

**Bovis Lend Lease (LMB) Inc. v Lower Manhattan
Dev. Corp.**

2016 NY Slip Op 30130(U)

January 21, 2016

Supreme Court, New York County

Docket Number: 603243/2009

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

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BOVIS LEND LEASE (LMB) INC.,

Plaintiff,

-against-

Index No.: 603243/2009

LOWER MANHATTAN DEVELOPMENT
CORPORATION,

DECISION & ORDER

Defendant.

-----x

BOVIS LEND LEASE (LMB), INC.,

Third-Party Plaintiff,

-against-

ARCH INSURANCE COMPANY,

Third-Party Defendant.

-----x

SHIRLEY WERNER KORNREICH, J.:

Plaintiff/Third-Party Plaintiff, Bovis Lend Lease (LMB), Inc., n/k/a, Lend Lease (US) Construction LMB, Inc. (Bovis), and defendant/counter-claim plaintiff, Lower Manhattan Development Corporation (LMDC), jointly move (Motion Sequence 013), pursuant to CPLR 3217(b), for court approval of a voluntary discontinuance with prejudice of Bovis' claims against LMDC and LMDC's counterclaims against Bovis. The motion is unopposed.

Surety/third-party defendant, Arch Insurance Company (Arch), cross-moves for summary judgment dismissing what remains of Bovis' third-party complaint against Arch [Dkt 89],¹ i.e. the first cause of action for contractual indemnification and second causes of action for breach of

¹ References to "Dkt" filed by a number refer to documents in this action filed in the New York State Courts Electronic Filing System.

contract, as limited by this court's decision and order, dated April 16, 2015 [SJ Decision, Dkt 657].

Bovis cross-moves, against Arch's cross-motion, for summary judgment against Arch. Bovis seeks a summary judgment declaring that: Arch is bound by the terms of a settlement agreement, dated May 8, 2015, between LMDC and Bovis (Settlement) and must reimburse Bovis for any money it pays LMDC thereunder; Arch waived its right to consent to the Settlement; and Arch breached the covenant of good faith and fair dealing when it refused to participate in the negotiations that led to the Settlement. Arch opposes.

I. Background

The facts underlying this action are stated in detail in this court's decisions and orders, dated May 9, 2011 (Dismissal Decision) and April 6, 2012, and the SJ Decision. Dkt 28, 78 & 89. For the sake of brevity, they will be repeated here only as necessary. Defined terms in the SJ Decision have the same meaning in this opinion.

On May 31, 2013, the First Department modified the Dismissal Decision to dismiss Bovis' delay damage claim and affirmed the dismissal of Bovis' other claims against LMDC. (AD Decision). Bovis filed a note of issue on November 15, 2013. Dkt 141. The parties' time to move for summary judgment was extended by the court to March 3, 2014, and two motions involving Bovis and Arch were decided by the SJ Decision. Dkt 142. The summary judgment motions between Bovis and LMDC were withdrawn at their request due to the Settlement.

Arch was the surety for The John Galt Corporation (Galt), a subcontractor of Bovis, pursuant to two Trade Contracts. In the SJ Decision, this court dismissed Bovis' third-third-party claim against Arch for breach of Arch's Bonds (3d Cause of Action); breach of the Trade Contracts, which Arch guaranteed pursuant to the Bonds (part of 1st Cause of Action); and

breach of ¶3 of the Companion Agreement for amounts Arch agreed to advance (part of the 2d Cause of Action). What remains of Bovis third-party complaint against Arch is: 1) the portion of the 1st cause of action for indemnification for any judgment in this action “on account of Galt’s Work” and defense costs incurred by Bovis in defending LMDC’s counter-claims; and 2) the portion of the 2d Cause of Action alleging that Arch breached ¶4 of the Companion Contract by failing to reimburse Bovis for payments it made to LMDC on account of Galt’s Work.

II. Discussion

A. Viability of Post-Note of Issue Summary Judgment Cross-Motions

CPLR 3212 provides that the court may entertain a summary judgment motion more than 120 days after a note of issue is filed for “good cause”. *Brill v City of New York*, 2 NY3d 648 (2004). Here, to the extent that the summary judgment motions are based on the newly-minted Settlement, the court finds good cause.

To the extent that the Settlement is not relevant to the current motions, good cause is not shown for another summary judgment motion on Bovis’ third-party complaint. Thus, Bovis’ cross-motion is denied to the extent that it seeks summary judgment on the ground that Arch’s liability for indemnification is coextensive with Bovis’ liability to LMDC under the Supp Contract. The SJ Decision previously resolved that issue adversely to Bovis, and Bovis is not entitled to a second bite at the apple. SJ Decision, p 33.

