

**Centennial Insurance Company v Van-Tag
Development Co., Inc.**

2006 NY Slip Op 30250(U)

August 1, 2006

Supreme Court, New York County

Docket Number:

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

Centennial

INDEX NO. 60.2159/05

MOTION DATE 1/25/06

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

- v -

Jan - Tang

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 28 2006

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 3/1/06

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 56

-----X
CENTENNIAL INSURANCE COMPANY,

Plaintiff,

Index No. 602159/05

-against-

VAN-TAG DEVELOPMENT CO., INC., TUFANO
CONSTRUCTION, INC., CARMINE TUFANO and
BARBARA TUFANO,

Defendants.

-----X
HON. RICHARD B. LOWE, III:

Defendants Tufano Construction, Inc., Carmine Tufano, and Barbara Tufano (collectively, the Tufano Defendants) move, pursuant to CPLR 3211 (a) (7), to dismiss the second, third, sixth, and seventh causes of action of the Amended Verified Complaint, insofar as they relate to construction project at the Long Island Transportation Management Center (the DOT Project).

FILED
AUG 11 2005

Background

In May 2001, the New York State Department of Transportation (the NYDOT) contracted with non-party, T. Enterprises, Inc., as general contractor, to provide labor, materials, equipment, and services for construction work on the DOT Project. In connection with the DOT Project, plaintiff issued and executed a performance bond (the Performance Bond) and payment bond (the Payment Bond), naming T. Enterprises as principal and the NYDOT as obligee. T. Enterprises defaulted under its contract with the NYDOT, and plaintiff, pursuant to its obligations under the Performance Bond, entered into a letter agreement with the NYDOT to complete the DOT

Project (the Takeover Agreement). The Takeover Agreement provided that plaintiff was to complete the DOT Project through a completion contractor approved by the NYDOT.

On May 9, 2003, plaintiff and defendant Tufano Construction entered into completion contract (the Completion Contract), whereby Tufano Construction agreed to furnish all supervision, labor tools, equipment, materials, and supplies necessary to complete the DOT Project. *See* Completion Contract, Section 1. The Completion Contract also provided that,

“[Plaintiff’s] payment bond issued on behalf of T Enterprises Inc., as Principal shall remain in effect for any and all claims for labor performed and/or materials supplied subject to the terms, limitations, and provisions of said payment bond. [Tufano Construction] shall not be responsible for any and all such claims in connection with T Enterprises Inc. for labor performed and materials supplied on or before May 9, 2003.

[Tufano Construction] shall be responsible for payment of all labor performed and/or materials supplied after May 9, 2003.”

Completion Contract, Section 7.

The Completion Contract also contained an indemnification clause. *See* Completion Contract, Section 8.

Previously in May 2002, in connection with separate projects involving certain Long Island school districts and a public library, plaintiff issued surety bonds on behalf of defendants Van-Tag Development Corp. (Van-Tag) and Tufano Construction in consideration of the Tufano Defendants signing a General Agreement of Indemnity (Indemnity Agreement).

The Indemnity Agreement provided that Van-Tag or the Tufano Defendants could request that plaintiff execute or procure the execution of certain surety bonds, undertakings, guaranties,

stipulations or other obligatory instruments for Van-Tag or the Tufano Defendants. It was agreed that plaintiff would be indemnified for any losses arising out of the execution of the certain surety bonds, undertakings, guaranties, stipulations or other obligatory instruments.

Plaintiff alleges that Tufano Construction defaulted on the DOT Project, while the Tufano Defendants allege that plaintiff failed to make payments for the work they performed.¹

The Tufano Defendants move to dismiss plaintiff's second cause of action seeking indemnification and exoneration, insofar as it relates to the DOT Project; the third cause of action for willful exaggeration of the mechanic's lien filed by Tufano Construction; and the sixth and seventh causes of action seeking the declaratory relief of quia timet, insofar as it relates to the DOT Project.

Discussion

Plaintiff's Second Cause of Action

The Tufano Defendants argue that plaintiff did not issue any bonds on behalf of Tufano Construction on the DOT Project, and did not pay any claims of Tufano Construction's subcontractors or suppliers in regard to the DOT Project, and therefore, plaintiff is not entitled to indemnification or exoneration. However, plaintiff argues that the Performance and Payment Bonds previously issued on behalf of T. Enterprises continued to remain in effect for the duration of the Project, as evidenced by the Takeover Letter and the Completion Contract.

"Exoneration is the equitable right of a surety to compel its principal to pay his or her debt and thereby discharge the surety's obligation under its bond." *In Re Gas Reclamation, Inc. Securities Litigation*, 741 F Supp 1094, 1104 (SD NY 1990). Therefore, the issue of law

¹ Tufano Construction filed a mechanic's lien in the amount of \$1,347,771.67.

before the court is whether the Performance and Payment Bonds extended to Tufano Construction when it took over the DOT Project. The court finds that the Bonds did not extend.

Plaintiff argues that the Takcover Agreement incorporates the terms of the Performance Bond, and therefore, the Performance Bond continued to remain in effect after Tufano Construction began completing the work. However, the Takcover Agreement, entered into by plaintiff and the NYDOT, acknowledges plaintiff's continuing obligations to the NYDOT, the obligee under the Bond, and does not extend the Performance Bond to Tufano Construction.

