

Five Star El. Corp. v Federal Ins. Co.

2014 NY Slip Op 31221(U)

May 6, 2014

Supreme Court, New York County

Docket Number: 602781/07

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
-----x

FIVE STAR ELECTRIC CORP.,

Plaintiff,

-against-

FEDERAL INSURANCE COMPANY and ST. PAUL
FIRE AND MARINE INSURANCE COMPANY,

Defendants.

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**Mtn Seq. Nos. 001 &
002**

DECISION AND ORDER

-----x

FEDERAL INSURANCE COMPANY,

Third-Party Plaintiff,

-against-

EA TECHNOLOGIES, INC., PETROCELLI
ELECTRIC CO., INC., TRANSIT TECH, LLC,
PEC REALTY CORP., FMSS, LLC

Third-Party Defendants.

-----x

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY,

Third-Party Plaintiff,

-against-

E.A. TECHNOLOGIES, INC., TRANSIT
TECHNOLOGIES, LLC, PETROCELLI ELECTRIC
CO., INC., FMSS, LLC; PEC REALTY CORP.;
PETROCELLI ELECTRIC CO OF NJ, INC.;
SIEMENS INDUSTRY, INC.,
SUCCESSOR-BY-MERGER TO SIEMENS
TRANSPORTATION SYSTEMS, INC., and
SIEMENS AKTIENGESELLSCHAFT

Third-Party Defendants.

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JEFFREY K. OING, J.:

Plaintiff, Five Star Electric Corp. ("Five Star"), commenced this action against defendants Federal Insurance Company ("Federal") and St. Paul Fire and Marine Insurance Company ("St. Paul") (collectively, "defendants") to recover sums owed for work, labor, and services performed by Five Star pursuant to a contract with Transit Technologies ("Transit") to which St. Paul and Federal were co-sureties.

In response, St. Paul and Federal commenced a third-party action for indemnity against a number of parties, including Siemens Industry, Inc. ("Siemens"), the successor to Siemens Transportation Systems, Inc.

In motion sequence no. 001, Five Star moves, pursuant to CPLR 3212, for an order granting it summary judgment against the defendants, jointly and severally, in the sum of \$11,884,010, together with prejudgment interest and reasonable attorneys' fees.

In motion sequence no. 002, Siemens moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss counts six through eight of St. Paul's third-party complaint for implied indemnity, exoneration, and quia timet.

Motion sequence nos. 001 and 002 are consolidated for disposition.

In the "General Agreement of Indemnity", dated October 20, 1998, with Federal, Siemens agreed, inter alia, to "indemnify and save harmless [Federal] from and against any and all loss, cost, damage or expense ... which it shall at any time incur by reason of its execution and/or delivery of ... bonds" to Federal (General Agreement of Indemnity, p. 1, Smith Reply Aff., Ex. G).

In the "Consortium Agreement" dated August 7, 2002, Siemens contracted with Transit, formerly known as E.A. Technologies/Petrocelli, J.V., L.L.C., to form a consortium, Siemens Transit Technologies (the "Consortium") in order to bid on a Metropolitan Transportation Authority ("MTA") contract, Public Address/Customer Information System Contract W-32658 (the "MTA Contract") (Consortium Agreement, Feinrider Affirm., Ex. 1). The Consortium Agreement provided that it should "not be construed as creating a partnership" or "any continuing relationship or commitment between the Parties" (Id., ¶ 2.3). Neither party was permitted to "assume, create or undertake any obligation of any kind whatsoever, express or implied, on behalf of or in the name of the Consortium" on its own (Id., ¶ 2.5.3).

The MTA Contract involved the installation of, inter alia, a public address system, customer information screens, and integrated CCTV in at least 156 subway stations in New York City (Demand for Arbitration, p. 5, Gordon Affirm., Ex. 4).

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The MTA accepted the Consortium's bid and, in a contract executed on or around September 17, 2003, Siemens and Transit agreed, inter alia, "to make all payments with respect to its subcontractors and suppliers in accordance with Section 139-f of the State Finance Laws" (MTA Contract, p. 43, Art. 3.10, Feinrider Affirm., Ex. 2). The MTA contract defined "subcontractor" as "any person, firm or corporation ... who contracts to furnish labor or labor and materials ... in connection with the Project, whether directly or indirectly on behalf of the [Consortium] and whether or not in privity of contract with the [Consortium]" (Id., p. 28, Art. 1.02[4]). The contract also required that the Consortium furnish a Payment Bond (Id., p. 48, Art. 5.01[a]). Siemens and Transit each signed the contract (Id., pp. 94-95).

In a Payment Bond dated September 2, 2003, the Consortium, Federal, and St. Paul agreed to be bound jointly and severally to the MTA and the New York City Transit Authority in the sum of \$111,861,849 for

wages and compensation for labor performed and services rendered by all persons engaged in the prosecution of the Project under said Contract ... including all persons so engaged who perform the work of laborers or mechanics at or in the vicinity of the site of the Project ... but not including office employees not regularly stationed at the site of the Project

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(Payment Bond, p. 8, Feinrider Affirm., Ex. 3). The Payment Bond conferred a direct right of action against any or all of the signatories to the Bond on "all persons who ... performed labor, rendered services or furnished materials and supplies" (Id.). The Bond incorporated the MTA Contract by reference (Id.). While the Consortium was named as the Principal on the Bond, Transit and Siemens each signed the Payment Bond (Id., pp. 10-11).

In a subcontract between Transit and Five Star dated December 10, 2003, Five Star agreed to perform all electrical, communications, and power work for the MTA Contract (Subcontractor Agreement, ¶ 2, Feinrider Affirm., Ex. 4). The subcontract provided that "any controversy or claim arising out of or relating to" the subcontract "or the breach thereof" would be settled through arbitration (Id., ¶ 12). Five Star's work on the project was to end, at the latest, in or around September 2006 (Id., ¶ 5; Willner 4/30/2009 Arbitration Proceeding, pp. 956, 961, Feinrider Affirm., Ex. 18).

Five Star's work on the project extended beyond the period contemplated in the subcontract (Feinrider Affirm., ¶ 18). On or about June 21, 2007, Five Star commenced an arbitration proceeding against Transit, alleging that "by reason of [Transit's] abandonment, material breach, anticipatory breach and/or cardinal change of its subcontract Five Star is

entitled to ... an award of its monetary damages incurred to date" (Demand for Arbitration, p. 1, Gordon Affirm., Ex. 4).

On or about August 17, 2007, Five Star commenced this action against Federal and St. Paul demanding payment of \$16,914,844 allegedly due and unpaid by Transit (Compl., pp. 4-5, Smith Aff., Ex. B). The parties consented to staying this action during the pendency of the arbitration proceeding (Zanotta Aff., ¶ 2; Smith Aff., ¶ 10).

During the arbitration, Transit's president, Edward Willner, testified that Siemens' failure to finish software necessary to the project was the "overriding" cause of the delays, though other delays were caused by "field conditions" (Willner 4/30/2009 Arbitration Proceeding, pp. 955-956, 961, Feinrider Affirm., Ex. 18).

In an award, dated June 28, 2012, the arbitrators found that the "critical path delays to the project" that had impacted Five Star's performance were "due to the inability of Siemens to timely perform," and "could not reasonably have been anticipated" (Award, p. 2, Feinrider Affirm., Ex. 14). The arbitrators found that "as between Five Star and Transit" these delays were the responsibility of Transit" and awarded Five Star \$11,844,010 for cost overruns due to delay, disruption and inefficiency (Id., pp. 2-3). The award included costs for labor, supervision, and

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project management, as well as warehouse costs, material, equipment and small tools costs, and subcontractor costs (Id., p. 3). The award denied Five Star's claims for pre-award interest and attorneys' fees (Id.). On November 29, 2012, Supreme Court (Justice Marguerite A. Grays [Queens County]) confirmed the award (Smith Aff., Ex. K).

DISCUSSION

A. Five Star's Motion for Summary Judgment (Mtn Seq. No. 001)

Five Star argues that the arbitration award collaterally estops defendants, St. Paul and Federal, the co-sureties, from litigating the issue of Transit's liability to Five Star. The doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (Ryan v New York Tel. Co., 62 NY2d 494, 500 [1984]). To determine if collateral estoppel applies, a two-part test must be satisfied. First, "the identical issue necessarily must have been decided in the prior action and be decisive of the present action (Sepulveda v Dayal, 70 AD3d 420, 421 [1st Dept 2010]). Second, "the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (Id.).

As the party seeking the application of collateral estoppel, Five Star bears the burden of demonstrating that the decisive issue in the present litigation "was necessarily decided in the prior action" against a party in privity with the defendants (Buechel v Bain, 97 NY2d 295, 303-305 [2001] [internal citations omitted]). Although defendants do not dispute that the arbitration proceeding determined the decisive issue here -- whether Transit is liable to Five Star for the work performed by Five Star under the subcontract -- they argue that collateral estoppel is inappropriate because they are not in privity with Transit.

While a surety is in privity with its principal such that an arbitration award against a principal has collateral estoppel effect against that principal's surety in subsequent litigation concerning the same issue (Azevedo & Boyle Contr., Inc. v J. Greaney Const. Corp., 285 AD2d 571, 572 [2d Dept 2001]; QDR Consultants & Dev. Corp. v Colonia Ins. Co., 251 AD2d 641 [2d Dept 1998]), defendants argue that this rule is inapplicable because they are only in privity with the Consortium and are not in privity with Transit alone.

Defendants' reliance on the term "Consortium" is misplaced. Here, their own argument, that "the term 'Consortium' as used in the Bond ... has no legal relevance under New York law and, at

most, is intended to demonstrate that both Transit and Siemens are joint Principals and Obligors under the Bond" (St. Paul's Memo. In. Opp., p. 23), demonstrates that Siemens and Transit are each principals on the bond, and, as such, defendants as sureties are in privity with Siemens and Transit separately. Accordingly, defendants and Transit are in privity.

In order to preclude application of collateral estoppel, St. Paul and Federal must demonstrate "the absence of a full and fair opportunity to contest the prior determination" (Buechel, 97 NY2d at 303-04, supra [citations omitted]). Defendants argue that they did not have a full and fair opportunity to be heard because neither they nor Siemens participated in the arbitration. As a result of this absence, they argue, Transit was free to "throw the Consortium under the bus" and to attempt to insulate itself from liability by blaming Siemens for the project delays (Federal and St. Paul Joint Memo. in Opp., p. 16).

This argument is equally unavailing. A surety's absence from a prior arbitration to which its principal was a party does not preclude the application of collateral estoppel against the surety (ODR, 251 AD2d at 643, supra). Furthermore, whether Transit "blamed" Siemens for the project's delays does not resolve the issue of whether defendants had a full and fair opportunity to be heard, particularly in view of the

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determination that defendants are in privity with Transit. Thus, under these circumstances, the doctrine of collateral estoppel is applicable to this action. The question that remains is what issues are subject to this doctrine.

Here, the arbitrators denied Five Star's claims for pre-award interest and attorneys' fees. As such, Five Star is collaterally estopped from asserting those claims in this action. Next, while collateral estoppel applies to the issue of Transit's liability under the subcontract, defendants argue that summary judgment is, nevertheless, inappropriate because issues of fact exist as to whether the entirety of the arbitration award is within the scope of the Payment Bond. The record demonstrates that this issue was not addressed in the arbitration proceeding. The arbitration award is more expansive in scope than the Payment Bond. The arbitration award included cost overruns for labor, supervision, and project management costs performed prior to the termination of the subcontract as well as additional warehouse costs, material, equipment and small tools, and subcontractor costs (Award, p. 3, Feinrider Affirm., Ex. 14). The Payment Bond, by contrast, covers claims for "[w]ages and compensation for labor performed and services rendered by all persons engaged in the prosecution of the Project under said Contract ... including all persons so engaged who perform the work of laborers

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or mechanics at or in the vicinity of the site of the Project ... but not including office employees not regularly stationed at the site of the project" (Payment Bond, p. 8, Feinrider Affirm., Ex. 3).

Five Star concedes that the wages of at least one employee are not properly chargeable against the Payment Bond (Five Star Reply Memo., p. 15, fn. 2), a tacit admission that the arbitration award is over-inclusive (Sette-Juliano Contr., Inc./Halcyon Const. Corp. v Aetna Cas. and Sur. Co., 246 AD2d 142, 150-51 [1st Dept 1998]). Five Star also concedes that some of the costs included in the arbitration award were for the wages of employees stationed at field offices around New York City (Smith Reply Aff., pp. 11-13). Nonetheless, Five Star argues that these employees do not fall under the Bond's exclusion of office employees not "regularly stationed at the site of the project," because these field offices should be considered part of the project site.

Five Star's interpretation is faulty because it would render the exclusion meaningless. If Five Star's field offices are part of the project site, then all of its office employees would be regularly stationed at the site of the project regardless of their physical location. Under these circumstances, the employees at Five Star's field offices fall within the scope of

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the exclusion, and, as such, cannot be included within the scope of the Payment Bond. Given that Five Star has not offered any evidence as to whether any of these field office employees regularly visited the project site, a factual issue exists as to Five Star's damages under the Payment Bond, if any.

