SHORT FORM ORDER

INDEX NUMBER: 32727-2007

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 04-03-2009
Motion Submit Date: 06-10-2009
Motion Sequence No.: 001 RRH
September 28, 2009

X

UNITED STATES FIDELITY AND GUARANTY,

Plaintiff,

-against-

VIRGINIA M. WOOD, DAVID A. WOOD SR., AND DAVID A. WOOD JR.,

Defendants.

X

Attorney for Plaintiff
Westermann, Sheehy Keenan Samaan & Aydelott, LLP
Garden City Center, Suite 502
100 Quinten Roosevelt Blvd.
Garden City, New York 11530

Attorney for Defendant
F. G. H. Keogh & Associates, PLLC
The Empire State Building
350 Fifth Avenue, Suite 1729
New York, New York, 10118

ORDERED, that the motion by plaintiffs pursuant to CPLR §3212, for summary judgment, is granted as set forth herein below; and it is further

ORDERED, that a hearing on counsel fees is scheduled for September 28, 2009 at 9:30 a.m.

Plaintiff commenced this action to recover damages for breach of a Master Surety Agreement in the amount of $4,554,671.55, including interest, expenses and counsel fees. This action arises out of an agreement between Plaintiff, United States Fidelity and Guaranty Company (USF&G), and Defendants, Virginia Wood, David Wood Sr., and David Wood Jr. as owners and/or operators of Precision Mechanical Inc. (hereinafter collectively referred to as "PMI" or "Defendants"), signed on June 18, 1997. PMI was a sheet metal company which performed HVAC subcontracting services, for general

contractors and governmental entities. Projects that involved government entities typically required several bonds. USF&G pursuant to the Master Surety Agreement, provided these bonds for PMI, and Defendants agreed to indemnify USF&G for any and all demands, claims, liabilities, losses and expenses incurred as a result of the issuance of any bonds on behalf of PMI. The damages claimed in this action arise out of settlements the Plaintiff made to resolve numerous claims by subcontractors, suppliers and project owners, asserted under material payment bonds and performance bonds issued by Plaintiff in connection with various construction projects undertaken by PMI. Plaintiff demanded that Defendants indemnify it for the payments, but they refused and the within action ensued.

Plaintiff commenced this action with the filing of a Summons and Complaint on October 16, 2007 seeking to recover damages based on the breach of the Master Surety Agreement. Issue was joined by Defendants' service of a Verified Answer dated April 17, 2008, in which they deny liability and interpose three affirmative defenses: 1) promissory estoppel; 2) commercial impracticability; and 3) failure to mitigate damages. Plaintiff now moves for an Order granting Summary Judgment and argues that Defendants' conclusory defenses must be rejected. In support of the motion, Plaintiff submits a Memorandum of Law, an Affidavit of Sherrie Monteiro, a representative of plaintiff, an Affirmation of Counsel, a Statement of Undisputed Material Facts, and a Sworn Statement and Voucher of Expenses, each dated March 11, 2009.

The gravamen of Plaintiff's argument is that pursuant to the plain and unambiguous language of the Master Surety Agreement, Defendants agreed to indemnify and hold Plaintiff harmless from and against all claims, damages, losses, costs and expenses, including counsel fees and further, unilaterally authorized Plaintiff to settle claims. Specifically, the Master Surety Agreement stated in relevant part:

> III. (A) UNDERSIGNED shall exonerate, hold harmless, indemnify and keep indemnified SURETY from and against any and all demands, claims, liabilities, losses and expenses of whatsoever kind or nature (including but not limited to interest, court costs and counsel fees) imposed upon, sustained, or incurred by SURETY by reason of: (1) SURETY having executed, provided or procured BOND(S) in behalf of PRINCIPAL, or (2) UNDERSIGNED'S failure to perform or comply with any of the provisions of this AGREEMENT:
> (B) In order to exonerate, hold harmless, and indemnify SURETY, UNDERSIGNED shall upon demand of SURETY, place SURETY in funds before SURETY makes any payment; such funds shall be, at SURETY'S option, money or property, or liens or security interests in property. (The

amount of such money or property or the value of the property to become subject to liens or security interests, shall be determined by SURETY.)

IV. (A) The liability of UNDERSIGNED hereunder shall extend to and include all amounts paid by SURETY in good faith under the belief that: (1) SURETY was or might be liable therefor; (2) such payments were necessary or advisable to protect any of SURETY'S rights or to avoid or lessen SURETY'S liability or alleged liability;
(B) the liability of UNDERSIGNED to SURETY shall include interest from the date of SURETY'S payments at the maximum rate permitted in the jurisdiction in which this AGREEMENT is enforced or is enforceable;
(C) the voucher(s) or other evidence of such payment(s) or an itemized statement of payment(s) sworn to by an officer of SURETY shall be prima facie evidence of the fact and extent of the liability of the UNDERSIGNED to SURETY.

