

Nelson Air Device Corp. v Hopwood

2009 NY Slip Op 32931(U)

December 1, 2009

Supreme Court, Nassau County

Docket Number: 012383/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

NELSON AIR DEVICE CORP.,

Plaintiff,

-against-

MARTIN HOPWOOD, JR.,

Defendant.

TRIAL/IAS, PART 3
NASSAU COUNTY

INDEX No. 012383/09

MOTION DATE: Aug. 28, 2009
Motion Sequence # 001

_____ The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Affirmation in Support..... X
- Reply Affidavit.... X
- Memorandum of Law..... X
- Reply Memorandum of Law..... X

This motion, by plaintiff, for an order pursuant to CPLR 3212 granting summary judgment in favor of plaintiff in the sum of \$189,828.70 plus costs, expenses and attorney's fees and granting such other and further relief as to the Court may seem just and proper, is determined as hereinafter set forth.

FACTS

Defendant Martin Hopwood, Jr. ("Hopwood") is the Chief Executive Officer and Sr. Vice President of Richards Conditioning Corp. ("Richards"). Plaintiff Nelson Air

Device Corp. ("Nelson") contracted with Richards, whereby Nelson agreed to perform HVAC work for Richards at a renovation of the Cooper Union School. In accordance with this work, Hopwood executed a personal guaranty of payment ("Guaranty") stating that ". . .he jointly, severally and unconditionally guarantees, without offset, the payment of all indebtedness of the applicant, whether now existing or hereafter created, and its successors and assigns and the payment of all costs and expenses, including attorneys' fees, incurred in enforcing the payment of such indebtedness or enforcing this Guaranty". (Guaranty, Exh A to moving papers). Nelson commenced this action to recover those debts not recovered and seeks summary judgment.

PLAINTIFF'S CONTENTIONS

The plaintiff contends that it is undisputed that a debt is owed by Richards to Nelson. The plaintiff avers that it performed work on the Cooper Union Project pursuant to its contract with Richards, and since only some of the agreed upon value of the work has been paid, a debt remains; and that Hopwood has entered into a valid personal guaranty of payment. The plaintiff contends that Hopwood is also liable for expenses and attorneys fees incurred to enforce payment of Richards' debt. It is the plaintiff's contention that since a valid debt exists between Richards and Nelson, Hopwood has entered into the Guaranty whereby he guaranteed payment of Richards' underlying debt, and the debt has not been paid, there are no genuine issues of material fact and summary judgment should be granted in plaintiff's favor.

DEFENDANT'S CONTENTIONS

The defendant contends that material issues of fact exists in this matter; and that there is a question of fact as to whether a debt is currently owed to the plaintiff, by Richards and/or the defendant. The defendant also contends that Richards is not obligated to make any payments to the plaintiff until Richards has received payment from F.J. Sciamè (the "General Contractor") or Cooper Union (the "Owner"); that payment to Richards from the General Contractor/Owner is a condition precedent to Richards making payment to the plaintiff, and since Richards has not received payment from the General Contractor and Owner, the defendant avers that Richards is not obligated to make payment to the plaintiff. Furthermore, the defendant argues that the plaintiff has failed to establish that the defendant made a guaranty of payment of the debt that is currently due to the plaintiff by Richards; that the guaranty was only signed by Mr. Hopwood based upon the fact that the guaranty would only come into effect if and only if Richards

received payment from F.J. Sciame/Cooper Union and thereafter Richards failed to make payment to the plaintiff. Moreover, the defendant contends that there is an issue of fact as to how much monies the plaintiff has received from a third party, namely F.J. Sciame/Cooper Union, and since there is an issue of fact as to whether the plaintiff received other forms of consideration in lieu of monetary payments for the work performed by the plaintiff, the plaintiff has failed to meet the prerequisite standard for pursuing a claim under a personal guaranty in New York. The defendant also contends that the Guaranty is ambiguous and therefore invalid since it does not define who the "applicant" is; that there is a clear question of fact as to the intent of the parties regarding the Guaranty and the use of the Guaranty. As such, the defendant avers that the agreement should be deemed ambiguous and voided by this Court. In addition, the defendant contends that he was forced to sign the purported Guaranty based on the plaintiff's threat to pull its men off the Project; that this conduct by the plaintiff created a fear of economic hardship which prevented the defendant from the exercise of free will in engaging in a business transaction since he was forced to sign the purported guaranty in order to keep the plaintiff's workers on the Project.

PLAINTIFF'S REPLY

The plaintiff contends that it has established that a valid debt exists between Richards and Nelson, that Defendant has entered into the Guaranty whereby he unconditionally guaranteed payment of Richards' underlying debt, and that the debt has not been paid; and that no issues of fact exist with regard to the pay-when-paid provision allegedly in the parties' contract because Nelson never agreed to the provision, such a provision is void, and most importantly, Richards has been paid by the general contractor for the work Nelson performed. The plaintiff contends that the pay-when-paid provision is void and therefore unenforceable as contrary to public policy because it forces the subcontractor to assume the risk that the owner will fail to pay the general contractor. In any event, the plaintiff contends that there is no evidence that F.J. Sciame has not paid Richards for the work Nelson performed on the Cooper Union Project. Thus, it is the plaintiff's contention that the defendant cannot use this provision to create an issue of fact. With respect to the defendant's defense of duress, the plaintiff contends that the defense is completely devoid of merit; that the defendant expressly waived all defenses in the personal guaranty and cannot now present defenses to create issues of fact; and that it would be within its legal and contractual rights to stop work until it was guaranteed that it would receive payment, therefore, the defendant's defense would lack merit as the plaintiff's alleged threats were not wrongful. The plaintiff also avers that the defendant

