UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, for the use of RCO CONSTRUCTION, LLC, Plaintiff, v. FEDERAL INSURANCE COMPANY, Defendant.	)	CIVIL ACTION NO. 20-00154

YOUNG, D.J.[1] May 3, 2022

MEMORANDUM OF DECISION

More and more parties are eager to cut the jury trial off at its knees through summary judgment. As Judge Patricia Wald aptly noted:

> [f]ederal jurisprudence is largely the product of summary judgment . . . . It is 1-L stuff that a motion for summary judgment lies only when there is no genuine issue of material fact, and that Rule 56 is not designed to foreclose when material facts are at issue. But research and observations in my D.C. Circuit suggest that summary judgment has assumed a much larger role in civil case dispositions than its traditional image portrays or even than the text of Rule 56 would indicate, to the point where fundamental judgments about the value of trials and especially trials by jury may be at stake.

The Honorable Patricia Wald, Summary Judgment at Sixty, 76 Tex. L. Rev. 1897, 1897-98 (1998). Courts ought be cautious in

[1] Of the District of Massachusetts, sitting by designation.

invoking this procedural mechanism, because while at first glance a case may appear apt for the summary judgment ax, more often than not its outcome relies on minute factual issues that are best left to the jury. This is one such case.

I. INTRODUCTION

The United States of America for the use of RCO Construction brought a claim against the Federal Insurance Company ("Federal") under the Miller Act, which allows subcontractors to sue for payment to which they are entitled on a construction project bond. Federal moved for summary judgment on the basis that the one-year statute of limitations had elapsed on RCO Construction's Miller Act claim. The determination of whether the statute of limitations elapsed hinges on when RCO Construction's last day of work took place, or, in other words, when the statute of limitations clock began to run.

Federal argued that the payroll records and documentary evidence provide sufficient proof that RCO Construction's last day was April 10, making its claim untimely by two days. RCO Construction countered that its employees were physically present and working on the project in question on April 12 and 13, making their action timely. RCO Construction also argued that payroll records and other documentary evidence are not definitive proof of its last day of work.

At a hearing held on December 9, 2021, this Court denied Federal's motion for summary judgment. This memorandum of decision explains the Court's reasoning. There is a genuine dispute of material fact as to whether RCO Construction's employees were physically present and working on the project on April 12 and 13. Furthermore, the payroll records and documentary evidence here cannot be considered definitive proof of the last day of work. More broadly, Miller Act cases cannot be decided on the basis of payroll records alone.

II. PROCEDURAL HISTORY

RCO Construction[2] filed suit against Federal on April 13, 2020. See Compl., ECF No. 2. On February 3, 2021, Federal moved for summary judgment. See Def.'s Mot. Summ. J. & Br. Supp. ("Mot. Summ. J."), ECF No. 16. The parties fully briefed this motion. See Pl.'s Response & Objection Def.'s Mot. Summ. J. ("Opp'n Mot. Summ. J."), ECF No. 19; Def.'s Reply Supp. Mot. Summ. J. ("Reply"), ECF No. 21.[3]

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[2] Under 40 U.S.C. 3133(b)(3), an action such as this one must be brought in the name of the United States for the use of the person bringing the action, which RCO has successfully done. See generally Compl. For ease of reference, however, the plaintiff will hereinafter be referred to simply as "RCO Construction."

[3] This Court has Federal Question subject matter jurisdiction over this matter, as it involves an action on a payment bond executed under Title 40, section 3131 of the United States Code et. seq. (the "Miller Act"). See 28 U.S.C. § 1352 ("The district courts shall have original jurisdiction,

This Court held a hearing on December 9, 2021 and denied the motion for summary judgment. See Minutes Proceedings, ECF No. 28. This memorandum explains the Court's reasoning.

III. FACTS

A. Undisputed Facts

RCO Construction is a Texas Limited Liability Company, all of whose members reside in Texas. The defendant Federal is a corporate surety that conducts business in Oklahoma and Texas. Compl. ¶ 1. Ross Construction Corp. ("Ross") is a player in this suit, in that it is the general contractor that hired RCO Construction to assist with construction on the relevant project. Mot. Summ. J. ¶ 1-2, at 2; Opp'n Mot. Summ. J. ¶ 1-2, at 2.

On May 26, 2016, Ross contracted with NAVFAC Southeast IPT Gulfcoast for a construction project known as Corpus Christi Repairs Hangar 55 and 56 and Fire Protection, Naval Air Station Corpus Christi, Texas ("the Project"). See Mot. Summ. J. 1; Opp'n Mot. Summ. J. 1. Pursuant to the Miller Act, Ross as the principal, and Federal, as the surety, executed a payment Bond, No. 8244-14-48, in connection with the Project. Id.

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concurrent with State courts, of any action on a bond executed under any law of the United States, except matters with jurisdiction of the Court of International Trade under section 1582 of this title."); see also Compl. ¶ 3.

On or around April 19, 2017, Ross and RCO Construction entered into a subcontract for the performance of certain work on the Project (Subcontract Agreement Number 04177.10-32-1313-0004) ("the Subcontract"). Mot. Summ. J. ¶ 1-2, at 2; Opp'n Mot. Summ. J. ¶ 1-2, at 2. RCO Construction continued work on the Project from 2017 to 2019. Mot. Summ. J. ¶ 5, at 3; Opp'n Mot. Summ. J. ¶ 5, at 3.

The parties disagree on when exactly RCO Construction's work ceased in 2019: RCO Construction argues its last day of work was April 13, 2019, at the earliest, and Federal argues it was April 10, 2019, at the latest. Mot. Summ. J. ¶ 3, at 2-3; Compl. ¶ 11. The parties do, however, agree on several key facts pertinent to this inquiry.

Both parties agree that RCO Construction submitted the following payroll records: (1) one for the week ending on April 10, 2019, see Mot. Summ. J., Ex. 3, Weekly Certified Payroll Reporting Form, ECF No. 16-3, and (2) another for the week ending on April 17, 2019, titled "Certified Payroll Report for **Non-Performing Week**," see id. Ex. 4, Certified Payroll Report for Non-Performing Week, ECF No. 16-4 (emphasis added); see also Mot. Summ. J. ¶ 3, at 2; Opp'n Mot. Summ. J. ¶ 3, at 2. RCO Construction also attached to its opposition a certified payroll -- Federal does not dispute its authenticity -- starting on April 25 and ending on May 1, 2019, which lists the same workers

as the April 10, 2019 Payroll and is associated with the same project. See Opp'n Mot. Summ. J., Ex. 7, Certified Payroll Week Ending May 1, 2019, ECF No. 19-7.

Both parties agree that on April 12, 2019, Ryan Ahlgrim ("Ahlgrim"), a Ross employee, sent an email requesting that RCO Construction fill trenches and proceed with tank excavation work. See Reply 3; Opp'n Mot. Summ. J. ¶ 3, at 2. In this email, Ahlgrim lists several tasks that "RCO [Construction] needs to do by close of business Friday, April 19th." See Opp'n Mot. Summ. J., Ex. 3, April 12, 2019 Email from Ryan Ahlgrim ("Ahlgrim's April 12 Email"), ECF No. 19-3. The email lists four separate items: (1) **backfilling the trench** and providing a total of five plates; (2) backfilling the **tank excavation**; (3) possibly using the **rock on site**; and (4) cleaning up **the punch list**. Id.

On April 16 and 17, 2019, RCO Construction and Ross exchanged emails regarding additional plates, the number that Ross would need for the Project, and what a quote on those plates would look like. See Opp'n Mot. Summ. J., Ex. 6, Email dated April 16, 2019 from Ross, ECF No. 19-6. Someone from Ross asked about the "status of the trench filling" during this conversation. Id. at 4. To this, someone from RCO Construction replied, "we have everything ready to go, we are just waiting to hear back on payment status for Feb." Correction Reply Exs.,

Ex. 1-A, April 16, 2019 Email Chain, ECF No. 22-1. Federal also submits a proposal drafted by RCO Construction on April 17, 2019, that lists "[b]ackfill[ing] of all existing trench areas" and providing plates, as tasks **to be completed**. See id. Ex. 1-B, Proposal, ECF No. 22-1.

Federal also attached several other email exchanges to its briefing -- RCO Construction does not dispute the authenticity of these documents. On April 19, 2019, Ahlgrim sent an email which states "I think we've convinced NAVFAC to leave the trenches open for now . . . ." See id. Ex. 1-C, April 19, 2019 Email Chain, ECF No. 22-1. On April 20, Ahlgrim sent an email stating "backfilling the tank excavation didn't happen last week. Doesn't even look like an attempt was made." See id. Ex. 1-D, April 20, 2019 Email Chain, Ex. 22-1. RCO Construction replied the same day with an email stating that "[t]here is nothing to backfill with" and that any backfilling material would constitute an added cost that Ross would need to cover in order for RCO Construction to move forward. See id.

On April 25, 2019, Ross terminated RCO Constructions's right to perform the remainder of the Subcontract. Mot. Summ. J. ¶ 5, at 3; Opp'n Mot. Summ. J. ¶ 5, at 3. RCO Construction collected its tools between April 30 and May 1, 2019. Mot. Summ. J. ¶ 6, at 3.

On November 1, 2019, RCO Construction filed an action identical to the one at bar in the District Court for the Southern District of Texas, which it voluntarily dismissed on January 15, 2020, pursuant to Federal Rule of Civil Procedure 41(a). Mot. Summ. J. ¶ 7, at 3-4; Opp'n Mot. Summ. J. ¶ 7, at 4.

On April 13, 2020, RCO Construction filed the instant action alleging one count under the Miller Act, claiming that Ross and its surety, Federal, have refused to pay a series of invoices to RCO Construction amounting to $152,466.24. Compl. ¶¶ 12-16, 17-19. In its complaint RCO Construction alleges that it was hired to provide subcontract work, equipment, and material necessary for the sitework, utilities, and concrete installation for the Project, making it a "first-tier" subcontractor.[4] Compl. ¶¶ 9-10.

B. Disputed Facts

The central dispute is whether RCO Construction's last day of work was April 10, 2019, as Federal claims, Mot. Summ. J. ¶ 3, at 2, or April 13, 2019, as RCO Construction argues, Compl. ¶ 11.

[4] "First tier" subcontractors are considered primary subcontractors, as they contract directly with the relevant contractors, and thus are covered by the Miller Act. See Matter of Garden State Erectors, Inc., 599 F.2d 1279, 1280 (3d Cir. 1979). Federal does not challenge RCO Construction's status as a "first tier" subcontractor.

