

Solco Plumbing Supply, Inc. v Yaffe

2009 NY Slip Op 31439(U)

June 29, 2009

Supreme Court, New York County

Docket Number: 106217/2007

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 106217/2007
SOLCO PLUMBING SUPPLY
VS.
YAFFE, SCOTT
SEQUENCE NUMBER : 004
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for partial summary judgment

PAPERS NUMBERED

1, 2
3, 4, 5
6

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 for partial summary judgment by defendant Highlands Ins. Co. is granted in accordance with the attached memorandum decision.

FILED

JUL 01 2009

COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 6/29/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 36

----- X
SOLCO PLUMBING SUPPLY, INC.,

Plaintiff,
- against-

SCOTT YAFFE, ESQ., an escrow agent,
HIGHLANDS INSURANCE CO., JOHN RUSIN,
ALASIA CO., STROBER BUILDING MATERIALS
CENTER, INC., NETRIX, INC., G & G DUCT
CLEANING, INC., PRESTO O-SALES AND
SERVICE, GUNHILL PLUMBING HEATING
SUPPLY CO., INC., and SIENNA
MECHANICAL CORP.

Index No. 106217/2007

DECISION AND ORDER

Motion Seq. No.: 004

Defendants.

LEILA RUSIN, GEORGE SHINAS, PARTHENOPI
SHINAS, GBE CONTRACTING CORPORATION,
and ALASIA CO., a joint venture,

Cross-Claim Defendants.

----- X

DORIS LING-COHAN, J.S.C.:

In this suretyship action, defendant Highlands Insurance Co. (Highlands) moves for summary judgment dismissing the first cause of action in the amended complaint, and awarding it \$865,948.61 on its first cross claim. As detailed below, the motion is granted to the extent of awarding Highlands judgment as to liability only on its first cross claim against all cross claim defendants except Leila Rusin, and is otherwise denied.

This action arises out of a series of transactions related to a contract awarded by New York City Housing Authority (NYCHA) on June 21, 2000, pursuant to

which defendant Alasia Co. (Alasia) agreed to perform plumbing services for the NYCHA at the Gun Hill Houses in the Bronx. Alasia submitted the lowest bid of \$5,226,000.

In order to obtain payment and performance bonds for this and other work, Alasia entered into an indemnity agreement dated April 1, 1999 (the indemnity agreement; ex. A to mov. aff.), with "First Indemnity of America Ins. Co. (First Indemnity), or any quota share partner," as the surety; defendants Alasia Co. (Alasia), GBE Consulting Corp. & Alasia Co., a Joint Venture (the Alasia joint venture), and GBE Corporation (GBE), as the contractors; and Leila Rusin, George and Parthenopi Shinas, GBE Contracting Corporation, and the Alasia joint venture, as indemnitors.

Leila Rusin alleges that her signature on the indemnity agreement is forged, although her signature is notarized. She has submitted the affidavit of a handwriting expert, who opines that it is not her signature on the indemnity agreement. There is no evidence of any disclosure with respect to the notary public who authenticated her signature. Pursuant to Executive Law § 135, a notary who engages in misconduct "in the performance of any of his powers such notary public shall be liable to the parties injured for all damages sustained by them" (see

Independence Leasing Corp. v Aquino, 133 Misc 2d 564, 573 [Co. Ct

Erie County 1986]). A factual issue as to whether Leila Rusin executed the indemnity agreement; thus, summary judgment with respect to Leila Rusin is denied. See *Zuckerman v. City of New York*, 49 NY2d 557 (1980).

Highlands is a quota share partner and assignee of First Indemnity pursuant to the terms of the indemnity agreement, which provides in paragraph 14 that the terms and conditions of the agreement "inure to the benefit" of any other surety that executes any bonds pursuant to the indemnity agreement (Ex. A to mov. aff.).

Highlands is a Texas corporation authorized to do business in the State of New York, and is in receivership allegedly pursuant to an order of the District Court of Travis County, Texas; no copy of that order has been submitted.

