IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

GRAYBAR ELECTRIC COMPANY, INC., a foreign corporation,)
Claimant,))
v.) C.A. No. N12L-02-007 WCC
MUSREF BELLEVUE PARKWAY, LP, a foreign limited partnership, CIGNA CORPORATION, a Delaware corporation, and UNITED TELECOMP, LLC, a foreign limited liability company,))))
Defendants.))

Submitted: May 29, 2012 Decided: August 30, 2012

On Plaintiff's Motion for Leave to Amend Complaint – **DENIED** On Defendants' Motion for Summary Judgment – **GRANTED**

OPINION

John R. Weaver, Jr., Esquire. Capehart & Scatchard, P.A., 831 North Tatnall Street, Suite 200, Wilmington, DE 19801. Attorney for Plaintiff Graybar Electric Company, Inc.

Joseph C. Schoell, Esquire. Drinker Biddle & Reath LLP, 1100 North Market Street, Suite 1000, Wilmington, DE 19801. Attorney for Defendants Musref Bellevue Parkway, LP, and Cigna Corporation.

CARPENTER, J.

Plaintiff was engaged as a subcontractor to provide materials for construction on Defendants' property. Plaintiff delivered the last materials in August 2011 and Defendants made final payment to the general contractor in mid-October 2011. Plaintiff, however, was never paid, and submitted a claim for a mechanics' lien in late February 2012. Defendants allege Plaintiff's claim is untimely under 25 *Del. C.* § 2711(b).

For the reasons discussed below, Plaintiff's Motion for Leave to Amend its Complaint is hereby DENIED and Defendants' Motion for Summary Judgment is hereby GRANTED.

BACKGROUND

Defendants Musref Bellevue Parkway, LP, and Cigna Corporation are the owner and tenant, respectively, of property located at 300 Bellevue Parkway in Wilmington, Delaware ("the property").¹ The tenant engaged a general contractor, United Telecomp, LLC ("UTC") to perform work on the property, and UTC purchased material for that work from Plaintiff Graybar Electric Company, Inc..² Plaintiff provided material to UTC on credit from May 4, 2011 to August 24,

¹ There is some confusion as to whether the property was leased to Cigna or one of its affiliates. That distinction is immaterial for the purposes of this opinion.

² While named as a defendant in Plaintiff's original complaint, UTC has submitted nothing to the Court in this matter and has not joined Defendants Musref Bellevue Parkway, LP, and Cigna Corporation in their Motion for Summary Judgment or their response to Plaintiff's Motion for Leave to Amend Complaint.

2011.³ UTC was paid in full when the work was finished, but UTC never paid Plaintiff for the materials. Plaintiff therefore initiated this action to claim a mechanics' lien against the land and improvements on the property.

Defendants move for summary judgment on the ground that Plaintiff's claim is untimely under 25 *Del. C.* § 2711(b) as the claim was not filed within the 120 day limitation set forth in the statute. Plaintiff asserts the claim was timely filed but requests leave of the Court to amend its complaint in order to set forth an alternate set of facts by which compliance with Section 2711(b) would also be established. The Court must decide whether to allow Plaintiff to amend its complaint and, on the basis of that decision, whether to grant Defendants' summary judgment motion.

DISCUSSION

1. Motion to Amend

Superior Court Civil Rule 15(a) provides that a plaintiff may amend its pleading "only by leave of court order . . . and leave shall be freely given when justice so requires." While Rule 15(a) contemplates a liberal granting of motions to amend generally, the Court scrutinizes motions to amend mechanics' liens more carefully because "[a] mechanics [sic] lien is entirely of statutory origin, and the

³ Compl. ¶¶ 7, 11.

law under which the lien arises is in derogation of the common law."4

Amendments to claims for mechanics' liens are not generally allowed after the expiration of the time for filing the claim.⁵ Even when timely filed, the Court seldom finds grounds to permit an amendment.⁶

Plaintiff seeks leave to amend its claim so that it might comply with 25 *Del*. *C.* § 2711(b). Section 2711(b) provides that subcontractors:

[S]hall file a statement of their respective claims within 120 days from the date from the completion of the labor performed or from the last delivery of materials furnished by them respectively. For purposes of this subsection, and without limitation, a statement of claim on behalf of such person shall be deemed timely if it is filed within 120 days of either of the following:

- (1) The date final payment, including all retainage, is due to such person; or
- (2) The date final payment is made to the contractor:
 - a. Who has contracted directly with the owner or reputed owner of any structure for the erection, alteration or repair of same; and b. With whom such person has a contract, express or implied, for the furnishing of labor or materials, or both, in connection with such erection, alteration or repair.⁷

In its original complaint, Plaintiff averred it last delivered materials to UTC on or about August 24, 2011.⁸ Plaintiff also stated that, "upon information and belief," it was filing its claim within 120 days of the date on which UTC was

⁴ E. J. Hollingsworth Co. v. Continental-Diamond Fiber Co., 175 A. 266, 268 (Del. Super. 1934).

