted to profit from his own wrongdoing in a court of justice." Bomba v. W.L. Belvidere, Inc., 579 F.2d 1067, 1070 (7th Cir. 1978). Traditional elements of equitable estoppel are: (1) misrepresentation by the party against whom estoppel is asserted, (2) reasonable reliance on such misrepresentation by the party asserting estoppel; and (3) detriment to the party asserting estoppel. Kennedy v. U.S., 965 F.2d 413, 417 (7th Cir. 1992)(citation omitted). Additionally, the doctrine of equitable estoppel is applied more liberally to a contractual limitations period than to a statutory limitations period. Doe, at 877. However, plaintiff bears the burden of presenting facts "which if true would require a court as a matter of law to estop the defendant from asserting the [contractual] limitations [period]." Bomba, at 1070-1071 (citation and internal quotations marks omitted).

For the doctrine of equitable estoppel to apply it is not necessary that plaintiff demonstrate it was intentionally misled or deceived by defendant's conduct or representations. *See* Id. at 1071 (citations omitted). Additionally, defendant does not have to intend to induce plaintiff's delay. Id. Accordingly, a promise to

pay a claim will estop defendant from asserting a limitations defense if plaintiff relied in good faith on defendant's promise in forbearing suit. Id. However, it is widely held that mere negotiations concerning a disputed claim without more is insufficient to warrant application of equitable estoppel. Cange v. Stotler & Co., Inc., 826 F.2d 581, 587 (7th Cir. 1987)(citation omitted). Additionally, plaintiff is only allowed a reasonable amount of time within which to sue after defendant's delaying tactics have ended. Doe, at 876 (citations omitted).

There is no question that in 2004 defendant USF&G misrepresented that plaintiff's claim would be honored. Accordingly, the first element of equitable estoppel is satisfied. Additionally, plaintiff suffered a detriment because as it concedes it failed to file its claim in a timely manner. Accordingly, the third element of equitable estoppel is also satisfied. However, plaintiff's continued reliance on defendant USF&G's assurances became unreasonable once its claim entered mediation in April of 2005. Accordingly, plaintiff failed to satisfy the second element of equitable estoppel and as a result its complaint against defendant USF&G is time-barred and summary judgment must be granted in favor of defendant USF&G.

Mr. Klussendorf stated in his affidavit that throughout winter, spring and summer of 2004 Mr. Stevens advised him that plaintiff's claim would be honored. Specifically, Mr. Stevens advised him that plaintiff's claim was on a list of Bond claimants

"where checks would be issued and be paid." Plaintiff relied on such representations and as a result did not immediately commence suit. The Court finds such reliance was reasonable at that point. However, Mr. Klussendorf stated that in April of 2005 the parties conducted mediation in an attempt to resolve both the Philadelphia Phillies stadium claim and the Bond claim at issue in this action. Once mediation began between the parties it was not reasonable for plaintiff to continue to rely on Mr. Stevens' representations that plaintiff's claim would be honored. If such were true mediation would not have been required.

Additionally, it is undisputed that defendant USF&G did not promise to honor plaintiff's claim at any point after 2004. Plaintiff is only allowed a reasonable amount of time within which to sue after defendant's representations of payment ended. *See* Doe, at 876 (citations omitted). Defendant USF&G's representations ended in 2004. Plaintiff failed to commence suit until January of 2006. Such delay is unreasonable. While the parties did engage in negotiations throughout much of 2005 it is widely held that mere negotiations concerning a disputed claim without more is insufficient to warrant application of equitable estoppel. Cange, at 587 (citation omitted). If plaintiff wished to preserve its rights during negotiations it could have filed suit and continued negotiating a settlement because in today's world of litigation it is reality that most cases settle. Doe, at 875. However, waiting over a year to commence this action was not reasonable.

Accordingly, plaintiff's complaint against defendant USF&G is time-barred under the contractual limitations period expressed by the Bond and summary judgment is granted in favor of defendant USF&G.

Defendant USF&G's motion to dismiss for improper venue pursuant to Rule 12(b)(3)

Because the Court granted summary judgment in favor of defendant USF&G on the basis that plaintiff's complaint is time-barred it need not decide its motion to dismiss for improper venue.

ORDER

IT IS ORDERED that defendant Jesse H. Bechtold's motion to dismiss for lack of personal jurisdiction is GRANTED.

IT IS FURTHER ORDERED that defendant United States Fidelity & Guaranty Company's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that defendant United States Fidelity & Guaranty Company's motion to dismiss for improper venue is DENIED as moot.

Entered this 25th day of May, 2006.

BY THE COURT:

s/

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JOHN C. SHABAZ
District Judge