

**ACS Sys. Assoc., Inc. v Safeco Ins. Co. of Am.**

2014 NY Slip Op 31790(U)

June 30, 2014

Supreme Court, New York Coutny

Docket Number: 150625/11

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

-----X  
ACS SYSTEMS ASSOCIATES, INC.,

Plaintiff,

-against-

SAFECO INSURANCE COMPANY OF AMERICA,

Defendant.

-----X  
O. PETER SHERWOOD, J.:

DECISION AND ORDER  
Motion Sequence No.: 002

Index No.: 150625/11

On this motion for summary judgment, it is undisputed that T.A. Ahern Contractors Corp. (“Ahern”) received from the School Construction Authority (“SCA”), payments on behalf of ACS Systems, Inc. (“ACS”), from which Ahern withheld \$1,101,889 on the asserted ground that there are legitimate “claims and offsets” that Ahern has against ACS.<sup>1</sup> ACS seeks to recover damages from Safeco as Ahern’s surety. General Municipal Law §106-b(2) provides in relevant part that:

Within seven calendar days of the receipt of *any payment* from the public owner, the contractor shall pay each of his subcontractors and materialmen the *proceeds* from the payment representing the value of the work performed and/or materials furnished by the subcontractor and/or materialman and reflecting the percentage of the subcontractor’s work completed or the materialman’s material supplied in the requisition approved by the owner and based upon the actual value of the subcontract or purchase order *less an amount necessary to satisfy any claim, liens or judgments against the subcontractor.*

(emphasis added).

Ahern failed to pay ACS “the proceeds [received from the SCA, a ‘public owner’] representing the value of the work performed” (*id*). There is no evidence in the record of any existing “claims, liens or judgments against the subcontractor” that would justify withholding disbursements required by the statute. Accordingly, the motion will be granted to the extent that,

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<sup>1</sup>This amount is taken from defendants’ letter submission dated June 18, 2014 and is awarded without prejudice to defendant showing that Ahern (as opposed to SCA) retained an additional \$79,751.

Ahern has received payment from SCA (Requisitions 18 and 19) and otherwise is denied. There are triable issues of fact regarding the claim for the balance of the base contract price and for additional work performed.

There being no interdependency of the facts and issues between the payment required to be made under General Municipal Law § 106(b)(2) and the other claims in ACS's sole cause of action, entry of judgment need not be deferred. This part of plaintiff's cause of action shall be severed pursuant to CPLR 5012 and judgment shall be entered thereon.

It is undisputed that the annual rate of interest is 12% (daily rate of 0.0003288). As to Requisition #18, the amount to be awarded is \$761,340. Interest shall accrue from May 4, 2011, reflecting an adjustment for a nine day delay of a portion of the payment resulting from a mechanics filed by ACS through the date of this Decision and Order (1154 days). The total interest is \$288,879. As to requisition #19, the amount to be awarded is \$340,549. Interest shall accrue from October 3, 2011 through the date of this Decision and Order (1002 days). Total interest is \$112,196. Total damages and interest to date is \$1,502,964. To the interest awarded (\$401,075) shall be added daily interest of \$362.30 per day from the date of this Decision and Order to the date judgment is entered and thereafter at the statutory rate of interest.

The cross-motion to consolidate this case with *T.A. Ahern Contractors Corp. v ACS Systems, Inc.*, ("Ahern Action") Index No.: 654157/2013 will be granted, there being common questions of law and fact pending in the two cases (*see* CPLR 602) including whether ACS performed work on the Samuel Gompers High School project in compliance with the subcontract and whether Ahern is obligated to pay ACS under the subcontract. Although ACS argues that the *ACS Action* is far advanced over the *Ahern Action*, it has not shown that it would be prejudiced by consolidation. ACS maintains that discovery in the *ACS Action* did not focus on who caused the delay but the issue of delay in the *ACS Action* is central to the question of whether ACS is owed for its work on the subcontract.

Accordingly, it is hereby

**ORDERED** that the cross-motion to consolidate is GRANTED and the above-captioned action is consolidated in this court with *T.A. Ahern Contractors Corp and Safeco Insurance Company of America v ACS Systems Associates, Inc.*, Index No. 654157/2013, under Index No. 654157/2013, and the consolidated action shall bear the following caption:

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T.A. AHERN CONTRACTORS CORP.

Plaintiff,

Index No.: 654157/2013

-against-

ACS SYSTEMS ASSOCIATES, INC.,

Defendant and Third-Party Plaintiff,

-against-

SAFECO INSURANCE COMPANY OF AMERICA,

Third Defendant.

-----X

And it is further

**ORDERED** that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

**ORDERED** that upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark the court's records to reflect the consolidation; and it is further

**ORDERED** that a copy of this order with notice of entry shall also be served upon the General Clerk's Office (Room 158M), and the Clerk is hereby directed to mark the court's records to reflect the consolidation; and it is further

**ORDERED** that the motion of summary judgment is GRANTED to the extent of all amounts actually received by T.A. Ahern Corp. from the School Construction Authority on behalf of ACS Systems Assocs, Inc. as follows:

1. Plaintiff, ACS Systems Assocs., Inc., is granted judgment against defendant, Safeco Insurance Company of America, as the surety of Ahern, in the *ACS Action* (Index No. 150625/2011) to the extent indicated and in the amount of \$1,502,964, together with daily interest in the amount of \$362.30 per day from the date of this Decision and Order until the entry of judgment, as calculated by the Clerk of the Court, and thereafter at the statutory rate and that portion of the complaint that seeks to recover amounts received by T.A. Ahern Corp from the School Construction Authority on

behalf of ACS plus interest is severed, and the Clerk is directed to enter judgment accordingly;

2. The consolidated action shall continue as to the claims of ACS for (a) the unpaid balance on the base subcontract, (b) approved and pending change orders and (c ) attorney fees and as to all remaining claims of Ahern (a) for a declaratory judgment, (b) breach of contracts and (c ) attorney fees.

This constitutes the decision and order of the court.

**DATED: June 30, 2014**

**ENTER,**  
  
**O. PETER SHERWOOD**  
**J.S.C.**