

Customweld Indus., Inc. v Pike Co., Inc.

2012 NY Slip Op 30992(U)

April 4, 2012

Supreme Court, Suffolk County

Docket Number: 24105-2010

Judge: Emily Pines

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present:

Hon. Emily Pines
Justice Supreme Court

Motion Date: 12-06-2012
Submit Date: 01-03-2012
Motion No.: 003 MD

[] Final
[x] Non Final

_____ X
CUSTOMWELD INDUSTRIES, INC, and
SLIP FIT,

Plaintiffs,

-against-

THE PIKE COMPANY, INC.,

Defendants.

_____ X

THE PIKE COMPANY, INC.,

Plaintiffs,

-against-

CUSTOMWELD INDUSTRIES, INC, and
SLIP FIT,

Defendants.

_____ X

Action # 1
Index Number: 24105-2010

Action # 2
Index Number 11759-2011

FACTUAL AND PROCEDURAL BACKGROUND

On December 17, 2009, The Pike Company, Inc. (Pike) and Customweld Industries, Inc. (Customweld) entered into a contract pursuant to which Customweld agreed to fabricate steel for a

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construction project in Patchogue, New York (Project) undertaken by Pike in exchange for payment of \$1,000,000 (Customweld Contract). The Customweld Contract was executed on behalf of Customweld by Lee Dorfman, as President. On that same date, Pike entered into a contract with Slip Fit, Inc. (Slip Fit) pursuant to which Slip Fit agreed to erect the steel for the Project in exchange for payment of \$175,000 (Slip Fit Contract). The Slip Fit Contract was executed on behalf of Slip Fit by Lee Dorfman, as President.

Article 6 of the Customweld Contract, entitled **PERFORMANCE BOND and MATERIAL PAYMENT BOND**, provides, in relevant part:

A Performance Bond and Material Payment Bond . . . shall be furnished in the full amount of this Agreement . . . [Customweld] shall furnish Performance Bond and Material Payment Bonds in an amount equal to one hundred percent (100%) of the total contract price as security for faithful performance of this contract, and for the payment of all persons performing labor or furnishing materials in connection with this contract . . . If bonds are not procured and delivered to The Pike Company, Inc. within thirty (30) calendar days from [sic] the date of this subcontract, [Customweld] is to produce an Irrevocable Letter of Credit in the amount of thirty percent (30%) of the value of this subcontract . . .

If bonding is not provided [Customweld] will be paid by [Pike] with dual-party checks naming both [Customweld] and Vendors/Sub-subcontractors.

It is undisputed that Mr. Dorfman knew that Pike was requiring that time be of the essence on the contracts. Mr. Dorfman admitted that he could not provide bonds on behalf of Slip Fit to Pike. Pike agreed to extend Customweld's time to obtain the required bonds but the parties disagree as to the length of time. It is undisputed that Customweld did not pay its subcontractors amounts due and that by May 5, 2010, Customweld had not provided performance and payments bonds.

By letter dated April 30, 2010, Pike notified Customweld that it was exercising its option under the contract to supplement the provision of fabricated steel due to a continuing problem with delivery of fabricated steel to the job site, and that Customweld had 48 hours to cure its failure to provide payment and performance bonds as required by Article 6 of the Customweld Contract.

Customweld did not provide the bonds by May 5, 2010.

By letter dated May 5, 2010, Pike terminated the Customweld Contract due to Customweld's failure to cure as demanded in the letter dated April 30, 2010.

Pike also sent a letter dated May 5, 2010, to Slip Fit advising Slip Fit that it had 48 hours to cure numerous alleged defaults in Slip Fit's performance.

By letter dated May 10, 2010, Pike terminated the Slip Fit contract due to Slip Fit's purported failure to cure the defaults outlined in the letter dated May 5, 2010.

Both Customweld and Slip Fit filed mechanic's liens, which did not reflect payments made by Pike to subcontractors of Customweld and Slip Fit. It is undisputed that at the time that the Customweld and Slip Fit contracts were terminated, steel had not been fabricated for the project's west building and steel erection had not been completed for any building.

On June 29, 2010, Pike commenced Action 2 against Customweld and Slip Fit in Supreme Court, Monroe County. The complaint alleges, among other things, that Customweld breached its contract by failing to supply structural steel for the project on time and of sufficient quality, and by failing to provide payment and performance bonds. It is also alleged that Slip Fit breached its contract by failing to install structural steel for the project on time and of sufficient quality, and by failing to complete the entire installation/erection of structural steel prior to receiving payment in lieu of providing a bond.

On July 2, 2010, Customweld and Slip Fit commenced Action No. 1 against Pike and Fidelity and Deposit Company of Maryland in Supreme Court, Suffolk County. The Verified Amended Complaint in Action 1 alleges, among other things, that up until the time the contracts were terminated, both Customweld and Slip Fit had completed all of their work in a timely and professional manner. It is alleged that Pike breached the Customweld Contract by failing to pay Customweld \$702,000, the balance due under the Customweld Contract for approved and accepted work. It is also alleged that Pike breached the Slip Fit Contract by failing to pay Slip Fit \$114,300, the balance due for approved and accepted work. Customweld and Slip Fit also sought to foreclose their respective mechanic's liens.