Accordingly, Five Star's motion for summary judgment against defendants is granted as to liability. The issue of damages is respectfully referred to a Special Referee/Judicial Hearing Officer to hear and report on that issue. That branch of Five Star's motion for summary judgment seeking pre-award interest and attorneys' fees is denied.

B. Siemens' Motion To Dismiss Third Party Complaint (Mtn Seq. No. 002)

Turning to that branch of Siemens' motion to dismiss the sureties' implied indemnity claim, as a general rule, a surety "is equitably entitled to full indemnity against [the] consequences of a principal obligor's default" (Lori-Kay Golf, Inc. v Lassner, 61 NY2d 722 [1984]). Siemens argues, however, that only the Consortium as a whole owes this duty to the sureties.

This argument fails on two grounds. First, Siemens concedes that the sureties have effectively named the Consortium as the third-party defendant by naming Siemens and Transit in the third-party complaint (Siemens' Memo. of Law, p. 7, fn. 9). Second,

Siemens concedes that "the term 'Consortium' ... has no legal relevance under New York law," making Transit and Siemens "joint Principals and Obligors under the Bond" (Siemens' Memo. of Law, p. 23, supra). Because Transit and Siemens are both principals under the Payment Bond, each is jointly and severally liable for all of the obligations under the Bond (Wujin Nanxiashu Secant Factory v Ti-Well Intern. Corp., 22 AD3d 308, 310-11 [1st Dept 2005]), including the implied obligation to indemnify the sureties.

Siemens, nonetheless, maintains that its Consortium Agreement with Transit prevents Siemens from being held jointly and severally liable in this action. While the Consortium Agreement governs the relationship between Siemens and Transit, it does not set forth their duties and obligations to the sureties. Accordingly, that branch of Siemens' motion to dismiss the sureties' implied indemnity claim is denied.

Siemens' motion to dismiss the sureties' claims for quia timet and exoneration is also denied. Quia timet is "the right of a surety to demand that the principal place the surety 'in funds' when there are reasonable grounds to believe that the surety will suffer a loss in the future because the principal is likely to default on its primary obligation to the creditor" (Borey v Natl. Union Fire Ins. Co. of Pittsburgh, PA., 934 F2d

30, 32 [2d Cir 1991]). Exoneration is "the surety's right, after the principal's debt has matured, to compel the principal to honor its obligation to the creditor" (Id.).

To establish quia timet and exoneration, a surety "must establish that the debt is presently due (exoneration) or will come due (quia timet), that the principal is or will be liable for the debt, and that, absent equitable relief, the surety will be prejudiced because it will be forced to advance the money to the creditor" (Id. at 33).

Siemens argues that defendant sureties have no claim for exoneration or quia timet because Five Star has not sought any payment from Siemens or the Consortium. This argument is misplaced. Under the terms of the MTA Contract, Siemens and Transit are jointly and severally bound to pay all lawful claims of subcontractors, regardless of whether they are in privity with the subcontractor (MTA Contract, pp. 28, 43, Art. 3.10, 1.02(4), Feinrider Affirm., Ex. 2). Furthermore, as a co-principal on the Payment Bond, Siemens is jointly and severally liable for all payments for labor and materials that fall within the scope of the Bond. As some or all of Five Star's claim may fall within the scope of the Bond, Siemens' motion to dismiss the sureties' exoneration and quia timet claims is denied.

Accordingly, it is

ORDERED that branch of Five Star's motion for summary judgment against defendants, Federal Insurance Company and St. Paul Fire and Marine Insurance Company, the co-sureties, is granted as to liability. The issue of damages is respectfully referred to a Special Referee/Judicial Hearing Officer to hear and report on that issue; and it is further

ORDERED that upon service of a copy of this order with notice of entry, the Clerk of Trial Support is respectfully directed to place the issue on the Special Referee/JHO calendar for disposition; and it is further

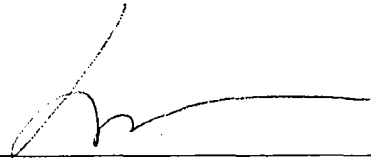
ORDERED that branch of Five Star's motion for summary judgment seeking pre-award interest and attorneys' fees is denied; and it is further

ORDERED that third-party defendant Siemens Industry Incorporated's motion to dismiss third-party plaintiffs St. Paul Fire and Marine Insurance and Federal Insurance Company's causes of action for implied indemnity, exoneration and quia timet is denied.

Counsel are directed to telephone the Clerk of Part 48 for a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/6/14


HON. JEFFREY K. OING, J.S.C.