The amended complaint contains two causes of action. The first cause of action seeks a judgment declaring null and void an escrow agreement (the escrow agreement), dated October 19, 2004 (ex. F to mov. aff.), with defendant Scott Yaffe, Esq. (Yaffe), as escrow agent, and directing that the funds held in escrow either be paid into court or placed with an escrow agent appointed by the court. The second cause of action seeks a declaration that Article 3-A of the Lien Law applies to the funds in the escrow agreement.

The amended complaint alleges that two payments were made

in 2006 by NYCHA to the escrow fund, totaling \$ 267,837.11, out of which approximately \$40,000 has been paid. Highlands denied these allegations in the initial complaint. The submissions do not include any statement of either the amount of the funds currently in escrow, or any transactions involving the account.

The only parties to the escrow agreement are "John Rusin d/b/a Alasia Co." (Rusin-Alasia), and Yaffe. The escrow agreement recites that Yaffe represents the surety and grantor Rusin-Alasia jointly. Paragraph 14 of the escrow agreement provides that Yaffe's compensation as escrow agent "will be paid as part of and in the same manner as escrow agent's legal work pursuant to escrow agent's joint representation of surety and grantor" (ex. F to mov. aff.).

According to plaintiff Solco Plumbing Supply, Inc. (Solco), the escrow agreement resulted from "extensive and protracted negotiations" that followed a stipulation of settlement of an action that Solco commenced and then settled in Supreme Court, Bronx County, seeking payment for plumbing material it had furnished. In connection with that action, Solco filed a \$234,960.07 mechanic's lien with NYCHA on October 24, 2003, and also made a formal claim against the payment bond. The stipulation of settlement is not included in the parties' submissions.

The escrow agreement was allegedly intended to provide a

means for payment of the multiple claims of subcontractors and suppliers under the NYCHA Gun Hill contract.

Rusin states in his affidavit in opposition that NYCHA delayed payments of over \$500,000 owed to Alasia, causing it financial difficulties. Alasia made a request to Highlands for a lien bond. Highlands, through its counsel and Yaffe, proposed creating an escrow fund that "would unencumber contract payments, provide funds to Alasia to complete the final 4% of contract work, and pay approved creditors" (Rusin Aff. in Opp. ¶ 5).

Rusin further alleges that Yaffe told him that Highlands would pay Yaffe's attorneys' fees.

The escrow agreement provides in paragraph 2:

[t]he escrowed funds will be used first to pay for the completion of the work under the contract, second to reimburse surety under the indemnity agreement, and third to pay the claims of grantor's subcontractors and suppliers referred to as the 'contract creditors.'

(ex. F to mov. aff.).

Paragraph 5 of the escrow agreement divides the contract creditors into three tiers: first, those who have filed liens and agreed to remove them, like Solco. The second tier includes contract creditors who have agreed not to file liens. The third tier would include contract creditors who have refused to agree not to file liens, but the escrow agreement states that there are no known third tier contract creditors. Paragraphs 6 through 8

provide that the claims of the first tier are paid first, then the second, then the third. (Ex. F to mov. aff.).

The escrow agreement provides that the escrowed funds are to be used first to pay the contractor to finish the work, next to reimburse the surety, and third to pay the contract creditors in order of tier.

According to Rusin, Alasia has substantially completed the work at the Gun Hill project at its own expense, but NYCHA has stated its intention not to make further payments into the escrow account until all disputes between the parties are resolved. The date of completion is not stated in the submissions before the court.

According to the amended complaint, a meeting was held on March 27, 2006, at which representatives of Alasia and Highlands attempted but failed to agree upon the amount of the indemnity obligations. Thereafter, by letter dated April 12, 2006, Alasia declared Yaffe, and another attorney, Roger Sauer (Sauer), Esq., in default under the escrow agreement, and stated that Alasia will no longer abide by the terms of the escrow agreement. Sauer's role is not clearly defined in the submissions. The April 12, 2006 letter is not in the parties' submissions.

Alasia admits sending the April 12, 2006 letter, but unlike Solco, has not filed any counterclaim seeking a declaration that the escrow agreement is null and void.

