**Fidelity & Deposit Co. of Maryland v Greystone Bldg. & Maintenance Corp.**

2009 NY Slip Op 30657(U)

March 17, 2009

Supreme Court, Nassau County

Docket Number: 005032/07

Judge: Stephen A. Bucaria

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.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**
Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Plaintiff,

INDEX No. 005032/07

MOTION DATE: Jan. 7, 2009
Motion Sequence # 001

-against-

GREYSTONE BUILDING & MAINTENANCE CORP., THEODORE MELITTAS, ALAN FRANCISCO, ADRIANA LOPESTRI, MARIA FRANCISCO and GREYSTONE ASSOCIATES, LTD.,

Defendants.

The following papers read on this motion:

Notice of Motion.................................... X
Affirmation/Affidavit in Opposition......... XX
Reply Affirmation .................................. X
Memorandum of Law................................ XXX

This motion, by plaintiff, for summary judgment pursuant to CPLR 3212 against defendants, Greystone Building & Maintenance Corp., Theodore Melittas, Adriana Lopestri and Greystone Associates, Ltd., and each of them, (i) in the amount of $3,452,788 on the first and second causes of action set forth in the complaint, (ii) in the amount of $151,730 on the third and fourth causes of action set forth in the complaint, and (iii) as to liability only on the

fifth cause of action set forth in the complaint, for the expenses, including counsel fees, incurred and to be incurred by plaintiff in prosecuting the instant action, and for such other and further relief as the Court may deem just and proper, is determined as hereinafter set forth.

This action arises out of a maintenance and repair project of the New York State Department of Transportation ("NYSDOT") for which the defendant Greystone was the contractor. Pursuant to the contract, Greystone agreed that the plaintiff, Fidelity and Deposit Company of Maryland (hereinafter "F&D") would act as surety for the Faithful Performance Bond and the Labor & Material Payment Bond, each in the amount of $7,276,171.76. The defendants Greystone Associates, Ltd., Adriana Lopestri, Alan Francisco, Maria Francisco and Theodore Melittas (collectively referred to as "indemnitors") indemnified F&D, in a separate agreement, dated September 5, 2002, for all payments or disbursements on the Bonds. Greystone defaulted on the NYSDOT contract, was terminated by NYSDOT, and F&D as surety, was called upon by NYSDOT to complete the work.

The plaintiff asserts that it then contracted with another contractor, Perini Corporation, to perform the remaining work and paid out a total of $6,139,266 plus $448,926 for labor and materials; the plaintiff received $3,135,404 in payments from NYSDOT under the contract, and the defendants owe F&D $3,452,788, plus additional expenses and counsel fees of $151,730, for a total of $3,604,518. Counsel for the plaintiff argues, seriatim, that the affirmative defenses are meritless and that there is no issue of fact which precludes summary judgment in favor of the plaintiff.

In opposition, the attorney for the Greystone defendants, i.e., all defendants except Alan and Maria Francisco, notes that no discovery has been conducted and that there is a lack of good faith on behalf of the plaintiff and a lack of reasonableness of the moneys it expended. Such bases generally present issues of fact which cannot be resolved on this motion. The defendant Theodore Melittas avers that the plaintiff spent excessive sums of money completing the project; that extra work was done on the project for which the defendants cannot be liable for; that the plaintiff breached its obligations to the defendants and the defendants are released; and that the plaintiff became a volunteer as the obligations were materially changed. He further avers that Greystone Building had the winning bid for $7,276,171.76, and the work started on December 1, 2002; and that by mid-2004, the work was approximately 50% complete but Greystone was paid less than the amount billed to New York State. The defendants then had financial difficulties financing the corporate defendant and this affiant asserts that the Francisco defendants diverted more than $300,000 of the

funds to their own use. After a conference, this defendant presented an outline by which the Greystone defendants could complete the project and that plan was rejected. Subsequently, the successor contractor finished the project for what the defendants describe as an "extremely high" amount of money (Melittas aff., ¶29). He specifically rejects the amount charged for attorneys' fees as "shocking", but concedes that the amount paid to Greystone's subcontractors and suppliers as "reasonable". He argues that he cannot properly oppose this motion without discovery from the plaintiff and its contractor, the non-party Perini, and to determine whether the cost breakdown was reasonable and whether the plaintiff acted in good faith.

