

Nunez Elec. Inc. v Fidelity and Deposit Co. of MD

2013 NY Slip Op 31040(U)

May 7, 2013

Sup Ct, Queens County

Docket Number: 6632/2012

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

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NUNEZ ELECTRIC INC., Number 6632 / 2012

Plaintiff,

-against-

Motion
Date January 16, 2013

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND,

Motion Seq. No. 1

Defendant.

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The following papers numbered 1 to 18 read on this motion by plaintiff pursuant to CPLR 3212 for summary judgment in its favor against defendant in the amount of \$263,555.96, plus interest, costs and disbursements, and for an award of attorneys' fees and punitive damages.

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Upon the foregoing papers, it is ordered that summary judgment is granted in part on the issue of liability only for breach of the payment bond claim for the following reasons:

Plaintiff subcontractor commenced this action against defendant surety to recover on a subcontract labor and material payment bond (the payment bond) for monies allegedly due on a subcontract/purchase order dated January 27, 2010 between it and Tru-Val Electrical Corp. (Tru-Val) in connection with a public improvement construction project known as PS 13 (Queens). In the amended complaint, plaintiff asserts that Tru-Val, the principal which secured the payment bond, breached the subcontract/purchase order by refusing to remit the outstanding balance despite plaintiff's completion of the work and demands. Plaintiff also alleges that defendant surety is in breach of the payment bond by

refusing to honor plaintiff's demand for payment of the unpaid invoices for labor and overhead and profit totaling \$263,555.96, and has acted in bad faith by failing to investigate its claim and refusing to make payment due it under the surety bond agreement. Plaintiff seeks compensatory damages in the amount of \$263,555.96, plus interest, costs and disbursements including attorneys' fees, and punitive damages. Defendant served an amended answer, asserting various affirmative defenses.

Defendant asserts that plaintiff did not give the court advance notice of its intention to make the instant motion, as required by the Rules of the Commercial Division of the Supreme Court (22 NYCRR) § 202.70[g] Rule 24 and, as a consequence, the court should deny the motion as untimely made.

The Rules of the Commercial Division of the Supreme Court (22 NYCRR) § 202.70[g] Rule 24, provide for a pre-motion conference to be held in nondiscovery disputes. The Rules further provides that a party's failure to comply may result in the motion being held in abeyance until the court has the opportunity to conference the matter. In this instance, neither side requested a pre-motion conference prior to filing the motion, the motion was adjourned upon consent and with the approval of the court, and both parties have fully briefed the motion. As a consequence, the court shall entertain the motion (*see ADCO Elec. Corp. v McMahon*, 38 AD3d 805 [2d Dept 2007]).

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad*, 64 NY2d 851 [1985]). However, if the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see Zuckerman*, 49 NY2d 557).

In support of its motion, plaintiff submits a copy of the pleadings, an affirmation of its counsel, an affidavit of Rachel Nunez, its president, and copies of the payment bond, the subcontract/purchase order, and the invoices of plaintiff together with certified payroll reports, proofs of mailing and signed work orders relating to each invoice.

State Finance Law § 137 requires a contractor on public improvement projects of a certain size to obtain a payment bond (see *Navillus Tile, Inc. v Bovis Lend Lease LMB, Inc.*, 98 AD3d 953 [2d Dept 2012]). The bond must guarantee "prompt payment of moneys due to all persons furnishing labor or materials to the contractor or any subcontractors in the prosecution of the work provided for in such contract" (State Finance Law § 137[1]). The liability of a surety under a payment bond is measured by the liability of the principal (see *Underpinning & Foundation Skanska, Inc. v Travelers Cas. & Sur. Co. of America*, 726 F Supp 2d 339 [SD NY 2010]).

The payment bond obligates defendant surety to remit prompt payment to a claimant having direct contract with Tru-Val for labor, material or both used or reasonably required for use in the performance of the contract, and permits such claimant to sue on the bond and prosecute the suit to final judgment for such sum as may be "justly due" and owing to the claimant. Pursuant to the subcontract/purchase order, plaintiff was to furnish labor, material and equipment to Tru-Val to "complete all low voltage and fire alarm work in the new addition" as per "all contract documents," subject to additions approved by Tru-Val's project manager, in exchange for payment of its labor costs at a rate approved by the New York City School Construction Authority (SCA), the owner of the project, plus 15% for overhead and profit. The subcontract/purchase order provides that all labor must be "in complete accordance with all contract documents."

Ms. Nunez avers that plaintiff performed and completed all of the work required under the subcontract/purchase order, but Tru-Val has failed to pay the sum of \$263,555.65 due and owing plaintiff, notwithstanding due demand. She also avers that Tru-Val never complained about the work which plaintiff performed or about the amounts which are claimed due under the subcontract/purchase order. She further avers that prior to making the instant motion, plaintiff sent to defendant copies of the subcontract/purchase order, invoices, payroll reports, proofs of mailing, signed work orders and various correspondence regarding the project and the amount owed plaintiff by Tru-Val, but defendant failed to fulfill defendant's obligations under the bond, or investigate, discuss or settle plaintiff's claim. Ms. Nunez identifies the various invoices totaling \$263,555.65 as being unpaid by Tru-Val.

