

Travelers Cas. and Surety Co. v Thomsen Constr. Co., Inc.
2008 NY Slip Op 33428(U)
December 15, 2008
Supreme Court, New York County
Docket Number: 103390/06
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK

PART ~~11~~ 12

Justice

Index Number : 103390/2006

TRAVELERS CASUALTY

vs

THOMSEN CONSTRUCTION

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO.

103390/06

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

s motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and cross-motion are
**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

DEC 23 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/15/08

[Signature]
BARBARA R. KAPNICK S.C.
JSC

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):

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12

-----X
TRAVELERS CASUALTY AND SURETY COMPANY,
on behalf of itself and as assignee,
and successor in interest to all rights
to collateral and indemnity in the name
of Reliance Insurance Company,

Plaintiff,

- against -

THOMSEN CONSTRUCTION COMPANY, INC.,
STEPHEN S. THOMSEN, MARY CHRISTINE P.
O'CONNOR-THOMSEN,

Defendant.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 103390/06
Motion Seq. No. 002

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

In this action, plaintiff Travelers Casualty and Surety Company ("Travelers") seeks reimbursement for losses incurred pursuant to an Indemnity Agreement.¹

The Complaint asserts claims for contractual indemnification and exoneration (first cause of action), common law indemnification (second cause of action), declaratory judgment (third cause of action), attorneys' fees (fourth cause of action) and specific performance (fifth cause of action).

¹ According to an Affidavit submitted by Sherrie L. Monteiro, Senior Claim Executive for Travelers, the total sum owed is \$1,579,746.73.

The indemnitors, defendants Thomsen Construction Company, Inc., Stephen S. Thomsen, as both Secretary and President of Thomsen Construction Company, and individually, and Mary Christine P. O'Connor-Thomsen, individually, executed a "Continuing Agreement of Indemnity - Contractor's Form" dated May 27, 1997 (the "Indemnity Agreement") in favor of Reliance Insurance Company ("Reliance") in connection with Reliance's issuance of bonds relating to several construction projects.

Travelers acquired Reliance's surety business in April 2000 and claims to have assumed all rights and obligations of Reliance under the Indemnity Agreement.

Defendants now move for summary judgment dismissing the Complaint on the grounds that the assignment of the Indemnity Agreement is unenforceable against the defendants. *See, Seligman & Latz v Noonan*, 201 Misc. 96, 99 (Sup. Ct., Monroe Co. 1951) which held that "[c]ontracts involving the element of personal confidence and credit are ... held not to be assignable without the consent of the other party."

Defendants argue that the substitution of a different Surety constituted a 'material deviation' to the contract, because Paragraph Tenth of the Indemnity Agreement granted Reliance (the "Surety")

the exclusive right for itself and for the Undersigned to decide and determine whether any claim, demand, suit or judgment upon said Bond or Bonds shall, on the basis of liability, expediency or otherwise, be paid, settled, defended or appealed, and its determination shall be final, conclusive and binding upon the Undersigned; and any loss, costs, charges, expense or liability thereby sustained or incurred, as well as any and all disbursements on account of costs, expenses and attorneys' fees, deemed necessary or advisable by the Surety, shall be borne and paid immediately by the Undersigned, together with legal interest...

Defendants contend that they granted this broad discretion only to Reliance, and never agreed to grant this decision making authority to Travelers.²

Plaintiff opposes the motion and cross-moves for summary judgment against defendants Thomsen Construction Company and Stephen S. Thomsen³ on the ground that there is no dispute that numerous performance and payment bonds were issued pursuant to the

² Defendants have annexed an Affidavit from defendant Stephen S. Thomsen who represents, in relevant part, as follows:

4. When executing the Agreement I relied heavily on the understanding that I was granting Reliance broad discretion to among other things, settle claims, suits or judgments.

5. My intention in executing the Agreement was to deal with Reliance as the Surety, and to afford them the broad discretion I have alluded to. I had dealt with Reliance for many years and felt comfortable doing business with them. I did not anticipate having a different entity be given broad discretion to make decisions on my behalf.

