

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

FRENER & REIFER AMERICA INC.,

Plaintiff,

-against-

DORMITORY AUTHORITY OF THE STATE OF
NEW YORK, et al.,

Defendants.

INDEX NO. 603679/2009

MOTION DATE Sept. 13, 2011

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for summary judgement.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the motion for summary judgment is decided in accordance with the accompanying decision and order.

Dated: April 6, 2012


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

-----X
FRENER & REIFER AMERICA INC.,

Plaintiff,

-against-

DORMITORY AUTHORITY OF THE STATE OF
NEW YORK and SURE IRON WORKS, INC.,

Defendants,

-against-

TURNER CONSTRUCTION COMPANY and
U.S. SPECIALTY INSURANCE COMPANY,

Additional Cross-Claim and
Counterclaim Defendants.

-----X
O. PETER SHERWOOD, J.:

This litigation arises out of the Dormitory Authority of the State of New York's ("DASNY") decision to terminate "for convenience" a contract for construction of a large canopy at Baruch College of the City University of New York (the "Baruch Project"). DASNY is a public benefit corporation that finances and provides construction services to public and private universities. Baruch College retained DASNY to provide construction services for some of its buildings. DASNY retained plaintiff, Frener & Reifer America, Inc. ("Frener"), as the general contractor to manufacture and install the canopy. Frener retained additional cross-claim and counterclaim defendant, Turner Construction Company ("Turner"), as a subcontractor. Turner retained KMS Contracting, Inc. d/b/a Sure Iron Works, Inc. ("SIW") as a sub-subcontractor to provide on-site labor for the Baruch Project. Pursuant to the contract between DASNY and Frener ("Contract"), Frener was required to give DASNY a labor and materials payment bond of approximately \$6 million to

DECISION AND
ORDER

Index No. 603679/2009

secure prompt payment of subcontractors ("the Bond"). U.S. Specialty Insurance Co. ("U.S. Specialty") served as surety.

To obtain the Bond, Frener had to engage in a complex financings with several creditors. Frener claims it incurred substantial fees in securing the Bond, the purpose of which was to provide financial protection for DASNY against claims from Frener's subcontractors, should Frener fail to pay any of them.

BACKGROUND

During the summer of 2009, Frener fabricated a mock-up of the canopy in order to test the performance of the structure. Two mock-up tests were performed. Both failed. As a result, DASNY issued a stop work directive to Frener and ultimately terminated the contract "for convenience".

Section 10.02 of the contract between DASNY and Frener, entitled "Termination for Convenience of Owner," provides in relevant part:

The owner, at any time, may terminate the Contract in whole or in part. Any such termination shall be effected by delivering to the Contractor a Notice of Termination specifying the extent to which performance of Work under the Contract is terminated and the date upon which the termination becomes effective. Upon receipt of the notice of termination, the Contractor shall act promptly to minimize the expenses resulting from the termination. The Owner shall pay the Contractor for Project Work performed by the Contractor and accepted by the Owner for the period extending from the date of the last payment requisition up to the effective date of the termination, including Overhead and Profit Allowance as described in Section 8.02, but in no event shall the Contractor be entitled to compensation in excess of the total consideration of the Contract ...

On June 8, 2009, DASNY emailed a stop work directive to Turner which states:

We are anticipating some design changes based on the mockup tests today. Please do not schedule any masonry probes, surveys, opening of the curtainwall and interior work till further advice. You can proceed with the erection of the partial platform on 5/10/09 as scheduled based on our meeting on 5/5/09.

Written notice to Frener of the termination for convenience was given on October 23, 2009.

DASNY paid Frener \$176,934.37 as termination for convenience related compensation pursuant to section 10.02 of the contract. Frener claims entitlement to \$111,602.00 in additional compensation on account of a "finders fee" it paid non-party, Allied Development Corp. ("Allied"), and \$137,065.29 as reimbursement of various bank fees incurred to secure the Bond and additional expenses associated with the alleged failure of DASNY to return the Bond upon termination. In addition, Frener seeks reimbursement of any amount that it must pay to subcontractor, SIW, on its claim against the Bond.

