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

CAB ASSOCIATES,

Plaintiff,

INDEX NO.: 014670/2004
MOTION DATE: 05/25/2010
MOTION SEQUENCE: 002

- against -

HLW INTERNATIONAL LLP

Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed 1
Defendant HLW International LLP's Statement of Undisputed Facts Submitted in Support of its' Motion for an Order of Summary Judgment 2
Memorandum of Law in Support of Defendant HLW International LLP's Motion for an Order of Summary Judgment 3
Plaintiff's Response to Defendant's Statement of Facts and in Opposition to Defendant's Motion for Summary Judgment 4
Affidavit of Charles Warshaw in Opposition, Affidavit of Kevin O'Kane in Opposition & Exhibits Annexed 5
Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment 6
Reply Affirmation of Scott K. Winikow in Further Support & Exhibits Annexed 7
Reply Memorandum of Law in Further Support of Defendant HLW International LLP's Motion for an Order of Summary Judgment 8

PRELIMINARY STATEMENT

Defendant moves for summary judgment dismissing the complaint, or in the alternative, granting defendant partial summary judgment on certain claims of alleged design errors or

omissions on the part of HLW to the extent that (i) CAB sustained no damage since the work was performed by CAB's subcontractor and CAB did not pay the subcontractor; (ii) the work was identified in the Contract Documents; (iii) a prudent contractor would have known to perform the work based upon its review of the Contract Documents,;and, (iv) the work was required because of a scope change requested by the Dormitory Authority of the State of New York (DASNY), or a field condition encountered on the project.

BACKGROUND

On or about February 10, 2000, DASNY contracted with the Vanderbilt Group, LLC ("Vanderbilt") to serve as the design/build contracted for the construction of a five – building dormitory residence hall on the grounds of the State University of New York at Old Westbury. Vanderbilt, in turn, retained HLW to provide design services for the mechanical, electrical, and plumbing portions of the project. The HLW/Vanderbilt Agreement consisted of two parts, the first of which will was for design services, and the second of which was for construction administration.

DASNY declared Vanderbilt to be in default and terminated the agreement with them. Before hiring a substitute, HLW and other members of the design team were requested to complete their projects. By the time CAB was retained, HLW had completed its design services for the project. Travelers Casualty and Surety Company, in accordance with their performance bond, arranged for the project's completion by issuing a Solicitation For Offers to complete the project. As part of this process, all contractors, including CAB, were directed to examine the job site and make an independent appraisal of the scope of work necessary for the completion the project. The Solicitation provided that no extra compensation would be paid subsequent to the issuance of the contract based upon any misunderstandings, errors, omissions or misinterpretations, or ignorance on the part of the contractor of the work required to complete the project.

According to the affirmation in opposition to the motion, Charles Warshaw, CAB's administrator acknowledged having spent approximately 3 months reviewing drawings, and having spent hundreds of man-hours in his review prior to entering into the Completion Contract. Defendant contends that plaintiff had ample time and opportunity to review drawings and report

on any errors or discrepancies prior to entering into the contract. Defendant further alludes to the testimony of Mr. Warshaw that CAB based its bid only on what the drawings showed, whether or not they notice errors or discrepancies in them. According to the motion papers, defendant claims that CAB intentionally fails to report errors or discrepancies in the hopes of attending the bid and seeking to increase its contract price through the Change Order process.

CAB was successful and was awarded the contract. On or about September 7, 2001 Travelers, DASNY, and CAB entered into a Tender and Substitution Agreement by which CAB was to correct defective work and complete all the remaining work on the project in exchange for $34,366,525. This agreement also required that CAB acknowledged having reviewed the documents and that "fully informed itself with respect to those items necessary to complete the work". Travelers and CAB entered into a Supplementary Agreement for a lightning protection system, as described in the Solicitation for Offers, for a payment of $151,000. H LW is not a party to either the Tender and Substitution Agreement or the Supplemental Agreement.

CAB retained Hugh O'Kane Electric Co., LLC (HOK) to perform electrical services under the terms of the completion contract. The agreement between CAB and HOK provided that the subcontractor would agree to a lump sum price which will include among other things, the lightning protection plan. HOK was obligated to review all of the contract documents, and not just the electrical drawings prepared by HLW, to ascertain the scope of work for the project.

