SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

BRER-FOUR TRANSPORTATION CORP.,

Plaintiff,

INDEX No. 01557/08

MOTION DATE: July 14, 2009
Motion Sequence # 001, 002

-against-

ZURICH AMERICAN INSURANCE COMPANY, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Reply Affirmation XX
Memorandum of Law..... XX
Reply Memorandum of Law..... X

This motion, by defendants, for an order pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint is **denied**; and a cross-motion, by plaintiff, for an order to dismiss the first through seventh affirmative defenses interposed in defendants' answer pursuant to CPLR 3212 is **denied**.

BACKGROUND

On or about July 30, 2004, defendants Zurich American Insurance Company, Fidelity and Deposit Company of Maryland and St. Paul Fire & Marine Insurance Company (Sureties) executed a $127,660.00 payment bond on behalf of Schiavone Construction Co., Inc. (Schiavone) the general contractor on a public works project designated as "Site Preparation, WM-11 Croton Water Treatment Plant, Bronx, New York, DEP Contract CRO-311, Comptroller's Contract 2005-008258." The project involved the excavation and disposal of more than one million cubic yards of rock and soil from the site on which a water treatment plan was to be constructed beneath the Mosholu Golf Course.

In this action plaintiff, which allegedly furnished transportation and removal and disposal services *vis a vis* rock and soil excavated at the site, with the approval of non-party general contractor Schiavone during the period March 27, 2006 to July 2, 2007, seeks to recover from defendant Sureties the sum of $452,315 for labor and materials furnished to the project which plaintiff alleges remains unpaid despite due demand.

According to defendant Sureties, plaintiff has no claim against Schiavone as plaintiff's only contract was with Fleet Trucking, Inc. [Fleet], which filed a voluntary petition for Chapter 11 relief with the United States Bankruptcy Court for the Southern District of New York under case number 07-13614 (ALG). Fleet hired plaintiff to perform a portion of the trucking services Fleet had agreed to perform for Schiavone, as evidenced by a series of purchase orders issued by Schiavone to Fleet.

Defendants seek summary dismissal of the complaint predicated on plaintiff's failure to give notice of its claim to Schiavone within one hundred twenty days from the date on which it last provided services [July 2, 2007] as required by State Finance Law § 137(3) which provides that:

> "[e]very person who has furnished labor or material, to the contractor or to a subcontractor of the contractor, in the prosecution of the work provided for in the contract and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was

> performed or material was furnished by him for which the claim is made, shall have the right to sue on such payment bond in his own name for the amount, or the balance thereof, unpaid at the time of commencement of the action; provided, however, that a person having a direct contractual relationship with a subcontractor of the contractor furnishing the payment bond but no contractual relationship express or implied with such contractor shall not have a right of action upon the bond unless he shall have given written notice to such contractor within one hundred twenty days from the date on which the last of the labor was performed or the last of the material was furnished, for which his claim is made, stating with substantial accuracy the amount claimed and the made of the party to whom the material was furnished or for whom the labor was performed."

By failing to provide Schiavone with the required statutory notice, defendant Sureties argue that plaintiff deprived Schiavone of the opportunity to withhold payment from Fleet. As a consequence, if plaintiff were to prevail in this action, defendants maintain that Schiavone (through its Sureties) would be forced to pay twice for the same trucking services.

While it is undisputed that plaintiff Brer-Four did not provide the requisite notice, plaintiff counters that since Fleet was not, in fact, a subcontractor on the project, but, rather, operated as a broker/agent providing off-site service providers to Schiavone, plaintiff was under no obligation to provide notice to Schiavone regarding its Payment Bond claim. Plaintiff contends that Schiavone's election not to establish a subcontract relationship that would stand between Fleet and the outside service providers it brought to the Croton project, effectively removed Brer-Four and other truckers from the notice requirement of State Law § 137(3).

With respect to its relationship with general contractor Schiavone, plaintiff avers, *inter alia*, that Schiavone directly controlled every aspect of its trucking services on the project, all of the supervisory personnel and job site managers were Schiavone employees and the truck weight scale house was operated by a Schiavone employee. Further, plaintiff alleges

that Schiavone managers routed, supervised and monitored the movement and activity of Brer-Four trucks across the site and controlled and directed the routes available to Brer-Four trucks after they left the site. In this regard, plaintiff points to paragraphs "c" and "d" of the Payment Bond which provide, *inter alia*,

> "The Principal and Surety (Sureties) agree that this bond shall be for the benefit of any materialman or laborer having a just claim, as well as the City itself."
>
> "All persons who have performed labor, rendered services or furnished materials and supplies, as aforesaid, shall have a direct right of action against the Principal and his, its or their successors and assigns, and the Surety (Sureties) herein, or against either or both or any of them and their successors and assigns. Such persons may sue in their own name, and may prosecute the suit to judgment and execution without the necessity of joining with any other person as party plaintiff."

