IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

BANK OF NOVA SCOTIA,	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION FILE**
	)	**NO. 94-VS-88537-F**
WESTINGHOUSE ELECTRIC	)	
CORPORATION and HENDERSON	)	
ELECTRIC COMPANY,	)	
	)	
Defendants.	)	

DEFENDANT WESTINGHOUSE ELECTRIC CORPORATION'S
REPLY BRIEF IN SUPPORT OF SECOND MOTION FOR SUMMARY JUDGMENT

ARGUMENT AND CITATION OF AUTHORITIES

I. BY THE CONTRACT'S TERMS, THE DATE OF SUBSTANTIAL COMPLETION IS NOT TO BE DETERMINED BY DELAY IN OBTAINING CERTIFICATE OF OCCUPANCY.

In its reply brief, Plaintiff cites a portion of the contract it claims controls the issue of the date the project was substantially completed, Section 8.1.3. Plaintiff does not, however, quote the entire definition. The remainder, left out of Plaintiff's brief, reads as follows:

> However, Contractor shall have been deemed to have met this requirement [substantial completion] if any required approval is withheld by governmental authority for any reason other than the failure of the Contractor to complete the Work in accordance with the contract documents.

(Contract, § 8.1.3, "Definitions," attached as Exhibit A, p. 22) (emphasis added). Consequently, the contractor, Beers Construction Company ("Beers"), was not to be held responsible for any delay in obtaining a certificate of substantial completion or a certificate of occupancy if the delay was not its responsibility. There is no contention that Beers or the subcontractors caused the issuance of the certificate of occupancy to be delayed.

Although the work was substantially complete on April 1, 1990, the permanent certificate of occupancy apparently did not issue until July 25, 1990. There was no urgency to obtain the certificate, however, as the original owner's financial difficulties caused the building to sit vacant and unoccupied even until the time of the fire, which occurred almost one year after the date of the permanent certificate of occupancy. (Plaintiff's Response to Defendant Westinghouse's First Interrogatories, attached as Exhibit "B," p.11, ¶ 23). Consequently, the date on which the City of Atlanta issued the permanent certificate of occupancy is simply not probative of the question of the date on which the project was in fact substantially completed. To hold otherwise would be to allow an owner's disinterest or government inaction to toll the statute of limitation period indefinitely. As one Treatise has noted, "[A] contractor may have substantially completed its scope of work and a certificate [of occupancy] may be irrelevant to that fact." 2 Steven G.M. Stein, Construction Law ¶ 7.09, at 7-80 (1999)citing J.M. Beeson Co. v. Sartori, 535 So. 2d 180 (Fla Dist. Ct. App. 1989)(substantial completion may occur when owner is able to occupy and fixture constructed space, sometimes prior to certificate of occupancy).

As April 1, 1990 is the date the project was substantially complete, and Plaintiff did not file its claim until July 13, 1994, the Plaintiff's claim is time barred as a matter of law. See O.C.G.A. § 9-3-30.

II. A TEMPORARY CERTIFICATE OF OCCUPANCY MEETING THE CONTRACT'S REQUIREMENT ISSUED MORE THAN FOUR YEARS BEFORE PLAINTIFF'S FILING OF THIS CASE.

Plaintiff asserts in its response brief that a certificate of occupancy issued for the property on July 25, 1990 and then suggests that, as a matter of law, the date of substantial completion is

the date of the certificate of occupancy. Plaintiff neglects, however, to mention that a temporary certificate of occupancy for the project issued on March 14, 1990. (See Certified Copy of Temporary Certificate of Occupancy, attached as Exhibit "C"). The certificate bore this statement by the City of Atlanta building inspector, "I certify that the building or space at the above address has been inspected and found to be safe for occupancy." (See Exhibit "C"). The contract between the Owner and Beers, § 8.1.3 contemplates that a Temporary Certificate of Occupancy is sufficient to qualify for substantial completion:

> The Date of Substantial Completion of the Work or designated portion thereof is the Date certified by the Architect when construction is sufficiently complete, in accordance with the Contract Documents, so the Owner can occupy or utilize the Work or designated portion thereof for the use for which it is intended and a Certificate of Occupancy or in instances acceptable to the Owner, a Temporary Certificate of Occupancy, is obtained by the Contractor and presented to the Owner.

(Exhibit A, p. 22).

A building that is sufficiently complete to be used for its intended purpose is substantially complete. See 2 Steven G.M. Stein, Construction Law ¶ 7.09, at 7-78 (1999). The Temporary Certificate of Occupancy was dated March 14, 1990, only days before the April 1, 1990 date for substantial completion. The certificate shows that the building was "safe for occupancy." Nevertheless, it is undisputed that the building was not even occupied as of the time of the fire. As the building was capable of being occupied more than four (4) years before July 13, 1994 (date of filing of the Complaint), the Plaintiff's claims are barred by the statute of limitations.