The Frener complaint contains seven causes of action. The first cause of action is against SIW and seeks a declaratory judgment that SIW has no valid claim against the Bond. The second through seventh causes of action are against DASNY as follows: Second, declaratory judgment that DASNY has no lawful basis to retain the Bond; Third, declaratory judgment that, even if DASNY can lawfully retain the Bond, the amount of the Bond must be reduced to \$250,000; Fourth, breach of implied covenant of good faith and fair dealing based on DASNY's refusal to release the Bond; Fifth, replevin for unlawfully keeping the Bond; Sixth, conversion for unlawfully keeping the Bond; and Seventh, breach of contract for failing to fully compensate Frener for costs incurred as a result of work performed on the Baruch Project.

Along with its answer, SIW added Turner and U.S. Specialty each as a "cross-claim defendant" and interposed cross-claims for \$245,000 relating to work performed in connection with preparation of engineering shop drawings and modifications to SIW's shop to allow for assembly and disassembly of the work it was sub-contracted to perform. The counterclaim against Frener relates to the same work. In its answer, Turner has cross-claimed against Frener for indemnification as to SIW's claims against it.

All of the parties except SIW have filed dispositive motions or cross-motions. On motion sequence number 002, DASNY moves for summary judgment dismissing counts two through seven of Frener's complaint. By separate Notice of Motion (motion sequence number 003), Frener cross-moves for summary judgment on all seven counts of its second amended complaint against DASNY and SIW. Turner moves for summary judgment dismissing the breach of contract cross-claim of SIW (motion sequence number 004) and cross-moves for summary judgment for a declaration that Frener is contractually obligated to indemnify it against SIW's claim. In its opposition, Frener requests that Turner's cross-claim be dismissed.

DISCUSSION

A. Legal Standard on Summary Judgment Motion

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp.*, *supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

However, once the initial demonstration has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing

evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and, further, that summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and “a shadowy semblance of an issue” are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine credibility issues, but simply to determine whether such issues of fact requiring a trial exist (*see Powell v HIS Contractors, Inc.*, 75 AD3d 463 [1st Dept 2010]; *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186 [1st Dept 2002]).

B. Frener’s Seventh Cause of Action for Breach of Contract Against DASNY

In its seventh cause of action for breach of contract against DASNY, Frener claims that it is entitled to recover for (1) the financing costs incurred (including bank fees and charges) as a result of Frener’s contract obligation to furnish a surety bond relating to the Baruch Project, (2) expenses incurred for work performed by Allied on the Baruch Project¹ and (3) reimbursement of any amount recovered by SIW against Frener.

¹Frener’s Second Amended Complaint does not reference a claim for expenses Frener incurred in connection with work allegedly performed by Allied.

Section 10.02 of the contract between Frener and DASNY provides that DASNY may terminate the contract "for convenience" and is responsible for only costs incurred up to the point the contract was terminated. Similar provisions are set forth in the contracts between Frener and Turner ("Frener/Turner"), and between Turner and SIW ("Turner/SIW").

DASNY maintains that, on June 8, 2009, it terminated the contract with Frener "for convenience." Despite the termination of the contract, DASNY has retained the Bond. Frener sues to cancel the Bond and also seeks to recover certain costs incurred prior to the time the contract was terminated. Frener argues that the contract was not terminated until October 23, 2009. DASNY has paid Frener \$880,000 for costs Frener incurred in connection with the Baruch Project. Frener claims there are additional costs for which it has not been paid. Those costs are a result of 1) fees it paid when it obtained financing for the Bond ("the Financing Costs") and 2) fees it paid to Allied Construction Corp. ("Allied"), a construction consulting company which was responsible for connecting Frener with the Baruch Project and providing construction consulting services for the project ("the Allied Costs").

By order dated December 9, 2009, the court (Yates, J.) reduced the amount of the Bond from \$6.2 million to \$1 million. At oral argument on the motions decided today the court further reduced the size of the Bond to \$300,000.

Pursuant to Section 10.02 of the contract, in the event of a termination for convenience of owner, the contractor is entitled to be paid for "Project Work² performed ... from the date of the last payment requisition up to the effective date of the termination, including Overhead and profit Allowance."