Pike now moves for summary judgment (1) declaring that the Customweld Contract was properly terminated for failure to post payment and performance bonds and for other breaches of its contract, (2) declaring that the Slip Fit Contract was properly terminated due to Slip Fit's failure to perform and dismissing the complaint in Action 1 as asserted by Slip Fit, (3) directing that the mechanic's liens filed by Customweld and Slip Fit be removed or reduced, (4) scheduling a hearing to determine Pike's damages, and (5) awarding costs and disbursements to Pike on the instant

motion. In support of the motion, Pike submits an affidavit from William Tehan, its Executive Vice President, Chief Financial Officer and Secretary. Tehan states, among other things, that Customweld had not provided performance or payments bonds by May 1, 2010, by which time the steel work had fallen behind schedule, the work was not being performed properly, and Customweld's subcontractors were not being paid. Tehan annexed several letters and e-mails to his affidavit purporting to detail ongoing problems with construction. Tehan alleges that Pike paid the subcontractors of Customweld and Slip Fit, and hired Island Steel to complete the contracts. Pike contends that it is entitled to summary judgment because it is undisputed that Customweld failed to furnish the required bonds and because Customweld and Slip Fit failed to perform their work in a timely and workmanlike manner.

In opposition to Pike's motion, Customweld and Slip Fit submit an affidavit from Lee Dorfman, President of both companies. Dorfman states, among other things, that the two main reasons for problems on the Project were Pike's consistent and repeated failure to provide approved shop drawings in a timely manner and Pike's failure to pay Customweld or Slip Fit any amount on the contracts. Dorfman states that it was his understanding that Pike was amenable to let work on the Project continue without the bonds being posted while Customweld sought the bonds. He claims that he kept Pike informed of Customweld's efforts to obtain the bonds and that Pike assisted Customweld with the necessary paperwork. According to Dorfman, it was not until Customweld had completed more than \$700,000 worth of work (70%) and expected the bonds to be issued any day, that Pike sent the default letter demanding that Customweld provide the bonds within 48 hours. Customweld admits that it did not provide the bonds but it contends that the contract provides that Pike's remedy for a failure to provide bonds was to issue two party checks. Additionally, it contends that by allowing the work to continue without the bonds in place, Pike waived the contract provision requiring bonds. With regard to the allegations of defective work, Dorfman provides a copy of a letter dated April 26, 2010, from Pike to international Fidelity Insurance Company stating that to that point Customweld had performed 37% of the work, that it appeared satisfactory under the terms of the contract, and that it was unaware of any claims from laborers, material men, suppliers or subcontractors that worked for Customweld. With regard to Pike's claim that the mechanic's liens filed by Customweld and Slip Fit are exaggerated, Dorfman states that he did not learn that Pike had paid suppliers of Customweld until after this action was commenced. Dorfman further states that the west building had not been commenced as of the termination date because Pike had not provided approved shop drawings. He also states that Pike's complaints about the workmanship are unfounded because Slip Fit was in the middle of the erection process so that it had not yet tightened all connections or completed the plumbing of the building, in accordance with standard industry practice. Customweld admits that it did not provide the bonds but it contends that it substantially performed its obligations and is entitled to be paid.

DISCUSSION

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85, 487 NYS2d 316 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713, 641 NYS2d 701 [2nd Dept. 1996]). “[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant” (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]).

The elements of a cause of action for breach of contract are (1) the existence of a contract between plaintiff and defendant, (2) performance by the plaintiff, (3) defendant’s failure to perform, and (4) damages resulting from such failure to perform (*see Furia v. Furia*, 116 AD2d 694 [2d Dept. 1986]).

Here, it is undisputed that Customweld failed to provide Pike with performance and payment bonds by May 5, 2010, the date on which Pike terminated the Customweld Contract. However, Customweld contends that Pike was not permitted to terminate the contract based upon its failure to provide the bonds because the contract provided that if the bonds were not provided, Pike would pay Customweld with dual party checks naming both Customweld and vendors/subcontractors. Contrary to Customweld’s contention, the fact that the contract permitted Pike to pay Customweld with two-party checks does not mean that Pike was not permitted to terminate based on Customweld’s failure to provide the bonds. The Customweld Contract is not ambiguous in this regard. In fact, as correctly pointed out by Pike, the contract also required Customweld to produce an irrevocable letter of credit for 30% of the value of the contract if bonds were not procured and delivered to Pike within 30 days from the date of the contract. Contrary to Customweld’s contention, the fact that Pike agreed to provide Customweld with an unspecified amount of additional time to provide the bonds does not create an issue of fact as to whether the bonds were even required.

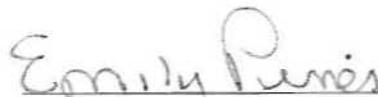
Nevertheless, the affidavit of Customweld’s President demonstrates the existence of an issue

of fact as to whether Pike, in allowing the work on the Project to be commenced and continue without the bonds in place, waived its right to bonds under Article 6 of the Customweld Contract. Additionally, the submissions raise an issue of fact as to whether Customweld had substantially completed its work at the time Pike terminated the contract. "The substantial performance rule precludes contract termination and limits a contracting party to a specific damage remedy" (845 *Un Limited Partnership v. Flour City Architectural Metals, Inc.*, 28 AD3d 271, 272 [1st Dept. 2006]). Finally, Pike has failed to submit evidence demonstrating, as a matter of law, that Customweld and/or Slip Fit failed to perform their work in a timely and/or workmanlike manner. The affidavit from William Tehan contains nothing more than unsupported conclusory assertions regarding the timeliness and adequacy Customweld's and Slip Fit's performance. In any event, Dorfman's affidavit raises issues of fact as to the timeliness and adequacy of Customweld's and Slip Fit's performance. Accordingly, it is

ORDERED that the motion (motion sequence # 003) by defendant in Action 1/Plaintiff in Action 2, the Pike Company, Inc., for summary judgment is denied.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: April 4, 2012
Riverhead, New York



Emily Pines
J. S. C.

Final
 Non Final

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