⁵ Id. Even by Plaintiff's latest calculations, its Motion for Leave to Amend Complaint was filed beyond the statutory deadline for filing the initial claim for a mechanics' lien.

⁶ Deluca v. Martelli, 200 A.2d 825, 828 (Del. 1964).

⁷ 25 Del. C. § 2711(b).

⁸ Compl. ¶ 7.

finally paid by the Defendants, although Plaintiff did not furnish that date. In their Motion for Summary Judgment, Defendants agree that Plaintiff last delivered materials to UTC on August 24, 2011, but Defendants note that if Plaintiff's filing period is deemed to begin on that date, Plaintiff's claim is untimely pursuant to the first sentence found in Section 2711(b). December 23, 2011 is 120 days from August 24, 2011, and Plaintiff filed its claim on February 24, 2012. Defendants also averred, and Plaintiff did not dispute, that the date on which UTC was finally paid was October 1, 2011. Using this date, Plaintiff still did not file its claim within 120 days as claimed in the original complaint, since Plaintiff's filing deadline calculated from October 1, 2011 would have been January 30, 2012.

Plaintiff does not take issue with this math but rather seeks to amend its original complaint to include a third possible date from which Section 2711(b) could begin to run, and that is the date final payment was due to Plaintiff.¹² If permitted to amend its complaint, Plaintiff would allege final payment was due to it on October 31, 2011, such that the filing deadline would have been February 29, 2012.

⁹ Compl. ¶ 12.

¹⁰ See 25 Del. C. § 2711(b) (requiring that subcontractors file claims "within 120 days from the date from . . . the last delivery of materials furnished by them").

¹¹ See Super. Ct. Civ. R. 6(a) (computing statutory time periods by excluding the day on which the period begins to run and including the last day of the period unless it is a Saturday).

¹² 25 Del. C. § 2711(b)(1).

To support this calculation, Plaintiff insists it had conversations with UTC that "amounted to" an agreement to net 75-day payment terms. The last invoice from the Plaintiff to UTC is dated August 24, 2011, and if the parties agreed to net 75-day payment terms, payment would have been due on or before October 31, 2011. Unfortunately for the Plaintiff there is no documentation to reflect this alleged agreement. In fact, every invoice related to Plaintiff and UTC's work on Defendants' property indicates payment was due within 30 days. Plaintiff argues that its course of dealing with UTC evinces the parties' understanding of net 75day payment terms, and if this time frame is used, the filing date of the complaint meets the statutory requirements. The Court accepts that such a pattern of conduct could establish the date final payment is due to the sub-contractor, but the undisputed facts here do not support such a pattern. Multiple invoices were issued here and none were paid either within 75 days or at all.

Even if UTC had, under a past contract, habitually paid Plaintiff under 75-day net payment terms, UTC broke that habit as of July 19, 2011, when UTC failed to pay Graybar's first invoice within 75 days. Indeed, UTC missed a total of ten invoice due dates before Plaintiff finished supplying materials for the project. If Plaintiff and UTC ever agreed to 75-day net payment terms, it was clear UTC was not abiding by these terms well before Plaintiff filed its mechanics' lien. The

only pattern here is one of patience and tolerance with a general contractor who was not paying for its supplies. While admirable, this pattern completely undercuts Plaintiff's argument that it expected payment on any invoices within 75 days.

Plaintiff is not motioning for leave to amend its complaint so that it may correct a mistake; the parties haven't previously alleged some other date on which payment was due to Plaintiff.¹³ Instead Plaintiff seeks to introduce an additional date, not for the innocuous purpose of expanding the record, but for the pointed purpose of giving fresh legs to a collapsing theory of statutory timeliness.¹⁴ Put another way, Plaintiff is asking to amend its complaint because once the date of last payment by the Defendants to UTC was established, Plaintiff's ability to argue a timely filing was put in jeopardy.

The Court understands Plaintiff's frustration with a disappearing defendant and alleged debtor. However, Section 2711(b)'s statutory mandates are strict.¹⁵

¹³ See E.J. Deseta HVAC Svcs., Inc. v. Conaty, 2005 WL 1950799, at *2 (Del. Super. July 29, 2005) (distinguishing cases in which leaves to amend to correct a mistake or supplement were granted from a case in which leave to amend to gain a strategic advantage in litigation was not granted).

¹⁴ See Deluca v. Martelli, 200 A.2d 825, 828 (Del. 1964) (granting plaintiff's motion for leave to amend a mechanics' lien claim that "in no way" changed the basic claim, but simply provided greater detail as demanded by defendants).