CAB directly retained HLW to provide construction administration services during the course of the project. Defendant points to that portion of the HLW/CAB agreement which provides that HLW will provide engineering construction services including, review of shop drawings, bi-weekly project construction meetings, periodic field inspections and responses to requests for information. CAB did not contract with HLW to perform any design services in that they had been completed before CAB came onto the project. The original HLW/Vanderbilt agreement was not assigned since it required the consent of HLW to do so, and HLW never approved of any such assignment. Defendants position is that HLW did not have any contractual relationship with HOK which was CAB's electrical subcontractor.

Defendant then deals with 36 separate claims interposed by the plaintiff. CAB and HOK allege that during the course of the project HOK performed work which was outside the scope of

the CAB/HOK agreement and for which HOK was not paid. The alleged extra work performed by HOK are claims numbered one – five; seven – twenty-two; twenty-four – thirty-one; and thirty-three – thirty-five ("Electrical Extra Work Claims"). The Non-Electrical items are alleged by plaintiff to be based upon latent defects, including the need for a sump pit cover, lounge main truss brackets, installation of angles and anchors, totaling $24,717.42.

Defendant reiterates that CAB has not paid HOK for any of these extra claims. Plaintiff previously sought to recover for the extra work claims against DASNY, in connection with which CAB and HOK entered into a Liquidating Agreement so that CAB could pursue claims against DASNY on behalf of the subcontractor, HOK. This agreement included a release by HOK of CAB from liability for the extra work except to the extent that CAB recovers money from DASNY in the DASNY action. This action was dismissed by order dated December 13, 2007 and the order was never appealed. Consequently, CAB has recovered no money from DASNY, and no money is owed to HOK by virtue of the release executed in accordance with the Liquidation Agreement. Defendant further claims that HOK's assignment of rights which it may have against HLW to CAB is of no consequence in that there is no privity between HOK and H LW and therefore, HOK never had any claim against HLW to assign.

Defendant's position on this motion is that all of the extra work claimed by plaintiff were readily knowable or actually contained in the HLW design plans. It was the obligation of CAB and HOK to conduct a full and thorough examination of the plans to determine what work was required in order to complete the project. Their failure to do so may have resulted in extra work being performed by the subcontractor; but the plaintiff in this action, the general contractor, never paid for such work and in fact received a release from HOK for any such claims.

Plaintiff opposes the motion claiming that CAB and it's subcontractor, HOK, incurred an additional cost of $407,122.81 for individual items of extra work which were caused because of HLW's defective contract drawings. It claims that the defendant misses the point in placing the responsibility on it and HOK to review the documents in order to arrive at a projected costs for the completion of the project, and alleges that no matter how extensively the plans were reviewed they would not have led to a finding of the latent defects contained in them. In addition, CAB's obligation to review the documents and plans ran only to DASNY, and did not inure to

the benefit of defendant in this action.

DISCUSSION

Plaintiff's Second Amended Verified Complaint alleges two causes of action. The first is for breach of contract, and the second is for negligence. The contract which CAB alleges was breached by HLW is the contract between DASNY and Vanderbilt. Plaintiff claims entitlement to pursue the claim by virtue of an assignment from Travelers, the original surety of Vanderbilt, to CAB, claiming that Travelers was subrogated to the rights of Vanderbilt Group against its subcontractors. Defendant contends that any such assignment required the approval of HLW, and that no such approval was ever given. HLW/Vanderbilt Agreement of April 18, 2000, Exh. "A" to Calabrese Affidavit attached to Motion at ¶ 7.2.

As surety for Vanderbilt, Travelers had no greater rights than Vanderbilt. CAB claims that it has been assigned Travelers rights under the contract between Vanderbilt and HLW for the design component of the agreement. As pointed out by defendant, however, neither HLW nor Vanderbilt were authorized to assign rights under the agreement without the consent of the other.

Summary Judgment

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield,* 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. *(Tortorello v. Carlin,* 260

A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' ". *(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

For defendant in this action to succeed on its motion, it must establish that, after giving plaintiff every possible favorable inference, there is no cognizable legal theory upon which plaintiff may succeed in this action.

