

**SUPREME COURT OF THE STATE OF NEW YORK**  
*Appellate Division, Fourth Judicial Department*

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**CA 14-01230**

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND WHALEN, JJ.

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NIAGARA UNIVERSITY AND NIAGARA UNIVERSITY  
ICE COMPLEX, INC., PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

THE HANOVER INSURANCE COMPANY,  
DEFENDANT-RESPONDENT.

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DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (JAMES W. GRESENS OF  
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

DAMON & MOREY LLP, BUFFALO (ERIC A. BLOOM OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Niagara County  
(Timothy J. Walker, A.J.), entered September 25, 2013. The order  
granted the motion of defendant for summary judgment and dismissed the  
complaint.

It is hereby ORDERED that the order so appealed from is  
unanimously reversed on the law without costs, the motion is denied  
and the complaint is reinstated.

Memorandum: Defendant, as surety, issued a performance bond on  
behalf of Sterling Glass Dual Pane, Inc. (Sterling) in connection with  
a building construction project undertaken by plaintiffs as owners of  
the Niagara University Academic Complex (Complex). In 2006,  
plaintiffs contracted with Sterling for the installation of windows in  
the Complex's exterior walls, and plaintiffs commenced this action in  
September 2010, seeking to recover damages under the performance bond  
based upon the failure of Sterling to complete its contract. The  
terms of the performance bond limited the time in which plaintiffs  
could commence an action to within two years "after [Sterling] ceased  
working." We agree with plaintiffs that Supreme Court erred in  
granting defendant's motion for summary judgment dismissing the  
complaint as time-barred under the contractual limitations period.  
Although defendant met its initial burden by submitting evidence that  
Sterling completed all work on the Complex on December 21, 2007,  
plaintiffs raised an issue of fact concerning the date on which  
Sterling "ceased working" on the Complex. Plaintiffs submitted  
evidence establishing that Sterling worked on the Complex in June 2009  
and June 2010 in furtherance of its contractual obligation to install  
the windows in accordance with industry standards, and thus there is  
an issue of fact whether Sterling "in effect continued to work on the

project" beyond December 2007 (*Construction Specialties v Hartford Ins. Co.*, 97 AD2d 808, 808; see *American Bldg. Contrs. Assoc., Inc. v Mica & Wood Creations, LLC*, 23 AD3d 322, 323).

Entered: February 6, 2015

Frances E. Cafarell  
Clerk of the Court