

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

EVCO SOUND AND ELECTRONICS, INC.,)

Plaintiffs,)

vs.)

**CEDAR STREET ELECTRIC AND
CONTROL. INC., SEABOARD SURETY
CO..**)

Defendants.)

Case No. **CV 2006 1971**

**ORDER DENYING DEFENDANT
SEABOARD SURETY COMPANY'S
MOTION FOR SUMMARY
JUDGMENT**

I. INTRODUCTION.

Ormond Builders, Inc. entered into a contract with Lakeland School District #272 of Rathdrum, Idaho, for construction of Timberlake Junior High School in Spirit Lake, Idaho. Ormond, as principal contractor, and defendant Seaboard Surety Company, as surety, provided a payment bond consistent with Idaho Code § 54-1925. Ormond entered into a written subcontract with defendant Cedar Street Electric and Control of Sandpoint, Idaho, to perform all of the electrical work on the project. In turn, Cedar Street entered into negotiations with plaintiff Evco Sound & Electronics, Inc., to perform portions of the "low voltage" electrical work on the project. Evco proposed to supply labor and materials to Cedar Street for the fire alarm, intercom, telephone and television media section of the project.

Although Evco and Cedar Street discussed the scope of the work and looked to enter into a written subcontract, the parties never entered into a formal express

contract. Evco asserts that Evco and Cedar Street reached an agreement on the scope of work and the price of \$165,850.00 for costs and labor. However, some work was later deleted from Evco's scope, and the price was adjusted to \$132,688.00. Seaboard Surety asserts that the parties never reached an agreement as to the ultimate scope of the work Evco would perform or the amount Evco would be paid.

Both Evco and Seaboard Surety agree that there was no formal express contract entered into between Evco and Cedar Street. Furthermore, Cedar Street submitted a proposed subcontract to Evco, which was never signed by Cedar Street. In conjunction with the work anticipated to be performed by Evco, Cedar Street forwarded a draft Joint Check Agreement to Evco. Evco executed the Joint Check Agreement, but it was never signed by Cedar Street or Ormond Builders.

Cedar Street was unable to pay its suppliers, subcontractors and labor force, and therefore Ormond Builders paid Cedar Street's employees to complete the work. Ultimately Ormond Builders paid Evco \$53,325.00, which Seaboard Surety asserts compensated Evco for all equipment and materials supplied as well as its on-site labor.

The project was substantially completed and the School District took occupancy of the Timberlake Junior High School Project on or around January 28, 2005. Evco maintains that although the District was allowed to use the Project, it was not complete and some of the original main contract work had not yet been started or completed. Evco asserts that it completed several significant tasks after the Project was turned over to the School District. However, it received only two payments for its work; one check for \$3,325.00 and another check for \$50,000.00. Evco asserts that the scope of work and subcontract price had not changed and that Ormond Builders still owes Evco \$79,343.04. Evco served a Notice of Claim on Ormond Builders on June 13, 2005, and

a claim on Seaboard Surety on Sept 29, 2005. Evco then commenced the underlying action on March 10, 2006.

Seaboard Surety filed a motion for summary judgment seeking dismissal of Evco's claims against it, arguing there are no material issues of fact because both parties agree there is no express contract and because Ormond Builders compensated Evco for the equipment and materials supplied as well as for its on-site labor in the amount of \$53,325.00. Seaboard Surety further asserts that Evco's claim is untimely under I.C. §54-1927 with respect to the 90-day notice provision as well as the one-year statute of limitations.

Oral argument on Seaboard Surety's motion for summary judgment was heard on April 11, 2007. At the hearing, counsel for Seaboard was granted leave to supplement the record with additional excerpts of two documents. The Court allowed for additional pages of pay requests from Ormond Builders and additional pages from the transcript of Kevin Bauer's deposition to be submitted. The Court also granted leave for Evco to respond to the additional filings by Seaboard.