Federal states that "documentary evidence" establishes that RCO Construction did not return to the Project on April 12, and 13. Reply 2. First, Federal argues that the payroll records indicate that April 10 was the final working week for RCO Construction on the project. See Mot. Summ. J. ¶ 3, at 2. Second, it states that the April 16, 19, and 20 email chains **imply** no backfilling was done on the project, and thus that the tasks mentioned in Ahlgrim's April 12 email were not completed on April 12 and 13. See Reply 2-4. Third, Federal attaches a proposal from the subcontractor it engaged after terminating RCO Construction, Coastal Concrete Construction, which it claims completed the trench and tank backfill that RCO Construction did not complete. See Reply, Exs. 1-E-1-F, Coastal Concrete Construction Subcontracts, ECF No. 22-1. Federal also includes the affidavit of James Hamilton ("Hamilton"), the Assistant Project Manager for Ross, who attests all of the documentary evidence is authentic. See Correction Reply Exs., Ex. 1, Aff. James Hamilton, ECF No. 22-1. Federal concedes, however, that Hamilton was not on site on April 12 and 13 and therefore cannot attest to who was or was not present those days. Reply 5; Opp'n Mot. Summ. J. ¶ 6, at 5.

RCO Construction rebuts, first, that the certified payroll records only list hourly employees and that RCO Construction was not required to submit records for salaried employees. Opp'n

Mot. Summ. J. ¶ 6, at 3. It also states that the payroll records indicate that RCO Construction's employees worked until May 1, 2019. See id. ¶¶ 9-11, at 6. Second, RCO Construction states that Ahlgrim's email caused RCO Construction's staff, including its utility subcontractor, to be on site April 12 and 13. See id. ¶ 3, at 2. Specifically, it claims that on April 12 and 13 it "performed earthwork and backfilled open holes." Id. ¶ 2, at 4. To that end, RCO Construction attaches two affidavits -- one from its employee and the other from its utility subcontractor -- claiming workers were present on site on April 12-13, 2019. See Opp'n Mot. Summ. J., Ex. 4, Aff. R.J. Delagarza ¶ 7, ECF No. 19-4 (attesting, as RCO Construction's Vice President of Operations, that its employees were present on site on April 12 and 13); see id. Ex. 5, Aff. Gilbert Cruz, ECF No. 19-5 (attesting, as the owner of Cruz contracting, the utility subcontractor, that its employees and RCO Construction employees were on site April 12 and 13). RCO Construction also claims that the email chains on April 16-20 indicate pricing negotiations for "**additional** excavation, backfill and plating work." Opp'n Mot. Summ. J. ¶ 7, at 5 (emphasis added). In support of this argument, it discusses how the April 16th emails show a negotiation regarding the number of plates and pricing, indicating it was a new project and not one included in the original contract. Mem. Opp'n Summ. J. 9.

The parties also disagree about the relevance of a Blue Angels air show that took place on the airbase where project operations were occurring. Federal alleges that the Project site was closed from April 12, 2019 to April 14, 2019 for a Blue Angels air show at the Naval Air Station, which prevented work on or near the flight line. Mot. Summ. J. ¶ 4, at 3. RCO Construction concedes that a Blue Angels air show took place during those dates but denies that the show impacted its work in any way. Opp'n Mot. Summ. J. ¶ 4, at 5. More specifically, it states RCO Construction workers were never instructed not to report to the worksite during those dates. See Aff. R.J. Delagarza ¶ 8. In its reply, Federal disputes this claim but also argues that it is immaterial. Reply 5.

IV. LEGAL STANDARD

Summary judgment is required when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Materiality depends on the substantive law, and only factual disputes that might affect the outcome of the suit can preclude summary judgment. Id. In reviewing the evidence, this Court must "draw all reasonable inferences in favor of the nonmoving

party, and it may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

"In its review, the Court construes the record in the light most favorable to the party opposing summary judgment." Wicks v. United States, 304 F. Supp. 3d 1079, 1089 (N.D. Okla. 2018) (Eagan, J.). This Court must "disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves, 530 U.S. at 151. The moving party bears the initial burden of demonstrating that "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the movant does so, then the nonmovant must set forth specific facts sufficient to establish a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986).

V. ANALYSIS

The Miller Act requires that "[b]efore any contract of more than $100,000 is awarded for construction, alteration, or repair of any public building or public work of the Federal Government, a person must furnish to the Government" several bonds including: (1) a performance bond with surety; and (2) a payment bond for the protection of all persons supplying labor and materials in carrying out the work provided for the contract for

use of each person. 40 U.S.C. § 3131. The Miller Act provides a right of action for contractors who believe they have not been paid in violation of the act. Id. § 3133(b)(2). The action must be brought in the name of the United States and can be brought in any district in which the contract is to be performed or was executed regardless of the amount in controversy. Id. § 3133(b)(3). The key issue of this case is whether the statute of limitations has elapsed on RCO Construction's claim.