In reply, the plaintiff's attorney argues that the Greystone defendants' opposition lacks any factual basis, and points out that the opposition is merely conclusory and based on what they describe as "on the face of it", and that the plaintiff did not act reasonably and lacked good faith. He contends that, based on the case law and the language of the indemnity agreement, the defendants have no viable defense herein; that the substitute contractor charged 2005 prices, rather than Greystone's 2002 price estimate; and that the defendants manipulated the payment schedule and the performance of the particular items in the State contract. He further contends that the defendants' opinion, that the contractor's charges are unreasonable, is unfounded when the defendants' misconduct is considered. Counsel notes that there is no specific opposition to the charge of $448,954 and the Indemnity Agreement. Counsel further notes the falsity of the defendants' assertion that Greystone was never formally defaulted and exhibits the letter which depicts that default and notice, and the plaintiff was forced to arrange for completion; and that Greystone Associates Ltd. is a party because it, too, was a party to the indemnity agreement. Counsel asserts that this action has been pending since March 2007 and no discovery demands have been made by the defendants; and that the defendants have not established an evidentiary basis for the defendants' position that discovery will lead to relevant and admissible evidence. With respect to attorney's fees, such is not what is sought by this motion.

**DECISION**

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

> "It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement

> as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; **Zuckerman v City of New York**, **supra**, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)".

Applying those principles to the facts herein, this Court has examined the record, as presented, which includes the pertinent pleadings, agreements, letters, affidavits, and other relevant data.

The plaintiff herein, the surety, has established **prima facie** entitlement to judgment in its favor by producing the pertinent contracts, indemnity agreement, the formal notice of termination of Greystone Building & Maintenance by New York State, payment spread sheet, proofs of claim, and Mr. Melittas' concession that the payment of subcontractors and suppliers of Greystone Building & Maintenance of $448,954 was reasonable and that he and his wife did execute the Indemnity Agreement.

In order to defeat the motion for summary judgment, it is elemental that the defendants must submit facts which create an issue so as to require a trial.

It is well settled that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**Rotuba Extruders v Ceppos**, 46 NY2d 223); or where the issue is arguable (**Sillman v Twentieth Century Fox Film Corp.**, 3 NY2d 395); or debatable (**Stone v Goodson**, 8 NY2d 8).

Further, "[i]ssue finding, rather than issue determination, is the key to the procedure"

(**Sillman v Twentieth Century Fox**, **supra**, p.404).

> "It is well settled that a party opposing summary judgment must produce evidence in admissible form creating an issue of fact".

(**Franklyn Folding Box Co., Inc. v Grinnell Manufacturing Inc.**, 234 AD2d 505, 651 NYS2d 914, 2nd Dept., 1996).

The defendants' submission consists of a series of conclusory suggestions that this Court should accept, as fact, because of the affiant's position and experience and because of counsel's experience in this field of litigation. The affidavit is not detailed, nor does it submit facts supported by business records and other factual exhibits (**Eagle Work Clothes Inc. v Gent Uniform Rental Corp.**, 30 AD3d 562, 817 NYS2d 144, 2nd Dept., 2006). The defendants' affidavit seeks denial of the summary judgment motion, stating that a review of records of Perini and Zurich is necessary ". . .so we can advise the Court of issues that must be determined" and ". . .if the costs incurred were reasonable and whether Zurich acted in good faith". Put another way, the defendants want discovery so that they may discover whether the costs were reasonable, and a careful reading of the Melittas affidavit suggests that the defendants are alleging a ". . .mere hope that the discovery will reveal something helpful to the [defendants'] case. . ." (**Monno v Owusu**, 232 AD2d 461, 648 NYS2d 341, 2nd Dept., 1996), and such cannot postpone a determination herein (**Bryan v City of N.Y.**, 206 AD2d 448, 614 NYS2d 554, 2nd Dept., 1994).

Accordingly, the defendants have not raised an issue of fact so as to require a trial and the motion is **granted**. As to the fifth cause of action for expenses, including counsel fees, an inquest is necessary to determine the sum due to the plaintiff for expenses.

This matter is referred to the Calendar Control Part (CCP), for a hearing on the issue of expenses, including counsel fees to be held on May 7, 2009 at 9:30 a.m. The plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

Counsel is directed to attach a copy of this Order with his Note of Issue when served upon the Calendar Clerk.

So Ordered.

Dated MAR 17 2009

J.S.C.

ENTERED
MAR 19 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE