

**Humphreys & Harding, Inc. v Universal Bonding
Ins. Co.**

2007 NY Slip Op 32104(U)

July 9, 2007

Supreme Court, New York County

Docket Number: 0601297/2002

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

FBEM

-----X
HUMPHREYS & HARDING, INC.,

Plaintiff,

-against-

UNIVERSAL BONDING INSURANCE COMPANY,
Defendant.

-----X
UNIVERSAL BONDING INSURANCE COMPANY,
Third-Party Plaintiff,

-against-

WELCH CONSTRUCTION CORPORATION, EMERSON
WELCH and EMERSON WELCH as ADMINISTRATOR
for GLORIA WELCH, Deceased,
Third-Party Defendants.

INDEX NO. 601297/2002 E

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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 _____

FILED

JUL 11 2007

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying
Decision and Order.

Dated: July 9 2007

KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 3

-----X
HUMPHREYS & HARDING, INC.,

Plaintiff,

-against-

Index No. 601297/2002

UNIVERSAL BONDING INSURANCE COMPANY,

Defendant.

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UNIVERSAL BONDING INSURANCE COMPANY,

Third-Party Plaintiff,

DECISION and ORDER

-against-

WELCH CONSTRUCTION CORPORATION, EMERSON
WELCH and EMERSON WELCH as ADMINISTRATOR
for GLORIA WELCH, Deceased,

Third-Party Defendants.

-----X
KARLA MOSKOWITZ, J:

FILED
JUL 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

This lawsuit arose from various contracts among the parties for the completion of a nursing home expansion and renovation construction project (the "project"), including a general indemnity agreement ("Indemnity Agreement") between the defendant third-party plaintiff, Universal Bonding Insurance Company ("Universal"), a surety, and the third-party defendants, Welch Construction Corporation, Emerson Welch and Emerson Welch as Administrator for Gloria Welch, Deceased (collectively "Welch"), construction subcontractors. The Indemnity Agreement indemnified Universal for any losses that Universal incurred in fulfilling its role as surety to the primary contractor on the project, Humphreys and Harding, Inc. ("H & H"). The Indemnity Agreement required Universal to supply completion subcontractors, if Welch

abandoned the project. H & H had retained Universal as its surety to ensure completion of the project at the same time that H & H had subcontracted with Welch.

By this motion (sequence number 003), Universal moves, pursuant to CPLR 2221 and CPLR 3212, for leave to reargue its prior motion for partial summary judgment. Universal asserts that this court misapprehended controlling law and facts in its prior decision, entered January 25, 2007. In that decision, this court denied Universal's motion for summary judgment: (1) determining that Welch was jointly and severally liable to Universal under the Indemnity Agreement for all losses incurred by Universal and the monetary relief that it has requested and (2) severing the remaining claims of Universal against Welch. Universal's motion for reargument is granted. Upon reargument, this court amends that part of its prior determination that denied Universal's motion for summary judgment.

FACTS

This court's January 25, 2007 Order and Decision provided a thorough background of this case. The following facts are particularly pertinent for the analysis of this case. In March 1999, H & H contracted with Concord Nursing Home for a building expansion and renovations. In May 2000, H & H subcontracted with Welch to perform a specific portion of the project. H & H simultaneously contracted with Universal, as surety, for performance and payment bonds to ensure completion of the subcontracted work. In February 2001, Welch voluntarily abandoned work on the project because of financial difficulties that delays with the project had caused. This meant that Universal, as surety, had to provide a completion subcontractor for the project that Welch had abandoned. Universal contracted with Certified Interiors, Inc. ("Certified Interiors") to complete the project. Concurrently, Universal initiated an Indemnity Agreement with Welch

for reimbursement of any expenses that resulted from Universal's contracting with Certified Interiors.

All of the parties cite each other as causing delays to the project. The parties also cite the September 11th terrorist attacks as causing additional delays to the project. H & H first notified Universal of Welch's delays with the project in January 2001. Universal contends that it fulfilled its obligations as surety to H & H. Universal further contends that Welch is obligated to reimburse Universal, according to the Indemnity Agreement between Universal and Welch. The sums Universal maintains Welch owes includes \$219,148.28 for the costs Universal incurred in satisfying the surety performance bond by contracting with Certified Interiors and others to complete the project that Welch had abandoned, along with the sum of \$66,136 for the costs Universal incurred in satisfying the surety payment bond with various claimants. (Defendant Third-Party Plaintiff's Amended Notice of Motion for Reargument and Partial Summary Judgment, pp 2-4) ("Universal's Motion for Reargument").

At oral argument, Welch disputed that it voluntarily abandoned the project and claimed that nonpayment forced Welch off the project. Welch further asserted that Universal "jump[ed] in" and completed the project in bad faith. (Transcript, pp 9-10, 11, 12-13). However, Universal counters that the manner in which Welch abandoned the project is irrelevant because Universal, as surety, was obligated to act according to H & H's requests. (See Transcript, p 13).

DISCUSSION

“[A] motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended relevant

facts, or misapplied any controlling principle of law.” (*Pro Brokerage, Inc. v. Home Ins. Co.*, 99 AD2d 971, 971 [1st Dept 1984] [quoting *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]).

Partial Summary Judgment for Relief Under the General Indemnity Agreement

“Summary judgment permits a party to show, by affidavit or other evidence, that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law, thereby avoiding needless litigation cost and delay.” (*Brill v City of New York*, 2 NY3d 648, 651 [2004]). Summary judgment is appropriate where there is no triable issue of fact before the court that warrants a trial. (*See Andre v Pomeroy*, 35 NY2d 361, 364 [1974] [“[W]hen there is no genuine issue to be resolved at trial, the case should be summarily decided”]).

Universal contends in its papers and at oral argument that the court misapprehended and overlooked the controlling law that governs the rights of an indemnified party. Under New York law, an indemnity agreement is “fully enforceable.” (*New York Housing Auth. v Olympia Constr.*, 4 Misc.3d 1016A [Sup Ct NY County 2004]). An indemnified party makes “a prima facie of entitlement to summary judgment by submitting a copy of the contract that the parties executed together with documentation of its . . . payment” in fulfillment of its surety obligations. (*Id.* [citations omitted]; *see also BIB Constr. Co., Inc. v Fireman’s Ins. Co. of Newark, New Jersey*, 214 AD2d 521, 523 [1st Dept 1995] [“[T]he evidence of payment in satisfaction of such expense, claim or charge is prima facie evidence of the propriety thereof and of the liability of [indemnitor to the indemnified party.]”). New York law provides that Universal need only supply the Indemnity Agreement and proof of payment to Certified Interiors and others as prima

facie evidence of Welch's liability and obligation to pay Universal for expenses Universal incurred in fulfilling its role as surety to H & H.

Universal maintains that it has supplied the documentation of the Indemnity Agreement and proof of payment to Certified Interiors and others to support its claim for entitlement against Welch. Universal supplied a copy of the Indemnity Agreement, along with copies of checks and itemized statements relating to Universal's payment to Certified Interiors and others to complete the project. Universal contends that Welch has failed to raise any genuine opposition to Universal's claim for relief in satisfaction of the contracted Indemnity Agreement.

Further, Universal cites New York law that urges the court to dispose of the case summarily when the agreement between the parties is clearly unambiguous. (*See Caporino v Travelers Ins. Co.*, 62 NY2d 234, 239 [1984] [stating that where "policies are unambiguous . . . their construction is solely a question of law for the court. . . . We may not disregard clear provisions which the insurers inserted in the policies and the insured accepted"] [citations omitted]; *see also Penguin 3rd Ave. Food Corp. v Brook-Rock Assoc.*, 174 AD2d 714, 715 [2d Dept 1991] ["It is well settled that the interpretation of a written agreement is within the province of the court and, if the language of the agreement is free from ambiguity, its meaning may be determined as a matter of law on the basis of the writing alone without resort to extrinsic evidence."]).

The Indemnity Agreement between Universal and Welch provides in pertinent part, as follows:

INDEMNITY. The Indemnitor and his successors [Welch] agree to indemnify and save harmless the Surety [Universal] from and against any and all demands, liabilities, loss, costs, damages or expenses of whatever nature or kind, including fees of attorneys and all other expenses, including but not limited to cost and fees of investigation, adjustment of claims, procuring

or attempting to procure the discharge of such bonds and in attempting to recover losses or expenses from the Indemnitors or third parties, whether the Surety shall have paid out any such sums or any part thereof or not and premiums on Bonds issued by the Surety on behalf of the Principal.

In furtherance of such indemnity:

A. Surety shall have the right in its sole discretion to determine whether any claims shall be paid, compromised, defended, prosecuted or appealed.

B. Surety shall have the right to incur such expenses in handling a claim as it shall deem necessary, including but not limited to the expense for investigative, accounting, engineering and legal services.

C. Surety shall have the foregoing rights, irrespective of the fact that the Undersigned may have assumed, or offered to assume, the defense of the Surety upon such claim.

D. In any claim or suit hereunder, an itemized statement of the aforesaid loss and expense, sworn to by an officer of Surety, or the vouchers or other evidence of disbursement by Surety, shall be prima facie evidence of the fact and extent of the liability hereunder of the Undersigned.

