

Whitestone Constr. Corp. v Nova Cas. Co.
2011 NY Slip Op 34110(U)
September 23, 2011
Sup Ct, Queens County
Docket Number: 8207/10
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

-----X
WHITESTONE CONSTRUCTION CORP.,

Plaintiff,

-against-

**NOVA CASUALTY COMPANY, AIX GROUP
d/b/a NOVA CASUALTY COMPANY, AON
INDUSTRIES, INC. a/k/a AON SUPERSTRUCTURE
LLC, AON REALTY LLC, ECT CET LLC, AND
GEORGE AND EVANDELOS TRITARIS,
INDIVIDUALLY, AND JOHN DOES 1-10,**

Defendants.

-----X
**AON INDUSTRIES, INC. a/k/a AON
SUPERSTRUCTURE LLC, ECT CET LLC,
AND GEORGE AND EVANDELOS TRITARIS,
INDIVIDUALLY,
NOVA CASUALTY COMPANY, AIX GROUP
d/b/a NOVA CASUALTY COMPANY, AON
INDUSTRIES, INC. a/k/a AON SUPERSTRUCTURE
LLC, AON REALTY LLC, ECT CET LLC AND
GEORGE AND EVANDELOS TRITARIS,
INDIVIDUALLY, AND JOHN DOES 1-10,
WHITESTONE CONSTRUCTION CORP.,**

Counterclaim Plaintiff,

-----X

The following papers numbered 1 to 7 read on this motion by plaintiff Whitestone Construction Corp. (Whitestone) for, *inter alia*, an order pursuant to CPLR 3211 dismissing the affirmative defenses asserted by defendant Nova Casualty Company

Index No. 8207/10
Motion Date: 7/6/11
Motion Cal. No. 45
Mot. Seq. 2

PAPERS
NUMBERED

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Answering Affidavits - Exhibits	2-3
Reply Affidavits	4
Memoranda of Law	5-7

Upon the foregoing papers it is ordered that the motion is determined as follows:

On or about July 6, 2004, Whitestone, as general contractor, entered into a subcontract with Aon whereby the latter obligated itself to provide material, labor, and equipment on a construction project located at 356 Madison Street, New York, New York undertaken by the New York City Housing Authority. As required by the subcontract, on or about April 29, 2005, Aon obtained performance and payment bonds naming Whitestone as the obligee in the amount of \$1,000,000 from Nova Casualty Company (Nova). In May, 2008, Whitestone notified Aon of alleged material breaches of the subcontract. After Whitestone sent Aon a second notice, the general contractor terminated the subcontract allegedly for cause by letter dated June 5, 2008. Whitestone itself subsequently completed the work required by the subcontract at a cost of an additional \$727,831.90. By letter dated April 6, 2010 demanding payment of that sum by Nova, Whitestone advised the surety for the first time that the general contractor had “terminated Aon for cause from the Project” and “thereafter to complete the Project, Whitestone intervened and assumed all of Aon’s obligations pursuant to the subcontract.” The surety denied Whitestone’s claim for failure to comply with the notice provisions of the performance bond. The surety alleges that it has been prejudiced by the failure because Whitestone deprived it of the opportunity to get advice from its construction consultants and to otherwise manage the costs incurred in completing Aon’s work. This action ensued on or about April 2, 2010.

The performance bond read in relevant part: “ Whenever Principal shall be, and declared by Obligee to be in default under the subcontract, the Obligee having performed Obligee’s obligations thereunder: (1) Surety may promptly remedy the default, subject to the provisions of paragraph 3 herein, or; (2) Obligee *after reasonable notice to Surety* may, or Surety upon demand of Obligee may arrange for the performance of Principal’s obligation under the subcontract subject to the provisions of paragraph 3 herein ***.” (Italics added.)

That branch of Whitestone’s motion which is for an order pursuant to CPLR 3211(b) dismissing Nova’s first affirmative defense is denied. The defense of failure to state a cause of action may properly be interposed in an answer, but a plaintiff may not test the sufficiency of his own complaint by moving to dismiss the defense. (*See, Butler v Catinella 58 AD3d 145.*)

That branch of Whitestone's motion which is for an order pursuant to CPLR 3211(b) dismissing Nova's second affirmative defense is denied. The second affirmative defense alleges that Whitestone failed to mitigate its damages, and Thomas A. Joyce, a surety claims consultant for Nova, amplifies the pleading somewhat by alleging that Whitestone failed to mitigate its damages because the general contractor did not notify the surety of its intention to complete the project itself. Nova implicitly alleges that it could have completed the project at a lesser cost. Whether the surety could have done so is an issue of fact which bars the dismissal of the second affirmative defense. "When material issues of fact are unresolved, a court should not strike a defense ***." (Faulkner v City of New York, 47 AD3d 879, 881.)

That branch of Whitestone's motion which is for an order pursuant to CPLR 3211(b) dismissing Nova's third affirmative defense is denied. That branch of Whitestone's motion which is for an order pursuant to CPLR 3211(b) dismissing Nova's fourth affirmative defense is denied. That branch of Whitestone's motion which is for an order pursuant to CPLR 3211(b) dismissing Nova's fifth affirmative defense is denied. The third affirmative defense alleges that the plaintiff failed to comply with all the requirements and conditions precedent for filing a claim against the performance bond. The fourth affirmative defense alleges that the plaintiff failed to comply with the notice provisions of the performance bond. The fifth affirmative defense alleges that the plaintiff breached its obligations under the performance bond by failing to give the surety the option to cure Aon's default. These affirmative defenses concern the plaintiff's failure to give notice of Aon's default to the surety before completing the subcontractor's work. Contrary to the arguments made by Whitestone, these affirmative defenses are valid. First, Nova's performance bond 32307 is not an AIA A311 Performance Bond. Nova's performance bond 32307 does not contain the AIA copyright. Moreover, Nova's performance bond 32307 is a subcontract performance bond, while the A311 is a bond given by a general contractor, as principal, to an owner, as obligee. Second, there is no ambiguity in the performance bond issued by Nova. The terms of the performance bond plainly allow the obligee to undertake to cure the principal's default only "after reasonable notice to Surety." "Surety bonds-like all contracts-are to be construed in accordance with their terms." (Walter Concrete Const. Corp. v Lederle Laboratories, 99 NY2d 603, 605.) A surety's liability is limited by the scope and meaning of its agreement. (Davis Acoustical Corp. v Hanover Ins. Co., 22 AD2d 843.) There are three ways that the principal's default may be remedied under the relevant paragraph of the performance bond, and all three ways require knowledge of the default by the surety before the subcontractor's work is completed. The terms of the performance bond allow the surety to keep control of the remedial work in its hands. Third, a failure to comply with a condition precedent will preclude recovery against a surety upon a bond. (See, National Fuel Gas Distribution Corp. v Hartford Fire Ins. Co., 28 AD3d 1169; 153 Hudson Development, LLC v DiNunno, 8 AD3d 77.) Whitestone was required to strictly

comply with the conditions of paragraph 2 of the bond which are essential to the surety's liability. (*See, Tishman Westwide Const. LLC v ASF Glass, Inc.*, 33 AD3d 539.)

Those branches of the motion which are for an order dismissing the affirmative defenses and counterclaims asserted by defendants Aon Industries, Inc. a/ka/ Aon Superstructure LLC, Aon Realty LLC, ECT CRT LLC, George Tritaris, and Evandelos Tritaris are granted upon default.

DATED: September 23, 2011

ORIN R. KITZES, J.S.C.