SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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CAVA CONSTRUCTION & DEVELOPMENT INC.,

Plaintiff,

-against-

TOWER INSURANCE COMPANY OF NEW YORK, I.K.E. ELECTRICAL CORP. a/k/a IKE ELECTRICAL CORP.,

Defendants.

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TOWER INSURANCE COMPANY OF NEW YORK,

Third-Party Plaintiff,

-against-

INTEGRATED BUILDING MANAGEMENT SERVICES, LLC, ANGELO CASTELLI, RONEET CASTELLI, YITCHAK ADIKA, REBECCA ADIKA, ILAN ADIKA, and DANA ADIKA,

Third-Party Defendants.

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DECISION AND ORDER

Index No. 650082/2014

Mot. Seq. 003

Third-Party Index No. 595644/2014

Mot. Seq. 004

HON. ANIL C. SINGH, J.:

Motion sequence 003 and 004 are consolidated for disposition.

In motion sequence 003, defendant I.K.E. Electrical Corp. moves for an order pursuant to CPLR 3025(b) for leave to file an amended answer and crossclaim, and third-party defendants leave to file an amended answer to third-party complaint and counterclaim. Defendant/third-party plaintiff Tower Insurance Company of New York ("Tower") opposes the motion.

In motion sequence 004, Tower moves for an order pursuant to CPLR 3212: a) awarding summary judgment in favor of Tower against co-defendant I.K.E. Electrical Corporation ("IKE") and third-party defendants Integrated Building Management Services, LLC ("IBM"), Angelo Castelli ("Angelo"), Roneet Castelli ("Roneet"), Yitchak Adika ("Yitchak"), Rebecca Adika ("Rebecca"), Ilan Adika ("Ilan"), and Dana Adika ("Dana") (collectively, the "Indemnitors") in the amount of $1,075,000, plus costs and expenses, including attorneys' fees and consulting fees; and b) setting a hearing to assess costs and expenses, including attorneys' fees and consulting fees. Indemnitors oppose the motion.

BACKGROUND

In April 2012, IKE entered into a subcontract with plaintiff Cava Construction & Development Inc. ("Cava") to perform certain work, including electrical work, for the construction of the Homewood Suites located at 312-318 West 37th Street in Manhattan. Prior to May 2012, IKE solicited Tower to issue surety bonds on its behalf. Before Tower would issue such bonds, it required IKE to execute a General Agreement of Indemnity ("GAI"). IKE, along with the other Indemnitors, executed the GAI in May 2012.

IKE then requested that Tower issue bonds on its behalf. Tower agreed, and issued a payment bond for $2,776,547 and a performance bond for the same amount. In September 2013, Cava notified IKE and Tower that IKE was terminated for cause,

and that IKE was in material breach of its obligations as subcontractor. IKE disputed this claim, and asserted that it was Cava that was in breach of the subcontractor agreement. Cava also made a demand on Tower to pay out the performance bond. In January 2014, Cava filed suit against IKE and Tower, in which Cava claimed $2.5 million in damages and attorneys' fees. In March 2014, Tower determined that its exposure might exceed $1,204,072.25 and made a collateral demand, pursuant to paragraph two of the GAI, for $1,204,072.25 from the Indemnitors.[1]

In April 2014, IKE made a partial payment of $25,000 toward the collateral demand. In November 2014, after negotiating with Tower, Benfield filed a partial lien satisfaction, noting that its outstanding lien had been reduced to $89,675. Benfield then filed suit against Tower for $89,675, which was paid by Tower. Adika reimbursed Tower for the $89,675.36. Tower's collateral demand was re-calculated to be $975,000.[2]

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[1] The March 2014 collateral demand was calculated as follows:

Preliminary Performance Bond Exposure	$500,000
Estimated Expenses	+$500,000
Benfield Claim	+$204,072.25
Total Collateral Demand as of March 2014	$1,204,072.25

[2] The April 2014 collateral demand was calculated as follows

Collateral Demand	$1,204,072.25
Portion Relating to Benfield	- $204,072.25
Partial Payment by IKE	- $25,000

In March 2015, third-party defendant Ilan attempted to list his home at 135 Truman Drive, Cresskill, New Jersey ("the Cresskill property"). In April 2015, Tower moved by order to show cause for a preliminary injunction to require payment of the collateral demand and to enjoin the transfer of the Cresskill property.

In April 2015, the Court entered a temporary restraint on the transfer for the Cresskill property and ordered the Indemnitors to deposit collateral in the amount of $975,000. While the order to show cause was pending, Tower and Cava entered into mediation and settled Cava's claim for $1.1 million. In October 2015, the Court ordered Tower to post an undertaking, pursuant to CPLR 6312(b), of $100,000, and ordered the Indemnitors to deposit $975,000 with Tower, within 30 days of Tower fulfilling its obligation under the GAI. Tower has filed an undertaking in the sum of $100,000 with this Court. Indemnitors have not paid any amount of the $975,000 collateral demand.

DISCUSSION

The standard for summary judgment is well settled. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact in the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851,

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Total Demand	$975,000

853 (1985). Despite sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. Id. Summary judgment is a drastic remedy and should only be granted if the moving part has sufficiently established that it is warranted as matter of law. See Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 (1986).

Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. Zuckerman v. City of New York, 49 N.Y.2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all inferences in favor of the non-moving party and should not pass on the issues of credibility." Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 (1st Dept 1992) (citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 (1st Dept 1989)). The court's role is "issue finding, rather than issue determination." Sillman v. Twentieth Century Fox- Film Corp., 3 N.Y.2d 395, 404 (1957) (internal quotations omitted). In a breach of contract claim, the interpretation of the contract is a question of law appropriate for resolution by way of summary judgment. Keith v. Houck, 88 A.D.2d 763, 764 (4th Dept 1982).

First Cause of Action

Tower seeks $1,075,000,[3] plus attorneys' fees and consultant fees, for losses which Tower sustained when it settled with Cava pursuant to the surety bonds which Tower executed for IKE.

Good Faith and Reasonableness

Tower has made a prima facie showing of entitlement to summary judgment and the burden of proof now shifts to Indemnitors to prove that there is a triable issue of fact regarding the reasonableness and good faith of the settlement which Tower reached with Cava. The First Department has held that a surety made a prima facie showing of entitlement to summary judgment, when that surety submitted a statement of losses and expenses as required by the indemnity agreement in question. Prestige Decorating & Wallcovering, Inc. v. U.S. Fire Ins. Co., 49 A.D.3d 406, 406 (1st Dept 2008). The First Department held that the defendants had failed to raise a triable issue as to the reasonableness of the payment or lack of good faith, and upheld the plaintiff's motion for summary judgment. Id. Tower has submitted a statement of losses and, therefore, has successfully carried its burden under Prestige.

Indemnitors contention that Tower's motion must be denied because Tower, as a surety, bears the burden of proving as a matter of law that it acted both

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[3] Settlement with Cava $1,100,000

Payment by IKE - $25,000

Total $1,075,000 (plus attorneys' fees and expenses)

reasonably and in good faith when it settled with Cava is inapposite to First Department holdings. The Fourth Department has held that in determining a surety's motion for summary judgement the "plaintiff ha[s] the burden of establishing both that ... the payments for legal fees were made in good faith, and that the amounts were reasonable." Hartford Fire Ins. Co. v. Edgewater Const. Co., 21 A.D.3d 1312, 1313 (4th Dept 2005). This argument fails, however, because Hartford is not the law in the First Department.

Additionally, the GAI states in relevant part that "vouchers or evidence of payment made by the surety shall be prima facie evidence of the fact and amount of liability." GAI ¶ 2. Accordingly, under controlling law and the terms of the GAI, Tower has made a prima facie showing of entitlement to summary judgment by providing an itemized list of expenses paid to Cava to settle claims made pursuant to the performance bond issued by Tower on IKE's behalf.

The burden now shifts to the Indemnitors to prove that there is a triable issue of fact regarding the reasonableness and good faith of the settlement which Tower reached with Cava.

In Ebasco Constructors v. A.M.S. Const. Co., 195 A.D.2d 439 (2d Dept 1993), the Second Department held, "[i]n light of the indemnitor's failure to deposit collateral with the surety upon demand, the surety had a right under the indemnification agreements to settle the claim." Ebasco, 195 A.D.2d at 440. A surety

is entitled to summary judgment against the indemnitors absent a showing of bad faith on the part of the surety. Id. Bad faith, or an absence of good faith "requires an improper or dishonest purpose on the part of the surety, and improper motive can be evidenced by unreasonable conduct on the part of the surety." 74 Am.Jur. 2d Suretyship §136 (2016).

Indemnitors argue that there are material issues of fact as to the reasonableness of Tower's settlement with Cava and whether the settlement was made in bad faith. As to evidence of bad faith, Indemnitors point to several e-mails in which Tower's counsel represented to the Indemnitors that Cava's claims were unfounded; that Cava was not responding to document requests; and that there existed numerous legal defenses to Cava's claims. See Yitchak Aff., Exh. A, pp. 5-8. Indemnitors' assert that Tower's settlement with Cava, after making such affirmative representations as to the weaknesses of Cava's case, constitutes bad faith and unreasonableness on Tower's part. Indemnitors also contend that Tower's settlement should be considered unreasonable because in the March 2014 collateral demand, Tower listed its preliminary exposure at $500,000, but then later settled with Cava for $1.1 million.

Indemnitors have failed to raise a triable issue of fact with respect to the reasonableness or good faith of its settlement with Cava. The Indemnitors fail to

provide any admissible evidence that Tower's settlement was dishonest or was achieved by unreasonable conduct.

First, Tower's decision not to pursue possible defenses against Cava does not in any way give rise to a triable issue as to the reasonableness or good faith of Tower's decision to settle with Cava. See generally Ebasco Constructors v. A.M.S. Const. Co., 195 A.D.2d 439 (2d Dept 1993).

Second, while Tower initially believed it had an exposure of at least $500,000, discovery from Cava showed damages in excess of $3.7 million. Viewed in this context a settlement of $1.1 million was not made in bad faith.

Deposit of Collateral

Next, Indemnitors argue that Tower did not have the right to settle because the collateral deposit requirement has been satisfied through a combination of: payments to satisfy the Benfield lien; the $25,000 payment to Tower in April 2014; and the restraint on transfer which the Court placed on the Cresskill property.

This assertion is meritless for two reasons. First, paragraph fifteen grants the surety the right to settle the claim unless the Indemnitors deposited with Tower "cash or collateral satisfactory to [Tower] in kind and amount to be determined at [Tower's] sole discretion to be used in paying any judgment..." Accordingly, Tower had the discretion to set the amount of collateral deposit required. Tower demanded $975,000 and, by the Indemnitors' own admission, the amount paid out to Tower to

date totals only $114,675.36. Second, Indemnitors incorrectly contend that Tower has received the equivalent of $975,000, by virtue of the restraint on transfer placed on the Cresskill property. The restraint was never intended by the Court to be a collateral deposit and may not now be construed under the terms of the GAI. Accordingly, since deposit of collateral was not made, Tower had the right to settle with Cava.

Owner Default

Indemnitors contend that summary judgment is not proper at this stage, because there are still factual disputes regarding whether or not Cava committed an owner default[4], and this dispute necessarily bears on whether or not Tower was obligated to pay Cava. The Federal Courts have held that a "party that pays a claim it is not obligated to pay is a volunteer and may not recover those expenses." Gen. Ins. Co. of Am. v. Merritt-Meridian Const. Corp., 1997 WL 187372, at *4 (S.D.N.Y. Apr. 16, 1997) (citing General Ins. Co. of America v. K. Capolino Construction Corp., 903 F.Supp. 623, 626 (S.D.N.Y. 1995)). Accordingly, a surety "may not recover unless it was obligated to pay under the terms of the payment bonds." Id.

[4] Cava is not the actual owner of the project but is considered "Owner" under the GAI. "Owner Default" is defined in the GAI as: failure of the owner, which has not been remedied or waived to pay the contractor as required under the construction contract or to perform and complete or comply with the other material terms of the contract.

Indemnitors point to section 3 of the performance bond, which states in pertinent part:

> If there is no owner default under the construction contract, the surety's obligation under this bond shall arise after:
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> The owner first provides notice to the contractor and the surety that the owner is considering declaring a contractor default [and]; the owner declares a contractor default, terminates the construction contract and notifies the surety; and the owner has agreed to pay the balance of the contract price in accordance with the terms of the construction contract to the surety or to a contractor selected to perform the construction contract.

Performance Bond § 3.

Indemnitors argue that if Cava was in owner default, then Tower was not obligated to pay under section three, and was therefore a volunteer under the Copolino standard. Indemnitors argue further that if Tower is a volunteer, it may recover from Indemnitors. Indemnitors also argue that the question of whether or not Cava was in owner default is a triable issue of fact, the existence of which defeats Tower's motion for summary judgment at this stage.

Indemnitors' reliance upon Copolino is misplaced. A surety is "entitled to indemnification under the indemnity agreement regardless of whether the principal was actually in default or liable under its contract with the obligee." Humphreys & Harding, Inc. v. Universal Bonding Ins. Co., 52 A.D.3d 324, 326 (1st Dept 2008) (quoting Frontier Ins. Co. v. Renewal Arts Contracting Corp., 12 A.D.3d 891, 893

(3d Dept 2004)). In Frontier, the Third Department expressly rejected the federal court's ruling in Copolino, holding that the federal court had misapplied New York law, and that the Copolino standard should only apply in the absence of an indemnification agreement on point. Id. at 893. Therefore, under New York law precedent, the question of whether or not Cava is in default, or whether Tower is entitled to repayment or a volunteer, is irrelevant, because the GAI will control when Indemnitors are liable to Tower. Accordingly, Indemnitors have failed to raise any triable issues with regards to Tower's obligation to pay Cava that could defeat Tower's motion for summary judgment.

Consultants' Fees and Attorneys' Fees

Indemnitors contend that the consultants' fees and attorneys' fees that Tower seeks are beyond the scope of the GAI, and for this reason, summary judgment cannot be granted.

This argument is without merit for two reasons. First, the subject of attorneys' fees and consultants' fees can be determined at a separate hearing, and has no bearing on the validity of a summary judgment motion. Second, the expansive language of the GAI necessarily includes consulting fees. Under paragraph two of the GAI, the Indemnitors are required to indemnify Tower:

> from and against any and all liability for losses and/or expenses of whatsoever kind or nature (including, but not limited to, interest, court costs and counsel fees) **and** from and against any and all such losses and/or expenses which the surety may sustain

> and incur: (1) By reason of having executed or procured the execution of the bonds, (2) By reason of the failure of the contractor and indemnitors to perform or comply with the covenants and conditions of the agreement or (3) In enforcing any of the covenants and conditions of this agreement. (emphasis added)

GAI ¶ 2. The GAI requires Indemnitors to indemnify Tower for costs related to "any and all liability for losses and/or expenses of whatsoever kind" and, in addition to those costs, they are required to indemnify Tower for all expenses the Surety incurs in enforcing any of the covenants and conditions of the agreement under three alternative scenarios. Therefore, the plain language of the GAI includes consulting fees.

Indemnitors cite to Hartford Fire Ins. v. Edgewater, 21 A.D.3d 1312 (4th Dept 2005), in which the court considered an indemnification agreement with similar language and found that fees should be excluded. Hartford is readily distinguishable, however, because there the surety was requesting fees which were incurred as a result of payments made to stabilize the building. Id. Tower, on the other hand, requests consultants' fees which it incurred while investigating the validity of Cava's claim against IKE. As surety, it was necessary for Tower to ascertain the validity of Cava's claims, and a failure to do so could be seen as indicative of bad faith. Tower's investigation was integral in determining whether IKE or Cava had failed to perform or comply with the covenants and conditions of the agreement. The amounts of

attorney's fees and consulting fees shall be established at a hearing before a special referee.

Motion to Leave to Amend

Under CPLR 3025, "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom." MBIA Ins. Corp. v Greystone & Co., Inc., 74 A.D.3d 499, 500 (1st Dept 2010). The moving party is not required to establish an evidentiary basis for its amendments and must only show that they are not "palpably insufficient or patently devoid of merit" Id. However, the court should examine the sufficiency of the merits of the proposed amendment. Boaz Bag Bag v. Alcobi, 129 A.D.3d 649 (1st Dept 2015) (internal quotation marks and citation omitted). Therefore, a motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment. Id.

Indemnitors seek to amend their answer to include crossclaims and counterclaims for: 1) bad faith; 2) breach of contract - GAI; 3) breach of contract – bonds; 4) negligence; and 5) breach of fiduciary duty. Indemnitors also seek to add numerous affirmative defenses to their answer.

Indemnitors' motion is denied because they have failed to provide a sworn affidavit of merit and any evidentiary proof in support of their claims. In their reply papers, the Indemnitors submitted an evidentiary affidavit. See Affidavit of Yitchak Adika. However, attempts to remedy a deficient motion to amend by attaching an

evidentiary affidavit to first time reply papers have been found insufficient by the First Department. Schulte Roth & Zabel, LLP v. Kassover, 28 A.D.3d 404, 405 (1st Dept 2006) (holding that it was improper for defendant to try to remedy a deficient attorney affirmation by introducing the necessary evidentiary affidavit). Therefore, Indemnitors' motion to amend is denied.

First Crossclaim and Counterclaim - Bad Faith

Even if the affidavit of merit were considered sufficient, Indemnitors' motion is denied because it is duplicative of the bad faith defense which was already asserted in their answer. Tower contends that Indemnitors' motion should be denied because there can be no independent cause of action for bad faith when it is derived from the same facts as a breach of contract claim. In support of its assertion, Tower relies upon Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 70 A.D.3d 423 (1st Dept 2010).

However, Amcan does not stand for the proposition that a claim for bad faith is automatically precluded by a claim for breach of contract. Instead, Amcan holds that a claim for breach of the covenant of fair dealing is precluded by a claim for breach of contract derived from the same set of facts. The concept of bad faith, however, is distinct from the implied covenant of fair dealing. While the Indemnitors' claim is not precluded by the existence of a breach of contract claim, it is duplicative of the bad faith defense which Indemnitors asserted in their answer.

Indemnitors have failed to raise a triable issue of fact as to whether or not Tower acted in bad faith. Since Indemnitors' claim for bad faith has already been shown to be devoid of merit, the motion to amend must be denied as to Indemnitors' first crossclaim and counterclaim for bad faith.

Second and Third Crossclaim and Counterclaim - Breach of Contract

Indemnitors motion is denied as to the second and third crossclaims and counterclaims for breach of counterclaim because the language of the GAI renders both claims devoid of merit. As discussed *supra*, Tower has the discretion under paragraph 15 of the GAI to settle litigation, because Indemnitors failed to pay the collateral demand. Indemnitors have failed to make any new showing with regards to Tower's alleged breaches of the performance bond, payment bond, or GAI. Accordingly, Indemnitors' motion for leave to amend is denied as to the second and third crossclaims and counterclaims for breach of contract.

Fourth Crossclaim and Counterclaim - Negligence

The motion to amend is denied because the Indemnitors' claim lacks the basic elements necessary to plead a claim for negligence. "Statements in a pleading shall be sufficiently particular to give the court and parties notice ... [of] the material elements of each cause of action or defense." CPLR § 3013.

In their motion to amend, Indemnitors have failed to list the elements of a negligence claim, and have not provided an explanation as to why the elements of negligence have been met. See Harriman v. New York, C. & St. L.R. Co., 253 N.Y.

398 (1930) (holding that a claim for negligence must set forth facts showing the existence of a duty, breach of that duty, and damages). Indemnitors' argument that the basic elements of negligence and merits of their claim can be derived by piecing together various allegations found throughout their pleadings and motion is without merit. Accordingly, Indemnitors' motion to amend must be denied as to the fourth amended crossclaim and counterclaim.

Fifth Crossclaim and Counterclaim - Fiduciary Duties

This proposed cause of action is without merit because sureties do not owe a fiduciary duty with regard to their principals. See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Turtur, 892 F.2d 199, 207 (2d Cir. 1989) ("In general, a surety does not owe a fiduciary duty to its principal."); see also Bruce v. Martin Nos 87 CIV 3978, 1990 WL 52180 at *7 (S.D.N.Y. Apr. 13, 1990) (holding that no New York or federal law supports the notion that a surety owes its principal fiduciary duties). Indemnitors' argument that the implied covenant of good faith creates a fiduciary duty in every contract is fundamentally incorrect and does not warrant further consideration. Indemnitors have failed to show that Tower owed them a fiduciary duty. Accordingly, Indemnitors' claim for breach of fiduciary duty is without merit.

Affirmative Defenses

Indemnitors' have failed to provide a sufficient legal basis for their defenses. Such bare recitations are devoid of merit and fail to meet the standards for pleadings

at this stage. Accordingly, Indemnitors' motion for leave to amend is denied as to the fifteen affirmative defenses asserted by the Indemnitors.

Accordingly it is,

ORDERED that the motion for summary judgement is granted, and the Clerk is directed to enter judgment in favor of defendant and third-party plaintiff Tower Insurance Company of New York and against defendant I.K.E. Electrical Corp. a/k/a IKE Electrical Corp., and third-party defendants Integrated Building Management Services, LLC, Angelo Castelli, Roneet Castelli, Yitchak Adika, Rebecca Adika, Ilan Adika, and Dana Adika, in the amount of $1,075,000, together with interest at the statutory rate from the date of April 15, 2014, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the motion for leave to file an amended answer and crossclaim and an amended answer to third-party complaint and counterclaim is denied; and it is further

ORDERED that the matter is referred to a Special Referee to hear and report on the issue of the amount of attorneys' fees and consulting fees to be awarded to Tower Insurance Company of New York; and it is further

ORDERED this matter is referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part; and it is further

ORDERED that counsel shall immediately consult with one another and counsel for Tower Insurance Company of New York shall, within 15 days, submit to the Special Referee Clerk by fax or e-mail an Information Sheet (which can be accessed on the court's website) containing all information called for therein; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further.

Date: May 25, 2016
New York, New York

Anil C. Singh