

Insurance Co. of North America v Galin

2008 NY Slip Op 32940(U)

October 23, 2008

Supreme Court, New York County

Docket Number: 110259/05

Judge: Herman Cahn

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

PRESENT: Hon. Herman Cahn PART 49
Justice

INSURANCE CO. OF NORTH AMERICA,

INDEX NO. 110259/05

MOTION DATE _____

- v -

MOTION SEQ. NO. 3

GALIN, MILES

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 _____	_____

Cross-Motion: Yes No

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

FILED
OCT 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 23, 2008

Herman Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED: _____ J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----x
INSURANCE CO. OF NORTH AMERICA,
Plaintiff,

-against-

Index No. 110259/05

MILES A. GALIN,
Defendant.
-----x

CAHN, J.:

FILED
OCT 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

This action was commenced by plaintiff Insurance Company of North America (INA), on its own behalf, as surety, and also as assignee of non-party Sterling National Bank of New York, against defendant Miles A. Galin to recover the sum of \$226,834.37, plus interest and expenses, including attorneys' fees, representing sums paid by INA to Sterling, pursuant to the terms of a surety bond issued by INA in favor of Sterling, at the request of Galin.

On this motion, INA seeks summary judgment granting it the relief requested in the verified complaint, striking each of the affirmative defenses and dismissing each of the counterclaims, set forth in Galin's verified answer, CPLR 3212.

BACKGROUND

Briefly, in June 1980, M/V Brazen Eagle, a vessel owned by Eagle Star Maritime Ltd. (Eagle Star) was detained in Karachi, Pakistan, when the amount of metric tons of goods (urea fertilizer) it offloaded was disputed. Galin, who owned or controlled Eagle Star, undertook to have the vessel released. He was informed that in order to have the vessel released, it would be necessary for him to post security for the benefit of the Karachi vessel agent. The security was required to be in the form of a letter of guarantee issued by a bank chartered in Pakistan. The chosen Karachi bank - Standard and Chartered Bank (Pakistan) - in turn, required security in the

form of a standby letter of credit from Galin's bank, Sterling, in New York. As security for its exposure under the standby letter of credit, Sterling, in turn, demanded security from Galin which was provided in the form of a surety bond, KO 0177647, issued by INA. Each of the above instruments were issued in the sum of \$360,000.

In connection with Sterling's issuance of the standby letter of credit, Galin (by his attorney, W. Shelby Coates, as attorney-in-fact) executed an "Application for Commercial Letter of Credit and Security Agreement." Said agreement provides, among other things, as follows:

1. As to drafts or acceptances under or purporting to be under the [Commercial Letter of] Credit [Credit], which are payable in United States currency, and any instruments drawn in whole or partial payment, renewal or extension thereof, [Galin] agree[s]:

a. in the case of each cite draft to reimburse [Sterling]. . . for the amount paid on such draft, or if so demanded by [Sterling], to pay [Sterling] . . the amount required to pay such draft; and

b. In the case of each acceptance to be paid by [Sterling] . . . the amount thereof, on demand but in any event not later than one (1) business day prior to maturity. . . .

In paragraph 3 of the agreement, Galin agreed to pay Sterling "on demand, [Sterling's] commission for the issuance of the Credit whether or not it is used, together with all charges and expenses paid or incurred by [Sterling] in connection therewith and legal interest when charged by [Sterling]."

In paragraph 5 of the agreement, Galin agreed:

to indemnify and hold [Sterling] harmless from and against each and every claim, demand, action or suit which may be made or brought against [Sterling] or any of [Sterling's] correspondence by reason of any transfer, sale, delivery, surrender or endorsement of any bill of lading where house receipt or any other document or the property represented by any thereof, at any time held by [Sterling] or held for

[Sterling's] account by any of [Sterling's] correspondence relative to any draft accepted by [Sterling] in reliance or on the provisions of this Agreement.

Paragraph 12 of the agreement stated that all rights, obligations and liabilities arising thereunder would be construed according to New York law.

By the end of June 1984, Standard and Chartered had paid \$133,165.63 under its letter of guarantee. In turn, Sterling had directly reimbursed Standard and Chartered for these amounts, and Sterling was reimbursed under the surety bond, for the \$133,165.63 it had paid to Standard and Chartered.

The letter of guarantee issued by Standard and Chartered provided that it "shall be renewed every year at its expiry date for further period of one year . . ." Sterling's letter of credit provided that it would automatically renew each year unless Sterling notified Standard and Chartered that the standby letter of credit would not be renewed.

In June 2004, Sterling gave notice of its decision not to further renew the letter of credit. Standard and Chartered, in turn, drew on the letter of credit an amount equal to Sterling's remaining exposure of \$226,384.37. Sterling then demanded reimbursement of this sum from Galin. When Galin did not pay, Sterling made a claim under the surety bond issued by INA. INA, in turn, made a demand on Galin to satisfy Sterling's claim, which demand likewise went unanswered by Galin. INA thereupon paid Sterling \$226,384.37 in full satisfaction of Sterling's claim against INA's surety bond. In exchange for this payment to Sterling, Sterling executed a receipt and an assignment of rights in the sum of \$226,834.37 in favor of INA.

INA thereafter commenced this action against Galin seeking to recover the amount of \$226,834.37 based on contractual indemnity, pursuant to the terms of the commercial letter of

credit and security agreement executed by Galin (first cause of action), as well as common law indemnity (second cause of action). The Complaint also contains a demand for exoneration (third cause of action) as well as a request that, based on Galin's alleged insecure financial condition and the fear that he may flee the jurisdiction, Galin be directed to deposit the amount of \$226,834.37 with the Clerk of the Court, or, alternatively, that the court appoint a receiver to receive and conserve Galin's property and assets (fourth cause of action). INA also seeks reimbursement of its commission for the issuance of the letter of credit, as well as all charges and expenses paid or incurred by it, together with legal interest. In this regard, INA asserts that it is entitled to reimbursement of its expenses and attorneys' fees incurred in connection with this action based on the above-quoted paragraph 5 of the Application for Commercial Letter of Credit and Security Agreement wherein Galin promised to reimburse Sterling for any payment it made in connection with the aforesaid letter of credit. INA alleges in the Complaint that it has paid expenses, including attorneys' fees in the sum of \$13,673.20, and disbursements and expenses of \$236.76.

The Answer contains general denials, as well as various affirmative defenses, including: lack of personal jurisdiction, failure to state a claim, statute of limitations, laches, equitable estoppel, statute of frauds, and lack of actual or apparent authority. The Answer also contains two counterclaims (conversion and accounting) as well as a claim for a set-off.

DISCUSSION

INA contends that Galin, as principal to the surety, owes a common law duty to indemnify and reimburse the surety for any losses sustained under its bond, including, but not limited to INA's \$226,834.37 payment to Sterling. In addition to its common law obligation,

INA submits that Galin also has a contractual obligation to indemnify INA.

Galín, in his affidavit in opposition, advances two grounds why relief should not be granted to INA - - first, fraud, and second, that his attorney was not authorized to sign the agreement on his behalf. Galín, in paragraph 3 of his affidavit, states that “[t]he claims upon which the letter of credit were issued were entirely fraudulent.” In paragraph 6 of his affidavit, he asserts that he never authorized his attorney to enter into the letter of credit agreement on his behalf, and that “Coates, perpetrated legal malpractice and a fraud by signing my name to documents that secured the letter of credit without my knowledge or my consent and in express disregard of my instructions.” Galín concludes, in paragraph 15 of his affidavit, that “given Mr. Coates’ fraudulent acts in signing my name pursuant to an alleged Power of Attorney which I never signed, and which plaintiff fails to produce . . . there is a sufficient dispute here to warrant a trial on the merits.” This “opposition” to the motion is comprised of unsupported allegations, devoid of detail or documentary support, that do not create any issues of fact.

“[T]he bare denial that the guarantee was executed is insufficient to raise a triable issue” (Machinery Funding Corp. v Stan Loman Enterprises, Inc., 91 AD2d 528, 529 [1st Dept 1982]). “Defendant’s naked denial that she ever executed a guarantee is insufficient. She does not assert that she did not execute the document annexed to the complaint, nor did she deny the validity of her signature at Special Term. Defendant’s denials and affirmative defenses are conclusory and not factual and, therefore, insufficient to defeat the motion for summary judgment” (Bankers Trust Co. v Fassler, 49 AD2d 855 [1st Dept 1975]; see also Banco Popular North America v Victory Taxi Mgmt., Inc., 1 NY3d 381, 384 [2004] [“[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature”).