²"Work" is defined in the contract as "performance of all obligations imposed upon the Contractor by the Contract"

Under Section 15.04 of the contract, Frener was obligated to furnish a surety bond. The obligation qualifies as "Work" under the terms of the contract. Frener contends but has not shown that the financing costs are direct costs which are reimbursable as opposed to indirect expenses which are not (*see Affirmative Pipe Cleaning, Inc. v City of New York*, 159 AD2d 417, 418 [1st Dept 1990][rejecting contractor demand for expenses and lost profits incurred prior to termination of contract for owner's convenience]; and *G&R Electrical Contractors, Inc. v State of New York*, 130 Misc2d 661[Ct Claims 1985][rejecting claim to recover "actual costs incurred by claimant"]). The court's interpretation of the contract terms aside, the conduct of the parties prior to termination confirms that they understood that Frener would not be reimbursed for bond finance costs. In its Application No. 1 for payment, Frener billed (and was paid) the amount of \$153,811 listed as 100% of the cost of the bond with a balance to be collected of \$0.00 (*see* Application No. 1, DASNY's Moving Papers, Ex K [line item 20 on p. 2]). Further, DASNY's chief project manager testified unambiguously that at an early stage, he told Frener that costs for procuring the bond were indirect construction costs and as such are overhead and a cost of doing business (Goldstein, Deposition pp 29-30).

Similarly, Frener's demand for reimbursement of the Finder's Fee paid to Allied must be rejected. The Contract does not provide for any payment to Frener for that work by Allied. Such work may be a cost of doing business but no payment is owed to Frener under the "Termination for Owner Convenience" section of the Contract. There is no separate line item in the Contract for a Finder's Fee. It appears that the subject was discussed prior to execution of the Contract. Frener agreed to eliminate the Finder's Fee as a separate line item as evidences on the schedule of values it submitted wherein the "Finder's Fee" is listed as \$0.

Frener did not seek reimbursement for the Finder's Fee until November 23, 2009, after the Contract was terminated (*see* Goldstein Aff'd, Ex N). At that time, Frener asserted that the Finder's Fee was distributed among other line items of the Contract. Michael Steinhueb, president of Frener, submitted an affidavit in which he states that Frener made an up-front payment to Allied of \$105,555, which "payment compensated Allied for its start to finish duties on the Baruch Project" (*see* Steinhueb Aff'd, ¶15). The consulting agreement between Frener and Allied, pursuant to which Allied's president, Herbert Koenig, provided services, specifies a different arrangement. It provides for "a consulting fee of ... \$5,000 per month ... compensation for finding business opportunities and project consulting" (based on a formula tied to the size of any signed contract) and "reasonable and customary business expenses" (*see* Goldstein Aff'd Ex. O). It appears that on its first monthly invoice, Frener billed \$5,580 for services provided by Mr. Koenig and that DASNY paid it.

DASNY's motion for summary judgment dismissing Frener's seventh cause of action for breach of contract must be GRANTED.

C. Frener's Claims

1. First Cause of Action (Declaratory Judgment Against SIW)

For its first cause of action, Frener seeks a declaration that Frener owes nothing to SIW. Frener argues that SIW cannot claim damages for any work done before June 3, 2009 because SIW's contract with Turner indicates that Turner and SIW did not intend to execute an enforceable agreement before that date. Frener also argues that SIW cannot claim damages for work performed after June 8, 2009 because by that time, pursuant to an e-mail Frener sent Turner, SIW should have been on notice (and if it was not it is Turner's liability) that work on the project was to be discontinued. As to the interim period, June 3 to June 8, 2009, Frener claims that SIW cannot identify any work performed or damages incurred.

The defense must be rejected. SIW was authorized to perform work prior to June 3, 2009 and there are substantial questions of fact as to whether SIW was actually on notice that its work was ordered suspended on June 8, 2009. SIW was hired to receive the canopy manufactured in Germany and shipped to the United States in parts, assemble it at its shop to make sure the parts all fit, disassemble it, deliver it to the site and erect it at that location. Terry Carbaugh, Turner's President, testified that on May 11, 2009, SIW was directed to proceed with its subcontract work (Carbaugh Depo., p. 101). Regarding the post June 8, 2009 period, the very e-mail to which Frener points to support the claim that all work was to be suspended, does not suspend *all* work. The e-mail states:

We are anticipating some design changes based on the mockup tests today. Please do not schedule any masonry probes, surveys, opening of the curtain wall, and interior work till further advise. You can proceed with erection of partial platform of 5/10/09 as scheduled based on our meeting of 5/5/09.

