

Travelers Indem. Co. v KRC, LLC

2007 NY Slip Op 32507(U)

August 7, 2007

Supreme Court, New York County

Docket Number: 0602526/2006

Judge: Joan Madden

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

PRESENT: HON. JOAN A. MADDEN

PART 11

Justice

THE TRAVELERS INDEMNITY COMPANY,
successor in interest by merger to GULF
INSURANCE COMPANY,

Plaintiff,

- v -

KRC, LLC and KAREEM MAITLAND,

Defendants.

INDEX NO. 602526/06

MOTION DATE: 6-21-07

MOTION SEQ. NO. 002

MOTION CAL. NO.

FILED

AUG 14 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Plaintiff moves for an order (1) renewing plaintiff's prior motion pursuant to CPLR 3215 for a default judgment against defendant KRC, LLC, and upon renewal granting a default judgment against KRC, LLC, and (2) granting summary judgment against defendant Kareem Maitland ("Maitland"). KRC, LLC submits no opposition to the motion, and Maitland opposes that part of the motion seeking summary judgment against him.

Plaintiff, as successor in interest by merger to Gulf Insurance Company ("Gulf

Insurance”), brings this action to recover under a written indemnity agreement for losses sustained on bonds issued by Gulf Insurance, as surety, to KRC, LLC, as principal.

The indemnity agreement dated November 15, 2002, indicates that it was signed by defendant Kareem Maitland, as a member of KRC, LLC and individually.¹ Under the paragraph 2 of the indemnity agreement, the indemnitors (i.e. KRC, LLC and Maitland), agreed to “indemnify and save [Gulf Insurance] harmless from and against every claim, demand, liability, costs, suit, judgment and expenses which [Gulf Insurance] may pay or incur as a result of having executed, or procured the execution of, such bonds...including fees of any attorney, whether on salary, retainer or otherwise, and the expense of procuring, or attempting to procure, release from liability, or in bringing suit to enforce the obligation of any of the indemnitors under this agreement.” Under paragraph 5 of the indemnity agreement, the indemnitors also agreed that Gulf Insurance shall have the exclusive right to determine for itself and the indemnitors whether any claim or suit brought by Gulf Insurance on any bond shall be settled or defended and Gulf Insurance discretion is binding on the indemnitors.

KRC, LLC failed to answer, move or otherwise respond to the complaint, and plaintiff moved for a default judgment against it. By decision and order dated January 27, 2007, this court denied the motion without prejudice and with leave to renew upon plaintiff’s submission, in accordance with CPLR 3215(f), of an affidavit of facts constituting its claim against KRC, LLC.²

In support of its renewal motion, plaintiff submits an affidavit from its Claim Representative Barbara Check (“Check”) who states that she has personal knowledge of the facts based on her review of plaintiff’s books and records. Check states that under the indemnity

¹As indicated below, Maitland denies that he signed the agreement.

² The court also required that plaintiff provided proof that the notice requirements of CPLR 3215 had been satisfied. On this motion, plaintiff has satisfied this requirement by showing that KRC, LLC was served pursuant to CPLR 3215(g)(4)(i) with an additional copy of the summons and complaint.

agreement, defendants promised to indemnify Gulf Insurance against any loss sustained in connection with the issuance of any bond by Gulf Insurance on behalf of KRC, LLC. She further states that KRC, LLC, as principal, and Gulf Insurance, as surety, issued Performance and Payment bonds, both bearing Bond No. B21855316 ("the bonds") in connection with a construction contract between KRC, LLC and F.J. Sciamé Construction Company, Inc., the general contractor, to perform certain work at the Thurogood Marshall Academy. According to Check, when KRC, LLC failed to perform as required under the contract, F.J. Sciamé Construction Company, Inc. made a claim against the bonds. Various subcontractors also made claims against the bonds based on KRC, LLC's failure to make required payments to them.

Check states that Gulf Insurance sustained losses on the bonds in the amount of \$1,083,364.36, and that \$167,455.64 is due and owing for expenses, attorneys' fees, costs and disbursements paid as the result of claims received under the bonds and submits a claim summary in support of her statements. Thus, according to Check, \$1,250,820 is due and owing plaintiff, as of February 1, 2007, based on payments made by Gulf Insurance to settle or otherwise resolve claims against the bonds as well as the costs, fees and expenses incurred as a result of those claims.

Based on the affidavit and proof submitted on renewal, plaintiff's motion for a default judgment against defendant KRC, LLC is granted in the amount of \$1,250,820.³

The motion for summary judgment against defendant Maitland, however, must be denied.⁴ In opposition to the motion, Maitland, appearing pro se, submits an affidavit stating that

³Check states that additional expenses have been incurred by plaintiff in connection with this action, and any relief granted here is without prejudice to the recovery of such expenses upon proper proof.

⁴In its decision and order dated January 27, 2007, the court noted that it was unclear from the papers whether Maitland had been served, whether he had answered or defaulted and whether plaintiff intends to pursue the action against him. On this motion, plaintiff submits proof that Maitland was served and answered the complaint.

he did not sign the indemnity agreement, and that his name was forged, and that at the time that the indemnity agreement was executed he was attending college in Maryland, and he submits a diploma and lease agreement to support his statements.

In reply, plaintiff asserts that if Maitland did not sign the indemnity agreement, his father Cecil Maitland, signed the agreement on Matiland's behalf and with Maitland's consent.⁵

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Here, assuming that plaintiff made a prima facie showing entitling it to summary judgment against Maitland, Maitland has controverted this showing based on his statements in his affidavit averring that he did not sign the indemnity agreement. Accordingly, plaintiff's motion for summary judgment against Maitland must be denied.

In view of the above, it is

ORDERED that plaintiff's motion for a default judgment against defendant KRC, LLC is granted without opposition, and it is further

⁵By decision and order dated July 10, 2007, this court granted plaintiff leave to amend the complaint to add as defendants Cecil Maitland and Angela Fenton, who is identified on the indemnity agreement as the individual who notarized Maitland's signature.

ORDERED that Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant KRC, LLC in the amount of \$1,250,820, together with interest at the statutory rate from February 1, 2007; and it is further

ORDERED that plaintiff's motion for summary judgment against defendant Kareem Maitland is denied.

Dated: ~~July~~ ^{August 6, 2007} 2007



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

FILED
AUG 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

Handwritten marks: a checkmark and the number 14.