International Fid. Ins., Inc. v Robert Elevator Indus., Inc.
2010 NY Slip Op 30084(U)
January 4, 2010
Supreme Court, Nassau County
Docket Number: 004862/2009
Judge: Ira B. Warshawsky
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SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

INTERNATIONAL FIDELITY INSURANCE, INC.,

Plaintiff,

INDEX NO.: 004862/2009
MOTION DATE: 11/05/2009
MOTION SEQUENCE: 001

-against-

ROBERT ELEVATOR INDUSTRIES, INC.,
ROBERT ELEVATOR COMPANY, INC.,
ROBERT VERTICAL TRANSPORTATION, INC.,
MORGAN VERTICAL CONSULTANTS, INC.,
ROBERT MORGAN and MICHELE MORGAN,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed 1
Affirmation in Opposition of Adam P. Friedman, Esq. & Exhibits Annexed 2
Reply Affirmation of Patrick F. Broderick, Esq. & Exhibits Annexed 3

PRELIMINARY STATEMENT

Defendants move for a change of venue from Nassau County, where they claim it has been improperly placed, to Kings County, where they claim that venue is proper. Plaintiff opposes the motion on the grounds of untimeliness and that, in any event, venue is properly set in Nassau County.

BACKGROUND

This is an action to recover on a performance bond issued by Plaintiff in conjunction with work performed by Defendants on behalf of Lindsay Park Housing Corp. This project resulted in litigation in Supreme Court, Kings County, under Index No. 213/05, which, according to Defendants in this action, remains open. According to the complaint in this action, International Fidelity Insurance Inc. ("International")issued a performance bond in the amount of $2,998,900. That document provided for indemnification of International by Defendants or their predecessor entity.

In 2005 Lindsay Park commenced litigation against International on the bond. The action was commenced in Supreme Court Kings County, and removed by International to the United States District Court for the Eastern District of New York. Lindsay Park claimed damages of $1,500,000 as a result of Robert Elevator's failure to perform its obligations under the construction contract. After conducting discovery, and mediation, International paid Lindsay Park $200,000 to satisfy the claim of Lindsay Park.

International contends that the settlement was reasonable, considering the possibility that Lindsay Park might succeed on the claim, exposing International to a claim of $1,500,000, and that the $200,000 settlement was made in good faith. International claims that through February 28, 2005 they incurred costs and expenses, including counsel fees of $142,614.02 in defending the Lindsay Park litigation. Defendants' position is that International made what is an essentially a "business decision" to pay $200,000, that Robert Elevator had done nothing wrong, and should not be held responsible for the settlement amount or for the expenditures in defending the action.

This action was commenced by the filing of a Summons and Complaint in the Nassau County Clerk's Office on March 17, 2009. Defendant notified Plaintiff by correspondence dated May 5, 2009 that they regarded the selection of Nassau County as an improper venue. They annexed copies of the Performance Bond as Exh. "A" and the Labor and Material Payment Bond as Exh. "B". The latter denominates Kings County as

the venue for any action under the bond, while the former did not. The instant action is for recovery on the indemnity agreement executed in conjunction with the issuance of the bonds.

DISCUSSION

The action is for recovery of money paid by Plaintiff to Lindsay Park to resolve a $1,500,000 claim made against the Plaintiff in this action. This motion is for an Order pursuant to CPLR § 511 (a) for a change of venue on the ground that the selected venue is improper. The statute provides in part as follows:

> **Rule 511. Change of place of trial**
>
> **(a) Time for motion or demand.** A demand under subdivision (b) for change of place of trial on the ground that the county designated for that purpose is not a proper county shall be served with the answer or before the answer is served. A motion for change of place of trial on any other ground shall be made within a reasonable time after commencement of the action.
>
> **(b) Demand for change of place of trial upon ground of improper venue, where motion made.** The defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant. Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper.

In this case Defendant filed an Answer dated May 20, 2009, in which they claimed an improper venue. This is on the heels of the May 5, 2009 correspondence from the Defendants asserting the same claim. Unfortunately, the 15-day window in subdivision (b) within which the party objecting to venue is to move, applies to a claim that the venue is improper. The time within which to move, therefore, expired on May 20, 2009.

But even if the Court were to conclude that the motion was to be made within the "reasonable time" provided for in subdivision (a), the motion would have to be denied on its

merits. It appears that International Fidelity did not commence a third-party action against the Defendants herein in the action commenced by Lindsay Park. Neither does it appear that the Defendants sought permissive intervention pursuant to CPLR § 1013.

Plaintiffs' action before the Court is based upon the Agreement of Indemnity attached as Exh. "B" to the Affirmation in Opposition. By the terms of this agreement, Contractor (Robert Elevator Industries, Ind., Robert Elevator Co., Inc., Robert Morgan and Michelle Morgan)agreed to

> "exonerate, indemnify, and keep indemnified Surety from and against any and all liability for losses and/or expenses of whatsoever kind or nature (including but not limited to interest, court costs and counsel fees) and from and against any and all such losses and/or expenses, which 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". [1]

It is clear that Defendants do not believe that the action by Lindsay Park should have been settled. Under the terms of the Indemnity Agreement, the Surety has the

> right to adjust, settle or compromise any claim, demand, suit or judgment upon the Bonds, unless the Contractor and Indemnitors shall request the Surety to litigate such claim or demand, or to defend such suit, or to appeal from such judgment, and shall deposit with the Surety at the time of such request, cash or collateral satisfactory to the Surety in kind and amount, to be used in paying any judgment or judgments rendered or that may be rendered, with interest, costs, expenses and attorneys' fees, including those of the Surety. [2]

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[1] Exh. "B" at ¶ SECOND.

[2] *Id.* at ¶ THIRTEENTH.

[* 5]

While Defendants allege that they opposed the settlement of the action by Lindsay Park, there is no allegation that they provided cash or other collateral satisfactory to the Surety so as to compel them to proceed to judgment and appeal pursuant to ¶ Thirteenth. As such, they are obligated by the express terms of the parties' indemnity agreement to reimburse plaintiff for all claims and expenses paid or incurred 'in consequence of having executed ' ' ' [surety] bonds' on behalf of the defendants". [3]

The Contract of Indemnity does not provide for a designated venue. As the County of residence of the individual Defendants, Nassau County is a proper venue. CPLR § 503 (a) states that "(e)xcept where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resiede when it was commenced; . . . ". Despite Defendants' claim, there is no venue "otherwise prescribed by law".

The motion for change of venue is denied.

This constitutes the Decision and Order of the Court.

Dated: January 4, 2010

J.S.C.

ENTERED
JAN 13 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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[3] *Frontier Insurance Company v. Renewal Arts Contracting Corporation, et al.*, 12 A.D.3d 891, 892 (3d Dept. 2004).