

Colonial Sur. Co. v Eastland Constr. Inc.
2016 NY Slip Op 31529(U)
August 11, 2016
Supreme Court, New York County
Docket Number: 603656/2008
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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COLONIAL SURETY COMPANY,

Plaintiff,

DECISION/ORDER
Index No. 603656/2008

-against-

EASTLAND CONSTRUCTION INC, NANCY SCHULMAN, ALLAN
SCHULMAN

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action for contractual indemnification, plaintiff Colonial Surety Company (“Colonial”) moves (in motion sequence number 009) for partial summary judgment, pursuant to CPLR § 3212 (b), against defendants Eastland Construction, Inc. (“Eastland”), Nancy Shulman and Allan Shulman, Eastland’s Project Executive (collectively the “Defendants”).

This action arose from construction surety bonds issued for three public improvement construction projects for: (1) an addition and alterations to the Hartsdale Fire Station No. 2 (the “Hartsdale Project” and “Hartsdale Bond”); (2) modernization and additions to schools in the Clarkstown Central School District in Clarkstown, New York (the “Clarkstown Project” and “Clarkstown Bond”); and (3) a contract with the State of New York known as “DOT — Construct Maintenance Subheadquarters and Salt Storage Building” (the “OGS Contract” and “OGS Bond”). a contract with the State of New York known as “DOT — Construct Maintenance Subheadquarters and Salt Storage Building” (the “OGS Contract” and “OGS Bond”).

Defendant Eastland was the general contractor pursuant to the underlying construction contracts. Plaintiff Colonial, as surety to Eastland, issued payment and performance bonds for the above-described projects. In consideration for and to induce Colonial to issue the bonds, Defendants executed a General Indemnity Agreement dated May 2, 2006 (the "Indemnity Agreement") in favor of Colonial as Indemnitee.

In relevant part, the Indemnity Agreement provided for indemnification and reimbursement to Colonial for:

(i) demands, liabilities, losses, costs, damages or expenses of whatever nature or kind, including all fees of attorneys and all other expenses, including but not limited to costs and fees of investigation, adjustment of claims, procuring or attempting to procure the discharge of Bonds, enforcement of any Contract with [the Indemnitors], and in attempting to recover losses of expenses from [the Indemnitors], or third parties, whether or not [Colonial] shall have paid out any or all of such sums, (ii) amounts sufficient to discharge any claim made against [Colonial] on any Bond, which amounts may be used by [Colonial] to pay such claim, or may be held by [Colonial] as collateral security against any loss on any Bond...

The Indemnity Agreement further provides that:

B. [Colonial] shall have the right to incur such expenses in handling a claim as it deems necessary or advisable, including but not limited to the expense for the investigation, accounting, engineering and legal services, and [Colonial's] good faith determination as to the necessity or advisability of any such expense shall be final and conclusive upon [the Indemnitors].

E. ... [Colonial may recover from [the Indemnitors] its expenses and attorneys' fees incurred in prosecuting or defending any action arising out of or relating to this Agreement or other Contract with [the Indemnitors] ...

Plaintiff filed this complaint on December 12, 2008, seeking, among other things, specific performance of the Indemnity Agreement to enforce Colonial's Demand for Collateral Security in the amount of \$1,065,273.35 and indemnification.

Colonial previously moved for partial summary judgment to enforce the Indemnity Agreement, and to indemnify Colonial for the losses it suffered in relation to the bonds it issued for the projects. I granted Colonial's motion on its indemnification claims, by decision and order dated November 17, 2014, and "adjudged and declared that defendants are jointly and severally liable to

plaintiff in the amount of \$998,405.15 plus interest.” Colonial now moves for partial summary judgment against the Defendants, jointly and severally, in the amount of \$1,391,730.49 plus interest, to reimburse Plaintiff for the attorney fees and consultant expenses incurred through August 31, 2014 in connection with the Bonds and the enforcement of the Indemnity Agreement.

At oral argument on this motion, on June 17, 2015, I granted Plaintiff’s motion for partial summary judgment as to liability on the third cause of action upon Plaintiff’s representation that it would discontinue the remaining causes of action without prejudice. I also: (1) directed defense counsel to submit a letter¹ that “specifically [told] me precisely what amounts [Defendants] are objecting to;” (2) permitted Plaintiff’s counsel to respond by letter²; and (3) ordered that, if necessary post-letter submissions, a hearing would be held to finalize the amount of the judgment. The hearing was held before me on March 14, 2016 (the “Fee Hearing”).

Discussion

The movant in 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.” *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). If this showing is met, “the burden then shifts to the non-moving party to ‘establish the existence of material issues of fact which require a trial of the action.’” *Jacobsen v. New York City Health and Hospitals Corp.*, 22 N.Y.3d 824, 833 (2014), 22 N.Y.3d 824, 833 (2014).

