All Seasons Landscaping, Inc. v. Travelers Cas. & Sur. Co. of Am.

Superior Court of Connecticut, Judicial District of Danbury

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ALL SEASONS LANDSCAPING, INC. v. TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA

Core Terms

warranty, judicial admission, perform work, inspection, toll, contractor, site, limitations period, one-year, subcontract, corrective, supplied, invasives, quotation, e-mail, plaintiff's claim, statute of limitations, payment bond, mischaracterization, terminated, marks, one year, replacement, time-barred, courts, contractual obligation, admission of evidence, completion, percent, removal

Judges: **[*1]** Robert A. D'ANDREA, Judge.

Opinion by: Robert A. D'ANDREA

Opinion

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO DISMISS (#102.00)

The defendant, Travelers Casualty and Surety Company of America ("defendant"), pursuant to Practice Book § 10-30, submits its May 21, 2021 motion to dismiss All Seasons Landscaping, Inc.'s ("plaintiff") complaint, claiming that the plaintiff failed to commence this action within one year after it last provided labor or materials in connection with the public construction contract in question as mandated by General Statutes § 49-42, therefore, its payment bond claim against the defendant, as surety, is not only barred by § 49-42, but pursuant to applicable case law, this court lacks subject matter jurisdiction over the action.

APPLICABLE FACTS

The plaintiff was a subcontractor under a subcontract ("subcontract") to a general contractor, Mastrobattisto, Inc. ("Mastrobattisto") in connection with a public construction contract that Mastrobattisto entered into with the State of Connecticut ("State") for work on a road project in Danbury, Connecticut. As required by statute, the defendant issued a performance bond and a payment bond, each in the penal sum of the project, $4,023,059.25, naming the State, as obligee, and Mastrobattisto, **[*2]** as principal. On March 18, 2019, the State terminated Mastrobattisto's contract and made a demand on the defendant's performance bond to arrange for completion of Mastrobattisto's contract. The defendant fulfilled that obligation by retaining another contractor to complete the contract and executed a takeover agreement with the State, as well as a completion agreement with the replacement contractor. On March 19, 2020, precisely one year after Mastrobattisto was terminated by the State, the plaintiff submitted a payment bond claim to the defendant on a form supplied by the defendant, and in response to the question 2.2(f) "Date you last worked on the project (not including warranty work)," the plaintiff replied "7/31/19." The plaintiff signed a certification of claim on March 19, 2020, and commenced this action on April 27, 2021, two years after Mastrobattisto was terminated from the project and almost two years after the plaintiff, attested, under oath, that it last performed work (not including warranty work) on the project on July 31, 2019.

DEFENDANT'S POSITION

Several established facts from the plaintiff's complaint and from the form that the plaintiff submitted to the defendant **[*3]** under oath, demonstrate that the plaintiff's claim is time-barred. On March 18, 2019, Mastrobattisto's contract with the State was terminated; and the plaintiff attests, under oath, in the claim form, that it last performed work on the project on July 31, 2019. On March 19, 2020, the plaintiff signed the certification of claim section on the claim form that the plaintiff submitted to the defendant, and on April 27, 2021 this suit commenced. The plaintiff has failed to commence its action within the one year required under the dictates of General Statutes § 49-42. By the plaintiff's own sworn statement, it last performed work on the project on July 31, 2019 but did not file its action until almost two years later, and the plaintiff's claim is barred by the statute of limitations and this court lacks subject matter jurisdiction over the claim.

The dictates of General Statutes § 49-42 are well-established. The statute provides in pertinent part: "(b) Every suit instituted under this section shall be brought in the name of the person suing, in the superior court for the judicial district where the contract was to be performed, irrespective of the amount in controversy in the suit, but *no such suit may be commenced after the expiration* ***[*4]*** *of one year after the last date that materials were supplied or any work was performed by the claimant*, except that any such suit solely seeking payment for retainage, as defined in section 42-158i, shall be commenced not later than one year after the date payment of such retainage was due, pursuant to the provisions of subsection (a) of section 49-41a." (Emphasis in original.)

In *Paradigm Contract Mgt. Co. v. St. Paul Fire and Marine Ins.* 293 Conn. 569, 979 A. 2d 1041 (2009), the Supreme Court made clear that compliance with the one-year statute of limitations is a condition precedent to vesting the court with subject matter jurisdiction: "It is well settled that, in an action brought pursuant to § 49-42, 'the time fixed for bringing the action is a limitation on the liability itself, and not of the remedy alone.' Id., 576; see also *Okee Industries, Inc. v. National Grange Mutual Ins. Co.*, 225 Conn. 367, 373, 623 A.2d 483 (1993) ('[w]e have relied on the rule of strict construction when the issue was whether the claimant's notice complied with the specific time requirements of [§ 49-42]'); *Okee Industries, Inc.* at 374, ("[t]he federal precedents, like our own, counsel liberal construction of statutory requirements other than those relating to specific time constraints.") Because compliance with the limitations period set forth in § 49-42 is a jurisdictional requirement, "a timely suit is an absolute condition precedent to maintaining an action under that section. This substantive **[*5]** requirement cannot be avoided by waiver or estoppel." (Citation omitted; internal quotation marks omitted.) *Fisher Skylights, Inc. v. CFC Construction Ltd. Partnership*, 79 F.3d 9, 12 (2d Cir. 1996); see also *Hayes v. Beresford*, 184 Conn. 558, 562, 440 A.2d 224 (1981) ("It is hornbook law that the parties cannot confer subject matter jurisdiction on a court by consent, waiver, silence or agreement"). *Paradigm*, at 576-577.

In *American Masons' Supply Co. v. F. W. Brown Co.*, 174 Conn. 219, 384 A.2d 378 (1978), the Supreme Court stated that "the General Assembly intended . . . §§ 49-41 and 49-42 to operate in general conformity with the federal statute, popularly known as the Miller Act (40 U.S.C. §§ 270a-270d). The provision of § 49-42 . . . [that] sets forth the time limitation within which suit must be commenced under the statute, therefore, is not to be treated as an ordinary statute of limitation, but as a jurisdictional requirement establishing a condition precedent to maintaining an action under that section." (Citations omitted.) Id., 223-24. Accordingly, to the extent that plaintiff's claim was not timely filed, as the defendant maintains, the plaintiff's claim is not only time-barred, but this court lacks subject matter jurisdiction to hear the matter. Because the remaining counts in the complaint are all based on the plaintiff's underlying assertion that it has a viable payment bond claim against the defendant, to the extent the payment bond claim is deemed time-barred, its remaining claims **[*6]** must also necessarily fail.

The defendant acknowledges that the complaint contains an allegation in Paragraph 10 that, ". . . through May 21, 2020, All Seasons has provided Work to the Project." This allegation carries no weight and must be disregarded, as Mastrobattisto's contract with the State was terminated on March 18, 2019, a full one year before the plaintiff claims that it last performed work on the project. Both logically and legally, once Mastrobattisto's contract with the State was terminated, the plaintiff's ability to continue performance under that subcontract was similarly terminated. Once Mastrobattisto's contract was terminated, the defendant's payment bond ceased to cover any work performed on the project after that date. Although the defendant does not accept that the plaintiff actually performed any work on the project in May, 2020, to the extent any such work was performed, it was merely as a

volunteer and not pursuant to any existing contractual obligation with Mastrobattisto, the entity for whom the defendant issued its payment bond. The payment bond that the defendant provided to the State states, in relevant part: "THE CONDITION OF THIS OBLIGATION, is such that **[*7]** WHEREAS said Principal [Mastrobattisto] has entered or intends to enter into a written contract with [the State] . . . NOW, THEREFORE, If said principal shall make payment for all materials and labor used or employed in the performance of such contract . . . then such obligation shall be null and void." The payment bond expressly ties the defendant's obligations to materials and labor used "in the performance of such contract." Clearly, if no such contract no longer exists due to its termination by the State, the defendant, as surety, cannot be held liable for work that any subcontractor voluntarily performs after the date of such termination.

Second, and more importantly, the plaintiff submitted a sworn affidavit attesting that it last performed work on the project on July 31, 2019. That claim form was signed March 19, 2020, almost one year after it provided those services, thereby providing the plaintiff with ample opportunity to verify that its sworn statement was accurate and truthful. Based on its unverified complaint, the plaintiff is now contradicting its own sworn affidavit in a rather apparent attempt to create some type of fact question or to otherwise attempt to revive its **[*8]** time-barred claim. The plaintiff's attempt is to no avail and must be rejected. Courts routinely reject a party's attempt to contradict itself in order to create questions of fact or to alter previous sworn testimony. It is clear that when the plaintiff realized that its claim was time-barred, it inserted into its complaint an unsupported allegation that is expressly contradicted by its own previous sworn declaration. The plaintiff's claim is time barred and must be dismissed.

The plaintiff has included in its complaint a number of additional counts, and all are based upon the plaintiff's initial, and incorrect, position that its claim is timely. All of the remaining counts are derivative of the time-barred payment bond claim, and if the plaintiff's payment bond claim is time-barred, which it is, then the remaining counts in the complaint must also necessarily fail. Each of the additional causes of action require some type of wrongful or unjust conduct on the part of the defendant. The Connecticut Legislature has established clear deadlines by which subcontractors are permitted to file claims on a payment bond. Supreme Court has mandated that the statutory deadlines require strict compliance. **[*9]** If the defendant's position that the plaintiff's claim is time-barred is correct, the defendant cannot be accused of having engaged in any type of wrongful or unjust conduct by properly following the dictates of established statutes and case law.

The plaintiff's first additional count accuses the defendant of unjust enrichment. The defendant's failure to pay the plaintiff cannot be "unjust" if it is insisting upon the plaintiff's strict compliance with General Statutes § 49-42, as mandated by the Connecticut Supreme Court in multiple cases. The plaintiff's second count must be dismissed. The plaintiff's next count against the defendant is for an alleged breach of the covenant of good faith and fair dealing. Once again, the plaintiff has not explained, alleged, or otherwise set forth any facts that could lead one to conclude that the defendant's insistence on compliance with the dictates of § 49-42 could possibly constitute bad faith. The plaintiff's third count must be dismissed. The plaintiff next claims that the defendant's failure to pay constituted civil theft pursuant to General Statutes § 52-564. Civil theft requires a demonstration of wrongful conduct. Again, insisting on, compliance with a statutory requirement cannot, as a matter **[*10]** of law, be wrongful. The plaintiff's fourth count must be dismissed. Finally, the plaintiff alleges, again without any factual support, that the defendant violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110 (b). As discussed above, those statutes and case law require strict compliance with the deadlines set forth in § 49-42. If the plaintiff believes that strict compliance is "unfair," its remedy is with the legislature and not with the defendant. The plaintiff's CUTPA count must be dismissed.

General Statutes § 49-42 contains a clear and unambiguous mandate that any suit on a payment bond on a public construction project must be filed within one year of when a subcontractor last provided labor or material to a project. The Supreme Court has stated that one year limitation must be strictly enforced. Moreover, if a claim is not timely, courts lack subject matter jurisdiction over the action. The plaintiff's claim is clearly time-barred based on its own sworn statement and must be dismissed. Because the remaining counts in the complaint are based on the initial presumed viability of its payment bond claim, those remaining counts must also be dismissed.

PLAINTIFF'S POSITION

The plaintiff asserts there are a number **[*11]** of

disputed issues of material fact that preclude dismissal without first allowing for substantive discovery and a required evidentiary hearing. The plaintiff relates the following as pertinent facts. On or about November 17, 2017, State of Connecticut Department of Transportation ("DOT") entered into contract No. 0034-0305 in the amount of $4,023,059.25 ("contract") with Mastrobattisto for work on intersection improvements on Route 37, Pembroke Road at Stacey and Barnum Roads in Danbury, Connecticut ("project"). On or about December 14, 2017 Mastrobattisto and the plaintiff entered the subcontract concerning the project, whereby the plaintiff would perform the scope of work pertaining to invasive removal, liming, turf establishment, erosion control, and wetland seeding, for the amount of $104,871.54. The plaintiff commenced providing labor, materials, equipment, goods and services ("work") on or about February 5, 2018 at the project. From February 5, 2018 and continuing through May 21, 2020, the plaintiff has provided its work on the project. As of August 10, 2018, the invasive species removal work was fully completed and the plaintiff was now responsible for making certain that any **[*12]** invasive species outside of the project area did not return. At that point, the plaintiff had completed 95 percent of the work including labor, equipment and materials and the DOT was holding 60 percent of the payments to assure that the plaintiff would warranty the work, which it did with site checks on June 28, 2019, July 31, 2019, May 8, 2020 and May 21, 2020. On August 5, 2019, the plaintiff advised that they believed the time frame was completed for the initial treatment period whereas the DOT advised that initial treatment period continued until the spring of 2020. On June 26, 2020, the DOT notified the plaintiff, the defendant, and others that the initial treatment period was complete, and the work was accepted, accordingly, extending the one-year warranty period into 2021.

The plaintiff performed the following services on May 8 and May 21, 2020; inspection of the entire work area, documented by photographs taken at the time, which demonstrated that no invasive species had rehabitated the footprint. The plaintiff's final warranty inspection was to be performed on or about June of 2021, however the defendant has unequivocally indicated that it would not allow the plaintiff to **[*13]** perform such work, and that the plaintiff's 2020 warranty inspection related work was as a "gratuitous intermeddler." On or about July 16, 2019, the defendant and B&W Paving & Landscaping, LLC ("replacement contractor") entered into a completion agreement, requiring replacement contractor to complete the remaining work on the project. The plaintiff gave notice to the defendant of its claim for the work that it had performed on the project on or about January 23, 2020, followed by submittal of its proof of claim materials, including the "claim form (subcontractor)" on or about March 19, 2020 ("notice"). In the notice, dated and notarized March 19, 2020, the plaintiff accurately represented that the date of last services that it had then performed on the project was July 31, 2019. At no point in time prior to these inspections did the defendant, replacement contractor or DOT terminate the plaintiff's subcontract. The defendant was expressly advised in September of 2020 that the plaintiff had performed warranty site checks on June 28, 2019, July 31, 2019, May 8, 2020 and May 20, 2020, "which involved inspection and making certain that any invasives outside of the project area did not **[*14]** work their way into the project." The defendant's counsel acknowledged that information when he stated, "[The plaintiff] now maintains that it performed site checks on 5/8/20 and 5/21/20". Accordingly, the defendant was advised in writing of the May 2020 site check work that the plaintiff performed on the project six months before commencing this action. At the time of the notice, the plaintiff had no contractual right to require payment of the final two payments, totaling 60 percent of the subcontract balance. However, it did place the defendant on notice that it was preserving its right to claim those funds.

Judge Moll, when faced with a nearly identical factual scenario as here set forth the' following standard and procedures for addressing and resolving such a motion. In *Conboy v. State*, 292 Conn. 642, 643-44, 974 A.2d 669 (2009), the seminal case regarding "the proper procedure for a trial court to employ in deciding a motion to dismiss for lack of subject matter jurisdiction when jurisdictional facts are disputed by the parties," our Supreme Court instructed in relevant part as follows: ". . . [W]here a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss **[*15]** in the absence of an evidentiary hearing to establish jurisdictional facts. ('[w]hen issues of fact are necessary to the determination of a court's jurisdiction . . . due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." (Internal quotation marks omitted)" *Am. Pride Builders, Inc. v. Hous. Auth. of City of New Haven*, 2018 Conn. Super. LEXIS 13, 2018 WL 632458, at *3-4.

There is a factual dispute over whether the plaintiff was provided with sufficient notice to terminate its

subcontract. It is undisputed that neither the defendant, replacement contractor nor the DOT provided written notice of termination of the subcontract. The plaintiff maintains that its warranty work conducted on May 21, 2020, was legally authorized and thus this action was timely commenced under §49-42, where the defendant was served on April 19, 2021 and the case filed on that same date, within the one year after the last date that materials were supplied or work was performed by the claimant. The plaintiff will require substantive discovery from the defendant and non-parties, including the replacement contractor and DOT, in order to conduct an evidentiary hearing on this issue. The defendant entire motion is predicated on the plaintiff's **[*16]** representation in its claim form ("notice") that the date of last services that it had then performed on the project was July 31, 2019. Nowhere in the notice does the plaintiff represent that it has completed its work on the project or that it will not continue to fulfill its contractual obligations under same. There was a myriad of additional communications between the plaintiff and the defendant resulting from the defendant's repeated requests for additional information so that it could investigate the claim. In the course of those exchanges, the defendant was unequivocally advised that the plaintiff had provided warranty inspection services on May 8 and May 21, 2020. The defendant was notified by a September 24, 2020 e-mail that the plaintiff had performed warranty site check on June 28, 2019, July 31, 2019, May 8, 2020 and May 20, 2020. At no point in time prior to these inspections did the defendant, replacement contractor or DOT terminate the plaintiff's subcontract. The scope of the evidentiary hearing to be conducted must include this issue of acceptance by the DOT, warranty inspections and the nature and extent of any remediation.

The remaining claims (counts 2-5) are not dependent **[*17]** upon the one-year time limitation period of § 49-42 and are thus not time-barred. The court's ultimate ruling as to count one may require the amendment of the allegations of the remaining counts and then the defendant can proceed with the pleadings practice as it sees fit.

DEFENDANT'S REPLY POSITION

Faced with the dispositive admission in its sworn proof of claim that establishes that the plaintiff's claim is barred by the one-year statute of limitations contained in General Statutes § 49-42, it now alleges that it performed "warranty work" on the project after the dates set forth in the proof of claim and, therefore, the suit was timely filed. It is well established that performance of warranty work, or corrective work, does not extend the limitation period in § 49-42. Moreover, at the time that the plaintiff performed the alleged warranty work, it was well aware that the project completion general contractor was not using the services of the plaintiff, and even if it did visit the project site, as it claims, it did so as a mere volunteer and not pursuant to any contractual obligation that would entitle it to payment.

The two facts need to be highlighted: (1) the plaintiff submitted a sworn proof of claim to the defendant **[*18]** stating that it last performed work on the project on July 31, 2019, and (2) it did not commence suit against the defendant until nearly two years later, on April 27, 2021. The plaintiff does not challenge these operative dates and thus they are undisputed facts. What the plaintiff has stated, supported by two additional sworn affidavits, is that after July 31, 2019, it visited the site on two occasions in May, 2020 to perform "warranty inspections" or "warranty site checks." The plaintiff states: "ASL maintains that its warranty work conducted on May 21, 2020, was legally authorized and thus was timely commenced under § 49-42." The plaintiff argued that the defendant was informed of these facts and, "[i]n the course of those exchanges Travelers was unequivocally advised that ASL had provided warranty inspection services on May 8 and May 21, 2020." Solely for purposes of this motion, the defendant will accept the plaintiff's statements that it performed "warranty work" in May, 2020 and thus those facts are also undisputed.

The payment bond statute, § 49-42 is patterned after the federal payment bond statute, known as the Miller Act, 40 U.S.C. §§ 270a-270d, and the Connecticut statute is often referred to as the "Little Miller Act." **[*19]** As the Supreme Court noted in *Okee Indus., Inc. v. National Grange Mut. Ins. Co.*, 225 Conn. 367, 623 A.2d 483 (1993): "Because § 49-42 was patterned after federal legislation popularly known as the Miller Act; 40 U.S.C. §§ 270a through 270d; we have regularly consulted federal precedents to determine the proper scope of our statute. The federal precedents, like our own, counsel liberal construction of statutory requirements other than those relating to specific time constraints," (Internal citations omitted.) Id., 374. See also *Pittsburgh Plate Glass C. v. Dahm*, 159 Conn. 563, 567, 271 A.2d 55 (1970) ("As we have previously pointed out, the similarity between s 4942 and the federal statute, popularly known as the Miller Act (40 U.S.C. ss 270a-270d), makes the decisions of the

federal courts relative to the latter helpful. *International Harvester Co. v. L. G. DeFelice & son, Inc.*, 151 Conn. 325, 333, 197 A.2d 638.") Although no Connecticut court has specifically addressed the issue of whether the performance of warranty work, or minor corrective work, will extend the limitations period under § 49-42, this issue has been addressed on many occasions by federal courts applying the Miller Act. The decisions are uniform: Performance of warranty work or minor corrective work will not toll the running of the statute of limitations.

For example, in *United States ex rel. Automatic Elevator Co., Inc. v. Lori Const.*, 912 F. Supp. 398 (N.D. Ill. 1996), the subcontractor contended, as does this plaintiff, that the Miller Act limitation period commenced, not from when it last performed work on the involved project, but rather from the date that it performed **[*20]** warranty work on the project. The court framed the legal issue as follows: "Thus the legal issue is joined: Does the Act's limitations period run from the last date on which labor was performed or materials were supplied to fulfill the terms of a contract, or from the later date on which labor was performed or materials were supplied pursuant to a contractual post-completion warranty?" Id., 400. The court rejected the subcontractor's position and dismissed the action as untimely, stating that it was applying the rule established by the majority of courts that have addressed the issue: "This Court will follow the uniform lead of the Courts of Appeals that have considered the issue . . . the performance of its warranty obligation did not re-trigger the commencement of the Act's one-year limitations period." Id., 401. Similarly, in *United States ex rel. Interstate Mechanical Contractor, Inc. v. International Fidelity Insurance Comp.*, 200 F.3d 456 (Sixth Cir. 2000), the court addressed the same issue and held: "Furthermore, we agree that work done at the request of the government and pursuant to a warranty, subsequent to final inspection and acceptance of the project, falls outside the meaning of labor performed as set forth in § 270b(b)." Id., 459. The court then observed: "The majority of circuits that have addressed this issue have held that remedial **[*21]** or corrective work or materials, or inspection of work already completed, falls outside the meaning of "labor" or "materials" under § 270b(b). Hence, performing such work or supplying such materials will not toll the Miller Act's one-year statute of limitations." Id., 460. As the above decisions indicate, the performance of warranty work, or corrective work, will not toll the statute of limitations under the Miller Act. The Supreme Court has consistently held that it looks to Miller Act decisions in applying § 49-42. As applied to this case, the plaintiff's alleged performance of warranty work in May, 2020 did not toll the running of the limitations period under § 49-42, and the plaintiff's claim was time barred as of July 20, 2020, one year after it last performed work on the project.

Entirely aside from the fact that the plaintiff's alleged "warranty work" did not toll the running of the limitations period under § 49-42, there is another, entirely independent reason why the claim is time-barred. When the plaintiff performed its alleged "warranty work" in May 2020, it was well aware that its contract with Mastrobattisto was terminated and that the completion contractor utilized the services of a different contractor to complete the plaintiff's scope **[*22]** of work. The plaintiff's presence on site in May, 2020 was as a mere volunteer and not pursuant to any contractual obligation that would toll the running of the limitation period. In his affidavit, Michael Poinelli attached a single e-mail dated June 26, 2020 to the effect that the plaintiff's work was completed. He does not, however, attach his multiple previous e-mails wherein he openly acknowledged that he knew that Mastrobattisto had been terminated, and that another subcontractor was completing the plaintiff's scope of work. Attached to the affidavit of Frank Sherer of the defendant are multiple e-mails from Mr. Poinelli that are within the same e-mail string as the June 26, 2020 e-mail.

For example, on August 5, 2019, shortly after the plaintiff last performed work on the project, Mr. Poinelli stated in an e-mail to Brian Martins, a representative of the State of Connecticut: "As you stated, Mastrobattisto is off the job and has been replaced with a new contractor." On January 20, 2020, Mr. Poinelli stated in another e-mail to Mr. Martins: "Although no one ever formally informed our company we found out that somewhere in between this period 'the general contractor we were subcontracting **[*23]** for; (Mastrobattisto) either went bankrupt or was thrown off the project." On April 27, 2020 Mr. Martins stated in an e-mail to Mr. Poinelli: "I'm not certain that a meeting between All Seasons, Inspection Staff, and an Environmental Scientist would be appropriate, because to the best of my knowledge, All Seasons does not have a Contract with Travelers or B&W Paving [the completing contractor]. . . . B&W has informed me that they have their own invasives removal crew. Advanced Resources. B&W intends to use Advance Resources in the future to take care of project invasives removal needs." Of particular note, the above e-mail is dated April 27, 2020, which is immediately prior to the two dates in May, 2020 that the plaintiff claims that it

performed its "warranty work." In other words, when the plaintiff visited the site in May, 2020, it was expressly aware that the completing contractor was using the services of a different subcontractor to complete the plaintiff's remaining scope of work. Any alleged warranty work that the plaintiff performed in May, 2020 was as a mere volunteer and not pursuant to any contractual obligation. This means that the last date that the plaintiff performed **[*24]** any work on the project pursuant to its subcontract was July 31, 2020, the date set forth in its sworn proof of claim. Accordingly, the plaintiff's claim is time-barred.

As a matter of law, the plaintiff's claim is barred by the dictates of § 49-42 and that this court lacks jurisdiction of the matter. Based on these undisputed facts, the defendant submits that an evidentiary hearing is unnecessary and that this court can make a determination based on the evidence submitted by the parties.

DECEMBER 6, 2021 AND DECEMBER 16, 2021 SHORT CALENDAR HEARING

The court heard evidence from Michael Poinelli, the president of the plaintiff on December 6, 2021 and December 16, 2021.

DEFENDANT'S SUPPLEMENTAL POSITION

The testimony of Mr. Poinelli along with the submitted exhibits, confirmed the plaintiff's own express admissions that the work performed on May 8, 2020 and May 20, 2020 was "warranty site checks." Accordingly, the one-year statute of limitations set forth in General Statutes § 49-42 was not tolled by the performance of the warranty work, and the plaintiff's claim against the defendant is therefore time-barred and this court lacks jurisdiction over the matter. There is only one dispositive legal question that this court **[*25]** needs to address: Does the performance of "warranty site checks" or repair/corrective work, toll the running of the one-year statute of limitations set forth in § 49-42? As a matter of law in Connecticut, and in other jurisdictions, the answer is "no.

In its reply brief, the defendant cited a number of cases involving the Federal Miller Act that have consistently held that performance of repairs, corrective work or warranty work does not toll the Miller Act one-year statute of limitations. Connecticut courts look to Miller Act decisions for guidance given the similarity between the Miller Act and General Statutes § 49-42. *See also United States ex rel. Miller Proctor Nickolas, Inc. v. Lumbermens Mut. Cas. Co.*, 2009 U.S. Dist. LEXIS 31431, 2009 WL 962273, *6 (E.D.N.Y 2009) ("Because the 2006 work constituted warranty repairs or corrections of previous services, Plaintiff failed to satisfy the Act's statute of limitations. Thus Plaintiff's filing is untimely"); *Interstate Mechanical v. International Fidelity*, 200 F.3d 456, 460 (6th Cir. 2000) ("Furthermore, we agree that work done at the request of the government and pursuant to a warranty, subsequent to final inspection and acceptance of the project, falls outside the meaning of labor performed as set forth in § 270b(b). If post-completion work performed pursuant to a warranty could toll the Miller Act's statute of limitations, then the surety would have no repose until all such warranties expired."); *T&A Painting, Inc. v. Professional Coatings*, (N.D. Calif. 1987), 673 F. Supp. 994, 996 ("Subsequent repair work did not **[*26]** affect the running of the one-year limitations period. This holding necessarily implies that, under the terms of the statute, the bond applies only to work under the original contract. Warranty work, however, is repair work.")

In its reply brief, the plaintiff indicated that the issue of whether performance of repair, corrective or warranty work would toll the limitations period under General Statutes § 49-42 had not been addressed by Connecticut courts. That is incorrect. The issue has been directly addressed. Following established precedents from the Federal Miller Act, Connecticut courts have held that the one-year limitation period in § 49-42 is not tolled by the performance of repair or corrective work.

In *Wickes Mfg. Co. v. Currier Elec. Co., Inc.*, 25 Conn. App. 751, 596 A.2d 1331 (1991), the plaintiff contended that after it had completed its work on a project, the contractor telephoned the plaintiff seeking advice on the usage of certain signaling equipment. The plaintiff delivered to the contractor copies of the equipment schematics and the service manuals that had previously been delivered. *Wickes*, 25 Conn. App. at 757. The plaintiff claimed that the additional work that it performed tolled the limitation period under § 49-42. The court disagreed and held that the claim was time-barred. The court began its analysis by noting, **[*27]** as other courts have noted, that Connecticut courts look to Federal Miller Act cases for guidance: "[T]he similarity between § 49-42 and the federal statute, popularly known as the Miller Act (40 U.S.C. §§ 270 a—d), makes the decisions of the federal courts relative to the latter helpful. We seek guidance from the federal case law in

determining what constitutes labor and materials under § 49-42 because there is no comprehensive definition of what these terms encompass under our statute. See *International Co. v. L.G. DeFelice & Son, Inc.*, 151 Conn. 325, 335, 197 A.2d 638 (1964)." (Citations omitted; internal quotations omitted.) Id., 758.

The court then held: "The limitations period of the Miller Act cannot be extended by correcting defects. *United States v. Hesselden Construction Co.*, 404 F.2d 774, 776 (10th Cir.1968). Repair work does not constitute the supplying of labor and materials under the Miller Act. *United States v. E.J.T. Construction Co.*, 415 F. Supp. 1328, 1332 (D.Del.1976). If additional material is provided to make repairs or provide replacement parts, the running of the statute is not tolled. See *General Ins. Co. of America v. United States*, 409 F.2d 1326, 1327 (5th Cir.1969). The plaintiff's telephone advice given to the Stamford employee was related to some sequencing problems in the signal equipment. The trial court found that it was not turn-on advice and no charge was billed for the conversation. The trial court cannot be held to be clearly erroneous in finding that this free advice was not labor that tolled § 49-42(b). Id., 758.

In *American Pride Bdlrs. v. Housing Auth. Of the City of New Haven*, 2018 Conn. Super. LEXIS 13, 2018 WL 632458 (2018), the plaintiff claimed that delivery **[*28]** of replacement stairs to a project tolled the limitation period. Again, citing to Miller Act precedent, the court disagreed, holding: "Second, even if the court were to find that the plaintiff delivered replacement stairs in October, November, or December 2012, as a matter of law, replacement products do not constitute 'materials' for purposes of § 49-42(b). The Appellate Court rejected a similar argument in *Wickes Manufacturing Co.*, 25 Conn. App. 751, stating: 'If additional material is provided to make repairs or provide replacement parts, the running of the statute is not tolled.' Id. at 758 (citing *General Ins. Co. of America v. United States*, 409 F.2d 1326, 1327 (5th Cir. 1969)). Several federal courts addressing the issue of replacement parts have reached the same conclusion. See, e.g., *U.S. ex rel. Interstate Mechanical Contractors, Inc. v. International Fidelity Ins. Co.*, 200 F.3d 456, 460 (6th Cir. 2000) ('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 [40 U.S.C.] § 270b (b). Hence, performing such work or supplying such materials will not toll the Miller Act's one-year statute of limitations') (joining majority); *Highland Renovation Corp. v. Hanover Ins. Group*, 620 F.Supp.2d 79, 83-84 (D.D.C. 2009) ('A plaintiff cannot survive a timeliness challenge without specific evidence of original contract work being performed within the one-year limit . . . [T]he work that [the plaintiff] presented evidence **[*29]** of completing . . . was corrective or remedial in nature, and therefore did not toll the limitation period under the Miller Act') (collecting cases)." 2018 Conn. Super. LEXIS 13, [WL] at *6.

As the above decisions make plain, performance of repair, corrective or warranty work will not toll the one-year statute of limitations under either the Miller Act or under General Statutes § 49-42. Repair work, corrective work or warranty work are all functionally equivalent. Whether categorized as a repair, or a correction of defective work, or warranty work, such work is performed pursuant to a contractual obligation after the primary contractual work has been completed. As the court in *T&A Painting* succinctly noted: "Warranty work, however, is repair work." 673 F. Supp at 996. The "warranty site checks" performed by the plaintiff are the precise type of work that the above courts have uniformly held does not toll the one-year limitation period under either the Miller Act or § 49-42. As the court noted in *International Mechanical*, supra., there is a solid reason for not allowing repair or warranty work to toll the limitation period. The court stated: "If post-completion work performed pursuant to a warranty could toll the Miller Act's statute of limitations, then the surety would have no repose until all such warranties expired." *Interstate Mechanical*, 200 F.3d at 460. The plaintiff was expressly **[*30]** aware that Mastrobattisto was terminated by the State and that the replacement contractor had hired its own invasives subcontractor. The plaintiff had no contractual obligation—or right—to be present on the site, and acted as a pure volunteer. Because it had no contractual right, or obligation, to be present on the site, the "warranty site checks" that the plaintiff performed in May 2020 could not, under any circumstance, be considered services that were performed pursuant to a valid contract that would be covered by § 49-42.

By its own sworn admission, the plaintiff last performed actual work on the project in July, 2019, and cannot be permitted to control the actual running of the limitation period in General Statutes § 49-42. by performing a *di minimis* amount of warranty or repair work. In *Okee Indus., Inc. v. National Grange Mut. Ins. Co.*, 225 Conn. 367, 373, 623 A.2d 483(1993), the Supreme Court held that, "[w]e have relied on the rule of strict construction when the issue was whether the claimant's notice complied with the specific time requirements of [§ 49-

42]." In this case, the plaintiff's sworn affidavit stated that it last performed work on the involved project on July 31, 2019. It had one year, until July 31, 2020, to commence its action. It did not commence its action until April 27, 2021. The **[*31]** plaintiff's affidavits also acknowledge that the services that it rendered in May, 2020 were nothing more than "warranty site checks." Performance of warranty work under § 49-42 does not toll the running of the one-year statute of limitations. In strictly applying the dictates of § 49-42, as required by *Okee*, the claim of the plaintiff is time-barred and this Court lacks jurisdiction over the matter, and its complaint must be dismissed.

PLAINTIFF'S SUPPLEMENTAL POSITION

The defendant's motion is predicated upon two principal arguments, both of which must fail; (i) that the plaintiff represented under oath that the last work that it performed on the project was on July 31, 2019, and (ii) that the plaintiff's characterization, in its papers objecting to the motion, of the services that it performed in May of 2020 as being warranty in nature is determinative of the outcome of this matter.

A. The plaintiff never misrepresented or misled the defendant into believing that it last performed work on the Project on July 31, 2019. The defendant's argument is easily refuted by the testimony of Mr. Poinelli, who explained that the defendant was given timely notice of the plaintiff's claim in January and March of 2020 **[*32]** (see exhibits 8 & 14) that accurately represented that the date of last services that it had then performed on the project was July 31, 2019. This was prior to the required close-out inspections of the treatment period that the plaintiff performed on May 8 and 21, 2020. The defendant cannot credibly claim that it was unaware of the plaintiff's claim that it had performed additional work on the project in May of 2020, where the plaintiff's counsel had communicated that fact to the defendant's counsel, and it was acknowledged in a responsive e-mail by the defendant's counsel on November 11, 2020. See exhibit 13. As set forth by the plaintiff in its original objection (#106.00), there was a myriad of additional communications between the plaintiff and the defendant's legal counsel pre-litigation resulting from the defendant's repeated requests for additional information so that it could investigate the claim. In the course of those exchanges, the defendant was unequivocally advised that the plaintiff had provided additional services on May 8 and May 21, 2020. Miller Affidavit (#108.00) parapraphs. 3-8, thus the defendant was advised in writing of the May 2020 work that it performed on **[*33]** the project six months before commencing this action.