III. NO PRIVITY OF CONTRACT EXISTED BETWEEN DEFENDANT WESTINGHOUSE ELECTRIC CORPORATION AND BEERS.

Plaintiff contends that the contract between Hooker and Beers controls the criteria for determining the date of substantial completion. Even though Defendant has shown that the contract affords no relief to Plaintiff, there is no privity of contract, however, between Plaintiff and Westinghouse Electric Corporation ("Westinghouse"). There is no contention that Beers had any obligation to Westinghouse under the contract, for Westinghouse furnished all electrical supplies to Henderson Electric Company directly and was paid by Henderson Electric Company pursuant to a purchase order. Indeed, contractually, the parties are three steps removed, because Hooker, the building's prior owner, was one step further up the contractual ladder. Therefore, Plaintiff attempts to enforce the terms of a contract against Westinghouse, with whom Plaintiff and its predecessor in interest were not in privity.

The prior order of this Court also made it clear that no privity existed between these parties. (Court's Order on Cross Motion for Summary Judgment, February 26, 1998). Thus, the Date of Substantial Completion is to be determined from the applicable Georgia statute of limitation for damage to real property and applicable case law, and not from a contract to which Defendant Westinghouse was not a party. O.C.G.A. § 9-3-50(2) defines substantial completion as follows:

> "Substantial completion" means the date when construction was sufficiently completed, in accordance with the contract as modified by any change order agreed to by the parties, so that the owner could occupy the project for the use for which it was intended.

Although the facts surrounding whether construction is sufficiently complete so that a project may be used as it was intended may be a matter of fact, substantial completion is a matter of law.

The date of substantial completion has been interpreted by the Court of Appeals to mean the date of last work performed on a building. See Broadfoot v. Citizens & Southern Nat'l Bank, 208 Ga.App. 382, 384, 430 S.E.2d 638, 640 (1993). The Court explained as follows:

> OCGA §§ 9-3-30 and 9-3-31 provide that all actions for trespass upon or damage to realty and for injuries to personalty "shall be brought within four years after the right of action accrues." In Corp. of Mercer Univ. v. Nat. Gypsum Co., 258 Ga. 365, 368 S.E.2d 732 (1988), the Supreme Court ruled that actions under OCGA § 9-3-30 must be brought within four years of substantial completion of the structure. In the instant case, the last work performed on the building, which could arguably be considered "substantial completion," was in 1977; thus, the statute of limitation ran in 1981.

Id. (emphasis added).

Substantial Completion is not synonymous with completely finished. See U.S. Fidelity & Guaranty Co. v. Rome Concrete Pipe Co., 179 Ga. App. 882, 884 n.1, 348 S.E.2d 83, 86 n.1 (1986)("`Completion' may mean either total completion or substantial completion, with only punch-list type items remaining to be done.")(emphasis in original). Items listed in a punch list are those which restrain the date of final completion, not substantial completion. See 2 Steven G.M. Stein, Construction Law ¶ 7.09, at 7-78 (1999). Literal and strict compliance with the contract is not required. All that is required is substantial compliance with the contract. See Roswell Properties, Inc. v. Salle, 208 Ga. App. 202, 207, 430 S.E.2d 404, 410 (1993). Substantial completion has the same meaning as substantial performance, and the terms are interchangeable. See Stein, supra, ¶ 6.07, & n. 12 at 6-18, ¶ 7.09, at 7-78; Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 501, 610 A. 2d 364, 375 (1992); J.M. Beeson Co. v. Sartori, 553 So. 2d 180, 182 (Fla. Dist. Ct. App. 1989). In no event is this date later than the last day employees were on the job. See Womack Indus., Inc. v. B & A Equip. Co., 199 Ga. App. 660, 661 405 S.E.2d 880, 881 (1991). Clean up work and inspections are considered to occur

after the construction is substantially complete and do "not amount to work towards completion of the contract." See id. In addition, repair work occurring after the date of substantial completion does not toll the statute of limitation. See Heffernan v. Johnson, 209 Ga. App. 139, 433 S.E.2d 108, 109 (1993) citing Bicknell v. Hearn Roofing & Remodeling, Inc., 171 Ga. App. 128, 130, 318 S.E.2d 729 (1984).

In sum, the date of substantial completion occurs when the major construction or building activity on the property ceases, with punch list type items yet remaining to be done, and not when a public authority formally issues a permit. This is particularly so when, as here, there is a delay in obtaining a permanent certificate of occupancy due to the building sitting vacant. Indeed, the building was still unoccupied at the time of the fire.

IV. THE CONTRACTOR'S LETTER ESTABLISHES THE DATE OF SUBSTANTIAL COMPLETION AS APRIL 1, 1990.

According to Plaintiff's response, the City of Atlanta issued a Certificate of Occupancy on July 25, 1990. On July 26, 1990, one day after the Certificate of Occupancy issued, LaFrench Giddens of Beers Construction Company sent a letter to the subcontractors on the project. The letter to the subcontractors states that the "owner" established the Date of Substantial Completion as April 1, 1990. The letter was written for the purpose of beginning the warranty period on the guarantees by the subcontractors on the work that each had performed. Section 9.8.1 of the construction contract establishes the date of substantial completion as the actual date when the warranties shall begin. "Warranties required by the Contract Documents shall commence on the Date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion." (Contract, § 9.8.1, "Substantial Completion," Exhibit A at p. 28). That date was April 1, 1990.

Contrary to Plaintiff's contention in its response brief that the letter constitutes inadmissible hearsay, the letter is admissible as an admission, by a party or by one in privity of estate with Plaintiff. See O.C.G.A. § 24-3-32 ("Admissions by . . . privies in estate . . . shall be admissible as against the parties themselves). The statement in the letter was made by the prior owner, Hooker, to Beers before the title had passed to Plaintiff through foreclosure. If Plaintiff owned the building at the time due to foreclosure, however, then the admission was an inconsistent out of court statement made by Plaintiff and is admissible generally. See O.C.G.A. § 24-3-31; Clark v. Toms, 181 Ga. App. 557, 353 S.E.2d 54 (1987)("Generally, proof of an explicit voluntary admission by a person of a fact adverse to his own interest is . . . prima facie evidence of the existence of that fact"). This is so even though the admission was not against the interest of Plaintiff at the time it was made. See Clark, 181 Ga. App. at 557, 353 S.E.2d at 54; W.T. Harvey Lumber Co. v. J.M. Wells Lumber Co., 104 Ga. App. 498, 498, 122 S.E.2d 143, 144 (1961).

To be admissible under the business record exception to the hearsay rule, a record must be of an act, event, or occurrence, and made at the time of the occurrence or within a reasonable time thereafter. See O.C.G.A. § 24-3-14; Moore v. State, 154 Ga. App. 535, 540-41, 268 S.E.2d 706, 710 (1980). The contractor's letter was a memorandum of the occurrence of establishing a date of substantial completion, completed contemporaneously with the event, and LaFrench Giddens made such memoranda in the regular course of business for Beers whenever a date of substantial completion was established on a project. Additionally, records made by one business and transmitted to another are admissible as business records of the receiving party if they are kept by the receiving party in the ordinary course of business. See Lewis v. United California

Bank, 240 Ga. 823, 242 S.E.2d 581 (1978); Jackson v. State, 209 Ga. App. 217, 219, 433 S.E.2d 655, 658 (1993). The memorandum at issue was a routine, factual document sent to the subcontractors as part of a related transaction, and the subcontractors were required to rely upon it to establish the date from which warranties would run, that is, the date of substantial completion. As such, the subcontractors relied upon the transmitted record as they would their own records. See Moore v. State, 154 Ga. App. 535, 539-40, 268 S.E.2d 706, 709-10 (1980).

The contractor's letter is admissible evidence, and it clearly establishes the owner's date of substantial completion as April 1, 1990. As it is undisputed that Plaintiff's claim was not filed until July 13, 1994, after the four year statute of limitation had run, Defendant Westinghouse is entitled to judgment as a matter of law.

V. THE DATE OF SUBSTANTIAL COMPLETION CONTAINED IN THE PRIOR COURT ORDER WAS NOT CONTESTED.

The prior order of this Court stated the date of substantial completion was April 1, 1990. (Court's Order on Cross Motion for Summary Judgment, February 26, 1998). This conclusion was based on Westinghouse's statement of undisputed facts in the motion for summary judgment. Plaintiff did not contest the statement of fact or that portion of the order, which pointed to the contractor's letter as establishing the date the project was substantially complete. Plaintiff therefore waived its opportunity to do so and is estopped from contesting it now.

In this case all claims by Plaintiff for damage to realty are time barred due to the indisputable fact that the lawsuit was not brought until more than four years after the date of substantial completion of the project.

CONCLUSION

For the foregoing reasons, Defendant Westinghouse Electric Company prays that the Court grant its Motion for Summary Judgment and dismiss all remaining counts against said Defendant.

Respectfully submitted, this _____ day of _____, 1999.

FREEMAN MATHIS & GARY, LLP

_____
T. Bart Gary
Georgia Bar No. 287430

Attorney for Defendant
Westinghouse Electric Corporation

100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5959
(770) 818-0000
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Defendant Westinghouse Electric Corporation's Brief in Support of Second Motion for Summary Judgment** thereof has been sent by first class mail, postage prepaid to:

Jon B. McPhail
Jon McPhail & Associates
6255 Barfield Road
Suite 155
Atlanta, Georgia 30328

This _____ day of _____, 1999.

_____
T. Bart Gary
Georgia Bar No. 287430

Freeman Mathis & Gary, LLP
100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5959
(770) 818-0000
KWB1171.DOC
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