³ The cross-motion does not formally seek any relief against defendant Mary Christine O'Connor-Thomsen.

Indemnity Agreement, and the Agreement provides, in relevant part, as follows:

SEVENTEENTH: This Agreement shall, in all its terms and agreements, be for the benefit of and protect any person or company joining with the Surety in executing said Bond or Bonds, or any of them, or executing at the request of the Surety said Bond or Bonds, or any of them as well as any company or companies assuming co-suretyship or reinsurance thereon.

See, *Travelers Cas. & Sur. Co. v Crow & Sutton Associates., Inc.*, 172 Fed.Appx. 382 (2nd Cir. 2006) which involved an indemnity agreement containing the same provision. The Second Circuit held that "whether Travelers 'acquired' Reliance or 'reinsured' Reliance in no way diminishes Travelers' ability to enforce the provisions of original Indemnity Agreements between defendants and Reliance." *Id.* at 384.

Based on the papers submitted and the oral argument held on the record on June 18, 2008, this Court finds that Travelers likewise has a right to enforce the terms of the Indemnity Agreement against the defendants in this case. See, *Wald v Marine Midland Bus. Loans*, 270 AD2d 73 (1st Dep't 2000).⁴

⁴ This Court notes that *Seligman & Latz v Noonan, supra*, which concerned a contract for employment as a beauty operator, is distinguishable from the instant case which does not involve a contract for the provision of personal services to be rendered. See, *Eisner Computer Solutions, LLC v Gluckstern*, 293 AD2d 289 (1st Dep't 2002).

Defendants alternatively argue that the Complaint must at least be dismissed against Mary Christine P. O'Connor-Thomsen on the grounds that the Indemnity Agreement provides, in relevant part, as follows:

TWENTY SECOND: Mary Christine P. O'Connor-Thomsen executed this indemnity solely for the limited purpose of agreeing that during the term of this indemnity if indemnitor, Stephen S. Thomsen, shall transfer any of his assets described and enumerated in personal financial statements dated August 31, 1996, and any subsequent statement to be provided in the future which is subject to this Indemnity Agreement and that such property of Stephen S. Thomson so received by Mary Christine P. O'Connor-Thomsen shall be subject to the terms of the indemnity given by Stephen S. Thomsen, as Indemnitor herein to the Surety. The Surety shall have no other claim or right in any other personal or real property of Mary Christine P. O'Connor-Thomsen.

Defendants argue that plaintiff has failed to allege any facts showing that any assets were transferred to Mrs. Thomsen.⁵

Plaintiff opposes this portion of the motion on the ground that defendants have failed to respond to its outstanding discovery demands and have not yet appeared for depositions, and that

⁵ Both Stephen S. Thomsen and Mary Christine P. O'Connor-Thomsen have submitted sworn Affidavits denying that any property was transferred to her which would make her subject to the indemnity.

therefore, the evidence necessary to oppose the dismissal as to Mrs. Thomsen is in her exclusive possession.

That portion of the motion relating to Mary Christine P. O'Connor-Thomsen is, therefore, denied as premature.

The cross-motion by plaintiff for summary judgment against defendants Thomsen Construction Company, Inc. and Stephen S. Thomsen is granted, as this Court finds that plaintiff has established its right to be indemnified and reimbursed by said defendants under the terms of the Indemnity Agreement.

The Clerk may enter judgment in favor of plaintiff Travelers Casualty and Surety Company, on behalf of itself and as assignee, and successor in interest to all rights to collateral and indemnity in the name of Reliance Insurance Company and against defendants Thomsen Construction Company, Inc. and Stephen S. Thomsen only, in the amount of \$1,579,746.73, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Plaintiff's claim for attorneys' fees is severed and continued and an assessment thereof is hereby directed.

Upon filing of a note of issue, the payment of the proper fees, if any, and service of a copy of this order with notice of entry, the Clerk of the Trial Support Office shall place this matter on the appropriate trial calendar for the above-directed assessment.

Plaintiff's claims against defendant Mary Christine P. O'Connor-Thomsen are severed and continued.

This constitutes the decision and order of this Court.

Dated: December 15, 2008



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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