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Order Granting XL Specialty Insurance Company'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,

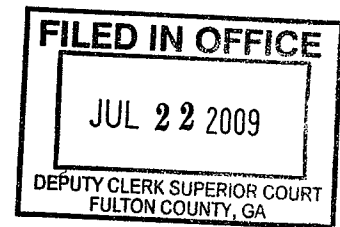
and

**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**

**CIVIL ACTION FILE NO.
2007CV128025**



COMPANY

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 GRANTING XL SPECIALTY INSURANCE COMPANY'S
MOTION FOR SUMMARY JUDGMENT**

On July 10, 2009, Counsel appeared before this Court to present oral argument on XL Specialty Insurance Company's Motion for Summary Judgment. After hearing the arguments made by counsel and reviewing the briefs submitted on the motions 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. XL Specialty Insurance Company (“XL”) is the 5-year roof and wall bond surety for LPS. Defendant Perkins & Will (“P&W”) was hired by GSFIC as the Project architect, and was in charge of contract administration.

GSFIC has filed suit complaining of extensive construction defects throughout the Project. XL has filed a Motion for Summary Judgment arguing that it should be dismissed from this case because the bond it issued to LPS never became effective.

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).

III. XL Specialty’s Motion for Summary Judgment

On May 7, 2003, XL issued a five-year roof and wall bond (the “Bond”) which LPS executed as principal. The Bond, which pertained to the Project, was drafted by the State and was required by GSFIC as part of the “closeout” documents package.

XL argues that the explicit terms of the Bond set the issuance of a final certificate by the architect as a condition precedent to any liability of XL under the Bond. The parties agree that the architect never issued a final certificate and therefore, XL contends that summary judgment should be granted in its favor.

GSFIC contends that a condition precedent must be clearly stated and that the provision in Section 3 of the Bond describes a period of time which is the end-point of XL's liability under the bond, not a condition precedent. If it were intended as a condition precedent, it would contain explicit language, such as "as a condition of the obligation." Additionally, GSFIC argues that Section 3 of the Bond conflicts with Section 4 describing the remedies available if there are leaks or defects. Thus, Section 3 does not clearly state a condition precedent.


However, one must look from Section 4 to Section 3 in order to determine when the remedy is available. Thus, we are back to the requirement of Section 3, that of a final certificate of the architect.

Finally, GSFIC argues that XL has waived its right to assert the condition precedent of a final certificate because LPS, its principal, by its defective and deficient work, prevented the final certificate from being issued.

The reason a final certificate is required before a surety is liable on such a bond is because the surety is warranting the walls and roof for a period of five years. It would be silly to issue such a warranty unless the architect had declared the work to be completed and final.

Summary judgment is hereby **GRANTED** to XL.

SO ORDERED this 21st day of July, 2009.


ELIZABETH E. LONG, SENIOR JUDGE
FULTON COUNTY SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

Copies to:

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