B. Voluntary Discontinuance

The motion by Bovis and LMDC for a voluntary discontinuance is denied. CPLR 3217 governs voluntary discontinuance of a claim. It provides that after a responsive pleading has been served, a claim can be discontinued voluntarily only by stipulation signed by all parties, pursuant to subsection (a), or by court order, pursuant to subsection (b). “Ordinarily a party

cannot be compelled to litigate, and absent special circumstances, discontinuance should be granted. *Tucker v Tucker*, 55 NY2d 378, 383 (1982). Nonetheless, denial of a motion to discontinue is permissible or obligatory where it will cause prejudice or other improper consequences. *Id.*, 383-384.

The instant record does not permit the court to exercise its discretion or to determine whether Arch will be prejudiced or suffer other improper consequences if the motion is granted. Bovis and LMDC (collectively, Movants) neither submitted the Settlement to the court nor provided a copy to Arch. Movants allege that Arch was provided with a copy of a “proposed agreement” in March 23, 2015. Dkt 736, 6/17/15 Dany Affirmation, ¶9. The Settlement was reached in May, 2015. *Id.*, ¶9. While Movants allege in conclusory fashion that the Settlement “does not release any of Bovis’ claims against Arch, or any of Arch’s claims against Bovis,”² the court cannot determine whether it is prejudicial to Arch without reading it. Nor can it blindly exercise its discretion. Accordingly, the motion approving a voluntary discontinuance of the Settlement is denied.

C. Cross-Motion by Arch Dismissing the Remainder of the Third-Party Complaint

Arch moves for summary judgment dismissing the remainder of Bovis’ first and second third-party causes of action arguing that: 1) Bovis breached the Companion Contract when it settled without Arch’s written consent and, therefore, Bovis can no longer recover damages for its breach or enforce the contractual indemnification provisions it contains; and 2) Bovis’ first cause of action against Arch should be dismissed because it seeks indemnification, pursuant to ¶4 of the Companion Contract for any judgment paid by Bovis on LMDC’s counter-claims,

² Dkt 670, 5/27/15 Geagan Affirmation, ¶8 & Dkt 671, 5/27/15 Dany Affirmation, ¶8.

pursuant to 6(b) of the Supp Contract, and the Settlement resolved LMDC's counter-claims prior to "a final judgment beyond appeal."

Paragraph 6 of the Supp Contract between LMDC and Bovis governed what would happen if Bovis did not prevail in this action. It provided:

6. *Litigation After Final Completion: Repayment of Advances if Bovis Unsuccessful.*

(a) LMDC and Bovis agree to forego Interim Arbitration under the [Prime Contract] relating to whether and to what extent [Bovis] may be entitled to compensation for the Contested Work (the "Dispute"). Rather, if LMDC and [Bovis] are unable to resolve the Dispute through negotiation, LMDC and [Bovis] agree to resolve the Dispute through litigation to be commenced by [Bovis] subsequent to Final Completion ... (the "Litigation"). In such Litigation, [Bovis] shall bear the burden of proving that [Bovis] is entitled to compensation for the Contested Work.....

(b) If [Bovis] obtains a judgment - final beyond appeal in the Litigation which establishes that [Bovis] was not entitled to be paid an amount equal to or greater than the total of all amounts paid by LMDC pursuant to this Agreement for the Gross Cleaning (the "Total Gross Cleaning Payments"), then [Bovis] shall repay to LMDC ... an amount equal to the difference between the Total Gross Cleaning Payments (other than any amounts which are non-refundable under this Agreement) and the amount of [Bovis'] final entitlement to payment for all of the Gross Cleaning as established in the Litigation. ...

[emphasis added]

Arch entered into a Companion Contract with Bovis, Bovis' sureties and Galt, dated as of February 5, 2007. Dkt 721. The Companion Contract, ¶4, contained the following pertinent provisions regarding the outcome of the Litigation:

4. With respect to the Litigation described in par. 6 of the LMDC Agreement [defined in the SJ Decision as the Supp Contract], Galt agrees to be a co-plaintiff with Bovis.... Galt and Arch acknowledge that they are united in interest as against LMDC with respect to the Dispute to be resolved in the Litigation. In this regard, such parties agree that ***Bovis and its selected counsel shall***

take the lead and shall control the prosecution, handling and litigative decisions involved in the Litigation, including settlement discussions regarding the issues presented in the Litigation. **Bovis... shall permit Arch and counsel of Arch's choice to jointly participate with Bovis ... and its counsel**, to the extent reasonable and appropriate, **in ... (e) decisions with respect to offers of compromise or settlement, or responses to such offers. Bovis shall not dispose of, settle or compromise any claim that involves Galt/Arch, nor shall it reject or respond to any offer of compromise or settlement of any claim that involves Galt/Arch received from or communicated by LMDC, without ... (b) prior written consent of Arch and its counsel. In the event Arch does not agree to a settlement that Bovis is prepared to accept, then Arch shall indemnify Bovis for all damages suffered in excess of the result that would have obtained if the settlement had been accepted. Each party shall bear and be responsible for its own counsel fees and expenses incurred in connection with the Litigation**, provided however, that nothing contained herein shall be considered a waiver of any rights of recovery that Bovis may have under Article 11 of the Trade Contracts. **With respect to the outcome of the Litigation, Galt/Arch and Bovis agree to be bound by the result, and insofar as the determinations involve Galt's Work, Galt/Arch shall be bound to Bovis to the same extent that Bovis is bound to LMDC**, and Bovis shall be bound to Galt to the same extent that LMDC is bound to Bovis. In addition, the parties to this Companion Agreement agree as follows: ...

(b) In the event that Bovis is required to make payment to LMDC under paragraph 6(b) of the Supp Contract, Galt shall be responsible to repay Bovis, or to pay to LMDC at Bovis' direction, all amounts that Bovis owes LMDC on account of Galt's Work. In the event Galt fails to make such payment within five days of Bovis' demand, then Arch, subject to credit for payments made under par. 3 above, shall be responsible for the first \$5,000,000 of any such payments. Thereafter, Arch and Bovis will each be responsible for 50% of any additional payments owed to LMDC; and

(c) As between Galt and Arch, Galt shall be responsible in the first instance to make such payment as directed by Bovis within five days of demand by Bovis. If Galt fails to make that payment, then Arch shall make the payment as directed by Bovis within five days of demand upon it.

Bovis admits that its liability to refund the Supp Contract advances made by LMDC was established when the AD Decision dismissed its claim for delay damages. Dkt 735, 6/17/15 Bovis Memorandum of Law (Bovis MOL), pp 5-6.

Arch is not entitled to summary judgment on the ground that Bovis breached the Companion Contract by settling without Arch's written consent. The Companion Contract provided that Arch's written consent was required to settle any claim "that involves Galt/Arch." Dkt 721, Companion Contract, 4. In the absence of the Settlement, there is no proof that the Settlement involved Galt/Arch. Therefore, Arch has not proved that its written consent to the Settlement was required.

Arch is entitled to summary judgment dismissing Bovis' first third-party cause of action to the extent that it seeks indemnification for any judgment obtained by LMDC on its counterclaims against Bovis. Bovis' papers admit that LMDC's counterclaims were discontinued with prejudice by the Settlement. As a result, Arch is correct that, pursuant to ¶6(b) of the Supp Contract and ¶4(b) of the Companion Contract, Arch's obligation to indemnify Bovis for a judgment beyond final appeal is an eventuality that will never occur.

On the other hand, Arch is not entitled to summary judgment dismissing Bovis' first and second third-party claims in toto because Arch could still be liable to Bovis for contractual indemnification and/or for breach of the Companion Contract, ¶4. There, Arch agreed to indemnify Bovis for all damages in excess of a settlement that Arch rejected and which Bovis was prepared to accept, and for breach of Arch's obligation to reimburse Bovis for monies it paid to LMDC on account of Galt's Work. As noted in the SJ Decision, there is a question of fact as to whether Bovis' obligation to repay LMDC was greater than Arch's obligation to reimburse and indemnify Bovis because the words "on account of Galt's Work" did not ambiguously

include all of Bovis' Work as defined in the Prime Contract. That issue of fact still remains and, if it is ever determined in this action that damages on account of Galt's Work exceeded the Settlement for Galt's Work (which may or may not be the same as Bovis'), then Arch will owe Bovis the excess. While Bovis argues that Arch is required, pursuant to the Companion Contract, to indemnify and reimburse Bovis for all amounts Bovis must pay LMDC, that argument was rejected by this court in the SJ Decision.

In addition, the first third-party claim sought costs and fees incurred by Bovis in defending against LMDC's counterclaims. As this is not raised by Arch's cross-motion and could have been raised by Arch's prior summary judgment motion, good cause is not shown for raising it at this late date. Therefore, the court will not grant summary judgment dismissing the portion of Bovis' first third-party claim for fees and costs incurred in defending LMDC's counterclaims.³

D. Bovis Cross-Cross Motion for Summary Judgment

Bovis cross-moves for summary judgment on the following grounds: 1) Arch waived its right to consent to a settlement by denying liability under the Companion Contract; 2) Arch is bound by any good faith settlement Bovis made with LMDC; and 3) Arch breached the covenant of good faith and fair dealing implied by the Companion Contract when it refused to participate in settlement negotiations. The motion is denied.

Bovis is not entitled to summary judgment on the ground that Arch waived its right to consent to settlement by disclaiming liability under the Companion Contract. Arch's consistent position, which this court agreed with in the SJ Decision, is that there is a question of fact as to

³ However, the court notes that recovery of fees and costs appears to be barred by ¶4 of the Companion Contract.

whether indemnity “on account of Galt’s Work” was synonymous with Bovis’ Work under the Prime Contract. As Bovis makes no showing here that it paid money under the Settlement “on account of Galt’s Work,” the same question of fact remains. Arch did not repudiate its liability. Rather, it insisted on limiting its liability in accordance with the scope of Galt’s Work under the Trade Contracts, which, as noted in the SJ Decision, *inter alia*, excluded Addendum 3 of Bovis’ Prime Contract. Addendum 3 required Government Authority approval for the means and methods of Bovis’ Work. By contrast, Galt’s Abatement Contract provided that Galt had responsibility for performance of its Work, unless Agencies willfully or negligently interfered or prevented Galt’s Work or contractual duties.

The only binding New York precedent cited by Bovis, *Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 74 A.D.3d 32, 39 (1st Dep’t 2010), is clearly distinguishable. *Deutsche Bank* held that an indemnitor was bound by a good faith settlement because it failed to participate in settlement negotiations after repudiating a claim ***that fell within the scope of the indemnification provision***. This court ruled in the SJ Decision that there was a question of fact as to the scope of Arch’s obligation to indemnify Bovis. Hence, Bovis is not entitled to summary judgment on this issue.

Furthermore, the Companion Contract governs what would happen if Arch refused to consent to a Settlement that Bovis was prepared to accept. Arch assumed the risk of indemnifying Bovis “for all damages suffered in excess of the result that would have obtained if the settlement had been accepted.” Bovis is bound by that agreement.

Turning to Arch’s alleged bad faith refusal to participate in settlement negotiations, the Companion Contract, ¶4, provided that Bovis would take the lead in settlement negotiations and “permit” Arch to participate. Notably, it did not require Arch’s participation. Also,

correspondence submitted by the parties establishes that Arch repeatedly responded to Bovis' demand for contribution to the Settlement. While Arch did not make an offer, that was because it continued to assert that Galt did extra work not required by the Trade Contacts that exceeded the scope of Bovis' Work under the Prime Contract. As previously noted, that is an issue of fact. Consequently, it cannot be ruled as a matter of law, at this juncture, that Arch acted in bad faith. Accordingly it is

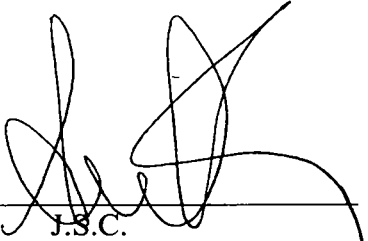
ORDERED that Motion Sequence 013 by Bovis Lend Lease (LMB), Inc., n/k/a, Lend Lease (US) Construction LMB Inc. (Bovis) and defendant Lower Manhattan Development Corporation (LMDC) to approve a voluntary discontinuance of the Bovis' claims and LMDC's counter-claims is denied with leave to renew with a copy of the Settlement; and it is further

ORDERED that the cross-motion for summary judgment by Arch Insurance Company (Arch) dismissing Bovis' first and second third-party claims against Arch is granted solely to the extent of granting summary judgment in Arch's favor on the portion of Bovis' first third-party cause of action for indemnification for any judgment obtained by LMDC on its counterclaims against Bovis, and Arch's cross-motion is otherwise denied; and it is further

ORDERED that the cross-cross motion by Bovis for summary is denied.

Dated: January 21, 2016

ENTER:



J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C.