

International Fid. Ins. Co. v Robert El. Indus., Inc.

2010 NY Slip Op 31696(U)

June 30, 2010

Supreme Court, Nassau County

Docket Number: 004862/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

P R E S E N T :

HON. IRA B. WARSHAWSKY,
Justice,

TRIAL/IAS PART 8

INTERNATIONAL FIDELITY INSURANCE
COMPANY,

Plaintiff,

INDEX NO.: 004862/2009
MOTION DATE: 04/27/2010
MOTION SEQUENCE: 002 & 003

-against-

ROBERT ELEVATOR INDUSTRIES, INC., ROBERT
ELEVATOR COMPANY, INC., ROBERT VERTICAL
TRANSPORTATION, INC., MORGAN VERTICAL
CONSULTANTS, INC., ROBERT MORGAN,
MICHELLE MORGAN, and LINDSAY PARK
HOUSING CORP.,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Defendant Lindsay park Housing Corp.'s Memorandum of Law in Support of Motion to Dismiss Plaintiff's Amended and Supplemental Complaint	2
Notice of Cross-Motion	3
Affirmation in Opposition of Adam P. Friedman & Exhibits Annexed	4
International Fidelity's Memorandum of Law in Opposition to Lindsay Park's Motion to Dismiss and in Support of its Cross-Motion for Leave to Amend its Complaint	5
Reply affirmation of Joseph V. Aulicino in Support of Motion to Dismiss Plaintiff's Amended and Supplemental Complaint and in Opposition to Plaintiff's Cross-Motion for Leave to Amend Plaintiff's Amended and Supplemental Complaint	6

Defendant Lindsay Park Housing Corp.’s Reply Memorandum of Law in Further Support of Motion to Dismiss Plaintiff’s Amended and Supplemental Complaint and in Opposition to Plaintiff’s Cross-Motion for Leave to Amend Plaintiff’s 7

Affirmation in Opposition by “Robert” Defendant to Co-Defendant Lindsay Park’s Motion to Dismiss 8

Affirmation on Behalf of “Robert Defendants” Supporting Plaintiff’s Application to File Second Amended Complaint 9

Amended and Supplemental Complaint

PRELIMINARY STATEMENT

Defendant, Lindsay Park Housing Corp. (“Lindsay Park”) moves for an Order, pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7), dismissing plaintiff’s amended and supplemental complaint as against Lindsay Park.

Plaintiff, International Fidelity Insurance Company(“IFIC”), has cross-moved for an Order, pursuant to CPLR 3025, granting IFIC leave to serve and file a second amended and supplemental complaint.

BACKGROUND

Defendants Robert Elevator Industries, Inc., Robert Elevator Company, Inc., Robert Vertical Transportation, Inc., and Morgan Vertical Consultants, Inc.(“Robert Elevator”) are involved in the construction and maintenance of elevators. Robert Vertical Transportation, Inc. and Morgan Vertical Consultants, Inc. are successor entities of Robert Elevator Industries, Inc. and Robert Elevator Company, Inc. Defendant Robert Morgan is the principal of the Robert Elevator entities. Defendant Michelle Morgan is the wife of Robert Morgan.

Defendant Lindsay Park is a New York corporation that entered a construction contract with Robert Elevator on July 30, 2001, for work to be performed at residential buildings of Lindsay Park. The contract required Robert Elevator to perform a complete modernization of 28 passenger elevators and perform a two-year post-completion preventive maintenance program.

In addition, on October 16, 2001, IFIC (“surety”) and Robert Elevator Industries, Inc.(“contractor”), executed a performance bond, wherein, IFIC agreed to act as surety for Robert Elevator’s contract to “furnish all work, labor, services, materials, and equipment necessary for

the complete modernization of (28) passenger elevators located in the residential buildings on the premises of [Lindsay Park]”.

In May, 2001, Robert Elevator, Robert Morgan, and Michelle Morgan executed an indemnification agreement in favor of IFIC. Three actions followed:

Action No. I

Robert Elevator v. Lindsay Park
 Commenced 6/28/04, Queens Co.
 Transferred to Kings Co. Index No. 01213/05
 Claim by Robert for unpaid fees; Counterclaim alleges default and failure to pay prevailing wage as required by contract
 Resolution: So Ordered Stipulation and Order of Settlement dated 9/15/09 (Exh. 7 to Motion)
 Lindsay Park to pay Robert Elevator \$200,000 in 60 monthly payments.

Action No. II

Lindsay Park v. International Fidelity Insurance Company
 Commenced 11/1/05
 Kings Co. - Removed to USDC, EDNY
 Action on Performance Bond
 Suit on Performance Bond
 Resolution: Settlement Agreement 9/24/08 in which IFIC pays Lindsay Park \$200,000
 In Agreement Lindsay Park acknowledges IFIC’s subrogation claim and entitlement to the first \$200,000 Lindsay Park pays to Robert Elevator.

Action No. III

International Fidelity Insurance Company v. Robert Elevator Industries

Supplemental Summons 1/21/10
 Nassau Co. Index No. 4862/ 09
 Based upon Agreement of Indemnity whereby Indemnitors “agreed to indemnify International from and against any and all liability and loss, including but not limited to counsel fees and expenses, that International may incur as a result of having executed surety bonds on behalf of Robert Elevator and/or in enforcing International’s rights under the Agreement of Indemnity”.

The instant litigation arises out of IFIC’s claim that it has equitable subrogation rights which provide IFIC with a priority interest over payments made by Lindsay Park to Robert Elevator pursuant to Robert Elevator’s Action I breach of contract claim against Lindsay Park.

IFIC does acknowledge that that its equitable subrogation rights are limited to \$200,000.00, the amount IFIC paid to Lindsay Park. IFIC further claims that Lindsay Park had prior notice of IFIC's equitable subrogation rights.

Defendant Lindsay Park argues that the terms of Settlement Agreement II preclude IFIC from making the instant claims against Lindsay Park based on IFIC's equitable subrogation rights because they were conditioned on there being a judgment entered in Action I. Plaintiff IFIC argues that it never waived its common law equitable subrogation rights in Settlement Agreement II.

Settlement Agreement II provides:

"B. Equitable Subrogation

LINDSAY PARK acknowledges that [IFIC] claims to have equitable subrogation rights which arise by operation of law as a result of the Settlement Payment, and that [IFIC] is entitled to the first \$200,000.00 of any payment LINDSAY PARK is obligated to make to ROBERT ELEVATOR (and/or to its successors and/or assigns) pursuant to any judgment entered in [Action I]. LINDSAY PARK represents and warrants that it has received notice from [IFIC] that [IFIC] demands that payment of the first \$200,000.00 of any payment LINDSAY PARK is obligated to make to ROBERT ELEVATOR (and/or to its successors and/or assigns) pursuant to any judgment entered in [Action I] be made to [IFIC] and not ROBERT ELEVATOR. In the event LINDSAY PARK is obligated to make any payment to ROBERT ELEVATOR (and/or to its successors and/or assigns) pursuant to any judgment entered in [Action I], LINDSAY PARK will pay the first \$200,000.00 of such payment to [IFIC], or such lesser amount in the event the amount LINDSAY PARK is obligated to pay ROBERT ELEVATOR (and/or its successor and/or assigns) in [Action I] is an amount that does not equal or exceed \$200,000 (this payment is referred to herein as the "Subrogation Payment").

Lindsay Park argues in its motion that plaintiff's amended and supplemental complaint should be dismissed as against Lindsay Park because:

- 1) documentary evidence conclusively establishes that settlement agreement II contains clear, complete and unambiguous terms that contradict plaintiff's allegations against Lindsay Park;

- 2) settlement agreement II reflects plaintiff's waiver and/or the limitation of the subrogation rights plaintiff alleges it had;
- 3) an accord and satisfaction was established in connection with the clear and unambiguous terms of settlement agreement II; and
- 4) plaintiff's amended pleading fails to state a claim upon which relief can be granted.

DISCUSSION

On a motion to dismiss made pursuant CPLR 3211, factual averments of the complaint are accepted as true and the plaintiff is accorded the benefit of all favorable inferences to determine "whether the plaintiff can succeed upon any reasonable view of the facts stated." (*Malik v. Beal* 54 A.D.3d 910 [2d Dept 2008]). Pleadings are to be liberally construed. (*Sotomayor v. Kaufman, Malchman, Kirby & Squire, LLP* 252 A.D.2d 554 [2d Dept 1998]).

In a CPLR 3211(a)(7) motion, bare legal conclusions or factual claims flatly contradicted by the record are not presumed to be true, nor are they accorded every favorable inference. *Id.*

A valid waiver requires "the voluntary and intentional abandonment of a known right which, but for the waiver would have been enforceable." (*Golfo v. Kycia Associates, Inc.*, 45 A.D.3d 531, [2d Dept 2007]). A valid waiver can "arise by either an express agreement or by such conduct or a failure to act as to evince an intent not to claim the purported advantage." *Id.* A waiver cannot be "created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence" *Id.* There must be proof of a "voluntary and intentional relinquishment of a known and otherwise enforceable right." *Id.*

Under the doctrine of equitable subrogation, "where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lienholder." (*Bermuda Trust Co. Ltd. v. Ameropan Oil Corp.*, 266 A.D.2d 251, [2d Dept 1999]), quoting Restatement, Restitution, § 162).

International Fidelity Insurance undertook the defense of Robert Elevator in Action No. 2. For whatever reason, be it business judgment, or fear of a more significant verdict against their insured, they paid \$200,000 to Lindsay Park to resolve the litigation. Under the terms of their

Agreement with Robert, they were entitled to indemnification for the money so expended. This was explicitly set forth in the language of Exh. 7, the Settlement Agreement to Action II.

Action I settled thereafter, with Lindsay Park obligated to pay \$200,000 to Robert. International claims entitlement to this sum in accordance with its Indemnity Agreement with Robert and its Settlement Agreement with Lindsay Park in Action No. II.

The Indemnity Clause in the Agreement of Indemnity between Robert Elevator Company, Robert Morgan and Michele Morgan, Exh. "D" to the Affirmation of Adam Friedman states in pertinent part as follows:

SECOND: The Contractor and Indemnitors shall exonerate, indemnify, and keep indemnified the 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.

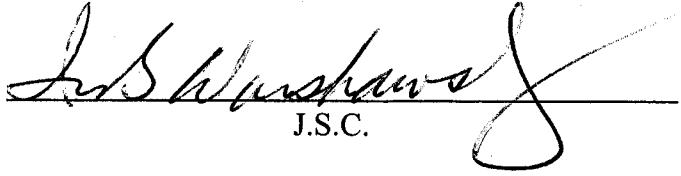
Whether or not warranted, International expended \$200,000 as a result of its having executed or procured the execution of the Bonds. They are entitled to indemnification to the extent of \$200,000, which defendant Lindsay Park specifically acknowledged in their Settlement Agreement. The claim that the failure to reduce a settlement to a judgment is contrary to the explicit language evidencing the intention of the parties, and the terms of the Indemnification Agreement.

International's cross-motion to amend their complaint to assert a claim against Lindsay Park as assignee of the rights of Robert Elevator is granted.

Nothing in the papers submitted in any way reflects a waiver by International of their claims for indemnification. Lindsay Park's motion to dismiss the proposed Amended and Supplemental Complaint is denied.

This constitutes the Decision and Order of the Court.

Dated: June 30, 2010


J.S.C.

ENTERED
JUL 06 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE