

John Galt Corp. v Travelers Cas. & Sur. Co. of Am.

2010 NY Slip Op 30161(U)

January 22, 2010

Supreme Court, New York County

Docket Number: 603295/07

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 57

Justice

Index Number : 603295/2007
JOHN GALT CORP.
vs.
TRAVELERS CASUALTY & SURETY
SEQUENCE NUMBER : 005
DISMISS

INDEX NO. _____
MOTION DATE 12/8/09
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

this motion to/for _____

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 IS DECIDED

IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM
DECISION AND ORDER.

FILED

JAN 26 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/22/10

JUSTICE SHIRLEY WERNER KORNREICH

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X

THE JOHN GALT CORP.,

Plaintiff,

-against-

DECISION & ORDER
Index No.: 603295/07

TRAVELERS CASUALTY AND SURETY CO.
OF AMERICA, FEDERAL INSUR. CO., FIDELITY
AND DEPOSIT CO. OF MARYLAND AND ZURICH
AMERICAN INSUR. CO., & BOVIS LEND LEASE
LMB,

Defendants.

-----X

TRAVELERS CASUALTY AND SURETY CO.
OF AMERICA, FEDERAL INSUR. CO. & FIDELITY
AND DEPOSIT CO. OF MARYLAND AND ZURICH
AMERICAN INSUR. CO.,

Third-Party Plaintiffs,

-against-

LOWER MANHATTAN DEVELOPMENT CORP.,

Third-Party Defendant.

-----X

KORNREICH, SHIRLEY WERNER, J.:

FILED
JAN 26 2010
NEW YORK
COUNTY CLERK'S OFFICE

Third-party defendant, Lower Manhattan Development Corporation (LMDC), moves to dismiss the third-party complaint brought against it by sureties who provided defendant general contractor Bovis Lend Lease LMB (Bovis) with the payment and performance bonds for this project. CPLR §§ 3211(a)(1) & (7). The bonds named Bovis as principal and LMDC as obligee. The sureties, third-party plaintiffs, seek contingent reimbursement from LMDC, by subrogation,

for any monies they might be found to owe to plaintiff subcontractor, The John Galt Corporation (Galt). For the reasons that follow, the motion is denied.

I. Background

In brief, this action arises out of three construction contracts arising from the decontamination and deconstruction of the former Deutsche Bank building (the "Building"), located at 130 Liberty Street in lower Manhattan. The Building had sustained significant damage as a result of the September 11, 2001 terrorist attacks. LMDC is a subsidiary of nonparty New York State Urban Development Corporation and was created in the aftermath of the terrorist attacks to coordinate the remembrance, rebuilding, and revitalization efforts in lower Manhattan. In August 2004, LMDC purchased the Building in order to redevelop the site.

In October 2005, LMDC, as owner, entered into a contract with defendant Bovis, as general contractor-construction manager, to decontaminate and deconstruct the Building (the LMDC/Bovis contract). The LMDC/Bovis contract required Bovis to perform the planning, engineering, maintenance, cleaning, abatement and removal of interior materials, deconstruction and disposal of removed materials, including potential human remains, asbestos and World Trade Center dust materials, and site work in connection with the deconstruction of the Building. Bovis agreed to guaranty its performance to LMDC by obtaining payment and performance bonds. Bovis obtained the required bonds from third-party plaintiffs.

In addition, the contract provided that the parties would not litigate any contract issues prior to the completion of the work; Bovis was not to stop work during the pendency of any dispute. Instead, Article 17 of the contract authorized an "Interim Arbitrator to decide all questions of any nature whatsoever arising out of, under, or in connection with, or in any way

related to or on account of, this Contract.” Article 17 also provided that any surety issuing a bond with respect to the contract “shall be bound by decisions of the Interim Arbitrator.” In furtherance of its obligations under the LMDC/Bovis contract, Bovis retained Galt, as subcontractor, pursuant to two trade subcontracts (the Bovis/Galt subcontracts). Galt agreed to perform all of the deconstruction and decontamination work required under the LMDC/Bovis contract.

On February 7, 2007, Bovis and LMDC entered into a supplemental agreement as a result of a dispute over increased costs for contested work. The parties agreed to share the costs of the increased work. They also agreed to forego Interim Arbitration regarding the contested work and to litigate the issue after completion of the contract if a settlement could not be reached. Bovis, if it were to litigate the issue, would have to bring the litigation within 45 days after final completion. The monies paid by LMDC pursuant to the agreement would be adjusted according to the outcome of the future settlement or litigation. The sureties consented to the terms of this agreement, agreeing that the penal sums under the bonds would not be reduced or increased by any payments made by LMDC under the agreement. They further agreed that the provisions of the bonds would remain the same and the sureties’ obligations would not be affected by the agreement. Finally, the supplemental agreement stated that the original contract would “remain unchanged and in full force and effect” except “as expressly modified by [the supplemental] agreement.” The agreement was signed by Bovis, LMDC and the sureties. A companion agreement incorporating the supplemental agreement into the Galt subcontracts was signed by Galt, Bovis, the surety for Galt and the defendant/third-party plaintiff sureties.

On August 18, 2007, a fire occurred at the Building which took the lives of two New

York City firefighters¹. It also significantly damaged the Building. On August 23, 2007, an allegedly unrelated incident occurred at the Building, involving falling equipment. On August 28, 2007, Bovis terminated the Bovis/Galt subcontracts, citing breaches of contract and delays allegedly caused by Galt.

Galt commenced this action against Bovis and the sureties, third-party plaintiffs, seeking \$19,647,872.56 allegedly due it for labor actually performed and equipment and materials supplied under the Bovis/Galt subcontracts. Galt also seeks more than \$50 million in profits allegedly lost as a result of Bovis's early termination of the subcontracts. In its answer, Bovis denies all claims and asserts a counterclaim for breach of contract in the amount of \$60 million, which Galt denies. Galt later joined LMDC as a direct defendant on identical factual allegations as those it asserts against Bovis. This court dismissed Galt's action against LMDC. The court assumes familiarity with its previous decision.

II. Third-Party Complaint

The third-party complaint brought against LMDC contends that the sureties are liable to Galt under the payment bond (although they deny liability) to the extent that Bovis is liable to Galt for amounts due under the subcontracts. However, they allege that such amount, if owed, "can only be ascertained after a determination of what amount is owed by LMDC to Bovis." Thus, the sureties contend that if any amount is owed to Galt and the sureties have to make such payment, the sureties "will be subrogated to Bovis's rights and claims to recover such additional payment from LMDC, as it will have been the failure of LMDC to pay the amounts due that

¹On December 22, 2008, following a 16-month investigation by the Manhattan District Attorney's Office into the circumstances surrounding the fire, a Manhattan grand jury indicted Galt Corp., a Galt Corp. executive, a Galt Corp. foreman and a Bovis site safety manager, for manslaughter.

resulted in [their] liability.” They seek damages “pursuant to [their] subrogation rights, and to [their] rights of indemnity as provided in the bonds.”

III. Arguments

A. Motion to Dismiss

LMDC first argues that the sureties have no right to indemnification pursuant to the bonds. It then contends that the third-party action is premature, because it is derivative of Bovis’s rights and Bovis has not brought and cannot bring a claim against it. It argues:

The Sureties admit in the Third-Party Complaint that they have not paid Galt and their subrogation rights against the remaining contract funds can “only be ascertained after a determination of what amount is owed by LMDC to Bovis under the Bovis Contract and the Supplemental Agreement.”

Aff. of Robert Miller, para. 25. LMDC contends that since the sureties have neither paid Bovis nor Galt, they have no claim against LMDC for subrogation.

Finally, LMDC argues that the contract provisions between Bovis and LMDC foreclosing litigation until completion of the project, is binding upon the sureties. It contends that since Bovis cannot assert a claim against LMDC, the sureties cannot bring such an action.

B. Opposition

In opposition, the sureties admit that they do not have a claim for indemnity based on the bond. However, they assert that they have pleaded a viable subrogation claim which is not premature. Moreover, they argue that neither Article 17 of the Bovis/LMDC contract nor the supplemental contract precludes the third-party action. The sureties argue that they were not parties to the Bovis/LMDC contract and cannot be bound by Article 17. However, they contend, even if they were so bound, Article 17 is a condition precedent in the contract properly pleaded

* 7]

as an affirmative defense, need not be pleaded in the complaint and is not a ground for pre-answer dismissal. Finally, they point out that the supplemental contract does not do away with Bovis' cause of action but merely requires LMDC and Bovis to defer litigation.

