

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

2008 NY Slip Op 32808(U)

October 7, 2008

Supreme Court, New York County

Docket Number: 602749/07

Judge: III, Richard B. Lowe

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: RICHARD B. LOWE III  
Justice

PART 36

Tadco

INDEX NO. 602749-07

MOTION DATE 5/16/08

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

Centennial

- v -

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

Upon the foregoing papers, it is ordered that this motion is decided in accordance to the attached decision

**FILED**

OCT 10 2008

COUNTY CLERK  
NEW YORK

Dated: 10/7/08

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

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

Plaintiffs,

Index No. 602749/07

-against-

CENTENNIAL INSURANCE COMPANY,

Defendant.

-----X

**RICHARD B. LOWE, III, J.:**

**FILED**  
OCT 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

In this action seeking declaratory, injunctive, and monetary relief based upon defendant Centennial Insurance Company's (Centennial) alleged bad faith settlement of a surety bond claim, bad faith refusal to release collateral, and material breaches of an indemnity agreement and stipulation entered into between the parties, Centennial moves to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (4), (5) and (7).

**FACTS**

This action is the latest in a series of litigation between the parties both in this court, and in other forums. Tadco Construction Company (Tadco) is a construction company which had a dispute with a supplier, Racanelli, regarding a metal building for a construction site. Centennial is a corporation that issues surety bonds and other types of civil bonds. Tadco signed a General Agreement of Indemnity (GAI) with Centennial, in which it agreed to indemnify Centennial from and against liability, loss and expenses resulting from certain surety bonds issued by it. Pursuant

to paragraph 7 of the GAI, Tadco and Centennial agreed that if Centennial set up a reserve against a bond claim, Tadco would post collateral with Centennial in the amount of such reserve, and that Centennial would have “the right to use the same or any part thereof, at any time, in payment or compromise of any judgment, claim, liability, loss, damage, attorneys’ fees and disbursements or other expenses ... .” GAI, Kent Aff. Ex. 1 (A), ¶ 7.

Centennial executed a labor and material bond (the Payment Bond) in the penal sum of \$1,627,541.00 in connection with a paving contract between Tadco and the New York State Department of Transportation. Racanelli sued Centennial and Tadco under the Payment Bond. After more than a year of litigation, Centennial set up a reserve for \$200,000, but Tadco failed to post collateral with Centennial. Centennial filed suit against Tadco seeking enforcement of the collateral obligation in paragraph seven of the GAI. Tadco defaulted on the summary judgment motion, and Centennial obtained a judgment against Tadco for \$219,303.03 on August 30, 2005.

In January 2006, Centennial and Tadco entered into a stipulation under which Tadco gave Centennial \$35,000 and arranged for nonparty Joseph DeMartino (brother of plaintiffs Frank DeMartino and Thomas DeMartino) to provide Centennial with a deed to a parcel of real property located in Queens County, as security for the judgment. The parties had disputes about the ramifications of the stipulation. This court determined that Centennial could not enforce the judgment after filing the deed to the property. Rather, it was limited to attempting to recover the judgment amount by proceeding against the property. Tadco was precluded from appealing the judgment, resulting from the summary judgment motion, after entering into the stipulation.

On August 22, 2006, in open court, Tadco entered into a stipulation of settlement with Racanelli, under which Tadco agreed to pay Racanelli \$141,250 within 30 days, or, in the event

of a default by Tadco, Racanelli was authorized to enter judgment against Tadco for that amount, plus interest. Tadco failed to make the payment. Although it blames Centennial for not releasing the collateral to enable it to pay, the terms of the stipulation did not require Centennial to release its collateral before the settlement was paid. In any event, Racanelli entered judgment against Tadco. Tadco filed a motion to vacate the judgment and the underlying stipulation of settlement, arguing that the settlement was only tentative and was not enforceable. The Trial Court (Cohalan, J.) rejected that argument, and denied the motion. Tadco appealed, and the Appellate Division, Second Department affirmed. *Racanelli Constr. Co., Inc. v Tadco Constr. Corp.*, 50 AD3d 875 (2d Dept 2008).

Centennial thereafter paid Racanelli the amount owed to it and secured by Centennial's bond. By assignment of judgment dated October 2, 2006, Centennial became the assignee of the Racanelli judgment. It has attributed the \$35,000 it received from Tadco toward that sum, and is now seeking to evict the tenants from the property that was deeded to it as collateral, in order to be able to sell the property to cover the expenses of the bond.