A Miller Act suit must be brought "no later than one year after the day **on which the last of the labor was performed or material was supplied** by the person bringing the action." Id. § 3133(b)(4) (emphasis added). RCO Construction filed the present action on April 13, 2020. Compl. As stated earlier, the parties' dispute centers around whether the "last of the labor was performed" on **April 10, 2019**, or **April 13, 2019**. Mot. Summ. J. ¶ 3, at 2; Compl. ¶ 11. The relevant period for statutes of limitations "exclude[s] the day of the event that triggers the period" and runs every day thereafter including the last day of the period, except if the last day is a Saturday, Sunday, or legal holiday. See Fed. R. Civ. P. 6(a)(1). "Under this rule, when a statute of limitations is measured in years, the last day for instituting the action is the anniversary date of the relevant act." United States v. Hurst, 322 F.3d 1256, 1260 (10th Cir. 2003). Here, depending on which party's date is

adopted, the last day to file was either **April 10, 2020** (a Friday), making the filing untimely, or **April 13, 2020** (a Monday), making the filing timely, and in the nick of time at that.

How to determine "exactly when 'the last of the labor was performed or material was supplied' for purposes of" § 1331(b)(4) is a fraught question. United States v. Int'l Fid. Ins. Co., 200 F.3d 456, 459 (6th Cir. 2000) (quoting 40 U.S.C. § 1331(b)(4)). Here it depends on two issues: (A) what factors are considered in establishing the last day of labor; and (B) whether the payroll and documentary evidence ought be weighed as determinative compared to other conflicting evidence. See Mot. Summ. J. 6.

As this memorandum explains, Federal's motion for summary judgment was denied because the payrolls do not create a definitive proof and there is a genuine issue of material fact as to when the last day of work took place. In other words, whether the statute of limitations has run on RCO Construction's claim is disputed.

A. Factors Relevant to Determining the Last Day of Labor in Miller Act Cases

To assess what the last day of work was for statute of limitations purposes, this Court must determine when work on RCO Construction's "original contract" concluded. U.S. for Use of

Magna Masonry, Inc. v. R.T. Woodfield, Inc., 709 F.2d 249, 251 (4th Cir. 1983) (internal quotations omitted). There appear to be two core views on how to determine a contract's conclusion date: (1) "upon substantial completion of a subcontract" and (2) "upon completion of the original requirements of the contract (as opposed to completion of 'corrections or repairs')." United States v. Fid. & Deposit Co. of Maryland, 999 F. Supp. 734, 742 (D.N.J. 1998).

The latter is the majority approach[5] and specifies that corrective work or repairs should not be factored for the statute of limitations calculation, because they cannot be considered part of the original contract. See Int'l Fid. Ins. Co., 200 F.3d at 460 ("The majority of circuits that have addressed this issue have held that remedial or corrective work or materials, or inspection of work already completed, falls outside the meaning of 'labor' or 'materials' under §

[5] The Fifth and Eleventh Circuits adopt the minority view under which "substantial completion" is the operative test of when the statute of limitations begins to run. See Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 172 (5th Cir. 1973); General Ins. Co. v. United States, 406 F.2d 442, 443-44 (5th Cir. 1969), reh'g denied, 409 F.2d 1326, cert. denied sub nom, United States for Use of Audley Moore & Son v. General Ins. Co., 396 U.S. 902, (1969); Trinity Universal Ins. Co. v. Girdner, 379 F.2d 317, 317 (5th Cir. 1967); Southern Steel Co. v. United Pac. Ins. Co., 935 F.2d 1201, 1205 (11th Cir. 1991). Under this view "insubstantial" work does not toll the statute of limitations, even if it is required under the prime contract. See, e.g., Johnson, 485 F.2d at 172.

[1331](b).”); United States for Use of Noland Co. v. Andrews, 406 F.2d 790, 792 (4th Cir.1969) (holding the “applicable legal test” to be “whether the work was performed and the material supplied as a part of the original contract or for the purpose of correcting defects, or making repairs following inspection of the project” (quotations omitted)); see also Magna Masonry, 709 F.2d at 250. “Hence, performing such [repair] work or supplying such materials will not toll the Miller Act’s one-year statute of limitations.” Int’l Fid. Ins. Co., 200 F.3d at 460; see also United States ex rel. Olson v. W.H. Cates Constr. Co., 972 F.2d 987, 991 (8th Cir. 1992); United States for Use of Billows Elec. Supply Co. v. E.J.T. Constr. Co., Inc., 517 F. Supp. 1178, 1181 (E.D. Pa. 1981), aff’d, 688 F.2d 827 (3d Cir. 1982), cert. denied, 459 U.S. 856 (1982); United States for Use of General Elec. Co. v. Gunnar I. Johnson & Son, Inc., 310 F.2d 899, 903 (8th Cir. 1962); United States for Use of Mod-Form v. Barton & Barton Co., 769 F. Supp. 235, 238 (E.D. Mich. 1991), aff’d without opinion, 966 F.2d 1453 (6th Cir. 1992). This, of course, entails that if there is a genuine dispute of material fact as to (1) whether work has taken place at all after a certain date or (2) whether the work that has taken place after the operative date is a “repair,” summary judgment is not appropriate. See United States for Use & Benefit of Austin v. W. Elec. Co., 337 F.2d 568, 575 (9th Cir. 1964).

The Tenth Circuit has adopted this majority approach. See Steenberg Const. Co. v. Prepakt Concrete Co., 381 F.2d 768, 774 (10th Cir. 1967). In United States v. Hesselden Construction Co., the Tenth Circuit dealt with what the "last day of work" is for purposes of a different section of the Miller Act's requirements -- the section governing the Act's notice requirements, 40 U.S.C. § 3133(b)(2). 404 F.2d 774, 776 (10th Cir. 1968). It held that the last day of work is when the last part of the "original contract" was performed, not when "corrections or repairs" were made. Id.