The only issue at this time with respect to the first cause of action is whether Solco has standing to seek a declaration that the escrow agreement is null and void.

Highlands argues in its CPLR 3212 motion to dismiss the complaint that Solco, as a stranger to the escrow agreement, lacks standing to seek a declaration that the escrow agreement is null and void. Highlands argues that the escrow agreement is a private contract to which Solco is not a party, and that Solco therefore lacks standing to seek a declaration as to its validity. Upon the submitted papers, Highlands has not demonstrated its entitlement to judgment as a matter of law dismissing the first cause of action in the amended complaint.

"The law is settled that an intended beneficiary of a contract may maintain an action as a third party but an incidental beneficiary may not" [citations omitted] (*Alicea v City of New York*, 145 AD2d 315, 317 [1st Dept 1988]). Thus, as a matter of contract law, Solco, as an intended beneficiary of the escrow agreement, has standing to seek declaratory relief with respect to the escrow agreement.

Moreover, Highlands has not demonstrated as a matter of law that Solco does not have standing as a beneficiary of the trust created by Article 3-A of the Lien Law (Lien Law § 71 [4]). Section 70 (1) of the Lien Law defines trust funds, as applicable, as "funds ... received by a contractor under or in

connection with a contract for the improvement of real property ... or in connection with a subcontract" (Lien Law § 70 [1]). While the funds subject to the escrow agreement were not paid directly to Alasia by NYCHA, they were paid to Yaffe as agent for Alasia.

Highlands's First Cross Claim

The second paragraph of the indemnity agreement provides as pertinent:

[t]he Contractor and Indemnitors shall exonerate, indemnify, and keep indemnified the Surety from and against any and all liability for losses and/or expenses of whatsoever kind or nature (including, but not limited to, court costs, interest, and counsel fees) and from and against any and all such losses as the Surety may sustain and incur: (1) By reason of having executed or procured the execution of the Bonds, (2) By reason of the failure of the Contractor or Indemnitors to perform or comply with the covenants and conditions of this Agreement or (3) in enforcing any of the covenants and conditions of this Agreement

(ex. A to mov. aff.).

"Indemnity agreements such as the ones at issue in this case are consistently enforced" (*American Home Assur. Co. v Gemma Const. Co., Inc.*, 275 AD2d 616, 619 [1st Dept 2000]). "It is well settled that a surety may secure its rights by a written contract with the principal or another who promises to make good for the loss" (*Matter of New York Sur. Co.*, 300 A.D.2d 401 [2002]).

An indemnity agreement may provide for payment of attorneys' fees to the surety, but the surety must "demonstrate that it reasonably and in good faith incurred such a fee" (*American Motorists Ins. Co. v Trans Int'l. Corp.*, 265 AD2d 280, 281 [2d Dept 1999]). "[P]ayments made by sureties under such provisions are scrutinized only for good faith and reasonableness as to the amount paid" [citations omitted] (*International Fid. Ins. Co. v Spadafina*, 192 AD2d 637, 639 [2d Dept 1993]).

Defendants argue that the expenditures for which Highlands seeks indemnification did not arise as a result of any of the three grounds in the language quoted above with respect to the indemnity agreement. This court disagrees. Highlands would not have incurred any expenses in connection with this project but for the fact that it executed the payment and performance bonds. Therefore, any claims for expenses that it can substantiate arose "[b]y reason of having executed or procured the execution of the Bonds." Also, the proof may show that Highlands incurred and may continue to incur legal expenses "[i]n enforcing any of the covenants and conditions of this Agreement." (Ex. A to mov. aff.).

The indemnity agreement also provides in the second paragraph, as pertinent:

[i]n the event of any payment by the Surety the Contractor and the Indemnitors further agree that in any accounting ... the Surety shall be entitled to charge for any and all

disbursements made by it in good faith ...
and that the vouchers or other evidence of
any such payments made by the Surety shall be
prima facie evidence of the fact and amount
of the liability to the Surety

(ex. A to mov. aff.).

