

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF MONROE

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RLI INSURANCE COMPANY,

Plaintiff,

DECISION AND ORDER

v.

Ind # 2004/00781

STEPHEN M. WATERS individually and  
d/b/a RUM-Z ENTERPRISES,

Defendant.

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Plaintiff, RLI Insurance Company, has moved pursuant to CPLR 3212 for an Order granting it summary judgment. This action arises out of a concession agreement entered by defendant with the New York State Office of Parks, Recreation and Historic Preservation for the operation of concessions at the Watkins Glen State Park in Watkins Glen, New York. As part of defendant's contract with the state, he agreed to provide \$35,000 worth of capital improvements to the Watkins Glen State Park facility. As part of his agreement with the state, defendant executed an All Purpose Application for Concessionaire's/Performance Bond with plaintiff in the amount of \$25,000, which application included an indemnification agreement, which is the subject of plaintiff's claim. Plaintiff's Complaint, ¶¶4-5. The indemnification agreement states that defendant will:

hold harmless and indemnify RLI from any and all liability, damages, loss, costs and expenses of every kind, including attorneys fees, which may be sustained or incurred arising out of the execution, enforcement,

procurement of release, or other action involving the application and/or issuance of the bond.

Plaintiff's Complaint, Exhibit A, ¶3. The indemnification agreement also required defendant to provide plaintiff with collateral security upon demand as security for any loss reserve, provided that defendant agreed further that plaintiff had the exclusive right to defend, settle, pay, or appeal any claim, and provided that a statement of loss and expense incurred by plaintiff shall be prima facie evidence of the fact and extent of defendant's liability to plaintiff.

The state became concerned that defendant had not complied with the requirement that the capital improvements be made, and, on February 12, 2003, filed a claim against plaintiff's bond. Plaintiff notified defendant of the claim on August 14, 2003, and the parties exchanged considerable correspondence in aid of plaintiff's investigation of the claim. Defendant claimed meritorious defenses, which plaintiff indulged for a time, but eventually rejected when defendant failed to provide collateral security as required and failed to provide proof of the defenses in response to plaintiff's request for the same. When the impasse became evident, plaintiff paid the state the full amount of the bond, \$25,000. Thereafter, defendant refused plaintiff's demand for reimbursement under the terms of the indemnification agreement, and announced to plaintiff that he was looking forward

to his day in court.

Plaintiff established that "it acted in good faith and that the amount paid was reasonable," Peerless Ins. Co. v. Talia Construction Co., Inc., 272 A.D.2d 919, 919 (4<sup>th</sup> Dept. 2000), and therefore its entitlement to summary judgment. Frontier Ins. Co. v. Renewal Arts Contracting Corp., 12 A.D.3d 891, 892 (3d Dept. 2004) ("the surety is entitled to indemnification upon proof of payment, unless payment was made in bad faith or was unreasonable in amount, and this rule applies regardless of whether the principal was actually in default or liable under its contract with the obligee"); Utica Mut. Ins. Co. v. Magwood Enter., Inc., \_\_\_ A.D.2d \_\_\_ (2d Dept. Feb 14, 2005). "Indemnity agreements such as the ones at issue in this case are consistently enforced." American Home Assurance Co. v. Gemma Constr. Co., 275 A.D.2d 616, 619-20 (1<sup>st</sup> Dept. 2000) (collecting cases).

Defendant failed to raise an issue of fact. Under these contractual arrangements, "it is irrelevant whether . . . [defendant] was actually liable on the underlying debt to . . . [the state]." International Fid. Ins Co. v. Spadafina, 192 A.D.2d 637, 639 (2d Dept. 1993). Although defendant alleges bad faith on the part of plaintiff in settling the state's claim, those allegations fail to raise a question of fact to defeat plaintiff's motion. Defendant's allegation that plaintiff acted in bad faith by failing to challenge the state's claim, or

contact alleged fact witnesses, is unfounded. "Defendan[t] submitted no evidence that plaintiff acted in bad faith, i.e., that plaintiff engaged in fraud or collusion." Peerless Ins. Co. v. Talia Construction Co., Inc., 272 A.D.2d at 919 (emphasis supplied). Defendant has also failed to raise a question as to whether plaintiff's investigation of the matter was reasonable and proper. Plaintiff contacted defendant and requested a statement of his position on the claim when plaintiff was informed of the claim. Affidavit of Everett Fritz, II, ¶¶12-13. The documents and affidavits before this court reveal that defendant did not provide plaintiff with anything more than conclusory denials of liability, and a vague witness list. In these circumstances, any claim "that plaintiff failed to investigate the claim fully would not impugn the good faith of plaintiff in making the payment." Id. 272 A.D.2d at 919-20. In addition, the failure of defendant to provide plaintiff with collateral security as demanded under the agreement entitled plaintiff to settle the state's claim. Ebasco Constructors, Inc. v. A.M.S. Construction Co., Inc., 195 A.D.2d 439, 440 (2d Dept. 1993).

Concerning the amount paid, defendant's obligation to the state was to make a \$35,000 capital improvement. The bond was only for \$25,000. The parties' negotiations resulted in a reduction of the state's claim to \$31,734.82, inasmuch as the

state agreed that defendant's proffered "invoices that represent possible capital improvements total \$3265.18." Letter of Thomas R. McCarthy, Esq., dated July 8, 2003 (included in Exh. F of defendant's affidavit). Defendant's affidavit fails to raise an issue of fact concerning the reasonableness of the payment amount. Acstar Ins. Co. v. Teton Enterprises, Inc., 248 A.D.2d 654, 655 (2d Dept. 1998).

Defendant alleges that plaintiff paid on a claim that its bond did not cover. The language of the bond, however, is inclusive and covered all of defendant's obligations as specified in the license agreement. Paragraph 7(a) of the license agreement states that the performance bond procured by defendant:

shall be kept in full force and effect by the Licensee throughout the entire term of this license to insure faithful performance by Licensee of all of the covenants, terms, and conditions of this License inclusive of, but not restricted to, the payment to Parks of all fees and charges.

(emphasis supplied). Furthermore, by its terms, the bond itself, signed by defendant, covered "all other obligations of principal specified in the original contract." Defendant's position is without merit.

Plaintiff also seeks attorneys' fees and costs pursuant to Paragraph 3 of the indemnification Agreement, which provides for collection of costs and expenses, including attorneys' fees, sustained in enforcing the agreement.

CONCLUSION

Plaintiff's motion for summary judgment is granted. Plaintiff's motion for attorneys' fees and costs is granted.

SO ORDERED.

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KENNETH R. FISHER  
JUSTICE SUPREME COURT

DATED: February 25, 2005  
Rochester, New York