Courts look to several factors to determine whether something is contained in the "original contract" -- rather than being a repair. First, courts evaluate the contract language to determine if the work in question meets a particular **contract requirement**. See Billows, 517 F. Supp. at 1182; United States for Use & Benefit of Am. Civ. Constr., LLC v. Hirani Eng'g & Land Surveying, P.C., 263 F. Supp. 3d 99, 111 (D.D.C. 2017) ("Instead, the court will simply look to the contract to determine for what tasks the parties agreed the subcontractor would be compensated, then determine the last date on which the subcontractor supplied materials or labor for one of those tasks.").

Second, courts look to **surrounding evidence** during the course of work that tends to clarify what tasks were considered

to be necessary to the original project -- such as whether the task was part of a "punch list." See, e.g., Austin, 337 F.2d at 573 (holding that because some projects fell under a "punch list," which was submitted before completion of the project, there was a genuine dispute of material fact as to whether those projects were part of the original contract or a repair). Third, courts will consider when a **"final inspection"** occurs -- often work taking place after inspection is considered to be a repair or auxiliary, and not factored into the statute of limitations. See Hesselden, 404 F.2d at 776 (holding that materials submitted after final inspection ought be considered part of a repair). It should be noted, however, that "inspection of work" will not extend the statutory period under the Miller Act. See Mod-Form, 769 F. Supp. at 238. And that inspection is not always dispositive -- even if a site passes inspection, the last "labor" for statute of limitations purposes has yet to occur if key elements required by the contract and subcontract are missing. See Andrews, 406 F.2d at 792. Fourth, some courts have considered **when the prime contract was terminated**. See United States of Am. for Use & Benefit of Am. Civ. Constr., LLC v. Hirani Eng'g & Land Surveying, PC, 26 F.4th 952, 959 (D.C. Cir. 2022).

Additionally, **whether the work is demobilization or cleanup work is not always dispositive**. For example, the Tenth Circuit

has at least in one case held that demobilization or clean-up work could be considered "labor" for statute of limitations purposes because it was contained in the contract under a "lump sum." Steenberg, 381 F.2d at 774 ("The contract and subcontract both provided for a lump sum price for mobilization and demobilization for the drilling and grouting work. In these circumstances, we cannot say that demobilization was not labor performed by Prepakt on the project within a year prior to the filing of the counterclaim."). But such a conclusion could not be sustained if cleanup work was **not compensable** work under the sub-contract. See, e.g., Hirani, 263 F. Supp. 3d at 114.

Assessing these **four key factors** -- centrality to the contract, outside evidence, date of final inspection, and date of termination of prime contract -- it becomes clear that the factors either weigh in RCO Construction's favor or elucidate genuine disputes of material fact.

First, while the **language of the Subcontract** is informative, it does not resolve the dispute. The Subcontract states that "[t]he subcontractor shall furnish all materials, tools, and equipment, and perform all work and labor necessary for the completion for the following portion(s) of the project: **Sitework, Utilities, Concrete.**" Mot. Summ. J., Ex. 1, Ross Group Sub-Contract ("Sub-Contract") 3, ECF No. 16-1. The key requirements of the contract highlight the genuine disputes of

material fact involving whether **sitework-** and **concrete-related** tasks were complete.

The parties disagree whether the April 10, 2019, Payroll encompasses all of the relevant workers who could have been on site, or whether there may be additional salaried employees (not encompassed by the payroll) who returned to complete **sitework** after April 10, 2019. See Mot. Summ. J. ¶ 3, at 2; Opp'n Mot. Summ. J. ¶¶ 9-11, at 6. Related to this argument about individuals' physical presence on the site, there is a dispute about whether the Blue Angels air show would have prevented RCO Construction's presence at the site. Mot. Summ. J. ¶ 4, at 3 (stating that the show's run from April 12 to 14, 2019, would have prevented work at the site); Opp'n Mot. Summ. J. ¶ 5, at 5 (stating that RCO Construction was never notified that it could not access the site during those dates and that the Blue Angels air show did not impact its work). Finally, there is a genuine dispute about whether the April 25 to May 1, 2019, payroll ought be taken into account. See Mot. Summ. J. 6.

Another dispute centers around the backfilling of the trench and tank excavation -- both key tasks under the contract. Undisputedly, Ahlgrim's April 12 email mentions these two tasks and, on April 17, 19, and 20, Ahlgrim referenced backfilling and trench work several times as unfinished projects. Ahlgrim's April 12 Email; Email dated April 16, 2019 from Ross; April 19,

2019 Email Chain; April 20, 2019 Email Chain. Federal argues that this exchange implies no backfilling was done on the project on April 12 and 13. See Reply 2. RCO Construction disputes this, asserting it was onsite completing earthwork and filling open holes on April 12 and 13, and stating that the emails from April 16-20 referenced "additional excavation, backfill, and plating work." See Opp'n Mot. Summ. J. ¶ 7, at 5. Although the evidence appears lopsided somewhat in Federal's favor, a genuine dispute of material fact exists for several reasons: (1) all of the documentary evidence (the emails) Federal provides are from Ahlgrim, a Ross employee, who may provide a skewed view of the work at the site; (2) RCO Construction genuinely disputes whether Ahlgrim was mentioning new work that needed to be addressed or the existing work mentioned in the April 12 email; (3) even taking for granted that Federal is right and these two tasks were not completed on April 12 and 13, there are two other tasks listed on Ahlgrim's April 12 Email -- using the rock on site and cleaning up the punch list, see Ahlgrim's April 12 Email -- which RCO Construction could have feasibly been doing on April 12 and 13 and which Federal raises no documentary evidence to rebut.

The second factor, the **punch list**, also highlights a genuine dispute of material fact. As stated, the punch list was mentioned in Ahlgrim's April 12 email, but it is never defined

in the evidence cited by the parties or discussed in the briefing. See Ahlgrim's April 12 Email; see generally Mot. Summ. J.; Mot. Opp'n Summ. J. Furthermore, some of the actions RCO Construction claims to have taken on April 12 and 13 -- filling holes and conducting earthwork -- Opp'n Mot. ¶ 2, at 4, could have been part of the punch list, and none of the documentary evidence Federal cites (with the exception of its broad statements regarding the payroll), contradicts that these could have been the items RCO Construction was taking care of on April 12 and 13.

Third, there was no **final inspection** here. Fourth, RCO Construction's contract was undisputedly not **formally terminated** until April 25, 2019. See Mot. Summ. J. ¶ 5, at 3; Opp'n Mot. Summ. J. ¶ 5, at 3. This fact, if anything, counsels in RCO Construction's favor of a later "last day of labor."

Finally, Federal claims any of RCO Construction's **cleanup efforts** were not labor for statute of limitations purposes. See Mot. Summ. J. 6 (citing Hirani, 263 F. Supp. 3d at 114). This cleanup undisputedly took place, at least in part, when RCO Construction went to collect its tools on April 30 and May 1, 2019. See id. ¶¶ 3-4, 6, at 2-3. Specifically, Federal argues that RCO Construction's own pay applications only indicated mobilization and not demobilization as compensable work. See id. As Federal concedes, RCO Construction does not argue its

team's demobilization or cleanup need be taken into account in order for this action to be timely; therefore, determining whether RCO Construction's demobilization ought be factored into the work on the "original contract" is not necessary.

Even if this Court were to do so, this situation is not as clear-cut as Federal makes it out to be. The sub-contract states cleanup is to be exempted from the cost of performance if not completed by the sub-contractor. Sub-Contract 6. Citing American Civil Construction, LLC v. Hirani, Federal contends that RCO Construction's demobilization work was not factored into the contract. See Mot. Summ. J. 5 (citing Hirani, 263 F. Supp. 3d at 114). Hirani, however, only stood for the notion that if the subcontract makes clear cleanup or demobilization "is **not** compensable work" then it will not be factored into the definition of labor for statute of limitations purposes. 263 F. Supp. 3d at 114. This contract, if anything, seems to lead to the contrary conclusion: that cleanup is compensable work and failure to conduct cleanup will be removed from the sub-contractor's payment. Therefore, it is possible that RCO Construction's cleanup work could be factored for purposes of calculating the last day of labor.

B. Payroll Records, Documentary Evidence, and the Existence of a Genuine Dispute of Material Fact

Federal posits that there is no genuine dispute of material fact because the payrolls -- along with the other documentary evidence that supported them -- constitute "sufficient evidence for the Court to find that RCO [Construction's] last date of labor was April 10, 2019." Reply 6. Both in its briefing and at the hearing, Federal argued that the "self-serving" and "contradicted" affidavits, presented by RCO Construction to counter the documentary evidence, "simply do not create a triable issue of fact." Id. 5-6.

RCO Construction rebuts that courts have previously refused to resolve cases based on final invoices or certified payrolls alone, and that the accompanying documentary evidence here is not only contested, but also does not demonstrate that its last day of work was April 10, 2019. Mem. Opp'n Summ. J. 7-8.

The sparse case law that exists on this point, Miller Act cases involving multiple contracts, the demands of summary judgment, and the Congressional intent behind the Miller Act, all indicate that payroll records alone are not determinative of the last day of labor. Because, as discussed above, there is a genuine dispute of material fact regarding the remaining documentary evidence, this Court cannot grant summary judgment.

1. Caselaw on Payroll Records and Whether They Constitute Definitive Proof of the Last Day of Labor

Courts have suggested that payroll records are **one of the many** pieces of evidence they consider, highlighting that payroll records are not necessarily determinative in the statute of limitations calculus. See Austin, 337 F.2d at 574 (holding there was a genuine dispute of material fact where an affidavit used payroll records among other things to show the last day of work took place after the disputed date); In re Triangle Maint. Serv., LLC, No. 11-15142, 2013 WL 960356, at *5 (Bankr. N.D. Miss. Mar. 12, 2013) (using payroll records and a job diary, alongside **the absence of evidence** from Plaintiff's side, to indicate that there was no dispute of material fact as to when the last day of work was). In fact, the Tenth Circuit's analysis in Hesselden implied that invoices or payroll records are not definitive proof of the last day of work. See 404 F.2d at 776. There, the court analyzed the original contract to find that the subject matter of the contract was furnished and billed as complete before the final invoice was issued. Id. What mattered, according to the court, was when work on the original project was finished, not what was contained in the last invoice. See id.

The Northern District of New York, the district court which has perhaps considered this issue most in depth thus far, **explicitly** declined to hold that payrolls and invoices are definitive evidence of the last day of labor: "this Court

refuses to resolve this case by an **overly broad rule** that the last labor shall be deemed to have occurred when plaintiff submitted the final invoice or certified payroll to the contractor." CEI, Inc. v. Nat'l Interior Contractor, Inc., No. 95-CV-0205, 1996 WL 365688, at *3 (N.D.N.Y. June 24, 1996) (emphasis added). In CEI, Inc. v. National Interior Contractor, Inc., the court ruled that reasonable minds could differ as to when was the last day of work, even if they took the defendant's view as to when the last invoice was sent. See id. Furthermore, the court emphasized that "[t]he **burden** is not on the non-movant to show with absolute certainty that the movant is wrong, but he must provide enough evidence to demonstrate there is a genuine issue for trial." Id. (emphasis added).

This is precisely the type of dispute at hand here. First, reasonable minds could differ as to the payroll records themselves, as payroll records exist for the weeks of April 17 and April 25, see Certified Payroll for Non-Reporting Week; Certified Payroll dated April 25, 2019, not just April 10, and RCO Construction claims these payrolls do not encompass all of its workers, see Opp'n Mot. Summ. J. ¶¶ 9-11. Second, the supplemental documentary evidence is not only vague and susceptible to differing interpretations, but also solely in the form of emails sent by Ahlgrim, a Ross employee. See supra V.A.

All other forms of evidence take the form of affidavits. See id.

Federal, in its briefing and at oral argument, argued that CEI, "the very authority cited in RCO [Construction's] Response," supports its motion. See Reply 6. Federal refers specifically to one parenthetical citation in CEI:

> While [payroll] evidence can be helpful in the determination, other similar evidence must support the conclusion that the work was, in fact, complete. See [United States for Use of H.T. Sweeney & Son, Inc. v. E.J.T. Const. Co., Inc., 415 F. Supp. 1328, 1332 (1976)](holding that evidence of correspondence between the contractor and plaintiff "corroborated" the invoices and bills to clearly establish the date of "last labor").

1996 WL 365688, at *3. Federal argues that this is the exact situation at hand, as its emails corroborate this conclusion. Reply 6. Federal also cites to BanxCorp v. Costco Wholesale Corporation, which teaches that "a self-serving, contradictory affidavit fails to raise a triable issue of fact when it conflicts with documentary evidence." See Reply 6 (quoting 978 F. Supp. 2d 280, 299 (S.D.N.Y 2013)).

Contrary to Federal's framing, CEI does not stand for the notion that any time a payroll is accompanied by outside documentary evidence it is sufficient to establish the last day of labor. This reading is an error of logic. Rather, CEI stands for the converse: without additional evidence, payrolls are not sufficient evidence, but with additional evidence, they

may be. As to BanxCorp, the Southern District of New York spoke of an affidavit that contradicted the calculation of averages, derived from authentic public money market data. 978 F. Supp. 2d at 303. Here, the affidavits are not at all comparable, as they: (1) provide additional information -- i.e. the fact that salaried employees are not factored into the payrolls, or the fact that employees could work during the Blue Angels air show; and (2) construe the documentary evidence in a way that is plausible, albeit possibly untrue -- i.e. that the email conversations were discussing an additional rather than existing project. While admittedly a close case, the issues at bar constitute neither the scenario contemplated in CEI nor that that in BanxCorp.

Therefore, not only are payroll records alone never sufficient to show the absence of a genuine dispute of material fact, but also, in this case, there is evidence to create a genuine dispute of material fact outside the payroll data.

2. Miller Act Cases Involving Separate Invoices

How courts treat statute of limitations issues concerning Miller Act claims where several separate invoices are involved is also informative. The general rule is that the limitations period for **all claims** associated with a single project begins to run when the last service or material was provided, regardless of whether the claims are associated with separate invoices or

payrolls. See GE Supply v. C & G Enterprises, Inc., 212 F.3d 14, 18 (1st Cir. 2000). In other words, as long as the services or materials were provided for a "single project" that was subject to a "single payment bond," it is of no consequence that they were captured by separate invoices. Id. Thus, if a plaintiff brings "its Miller Act claim within the one-year period following the day on which it supplied the last material for the Project, its entire claim is timely." Id.

Courts then consider the statute of limitations based on **bond**, not on **invoice**. See United States for Use & Benefit of Trane Co. v. Raymar Contracting Corp., 406 F.2d 280, 283 (2d Cir. 1968) (Kaufman J., dissenting) ("It is more in keeping with Congressional intent for us to construe the one-year limitation as running only once for each supplier on a job, commencing on the last day he supplied any material for work under the prime contract."); see also Gen. Elec. Co. v. S. Const. Co., 383 F.2d 135, 138 (5th Cir. 1967) (holding that the plain meaning of the Miller Act does not limit recovery only to those invoices that fall within the limitations period); cf. U.S. for Use of Grotnes Mach. Works, Inc. v. Henry B. Byors & Son, Inc., 454 F. Supp. 203, 206 (D.N.H. 1978) (distinguishing its holding from the aforementioned cases because there were "[s]eparate contracts for separate projects covered by separate payment bonds," thus indicating that the bond, and not the contracts, is the

instrumental metric in determining whether a claim falls within the statute of limitations).

This caselaw supports the conclusion that courts determine timeliness not based on payrolls, which provide similar evidence to invoices, but on all evidence relevant to the work activities associated with a bond. This advocates against weighing Federal's payroll evidence as more definitive than the rest of the conflicting evidence provided.

3. The Principles of Summary Judgment & the Importance of Leaving Factual Questions for the Jury's Determination

The Tenth Circuit has explained that a genuine dispute exists "if a **rational jury** could find in favor of the nonmoving party on the evidence presented." Laul v. Los Alamos Nat'l Lab'ys, 765 F. App'x 434, 440 (10th Cir. 2019) (internal quotations omitted) (emphasis added). Where the dispute rises and falls on the weight or credibility of certain evidence, a genuine dispute of material fact exists and summary judgment is not appropriate, because "determining the weight and credibility of the evidence is within the sole province of the jury." United States v. Garza, 990 F.2d 171, 173 (5th Cir. 1993). Furthermore, where documentary evidence is susceptible to different, yet reasonable, interpretations, a question of fact for the jury also exists. See Lanier Pro. Servs., Inc. v. Ricci, 192 F.3d 1, 4 (1st Cir. 1999) (discussing how when

contract terms have multiple possible and plausible interpretations, which reading is to prevail is for the jury to decide). Courts ought be wary of substituting their own judgment regarding the sufficiency of the evidence for that of the "reasonable jury." See Suja A. Thomas, The Fallacy of Dispositive Procedure, 50 B.C. L. Rev. 759, 760 (2009) (arguing that "under the mantra of whether a reasonable jury could find for the plaintiff -- **judges** do indeed decide whether **they** could find for the plaintiff or whether **they** think that the evidence is sufficient, not whether a reasonable jury could find for the plaintiff or whether a reasonable jury could think that the evidence is sufficient" (emphasis added)).

Appropriate deference to jury's role is essential. Fidelity to the Federal Rules and this Circuit's precedent demand it. Moreover, when courts disregard this principle, it has direct and negative impact on the survival of the jury trial more broadly. As Judge Posner observed: "The expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial." Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 1997). The empirical data confirms, "[t]he decline in trials coincides with a significant increase in summary judgment." Richard L. Steagall, The Recent Explosion in Summary Judgment Entered by the Federal Courts has Eliminated the Jury from the

Judicial Power, 33 S. Ill. U. L. J. 469, 469 (2009). Courts ought be mindful of this drift and guard against it, with a keen eye towards confining themselves to what is truly a legal, rather than a factual, dispute.

Essentially, what Federal asks of this Court is to exercise its judgment for that of the jury as to the probative effect of payroll data and some accompanying documentation. Federal hopes this Court will find facts -- that Ahlgrim's emails are a true assessment of the conditions of the worksite, that only the April 10 payroll is central to the work, that the Blue Angels air show prevented work on April 12 and 13, and that Federal's interpretation of the attached email chains is credible. This Court declines to take such liberties with the summary judgment standard and infringe upon the province of the jury.

4. The Congressional Intent of the Miller Act

Courts' interpretations of the Miller Act generally support this reading of payroll evidence. "The essence of [the Miller Act's] policy is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his suppliers of labor and material." United States ex rel. Sherman v. Carter, 353 U.S. 210, 216-17 (1957). "[T]here is no dispute that the Miller Act's purpose is to ensure that subcontractors are promptly paid in full for furnishing labor and materials to federal construction projects." U.S. ex rel. Acoustical

Concepts, Inc. v. Travelers Cas. & Sur. Co. of Am., 635 F. Supp. 2d 434, 438 (E.D. Va. 2009). Furthermore, the Miller Act is "highly remedial (and) entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects." F. D. Rich Co. v. U. S. for Use of Indus. Lumber Co., 417 U.S. 116, 124 (1974). Courts have cited this remedial purpose in construing and applying the statute of limitations period. See Gen. Elec. Co, 383 F.2d at 138.

This Court's approach to calculating the last day of labor is consistent with the statute's intent. Reading the Miller Act as requiring payroll- or invoice-based proof of the final day of work for statute of limitations purposes would constrain the number of Miller Act claims that could be brought and possibly preclude meritorious claims from being heard -- contrary to the Congressional intent.

VI. CONCLUSION

Federal's motion for summary judgment fails for two reasons. Payroll evidence alone is not sufficient to provide definitive proof of the last day of labor. Even where payroll evidence is supported by documentary evidence, where that documentary evidence is disputed or susceptible to different interpretations, a genuine dispute of material fact exists. Furthermore, here, even if Federal were correct that the payroll

evidence is supported by the documentary evidence, RCO Construction has adduced additional facts to indicate that these documents do not provide the complete picture: viz. these documents arguably do not include salaried employees, they exclude the May 1, 2019, payroll, and they do not factor in other types of work, i.e. earthwork.

What Federal asks of this Court is not just against the summary judgment standard and Miller Act precedent; it also would have the Court transgress its province in relation to that of the Jury. It asks the Court to disregard the jury's role as finder of fact.

For the aforementioned reasons, the Court denied Federal's motion for summary judgment, ECF No. 16. See Minutes Proceedings, ECF No. 28.

/s/ William G. Young
WILLIAM G. YOUNG
JUDGE
of the
UNITED STATES[6]

[6] This is how my predecessor, Peleg Sprague (D. Mass. 1841-1865), would sign official documents. Now that I'm a Senior District Judge I adopt this format in honor of all the judicial colleagues, state and federal, with whom I have had the privilege to serve over the past 44 years.