According to Highlands's first cross claim, Alasia failed to pay its subcontractors and suppliers in 2003 and 2004, resulting in claims against the payment bond. Highlands alleges that it incurred losses, "including but not limited to consulting and counsel fees" (Answer and Crossclaims ¶ 53).

Highlands alleges in paragraphs 54, 55 and 56 of its first cross claim that it sent two letters to the indemnitors, dated April 13, 2006, and June 6, 2006, demanding payment of \$344,000, and that Highlands' losses pursuant to the indemnity agreement have continued to rise, but that the indemnitors have failed to respond to the demand. The letters are not in the parties's submissions. The indemnitors deny those paragraphs in their replies.

The \$865,948.61 demanded in Highland's first cross claim is comprised of expenses allegedly incurred by Highlands in connection with the payment and performance bonds. Except for approximately \$72,000, the amount demanded is entirely for legal fees allegedly incurred by Highlands.

According to the affidavit of Andrew B. Swanson (Swanson), a claims Supervisor with Highlands, submitted in support of the

motion, "as of February 9, 2009, Highlands has incurred \$865,948.61 in expenses under bond No. G00026" (Swanson Aff. ¶ 19).

Swanson states that Highlands contracted out its claims processing under the payment bond to a consultant, Hudson International Group, Inc. (Hudson), which made payments "directly and indirectly" to Alasia, to avoid being called to perform under the performance bond, and also paid bills submitted by attorneys (Swanson aff. ¶ 18).

The only additional evidentiary support for Highlands' claims is a spreadsheet captioned, "Payment Inquiry By Claim Number" (ex. E to mov. aff.), which lists by category each check that allegedly represents a reimbursable expense paid by Highlands. No vouchers or copies of the checks are included in Highlands' submissions; nor does Exhibit E identify the ultimate payees of the non-legal payments, but lists only Hudson as the payee.

In order to substantiate its right to payment from indemnitors for counsel fees, a surety must submit an affidavit of counsel "with knowledge of the services provided explaining how the fees were incurred" (*Centennial Ins. Co. v. 4-A General Contracting Corp.*, 13 Misc 3d 1217[A] 2006 WL 2829790 (Sup Ct, NY County 2006). "[M]ere submission of copies of the front and backs of checks fails to demonstrate that these fees were

reasonable and incurred in good faith" (*id.*).

Similarly, in order to establish its entitlement to judgment as a matter of law on its claim for reimbursement of non-legal expenses, Highlands must present more than a mere internal spreadsheet generated by its agent to establish even *prima facie* the validity of the payments allegedly made by Highlands related to the payment and performance bonds. The indemnity agreement, as quoted above, provides that "the vouchers or other evidence of any such payments made by the Surety shall be *prima facie* evidence of the fact and amount of the liability to the Surety."

In the absence of the vouchers specifically provided for in the indemnity agreement, the only "other evidence" is exhibit E to the motion papers, which does not contain sufficient data identifying the alleged non-legal payments to constitute sufficient *prima facie* evidence to establish Highlands's entitlement to judgment as a matter of law. Thus, at the trial of this case, a determination will be made as to whether the checks listed in the spreadsheet are reimbursable under the indemnity agreement, either as expenses incurred or for payments related to the payment or performance bonds.

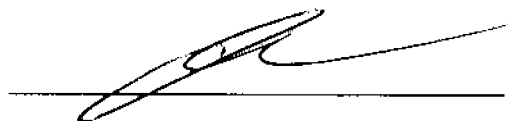
Accordingly, it is

ORDERED that Highlands's motion for partial summary judgment is granted, to the extent awarding it judgment, of liability only, on its first cross claim, against all cross claim

defendants, except Leila Rusin, and is otherwise denied; and it is further

ORDERED that within 30 days of entry of this order, Highlands shall serve a copy upon all parties with notice of entry.

Dated: June 29, 2009



Hon. Doris Ling-Cohan, J. S. C.

J:\Summary Judgment\solcoplumbingfinal.wpd

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