

TPE Inc. v Travelers Cas. & Sur. Co. of Am.
2014 NY Slip Op 33427(U)
December 1, 2014
Supreme Court, Queens County
Docket Number: 701699/2014
Judge: Orin R. Kitzes
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES
Justice

IA Part 17

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TPE INC, d/b/a The Plumbing Exchange,

Index
Number 701699/ 2014

Plaintiff,

-against-

Motion
Date July 18, 2014

TRAVELERS CASUALTY AND SURETY COMPANY OF
AMERICA, FEDERAL INSURANCE COMPANY
FIDELITY ANF DEPOSIT COMPANY OF
MARYLAND, ZURICH AMERICAN INSURANCE
COMPANY, LIBERTY MUTUAL INSURANCE
COMPANY and CONTINENTAL INSURANCE
COMPANY,

Motion Seq. No. 1

Defendants.

-----x

FILED
DEC -5 2014
COUNTY CLERK
QUEENS COUNTY

The following papers numbered E9 to E42 read on this motion by the defendants for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint against them.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	E9-38
Memoranda of Law	E36
Answering Affidavits - Exhibits.....	E39-E40
Reply Affidavits.....	E41-E42

Upon the foregoing papers it is ordered that the branch of the motion to dismiss the complaint pursuant to CPLR 3211(a)(1) is granted. The branch of the motion to dismiss the complaint pursuant to CPLR 3211(a)(7) is denied as moot.

The defendant sureties issued a labor and material payment bond to a joint venture comprised of Turner Construction Company

and Scalamandre & Sons, Inc. in connection with a construction project at JFK International Airport.

The bond precludes a suit against the sureties "unless claimant . . . shall have given written notice to any two of the following: the Principal [Joint Venture], the Owner [Delta], or the Surety . . . within ninety (90) days after such claimant did or performed the last of the work or labor, or furnished the last of the materials for which said claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished, or for whom the work or labor was done or performed."

The first notice of claim that TPE submitted to defendant sureties was by letter from its attorneys, dated September 12, 2013. This letter reads in relevant part: "We represent TPE, Inc. d/b/a The Plumbing Exchange ("TPE"). TPE supplied plumbing materials and supplies to contractors/agents, Bass Plumbing & Heating Corp. and J.E.S. Plumbing and Heating Corp. for the above mentioned project." According to plaintiff TPE, the letter gave defendants written notice of a claim for money owed on materials plaintiff supplied for the project, the last of which was supplied to J.E.S. Plumbing and Heating Corp (J.E.S.) around August 29, 2013. Plaintiff has submitted a copy of invoices showing (1) products were sold to J.E.S. and shipped to "Delta Airlines, JFK" and (2) the "date ordered" as August 29, 2013.

Plaintiff TPE also sent a letter dated October 25, 2013 and a completed bond claim form sworn to on October 10, 2013 in which TPE's president asserted that the last date on which TPE supplied labor and/or materials to Bass Plumbing & Heating Corp. was June 5, 2012.

Upon determining that the last date that TPE could have provided timely notice under the bond was September 3, 2012 and that the first notice was over a year too late, the sureties rejected the claim.

In response, TPE's attorney sent a letter, dated February 28, 2014, with a revised notice of claim form alleging that TPE had also supplied materials to J.E.S., the final date being "around August 29, 2013." The letter reads in relevant part: "However, as noted in our claim, TPE continued the work at the project for another subcontractor, J.E.S []. Thus, TPE's work continued at the project until the last day it supplied materials to J.E.S., which was about August 29, 2013. *** This should clarify the last day materials and labor was supplied at the project was around August 29, 2013. Thus, TPE's claim, served on September 12, 2013, was

well within the time limits provided in the bond." (TPE sent invoices to J.E.S., dated May 7, 2013 and August 29, 2013, totaling \$935.90.)

Pursuant to CPLR 3211 provides a party may move to dismiss one or more causes of action asserted against him on the ground that a defense is founded on documentary evidence. (See, *Galvan v 9519 Third Avenue Restaurant Corp.*, 74 AD3d 743.) To prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim." (*Fernandez v Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; see *Galvan v 9519 Third Avenue Restaurant Corp.*, *supra*; *Vanderminden v Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248.)

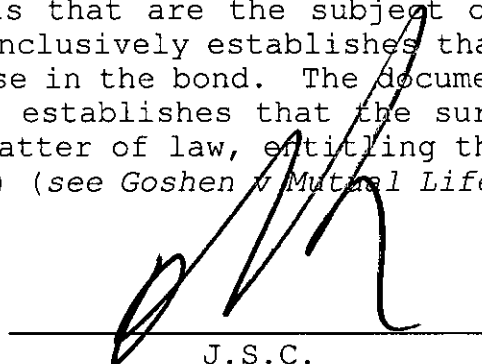
A subcontractor is bound, as a third-party beneficiary, to the terms of a material and labor payment bond entered into specifically to secure payment to such parties." (*Krugman and Fox Const. Corp. v Elite Associates, Inc.*, 167 AD2d 514.)

In this case, defendant sureties have submitted documentary evidence which is dispositive of this case. The letter from TPE's attorney dated February 28, 2014 admits that "TPE finished supplying materials and labor for Bass Plumbing & Heating Corp" on June 5, 2012. The letter dated February 28, 2014 from TPE's attorney makes clear that TPE calculates the time to submit a claim to the sureties from the date on which it last supplied materials to J.E.S., that is, around August 29, 2013. However, the documentary evidence shows that the claim made against the bond by TPE is only for materials which TPE supplied to Bass Plumbing & Heating Corp. TPE's claim against the bond is in the amount of \$123,005.62. TPE filed a mechanic's lien, dated September 12, 2012, related to the project in which TPE asserted that it was "employed" by Bass Plumbing & Heating and that it was owed \$123,005.62, the same amount for which it made a claim against the bond. Moreover, the spreadsheet that TPE submitted to the sureties in support of its claim has items totaling \$123,005.62, and none of these items concern J.E.S.

In opposition to the instant motion, plaintiff TPE failed to show that any issues of fact remain to be tried. The affidavit of Zalmen Blau, the President of TPE, does not state unequivocally that J.E.S. failed to pay the invoices sent to it; the affidavit merely states ambiguously "the claim was based on materials which remain unpaid for the project, the last of which were supplied to J.E.S."

The bond precludes a suit against the sureties "unless claimant . . . shall have given written notice . . . within ninety (90) days after such claimant did or performed the last of the work or labor, or furnished the last of the materials for which said claim is made." The bond clearly provides that a claimant must give ninety days notice calculated from the time that it last furnished work, labor, or materials that are the subject of the claim. The documentary evidence conclusively establishes that TPE did not comply with the notice clause in the bond. The documentary evidence in this case conclusively establishes that the sureties have a defense which is good as a matter of law, entitling them to a dismissal based on CPLR 3211(a)(1) (see *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314.)

Dated: December 1, 2014



J.S.C.