attempts to create issues of fact by baldly concluding that Nelson has either received additional payment for work performed at the Cooper Union School from third parties, or has entered into agreements to be compensated in other ways for the work performed, as these allegations are a complete fabrication. Furthermore, plaintiff contends that, contrary to the defendant's unsubstantiated allegation, Nelson has not entered into any agreement with F.J. Sciamè that would serve as compensation for work performed at the Cooper Union Project; that the defendant presents no evidence in support of this allegation and that none exists. Moreover, the plaintiff avers that pursuant to the Guaranty, the plaintiff may demand payment from the defendant without seeking payment from the debtor or any other party; and that the defendant is precluded from introducing his statements of intent as they are barred by the parol evidence rule. Finally the plaintiff avers that the defendant drafted the very Guaranty which he now claims is ambiguous, thus the defendant's assertion, that he was not aware whose debt he was guaranteeing because the term "applicant" appeared in the Guaranty is untenable. Moreover, the plaintiff contends that the defendant's own Affidavit contradicts any allegation that the Guaranty is ambiguous and that the defendant did not know whose debt he was guaranteeing. It is the plaintiff's contention that pursuant to the defendant's own affidavit, he acknowledges that he signed the Guaranty with the knowledge that he was securing Richards' debt and may have to make payment to Nelson for Richards' debt. Accordingly, the plaintiff contends that since all of the facts of this matter are known by both parties and no issues of material fact exist, this motion is not premature and the plaintiff is entitled to judgment as a matter of law.

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 in the case at bar has warranted an intensive examination of the record as presented to this court, which includes the pertinent pleadings, affidavits and other relevant data.

"A *prima facie* case for breach of a guaranty is established by showing the existence of the guarantor to make the necessary payments.

Verela v Citrus Lake Development, Inc., 53 AD3d 574 (2nd Dept., 2008); Physician's Domain, Inc. v Grosso, 288 AD2d 362 (2nd Dept., 2001); E.D.S. Security Systems, Inc. v Allyn, 262 AD2d 351 (2nd Dept., 1999).

Submission of an unconditional guaranty along with an affidavit of nonpayment is sufficient for a judgment under CPLR 3212. European American Bank & Trust Co. v Schirippa, 108 AD2d 684 (1st Dept., 1985).

(JP Morgan Chase Bank, N.A. v Complete Environmental Services, Inc., 21 Misc3d 1113(a), 873 NYS2d 512, S. Ct., Nassau, 2008). Here, Nelson has established the *prima facie* elements necessary to enforce Hopwood's written guaranty. Nelson has submitted to the court the absolute and unconditional personal guaranty signed by Hopwood along with an affidavit of nonpayment. Once the plaintiff has met its burden, it is incumbent

upon the defendants to establish, by admissible evidence, that a triable issue of fact exists. Here, the defendant's averments are insufficient to create a triable issue of fact. The defendant first avers that a triable issue of fact exists as to whether a debt is currently owed to the plaintiff by referring to a pay-when-paid provision allegedly contained in the Purchase Order/Subcontractor Work agreement that a debt is not currently owed to the plaintiff, however, such a provision is void as against public policy.

A pay-when-paid provision in a subcontract, which transfers the risk of an owner's default from a general contractor to a subcontractor, violates New York public policy as set forth in the Lien Law (see, West Fair Electric Contractors v Aetna Casualty & Surety Co., 87 NY2d 148, 638 NYS2d 394, 1995).

The Lien Law provides, in pertinent part: "[N]otwithstanding the provisions of any other law, any contract, agreement or understanding whereby the right to file or enforce any lien created under article two is waived, shall be void as against public policy and wholly unenforceable".

The defendant attempts to create an issue of fact by concluding, without any supporting admissible evidence, that Nelson has either received additional payment for work performed at the Cooper Union School from third parties, or has entered into agreements to be compensated in other ways for the work performed. However, such conclusory assertions, with no evidentiary proof in admissible form, are insufficient to demonstrate the existence of a genuine issue of material fact. The defendant's assertion of economic duress in his attempt at voiding the Guaranty is unsubstantiated and directly contradicted by the plaintiff's unrebutted assertion that it was the defendant who drafted, or caused the draft, of the Guaranty. As such, the defendant has failed to demonstrate that defense with admissible evidence (see, Trustco Bank New York v MME Power Enterprises, Inc., 223 AD2d 587, 636 NYS2d 831, 2nd Dept., 1996). Since the defendant has failed to come forward and show, by admissible evidence, that there is a bona fide issue requiring a trial, the motion must be **granted**. Any other specific allegations of issues raised by the defendant not specifically determined herein are deemed to be without merit or substantiation.

The issue of attorney's fees cannot be decided herein.

This matter is referred to the Calendar Control Part (CCP), for a hearing on the issue of attorney's fees to be held on January 14, 2010 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

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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 DEC 01 2009

Stephen A. Bucaria
J.S.C.

ENTERED
DEC 03 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE