

Colonial Surety Co. v WJL Equities Corp.

2012 NY Slip Op 30213(U)

January 23, 2012

Sup Ct, NY County

Docket Number: 112578/2010

Judge: Emily Jane Goodman

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 112579/2010
COLONIAL SURETY COMPANY
VS.
WJL EQUITIES CORP.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED
1-5
6

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

Cross-Motion: Yes No

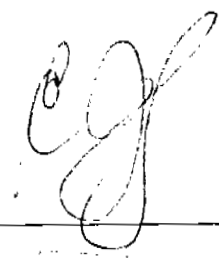
Upon the foregoing papers, it is ordered that this motion *is granted as requested with the original Memorandum Decision and Order*

FILED

JAN 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/23/12



J.S.C.

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: PART 17

-----X
COLONIAL SURETY COMPANY,

Index No.: 112579/2010

Plaintiff,

DECISION & ORDER

-against-

WJL EQUITIES CORP., DANIELLE K.
BUENAVENTURA and WILLIAM J. LOUGHEED,

FILED

JAN 30 2012

Defendants.

-----X
EMILY JANE GOODMAN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Colonial Surety Company (Colonial) sues defendants WJL Equities Corp. (WJL), Danielle K. Buenaventura (Buenaventura), and William J. Lougheed (Lougheed) for breach of indemnity agreements. Colonial, pre note of issue, moves for summary judgment in its favor (CPLR 3212). The motion is decided as follows.

WJL is a company engaged in construction contracting. In connection with its contracting work, it was required to post various performance and payment bonds. It entered into two General Indemnity Agreements (Agreements) with Colonial (Nunziata Aff., Ex. A and B) to secure several bonds on behalf of WJL. In connection with the Agreements, WJL obtained multiple performance and labor and material payment bonds from Colonial (id. Ex. C). Defendants do not dispute any of the facts presented by Colonial (Memorandum in Opposition, p. 1 [unpaginated])["The statement of facts presented ... by Attorneys for Plaintiff is essentially

correct.")). As a result of issuing the bonds to WJL, Colonial alleges that it incurred \$228,084.41 in various costs and fees, including attorney's fees.

The Agreements define "Indemnitor" as "[a]ll persons executing this Agreement with the Surety, including the Principal" (id. Ex. A, p. 1; Ex. B, p. 1). The signatories included WJL by Buenaventura, as president, as well as Buenaventura individually, and Loughheed, individually. The Agreements required the Indemnitors to perform all conditions of each bond issued, and to indemnify Colonial from all "demands, liabilities, losses, costs, damages or expenses of whatever nature or kind" arising therefrom, including investigation and attorney's fees (Agreements, ¶ 3), and an itemized statement of the "loss and expense, sworn to by an officer of Surety ... shall be prima facie evidence of the fact and extent of liability hereunder of Indemnitor" (id., ¶ 4[D]).

Indemnity agreements, such as the one at issue here, are regularly enforced (*American Home Assur. Co. v. Gemma Const. Co., Inc.*, 275 AD2d 616, 619 [1st Dept 2000]). Colonial argues that it is entitled to summary judgment under the terms of the Agreements, and it supplies copies of the Agreements, unsigned copies of the bonds, and a list of its expenses (Nunziata Aff., Ex. A-D), as verified by Wayne Nunziata, president of Colonial. Defendants counter that no discovery has yet occurred, and

summary judgment is premature. They also note that the bonds supplied by Colonial are unsigned, and should not be considered by the court.

Notably, Defendants do not deny the validity of the Agreements, and do not deny that Colonial issued the bonds at issue to WJL. Rather, Defendants supply Buenaventura's affidavit, wherein Buenaventura states that the bonds attached to Colonial's motion "may or may not apply to these transactions" (Buenaventura Aff., ¶ 8). This statement is belied by the language of the Agreements, which defines "Bond" as:

Any contractual obligation undertaken by Surety for Principal before or after the date of this Agreement, and any renewal, alteration, modification or extension of said obligation.

(Agreements, ¶ 1). It is uncontested that the Agreements were entered into prior to the issuance of the bonds, and, again, Defendants do not contest that the bonds were issued. Accordingly, the Agreements apply to the bonds, and Defendants, as indemnitors, are liable to Colonial for any costs incurred under the bonds.

Defendants do not describe what evidence discovery would uncover that would defeat this motion. "The 'mere hope' of defendants that evidence sufficient to defeat such a motion may be uncovered during the discovery process is not enough"

(Frierson v. Concourse Plaza Associates, 189 AD2d 609, 611 [1st Dept 1993]; see also Prestige Decorating and Wallcovering, Inc. v

US Fire Ins. Co., 49 AD3d 406 [1st Dept 2008]).

Next, Defendants take issue with Colonial's list of expenses. The sworn itemized statement of losses and expenses (Nunziata Aff., Ex. D) lists several dozen checks (including check numbers and dates paid) made out to "McElroy, Deutsch & Mulvaney," "Larry Miller," "Nihill & Riedley" and "Beacon Consulting Group". Defendants argue that the list is insufficiently descriptive of the loss and expenses incurred in that it does not describe who the entities are, what specific work was done by them, or to which bond the fees were applied.

However, the Agreements do not require such specificity; rather "an itemized statement of the aforesaid loss and expense, sworn to by an officer" will be sufficient. "New York courts have held that such provisions mean that 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" (Frontier Ins. Co. v. Renewal Arts Contracting Corp. 12 A.D.3d 891 [3rd Dept 2004]). Defendants do not assert any claims of fraud or bad faith in opposition to this motion, nor did they raise it in their affirmative defenses.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on

the complaint is granted and the Clerk of the Court is directed to enter judgment accordingly in favor of plaintiff and against defendant in the amount of \$228,084.41, together with interest at the statutory rate from the date of judgment and costs and disbursements as taxed.

Dated:

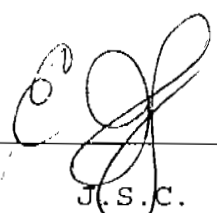
Jan 23, '12

FILED

JAN 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



J.S.C.

EMILY JANE GOODMAN