

EGW Temporaries, Inc. v RLI Ins. Co.

2010 NY Slip Op 34028(U)

January 15, 2010

Supreme Court, Erie County

Docket Number: 9010/06

Judge: John M. Curran

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

EGW TEMPORARIES, INC.

Plaintiffs

MEMORANDUM
DECISION

vs.

Index No. 9010/06

RLI INSURANCE COMPANY and
ENVIROCLEAN SERVICES, INC.

Defendants

RLI INSURANCE COMPANY

Third-Party Plaintiff

vs.

TITAN WRECKING & ENVIRONMENTAL, LLC
and LEBIS ENTERPRISES, INC.

Third-Party Defendants

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **BLOCK, COLUCCI, LONGO, P.C.**
Attorneys for Plaintiff
Mark J. Longo, Esq., of Counsel

HARRIS BEACH, PLLC
Attorneys for Defendant RLI Insurance Company
Richard T. Sullivan, Esq., of Counsel

CURRAN, JOHN M.

This matter was tried non-jury on August 25, 2009. At the conclusion of the proof, the attorneys agreed to submit simultaneous post-trial memoranda which were received

on October 30, 2009, at which time decision was reserved. Between the close of proof and submission of the post-trial memoranda, plaintiff moved to conform the pleadings to the proof to submit into evidence the fully-executed payment bond it could not locate at the time of trial. The court granted this motion by re-opening the proof and by affording defendant, RLI Insurance Company ("RLI"), and third-party defendants, Titan Wrecking & Environmental LLC ("Titan") and Lebis Enterprises, Inc. ("Lebis"), an opportunity to respond, which they declined. Defendant, Enviroclean Services, Inc. ("Enviroclean"), is in default and the relief sought by plaintiff against Enviroclean is therefore in all respects granted.

FACTUAL BACKGROUND

Plaintiff is a temporary help service. It has its own employees and trains them to provide the services requested by plaintiff's customers. Plaintiff's employees are paid directly by plaintiff, receive benefits from plaintiff, and plaintiff reserves the right to hire and fire each of its employees. Plaintiff's employees work directly under plaintiff's supervision.

Titan and Lebis are related entities born of the Bodami family. At the time of the transactions involved in this litigation, Lebis was owned by Josephine Bodami, the mother of Tony and Frank Bodami. Titan has at all relevant times been owned and operated by Tony and Frank Bodami.

In November of 2002, Lebis entered into an agreement with the Buffalo Municipal Housing Authority ("BMHA"). Pursuant to that agreement, Lebis was to perform asbestos abatement work. BMHA and Lebis entered into a lump sum contract in the amount of \$669,590.00.

Also in November of 2002, Lebis entered into a subcontract with Enviroclean. Pursuant to that agreement, Enviroclean was to perform virtually all of the services required of Lebis under the agreement with BMHA. The lump sum contract amount between Lebis and Enviroclean was \$597,226.00.

Shortly after these agreements were entered into, Tony and Frank Bodami suggested to plaintiff that plaintiff contact Enviroclean in order to provide the labor on the subject job site. Plaintiff did so and was retained by Enviroclean to provide the labor. Plaintiff was repeatedly assured by Enviroclean and Tony and Frank Bodami that it would be paid for its services.

After the completion of the job, plaintiff had difficulties in getting payment from Enviroclean. These efforts continued until they proved unsuccessful at which time this lawsuit was commenced. Other litigation also was commenced, the result of which generated partial payment to plaintiff from funds made available to Enviroclean in the sum of \$15,000.00 with a potential further payment of an additional \$15,000.00 being held in trust depending on the outcome of this litigation.

ANALYSIS

Plaintiff seeks payment pursuant to the payment bond. It has alleged two theories in its complaint: (a) a theory premised on the alter ego status of Lebis and Titan; and (b) a demand for reformation of the payment bond based on mistake. Plaintiff has failed to carry its burden to establish that Lebis and Titan were alter egos and therefore the Court dismisses the second cause of action. However, the Court concludes that the plaintiff has

established by clear and convincing evidence that there was a mutual mistake with respect to the identification of Titan in the payment bond rather than Lebis.


Frank Bodami testified at trial that he had no idea how the name of Titan was inserted into the payment bond and had no explanation for this mistake. No one testified on behalf of RLI. The evidence reflects that this was clearly a mutual mistake between RLI and Lebis. Accordingly, the Court grants judgment reforming the payment bond to reflect that it is to benefit Lebis and not Titan (*Court Tobacco Stores, Inc. v Great Eastern Ins. Co.*, 43 AD2d 561, 561-562 [2nd Dept 1973]; *Leavitt -Berner Tanning Corp. v American Home Assurance Co.*, 129 AD2d 199, 201-202 [3rd Dept 1987], *lv denied* 70 NY2d 609 [1987]; *Cheperuk v Liberty Mutual Fire Ins.*, 263 AD2d 748, 749-750 [3rd Dept 1999]). On this basis, plaintiff has in all respects met its burden to establish entitlement to payment from RLI pursuant to the terms of the payment bond (*Schuler-Haas Elec. Co. v Aetna Casualty & Surety Co.*, 40 NY2d 883 [1976]; *Scaffold Russ Dilworth Ltd. v Shared Mgt. Group Ltd.*, 289 AD2d 932, 934-935 [4th Dept 2001]). Plaintiff is therefore entitled to judgment against RLI in the amount of the balance owed which is \$54,133.75, together with statutory interest from the date of default of March 1, 2003. Plaintiff is not entitled to attorneys' fees as there is no agreement or statute providing for same.

Furthermore, at trial, it was agreed between RLI and Lebis that any judgment against RLI would be automatically entered against Lebis pursuant to the allegations in the

third-party complaint. Accordingly, RLI is entitled to judgment against Lebis in the same amount as identified in the previous paragraph.

Plaintiff should settle the Order and Judgment on notice to defendants' counsel.

DATED: January 15, 2010



HON. JOHN M. CURRAN, J.S.C.