At the heart of this action is the issue as to whether or not there was privity between CAB and HLW. HLW's contract for the drafting of construction plans was with Vanderbilt. Vanderbilt was terminated, and, pursuant to the bonding agreement with Travelers, the latter undertook to complete the project, and retained CAB as the general contractor in place of Vanderbilt. CAB, DASNY and Travelers entered into a Tender and Substitution Agreement, and Travelers and CAB entered into a separate agreement (Exh. 1 to Reply Affirmation of Scott Winikow at p. 2) which provided in pertinent part as follows:

> CAB has agreed to assume a liability for all defects in any work performed by Vanderbilt, Vanderbilt's consultants, subcontractors and/or suppliers, whether latent or otherwise. Travelers has reserved and continues to reserve all of its rights and defenses respect thereto except that, to the extent that there are latent defects for which CAB has assumed responsibility pursuant to the TSA and the cost of correcting such latent defects by CAB exceeds $100,000.00, then Travelers assigns to CAB rights, if any, which it would have to affirmatively pursue claims against such subcontractors, suppliers and/or consultants of Vanderbilt solely with respect to the latent defective work assumed by CAB which exceeds the cost of $100,000.00. All defenses and other rights as against all such subcontractors, suppliers and/or consultants of Vanderbilt are fully reserved by Travelers.

As an initial argument, plaintiffs allege that the issue of the validity of Travelers assignment of the rights it acquired from Vanderbilt was already determined in a prior decision of this Court. In that decision of July 30, 2008 this court denied the motion to dismiss based upon documentary evidence because the documentary evidence did not fully resolve the issue as to whether or not the work required on behalf of CAB, the incoming general contractor, was the result of "latent defects". It did not deal specifically with the issue as to whether the agreement between CAB and Travelers was sufficient to place the CAB in the position of Travelers' insured, Vanderbilt. The determination of that issue remains open for the court at the present time. All that was required for the prior determination was the courts conclusion that the documentary evidence was insufficient to conclude whether or not the deficiencies were, or were not, latent defects. It therefore does not constitute the law of the case for anything more which was not necessary for that determination. (*Matter of Oyster Bay Assocs., Ltd. Partnership v. Town Bd. of Oyster Bay,* 21 A.D.3d 964, 966 (2d Dept. 2005).

Defendants argue that the Vanderbilt/HLW Agreement was never assigned, because HLW never consented to an assignment. Travelers, acting as the surety on the performance bond purchased by Vanderbilt, acquired whatever rights Vanderbilt had upon its discharge from the project on February 9, 2001. Did those rights include the right to assign Vanderbilt's rights against HLW without the latter's consent?

The motion claims that the requirement for written approval for the assignment of the Vanderbilt/HLW contract is substantiated by the affidavit of Joseph Calabrese, attached to the moving papers. At ¶ 9 Calabrese states that the design contract with Vanderbilt was completed by the time that CAB came on board. The contract with Vanderbilt and HLW was not assigned to CAB; rather, CAB and HLW entered into a new agreement for engineering construction supervision services. (Exh. "B" to the Calabrase affidavit).

This argument, however, misses the fact that "a surety who answers for the default of his principal pursuant to the terms of a performance bond, either by completing the work required under the principal's contract with the owner-obligee, or by paying compensation to the owner-obligee, is entitled to be subrogated to the rights of the obligee whom he has paid, or on whose behalf he has completed the contract ". (*Menorah Nursing Home, Inc. v. Zukov,* 153 A.D.2d 13,

17 [2d Dept. 1989]). Travelers acquired the rights of Vanderbilt when it completed the latter's contract obligations with DASNY. Travelers thereafter assigned its rights to CAB under the Tender and Substitution Agreement. CAB retained HOK to perform the electrical work, which is claimed to have been necessitated by latent defects in the HLW plans, which they seek to enforce in this action. HLW had no contract with CAB to perform the electrical design work, although it was in privity with CAB for contract supervision. HOK had no privity with HLW at all. Travelers' subrogated rights from Vanderbilt did not include the right to assign the contract without the written consent of HLW. Agreement between HLW and Vanderbilt, Exh."A" to Calabrese affidavit at ¶ 7.2.

Defendant's motion to dismiss the claims of CAB against HLW for claimed latent defects giving rise to the performance of work in excess of $100,000 by HOK is granted. CAB did not obtain a valid assignment of rights from Travelers, since HLW never consented. CAB's receipt of claims of HOK against HLW is meaningless, since HOK was not in privity with HLW and has no claim against them.

The Court also grants the motion to dismiss the second cause of action alleging negligence. HLW and CAB were not in privity, or its functional equivalent, as to the design services portion of the contract, which the complaint alleges were negligently performed. Consequently, there can be no claim of negligence. Neither was CAB a third-party beneficiary of the Vanderbilt/HLW contract. Their involvement in the project only commenced after Vanderbilt's termination. (*Segall v. Rapkin,* 243 A.D.2d 624, 2d Dept. 1997).

This constitutes the Decision and Order of the Court.

Dated: August 24, 2010

J.S.C.