In addition to plaintiff's alleged failure to comply with the notice requirement of the statute, defendant Sureties maintain State Finance Law §137(3) affords protection only to a "person who has furnished labor or material to the contractor or to a subcontractor of the contractor, in the prosecution work provided for in the contract." Therefore, as a sub-trucker to a party not considered a subcontractor on the project, plaintiff does not qualify as a proper claimant against Schiavone's Payment Bond.

ANALYSIS

A Payment Bond (also known as a labor and material bond) is an undertaking by a surety to compensate unpaid subcontractors, suppliers and others who furnished labor and material to the surety's principal in connection with a bonded project. (***Sciacca Concrete Corp. v Hartford Fire Ins. Co.***, 212 AD2d 225, 232, 2nd Dept., 1995). Pursuant to State Finance Law § 137(1), issuance of a labor and material Payment Bond is mandatory on public improvement projects. The statute is intended to supplement the Lien Law and to guarantee payment, through a bond, to those who furnish labor and material on public improvement projects even where there are insufficient funds against which a lien could be filed. (***Harsco Corp. v Gripon Const. Corp***, 301 AD2d 90, 93, 2nd Dept., 2001). In those instances where the bond does not specifically refer to the State Finance Law, the bond is

deemed to have been issued pursuant to the statute and is subject to its provisions. (***A.C. Legnetto Constr., Inc. v Hartford Fire Ins. Co.***, 92 NY2d 275, 280, 1998). The statutory text will be read into the bond. (***Graham Architectural Products Corp. v State Paul Mercury Ins.*** *Co.*, 303 F.Supp.2d 274, 280, E.D.N.Y. 2004; ***Harsco Corp. v Gripon Const. Corp.***, ***supra***, at p. 93).

Notwithstanding that Fleet was not a subcontractor on the project, and defendants maintain there was "no direct contract" between plaintiff and general contractor Schiavone, under the facts at bar, there is a factual issue as to whether a contractual relationship, either express or implied, existed between plaintiff and general contractor Schiavone which would permit plaintiff to recover under the Payment Bond in the absence of notice as required when an entity, which has a direct contractual relationship with a subcontractor, but no contractual relationship, express or implied, with the general contractor, seeks recovery under a Payment Bond.

CONCLUSION

The arguments advanced by defendant Sureties are an insufficient basis on which to ground a summary determination as to whether plaintiff is entitled to recover under the terms of the Payment Bond and State Finance Law § 137(3). Defendants' reliance on ***Gernett Asphalt Products, Inc. v Bensal Construction, Inc.***, 90 AD2d 993 [4th Dept. 1982], *aff'd as modified* 60 NY2d 871 [1983] is unavailing as plaintiff does not assert status as one providing services for a materialman, as opposed to a contractor or subcontractor, but, rather, as one having an express or implied relationship with the general contractor. The Court notes that the appellate decision, as referred to hereinabove, was modified by the Court of Appeals for the reasons stated by the dissent in the appellate division memorandum decision which found the Surety liable, under the terms of the Payment Bond, to all claimants who furnished labor or materials in connection with the construction whose claims were provable and unpaid. Interestingly, the Court found the policy argument advanced by the Surety, that it would be required to pay twice for the same material/services if the claimant prevailed, (the same argument advanced by defendants herein), unpersuasive.

The proponent of a summary judgment motion bears the initial burden of tendering sufficient admissible evidence to demonstrate the absence of any material issue of fact as a matter of law. (***Alvarez v Prospect Hospital***, 68 NY2d 320, 324, 1986). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (***JMD Holding Corp. v Congress Financial Corp.***, 4 NY3d 373, 384, 2005; ***Winegrad v***

New York University Medical Center, 64 NY2d 851, 852, 1985). Moreover, the parties' competing contentions must be viewed in a light most favorable to the party opposing the motion. (***Boyde v Rome Realty Leasing Ltd. Partnership***, 21 AD3d 920, 921, 2nd Dept., 2005; ***Mitchell v Fiorini Landscape, Inc.***, 253 AD2d 860, 861, 2nd Dept., 1998). Summary judgment will not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is even arguable. (***Herrin v Airborn Freight Corp.***, 301 AD2d 500, 500-501, 2nd Dept., 2003). Where, as here, there are facts sufficient to require a trial of any issue of fact, a motion for summary judgment will be denied. An award of summary judgment is only appropriate where an examination of the merits clearly demonstrates the absence of any triable issues of fact.

Accordingly, defendants' motion pursuant to CPLR 3212 for summary judgment dismissing the complaint is **denied**.

Plaintiff's cross motion to dismiss the affirmative defenses asserted in defendants' answer is **denied** in view of the decision on the motion in chief and on the grounds that the answer submitted on the cross motion does not contain affirmative defenses denominated as "first," "second," "third," "fourth," "fifth," "sixth," and "seventh."

Dated AUG 26 2009

Stephen A. Bucaria
J.S.C.