JUDGE'S COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

C. GREEN CONTRACTOR, INC.	*	
	*	4-99-CV-90367
Plaintiff,	*	
	*	
v.	*	
	*	
MAY ELECTRICAL CONTRACTORS, LTD. AND NOBEL INSURANCE CO.,	*	
	*	MEMORANDUM OPINION AND ORDER
Defendant.	*	

C. Green Contractor, Inc. filed a Motion for Summary Judgment against May Electrical Contractors, Ltd. and Nobel Insurance Co on June 14, 2000. Nobel Insurance Co. resisted on June 28, 2000, and C. Green Contractor, Inc. did not reply. May Electrical Contractors, Ltd. signed a waiver of service, but has neither appeared nor filed a responsive pleading. The Court heard oral arguments on the Motion for Summary Judgment from C. Green Contractor, Inc. and Nobel Insurance Co., and now considers the matter fully submitted.

I. Facts

Plaintiff C. Green Contractors, Inc. brings this suit pursuant to 40 U.S.C. § 270b (the "Miller Act") to recover payment from Defendants May Electrical Contractors, Ltd. ("May Electrical") and Nobel Insurance Company ("Nobel") for certain materials furnished to May Electrical during a construction project for the Iowa National Guard. May Electrical was the primary contractor of the project and entered into a subcontract with Green. Nobel provided the surety bond as per Section 720(a) of the Miller Act.

Green "last performed work and/or provided materials to the construction site on or about

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May 11, 1998." (Amend. Compl. ¶ 10.) Green fully performed its obligation under the terms of the contract with May Electrical. (Id. ¶ 13.) However, in a letter dated May 14, 1998, Green wrote to May Electrical stating that it had not received payment in full. (Green Aff. Ex. G.) In a letter dated May 19, 1998, again from Green to May Electrical, Green acknowledged that May Electrical agreed to pay Green $1,000 per week beginning May 29, 1998 and ending June 30, 1998, at which time all remaining sums due would have been paid in full. (Compl. Ex. H.) In return, the letter states, Green agreed not to put a mechanic's lien on the property. (Id.) Despite all this, May Electrical, and thereby Noble as well, still owed Green $7, 341.24 as of the date of Green's Amended Complaint. (Amend. Compl. ¶ 15.) Green filed its Original Complaint on June 30, 1999.

II. Summary Judgment Standard

"[S]ummary judgment is an extreme remedy, and one which is not to be granted unless the movant has established his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances." *Robert Johnson Grain Co. v. Chemical Interchange Co.*, 541 F.2d 207, 209 (8th Cir. 1976) (citing *Windsor v. Bethesda General Hospital*, 523 F.2d 891, 893 n.5 (8th Cir. 1975)). The purpose of the rule is not "to cut litigants off from their right of trial by jury if they really have issues to try," *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) (quoting *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944)), but to avoid "useless, expensive and time-consuming trials where there is actually no genuine, factual issue remaining to be tried," *Anderson v. Viking Pump Div., Houdaille Indus., Inc.*, 545 F.2d 1127, 1129 (8th Cir. 1976) (citing *Lyons v. Board of Educ.*, 523 F.2d 340, 347 (8th Cir. 1975)).

The plain language of Federal Rule of Civil Procedure 56(c) mandates the entry of

summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The precise standard for granting summary judgment is well-established and oft-repeated: summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). The Court does not weigh the evidence nor make credibility determinations, rather the court only determines whether there are any disputed issues and, if so, whether those issues are both genuine and material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Wilson v. Myers*, 823 F.2d 253, 256 (8th Cir. 1987) ("Summary judgment is not designed to weed out dubious claims, but to eliminate those claims with no basis in material fact.") (citing *Weightwatchers of Quebec, Ltd. v. Weightwatchers International, Inc.*, 398 F. Supp. 1047, 1055 (E.D.N.Y. 1975)).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact based on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. *See Celotex*, 477 U.S. at 323; *Anderson*, 477 U.S. at 248. Once the moving party has carried its burden, the nonmoving party must go beyond the pleadings and, by affidavits or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is genuine issue for trial. *See* Fed. R. Civ. P. 56(c), (e); *Celotex Corp.*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 257. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat a motion for summary judgment; the

requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48 (emphasis added). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *See id.* at 248. "As to materiality, the substantive law will identify which facts are material . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

III. Analysis

The statute of limitations has run on Green's claim against Nobel. The Miller Act states that no "suit shall 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 him [a person covered under the Act]." 40 U.S.C. § 270b(a). In its Complaint, Green states it "last performed work and/or provided materials to the construction site on or about May 11, 1998." (Compl. ¶ 10.) Yet, Green filed its Complaint on June 30, 1999--thirteen and one-half months after it last performed work or supplied material to May Electrical. Therefore, unless Noble is equitably estopped from asserting the statute of limitations as a defense, Green does not have a claim against Nobel.

Nobel argues that Green has not alleged any representations by Nobel which would lead to Nobel being equitably estopped from asserting the statute of limitations. Green argues that as a surety of May Electrical, Nobel can assert no defense which May Electrical cannot assert–and that if May Electrical is equitably estopped by virtue of its conduct, so is Noble. Green is correct. However, Green did not brief the issue of equitable estoppel nor did it explain in its oral argument why Nobel is equitably estopped from asserting the statute of limitations.

"[T]he surety stands in the shoes of its principal." *United States v. Frank Briscoe Co.*, 462 F.Supp 114, 116 (E.D.La. 1978). In so doing, "[t]he surety may generally set up any defense, legal or equitable, which is available to the principal; conversely, the surety may assert

no defense which is not available to the principal." 74 Am.Jur.2d Suretyship § 25 (1974). This principle of suretyship applies equally to the Miller Act. The Eighth Circuit has held that generally "[a] surety's liability under the Miller Act is measured by the general contractor's liability under the construction contract." *Consolidated Electrical & Mechanicals, Inc. v. Biggs General Contracting, Inc.*, 167 F.3d 432, 435 (8th Cir. 1999). More specifically, in *United States v. Consolidated Construction*, Civ. A. No. 92-A-196, 1992 WL 164519, at *2 (D.Colo. June 25, 1992), the court held that the surety was bound by the statements and conduct of the principal, and the equitable conduct created by that conduct operated to bar the surety from asserting the statute of limitations. In *Frank Briscoe Co.*, 462 F.Supp. at 116, the court held that a Miller Act surety of a general contractor is bound by the dealings between its principal and a subcontractor. The issue then, is whether May Electrical could have asserted the statute of limitations.

The Eighth Circuit has recognized the doctrine of equitable estoppel in the Miller Act context. *See United States v. Aetna Casualty & Surety Co.*, 480 F.2d 1095 (8th Cir. 1973) (holding that the contractor was not equitably estopped from asserting a Miller Act claim against the surety). The essential elements of equitable estoppel are as follows: "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the misleading conduct or false representations of the party to be estopped; and (3) change in position based thereon to his injury, detriment or prejudice." *Id.* at 1099 (citing 28 Am.Jur.2d Estoppel and Waiver § 35 (1966).[1] Green fails to establish these elements.

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[1]Federal, not Iowa, equitable estoppel standards are appropriate in this analysis because Green's claims present a federal question (under the Miller Act). *See Garfield v. J.C. Nichols Estate*, 57 F.3d 662, 665 (8th Cir.1995) (holding that state law is inapplicable to questions of estoppel and tolling in cases where a federal claim is at issue).

Viewing the facts in a light most favorable to Nobel, the nonmoving party, the Court cannot say that no genuine issue of material fact exists as to whether May Electrical could have asserted the statute of limitations. The sum total of Green's evidence and arguments relating to equitable estoppel consists of two letters from Green to May Electrical. The first letter, dated May 14, 1998, states that money is due and if it is not paid by May 18, 1998 Green will consider legal remedies. (Green Aff. Ex. G.) The second letter, dated May 19, 1998, acknowledges an agreement that May Electrical will pay Green $1,000 a week until June 30, 1998, at which time all remaining sums will be due and owing, and in return Green would withhold filing a mechanic's lien. (Compl. Ex. H.) While this evidence may support allegations that Green relied on May Electrical's promise and was unaware that May Electrical was not going to pay the full sum on June 30, 1998, Green has not specifically alleged any of the elements of equitable estoppel.[2]

Further, Green submits no evidence that it relied to its detriment on May Electrical's promise to pay. *See* 51 Am.Jur.2d. Limitation of Actions § 43 (1970) (describing the application of equitable estoppel on the statute of limitations as lulling an "adversary into a false sense of security and thereby causing him to subject a rightful claim to the bar of the statute of limitations. . . ."). In *United States v. Fireman's Fund Ins. Co.*, No. Civ.A. 98-CV-5186, 1998 Wl 961900, at *2 (E.D.Pa. Dec. 18, 1998), the court held that equitable estoppel did not prevent a Miller Act defendant from asserting the statute of limitations where plaintiff still had 27 days

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[2]In its Memorandum of Authorities in Support of Plaintiff's Motion for Summary Judgment, Green only states that the lack of application of the statute of limitations was disposed of in this Court's February 9, 2000 ruling. However, in that ruling, this Court stated only that the Defendants may be equitably estopped from asserting the statute of limitations–and that such a finding was sufficient to foreclose Noble's motion to dismiss under the Rule 12(b)(6) standard. This Court in no way conclusively determined that Noble, or May Electrical, was equitably estopped from asserting the statute of limitations.

to assert its claim. The court stated that "[w]here a plaintiff has not shown that it was prevented from asserting its rights, limitations periods must be strictly enforced." *Id.* Green has not shown that any conduct by May Electrical or Nobel prevented it from filing its Miller Act claim on time.[3] Therefore, summary judgment against Nobel is inappropriate.

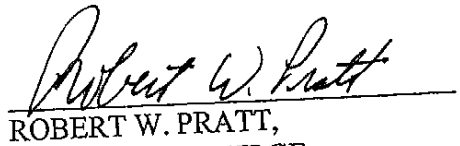
The statute of limitations has likewise run on Green's claim against May Electrical. However, unlike Nobel, May Electrical did not assert the statute of limitations. In fact, May Electrical has not resisted Green's claim at all. Summary judgment is therefore appropriate against May Electrical.[4]

IV. Conclusion

Green's Motion for Summary Judgment (#16) is **denied** against Nobel and **granted** against May Electrical.

IT IS SO ORDERED.

Dated this 5th day of September, 2000.



ROBERT W. PRATT,
U.S. DISTRICT JUDGE

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[3]In fact, Green is completely silent on what happened between June 30, 1998 and June 30, 1999. It has not alleged any conduct in that time, by May Electrical or Nobel, pertinent to equitable estoppel. Green has simply not explained why it took so long to file this suit.

[4]May Electrical's absence does not prevent this Court from exercising jurisdiction over May Electrical. May Electrical signed a waiver of service dated August 11, 1999. (Waiver of Service of Summons of May Electrical Contractors, Ltd.) By doing so, May Electrical subjected itself to the personal jurisdiction and venue of this Court. *See* Fed. R. Civ. P. 4(d)(1).