II. ANALYSIS.

1. There is a Genuine Issue of Material Fact as to Whether Evco's Claims are Time Barred by the Statute of Limitations.

Evco's claims against Seaboard Surety are asserted under the Public Contracts Bond Act set forth in I.C. § 54-1927, which provides in part...

Every claimant who has furnished labor or material...or otherwise supplied equipment in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under this act, and who has not been paid in full therefor before the expiration of a period of ninety (90) days after the day on which the last of the labor was done or performed by him or material or equipment was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for

the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute such action to final judgment for the sum or sums justly due him and have execution thereon; ***provided, however, that any such claimant having a direct contractual relationship with a subcontractor of the contractor furnishing such payment bond but no contractual relationship expressed or implied with such contractor shall not have a right of action upon such payment bond unless he has given written notice to such contractor within ninety (90) days from the date on which such claimant performed the last of the labor or furnished or supplied the last of the material for which such claim is made...***

Every suit instituted on the aforesaid payment bond shall be brought in appropriate court in any county in which the contract was to be performed and not elsewhere; ***provided, however, that no such suit shall be commenced after the expiration of one (1) year from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material or equipment for which such suit is brought***, except, that if the claimant is a subcontractor of the contractor, no such suit shall be commenced after the expiration of one (1) year from the date on which final payment under the subcontract became due.

I.C. §54-1927 (emphasis added).

Seaboard Surety asserts that Evco's claims against it are untimely because the Project was substantially completed in January of 2005 and Evco's Notice of Claim was dated June 8, 2005, well after the 90-day period. Seaboard Surety argues that any work completed by Evco after January 28, 2005, constituted "punch-work" or warranty work and did not extend the statutory notice period, or bar dates, set forth under I.C. §54-1927. At oral argument, Seaboard Surety presented argument that Evco's claim should be dismissed because the type of work done by Evco after January 2005 did not fall under the scope of the bond or Idaho's mechanic lien statute.

There is little case law in Idaho that expounds upon the time requirements found in the Public Contracts Bond Act. However, the Act is patterned after the federal Miller Act, 40 U.S.C. §3131, *et seq.* Idaho Supreme Court has recognized that Idaho law with regard to suit on payment bonds follows the provisions of the federal Miller Act and

should be interpreted consistently with it. *City of Weippe v. Yarno*, 96 Idaho 319, 528 P.2d 201 (1974); *Interform Company v. Mitchell*, 575 F.2d 1270, 1279 (9th Cir. 1978). There are several Miller Act decisions which hold that “remedial or corrective work or materials, or inspection of work already completed,” falls outside the scope of the statute and will not toll the statute of limitations in such instances. See *U.S.A. ex. rel. Interstate Mechanical Contractors, Inc., v. International Fidelity Insurance Company*, 200 F.3d 456 (6th Cir. 2000). In *International Fidelity*, the Court reviewed the issue of when the one-year statute of limitations commenced under the Miller Act. After the contractor had completed work in early June of 1994, a subcontractor returned to the Project to conduct testing, and ultimately replaced several pieces of equipment that were not functioning properly. One year after the date in which the repairs were made the Plaintiff filed suit. *Id.* at 458.

The Sixth Circuit Court of Appeals addressed the issue of “when the last labor was performed or material supplied” for purposes of the commencement of the statute of limitations, holding that courts must “distinguish whether the work was performed...as part of the original contract or for the purpose of correcting defects, or making repairs following inspection of the project”. *Id.* at 460. That Court further held that “ work done...pursuant to a warranty, subsequent to final inspection and acceptance of the project, falls outside of the meaning of labor performed as set forth in [the statute]”. *Id.* at 459. The Sixth Circuit Court of Appeals identified the initial date of substantial completion as the operative date, explaining that the majority rule requires the trier of fact to distinguish between work performed within the scope of the contract and work done for the purpose of correcting defects or making repairs. That Court reasoned that the “correction-or-repair versus original-contract test presents a useful

framework to determine when the [Act's] statute of limitations begins to run". *Id.* at 460.

Seaboard Surety concedes Evco returned to the project in April 2005, but argues that this extra work merely constituted warranty work that would not extend the deadlines under the statute. Seaboard Surety supports this argument with the affidavits of Georgeanne Griffiths (Hahn Affidavit, Exhibit A) and Greg Hostert. These affiants claim the School District occupied the junior high school in January 2005. Both claim that following the completion of the construction work in February 2005 they received instruction and training on the systems installed by Evco. Griffiths claims additional instruction was given by Evco in April of 2005.

Evco asserts that it completed three significant tasks after the project was turned over to the school district, all of which fell within the scope of their contractual agreement. Evco's Notice of Claim was served on June 13, 2005, and action was commenced on March 10, 2006. Evco asserts that it last supplied labor and material to the Project on June 15, 2005, and therefore both its Notice of Claim and Suit against Cedar Street and Seaboard Surety were timely. Regarding Seaboard Surety's argument under the Idaho lien statute, Evco points out the bond language deletes any provision in the bond which might conflict with the definition of labor and materials under the Public Contract Act. Plaintiff's Supplemental Memorandum, p. 4.

Summary judgment is not proper in this case because there is a genuine issue of material fact regarding the scope of Evco's work conducted after February 2005. Seaboard Surety asserts that the work done by Evco after the School District occupied the Project was merely warranty work, or "punch-list" work, while Evco argues that the work completed after February 2005 fell within the scope of their contractual

obligations. Although Seaboard Surety tries to bolster its argument by citing to *International Fidelity*, that case can be distinguished from this action, and therefore summary judgment is improper.

In *International Fidelity* the court found that the scope of the work completed by the Plaintiff was “remedial or corrective work or materials, or inspection of work already completed”. While Seaboard Surety argues Evco’s work after February of 2005 falls within this same category, this Court finds there is a question of fact as to whether the work performed by Evco was “remedial...corrective...or inspection of work already done”. See *International Fidelity*, 200 F.3d at 461. Evco asserts it completed original contract work on the project as late as June 15, 2005, when it completed the “as built drawings.” Plaintiff’s Memorandum, p. 4. This work included owner training, installation of the television system, and completion of as-built drawings. *Id.* These tasks, and especially the installation of a television system on April 15, 2005, do not seem to fall under the category of *remedial* or *corrective* work as defined by the Sixth Circuit Court of Appeals in *International Fidelity*. In that case the corrective work and final testing was not “required by the original contract”. *International Fidelity*, 200 F.3d at 461. There is a question of fact as to whether installation of a television system and owner training on the systems installed by Evco fell within the original scope of the contract, and therefore within definition of “labor” and “material” under I.C. § 45-1927.

Because there is an issue of fact regarding whether the labor and material provided by Evco after February 2005 falls within the scope of the contract and, thus, whether this suit is timely under I.C. §45-1927, summary judgment is not appropriate.

2. Although There is no Express Written Subcontract Between Evco and Cedar Street, There is a Question of Fact Regarding the Parties’ Intent to Enter Into a Contractual Relationship and Whether Contractual Remedies are Available to Evco.

Undisputed facts reveal that there was never an express contract between Evco and Cedar Street. Seaboard Surety asserts there was merely a series of negotiations that never resulted in a common understanding as to the scope of Evco's work or the amount it would be paid. To the contrary, Evco argues that although there was no formal subcontract, the parties came to a contractual agreement regarding the scope of work and price through a series of documents.

Contractual entitlement may arise via several distinct theories, including claims based on express contract, or based on implied in fact or implied in law contract claims. In *Great Plains Equipment, Inc., v. Northwest Pipeline Corporation*, 132 Idaho 754, 979 P.2d 627 (1999) the Idaho Supreme Court explained that an implied in fact contract requires "no express agreement but the conduct of the parties implies an agreement from which an obligation in contract exists." *Id.* at 767. The Court distinguished an implied in fact contract from an implied in law contract, or quasi contract, explaining that a contract implied in law is "not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent or the agreement of the parties and, in some cases, in spite of an agreement between the parties". *Id.*

Seaboard Surety seeks a determination that there is no express contract, and Evco does not dispute that it never entered into a formal written agreement with Cedar Street. However, Evco asserts that the statute requires only a "contractual relationship", either "expressed or implied", and therefore should be allowed to recover under a breach of contract theory. See I.C. §45-1927. Seaboard Surety compares this case with *Intermountain Forest Management, Inc., v. Louisiana Pacific Corporation*, 136 Idaho 233, 31 P.3d 921 (2001), where the Idaho Supreme Court held that no valid

express contract existed between the parties based upon the parties' failure to both sign the proposed subcontract. *Id.* at 925. However, Seaboard Surety's reliance is a bit misguided as the Court in *Louisiana Pacific* reasoned there was no valid contract because "L-P's normal procedure was to put logging contracts in writing", and it was "undisputed that the parties' intent was to create a written contract to govern their agreement". *Id.* The Court further explained that the lack of a signature does not necessarily prevent contract formation. However, there must be a distinct understanding common to both parties. *Id.*

In this case, Evco asserts that although there was no formal subcontract, Evco often "did work like this without a formal subcontract and had done prior work with Cedar Street without a subcontract". Plaintiff's Memorandum in Opposition, p. 2. Evco submits the affidavit of Kevin Bauer, along with several exhibits attached to that affidavit, to support its argument that a contractual relationship was established even though no formal writing was signed. Bauer testifies that Evco's subcontract with Cedar Street was "like hundreds that Evco has made" and it is "not unusual for Evco to not have a formal, written, signed, subcontract for projects like the Project". Bauer Affidavit, p. 3, ¶15.

At oral argument, Seaboard Surety's counsel rebutted Evco's argument that Evco's usual practice was to work with Cedar Street without a formal subcontract by asserting that Evco had only worked with Cedar Street one previous time. Seaboard Surety's counsel asked for leave to supplement the record on this issue, and leave was granted. Seaboard Surety submitted an excerpt from James E. Monteressi's deposition in support. Monteressi recalled doing business with Cedar Street on two previous occasions. Exhibit B to Frederick Hahn's Supplemental Affidavit, p. 5, LI. 1-18.

However, Monteressi did not testify as to whether a formal contract had been entered into on those two prior occasions or to any other aspect of the relationship between Evco and Cedar Street, except that he was unaware of any conflict between the two companies. *Id.* LI. 19-22. Monteressi's testimony adds little to either party's argument.

There is a genuine issue of fact as to whether the parties intended for the agreement to be reduced to writing before a contractual relationship was formed or whether a contractual relationship was established between the parties through mutual assent of the scope and price of the labor and materials supplied by Evco. The Fax cover sheet from Cedar Street to Kevin Bauer dated June 14, 2004, shows that Cedar Street intended to enter into a contract with Evco for the Project and demanded work to start ASAP. Bauer Affidavit, Exhibit C. The Fax cover sheet dated June 22, 2004, from Cedar Street to Kevin Bauer shows that Cedar Street submitted a subcontract to Evco for its review. Bauer Affidavit, Exhibit E. These faxes raise an issue of fact as to whether the parties intended their oral agreements to be reduced to writing before they became binding or whether the written subcontract was viewed merely as a record. This is a question of fact as to intent which should be answered by the trier of fact.

III. CONCLUSION AND ORDER.

For the reasons stated above, Seaboard Surety's Motion for Summary Judgment is **denied**. There are issues of material fact relating to the scope of the work performed by Evco after the School District took occupancy of the Project in February 2005. There is also a question of fact as to whether the parties intended to enter into a contractual and whether their oral agreements were to be reduced to writing.

IT IS HEREBY ORDERED that Seaboard Surety's Motion for Summary

Judgment is **DENIED**.

Entered this 8th day of May, 2007.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2007, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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