Plaintiff argues that it acted in good faith in settling the numerous claims filed and Defendants have breached the Agreement by failing to indemnify them. In her affidavit in support, Sherrie Monteiro ("Monteiro"), a representative of plaintiff, details the claims received under the payment bonds issued on behalf of PMI and the payments made to the claimants. In several instances, Plaintiff consulted with PMI and sought its input prior to settling the claim. Additionally, according to Monteiro, the claims were settled for an amount significantly less than that sought initially by the various claimants. Finally, Monteiro states that the total costs incurred in investigating and resolving the bond claims, including counsel fees, consultant fees and other expenses, totaled $1,801,519.76. Based on the foregoing, Plaintiff argues there is no question of fact, that the conclusory affirmative defenses are without merit, and the motion for summary judgment should be granted.

In opposition to the motion, Defendants submit an Affirmation of Counsel, an Affidavit by Defendant David Wood, a Memorandum of Law and various correspondence. Defendants assert that the Master Surety Agreement entitled them to notice of a proposed payment on a bond claim and the opportunity to challenge said payment prior to settlement of the claim. In his affidavit, Defendant David Wood ("Wood") states that he was the president of PMI and has over 20 years experience in the HVAC contracting business. Wood relies on Article III, Section B, of the Master Surety Agreement in support of Defendants' position that it had the power to challenge the settlement of

claims against the bond. Wood argues that this section required Plaintiff to notify and consult with Defendants prior to settling any claim, and that they relied on this provision when entering the Agreement because they were in a superior position to navigate these type of issues. Defendants annex a letter, dated June 29, 2001 from Wood stating that it did not want any further claims paid before meeting with them. Thereafter, the submissions reflect that a meeting was held on August 23, 2001 and PMI agreed that certain claims were due and owing and PMI disputed other claims. In his Affidavit, Wood disputes the payment of several of the claims detailed by Monteiro and argues that Plaintiff should have consulted with Defendants prior to the payment. Defendants assert that this raises questions of fact that preclude the granting of summary judgment in Plaintiff's favor.

Turning to the affirmative defenses, Defendants assert that promissory estoppel bars Plaintiff's claim in that Defendants relied on a promise by Plaintiff, to wit, to notify Defendants prior to the settlement of a claim, and that they were injured as a result of such reliance. Additionally Defendants claim that Plaintiff failed to mitigate its damages by not consulting with them prior to settling the claims and in fact, that Plaintiff made "reckless and excessive" payments on claims they "knew were frivolous". Lastly, Defendants argue that the attorneys' fees and expenses sought are excessive and that Plaintiff has failed to offer any proof of the reasonableness of the fees. Therefore, Defendants urge the Court to deny the motion for summary judgment in its entirety.

In reply, Plaintiff argues that Defendants have not disputed any of the facts but instead, erroneously argue that the Master Surety Agreement requires Plaintiff to demand collateral from Defendants prior to the demand for indemnification and thus requires Plaintiff to notify Defendants of all payments before disbursement. Plaintiff asserts that such interpretation of the Master Surety Agreement is without merit since Article III does not require Plaintiff to demand collateral but only requires Defendants to post the collateral *if demanded* (emphasis added), and thus, the defense of promissory estoppel must fail. Further, Plaintiff claims that Defendants have failed to demonstrate that the failure to notify them of the settlements increased the losses and thus reflected a failure to mitigate damages. Plaintiff asserts that Defendants have failed to raise a question of fact sufficient to deny the motion for summary judgment.

The law is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Goldberger v. Brick & Ballerstein, Inc.,* 217 AD2d 682, 629 NYS2d 813 (2d Dep't 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. *Zayas v. Half Hollow Hills Cent. School Dist.,* 226 AD2d 713, 641 NYS2d 701 (2d Dep't 1996). Bald conclusory assertions are insufficient to defeat a motion for summary judgment. *Orange County-Poughkeepsie Ltd Partnership v. Bonte,* 37 AD3d 684, 830 NYS2d 571 (2d Dep't 2007). "It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather to determine whether there exists a genuine issue of fact." *Triangle Fire Protection Corp. V. Manufacturer's Hanover Trust Co.,* 172 AD2d 658, 570 NYS2d 960 (2d Dep't 1991). A motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Scott v. Long Island Power Auth.,* 294 AD2d 348, 741 NYS2d 708 (2d Dep't 2002).

It has been repeatedly recognized that an agreement which is clear and unambiguous on its face must be enforced according to its terms. *Greenfield v. Philles Records, Inc.,* 98 NY2d 562, 750 NYS2d 565, 780 NE2d 166 (2002); *Salerno v. Odoardi,* 41 AD3d 574, 838 NYS2d 156 (2d Dep't 2007); *Norma Reynolds Realty, Inc. v. Edelman,* 29 AD3d 969, 817 NYS2d 85 (2d Dep't 2006). Turning specifically to indemnity agreements, the Courts have repeatedly held that pursuant to agreements containing the broad language contained herein, "the surety is entitled to indemnification upon proof of payment, unless payment was made in bad faith or was unreasonable in amount, and this rule applies regardless of whether the principal was actually in default or liable under its contract with obligee." *John Deere Ins. Co., v. GBE/Alasia Corp.,* 57 AD3d 620, 869 N.Y.S.2d 198 (2d Dept. 2008); *quoting, Frontier Ins. Co., v. Renewal Arts Cont. Corp.,* 12 A.D.3d 891, 784 N.Y.S.2d 69. *See also, International Fidelity Ins. Co., v. Spadafina,* 192 A.D.2d 637, 596 N.Y.S.2d 453 (2d Dept. 1993). Payment is made in good faith if the surety pays the claims "in the honest belief that it was liable for such claims." *Lee v. T.F.*

DeMilo Corp., 29 A.D.3d 867, 815 N.Y.S.2d 700 (2d Dept. 2006), *quoting, Maryland Cas. Co. v. Grace*, 292 N.Y. 194, 54 N.E.2d 362. Where the agreement provides that the voucher or statement of expenses is prima facie proof of the propriety of the payment and the indemnitor's liability therefor and same are submitted to the Court, it is incumbent on the indemnitors to come forward with sufficient evidence to raise a triable issue of fact as to the bona fides of the payment or the reasonableness of the amount. *Dramar Construction, Inc., v. G and A Renovation and Restoration, Inc.*, 302 A.D.2d 487, 756 N.Y.S.2d 71 (2d Dept. 2003).

In the case at bar, Plaintiff has met its prima facie burden by the submission of the Sworn Statement and Voucher of Expenses pursuant to Article IV(C) of the Master Surety Agreement. In opposition, Defendants have failed to raise a triable issue of fact. First, Defendants' argument that the Master Surety Agreement *required* Plaintiff to notify them of all claims prior to settlement is wholly without merit. The plain and unambiguous language of the Agreement merely required that *if demanded*, Defendants would deposit collateral with Plaintiff prior to settlement. This provision, contrary to Defendants' claim, did not require Plaintiff to demand security and thus notify Defendants prior to settlement. Moreover, the Master Surety Agreement clearly obligated Defendants to indemnify Plaintiff for all claims made in good faith and there has been no demonstration that such was not the case here. Rather, Plaintiff settled all of the claims for a fraction of the amount claimants demanded, notwithstanding Defendants' assertion that they should've been included in the settlement discussions and, in fact, Defendants did participate in the settlement of several of the claims.

Defendants have raises only conclusory, unsubstantiated affirmative defenses of promissory estoppel and failure to mitigate damages, which are insufficient to defeat a motion for summary judgment. *See, e.g.,Quest Commerial v. Rovner*, 35 A.D.3d 576, 825 N.Y.S.2d 766 (2d Dept. 2006); *Bennell Hanover Assoc. v. Neilson*, 215 A.D.2d 710, 627 N.Y.S.2d 439 (2d Dept. 1995); *Dvoskin v. Prince*, 205 A.D.2d 661, 613 N.Y.S.2d 654 (2d Dept. 1994). Instead, Plaintiff has demonstrated that such affirmative defenses are without merit in that there was no promise to notify and/or consult Defendants prior to the settlement of any claims. Here, the Court also notes that Article XIII of the Master Surety Agreement contained a merger clause which provided that this "AGREEMENT constitutes the entire AGREEMENT between the parties and all

previous representations, negotiations, discussions and promises concerning SURETY'S willingness to provide, procure or execute bonds in any specific amount, single limit or aggregate work program, or concerning SURETY'S intention to enforce or refrain from enforcing any of the terms of this AGREEMENT or exempt any specific assets or waive any of the terms hereof are hereby merged into this AGREEMENT." Finally, as noted above, Plaintiff settled the claims for amounts significantly less than demanded and Defendants have not demonstrated that such settlements were not in good faith.

Based on the foregoing, Plaintiff's motion for an Order granting summary judgment and striking Defendants' Answer is granted. On the issue of counsel fees, the Court must have a hearing to determine the reasonable value of the services rendered. Accordingly the motion by plaintiffs pursuant to CPLR §3212, for summary judgment, is granted and a hearing on counsel fees is scheduled for September 28, 2009 at 9:30 a.m.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: August 11, 2009
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.