IV. Discussion

CPLR 3211(a)(7) provides for dismissal for failure to state a cause of action. In determining a motion under this section, the Court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Since the Court's inquiry on such a motion is narrow, it must liberally construe the complaint, accepting as true both the material allegations of the complaint and whatever can be reasonably inferred from them. *Demicco Bros., Inc. v Con. Ed. Co.*, 8 AD3d 99 (1st Dept 2004). Factual claims in the complaint, however, if contradicted by documentary evidence, are not entitled to such consideration. *Maas v Cornell Univ.*, 94 NY2d 87, 91 (1999). In fact, a complaint may be dismissed based upon a defense founded upon documentary evidence if the documentary evidence resolves all factual issues as a matter of law and disposes of the plaintiff's claim. CPLR 3211(a)(1); *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept), *lv denied* 917 NY2d 605 (2001).

"Subrogation is the principle by which an insurer, having paid losses of its insured, is placed in the position of its insured so that it may recover from the third party legally responsible for the loss." [citation omitted] *Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 581 (1995). A surety on a performance bond, who answers for the default of its principal, is entitled to be subrogated to any claims its principal may have against third parties responsible for the default.

Menorah Nursing Home, Inc. v Zukov, 153 AD2d 13, 17 (2d Dept 1989). The right of a surety to subrogation accrues when the creditor for whom the surety provided collateral, is made whole. *Winkelman* at 582; *Menorah* at 18.

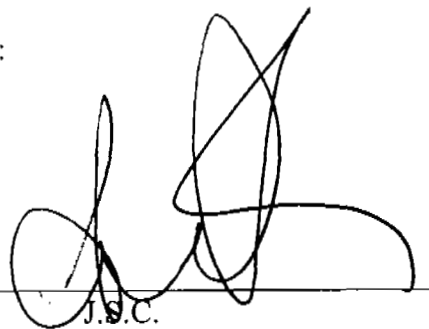
CPLR §1007 provides for impleader by a defendant of a new party who “is or may be liable” for all or part of the claim against it. The language of the statute has been interpreted to encompass contingent claims based upon subrogation. *Krause v Amer. Guar. & Liab. Ins. Co.*, 22 NY2d 147, 152-3 (1968). *Accord Menorah* (surety, who is potentially liable on its bond, does not lack standing simply because it has not paid any money pursuant to its bond); *Con. Ed. Co. v Royal Indem. Co.*, 41 AD2d 37 (1st Dept 1973). The policy behind the rule is “the avoidance of multiplicity and circuity of action, and the determination of the primary liability as well as the ultimate liability in one proceeding, whenever convenient.” *Id.* at 153. Thus, a third-party action need not be limited to indemnification of the main action, but, rather, is “a tool for economical resolution of interrelated lawsuits.” *George Cohen Agency, Inc. v Donald S. Perlman Agency, Inc.*, 51 NY2d 358, 364-5 (1980). Nor is it limited to the amount or legal theories asserted in the main action. *Id.* at 365; *Gross v De Meglio*, 143 AD2d 609, 610 (1st Dept 1988)(broad and liberal utilization of impleader is available even if the impleaded party owes no duty to primary plaintiff).

Here, third-party plaintiff concedes that the documentary evidence -- the bond -- refutes its indemnity claim. Consequently, that cause of action is dismissed. Third-party plaintiffs, however, have standing to bring the inchoate subrogation action, since LMDC may be liable to the sureties. *See Krause; Menorah*. Nor does Bovis’ agreement to defer litigation undercut the sureties rights to bring the impleader action. Bovis did not give up its claims against LMDC but

merely deferred them. Should the sureties, in the end, have to pay on the bond for Galt's claims against Bovis, they will have a claim against LMDC. The sureties were not party to the LMDC/Bovis contract agreeing to defer litigation and cannot be bound by it. As to the supplemental agreement regarding the added costs of cleanup, the sureties were aware of that agreement and agreed to keep the bond intact despite the agreement between Bovis and LMDC. The court does not read the agreement to subject the sureties to settlement negotiations or to deferral of litigation. Accordingly, it is

ORDERED that the motion of third-party defendant LMDC to dismiss the third-party action, is denied.

ENTER:



J.S.C.

January 22, 2010

JUSTICE SHIRLEY WERNER KORNREICH

FILED
 JAN 26 2010
 NEW YORK
 COUNTY CLERK'S OFFICE