¹⁵ By way of example, this Court has refused to grant leaves to amend mechanics' lien claims when their affidavits of verification stated the claims were true to the best of affiant's knowledge, information and belief, as opposed to stating the claims were "true and correct" as required by 25 Del. C. § 2712(c). See, e.g., Atlantic Millwork Corp. v. Harrington, 2002 WL 31045223 (Del. Super. Sept. 12, 2002), American East Explosives, Inc. v. Eastern States Development Co., 2001 WL 492074 (Del. Super. Apr. 27, 2001). Defendants raise this very issue for the first time in their most recent letter to the Court. Plaintiff's affiant—like the affiants in Atlantic Millwork and American East Explosives—states that Plaintiff's claim is

To allow Plaintiff to amend its complaint now would be tantamount to permitting Plaintiff to argue a new legal theory to meet the timeliness requirement of the statute. This is inconsistent with the intent of the statute to require prompt notification of non-payment by contractors that may cloud the property. Plaintiff's letter supporting its Motion for Leave to Amend Complaint does not defeat the inference that Plaintiff is asking the Court to consider various legal theories seriatim.¹⁶

For all these reasons Plaintiff is unable to support its new theory of timeliness, and the Court denies Plaintiff's Motion for Leave to Amend Complaint.

2. Motion for Summary Judgment

Corollary to the Motion to Amend, Defendants have moved for summary judgment on the grounds that Plaintiff's complaint is untimely. Defendants are entitled to summary judgment if they successfully meet their burden of showing that there are no genuine issues of material fact.¹⁷ The Court must view all factual

true to the best of her knowledge. Because the Court grants Defendants' Motion for Summary Judgment on other grounds, the Court makes no determination on this issue.

¹⁶ See Kraus v. State Farm Mut. Auto. Ins. Co., 2004 WL 2830889, at *6 (Del. Super. Apr. 23, 2004) (noting that evidence that the plaintiff was aware of facts and failed to include them in the complaint can raise the inference that plaintiff was forcing the Court to consider various legal theories).

¹⁷ Del. Super. Ct. Civ. R. 56(c), Wilmington Trust Co. v. Aetna, 690 A.2d 914, 916 (Del. 1996), Moore v. Sizemore, 405 A.2d 679, 681 (Del. 1979).

inferences in the light most favorable to Plaintiff.¹⁸ Summary judgment will not be granted if there is a material fact in dispute or if further inquiry into the facts would be appropriate.¹⁹

The parties do not appear to dispute the critical dates concerned in this litigation; rather, they dispute which legal theory should apply to determine the timeliness of this litigation with respect to those dates. In *King Construction, Inc. v. Plaza Four Realty, LLC*, the Supreme Court of Delaware cited the synopsis to the bill enacting 25 *Del. C.* § 2711(b), which provides:

[Section 2711(b)] clarifies when the time periods commence for filing liens by subcontractors or materialmen. The time periods within which a subcontractor or materialman must file a mechanics' lien are calculated from the date of completion of the labor performed or from the last delivery of materials furnished by them, respectively. Although such dates usually are not difficult to determine, they may trigger the filing of a lien before the time established by the contract for final payment to the subcontractor or materialmen or final payment to the general or prime contractor with whom the subcontractor or materialmen has his contract. *In such circumstances*, [the amendment to section 2711(b)] allows the subcontractor or materialmen to defer filing a lien until 120 days after either the date final payment is due him or the date when the general or prime contractor with whom he has a contract is finally paid.²⁰

¹⁸ Alabi v. DHL Airways, inc., 583 A.2d 1358, 1361 (Del. 1990).

¹⁹ Ebersole v. Lowengrub, 180 A.2d 467, 470 (Del. Super. 1962), rev'd in part on proc. grounds and aff'd in part, 208 A.2d 495 (1965).

²⁰ King Const., Inc. v. Plaza Four Realty, LLC, 976 A.2d 145, 157 (Del. 2009) (quoting S.B. 130, 140th Gen. Assem. (Del.1999) (synopsis)) (emphasis added).

In other words, the legislature first intended the time period for filing a mechanics' lien to be calculated from the date the subcontractor finally completed labor or delivered materials. If, however, that calculation would require the subcontractor to file a claim before the time the parties established for final payment to the subcontractor or general contractor, the subcontractor may take advantage of Section 2711(b)(1) or (2) to defer filing.

Applying this interpretation of Section 2711(b) to the case at bar, Plaintiff could have filed its mechanics' lien by one of three dates. First, Plaintiff could have filed by December 23, 2012—120 days after its final delivery of materials on August 24, 2011— under 2711(b). Second, since the parties contracted for final payment to be due to Plaintiff later than that date, i.e. 30-day net payment terms, Plaintiff could have filed by January 23, 2012 under 2711(b)(1). Finally, Plaintiff could have filed 120 days after Cigna paid UTC on October 1, 2011, which would have been January 30, 2012, under 2711(b)(2).

Plaintiff did not file the present claim until February 2012. Plaintiff's claim is thus untimely filed and the Court cannot consider it. For this reason Defendants' Motion for Summary Judgment is granted.

IT IS SO ORDERED

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.