E. Surety shall have the right to reimbursement of its expenses, premiums and attorneys' fees hereunder, irrespective of of expenses, premiums and attorneys' fees hereunder, irrespective of whether any bond loss payment has been made by Surety. In any suit on this Agreement, Surety may recover its further expenses and attorneys' fees incurred in such suit.

(Universal's Motion for Reargument, Ex.B [emphasis added]).

Welch must show the existence of a genuine triable factual issue to prevent Universal from obtaining summary judgment on its motion to recover the amounts Welch owes under the Indemnity Agreement. (*See Zuckerman v City of New York*, 49 NY2d 557, 560 [1980] [stating that "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do . . ."]). Welch contends that Universal had no authority to jump in and ensure the project's completion or make payments to Certified Interiors for work on the project because Welch had already "substantially" fulfilled contractual obligations it owed to H & H. (Affirmation of Regina Felton, Esq.,

April 24, 2007, ¶ 8) (“Felton Affirmation”). Welch asserts that Universal’s attorneys drafted the contract establishing Welch’s subcontractual default with H & H. (Felton Affirmation, ¶¶ 13-14). Welch further asserts that Universal calls this contract the “voluntary default,” although Welch maintains its contention that nonpayment forced it off the project. (*Id.*) Universal counters that Welch signed the default contract of its own free will and has failed to raise any genuine opposition with regards to the default contract. (*See* Transcript, pp 13-15).

Welch further contends that Welch’s departure from the project did not trigger Universal’s surety obligations because, in addition to Welch’s completion of its contractual obligations with H & H, Welch did not abandon the project, as Universal contends, but nonpayment forced Welch off the project. (*See* Felton Affirmation, ¶¶ 9-10). However, Welch’s contentions are unavailing because H & H controlled Universal’s surety performance when H & H called on Universal to fulfill its obligations as surety. (*See BIB Constr. Co., Inc.*, 214 AD2d at 523 [“This indemnity agreement governs the relationship between plaintiff contractor and defendant surety. Once the [contractor] declared [subcontractor] in default and demanded that defendant, as surety, fulfill [subcontractor’s] obligations, defendant was required to comply, regardless of its own belief in the correctness of the [contractor’s] action.”] [citations omitted]).

Universal contends in its papers and at oral argument that the court misapprehended the facts of the case related to the amounts Welch owed Universal under the Indemnity Agreement, and Universal provides documentation of the expenses it incurred in fulfilling its surety obligations to H & H. Universal seeks reimbursement from Welch in the amounts of \$219,148.28 and \$66,136 in satisfaction of performance

and payment bonds respectively, as surety to H & H. Universal provided itemized documentation of the related expenses it incurred in supplying a replacement subcontractor for the completion of the project. Universal also provided supporting affidavits, uncontested by Welch, that verified these payments. (*See* Transcript, pp 7-8).

This documentation of payments Universal made, along with proof of the Indemnity Agreement, establishes a prima facie entitlement for relief by Welch and provides evidence of Welch's liability to Universal under the Indemnity Agreement. (*See Republic Ins. Co. v Real Dev. Co.*, 161 AD2d 189 [1st Dept 1990] ["[A]n itemized and attested statement as to such payment, settlement or compromise would be prima facie evidence of defendants' liability under this indemnification agreement."]).

CONCLUSION

Accordingly, it is

ORDERED that the motion by defendant third-party plaintiff, Universal Bonding Insurance Company, for reargument is granted, and upon reargument, this court amends that part of its prior determination that denied Universal's motion for summary judgment; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant third-party plaintiff and against third-party defendants in the amounts of \$219,148.28 and \$66,136, with interest from each payment date until the date of entry of judgment, as calculated by the Clerk, together with costs and disbursements, to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

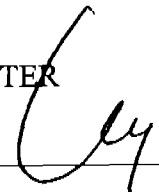
ORDERED, DECLARED and ADJUDGED that Welch Construction Corporation is liable to Universal Bonding Insurance Company for the amount of any damages and judgment

entered thereon proven by Humphreys & Harding, Inc. at trial against Universal Bonding Insurance Company both as the principal in University Bonding Insurance Company's Subcontract Performance Bond and as indemnitee, and that third-party defendants Emerson Welch and Gloria Welch are jointly and severally liable with Welch Construction Corporation for any such damages and judgment entered; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and sever the claim for attorneys' fees and an assessment thereof is directed; and it is further

ORDERED that a copy of this Order with Notice of Entry be served upon the Trial Support Clerk (Room 158), who is directed upon filing of a Note of Issue and a Statement of Readiness and the payment of proper fees, if any, to place this action on the Part 03 trial calendar for the assessment hereinabove directed. Movant is directed to contact the Part 03 Clerk to obtain a date for the assessment.

Dated: July 27, 2007

ENTER


J.S.C.

FILED
JUL 11 2007
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