

**Leon D. Dematteis Constr. Corp. v Vigilant Ins. Co.**

2011 NY Slip Op 33897(U)

November 18, 2011

Supreme Court, New York County

Docket Number: 651337/10

Judge: Charles E. Ramos

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This opinion is uncorrected and not selected for official publication.

PRESENT: CHARLES E. RAMOS  
Justice

PART 53

De Matteis Constr.,  
et al  
- v -  
Vigilant Ins. Co.

INDEX NO. 651337/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Is decided in accordance with  
accompanying memorandum decision and order.

Dated: 11/18/11

  
\_\_\_\_\_  
HON. CHARLES E. RAMOS

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION  
-----X  
LEON D. DEMATTEIS CONSTRUCTION CORPORATION  
and 1765 FIRST ASSOCIATES, LLC,

Plaintiff,

-against-

Index No.  
651337/0010

VIGILANT INSURANCE COMPANY,

Defendants.

-----X

**Charles Edward Ramos, J.S.C.:**

Defendant Vigilant Insurance Company (Vigilant) moves pursuant to CPLR 3211 (a) (1) and (7) to dismiss plaintiffs' second amended complaint in its entirety.

**Background<sup>1</sup>**

This action arises out of a performance bond (Performance Bond) issued by surety (Vigilant) on behalf of plaintiff Leon D. Dematteis Construction Corporation (Dematteis), as principal contractor, and Sorbara Construction Corp. (Sorbara), as sub-contractor for the construction of a concrete superstructure in connection with a high-rise luxury building (project) on the East Side of Manhattan. During the course of the project, a tower crane collapsed onto a neighboring building, killing the crane operator and causing substantial casualty and property damage.

Plaintiffs Dematteis and 1765 First Associates LLC (1765),

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<sup>1</sup> The facts set forth herein are taken from the Plaintiffs' pleadings and are assumed to be true for the purposes of disposition.

the developer of the project (together, Plaintiffs), commenced this action against Vigilant under the Performance Bond seeking to recover delay damages that they allegedly incurred by the cessation and delay of completion of Sorbara's work beyond the five months allowed under the Subcontract.

From the inception, 1765 purportedly made prompt completion of the project an imperative, committing DeMatteis to a strict completion schedule that DeMatteis, in turn, imposed on Sorbara in the Subcontract, executed in 2006.

In 2007, Vigilant issued the Performance Bond in favor of Plaintiffs. The crane collapse occurred on May 30, 2008, and caused a seven month delay in the completion of the project. In addition, Plaintiffs allege that the cost to complete the project significantly increased, which constitutes a default under the Subcontract and the Performance Bond, triggering Vigilant's liability. Further, Plaintiffs argue that, although they provided timely notice of default to Vigilant, they were not required to do so, nor were they required to terminate or call upon Vigilant to complete Sorbara's work under the Subcontract.

Plaintiffs commenced this action in August 2010, and amended their complaint in October 2010, followed by a second amended complaint. Currently, Plaintiffs seek to withdraw a portion of their first cause of action which alleges that Vigilant is obligated to indemnify them for third party casualty claims

caused by the crane collapse.

#### Discussion

Vigilant moves to dismiss the complaint in its entirety on the ground that Plaintiffs are barred as a matter of law from seeking delay damages because DeMatteis requested, and Sorbara fully completed, the Subcontract underlying the Performance Bond without actually defaulting or terminating Sorbara. Further, Vigilant asserts that any initial notice of a potential default was withdrawn by DeMatteis when it agreed to allow Sorbara to continue the Subcontract. Thus, according to Vigilant, Plaintiffs are precluded from stating a claim for delay damages because a condition to its liability under the Performance Bond was not satisfied.

Performance bonds, like all contracts, are to be construed in accordance with their terms (*Walter Concrete Constr. Corp. v Lederle Labs*, 99 NY2d 603, 604-05 [2003]). Where the terms are unambiguous, interpretation of the performance bond is a question of law for the court (*Id.*). Before a surety's obligations under a bond can mature, the obligee must comply with any conditions precedent, which is an act or event other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises (*Travelers Cas. and Sur. Co. v White Plains Public Schools*, 2007 WL 935612, \*20 [SD NY 2007]).

Here, the Performance Bond states:

"NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, **if Trade Contractor [Sorbara] shall promptly and faithfully perform said Contract [Subcontract], then this obligation shall be null and void;** otherwise it shall remain in full force and effect ... **[W]hensoever Trade Contractor shall be, and declared by Owner or DeMatteis to be in default under the Contract,** DeMatteis having performed Owner's obligations thereunder, the Surety [Vigilant] may promptly remedy the default ...

Any suit under this bond must be instituted before the expiration of two (2) years from the date on which final payment under the Contract falls due" (emphasis added).

In addition, the Performance Bond expressly incorporates by reference the terms of the Subcontract.

The Court of Appeals considered an identical performance bond as at issue here - the industry standard AIA 311 form performance bond, and concluded that it contains no explicit provision requiring a notice of default or the subcontractor's cessation of work as a condition precedent to the commencement of a legal action against a surety on the bond. Rather, the standard AIA 311 form performance bond requires only that an action be commenced within two years from the date on which final payment under the contract is due (*Walter Concrete Constr. Corp.*, 99 NY2d at 604-05).

The Court reasoned that, "had the parties to the contract desired notice of default as a precursor to liability under the bond, they could have elected to issue the more specific AIA-312 [form of bond], which by its terms requires pre-default

notification be given to the contract and surety" (*Id.*; see e.g. *Travelers Cas. and Sur. Co. v White Plains Public Schools*, 2007 WL 935612 at \*20). Thus, while an AIA 312 form of performance bond requires a declaration of default before the surety is liable, the AIA 311 form of performance bond does not (*accord* 120 *Greenwich Dev. Assocs., LLC v Reliance Ins. Co.*, 2004 WL 1277998, \*12 [SD NY 2004]; *Menorah Nursing Home v Zukov*, 153 AD2d 13, 21-22 [2d Dept 1989]; *Babylon Assocs. v County of Suffolk*, 101 AD2d 207 [2d Dept 1989]). Consequently, service of a notice of default or demanding that Sorbara cease work on the project were not conditions precedent to the commencement of this action against Vigilant under the Performance Bond.

The second issue is whether Vigilant's liability cannot be triggered as a matter of law because DeMatteis did not seek to terminate Sorbara until after the project was substantially complete. According to Vigilant, the documentary evidence irrefutably demonstrates that DeMatteis accepted Sorbara's substantial performance of the project, and thus, there could be no default under the Subcontract that could trigger the surety's liability.

This Court determines that it is premature to conclude that Plaintiffs have no claim under the Performance Bond at this stage. First, the terms of the Performance Bond expressly incorporate by reference the terms of the Subcontract. The

Subcontract provides, in turn, that Sorbara agreed to "indemnify Dematteis and Owner [1765] against any losses, claims, loss of profit and any other costs or expenses of any kind whatsoever **resulting from any delay to the progress to the Work**" (emphasis added) (Article 9, Subcontract).

Article 4 of the Subcontract makes time of the essence, and commits Sorbara to "proceed with the Work [project] and every part in detail thereof in a **prompt and diligent manner ... Trade Contractor shall closely adhere to any Work schedule provided by Dematteis** (emphasis added)." Article 6 of the Subcontract sets the completion date for Sorbara's work as January 15, 2008, five months after the mutually agreed start date, and contemplates certain remedies in the event of delayed or untimely performance by Sorbara, including damages and termination. Moreover, the Performance Bond itself conditions the release of the surety's obligations thereunder on Sorbara's "**promptly and faithfully perform[ing]**" (emphasis added).

Based upon the language of the Performance Bond which incorporates by reference the terms of the Subcontract, this Court cannot conclude on the basis of documentary evidence that Vigilant's liability is limited solely to the cost of completion of the Subcontract as opposed to delay damages (see *Babylon Assoc.*, 101 AD2d 207).

The Subcontract, as incorporated, expressly contemplates the

recovery of delay damages. Further, the Performance Bond permits DeMatteis to allow Sorbara to complete the Subcontract or to terminate and retain another contractor to complete the project, and does not require a declaration of default as a condition precedent to Vigilant's liability (see *RLI Ins. Co. v St. Patrick's Home for the Infirm and Aged*, 452 F Supp 2d 484 [SD NY 2006]; compare *Travelers Cas. and Sur. Co.*, 2007 WL 935612 at \*14-20). Therefore, Vigilant fails to demonstrate that documentary evidence irrefutably establishes that Vigilant's obligations never arose under the Performance Bond.

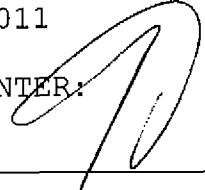
Vigilant's remaining arguments have been considered and are rejected.

Accordingly, it is

ORDERED that Defendant Vigilant Insurance Company's motion to dismiss is denied; and it further

ORDERED that Vigilant Insurance Company shall serve an answer to the second amended complaint 20 days after service of a copy of this order with notice of entry, whereupon the parties shall contact the Part Clerk in order to schedule a Preliminary Conference.

Dated: November 18, 2011

ENTER: 

**HON. CHARLES E. RAMOS**