The extent that the defendant still argues that the plaintiff was notified that it had been terminated, it has failed to prove that point "where every presumption favoring jurisdiction should be indulged." *Amodio v. Amodio*, 247 Conn. 724, 728, 724 A.2d 1084 (1999). Here, the defendant relies solely upon an ambiguous e-mail to the plaintiff advising it that Mastrobattisto had been terminated and replaced, where Mr. Poinelli testified that his understanding of the meaning of that exchange was that the plaintiff would not be proceeding with Phase 2 of the invasives work on the project. This is hardly the type of unambiguous and clear evidence allowing the court to resolve this disputed fact against the plaintiff and dismiss the action. *See Conboy v. State*, 292 Conn. 642, 974 A.2d 669 (2009). (Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.) Significantly, the plaintiff was never informed in writing by the State the defendant, Mastrobattisto or the replacement contractor that it had been terminated on the Phase **[*34]** 1 invasives work. The plaintiff was aware that it had an obligation under its subcontract to "be responsible for removal and eradication of all plant material deemed as invasive or unwanted within the delineated area(s) for the duration of the project *or until relieved of responsibility* of the removal item. . . ." Exhibit 3 (Emphasis in original.)

B. The work performed by the plaintiff in May of 2020 was not warranty work and was part of the core contractual obligations required of the plaintiff as expressly set forth in the subcontract. Mr. Poinelli's testimony was uncontroverted by the defendant and establishes that the work was performed by the plaintiff on this project on May 5 and 21, 2020 and that the work was a close-out inspection of the treatment period and any necessary remediation. These inspection services are expressly required within the subcontract *as the underlying work that must be performed by the plaintiff* as it is expressly within the treatment period and is a condition precedent to entitlement to payment, as made abundantly clear by the State (see exhibit. 7). Brian Martins, State Transportation Engineer and Chief Inspector of this project in two e-mails made the **[*35]** State's position clear to the plaintiff. First, in his October 11, 2018, e-mail to Mr. Poinelli he states: "The treatment

period is defined within the schedule that was submitted by your office and approved of by the DOT. *The treatment schedule shown within the submittal goes into 2020*. The treatment period is not considered complete. . . ." (Emphasis in original. Exhibit. 7, P.1. Second, in his August 5, 2019, e-mail to Mr. Poinelli he reiterates: "I'm confused: *The treatment period outlined in All Seasons's schedule, . . . shows the treatment period going out to Spring of 2020*. How can-the treatment period be considered complete?" (Emphasis added) Exhibit. 6, pp 12-13.

These facts are clearly distinguishable from the Federal District Court cases relied upon by the defendant that warranty services do not extend or toll the limitation period under the Federal Miller Act or by extension to General Statutes § 49-42, aka The Little Miller Act. *U.S. ex rel. Automatic Elevator Co., Inc. v. Lori Const.*, 912 F. Supp. 398, 400 (N.D. Ill. 1996) is clearly distinguishable where it involved warranty work, corrections or repairs to already-completed work. Whereas the plaintiff's services provided in May of 2020 were labor and materials required to fulfil the scope of its obligations under the subcontract and are **[*36]** expressly identified as falling within the treatment period. Further, unlike the defendant in *Automatic Elevator*, the plaintiff disputes the defendant's claim that the work performed in May of 2020 was pursuant to a warranty clause.

C. The mischaracterization of the May 2020 work performed by the plaintiff as "warranty" work or services is not controlling as mere evidential admissions. The defendant's sole remaining argument in support of its motion is not one that it originally claimed in its motion but is one that arose in response to the plaintiff's objection, and is based upon the plaintiff's mischaracterization of the work that it undertook on the project in May of 2020. In the objection and supporting affidavits the plaintiff sets forth that those services were "warranty inspections," "warranty site checks" and "warranted the work." The defendant asserts this as proof-positive that the work and services performed in May of 2020 by the plaintiff was in fact warranty work and does not act to extend the statute of limitations under § 49-42. As made clear in the record during the hearings, the work and services provided by the plaintiff were core work requirements within the treatment period **[*37]** and as such were an express condition precedent to the plaintiff's right to payment of the 30 percent third tranche, which only was due and payable upon successful completion of the treatment period. The mischaracterizations contained within the plaintiff's objection are evidentiary admissions which the court may disregard in light of the clear contractual language and evidence concerning the work and services provided in May of 2020.

"The distinction between judicial admissions and mere evidentiary admissions is a significant one that should not be blurred by imprecise usage. . . . While both types are admissible, their legal effect is markedly different; judicial admissions are conclusive on the trier of fact, whereas evidentiary admissions are only evidence to be accepted or rejected by the trier." (Internal quotation marks omitted.) *Tianti v. William Ravels Real Estate, Inc.*, 231 Conn. 690, 695 n. 6, 651 A.2d 1286 (1995). "Factual allegations contained in pleadings upon which the cause is tried are considered judicial admissions and hence irrefutable as long as they remain in the case." (Internal quotation marks omitted.) *West Haven Sound Development Corp. v. West Haven*, 201 Conn. 305, 312, 514 A.2d 734 (1986). "The admission of the truth of an allegation in a pleading is a judicial admission conclusive on the pleader." (Internal quotation marks omitted.) **[*38]** *Cross v. Hudon*, 42 Conn. App. 59, 65, 677 A.2d 1385, cert. denied, 239 Conn. 932, 683 A.2d 400 (1996). "A judicial admission dispenses with the production of evidence by the opposing party as to the fact admitted, and is conclusive upon the party making it." (Internal quotation marks omitted.) *Tianti*, supra, 695 n. 7. In contrast with a judicial admission, which prohibits any further dispute of a party's factual allegation contained in its pleadings on which the case is tried, "[a]n evidential admission is subject to explanation by the party making it so that the trier may properly evaluate it." (Internal quotation marks omitted.) *Willow Funding Co., L.P. v. Grencom Associates*, 246 Conn. 615, 621, 717 A.2d 1211. Thus, an evidential admission, "while relevant as proof of the matter stated . . . [is] not conclusive." (Citation omitted.) *Remkiewicz v. Remkiewicz*, 180 Conn. 114, 118, 429 A.2d 833 (1980). "As a general rule statements in withdrawn or superseded pleadings, including complaints, may be considered as evidential admissions [of] the party making them, just as would any extrajudicial statements of the same import." (Internal quotation marks omitted.) *Danko v. Redway Enterprises, Inc.*, 254 Conn. 369, 375, 757 A.2d 1064 (2000).

Bowen v. Serksnas, 121 Conn. App. 503, 517, 997 A.2d 573 (2010) for which the following Keynote entries are found: Keynote 18 "Whether a party's statement is a judicial admission or an evidentiary admission is a factual determination to be made by the trial court." Keynote 19 ". . . while both judicial admissions and evidentiary admissions **[*39]** are admissible, their legal

effect is markedly different; judicial admissions are conclusive on the trier of fact, whereas evidentiary admissions are only evidence to be accepted or rejected by the trier." Keynote 20 "In contrast with a judicial admission, which prohibits any further dispute of a party's factual allegation contained in its pleadings on which the case is tried, an evidential admission is subject to explanation by the party making it so that the trier may properly evaluate it; thus, an evidential admission, while relevant as proof of the matter stated, is not conclusive." Keynote 21 "Because the probative value of an admission depends on the surrounding circumstances, it raises a question for the trier of fact, who is free to give as much weight to such an admission as, in the trier's judgment, it merits, and need not believe the arguments made regarding the statement by one side or the other."

D. The plaintiff has clearly alleged sufficient facts and presented ample evidence for the case to proceed as its work falls squarely within the language of General Statutes § 49-42, where it supplied materials and performed work on May 8, 2020, within the treatment period of the subcontract in connection **[*40]** with the project within one year prior to filing suit on April 19, 2021.

E. Should the defendant's interpretation of General Statutes 49-42 be correct then the plaintiff is left with no statutory recourse and is trapped within a "Catch-22" scenario. The defendant's legal arguments, which it characterizes as "logical" (motion, p. 6) create a legal "Catch-22" for the plaintiff. Due to the nature of the subcontract, whereby the plaintiff performs 95 percent of its work at the mechanical removal stage, which was completed by August 10, 2018 but 60 percent of the payments are linked to close out of the treatment period, which concluded with the State's acceptance on June 26, 2020 (exhibit 6, p 2) followed by the one-year warranty assessment obligations which ran through June 25, 2021, thus when Mastrobattisto is terminated on March 18, 2019, there are no sums due to the plaintiff for the work that it has already performed. If the defendant is correct, then as of the last-date that the plaintiff was contractually working on the project, it had no claim that it could pursue under the payment bond and when its right to the remaining two payment tranches, the first of which is acknowledged by the State on June 26, **[*41]** 2020, it is already time-barred under § 49-42. Under this scenario, the plaintiff has no right to make a claim against the payment bond for the work performed but which is conditioned upon "successful completion of the treatment period" followed by a one-year warranty period. According to the defendant's logic, it is legally impossible for the plaintiff to make a claim against the payment bond for the work that it performed and was accepted by the State.

F. The remaining counts are not subject to this motion to dismiss, as the remaining claims (counts 2-5) are not dependent upon the one-year time limitation period of General Statutes § 49-42 and are thus not time-barred. The defendant must concede that this court does have subject matter jurisdiction over those legal causes of action and to the extent that it claims the pleadings should be revised to provide more details, a motion to dismiss, pursuant to Practice Book § 10-30, is not the appropriate vehicle. The court's ultimate ruling as to the bond claim (count 1) may require the amendment of the allegations of the remaining counts and then the defendant can proceed with its pleadings practice as it sees fit. For all of the foregoing reasons, the defendant Travelers' motion to dismiss **[*42]** should be denied.

DEFENDANT'S POSTION RE: ADMISSIONS

Given the repeated, deliberate, clear and unequivocal statements made by the plaintiff, the defendant submits that the sworn statements were judicial admissions and are binding on the plaintiff. The plaintiff provided sworn affidavits of its president, Mr. Poinelli, as well as by its attorney, that the plaintiff performed "warranty site checks" or "warranty inspections" in May, 2020 and its filing of its action was timely. Mr. Poinelli expressly testified that his affidavit was truthful and accurate. Mr. Poinelli's testimony, submitted affidavits and the multiple statements in the plaintiff's objection were clear and unequivocal statements of fact made or ratified by Mr. Poinelli, who was in a unique position to provide accurate statements concerning the nature of the work performed by the plaintiff. In fact, Mr. Poinelli testified that he drafted the subcontract in question and was therefore the most knowledgeable person to testify as to the nature of the work that was performed by the plaintiff in May 2020. Similarly, the plaintiff's counsel, an experienced construction lawyer, was also uniquely suited to accurately and unequivocally **[*43]** describe the nature of work that it performed in May 2020. A review of Mr. Poinelli's affidavit, counsel's affidavit and the objection reveal that on twenty-eight separate occasions, the plaintiff described the work it performed as "warranty" work or that the work was "warranted." In its objection and affidavits, the plaintiff never described the work it performed in May 2020 as a "core contractual obligation" or any words even remotely

similar to that effect. It was only after the defendant pointed out that performance of warranty work did not toll the running of the limitations did the plaintiff perform a complete "about-face" and began describing the work performed in May 2020 as a "core contractual obligation." The plaintiff represented to this court that the twenty-eight separate descriptions of the May 2020 work as warranty work in sworn affidavits and pleadings was nothing more than a "mischaracterization," and that its "mischaracterizations" are nothing more than evidentiary admissions, "which the court may disregard. . . ."

The plaintiff would not be trying to belatedly retract its sworn admissions that the work it performed was warranty work, if it was not now acutely aware **[*44]** that its multiple and repeated admissions were dispositive and fatal to its claim. The plaintiff's attempt to eliminate the impact of its admissions by calling them mere "mischaracterizations" and nothing more than evidentiary admissions is contrary to the law in Connecticut. It is established that, "[w]hether a party's statement is a judicial admission or an evidentiary admission is a factual question for the trial court. *Tianti v. William Raveis Real Estate, Inc.*, 231 Conn. 690, 694-95, 651 A. 2d. 1286, 1289 (1995). To assist trial court's in making that determination, clear guideposts have been established by the courts. In *Mamudovski v. BIC Corp.*, 78 Conn. App. 715, 829 A. 2d 47 (2003), the Appellate Court set forth the applicable standard: "For a factual allegation to be held to be a judicial admission, the fact admitted should be one within the speaker's particular knowledge and one about which the speaker is not likely to be mistaken. A party's testimony should be deemed a judicial admission only as to those facts that are 'peculiarly within his own knowledge and as to which he could not be [mistaken. . . ,] A conclusive judicial admission, to be binding, must be one of fact and not a conclusion or an expression of opinion. Courts require the statement relied upon as a binding admission to be clear, deliberate and unequivocal. Judicial **[*45]** admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." (Citations omitted; internal quotations omitted.) *Mamudovski*, at 728-729. *Kopacz v. Day Kimball Hospital of Windham County, Inc.*, 64 Conn. App. 263, 779 A.2d 862 (2001) opined that "Judicial admissions are voluntary and knowing concessions of fact by a party or a party's attorney occurring during judicial proceedings. . . . A judicial admission is, in truth, a substitute for evidence, in that it does away with the need for evidence." Id., 272.

As indicated, judicial admissions are "defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." *Mamudovski*, supra. Mr. Poinelli testified that he participated in the drafting and negotiating of the subcontract, he is an experienced businessperson having entered into contracts with some of the largest contractors in Connecticut, and both he and his counsel know the distinction between warranty work and a "core contractual obligation." In Mr. Poinelli's affidavit, and in the affidavit of its counsel, an experienced construction attorney, the work performed by the plaintiff in May, 2020 was accurately and repeatedly described as warranty work. That admission was repeated twenty-eight times in the **[*46]** two affidavits and the plaintiff's objection. The repeated sworn statements were "clear, unequivocal statements" concerning "concrete facts" that "were within [All Seasons] knowledge." This court should not permit those sworn statements to be cynically discarded because the plaintiff has realized that its truthful statements are fatal to its claim. The sworn statements by the plaintiff and its agents are binding judicial admissions. The defendant acknowledges that this court makes the determination as to whether the plaintiff's sworn statements are evidentiary or judicial admissions. The defendant submits that the plaintiff's deliberate and repeated statements that the work it performed in May 2020 was warranty work constitute judicial admissions and cannot be set-aside because they are now inconvenient to the plaintiff's claim.

Even if this court were to determine that the plaintiff's previous statements were mere "mischaracterizations" and were evidentiary admissions, that does not mean that this court must accept its new-found description of the work that it performed in May 2020. This court is permitted to consider the probative value of the admissions in light of relevant surrounding **[*47]** circumstances. As noted by the court in *O & C Industries, Inc. v. All Phase Enterprises, Inc.*, 112 Conn. App. 511, 523 n. 5, 963 A.2d 676: (2009): ". . . [A]n evidential admission, while relevant as proof of the matter stated . . . [is] not conclusive . . . Because the probative value of an admission depends on the surrounding circumstances, it raises a question or the trier of fact . . . The trier of fact is free to give as much weight to such an admission as, in the trier's judgment, it merits, and need not believe the arguments made regarding the statement by one side or the other." (Citations omitted; internal quotation marks omitted.) The plaintiff's about-face on its characterization of the work that it performed in May 2020 lacks any degree of

credibility. If this court concludes that the plaintiff's admissions are evidentiary admissions, the defendant further submits that this court should exercise its discretion and reject the plaintiff's attempt to resurrect its stale claim by recharacterizing the work that it performed. The defendant submits that the plaintiff's repeated admissions that only it performed warranty work in May 2020 constitute binding judicial admissions. Based on those admissions and the law set forth, the defendant respectfully requests that its motion to dismiss **[*48]** be granted.

PLAINTIFF'S POSTION RE: ADMISSIONS

The work performed by the plaintiff in May of 2020 was not warranty work but part of the core contractual obligations requirements. The mischaracterization of the May 2020 work as "warranty" work or services is not controlling as that mischaracterization is an evidential admission and is subject to explanation by the party making. A judicial admission is '"[a]n express waiver, made in court or preparatory to trial, by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. . . . It is, in truth, a substitute for evidence, in that it does away with the need for evidence.' 9 Wigmore, Evidence (3d Ed.) § 2588." *State v. Rodriguez*, 180 Conn. 382, 396, 429 A.2d 919 (1980). In contrast with a judicial admission, which prohibits any further dispute of a party's factual allegation contained in its pleadings on which the case is tried, an evidential admission is subject to explanation by the party making it so that the trier may properly evaluate it; thus, an evidential admission, **[*49]** while relevant as proof of the matter stated, is not conclusive. *O & G Indus., Inc. v. All Phase Enterprises, Inc.*, 112 Conn. App. 511, 963 A.2d 676 (2009). Here, the plaintiff in its objection to motion to dismiss and two supporting affidavits, has used language that has mischaracterized the actual services performed in May of 2020. The mischaracterization is in classifying the work as warranty in type or nature when the evidence has shown that the work was within the treatment period and that the warranty period arose subsequent to conclusion of the treatment period.

The following hypothetical is proffered; counsel has stated that his client performed "A", however that is directly contradicted by the contract documents and evidence introduced, which expressly state that the work performed was "B". The mischaracterization or mistake has been explained to the court and the record has been modified and corrected through the evidence presented at the hearing and by reference to the express language in the subcontract and the e-mail exchanges between the parties setting forth the DOT interpretation of the treatment period. "If a party . . . unequivocally concedes a fact, such concession for the purposes of the trial, has the force of a judicial admission, and a party is bound **[*50]** thereby unless the court, in its reasonable discretion, allows the concession to be later withdrawn, explained, or modified, if it appears to have been made by improvidence or mistake." *Dreier v. Upjohn Co.*, 196 Conn. 242, fn. 2, 492 A.2d 164 (1985). "A party is bound by a judicial admission unless the court, in the exercise of its discretion, permits the admission to be withdrawn, explained or modified." *Ne. Builders Supply & Home Centers, LLC v. RMM Consulting, LLC*, 202 Conn. App. 315, 338, 245 A.3d 804, *cert. denied*, 336 Conn. 933 (2021). The "pleading" in *Ne. Builders* was an operative counterclaim of a party as distinguished from the plaintiff's initial filings. The Connecticut Supreme Court has noted that the "pleadings" that constitute judicial admissions are those "upon which the case is tried" which would be the complaint, answer and defenses. That decision then acknowledges that "judicial admissions may be expressed in different forms such as formal pleading or written stipulation." The decision turns on the admission by the party of several facts in the complaints and notes that "at no time during the trial of those cases did he seek to have his admissions withdrawn, explained or modified." (Internal quotation marks omitted.) Id. That is directly contrasted with the facts before this court where the plaintiff's initial filings have been both explained and modified **[*51]** prior to the court's decision.

A court's determination of whether a particular statement made by a party in litigation is a judicial admission involves a factual determination. *See Mamudovski v. BIC Corp.*, 78 Conn. App. 715, 727, 829 A.2d 47, *cert. granted on other grounds*, 266 Conn. 915, 833 A.2d 467 (2003). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Frillici v. Westport*, 264 Conn. 266, 277, 823 A.2d 1172 (2003). In a factually similar case, where a party had made representations in a filed pleading (but not in its complaint, answer or defense) and the

opposing party sought to have those classified as binding and conclusive judicial admissions, the court recognized it to be an evidentiary admission and quickly dispatched the argument. "*Semac* claims that Skanska admitted this amount was owed, and the court is bound by those admissions. But it is not. As the 2004 Appellate Court decision in *National Amusements, Inc. v. East Windsor* illustrates, the court must consider the context of any admission when determining what weight to give it." *Semac Elec. Co., Inc. v. Skanska USA Bldg., Inc.* (Moukawsher, J.), 2017 Conn. Super. LEXIS 4454, 2017 WL 4873133 at *1.

The misstatement of "A" and the correction **[*52]** of "B" does not constitute the concession of the critical fact in this case, namely whether any of the work performed by the plaintiff during May of 2020 was warranty services. The subcontract plainly sets forth that they were not, as the services provided within that time period were expressly identified as occurring within the treatment period and where the warranty period is expressly stated to follow the close-out of the treatment period, which occurred on June 26, 2020. The mischaracterization of the work as "A" does not in fact change it from being "B". For the foregoing reasons and those asserted in the evidentiary hearing and the plaintiff's memorandum, the motion to dismiss should be denied.

LEGAL STANDARD

"[A] motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Santorso v. Bristol Hospital*, 308 Conn. 338, 350, 63 A.3d 940 (2013). "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *MacDermid, Inc. v. Leonetti*, 310 Conn. 616, 626, 79 A.3d 60 (2013). "A court deciding a motion to dismiss must determine not the merits of the claim **[*53]** or even its legal sufficiency, but rather, whether the claim is one that the court has jurisdiction to hear and decide." (Internal quotation marks omitted.) *Hinde v. Specialized Education of Connecticut, Inc.*, 147 Conn. App. 730, 740-41, 84 A.3d 895 (2014). "Any claim of lack of jurisdiction over the subject matter cannot be waived; and whenever it is found after suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the judicial authority shall dismiss the action." Practice Book § 10-33. "The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." *Manifold v. Ragaglia*, 94 Conn. App. 103, 117, 891 A.2d 106 (2006).

General Statutes § 49-42 provides in pertinent part: "(b) Every suit instituted under this section shall be brought in the name of the person suing, in the superior court for the judicial district where the contract was to be performed, irrespective of the amount in controversy in the suit, but *no such suit may be commenced after the expiration of one year after the last date that materials were supplied or any work was performed by the claimant*, except that any such suit solely seeking payment for retainage, as defined in section 42-158i, shall be commenced not later than one year after the date payment of such retainage **[*54]** was due, pursuant to the provisions of subsection (a) of section 49-41a." (Emphasis added.)

"As we have previously pointed out, the similarity between s 49-42 and the federal statute, popularly known as the Miller Act (40 U.S.C. ss 270a-270d), makes the decisions of the federal courts relative to the latter helpful." *Pittsburgh Plate Glass Co. v. Dahm*, 159 Conn. 563, 567, 271 A.2d 55 (1970).

"Because § 49-42 was patterned after federal legislation popularly known as the Miller Act; 40 U.S.C. §§ 270a through 270d; we have regularly consulted federal precedents to determine the proper scope of our statute. The federal precedents, like our own, counsel liberal construction of statutory requirements other than those relating to specific time constraints. As the Supreme Court of the United States observed in *Fleisher Engineering & Construction Co. v. United States ex rel. Hallenbeck* 311 U.S. 15, 18, 61 S. Ct. 81, 83, 85 L. Ed. 12 (1940), 'a requirement which is clearly made a condition precedent to the right to sue must be given effect, but in determining whether a provision is of that character the statute must be liberally construed so as to accomplish its purpose.'" *Okee Indus., Inc. v. National Grange Mut. Ins. Co.*, 225 Conn. 367, 374, 623 A. 2d 483 (1993).

"General Statutes (Rev. to 1995) § 49-42(b) provides in relevant part: 'Every suit instituted under this section shall be brought in the name of the person suing . . . but no such suit may be commenced after the expiration of one year after . . . the date such materials were supplied or any work was performed.' This court previously has

concluded that 'the General Assembly intended **[*55]** . . . §§ 49-41 and 49-42 to operate in general conformity with the federal statute, popularly known as the Miller Act (40 U.S.C. §§ 270a-270e). . . . The provision of § 49-42 . . . [that] sets forth the time limitation within which suit must be commenced under the statute, therefore, is not to be treated as an ordinary statute of limitation, but as a jurisdictional requirement establishing a condition precedent to maintaining an action under that section.' (Citations omitted.) *American Masons' Supply Co. v. F.W. Brown Co.*, 174 Conn. 219, 223-24, 384 A.2d 378 (1978). It is well settled that, in an action brought pursuant to § 49-42, 'the time fixed for bringing the action is a limitation on the liability itself, and not of the remedy alone.' see also *Okee Industries, Inc. v. National Grange Mutual Ins. Co.*, 225 Conn. 367, 373, 623 A.2d 483 (1993) ('[w]e have relied on the rule of strict construction when the issue was whether the claimant's notice complied with the specific time requirements of [§ 49-42]'); *Okee Industries, Inc.* at 374, ("[t]he federal precedents, like our own, counsel liberal construction of statutory requirements other than those relating to specific time constraints.") Because compliance with the limitations period set forth in § 49-42 is a jurisdictional requirement, "a timely suit is an absolute condition precedent to maintaining an action under that section. This substantive requirement cannot be avoided by waiver or estoppel." (Citation omitted; **[*56]** internal quotation marks omitted.) *Fisher Skylights, Inc. v. CFC Construction Ltd. Partnership*, 79 F.3d 9, 12 (2d Cir. 1996); see also *Hayes v. Beresford*, 184 Conn. 558, 562, 440 A.2d 224 (1981) ("It is hornbook law that the parties cannot confer subject matter jurisdiction on a court by consent, waiver, silence or agreement"). *Paradigm Contract Mgt. Co. v. St. Paul Fire and Marine Ins.* 293 Conn. 569, 575-577, 979 A. 2d 1041 (2009).

"This Court has not previously considered in a published opinion exactly when 'the last of the labor was performed or material was supplied' for purposes of § 270b (b). As a question of statutory interpretation, we consider the issue de novo. We agree with the majority of courts that have interpreted the phrase and have concluded it connotes more than mere substantial completion or substantial performance of the plaintiff's obligations under its contract. Furthermore, *we agree that work done at the request of the government and pursuant to a warranty, subsequent to final inspection and acceptance of the project, falls outside the meaning of labor performed as set forth in § 270b(b)*. If post-completion work performed pursuant to a warranty could toll the Miller Act's statute of limitations, then the surety would have no repose until all such warranties expired. The challenge before the Court is to assess whether tests of replacement components fall between substantial completion of the project and its final completion, and are thus **[*57]** included as labor under the Act, or whether such tests are more properly analogized to warranty work and excluded. 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 § 270b (b)*. Hence, *performing such work or supplying such materials will not toll the Miller Act's one-year statute of limitations*. The majority rule requires the trier of fact to distinguish 'whether the work was performed . . . as a 'part of the original contract' or for the 'purpose of correcting defects, or making repairs following inspection of the project.'" (Citations omitted; emphasis added.) *United States ex rel. Interstate Mechanical Contractor, Inc. v. International Fidelity Insurance Comp.*, 200 F.3d 456, 459-60 (Sixth Cir. 2000).

"The determination of whether a party's statement is a judicial admission or an evidentiary admission is a question of fact for the, trial court . . . '[w]hether these statements when viewed as a whole result in a judicial admission is a determination best left to the trial court which observed the witnesses, heard the testimony and was the sole judge of the weight to be accorded such testimony' . . . witness or party should not be presumed to have made judicial admission without finding **[*58]** of trial court . . . court must be asked to make finding as to nature of admission." (Citations omitted; internal quotation marks omitted.) *O & G Industries, Inc. v. All Phase Enterprises, Inc.*, 112 Conn. App. 511, 524, 963 A.2d 676 (2009).

"For a factual allegation to be held to be a judicial admission, the fact admitted should be one within the speaker's particular knowledge and one about which the speaker is not likely to be mistaken. A party's testimony should be deemed a judicial admission only as to those facts that are 'peculiarly within his own knowledge and as to which he could not be [mistaken. . . .] *A conclusive judicial admission, to be binding, must be one of fact and not a conclusion or an expression of opinion*. Courts require the statement relied upon as a binding admission to be clear, deliberate and unequivocal. *Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge."* (Citations omitted; emphasis added; internal quotations omitted.) *Mamudovski v. BIC Corp.*, 78 Conn. App. 715, 728-29, 829 A. 2d 47 (2003).

LEGAL ANALYSIS

""General Statutes (Rev. to 1995) § 49-42(b) provides in relevant part: 'Every suit instituted under this section shall be brought in the name of the person suing . . . but no such suit may be commenced after the expiration of one year after . . **[*59]** . the date such materials were supplied or any work was performed.' This court previously has concluded that 'the General Assembly intended . . . §§ 49-41 and 49-42 to operate in general conformity with the federal statute, popularly known as the Miller Act (40 U.S.C. §§ 270a-270e). . . . The provision of § 49-42 . . . [that] sets forth the time limitation within which suit must be commenced under the statute, therefore, is not to be treated as an ordinary statute of limitation, but as a jurisdictional requirement establishing a condition precedent to maintaining an action under that section. It is well settled that, in an action brought pursuant to § 49-42, the time fixed for bringing the action is a limitation on the liability itself, and not of the remedy alone. ('[w]e have relied on the rule of strict construction when the issue was whether the claimant's notice complied with the specific time requirements of [§ 49-42]'); ("[t]he federal precedents, like our own, counsel liberal construction of statutory requirements other than those relating to specific time constraints,") Because compliance with the limitations period set forth in § 49-42 is a jurisdictional requirement, "a timely suit is an absolute condition precedent to maintaining an action under **[*60]** that section. (Citations omitted; internal quotation marks omitted.) *Paradigm Contract Mgt. Co. v. St. Paul Fire and Marine Ins.* 293 Conn. 569, 576-77, 979 A. 2d 1041 (2009). Based on *Paradigm*, it is incumbent on the plaintiff to prove that it initiated the suit within one year from the dated "materials were supplied or any work was performed" in order to proceed with the action, or the matter must be dismissed as untimely.

The plaintiff asserts that it commenced providing labor, materials, equipment, goods, and services on or about February 5, 2018, and continuing through May 21, 2020. As of August 10, 2018, the invasive species removal work was completed, and the plaintiff had completed 95 percent of the work, and the DOT was holding 60 percent of the payments to assure that the plaintiff would warranty the work, which it did with site checks on June 28, 2019, July 31, 2019, May 8, 2020, and May 21, 2020. On May 8, 2020, and May 21, 2020, the plaintiff performed an inspection of the entire work area, documented by photographs which demonstrated that no invasive species had rehabitated/reappear within the footprint. The plaintiff's claims that the final warranty inspection was to be performed on or about June of 2020, however the defendant would not allow the plaintiff to perform such work. **[*61]** The plaintiff, however, by its completion of the claim form, and certification of claim signed March 19, 2020, confirmed that the last non-warranty work was completed on July 31, 2019. The plaintiff then commenced this action on April 27, 2021, almost two years after the plaintiff, attested, under oath, that it last performed non-warranty work on the project on July 31, 2019. The plaintiff now claims that it "mischaracterized" the work it performed as warranty work, when it had actually engaged in work which was within the treatment period and that the warranty period did not arise until the conclusion of the treatment period.

The first issue requiring resolution is the definition of what "materials were supplied or any work was performed" by the claimant. As there is no direct Connecticut appellate case law that resolves this issue the court must look outside the state. Federal court opinions provide guidance. Our courts have not previously considered in a published opinion exactly when the last of the labor was performed or material was supplied for purposes of General Statutes § 49-42 §270b(b).

The court and the parties could find no direct, on point, appellate level authority in Connecticut that specifically delineated **[*62]** what work is covered or not covered under General Statutes § 49-42, when evaluating a contractor's work for determining if there has been compliance with General Statutes § 49-42, which provides in pertinent part that ". . . *no such suit may be commenced after the expiration of one year after the last date that materials were supplied or any work was performed by the claimant*. . . ." The Supreme Court begins our analysis with federal precedent. "We have concluded that the General Assembly intended General Statutes ss 49-41 and 49-42 to operate in general conformity with the federal statute, popularly known as the Miller Act (40 U.S.C. ss 270a-270d). The provision of s 49-42 affected by Public Act No. 192, which sets forth *the time limitation* within which suit must be commenced under the statute, therefore, *is not to be treated as, an ordinary statute of limitation, but as a jurisdictional requirement establishing a condition precedent to maintaining an action under that section*. (Emphasis added; internal citations omitted.) *American Masons' Supply Co. v. F. W. Brown Co.* 174 Conn. 219, 223-224, 384 A.2d 378 (1978). As the Supreme Court noted in *Okee Indus., Inc. v. National Grange Mut. Ins.*

Co., 225 Conn. 367, 623 A.2d 483 (1993): "Because § 49-42 was patterned after federal legislation popularly known as the Miller Act; 40 U.S.C. §§ 270a through 270d; we have regularly consulted federal precedents to determine the proper scope of our statute. The Supreme Court made is clear that the filing of the action within **[*63]** the one-year time limitation is a condition precedent to maintaining the action, and if not complied with, the court was without jurisdiction. In *Paradigm Contract Mgt. Co. v. St. Paul Fire and Marine Ins.* 293 Conn. 569, 979 A. 2d 1041(2009), the Supreme Court again made clear that compliance with the one-year statute of limitations is a condition precedent to vesting the court with subject matter jurisdiction: "It is well settled that, in an action brought pursuant to § 49-42, 'the time fixed for bringing the action is a limitation on the liability itself, and not of the remedy alone.'" Id., 576. This court finds that in order for the plaintiff's bond claim to survive, the suit must have been filed within the one-year time period from the last date that "*materials were supplied or any work was performed*" pursuant to the subcontract. (Emphasis added.) Id. In this matter, the plaintiff did not meet the statutory time limitation if the work performed after July 31, 2019 did not involve a situation where "materials were supplied or any work was performed by the claimant." The court must determine if the plaintiff is correct in its position and to what type of work was performed up to May 21, 2020.

No Connecticut court has specifically addressed the issue of whether the performance of warranty **[*64]** work, or minor corrective work, will extend the limitations period under § 49-42, but this issue has been addressed by federal courts applying the Miller Act. The decisions are quite in agreement that performance of warranty work or minor corrective work will not toll the running of the statute of limitations. In *United States ex rel. Automatic Elevator Co., Inc v. Lori Const.*, 912 F. Supp 398 (N.D. Ill. 1996); a subcontractor, Automatic Elevator, as the plaintiff, contended that the Miller Act limitation period commenced, not from when it last performed work on the involved project, but rather from the date that it performed warranty work on the project. The court addressed the following legal issue: "Does the Act's limitations period run from the last date on which labor was performed or materials were supplied to fulfill the terms of a contract, or from the later date on which labor was performed or materials were supplied pursuant to a contractual post-completion warranty? Although that poses a question of first impression in this Circuit, the case law elsewhere consistently adopts the former approach, so that Automatic's lawsuit must be dismissed." Id., 400. The court concluded "This Court will follow the uniform lead of the Courts of Appeals that have considered the issue. It therefore holds that Automatic's **[*65]** work in the performance of its warranty obligation did not re-trigger the commencement of the Act's one-year limitations period." Id., 401.

In *United States ex rel. Interstate Mechanical Contractor, Inc. v. International Fidelity Insurance Comp.*, 200 F.3d 456 (Sixth Cir. 2000), the court addressed the same issue and held: "This Court has not previously considered in a published opinion exactly when 'the last of the labor was performed or material was supplied' for purposes of § 270b(b). As a question of statutory interpretation, we consider the issue de novo. We agree with the majority of courts that have interpreted the phrase and have concluded it connotes more than mere substantial completion or substantial performance of the plaintiff's obligations under its contract. Furthermore, we agree that work done . . . pursuant to a warranty . . . falls outside the meaning of labor performed as set forth in § 270b(b). If post-completion work performed pursuant to a warranty could toll the Miller Act's statute of limitations, then the surety would have no repose until all such warranties expired. The challenge before the Court is to assess whether tests of replacement components fall between substantial completion of the project and its final completion, and are thus included as labor under the Act, or whether such tests are more properly analogized to warranty **[*66]** work and excluded. Id., 459-60.

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 § 270b(b). Hence, performing such work or supplying such materials will not toll the Miller Act's one-year statute of limitations. *See, e.g., United States for the 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 (3rd Cir.), *cert. denied*, 459 U.S. 856, 103 S.Ct. 126, 74 L.Ed.2d 109 (1982); *United States for the use of Magna Masonry, Inc., v. R.T. Woodfield, Inc.*, 709 F.2d 249, 250 (4th Cir.1983); *United States ex rel. Austin v. Western Elec. Co.*, 337 F.2d 568, 572 (9th Cir.1964); *United States for the use of State Elec. Supply Co. v. Hesselden Constr. Co.*, 404 F.2d 774, 776 (10th Cir.1968). The majority rule requires the trier of fact to distinguish '"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.'" *Austin*, 337 F.2d at

572-73.

"Although this line of inquiry has received criticism, this Court concludes the correction-or-repair versus original-contract test presents a useful framework to determine when the Miller Act's statute of limitations begins to run. As set forth in *Austin*, the correction-or-repair versus original-contract test provides a bright-line rule from which each interested party—the government, contractor, subcontractor, and surety—can gain a clear understanding of what work constitutes labor under § 270b(b). Furthermore, the majority rule induces the **[*67]** parties to structure their contractual obligations to account for the statute of limitations. Although the liberal purposes of the Miller Act may not be effectuated in each and every case, the benefits of certainty and administrability afforded by a bright-line rule here outweigh the inherent risk of over or under inclusive results presented by bright-line rules. Hence, for the foregoing reasons, we adopt the majority rule for our Circuit." (Internal citations omitted.) *United States ex rel. Interstate Mechanical Contractor, Inc. v. International Fidelity Insurance Comp*, at 459-60. As our Supreme Court has held that it looks to Miller Act decisions in applying § 49-42, the case law is clear, the plaintiff's performance of work in May 2020, if only warranty related, would not toll the running of the limitations period under § 49-42.

The plaintiff asserts that the work it performed in May of 2020 was not warranty work but part of the core contractual obligations requirements. The plaintiff claims that its repeated "mischaracterization" of the May 2020 work as "warranty" work or services is not controlling, as that mischaracterization is only an evidential admission, not a judicial admission, and is subject to explanation by the party making the mischaracterization. According to the defendant, the plaintiff's "mischaracterizations **[*68]** started" when it filled out the bond claim form on March 19, 2020 swearing under oath that it last performed covered work on July 31, 2019, and continued until through September 17, 2021, when the plaintiff filed its sworn affidavits, right up to when Mr. Poinelli testified before this court on November 20, 2021, nearly eighteen months later, when the characterization of work did a one-hundred-eighty degree turnaround, and it became part of the core contractual obligations required in the subcontract. The court agrees with the defendant and factually finds, after a complete evidentiary hearing, that the plaintiff's first characterization of the nature of the work performed was factually correct when made, continues to be factually correct, and anything the plaintiff performed after July 31, 2019 was not part of the core contractual obligations requirements, but warranty work. For the reasons stated below, the defendant's motion to dismiss must be granted as to the bond claim.

The parties gave detailed memoranda of law on whether the plaintiff's mischaracterizations were judicial admissions or evidentiary admission. The Appellate Court provide a clear process for this court to follow: **[*69]** "The determination of whether a party's statement is a judicial admission or an evidentiary admission is a question of fact for the trial court . . . *[w]hether these statements when viewed as a whole result in a judicial admission is a determination best left to the trial court which observed the witnesses, heard the testimony and was the sole judge of the weight to be accorded such testimony* . . . witness or party should not be presumed to have made judicial admission without finding of trial court . . . *court must be asked to make finding as to nature of admission."* (Citations omitted; emphasis added; internal quotation marks omitted.) *O & G Industries, Inc. v. All Phase Enterprises, Inc.*, 112 Conn. App. 511, 524, 963 A.2d 676 (2009). The court held multiple evidentiary hearings to evaluate the evidence presented by the plaintiff, observed the witness, and judged Mr. Poinelli's credibility. The litmus test for this court is clearly defined. "For a factual allegation to be held to be a judicial admission, *the fact admitted should be one within the speaker's particular knowledge and one about which the speaker is not likely to be mistaken*. A party's testimony should be *deemed a judicial admission only as to those facts that are 'peculiarly within his own knowledge and as to which **[*70]** he could not be [mistaken. . . .] A conclusive judicial admission, to be binding, must be one of fact and not a conclusion or an expression of opinion*. Courts require the statement relied upon as a binding admission to be clear deliberate, and unequivocal. *Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge*." (Citations omitted; emphasis added; internal quotations omitted.) *Mamudovski v. BIC Corp.*, 78 Conn. App. 715, 728-29, 829 A. 2d 47 (2003). This court has observed the testimony of Mr. Poinelli, reviewed his testimony, reviewed the memoranda, and as the sole judge of the weight to be accorded such evidence finds that the litmus test defined above has been clearly established, and finds that the admissions made by the plaintiff were judicial admissions, and not evidentiary admissions. The testimony Mr. Poinelli provided to the court, a significant time after the actual work was completed, did not provide the necessary weight to convince the court that

the "mischaracterizations" are evidentiary admission, nor did he convince the court that they statements were they factually inaccurate when made.

The first significant admission was made by the plaintiff's vice-president **[*71]** Louis Lavecchia and was contained in the form entitled "CLAIM FORM (SUBCONTRACTOR)" dated March 19, 2020. The form asked two pertinent questions and the plaintiff's authorized representative and vice-president supplied clear, unambiguous answers. The questions and answers were: "e. Date you began work in the project: 2/5/2018," and, "f. Date you last worked on the project (not including warranty work): 7/31/2019." The subscribed and sworn to form stated in its "Certification of Claim," *I Louis Lavecchia* (person completing form), being first *duly sworn, say under penalty of perjury* that I *am responsible for the compilation of the information* provided herein, *and the foregoing is true, accurate and complete statement of my claim or my company's claim*, and I hereby affirm that the amount claimed is justly due me or my company." (Emphasis added.) Application of the criteria provided in *Mamudovski* clearly demonstrates that this is not only a clear and unequivocal judicial admission but should be sufficient to end the inquiry. Is this statement by the plaintiff's vice-president, Louis Lavecchia of a "*fact admitted . . . within the speaker's particular knowledge and one about which the speaker is not **[*72]** likely to be mistaken*?" Clearly, as representative of the plaintiff authorized to complete the claim form, this is undoubtedly within his particular knowledge and, not one that Mr. Lavecchia would be likely to be mistaken. Finally, the statement made by the representative "*must be one of fact and not a conclusion or an expression of opinion*." (Emphasis added.) One cannot question that the statement of "Date you last worked on the project (not including warranty work): 7/31/2019 was a factual statement delineating what type of work was performed by the plaintiff, and was not a conclusion or expression of opinion, as his oath stated that his claim was a "*compilation of the information* provided herein, *and the foregoing is true, accurate and complete statement of my claim or my company's claim*." (Emphasis added.) There is nothing about this statement of fact by Louis Lavecchia that can be misconstrued. Although the inquiry should end here, the court will examine other "mischaracterizations" by the plaintiff to determine whether they are judicial admissions or evidentiary admissions that may change the court's analysis. Swearing to the truth of the statements under penalty of perjury, **[*73]** a class D felony, with a penalty of 5 years incarceration, gives great incentive to tell the truth. The court finds it highly unlikely that Mr. Lavecchia would not have made his representations if they were not factually accurate. The court finds it most credible that the statements made by Mr. Lavecchia regarding the nature of the work performed by the plaintiff to be accurate and factually correct when made on March 19, 2020.

The subscribed and sworn to affidavit of Mr. Poinelli, specially drafted for, and presented to the court in opposition to the defendant's motion to dismiss, provides further significant evidence that the plaintiff performed warranty work after July 31, 2019, despite its later protestations. Mr. Poinelli in his affidavit states in pertinent part in paragraph 11 ". . . . As of August 10, 2018 the invasive species removal work was fully completed and ASL was now responsible for making certain that any invasives outside of the Project area did not return." The affidavit goes on in paragraph 12 in pertinent part, where Mr. Poinelli states "At that point in time the mechanical removal work was completed and Connecticut D.O.T. was holding balances to make sure ASL **[*74]** warranted the work. At that point in time ASL had completed 95% of the work including labor, equipment and material and the DOT was holding 60% of the payments *to assure ASL would warranty the work, which it did with site checks on June 28, 2019, July 31, 2019, May 8, 2020 and May 21, 2020*." (Emphasis added.) This statement clearly states that the plaintiff was performing warranty work when it performed the site checks on June 28, 2019, July 31, 2019, May 8, 2020, and May 21, 2020. Mr. Poinelli made statements under oath, in an affidavit presented to the court. Submitting a false affidavit to the court for an official proceeding subjects Mr. Poinelli to significant civil and criminal consequences, therefore, this court finds it most credible that the statements made by Mr. Poinelli regarding the nature of the work performed by the plaintiff to be accurate and factually correct when made, just like those of Mr. Lavecchia.

The "Control and Removal of Invasive Vegetation", attached as an exhibit to Mr. Poinelli's affidavit, at page 119 states "If the Contractor believes that eradication has been achieved, the Contractor shall request a site inspection by the Environmental Scientist for **[*75]** concurrence. If the Environmental Scientist concurs that eradication has been achieved, the area will be *subject to a one (1) year warranty starting on the first day following the inspection by the Environmental Scientist."* (Emphasis added.) The e-mail of January 22, 2020 from Mr. Poinelli to Brian J. Martins, presented as an exhibit in his affidavit, provides further supporting evidence that the plaintiff's initial characterization of the type of work

performed was in fact warranty work as it originally stated. The e-mail confirms that it refers to the payment schedule. The subcontract controlling the project states in the "Basis of Payment" section:

> A. Upon approval of the required schedules, the Contractor will receive a payment equal to 10% of all areas delineated.
>
> B. Upon initial treatment as it is described in the schedule of operations, the Contractor will receive a payment equal to 30% of all areas receiving initial treatment.
>
> C. Upon successful completion of the treatment period as determined by the site review by the Environmental Scientist, the Contractor will receive a payment equal to 30% of all areas receiving final treatment.
>
> D. Upon successful completion of the 1 year warranty **[*76]** period covering all treated areas on the project, the contractor will receive a payment equal to 30%.

The e-mail from Mr. Poinelli states that the first two payments were made to the plaintiff for A. the initial approval of required schedules, and B. the initial treatment. The e-mail goes on to state that "In September of 2018 we (ASL) informed you that we had accomplished successful completion of the treatment period and requested a site meeting with the environmental scientist to confirm this. On October 5, 2018 You, Christine Xenelis (DOT representative for environmental scientist) and myself met a the site and completed a site review to determine if the initial treatment period was successful. . . . Christine confirmed that for all intents and purposes the initial treatment period was successful. Shortly after this meeting I petitioned the DOT for the next 30 percent payment as we had met the requirements for item (C.) of the specifications." The plaintiff was clearly indicating that it finished the third aspect of the subcontract, the treatment period, and was entitled to be paid for the next 30 percent payment and was now into the warranty period that starts immediately after **[*77]** the treatment period, section (C.), was completed by the plaintiff.

On January 23, 2020, Mr. Poinelli sent a letter to the defendant, which was marked as plaintiff's exhibit 8 stating in pertinent part "All Seasons last performed work on the project on July, 31, 2019. . . . Please be informed that All Seasons is presently owed $54,330.07 by Mastrobattisto. . . . Please consider this letter to constitute All Seasons claim against the above payment amount. The claim is made pursuant to the terms of the bond and Connecticut General Statutes § 49-42." This demand was for the second and third 30 percent payment under sections (C) and (D) of the Basis of Payment section of the subcontract, as the plaintiff had confirmed in his January 22, 2020 e-mail to Brian J. Martins that the 40 percent of the contract was paid to the plaintiff (10 percent payment and the first 30 percent payment). This again confirms that the full treatment period was completed, and the plaintiff is now seeking the 30 percent payment for the treatment period and 30 percent payment for the warranty period.

Further supporting the conclusion that the work performed by the plaintiff on May 8, 2020, and May 21, 2020 was in fact warranty work only, is the e-mail of April 27, **[*78]** 2020 from Mr.-Martins to Mr. Poinelli and Mr. Lavecchia which states: "I'm not certain that a meeting between All Seasons, Inspection Staff, and an Environmental Scientist would be appropriate, because to the best of my knowledge, *All Seasons does not have a Contract with Travelers or B&W Paving [the completing contractor]. . . . B&W has informed me that they have their own invasives removal crew*. Advanced Resources. B&W intends to use Advance Resources in the future to take care of project invasives removal need *Since All Seasons is no longer the sub for invasives removal on the projects* . . . why is All Seasons requesting a site review with the State?" It is patently clear that the State, in simple unambiguous language, informed the plaintiff that there was no longer any contractual obligation for the plaintiff to perform any work on the project, after April 27, 2020, and when the plaintiff visited the site on May 8, 2020, and May 21, 2020, it was expressly aware that the completing contractor was using the services of a different subcontractor to complete the plaintiff's remaining scope of work. The defendant is correct that any alleged warranty work that the plaintiff performed **[*79]** May 8, 2020, and May 21, 2020 was not pursuant to any contractual obligation. Simply put, the last date that the plaintiff performed any work on the project pursuant to its subcontract was July 31, 2019, the date set forth in its sworn proof of claim.

It cannot be credibly argued by the plaintiff that it did not make a significant number of factual statements relating to the type of work performed, the time frame in which the work was performed, and what was owed to the plaintiff. All of the statement contained in the pleadings and exhibits are factual statements, "and not a conclusion or an expression of opinion" as referred to in *Mamudovski*, were made in close time proximity to when the work was performed and clearly constitute

judicial admissions. Applying the following standard provides the court with a clear decision. "For a factual allegation to be held to be a judicial admission, *the fact admitted should be one within the speaker's particular knowledge and one about which the speaker is not likely to be mistaken*. A party's testimony should be *deemed a judicial admission only as to those facts that are 'peculiarly within his own knowledge and as to which he could not be [mistaken. . . A* ***[*80]*** *conclusive judicial admission, to be binding, must be one of fact and not a conclusion or an expression of opinion*." (Emphasis added.) *Mamudovski*, 728-29. Courts require the statement relied upon as a binding admission to be clear, deliberate, and unequivocal. *"Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge*." (Citations omitted; emphasis added; internal quotations omitted.) Id. The above referred admissions by the plaintiff are undoubtedly ones that are *"within the speaker's particular knowledge and one about which the speaker is not likely to be mistaken*," relate "*facts that are 'peculiarly within his own knowledge and as to which he could not be mistaken*," and are clearly "*one of fact and not a conclusion or an expression of opinion*," and constitute *deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge*." Id.

The plaintiff claims that its exhibits 12 and 17, which shows hours worked, work performed, and material used, demonstrates that the work done on the dates contained in the exhibits was part of the core contractual obligations requirements, not warranty **[*81]** work, and validates the bond claim under General Statutes § 49-42 as being timely. Such is not the case upon review. Exhibit 12 confirms that on June 28, 2019 and July 31, 2019, a total of 15.57 hours (3.9 hours on June 28, 2019, and 11.67 hours on July 31, 2019) were expended for the work coded as "Invasive Removal" the last time this exhibit shows any core contractual work being performed. The exhibit then confirms that on May 5, 2020, 2.3 hours were expended for "Invasive Spray," and May 21, 2020, 0.40 hours were expended for work coded as "Mobilize & Driver" which were described by Mr. Poinelli at the evidentiary hearing as "check site for invasives." Exhibit 17 shows a quantity of spray used on that day as reflected in the time expended as shown exhibit 12 of 2.3 hours. The plaintiff claims that this work is part of the core contractual work being performed, and given the dates, the April 21, 2021 filing of the suit was timely filed within the one-year limitation period in General Statutes § 49-42. In order for this to be valid, the work performed must actually be "*last date that materials were supplied or any work was performed by the claimant*" pursuant to the subcontract. *Paradigm Contract Mgt. Co.* at 576. If it is not considered part of work as described, **[*82]** it is not covered, and count one of the complaint fails. Work done by the plaintiff pursuant to a warranty, subsequent to final inspection and acceptance of the project, falls outside the meaning of labor performed as set forth in the Miller Act (40 U.S.C. §§ 270a-270d) as applied by Connecticut courts to General Statutes § 49-42, known as the "Little Miller Act." Looking to federal case law was done by the Connecticut Appellate Courts provides clear guidance. "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 § 270b (b)*. Hence, *performing such work or supplying such materials will not toll the Miller Act's one-year statute of limitations*. The majority rule requires the trier of fact to distinguish 'whether the work was performed . . . as a 'part of the original contract' or for the 'purpose of correcting defects, or making repairs following inspection of the project.'" (Citations omitted; emphasis added) *United States ex rel. Interstate Mechanical Contractor, Inc.* 460.

Application of the above standard leads this court to the only rational conclusion, the work done by the plaintiff after July 31, 2019 was warranty work, and not part of the "original contract" **[*83]** undertaken by the plaintiff. Plaintiffs exhibits 12 and 17 provide proof. Plaintiffs exhibit 12 then confirms that on May 5, 2020, 2.3 hours were expended for "Invasive Spray," and May 21, 2020, 0.40 hours were expended for work coded as "Mobilize & Driver" which were described by Mr. Poinelli at the evidentiary hearing as "check site for invasives." Exhibit 17 shows a quantity of spray used on May 8, 2020. The work performed was, without question, "*corrective work or materials*," and was "*inspection of work already completed*." All the required mechanical invasives removal was already completed many months beforehand. Based on the foregoing, the plaintiff has failed to file the suit within the one-year limitation period as required by the General Statutes § 49-42, known as the "Little Miller Act," and count one must be dismissed.

The above is more than sufficient to determine the outcome of the plaintiff's bond claim under General Statutes § 49-42, therefore, the court will not examine plaintiff's counsel's affidavit in its analysis of the defendant's motion to dismiss. Based on the foregoing, the plaintiff is bound by its clear judicial admissions, and failed to file the suit within the one-year time limitation

as provided in General Statutes § 49-42. Court **[*84]** one must be dismissed.

Remaining Counts

Defendant asserts that because the remaining counts in the complaint are all based on the plaintiff's underlying assertion that it has a viable payment bond claim against the defendant, to the extent the payment bond claim is deemed time-barred, its remaining claims must also necessarily fail. The defendant also posits that the other counts are insufficient on their face and must be dismissed. The defendant presented no case law that determined that a time barred action on the bond was the exclusive remedy available to the plaintiff, and that all other claims must fail. Neither did the defendant produce any case law that requires other claims to be governed by the one-year limitation period to file the actions as dictated by General Statutes § 49-42.

The plaintiff on the other hand, asserts that the four additional counts are valid, and are not affected by whether the bond claim under General Statutes § 49-42 withstands the motion to dismiss. The plaintiff counters that the court does have subject matter jurisdiction over the legal causes of action in counts two through five, and to the extent that the defendant claims the pleadings should be revised to provide more details, a motion to dismiss, **[*85]** pursuant to Practice Book § 10-30, is not the appropriate vehicle.

The case of *Wolverine Fire Protection Co. v. Tougher Industries*, Inc., 2001 Conn. Super. LEXIS 1695, 2001 WL 808395 provides guidance. "Section 49-42 does not contain an exclusivity provision, and no Connecticut [Appellate] cases were found that expressly addressed the issue of whether [§]49-42 provides an exclusive remedy. However, there have been cases in Connecticut in which violations of [§] 49-42 and (CUTPA), [the Connecticut Unfair Insurance Practices Act (CUIPA), § 38a-815] and CUTPA have been alleged in a single complaint" *Blakeslee Arpaia Chapman, Inc. v. United States Fidelity & Guaranty Co.*, Superior Court, judicial district of New London, Docket No. 520348 (March 4, 1994) (*Hurley, J.*) (11 Conn. L. Rptr. 169); see, e.g., *Okee Industries, Inc. v. National Grange Mutual Ins. Co.*, 225 Conn. 367, 623 A.2d 483 (1993) (complaint alleged violations of § 49-42, CUIPA and CUTPA); *Saturn Construction Co. v. Premier Roofing Co.*, 238 Conn. 293, 296, 680 A.2d 1274 (1996) (complaint alleged violations of § 49-41a and CUTPA). Furthermore, the Connecticut Supreme Court has explicitly stated: "In the absence of . . . explicit language, we adhere to our long-standing rule that [n]o statute is to be construed as altering the common law, farther than its words import [and a statute] is not to be construed as making any innovation upon the common law which it does not fairly express.' (Internal quotation marks omitted.) *Rumbin v. Utica Mutual Ins. Co.*, 254 Conn. 259, 266, 757 A.2d 526 (2000)." *Wolverine*, 2001 Conn. Super. LEXIS 1695, [WL] at *2.

The *Wolverine* court also examined the federal cases, as the Supreme Court **[*86]** has always looked to the federal courts for Miller Act rulings, as Connecticut finds our "Little Miller Act" so closely aligned that federal court rulings are followed when deciding issues of our "Little Miller Act." "The United States Courts of Appeals for the Second, Fifth, Ninth and Tenth Circuits have considered the issue of whether the federal Miller Act provides a plaintiff with an exclusive remedy, and these Courts of Appeals have concluded that it does not. See *United States v. Reid & Gary Strickland Co.*, 161 F.3d 915, 919 (5th Cir.1998); *Wright v. United States Postal Service*, 29 F.3d 1426, 1431 (9th Cir.1994); *K-W Industries v. National Surety Corp.*, 855 F.2d 640, 643 (9th Cir.1988); *Active Fire Sprinkler Corp. v. United States Postal Service*, 811 F.2d 747, 754 (2nd Cir.1987); *United States v. Ins. Co. of North America*, 695 F.2d 455, 458 (10th Cir.1982)." *Wolverine*, 2001 Conn. Super. LEXIS 1695, [WL] at *3.

Finally, the *Wolverine* court examined "The issue of whether § 49-42 is a plaintiff's exclusive remedy has been addressed in several Connecticut Superior Court decisions. *Blakeslee Arpaia Chapman, Inc. v. United States Fidelity & Guaranty Co.*, supra, Superior Court, Docket No. 520348, involved facts very similar to the present action. In *Blakeslee Arpaia Chapman, Inc. v. United States Fidelity & Guaranty Co.*, the plaintiff alleged that the defendant's failure to pay the plaintiff on its subcontract balance constituted a breach of § 49-42, a violation of CUIPA, a violation of CUTPA; and a breach of the covenant of good faith and fair dealing. Looking to precedent from the federal courts construing the Miller Act, the court concluded that '[§]49-42 is not plaintiff's exclusive remedy against a general contractor's surety.' Id. In *Premier Roofing* ***[*87]*** *Co. v. Ins. Co. of North America*, Superior Court, judicial district of Danbury, Docket No. 312438 (March 3, 1995) (*Leheny, J.*) (13 Conn. L. Rptr. 544, 547), the court emphasized the remedial purpose of § 49-42 and permitted a CUTPA claim along with a claim under § 49-42. See also *Production Equipment Co. v. Blakeslee Arpaia Chapman, Inc.*, Superior Court, judicial district of

New Haven, Docket No. 247485 (January 3, 1996) (*Silbert, J.*) (15 Conn. L. Rptr. 558) (allowing CUTPA claim in addition to claim pursuant to § 49-42). It is the opinion of this court that § 49-42 is not the plaintiff's exclusive remedy." *Wolverine*, 2001 Conn. Super. LEXIS 1695, [WL] at *3.

Based on the foregoing, as additional causes of action are permitted with a bond claim under General Statutes § 49-42, the defendant's motion to dismiss counts two through five based on count one being time-barred is denied.

CONCLUSION

For the reasons stated above, defendant's motion to dismiss count one of the plaintiff's April 7, 2021 complaint is hereby GRANTED, and the motion to dismiss, as it relates to counts two through five is hereby DENIED. The plaintiff's objection to the motion to OVERRULED as it relates to count one of the plaintiff's complaint, and is SUSTAINED as it relates to counts two through five

BY THE COURT,

/s/ D'Andrea, **[*88]** Robert A.

D'ANDREA, Robert A., Judge

ORDER

ORDER REGARDING:

04/04/2022 102.05 MEMORANDUM OF DECISION

The foregoing, having been considered by the Court, is hereby:

ORDER:

An order is entered in accordance with the Memorandum of Decision issued by the Court on April 4, 2022.

JDNO sent/copy to RJD via email 4/4/22-VSF

439597

Judge: ROBERT A D ANDREA

Processed by: Vanessa Fertaly

This document may be signed or verified electronically and has the same validity and status as a document with a physical (pen-to-paper) signature. For more information, see Section I.E. of the *State of Connecticut Superior Court E-Services Procedures and Technical Standards* (https://jud.ct.gov/external/super/E-Services/e-standards.pdf), section 51-193c of the Connecticut General Statutes and Connecticut Practice Book Section 4-4.