

American Interiors, Inc. v IDI Constr. Co., Inc.

2006 NY Slip Op 30589(U)

May 8, 2006

Supreme Court, Suffolk County

Docket Number: 29022-2003

Judge: Sandra L. Sgroi

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SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 45 SUFFOLK COUNTY

Present:

Hon SANDRA L. SGROI

MOTION DATE: 3-15-06
 SUBMITTED: 4-13-06
 MOTION NO.: 011 - MotD

 AMERICAN INTERIORS, INC., on behalf of
 itself and all other persons entitled to share in
 funds received by Payton Lane Nursing Home,
 Inc. or IDI Construction Company, Inc., in
 connection with the real property improvement
 for the Payton Lane Nursing Home located in
 Southampton, New York,

Plaintiff,

-against-

IDI CONSTRUCTION COMPANY, INC.,
 PAYTON LANE NURSING HOME, INC.,
 AMERICAN MANUFACTURERS MUTUAL
 INSURANCE COMPANY, AMERICAN
 MOTORISTS INSURANCE COMPANY,
 JAMES STUMPF, WILLIAM M. FLECK, SAM
 KLEIN, PFC CORPORATION, PIRRAGLIA
 CONTRACTING, INC., CONSERVE
 ELECTRIC, INC., NATIONSRENT, INC.,
 CENTRAL DESIGN SYSTEMS INC.,
 HAMPTON AIR EAST, STEVENSON
 LUMBER COMPANY - NEWBURGH, INC.,
 L&W SUPPLY CORP., and "JOHN DOE ONE"
 THROUGH "JOHN DOE TEN"

Defendants,

TORRE, LENTZ, GAMELL, GARY & RITTMASER,
 LLP
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 Lane Properties, Inc. and Sam Klein
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 and William M. Fleck
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REYNOLDS, CARONIA, GIANELLI & HAGNEY,
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 P.O. Box 11177
 Hauppauge, New York 11788

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BARBARA BERNTSEN,

Additional Defendant on
CounterclaimSTEVENSON LUMBER COMPANY-
NEWBURGH, INC.,

Third Party Plaintiff,

-against-

AMERICAN APPLICATION SYSTEMS, INC.,
PAYTON LANE PROPERTIES, INC., UNITED
STATES SECRETARY OF HOUSING AND
URBAN DEVELOPMENT, ARCH
INSURANCE COMPANY and JOHN DOE 1-5
and XYZ COMPANY,

Third Party Defendants.

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Upon the following papers numbered 1 to read on this motion for summary judgment: Notice of Motion and supporting papers 1-15; Affidavits in opposition and supporting papers 16-21; Affirmation and Affidavit in reply 22-23; it is,

ORDERED that the motion of the Defendant L&W Supply Corporation d/b/a Gypsum Specialists/JB Acoustical of CT for summary judgment is denied with leave to renew after discovery has been completed and in accordance with the directives contained in this order including compliance with the Rules of this Court.

IDI Construction Company, Inc.(hereinafter "IDI"), the general contractor, entered into written agreements with various contractors and suppliers for the purpose of constructing the Payton Lane Nursing Home and many of those entities are parties in this litigation. The Defendants, American Manufacturers Mutual Insurance Company and American Motorists Insurance Company (hereinafter "the Surety"), issued the bond for the Payton Lane Nursing Home construction project. The underlying contract for the construction of the Nursing Home project required IDI to complete construction of the project by April 12, 2003. The Plaintiff, American Interiors, Inc., performed work on drywall, ceilings, carpentry, sidings/stucco, roof trusses and exterior framing for the project. The President of American Interiors, Inc., Barbara Berntsen, alleges that Defendant L&W Supply Corporation d/b/a Gypsum Specialists/JB Acoustical of CT (hereinafter "L&W") furnished various building materials to American Interiors, Inc. for use in the project in the unpaid amount of \$176,554.13. These building materials were allegedly delivered pursuant to orders placed by American Interiors, Inc. and Berntsen alleges that these materials were actually used in the Payton Lane Nursing Home project.

After a series of disputes, on or about May 11, 2004 Payton Lane terminated IDI as the general contractor on the project and requested that the Surety complete the project in accordance with the performance bond. The Surety acted upon that request and on July 9, 2004, the Surety entered into a take-over agreement with Payton Lane and agreed to complete the Project using a third-party contractor to ensure completion of the project. In furtherance of the task of completing construction of the Nursing Home, the Surety retained Greyhawk to analyze and evaluate the Nursing Home project and assess the outstanding claims for nonpayment made by subcontractors and suppliers of material to the project. IDI has now filed for bankruptcy protection.

A number of subcontractors and suppliers have commenced law suits to recover monies for goods and services allegedly provided for this project. The various parties have asserted claims, cross-claims and counterclaims against one another and the parties Stevenson Lumber Company-Newburgh, L & W Supply Corp., Coastal Electric Construction Corp., Pirraglia Contracting, Inc., Hampton Air East, Inc., S&J Mechanical Corp. have asserted affirmative claims against American Interiors, Inc. American Interiors, Inc. in its sixth Cause of action has asserted affirmative claims against L & W Supply Corp., Stevenson Lumber Company-Newburgh, Pirraglia Contracting, Inc., Coastal Electric Construction Corp. and S & J Mechanical Corp.¹

¹This summary is not intended to be a complete synopsis of all parties or the claims interposed by the various parties to the actions commenced.

L&W has moved for an order granting summary judgment on the First, Second and Third Counterclaims in its Verified Answer to the Second Amended Complaint with Counterclaims and Cross-Claims against the Plaintiff American Interiors, Inc., summary judgment in favor of L&W on its Fourth Counterclaim against American Interiors and Counterclaim Defendants American Application, Partition Supply Systems, American Drywall of Connecticut, American Drywall of Massachusetts and Barbara Bernsten for breach of their obligations under a Guaranty and Surety Agreement,² summary judgment in favor of L&W on its third Cross Claim against American Manufacturers Mutual Insurance Company and American Motorists Insurance Company for breach of their obligations under a labor and material payment bond, and severing L&W's remaining counterclaims and cross claims.

The attorney for the Defendants, American Manufacturers Mutual Insurance Company and American Motorists Insurance Company (hereinafter "the Surety") has opposed the motion. According to the attorney for the Surety, L&W has not provided Court ordered discovery including responses to interrogatories and the Production of a corporate representative for a deposition. The attorney for the movant has replied to the affirmation in opposition interposed by the Surety and he does not deny that L&W has failed to comply with Court ordered discovery in this matter.³ In addition, the Court further notes that although this matter has been conferenced extensively, the attorney for the Plaintiff never requested permission to make the motion for summary judgment herein. Further, although the attorneys in this action have affirmatively chosen to litigate this action in the Commercial Part, the attorney for L&W has not complied with Rule 24 of the Commercial Rules of the New York Courts. Under these circumstances the motion of L&W for various relief is denied at this time and L&W is directed to complete discovery in this matter.

The Court further notes that the payment bond issued by the surety apparently defines claimant "as one having a direct contract with the Principal or with a subcontractor of the Principal for labor, material, or both, used or reasonably required for use in the performance of the contract." The Surety has the right to conduct discovery to ensure that L&W is a proper claimant as that term is defined by the Bond, that L&W actually provided the goods to American Interiors, Inc. and that American Interiors, Inc. used all of those goods in the

²Although the Plaintiff American Interiors, Inc. has commenced an action against L&W, and L&W has sued the President of American Interiors, Inc. personally and interposed a counterclaim against American Interiors, Inc., neither Barbara Bernsten nor American Interiors have opposed this motion and Barbara Bernsten has actually submitted an affidavit as part of L&W's motion for affirmative relief. American Interiors is free to discontinue its action against L&W, after consent of the Court and the other parties to this action pursuant to CPLR R 3217. Further, Bernsten and American Interiors, Inc. could consent to the entry of judgment against them on the claims interposed by L&W in this litigation.

³This matter was originally commenced in 2003, and the Court has worked assiduously with the Parties in an attempt to ensure the completion of discovery in a timely manner. While the philosophy of this Court is not to restrict the access of any party to written motion practice, motions for summary judgment should be engaged in pursuant to the rules of the Part and in good faith.

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Payton Nursing Home project without any double billing for those goods occurring. These issues cannot be resolved until discovery has been completed, and the Court notes that even at that point, triable issues of fact may exist that preclude the entry of judgment (see generally, *Aetna Cas. and Sur. Co. v. LFO Const. Corp.*, 207 A.D.2d 274, 615 N.Y.S.2d 389; see also, *Spancrete Northeast, Inc. v. Travelers Indem. Co.*, 99 A.D.2d 623, 472 N.Y.S.2d 177).

Dated: 5/2/06



SANDRA L. SGROI, J. S. C.