By these submissions, plaintiff has established its prima facie entitlement to summary judgment for breach of contract on its first cause of action (CPLR 3212[b]; see *Zuckerman*, 49 NY2d at 562 [1980]; *Andrew R. Mancini Assoc., Inc. v Mary Imogene Bassett Hosp.*, 80 AD3d 933, 935 [3d Dept 2011]; *Kemper Ins. Cos. v State of New York*, 70 AD3d 192, 199 [3d Dept 2009]; see also *American Bldg.*

Supply Corp. v Avalon Properties, Inc., 8 AD3d 515 [2d Dept 2004]).

Plaintiff, however, has failed to demonstrate entitlement to recover punitive damages based upon defendant's failure to perform its contractual obligation as a surety (see *Aetna Cas. & Sur. Co. v City of New York*, 160 AD2d 561 [1st Dept 1990]; *Spancrete Northeast v Travelers Indemnity Co.*, 112 AD2d 571 [3d Dept 1985]). Under New York law, it is clear that to recover punitive damages in connection with a breach of contractual obligations, bad faith must be proven to the extent that it demonstrates an "extraordinary showing of a disingenuous or dishonest failure to carry out a contract" (*Gordon v Nationwide Mut. Ins. Co.*, 30 NY2d 427, 437 [1972], cert denied, 410 US 931 [1973]; see *Rocanova v Equitable Life Assur. Soc'y.*, 83 NY2d 603 [1994], quoting *Walker v Sheldon*, 10 NY2d 401 [1961]; *Pinnacle Environmental Systems Inc. v R.W. Granger & Sons Inc.*, 245 AD2d 773 [3d Dept 1997]). Defendant's refusal to pay on the payment bond, participate in a conference call or effectuate a settlement with plaintiff following the commencement of this action does not constitute 'morally culpable conduct' required to establish a claim for punitive damages.

In addition, plaintiff has failed to demonstrate entitlement to an award of attorney's fees. State Finance Law § 137(4)(c) authorizes an award of reasonable attorney's fees in an action on a payment bond furnished pursuant to section 137, when it appears based upon "a review of the entire record" that either the original claim or the defense interposed to such a claim is "without substantial basis in fact or law." Plaintiff has failed to show that the affirmative defenses asserted by defendant are without substantial basis in law or fact. In addition, the payment bond specifically provides that the obligee "shall not be liable for the costs or expenses of any . . . suit" brought to recover the sum "as may be justly due claimant."

The burden shifts to defendant to raise a triable issue of fact regarding its defenses to plaintiff's breach of contract claim.

Defendant asserts that it investigated plaintiff's claim in good faith and a bona fide dispute exists regarding the amount "justly due" to plaintiff. It offers the affidavit of Christopher Totaro, the president of Tru-Val, who states that plaintiff did not duly perform and complete the work required pursuant to the subcontract/purchase order with Tru-Val, portions of the work allegedly completed were not satisfactorily performed and Tru-Val was required to expend additional labor and materials to correct and completed plaintiff's unsatisfactory work. According to Mr. Totaro, the SCA issued a punch list denominated as the "Open Non-

Conformance Report Log," dated February 14, 2011, setting forth defective or outstanding work for the project. Mr. Totaro indicates that a significant portion of the items on the punch list relate to work assigned to plaintiff pursuant to the subcontract/purchase order with Tru-Val, and cites certain items on the punch list as examples of the incomplete or deficient work of plaintiff. Mr. Totaro also indicates that Tru-Val is entitled to offsets and back charges for the additional labor and materials Tru-Val expended to complete and correct the work. Defendant additionally submits a copy of the SCA's punch list, and an affirmation of its counsel, Cecilia E. O'Connell, Esq., indicating defendant sought the discovery of documents and statements from employees of Tru-Val in investigating plaintiff's claim, and has been in communication with plaintiff regarding the status of the claim and lawsuit.

Defendant, by its submissions, has raised a question of fact as to whether it is guilty of bad faith in failing to investigate or pay plaintiff under the payment bond. It, however, has failed to raise a question of fact as to whether plaintiff materially breached its subcontract/purchase order with Tru-Val so as to alleviate defendant of its payment obligation under the payment bond. Rather, the affidavit of Mr. Totaro creates a question of fact only as to the amount "justly due" to plaintiff, and not to defendant's liability as surety.

Under such circumstances, plaintiff is entitled to summary judgment in its favor as against defendant on the issue of liability for breach of the payment bond under its first cause of action, and the issue of damages shall be determined at trial. Trial dates will be set by the court on the return date currently scheduled for June 14, 2013 at 9:30 a.m. in Part 17.

Dated: May 7, 2013

J.S.C.