Galin's claim that his attorney lacked authority to sign the application of commercial credit and security agreement not only lacks support, but is belied by the facts, including the fact that he reimbursed Sterling in the amount of \$133,165.63. Additionally, even if such actual authority had been lacking, the facts warrant the conclusion that the attorney had apparent authority to sign as Galin's attorney-in-fact (see generally Hallock v State of New York, 64 NY2d 224 [1984]).

INA has established its entitlement to judgment in the amount of \$226,834.37, plus reimbursement of its costs and expenses, pursuant to the documentary evidence, including the agreement signed by Galin's attorney, as attorney-in-fact, and also supported by the evidence supplied by INA demonstrating its payment of the above-stated amount. Galin has come forward with no evidence to refute INA's entitlement to judgment. As stated by the First Department in American Home Assur. Co. v Gemma Constr. Co., Inc. (275 AD2d 616, 620 [1st Dept 2000]):

Defendants derived the benefit of plaintiff's bonds and other services, obtained at substantial financial cost to American Home, and their responsibilities are governed by their agreement to indemnify plaintiff against "all loss and expense, including attorney fees, incurred by Surety by reason of having executed any Bond" (see, National Union Fire Ins. Co. v Robert Christopher Assocs., [257 AD2d 1, 3, 11 (1st Dept 1999)]; General Acc. Ins. Co. v Merritt-Meridian Constr. Corp., [975 F Supp 511, 516 (SD NY 1997)]). By submitting the indemnity agreements, along with a sworn itemized statement of loss and expense of \$7,129,638.96, further supported by copies of payment drafts in that same amount, plaintiff demonstrated its prima facie entitlement to recovery thereupon (see, Kornblith v Ostrau, 252 AD2d 572 [2d Dept 1998]; International Fid. Ins. Co. v Spadafina, [192 AD2d 637, 639 (2d Dept 1993)]).

We find no merit to any of the defendants' affirmative defenses or counterclaims, and the fact that defendants have not yet been afforded discovery does not preclude their summary dismissal (see, Chemical Bank v PIC Motors Corp., 58 NY2d 1023, 1026 [1983]).

(id.).

The same factors as those presented in the above-quoted case are present in this case, and likewise support summary judgment in INA's favor (id.; see also Republic Ins. Co. v Real Development Co., 161 AD2d 189, 190 [1st Dept 1990] ["[i]n the absence of evidence to the contrary, the clear import of the indemnification agreement rendered this case appropriate for summary disposition"]).

INA alleges that it has incurred attorneys' fees and expenses to date in the sum of \$32,272.53 which INA is entitled to indemnification from Galin, pursuant to the terms of the previously quoted agreement. Galin has not controverted INA's entitlement to this relief or the sum requested, and accordingly, said amount is awarded to INA.

INA has also made a prima facie showing of the lack of merit of Galin's affirmative defenses, his counterclaims and his demand for a set-off. Here too, Galin has not come forward with any evidentiary showing or legal argument which could support the validity of these claims, or raise a triable issue with respect thereto. Thus, none of Galin's affirmative defenses, counterclaims, or set-off have been shown to have any merit. Accordingly, INA is also entitled to summary judgment dismissing the counterclaims, the set-off and striking the affirmative defenses.

CONCLUSION

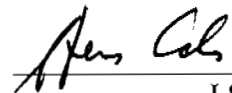
It is ORDERED that plaintiff Insurance Company of North America's motion for summary judgment is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$226,834.37, together with interest at the rate of 9% per annum from September 22, 2004 until the date of entry of judgment, as calculated by the

Clerk, and granting plaintiff judgment as and for its attorneys' fees and expenses accrued to date in the sum of \$32,272.53, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and judgment dismissing defendant's contributions; and it is further

ORDERED that judgment is granted in plaintiff's favor striking the affirmative defenses set forth in defendant's answer, and also dismissing the counterclaims and set-off set forth in said answer.

Dated: October 23, 2008

ENTER:



J.S.C.

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