In this action, Tadco raises 11 causes of action, and alleges as follows: (1) Centennial's payment to Racanelli to settle that action was made in bad faith and was a breach of its duty to act reasonably and in good faith; (2) Tadco seeks a declaratory judgment that Centennial's payment was made in bad faith and that Centennial is not entitled to indemnification; (3) Centennial wrongfully refused to release the collateral to Tadco for Tadco's anticipated settlement of the action with Racanelli; (4) Tadco seeks a declaratory judgment that Centennial is not entitled to indemnification because of its refusal to release the collateral; (5) Centennial had no right to settle the Racanelli action under the indemnity agreement because it was fully

collateralized and it wrongfully settled without notice to Tadco and without Tadco's consent; (6) Tadco seeks a declaratory judgment that Centennial is not entitled to indemnification and has no right to retain the collateral due to its breach of the indemnity agreement; (7) Tadco seeks damages resulting from Centennial's breach of the covenant of good faith and fair dealing; (8) Centennial breached the stipulation by serving a restraining notice on The Dormitory Authority of the State of New York (DASNY) to enforce the underlying default judgment after Tadco failed to tender the letter of credit and make the installment payments, which caused damage to Tadco; (9) Tadco seeks a declaratory judgment that Centennial is not entitled to indemnification under the indemnity agreement due to its breach of the stipulation, and has no right to retain the collateral in the Racanelli action; (10) Centennial acted in bad faith in serving the second restraining notice on DASNY after Tadco failed to tender the letter of credit and make installment payments, which resulted in damages; and (11) Tadco seeks a mandatory injunction requiring Centennial to return and reconvey to Tadco the collateral tendered by Tadco to Centennial during the Racanelli action.

Centennial argues that several of the causes of action are predicated upon the notion that Centennial's payment to Racanelli was wrongful. However, Centennial contends that Tadco cannot re-litigate those issues, since they have been determined in other cases. Centennial also maintains that its retention and use of the collateral is proper. Additionally, anything that is brought in this action regarding the restraining notice can be brought before the court in the pending abuse of process action. Therefore, Centennial concludes that the complaint should be dismissed.

#### DISCUSSION

### Racanelli Action

Tadco maintains that Centennial acted in bad faith by settling with Racanelli, even after it was fully collateralized. It relies on its implied request to continue litigating after the settlement was not consummated. This contention, combined with the contention that Centennial improperly refused to release the collateral, underlies causes of action one through seven.

Tadco reached a settlement in open court with Racanelli. While Tadco attempts to deny the importance of that settlement agreement, and in fact litigated the enforceability of that settlement through the Appellate Division, there was an enforceable settlement agreement. *Racanelli Constr. Co. v Tadco Constr. Corp.*, 50 AD3d 875, *supra*. As a result of this settlement agreement, Racanelli was authorized to enter judgment if Tadco failed to make payment within 30 days of the settlement. Tadco failed to do so, and Racanelli therefore proceeded to enforce its rights. At that point, Centennial was obligated to pay the agreed-upon amount, as surety under the payment bond. The fact that Centennial was collateralized did not in any way mean that there was any basis to continue litigating an action in which Racanelli had already obtained judgment. While Tadco may have thought it worthwhile to contest the enforceability of the settlement agreement, that does not mean that Centennial acted in bad faith by failing to do so. Indeed, the fact that Tadco's position was found to be without merit demonstrates that there was nothing wrong with Centennial acquiescing to the terms of the settlement. Furthermore, Tadco provided the collateral while the action was ongoing. There would be no reason for Centennial to assume that Tadco would want to continue litigating after agreeing to a settlement if Tadco did not expressly inform it of such an intention. Thus, Tadco's admitted failure to expressly state that it wished to continue to litigate is also a barrier to its current position.

Consequently, there is no merit to Tadco's first, second, fifth, sixth, and seventh causes of action. The prior motions in this case, the results in the related Second Department action, as well as the documentary evidence require dismissal.

With respect to the third and fourth causes of action, Tadco maintains that Centennial acted in bad faith in refusing to release the collateral, so that Tadco could make the payment necessary in settlement of the Racanelli action. Tadco's position is without merit.