SIW claims it is owed \$245,000 for the engineering shop drawings work and for shop modifications made in anticipation of acceptance and assembly of the canopy. Turner concedes that SIW is owed money for work on shop drawings but disputes the amount claimed. Turner vigorously disputes that it agreed to pay SIW for improvements to its facilities.⁵ Turner also points out that Steven Horn, SIW's president, admitted that SIW's facilities as they existed prior to the time the Turner/SIW subcontract was executed was capable of performing the required work. SIW was not contractually obligated to make any shop modifications in connection with the work and SIW does not list any of the shop modifications for which it now demands payment in the schedule of values it submitted to Turner. SIW has submitted evidence of payments in the amounts of \$52,176.26 associated with the shop drawings and \$4,640 for work attributable to preliminary shop drawings.

⁵The improvements included installation of a 10-ton bridge crane and 6,000 square feet of concrete footings, foundation and slab.

SIW asserts that these amounts do not include its "internal labor costs" but it has not set forth those labor costs.⁴

SIW argues nevertheless that the permanent shop modification work is subsumed in a \$450,000 item for "false work". The line item on the schedule of values on which SIW relies is listed as "STRUCTURAL STEEL - Shop Assembly - False Work." Installation of a 10-ton long bridge crane and construction of concrete footage, foundation and slab does not qualify as "Structural Steel ... false work." SIW has submitted no documentary evidence in support of the claim. In any event, if the shop upgrade work is within the scope of the Turner/SIW subcontract for which SIW is entitled to be paid directly as "false work", SIW was contractually obligated to disclose that fact to Turner and to seek approval of the sub-contractor it intended to hire for the work (*see* Niedda Aff'd, ¶¶ 13, 16-18 and Turner/SIW subcontract, Ex. D, Special Provisions §§ 1.10, 7.2[i]). There is no evidence that SIW did either of them.

The admissible evidence before the court reveals that SIW was obligated to prepare engineering shop drawings, was directed by Turner to proceed with the work and was not ordered to cease this work until September 29, 2009 at the earliest (*see* Horn Aff'd dated August 11, 2011, Ex. G). The Turner/SIW contract does not provide for a facility upgrade and it does not obligate Turner to pay for shop modifications SIW elected to make. Frener's motion for summary judgment as to its first cause of action is GRANTED to the extent it seeks a declaration that SIW has no valid claim against the Bond for shop upgrade work. Frener's motion for summary judgment dismissing SIW's cross-claim against Frener and U.S. Specialty is DENIED. Similarly, Turner's motion for summary judgment on its cross-claim against Frener for sums owed to SIW is GRANTED to the

⁴The \$88,000 claimed is the full amount stated in the Schedule of Values for "Structural Steel-Engineering/Shop Dwg's" (*see* Horn Aff'd, Ex. E).

extent Turner seeks indemnification for the shop drawings work.

2. Second (Declaratory Judgment) Third (Alternative Declaratory Judgment) Fifth (Replevin) and Sixth (Conversion) Causes of Action

DASNY bases its decision to retain the Bond on its reading of State Finance Law section 137

(3) and the Bond. Section 137(3) states:

Every person who has furnished labor or material to a contractor or to a subcontractor of the contractor, in the prosecution of the work provided for in the contract and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last labor was performed or material was furnished by him for which the claim is made, shall have the right to sue on such payment bond in his own name for the amount, or the balance thereof, unpaid at the time of commencement of the action; provided, however, that a person having a direct contractual relationship with a subcontractor of the contractor furnishing the payment bond but no contractual relationship express or implied with such contractor shall not have a right of action upon the bond unless he shall have given written notice to such contractor within one hundred twenty days from the date on which the last of the labor was performed or the last of the material was furnished.