The Takcover Agreement merely states that pursuant to the Performance Bond, which was incorporated by reference, plaintiff's payments were to be forwarded by the NYSDOT to the State Comptroller. Further, the Takcover Agreement simply states that plaintiff "acknowledges" its obligation under the Performance Bond. This language does not extend the Performance Bond to Tufano Construction.

Plaintiff also argues that the Completion Contract extended the Payment Bond to Tufano Construction, as evidence in Section 7 of the Completion Contract. However, this provision clearly does not extend the Payment Bond to Tufano Construction. The provision reads that the Payment Bond shall remain in effect for any and all claims for labor performed and/or materials supplied with respect to T. Enterprises, subject to the terms, limitations, and provisions of the Bond. It then separately states that Tufano Construction is responsible for payment of all labor performed and materials supplied, after May 9, 2003. In regards to Tufano Construction, this provision just emphasizes that it is responsible for payment of all labor and materials.

Tufano Construction is not the principal, by extension of the Payment and/or Performance Bonds, and therefore, plaintiff's claim for exoneration, in regard to the DOT Project, is

dismissed.

Further, since this court finds that the Payment Bond did not extend to Tufano Construction, plaintiff cannot state a cause of action for trust fund violations under Article 3A of the New York Lien Law. Plaintiff argues that, under New York Lien Law § 77 and the principals of equitable subrogation, a surety who makes payments under its bond to an Article 3A beneficiary gains subrogation rights to all claims that the Article 3A beneficiary had against the trust fund diverter. Here, however, a bond was never issued or extended on behalf of Tufano Construction, so plaintiffs cannot make payments under a bond that does not exist. Plaintiff's claim for diversion of the Lien Law Article 3A trust funds is dismissed.

Plaintiff's second cause of action also seeks indemnification for losses incurred for breach of the Completion Contract. Plaintiff sufficiently alleges a cause of action against Tufano Construction for breach of the Completion Contract, which contains an indemnification provision.

As to the individual Tufano Defendants, plaintiff alleges that the Indemnity Agreement, signed by Barbara and Carmine Tufano, as individuals, binds them as indemnitors with respect to the Completion Contract, because the Indemnity Agreement encompasses not only bonds executed, but also, obligatory instruments, such as the Completion Contract. Therefore, plaintiff argues that the individual Tufano Defendants are indemnitors of any losses or default suffered by the plaintiff as a result of Tufano Construction's work under the Completion Contract. The Court finds plaintiff's allegations sufficiently allege a cause of action seeking indemnification. The Tufano Defendant's motion to dismiss plaintiff's second cause of action for breach of contract, and seeking indemnity, is denied.

Sixth and Seventh Causes of Action

The Tufano Defendants move to dismiss plaintiff's sixth and seventh causes of action seeking the declaratory relief of quia timet against defendants, insofar as these causes of action relate to the DOT Project.

Quia timet is the right to be protected from anticipated future injury where it cannot be avoided by a present action at law. *Fireman's Ins. Co. v Keating*, 753 F Supp 1146 (SD NY 1990). In the context of a suretyship, a bill quia timet lies to compel the principal to pay the debt after it has become due, and its use has also been extended to compel the principal to furnish the surety indemnity against possible loss where the surety has reasonable grounds for anticipating its rights are being jeopardized and will incur liability by threaten conduct of the principal. *Id.* at 1155.

In regard to the Performance and Payment Bonds, as previously stated, this Court finds that these instruments did not extend to Tufano Construction, and therefore, plaintiff can not seek this relief, in regard to those Bonds, without a surety-principal relationship. *In Re Gas Reclamation, Inc. Securities Litigation*, 741 F Supp 1094, *supra*.

However, as previously stated, plaintiff sufficiently alleges that it is entitled to indemnification by the Tufano Defendants, as the Indemnity Agreement allegedly extended security on behalf of the Tufano Defendants to indemnify plaintiff for any losses or default by Tufano Construction, arising out of the Completion Contract. Based on these allegations, plaintiff may be entitled to the relief of quia timet against the Tufano Defendants. Therefore, the Tufano Defendants' motion to dismiss the sixth and seventh causes of action is denied.

Third Cause of Action

Plaintiff's third cause of action seeks damages based on the allegation that Tufano Construction's mechanic's lien, filed March 26, 2004, was willfully exaggerated. Plaintiff has offered to withdraw this cause of action without prejudice as their claim is premature. The claim is withdrawn without prejudice, since a court has not declared the mechanic's lien void on account of willful exaggeration. *See Wellbilt Equip. Corp. v Fireman*, 275 AD2d 162 (1st Dept 2000).

Accordingly is it

ORDERED that the Tufano Defendants' motion to dismiss the second cause of action is granted, in part, and dismissed, in part, in so far as plaintiff's claims for exoneration and diversion of trust funds under Article 3A of the New York Lien law against the Tufano Defendants in regard to DOT Project are dismissed; and it is further


ORDERED that the Tufano Defendants' motion to dismiss the sixth and seventh causes of action is denied; and it is further

ORDERED that plaintiff's third cause of action is withdraw without prejudice; and it is further

ORDERED that the Tufano Defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: August 1, 2006

ENTER:


HON. RICHARD B. LOWE, III
J.S.C.

FILED