Tadco relies on a letter of May 15, 2006, in which Centennial's counsel stated that installment payments which were to be tendered by Tadco as collateral could be used to fund any future Tadco/Racanelli settlement, at Tadco's request. However, that letter does not say that Centennial would release the money to Tadco - it merely states that the monies could be used to fund a future settlement. Further, as Centennial points out, most of the value of the collateral was in the form of the deed to Joseph DeMartino's property. Requesting a release of that collateral on the day that payment was due to Racanelli would not have had any impact on Tadco's ability to pay Racanelli. Thus, even if Tadco could demonstrate that anything in the stipulation between it and Centennial, or in the GAI, required release of the collateral, it cannot demonstrate that the failure to release the collateral was responsible for Tadco's inability to pay the settlement amount to Racanelli at the required time. Additionally, Tadco fails to acknowledge that its obligation to Centennial was not limited to the amount of the settlement with Racanelli. Rather, Centennial was entitled to reimburse itself for attorneys' fees, costs and disbursements that resulted from the action by Racanelli. GAI, ¶¶ 7 and 8, Kent Aff., Ex. 1 (A).

In view of Tadco's failure to demonstrate that Centennial acted in bad faith in refusing to release the collateral to which it was entitled, the third and fourth causes of action are also

dismissed.

Causes of Action 8 - 10

These causes of action involve events that occurred in the Spring of 2006. Centennial tried to enforce its judgment against Tadco by serving a restraining notice on the DASNY rather than seeking to foreclose on the property to which it held the deed. Centennial points out that this occurred before this court and the Appellate Division had concluded that Centennial was limited to seeking relief through the collateral that it held. In the eighth and ninth causes of action, Tadco contends that by serving the restraining notice, Centennial breached the parties' stipulation, and seeks damages of not less than \$300,000.00, and a declaratory judgment that Centennial has no right to indemnity or to retain the collateral. In the tenth cause of action, Tadco maintains that Centennial's action breached the implied covenant of good faith and fair dealing, and seeks damages of not less than \$300,000.00.

Prior to commencing this action, Tadco commenced an action for abuse of process in this court, which is still pending. *Tadco Constr. Corp. v Gottesman Wolgel Malamy*, Sup Ct, NY County, index No. 603259/06 (Abuse of Process Action). In that action, Tadco also seeks not less than \$300,000.00 for abuse of process, negligent issuance and service of process, and malicious issuance and service of process. The Abuse of Process Action involves "substantially the same parties, issues and underlying facts." *Josephs v Bank of N.Y.*, 302 AD2d 318, 319 (1<sup>st</sup> Dept 2003). Thus, there is no reason to have duplicative effort and time spent on those causes of action here. The only significant difference is Tadco's prayer for declaratory relief. However, Tadco could seek to obtain such relief in the Abuse of Process Action, if it deems it so advisable. That alone should not suffice to enable Tadco to pursue another action with substantially the

same facts and issues.

Tadco opposes this portion of the motion, saying that discovery is drawing to a close and that the Abuse of Process Action is not based upon breach of stipulation. Tadco's position is unconvincing.

Tadco has not offered any suggestion that the claims raised in these causes of action would require additional discovery. The factual assertions concerning both actions are virtually the same. The stipulation itself does not require the parties to engage in discovery. After having obtained discovery in the Abuse of Process Action, Tadco must determine only whether the facts discovered constitute a breach of the stipulation. Without some concrete basis on which to assert the need for further discovery, the mere fact that discovery is completed does not suffice to allow Tadco to bring a separate action involving the same parties, the same facts, and the same issues. *Id.*; see also Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:15. Consequently, causes of action eight through ten are dismissed as duplicative of the Abuse of Process Action.

#### Eleventh Cause of Action

In the eleventh cause of action, Tadco seeks a mandatory injunction, based upon all of the alleged wrongdoing, requiring Centennial to return to Tadco all of the collateral that it provided in connection with the Racanelli action.

As was discussed above, Tadco has not stated a claim for bad faith, nor have any of its other claims survived. Therefore, the eleventh cause of action must also be dismissed.


#### CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Centennial Insurance Company to dismiss the complaint is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 7, 2008

ENTER:   
\_\_\_\_\_  
J.S.C.

HON. RICHARD B. LOWE, NJ

**FILED**  
OCT 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK