

Nova Cas. Co. v Gator Recycling Corp.

2011 NY Slip Op 31824(U)

June 21, 2011

Supreme Court, Nassau County

Docket Number: 22591/09

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

MG

NOVA CASUALTY COMPANY,

Plaintiff,

Motion Sequence #1
Submitted April 13, 2011

-against-

INDEX NO: 22591/09

GATOR RECYCLING CORP., BRIAN
LEVINE and DEBRA LEVINE,

Defendants.

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....	1-4
Affs in Opposition.....	5-8
Affs in Reply.....	9&10
Memoranda of Law.....	11&12

Upon the foregoing, it is ordered that this motion by the plaintiff Nova Casualty Company ("Nova") for an order pursuant to CPLR 3212 granting it summary judgment in its favor and against defendants is granted as provided herein.

The facts pertinent to the determination of this motion are as follows:

On December 3, 2002, the defendants Gator Recycling Corp. ("Gator"), Brian Levine and Debra Levine executed a written General Agreement of Indemnity in their individual capacities and in addition, Brian did so in the capacity of president of Gator. All of those

signatures were notarized. That agreement afforded Nova the "right to pay, settle or compromise any expense, claim or charge of the character enumerated in" the Indemnity Agreement and it provided that "the voucher or other evidence of such payment shall be *prima facie* evidence of the propriety thereof and of the Indemnitor's liability therefore to [Nova]." The defendants jointly and severally agreed to "indemnify and save [Nova] harmless from and against every claim, demand, liability, loss, cost, charge, counsel fee, payable on demand of the Surety, whether actually incurred or not. . . . expense, suit, order judgment and adjudication whatsoever, and any all liability therefore, sustained or incurred by [Nova] by reason of having executed or procured said bonds or obligations, and will place [Nova] in funds to meet same before it shall be required to make payment. . . ." The Indemnity Agreement also required the defendants to place funds in Nova upon Nova's request sufficient to defray all expenses and judgments that may be rendered should Nova join in the prosecution or defense of any legal proceedings.

On or about December 5, 2002, at defendants' request, Nova issued a payment bond, Bond No. 27005, in the amount of \$532,800 in favor of the Town of Brookhaven ("Brookhaven") guarantying Gator's payment of monthly fees, charges, penalties and damages associated with Gator's delivery and disposal of solid waste at a landfill in Brookhaven from January 1, 2003 through December 31, 2003. As a result of Gator's failure to make timely monthly disposal fee payments to Brookhaven, Brookhaven made a demand upon Nova via a Notice of Claim on October 22, 2003. Upon receipt thereof, Nova sought indemnification from the defendants pursuant to the Indemnity Agreement. The defendants did not place funds with Nova and it had to defend itself in the action brought by the Town entitled *Town of Brookhaven v Gator Recycling Corp. and Nova*

Casualty Company. Nova investigated and ultimately concluded that Gator owed the Town \$325,463.30 in principal charges. Nova ultimately settled the Town's claim against the defendants for \$175,000 in October, 2009.

Despite Nova's demand, the defendants have not reimbursed it the \$175,000 which it paid Brookhaven pursuant to its demand on the payment bond, nor have they reimbursed Nova for the costs and expenses it has incurred as a result of the Town's claim, including its defense costs in the Town action or the costs of prosecuting this action.

Nova presently seeks summary judgment awarding it the \$175,000 it paid to the Town, as well as the fees and expenses it incurred investigating and defending the defendants against the Town's claim including attorney's and accountant's fees and the expenses it has incurred in this action. Nova also seeks to have the defendants exonerate it from any additional claims, and expenses incurred by reason of Payment Bond No. 27005.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Sheppard-Mobley v King*, 10 AD3d 70, 74, *aff'd. as mod.*, 4 NY3d 627, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Sheppard-Mobley v King, supra*, at p. 74; *Alvarez v Prospect Hosp., supra*; *Winegrad v New York Univ. Med. Ctr., supra*). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence

of a material issue of fact. (*Alvarez v Prospect Hosp.*, *supra*, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. (See, *Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521, citing *Secof v Greens Condominium*, 158 AD2d 591).

“New York courts have held that pursuant to an indemnity agreement such as [the one here,] ‘the surety is entitled to indemnification upon proof of payment, unless payment was made in bad faith or was unreasonable in amount, and this rule applies regardless of whether the principal was actually in default or liable under its contract with the obligee.’” (*Lee v T.F. DeMilo Corp.*, 29 AD3d 867, 868, quoting *Frontier Ins. Co. v Renewal Arts Contracting Corp.*, 12 AD3d 891, 892; see also, *John Deere Insurance Company v GBE/Alasia Corp.*, 57 AD3d 620, 621). “[U]nder this analysis, it is irrelevant whether the indemnitor was actually liable on the underlying debt.” (*John Deere Insurance Company v GBE/Alasia Corp.*, *supra*, at p. 621, citing *Frontier Ins. Co. v Renewal Arts Contr. Corp.*, *supra*, at p. 892; *International Fidelity Ins. Co. v Spadafina*, 192 AD2d 637, 639). “Payment is made in good faith if the surety pays the claims ‘in the honest belief that it was liable for such claims.’ ” (*Lee v T.F. DeMilo Corp.*, *supra* at p. 868, quoting *Maryland Casualty Co. v Grace*, 292 N.Y. 194, 200).

In support of its motion, Nova has submitted the affidavit of Warren B. Seifert, Vice President of claims for Nova. He has submitted a copy of the General Agreement of Indemnification, the Payment Bond and the Town’s claim. He attests that “after having conducted a thorough investigation of the Town’s claim, Nova verified that Gator owe[d]

the Town \$325,463.40 in principal charges.” Nova has established that it settled the Town’s claim for \$175,000. Mr. Seifert also attests that Nova has incurred more than \$10,000 in legal fees and \$5,000 in accounting fees in responding to and defending against the Town’s claim and in pursuing its claim for indemnification.

By submitting the indemnity agreements along with proof of loss and expenses supported by a copy of the payment drafts in the amount of \$175,000, Nova has established its entitlement to summary judgment thereby shifting the burden to the defendants to demonstrate the existence of a material issue of fact. (*John Deere Insurance Company v GBE/Alasia Corp.*, *supra*; *Lee v De Milo Corp.*, *supra*; *Frontier Ins. Co. v Renewal Arts Contracting Corp.*, *supra*; see also *American Home Assur. Co. v Gemma Const. Co., Inc.*, 275 AD2d 616, lv. *dism.*, 95 NY2d 959, lv. *dism.*, 96 NY2d 791, citing *Kornblith v Ostrau*, 252 AD2d 572; *International Fidelity Ins. Co. v Spadafina*, *supra*). Where like here, the surety has “the exclusive and binding authority to assess the merits of any claim brought under its bond . . . any factual issue as to liability under the bonds [is] immaterial unless the [indemnitor] also showed that [the surety] decided to accept liability and pay the obligee’s claim in bad faith.” (*Frontier Ins. Co. v Renewal Arts Contracting Corp.*, *supra*, at p. 893). “The excessiveness of the amounts paid on [the Town’s] claim is insufficient to meet defendants’ burden to raise a question of material fact as to bad faith.” (*Frontier Ins. Co. v Renewal Arts Contracting Corp.*, *supra*, at p. 893, citing *Peerless Ins. Co. v Talia Const. Co., Inc.*, 272 AD2d 919; *Acstar Ins. Co. v Teton Enterprises, Inc.*, 248 AD2d 654; *Republic Ins. Co. v Real Development Co.*, 161 AD2d 189).

The defendants have failed to raise an issue of fact. The only arguments advanced in opposition are that Nova settled the Town's claim for an excessive amount, which is an inadequate ground to defeat Nova's entitlement to summary judgment, and that Debra Levine did not agree to indemnify Nova as her signature was forged. " '[A] certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, or upon a bare preponderance of evidence, but only on proof so clear and convincing so as to amount to a moral certainty.'" (*Beshara v Beshara*, 51 AD3d 838, quoting *Albany County Sav. Bank v McCarty*, 149 NY 71, 80; see also, *John Deere Insurance Company v GBE/Alasia Corp.*, *supra*, at p. 622; *Paciello v Graffeo*, 32 AD3d 461, *lv den.*, 8 NY3d 802; *Osborne v Zornberg*, 16 AD3d 643; 1 N.Y. Jur.2d, Acknowledgments § 30, at p. 258). In view of the fact that Debra Levine's signature bore the acknowledgment of a notary public, her conclusory affidavit denying the signature is insufficient to raise a triable issue of fact and to rebut the presumption of due execution. (*John Deere Insurance Company v GBE/Alasia Corp.*, *supra* at p. 622; see also, *Albany County Sav. Bank v McCarty*, *supra*, *Beshara v Besara*, *supra*).

The plaintiff's motion is granted as follows: Nova is awarded \$175,000 as and for its payment to the Town of Brookhaven on the Bond No. 27005. It is also granted summary judgment with respect to the defendants' liability for the costs and expenses it has incurred with respect to the bond, including the lawsuit by the Town and this lawsuit, such sum to be determined at a hearing.

Therefore, in accordance with CPLR 3212(c), this matter is scheduled for an immediate trial on the issue of damages at an IAS Part 3 of this Court on August 16, 2011 at

9:30 a.m., subject to the filing of a Note of Issue by plaintiff within twenty (20) days after service of a copy of this order with notice of entry upon the attorney for the defendants.

Finally, Nova is exonerated from any other claims and expenses related to Bond No. 27005 and the defendants **must** exonerate Nova from any other claims and expenses related to Bond No. 27005.

Dated: JUN 21 2011


UTE WOLFF LALLY, J.S.C.

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ENTERED

JUN 23 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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