The applicable State Finance Law section of the Bond (the "Bond Provision") provides:

[Frener is] "held and firmly bound unto [DASNY]... as Obligee" and "the condition of the obligation is such that if [Frener] shall promptly make payment to all claimants as hereinafter defined, for all labor and material used or reasonably required for use in the performance of the Contract, then this obligation shall be void.

Pursuant to section 137(3), DASNY remains exposed to liability because not all sums owed for labor and material supplied to the Baruch Project have been paid in full. There is a claim outstanding against Frener by SIW for up to \$245,000. Frener's motion for summary judgment on its second cause of action (to cancel the bond entirely) must be denied. However, its motion for summary judgment on its third cause of action (to reduce the bond) shall be granted. Its fifth cause of action (replevin) and sixth cause of action (conversion) must also be denied because of these claims require a showing that, as a matter of law, DASNY is in wrongful possession of the bond, a standard Frener has failed to satisfy. For the same reasons, DASNY's motion for summary judgment dismissing Frener's second, fourth, fifth and sixth causes of action must be GRANTED.

DASNY's motion for summary judgment as to Frener's third cause of action must be DENIED. Frener asserts in its reply papers that the Bond Provision applies only when the contract was terminated for cause, not when it was terminated for convenience, as was the case here. Frener's interpretation of the Bond Provision is not unreasonable and the issue cannot be decided on a motion for summary judgment.

3. Fourth Cause of Action

As to Frener's fourth cause of action for breach of good faith and fair dealing, DASNY's motion for summary judgment must be GRANTED. Frener has not identified any facts distinguishing this claim from its breach of contract claim. In the absence of such distinction, the breach of good faith and fair dealing claim is duplicative and must be dismissed. (*See Pier 59 Studios LP v Chelsea Piers LP*, 27 AD3d 217 [1st Dept 2006]; *Canstar J.A. Jones Const. Co.*, 212 AD2d 452 [1st Dept 1995]).

Accordingly, it is hereby

ORDERED that Frener's motion for summary judgment as to its first cause of action is GRANTED to the extent it seeks a declaration that SIW has no valid claim against the Bond for shop upgrade work (motion sequence number 003); and it is further

ORDERED that Frener's motion for summary judgment for a declaratory judgment that DASNY has no lawful basis to retain the Bond (motion sequence number 003) is DENIED; and it is further

ORDERED that Frener's motion for summary judgment on its third cause of action for a declaratory judgment that, even if DASNY can lawfully retain the Bond, the amount of the Bond must be reduced (motion sequence number 003) is GRANTED; and it is further

ORDERED that the Bond is hereby ordered reduced to \$75,000, which is sufficient to satisfy

the approximately \$58,000 of reimbursable costs established by SIW for the shop drawings work plus accrued interest; and it is further

ORDERED that Frener's motion for summary judgment against DASNY for breach of contract for costs incurred as a result of work performed on the Baruch Project (motion sequence number 003) is **GRANTED**; and it is further

ORDERED that DASNY's motion for summary judgment dismissing Frener's Fourth (breach of implied covenant of good faith and fair dealing), Fifth (Replevin) and Sixth (Conversion) causes of action (motion sequence number 002) is **GRANTED**; and it is further

ORDERED that Turner's motion for summary judgment on the breach of contract cross-claim of SIW is **GRANTED** (motion sequence number 004) to the extent that SIW seeks compensation for shop upgrade work; and it is further

ORDERED that Turner's cross-motion for summary judgment for a declaration that Frener is obligated to indemnify Turner against SIW's claim (motion sequence number 004) is **GRANTED**; and it is further

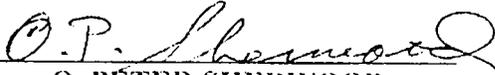
ORDERED that counsel for the respective parties shall appear for a status conference on Wednesday, May 16, 2012 at 9:30 AM, in Part 49, Courtroom 252, 60 Centre Street, New York, New York, to discuss all of the remaining issues.

The court has considered all other claims and they are **DENIED** except to the extent expressly allowed herein.

This constitutes the decision and order of the Court.

DATED: April 6, 2012

ENTER,


O. PETER SHERWOOD

J.S.C.