

**Centennial Ins. Co. v Tadco Constr.
Corp.**

2007 NY Slip Op 32111(U)

June 29, 2007

Supreme Court, New York County

Docket Number: 0603713/2004

Judge: Richard B. Lowe

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

PRESENT: _____
Justice

PART 56

Centennial

INDEX NO. 603713-4

MOTION DATE 3/14/07

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

- v -

ADCO

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

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

FILED

JUL 10 2007

Upon the foregoing papers, it is ordered that this motion

... IN ACCORDANCE
... MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/29/07

HON. RICHARD E. ...

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: IAS PART 56

-----X

CENTENNIAL INSURANCE COMPANY,

Plaintiff,

Index No. 603713/04

-against-

TADCO CONSTRUCTION CORP., D&D MASON
CONTRACTORS, INC., FRANK DeMARTINO and
THOMAS DeMARTINO,

Defendants.

-----X

TADCO CONSTRUCTION CORP.,

Third-Party Plaintiff,

Index No. 590436/06

-against-

RABINOWITZ & GALINA, MICHAEL ROY GALINA
and MICHAEL MARC RABINOWITZ,

Third-Party Defendants.

FILED
JUL 10 2007
NEW YORK
COUNTY CLERK

-----X

Hon. Richard B. Lowe, III

Plaintiff Centennial Insurance Company (Centennial) moves, pursuant to CPLR 3212, for summary judgment on the ground that defendants Tadco Construction Corp. (Tadco) and Frank DeMartino (DeMartino) breached their fiduciary duties and violated Article 3-A of the Lien Law; pursuant to CPLR 3126, deeming the issues and information relevant to defendants' breach of fiduciary duty and violation of Article 3-A of the Lien Law be resolved in favor of Centennial on the ground that defendants willfully refused to obey multiple court orders, striking defendants'

answer, and prohibiting defendants from opposing plaintiff's claims and from producing evidence with respect to the breach of fiduciary duties and violation of the Lien Law; and setting this matter down for a hearing and determination of damages.

Defendants DeMartino, Tadco, D&D Mason Contractors, Inc. and Thomas DeMartino cross-move, pursuant to CPLR 3212, for summary judgment dismissing the cause of action for breach of fiduciary duty and/or vacating the note of issue and certificate of readiness if Centennial is permitted to proceed with its new claim.

FACTS

Centennial is a company authorized to act as a surety and to execute surety bonds for construction projects in the State of New York. It issued a performance and payment bond naming Tadco as principal with respect to a construction project for the Department of Transportation of the State of New York (DOT). During the course of that project, Tadco ordered a pre-engineered metal building from Racanelli Construction Company, Inc. (Racanelli), which, in turn, contracted with Ceco Building Systems to fabricate the materials for the building. There were serious disputes concerning the building, and Tadco contends that the building was defective and non-conforming. Racanelli commenced a lawsuit alleging that Tadco failed to pay Racanelli, while Tadco contends that the non-conforming nature of the building resulted in Tadco incurring substantial costs to modify the building, as well as significant delay costs. During the course of the underlying lawsuit, Centennial demanded that Tadco post collateral for the lawsuit, and to indemnify Centennial for expenses incurred as a result. When Tadco failed to do so, Centennial commenced the instant suit, seeking collateral for the payment bond; alleging that Tadco used funds received from DOT for obligations other than the DOT project and

seeking exoneration from all claims made under the bond; seeking declaratory relief of quia timet that defendants pay the amount of the bond claims; for breach of fiduciary duty; for attorneys' fees paid to prior counsel; and for continuing attorneys' fees.

There are two causes of action at issue in this motion, the second cause of action, claiming a breach of the Lien Law, and the fourth cause of action, which is for breach of fiduciary duties. In addition, Centennial seeks various sanctions against defendants for their alleged failure to comply with discovery orders. At oral argument, the parties were advised that any discovery disputes would be addressed by the Special Master. They will not be addressed in this decision. In a prior motion, this court granted Centennial's motion for partial summary judgment, on default, requiring Tadco to post collateral. The parties entered into a stipulation providing for payment of the collateral, in which Tadco agreed to pay Centennial \$35,000, and gave Centennial a deed in lieu of foreclosure for a piece of property whose estimated value is in excess of \$500,000.

On this motion, Centennial seeks, specifically, a declaratory judgment against defendants stating that defendants breached their fiduciary duties under Article 3-A of the Lien Law, by failing to maintain the contract funds in trust, by failing to retain books and records for the trust fund, and by diverting sums of not less than the amount that Centennial paid to Racanelli, plus interest. Centennial also seeks an order setting this matter down for a hearing and determination of damages.

In their cross motion, defendants outline the difficulties that they encountered with the pre-engineered building, including the costs that they were forced to incur, and the payments that were required to remedy the problems with the building. Tadco maintains that all of the

payments that it received from DOT for the project were used to pay the costs of the DOT project, including the extra expenses incurred because of the non-conforming building. Tadco disputes that it had any obligation to pay Racanelli, in view of the defects in the product it provided, and points to a decision in the underlying action that Racanelli commenced against Tadco, in which the court denied Racanelli's motion for partial summary judgment, and directed an immediate trial on the issue of damages sustained by Tadco as a result of the non-conforming delivery. Defendants contend that this, combined with additional factual allegations, *infra*, demonstrate that Centennial's settlement with Racanelli was made in bad faith. If proven, such bad faith would obviate any obligation that Tadco would otherwise have to reimburse Centennial. (*Frontier Ins. Co. v Renewal Arts Contr. Corp.* 12 AD3d 891, 892 [3d Dept 2004]).

Racanelli and Tadco engaged in settlement negotiations in the underlying action, which resulted in a stipulation of settlement. In September 2006, Tadco's counsel wrote to Centennial's counsel requesting release of the \$35,000 tendered by Tadco as collateral for the Racanelli action in partial satisfaction of the default judgment in this case, pursuant to the stipulation, so that Tadco could apply the money toward an anticipated settlement. Centennial refused to release the money, or the deed in lieu of foreclosure that it also received from Tadco as collateral.

On September 27, 2006, unbeknownst to Tadco, Centennial settled with Racanelli by paying Racanelli \$141,250.00. Tadco never received any information about the settlement, or any documents associated with it. Tadco maintains that Centennial's actions in undermining Tadco's ability to settle with Racanelli, and later paying Racanelli \$141,250.00, is evidence of Centennial's bad faith.

In their cross motion, defendants seek to dismiss the cause of action for breach of

fiduciary duty, and to vacate the note of issue and certificate of readiness if Centennial is permitted to proceed with its new claim based upon its payment to Racanelli.

DISCUSSION

Article 3-A of the Lien Law

Centennial contends that defendants breached their trust obligations by failing to pay Racanelli from the payments Centennial received from DOT, and by failing to keep proper books and records of those monies. Centennial maintains that it subrogated to the rights of Racanelli, and can, therefore, raise this fiduciary claim.

Centennial's position is without merit.

Article 3-A of the Lien Law creates a fiduciary duty between a contractor and a subcontractor, with respect to the funds that the contractor receives for a construction project. Those funds must be held in an Article 3-A trust. Only a beneficiary of the Article 3-A trust may assert a claim for a breach of fiduciary duty against the contractor for violation of the contractor's obligations under Article 3-A. (*Select Constr. Corp. v 502 Old Country Rd. LLC*, 11 Misc 3d 1078(A) [Sup Ct, Nassau County 2006]).

At the time that Centennial commenced this action, it had not yet settled Racanelli's claim. Thus, it had not yet subrogated to any cause of action that Racanelli might have had against Tadco. (*American Sur. Co. of N.Y. v Palmer*, 240 NY 63 [1925]). Accordingly, even if Centennial's allegations regarding Tadco's use of the funds were true, since Centennial is not a subcontractor, it would not have had standing to raise it at the time the action commenced. Centennial's motion for summary judgment seeking declaratory relief based on violations of the Lien Law is, therefore, denied.

The court notes that even if Centennial had standing, its motion would have to be denied. There are factual issues regarding whether Tadco's legitimate expenditures exceeded the amount it received from DOT. If those expenditures were necessary to rectify the damage caused by the non-conforming building, the fact that there were insufficient funds to pay a subcontractor would not mean that Tadco violated the Lien Law. (*Avon Elec. Supplies v C.K. Elec.*, 297 AD2d 768 [2d Dept 2002]); (*Fentron Architectural Metals Corp. v Solow*, 101 Misc 2d 393 [Sup Ct, NY County 1979]).

The parties argue extensively about whether Centennial's settlement with Racanelli was made in good faith. This issue is not properly before the court at this time. This action was commenced seeking collateral for Centennial's exposure, not reimbursement for its settlement; thus, any question regarding the good faith nature of the settlement that was ultimately made is beyond the scope of the complaint, and will not be addressed by the court.

Breach of Fiduciary Duty - Fourth Cause of Action

Defendants seek summary judgment dismissing the fourth cause of action for breach of fiduciary duty.

The fourth cause of action of the complaint alleges that the directors of Tadco had fiduciary obligations to Tadco, and that they breached those obligations, causing damage to Tadco. However, Centennial does not suggest any basis for it to raise such a claim. In order for Centennial to successfully raise a cause of action for breach of fiduciary duty, Centennial must allege and prove that the directors breached a duty that they had to Centennial. (*See Batas v Prudential Ins. Co. of Am.*, 281 AD2d 260 [1st Dept 2001]); (*see also Henneberry v Sumitomo Corp. of Am.*, 415 F Supp 2d 423 [SD NY 2006]). Centennial is not a shareholder of Tadco, and

has no standing to bring a suit on behalf of the corporation. Consequently, Centennial has failed to demonstrate any standing, and cannot prove its entitlement to summary judgment.

In its argument on this motion, Centennial raises allegations regarding Tadco's failure to comply with Article 3-A of the Lien Law. However, that is not the basis for the breach of fiduciary duty raised in the fourth cause of action, and Centennial cannot raise a new cause of action without amending its complaint. *See Central State Bank v American Appraisal Co.*, 33 AD2d 1009 (1st Dept 1970), *affd* 28 NY2d 578 (1971). Thus, its arguments regarding Tadco's possible failure to abide by the Lien Law are irrelevant to the fourth cause of action.

Centennial has offered no evidence that it has standing to raise this cause of action. Consequently, defendants' cross motion dismissing the fourth cause of action is granted.

Vacate Note of Issue and Certificate of Readiness

Defendants seek to vacate the note of issue and certificate of readiness if the court permits Centennial to proceed with its new claim. The new claim seems to be that Centennial is seeking recovery for the amount it paid to Racanelli, plus interest, costs and disbursements, under an equitable subrogation theory. Centennial, on the other hand, contends that it is only now able to reduce the amount it originally sought to a precise number, because it has settled the underlying action.

Centennial has not requested leave to amend its complaint (*see Central State Bank v American Appraisal Co.*, 33 AD2d 1009, *supra*), and, as discussed above, was not in a position to raise a subrogation claim at the time that this action was filed. It sought, and obtained, collateral for the payment bond. It has, in fact, filed the deed in lieu of foreclosure, and commenced efforts to force the occupants of the building to vacate, so that it can sell the

building. Therefore, Centennial cannot also seek an alternate form of relief, or proceed on a claim which is not part of the complaint.

In view of Centennial's assertion that it is not seeking a monetary judgment, it is unclear precisely what form of relief Centennial is seeking at this time. While it professes to seek a declaratory judgment, the declaratory judgment it seeks would state that defendants diverted sums of not less than the amount paid to Racanelli. It is unclear that there would be any purpose for such a declaration. When a party seeks a declaration regarding a monetary amount, courts generally do not grant declaratory relief, but require the party to seek a money judgment. (*See Olsen v New York State Dept. of Envtl. Conservation*, 307 AD2d 595, 596 [3d Dept 2003]); (*Bartley v Walentas* 78 AD2d 310 [1st Dept 1980]). Moreover, Centennial has, in effect, already obtained such relief; it obtained the collateral it sought. The precise amount that it will ultimately be entitled to has not yet been determined, but it appears from the record and the parties' arguments before the court that the collateral will more than meet the amount of Centennial's expenditures. Centennial has not demonstrated that any further attempt by it to obtain assets held by defendants would be proper, or within the scope of the parties' stipulation for providing payment of collateral.

In light of this court's determination that the issue of the payment to Racanelli is not properly before the court at this time, there does not appear to be any need for further discovery. Therefore, defendants' request to vacate the note of issue and certificate of readiness is denied as moot.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied; and it is further


ORDERED that defendants' cross motion for summary judgment is granted and the fourth cause of action is severed and dismissed; and it is further

ORDERED that so much of defendants' cross motion as seeks to vacate the note of issue and certificate of readiness to allow for further discovery is denied as moot; and it is further

ORDERED that the remainder of the action shall continue.

Dated: June 29, 2007

ENTER:



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

FILED
JUL 10 2007
NEW YORK
COUNTY CLERK'S OFFICE