

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D55216
L/htr

_____AD3d_____

Submitted - December 11, 2017

MARK C. DILLON, J.P.
ROBERT J. MILLER
BETSY BARROS
LINDA CHRISTOPHER, JJ.

2015-07031

DECISION & ORDER

Autry D. Forbes, respondent, v American Safety
Casualty Insurance Company, appellant, et al.,
defendants.

(Index No. 703222/14)

Westermann Sheehy Keenan Samaan & Aydelott, LLP, Uniondale, NY (Robert J. Fryman and Christopher J. Sheehy of counsel), for appellant.

Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, Uniondale, NY (Peter L. Agovino and Raymond A. Castronovo of counsel), for respondent.

In an action, inter alia, to recover upon a performance bond, the defendant American Safety Casualty Insurance Company appeals from an order of the Supreme Court, Queens County (Duane A. Hart, J.), entered April 13, 2015, which denied its motion for summary judgment dismissing the complaint insofar as asserted against it.

ORDERED that the order is affirmed, with costs.

In 2012, the plaintiff hired the defendant Earth Link General Construction, Inc. (hereinafter Earth Link), as a general contractor for a home construction and renovation project. In connection with the project, Earth Link obtained a performance bond and a payment bond from the defendant American Safety Casualty Insurance Company (hereinafter ASCI).

The plaintiff commenced this action against Earth Link, ASCI, and others. The plaintiff alleged that Earth Link breached the construction contract by, inter alia, performing work in a deficient manner. As against ASCI, the plaintiff sought to recover on the performance bond. In an order entered April 13, 2015, the Supreme Court denied ASCI's motion for summary judgment

April 25, 2018

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dismissing the complaint insofar as asserted against it. ASCI appeals.

ASCI was not entitled to summary judgment dismissing the complaint insofar as asserted against it, as it failed to establish, prima facie, that any of the conditions precedent set forth in the performance bond were not satisfied by the plaintiff (*see Klewin Bldg. Co., Inc. v Heritage Plumbing & Heating, Inc.*, 42 AD3d 559, 560; *see also Walter Concrete Constr. Corp. v Lederle Labs.*, 99 NY2d 603, 605). Since ASCI failed to meet its prima facie burden, the Supreme Court properly denied ASCI's motion without regard to the sufficiency of the plaintiff's opposition papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

DILLON, J.P., MILLER, BARROS and CHRISTOPHER, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court