Here, the Indemnity Agreement states that an itemized statement of expenses sworn to by an officer shall be prima facie evidence of the fact and extent of the indemnitors’ liability. Thus, as I previously held, Plaintiff has demonstrated its prima facie entitlement to summary judgment on its

¹ Rather than a letter submission, as I requested, Defendants submitted an affidavit by Defendant Allan Schulman on June 23, 2015.

² Plaintiff filed its letter response on July 1, 2015.

third claim with respect to attorney fees and consultant expenses based on its submission of an itemized statement. *See, e.g., Utica Mut. Ins. Co. v. Cardet Const. Co., Inc.*, 114 A.D.3d 847 (2d Dept. 2014) (holding that plaintiff “met its prima facie burden by submitting the indemnification agreement, the performance bond, and itemized statements of attorney fees and expenses.”)

Defendants concede liability but argue that overall legal fees and the fees for Beacon Consulting (“Beacon”) are unreasonable. Plaintiff has agreed, via letter dated July 1, 2015, to waive its right to the amount of attorney fees that defendants specifically claimed were objectionable. Thus, Plaintiff reduced its attorney fee request by \$12,612.88³ and seeks \$1,076,933.75. In the absence of any further specific objections to the reduced amount of attorney fees, Defendants have not raised a triable issue of fact concerning the “bona fides of the payment or the reasonableness of its amount.” *Prestige Decorating and Wallcovering, Inc. v. U.S. Fire Insur. Co.*, 49 A.D.3d 406, 407 (1st Dept. 2008); *see also Utica Mut. Ins. Co.*, 114 A.D.3d. at 849 (internal citations omitted) (deeming attorney fees to be reasonable where defendants “failed to raise a triable issue of fact regarding the reasonableness of the attorney fees and expenses... or [plaintiff’s] good faith in incurring such fees and expenses.”). Therefore, I grant Plaintiff’s request for \$1,076,933.75 in attorney fees.

In addition, Plaintiff seeks \$302,183.86 as reimbursement for its payments to Beacon. In opposition to this motion and the Beacon fee request, Defendants submitted an affidavit from defendant Allan Schulman and an affirmation from Oscar Michelen, defendants’ attorney. A second affidavit was also submitted by Defendant Allan Schulman in response to my request for a letter stating Defendants’ fee objections with specificity. Neither of the Schulman affidavits contain evidence that Plaintiff acted fraudulently or in bad faith. *Peerless Ins. Co. v. Talia Constr.*

³ The reduction amount represents Defendants’ objections to the Klotz & McCann entries, the MDMC entries and the Larry Miller invoices.

Co., 272 A.D.2d 919 (4th Dept. 2000). Indeed, the affidavits lack specificity regarding what portion(s) of the Beacon costs are objectionable and only contain conclusory allegations that Plaintiff's request is "unreasonable" based upon defendant Allan Schulman's "expert" experience and his belief that the requested amount is excessive for a project administrator.

However, Garreth Murray ("Murray"), the Beacon employee who took over as project manager, testified at the Fee Hearing to the propriety of the Beacon fees. Murray testified that the fee requested was for surety consulting, project management and finishing work. While on the stand, Murray was shown Exhibit J, which listed Plaintiff's losses under all of the contracts with Eastland, and he stated that Beacon's fees were above and beyond anything listed in Exhibit J. He then stated that there was "no double dipping with Beacon [sic] costs" meaning that the amount requested by Plaintiff represents costs that were different than the losses in Exhibit J. In other words, Beacon was not already repaid by the owner for the Beacon related-costs that Plaintiff seeks in this motion.

In light of Murray's unrebutted testimony that the fees were actually earned, and Defendants' failure to offer any evidence of unreasonableness of the Beacon fees except for the conclusory affidavit of defendant Allan Schulman, I find that Defendants fail to raise a triable issue of fact regarding the appropriateness of these consulting fees. *Gettinger Assoc., L.P. v. Abraham Kamber Co. LLC*, 83 A.D.3d 412, 414 (1st Dept. 2011) (holding that a party's submission of a "self-serving affidavit" was in and of itself "insufficient to raise an issue of fact."); *Prestige Decorating and Wallcovering, Inc.*, 49 A.D.3d at 407 (defendant's "conclusory affidavits" insufficient to raise a triable issue of fact as to the reasonableness of the fee amount requested by plaintiff). Thus, I grant Plaintiff's request for \$302,183.86 for the Beacon fees.

In accordance with both the foregoing and my previous rulings on the record during oral argument for Motion Sequence No. 009, on June 17, 2015, it is,

ORDERED that the partial summary judgment motion by Plaintiff on their third cause of action is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants in the amount of \$1,379,117.61, together with interest at the statutory rate from December 12, 2008 until the date judgment is entered, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and

In accordance with my prior order and decision on November 17, 2014 (on Motion Sequence No. 008), it is

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants in the amount of \$998,405.15, together with interest at the statutory rate from December 12, 2008 until the date judgment is entered, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it further

ORDERED that the action is discontinued as to the remaining causes of action without prejudice.

This constitutes the decision and order of the Court.

DATE: 8/11/16


SCARPULLA, SALIANN JSC