

**Milcon Constr. Corp. v Travelers
Indem. Co.**

2009 NY Slip Op 30718(U)

March 26, 2009

Supreme Court, New York County

Docket Number: 601197/07

Judge: Michael D. Stallman

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

PRESENT: HON. MICHAEL D. STALLMAN

PART 7

Justice

Index Number : 601197/2007

MILCON CONSTRUCTION CORPORATION

VS.

THE TRAVELERS INDEMNITY COMPANY

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 601197-07
MOTION DATE 10/22/08
MOTION SEQ. NO. #001
MOTION CAL. NO. 9

here read on this motion to/for _____

PAPERS NUMBERED

1-2

3-5

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 *is decided in accordance with the attached decision and order.*

FILED

MAR 31 2009

**COUNTY CLERK'S OFFICE
NEW YORK**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/26/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

-----X
MILCON CONSTRUCTION CORPORATION,

Plaintiff,

- against -

THE TRAVELERS INDEMNITY COMPANY,

Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.:

Index No. 601197/07

Decision and Order

FILED

MAR 31 2009

COUNTY CLERK'S OFFICE
NEW YORK

In this action on a labor and materials payment bond, plaintiff Milcon Construction Corporation (Milcon) moves, pursuant to CPLR 3212, for summary judgment in the amount of \$272,295.90 with interest, attorneys' fees pursuant to State Finance Law § 137, and to dismiss all defenses. Defendant, the Travelers Indemnity Company (Travelers) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

FACTS

This action revolves around a project known as "York College, St. Monica's Daycare Center" (the Daycare Center). The DASNY was the owner of the Daycare Center. It originally engaged JBC Contracting Company (JBC) as the general contractor. JBC posted a performance bond and a payment bond, both of which were issued by Gulf Insurance Company (Gulf). Travelers is the successor in interest to Gulf¹. JBC allegedly defaulted, and was

¹ The court will use the name "Travelers" to refer to either
(continued...)

terminated. Pursuant to the performance bond, Travelers then entered into a written takeover agreement (Takeover Agreement) with DASNY, pursuant to which Travelers agreed to take over and complete the work, in accordance with the original contract.

Travelers hired ICM to complete the work, and ICM hired Milcon as a subcontractor for a portion of the completion work. ICM was dissatisfied with some of the work performed by Milcon, amounting to approximately \$10,000. Milcon contends that it sent invoices to ICM, the final one of which requested payment of the full balance due. Milcon maintains that ICM received the invoices, and did not dispute them. Milcon now seeks to recover against the payment bond.

The Takeover Agreement. (Ex. 5 to Notice of Motion) provides that the bonds issued for the contract remain in full force and effect. Takeover Agreement Article VI. The original payment bond, issued by Travelers, names JBC as principal, and provides that only a claimant, meaning "one having a direct Contract with the Principal or with a Subcontractor of the Principal for labor, material, or both..." can recover on the bond. Payment Bond, ex. 4 to Notice of Motion. It also provides that the terms and conditions of the bonds will govern the rights and liabilities of

¹(...continued)
Travelers or Gulf, since there is no dispute that Travelers has liability for any obligations of Gulf under the performance and payments bonds.

the parties to the Takeover Agreement. *Id.* In addition, it states that the Takeover Agreement was not intended to create any third-party beneficiaries, or the confer any enforceable rights on anyone other than the parties to the agreement. Takeover Agreement Article V.

In this action, Milcon seeks to recover amounts that it claims that it is owed for work that it performed on behalf of ICM on the Daycare Center.

A few months after commencing the instant lawsuit, Milcon commenced an action in the Supreme Court of New York, Suffolk County, against Travelers, ICM and the Dormitory Authority of the State of New York (DASNY), which is currently pending, also in order to recover this debt. In that action, Milcon asserted causes of action for lien foreclosure, breach of contract, quantum meruit and account stated.

DISCUSSION

Milcon contends that Travelers is obligated to pay Milcon based on the payment bond. Pursuant to State Finance Law § 137, Milcon also seeks attorneys' fees, since Travelers has refused to pay Milcon the outstanding amounts due, without any legitimate basis. Milcon relies heavily on the language of the Takeover Agreement, which provides that Travelers was responsible for payment of lower tier contractors (such as Milcon), and requires Travelers to complete the Daycare Center in accordance with the

terms of the original contract. The original contract requires that both a performance bond and a payment bond be in place until the work is completed. Further, the performance bond and payment bond that Travelers issued at the inception of the project had to remain in place, in accordance with the Takeover Agreement. Thus, Travelers was responsible for ensuring that ICM posted the necessary bonds. Milcon argues that since no separate bonds were posted by ICM, the performance bond and payment bond that were posted by JBC still cover the project, and that Milcon should, therefore, be able to recover on the payment bond. Milcon points out that Travelers was liable for payment before JBC defaulted, and should not be able to reduce its exposure after taking over for JBC. Milcon argues that this is especially true where, as here, Travelers hired the completion contractor, and, therefore, approved of that contractor. Milcon asserts that it would not have entered into the subcontracts with ICM if it had known that there was no payment bond in place. Milcon asserts that it was relying on the statutory mandate requiring the posting of a payment bond.

Travelers contends that the payment bond, by its terms, applies only to those subcontractors who had a direct contractual relationship with JBC. Since Milcon did not have such a relationship, it cannot recover under the payment bond. Further, Milcon cannot rely on any of the provisions of the Takeover Agreement since it, by its terms, does not confer any benefit on

any entity other than the parties to the agreement. Additionally, the Takeover Agreement states that it shall not "in any way modify, increase or decrease the obligations of the Surety under the Performance Bond or Payment Bond, either as to scope of liability, the beneficiaries thereto or penal limits of said bonds." Takeover Agreement, Article I.

There is no question that state law, as well as the original contract and the Takeover Agreement, require a payment bond to be posted for a project such as the Daycare Center. However, the payment bond that was issued in this case, was very specific as to who is covered by the bond. It provides that only those with a direct contract with the principal, JBC, is covered. While the Takeover Agreement provides that the payment bond was to continue, it also provides that it was not extended, nor would it increase the beneficiaries under the bond. Thus, even if the Takeover Agreement did not preclude third parties from asserting rights pursuant to that agreement, Milcon could not successfully seek recovery under the payment bond that was posted by JBC. Rather, the logical, plain meaning of the terms of the payment bond, together with the Takeover Agreement, is that the payment bond would continue to be in force for any subcontractors that contracted with JBC, but were not paid. General rules of construction are used to construe payment bonds, and here, the payment bond restricts recovery to those who have a contract with

[* 7]

JBC. See *HNC Realty Co. v Bay View Towers Apts.*, 64 AD2d 417, 424 (2d Dept 1978). Thus, even though the purpose of the bond is to protect subcontractors working on the project (*id.*; *Quantum Corporate Funding, Ltd. v Westway Indus., Inc.*, 4 NY3d 211, 215 [2005]), the court cannot read the bond to protect those who are excluded by the terms of the bond. Nor can the Court extend the role of the payment bond to subcontractors who contracted with ICM, since ICM did not post the payment bond. See *95 Lorimer, LLC v Insurance Co. of State of Pa.*, 6 Misc 3d 500, 505 (Sup Ct, Kings County 2004); State Finance Law § 137.

Milcon argues that if Travelers was obligated by the Takeover Agreement and by State Finance Law § 137 to require ICM to post a bond, and failed in that obligation, it is not appropriate for Travelers to be relieved of any liability. However, that does not mean that Milcon can, therefore, recover under a payment bond that does not cover its contract. Rather, Milcon must attempt to seek redress through other means. The court notes that Milcon is apparently seeking such redress in its action in Suffolk County.

In view of this result, Milcon is also not entitled to attorneys' fees pursuant to State Finance Law § 137 (4) (c). It is also unnecessary for the court to address the question of how any dissatisfaction with part of the work that was done would affect any recovery.

CONCLUSION


Accordingly, it is hereby

ORDERED that the motion of Milcon Construction Corporation is denied; and it is further

ORDERED that the cross motion of Travelers Indemnity Company for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 26, 2009
New York, New York

ENTER: 

J.S.C.

FILED
MAR 31 2009
COUNTY CLERK'S OFFICE
NEW YORK