

Aussie Painting Corp. v Western Sur. Co.

2016 NY Slip Op 32777(U)

September 27, 2016

Supreme Court, Nassau County

Docket Number: 600718-14

Judge: Timothy S. Driscoll

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
AUSSIE PAINTING CORP.,

Plaintiff,

-against-

**WESTERN SURETY COMPANY, and KISKA
CONSTRUCTION, INC., "JANE and JOHN DOES"
numbered 1-10, said persons and/or entities being
fictitious and intended to represent all those with an
interest in the case at bar,**

Defendants.
-----x

**TRIAL/IAS PART: 12
NASSAU COUNTY**

Index No: 600718-14

**Motion Seq. No. 1
Submission Date: 8/16/16**

The following papers having been read on this motion:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Correspondence dated August 5, 2016.....x**

This matter is before the Court for decision on the motion filed by Defendants Western Surety Company ("Western") and Kiska Construction, Inc. ("Kiska") ("Defendants") on July 22, 2016 and submitted on August 16, 2016. For the reasons set forth below, the Court grants the motion.

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR § 4102, striking the jury demand contained within the Note of Issue of Plaintiff Aussie Painting Corp. ("Plaintiff") dated May 31, 2016.

By letter to the Court dated August 5, 2016, counsel for Plaintiff advised the Court that Plaintiff offers no position with regard to the motion and will not be submitting opposition.

B. The Parties' History

In support of the motion, counsel for Defendants ("Defendants' Counsel") provides copies of the Verified Complaint ("Complaint"), along with its exhibits, specifically the January 16, 2012 Subcontract between Plaintiff and Kiska ("Subcontract"); Plaintiff's Notice of Mechanic's Lien ("Lien") dated February 15, 2013 in the amount of \$1,102,631.00; and Notice of Pendency of action to foreclose on Lien, dated February 14, 2014 (*see* Exs. A-1 to A-3 to Bletsch Aff. in Supp.). Defendants' Counsel affirms that Defendants served their Answer with Counterclaims on April 30, 2014 and Plaintiff served a Reply to Counterclaims on May 16, 2014. Those were superseded by an amended answer and corresponding reply (Exs. C and D to Bletsch Aff. in Supp.).

Defendants' Counsel affirms that Plaintiff filed a Note of Issue and Notice for Trial, including a demand for trial by jury, on May 31, 2016 (Ex. E to Bletsch Aff. in Supp.). Defendants' Counsel affirms that during a telephone conference with the Court and counsel on June 15, 2016, the Court directed Defendants to wait until the conclusion of mediation before bringing the instant motion. Defendants' Counsel affirms that the mediation did not result in a resolution of this action, and Defendants now move to strike the jury demand.

Defendants' Counsel provides an overview of the allegations in this action which relate to a bridge rehabilitation project ("Project") involving a series of bridges on Long Island, New York. Kiska, the general contractor, entered into the Subcontract with Plaintiff on January 16, 2012, pursuant to which Plaintiff was to perform certain cleaning and painting work on certain bridges for the Project. Paragraph 39 of the Subcontract provides as follows:

Any dispute arising out of or in connection with this agreement on the performance or non-performance thereof shall be determined by a judge sitting without jury in an appropriate action in the Supreme Court of the State of New York, Queens County. The parties each expressly waive any right to trial by jury in any such action, but any determination in any such action shall be subject to such rights of appeal as may be provided by law.

Western, Kiska's surety, issued a payment bond to Kiska. Plaintiff alleges that Plaintiff performed all work and extra work, rendered all services, and furnished all materials and supplies required, and that Kiska improperly failed to pay Plaintiff pursuant to the Subcontract, and improperly terminated the Subcontract. Defendants allege, in support of their counterclaims, that, after commencing work under the Subcontract, Plaintiff failed to meet its schedule requirements, failed to properly staff the job, and failed to properly fund the job, and otherwise

breached the Subcontract. Therefore, with the approval of the New York State Department of Transportation (“DOT”), Kiska terminated the Subcontract.

Plaintiff commenced this action on February 14, 2014 which asserts the following causes of action: 1) a payment bond claim against Western, 2) a Lien Law claim against Western, 3) breach of the Subcontract against Kiska, 4) unjust enrichment against Kiska, and 5) breach of the implied covenant of good faith and fair dealing against Kiska. Defendants submit that Plaintiff has improperly demanded a trial by jury of all issues, both because Plaintiff waived its right to a jury under the Subcontract and because Plaintiff, by joining legal claims with equitable claims and other expressly non-jury claims, has waived its right to a jury trial on all claims.

C. The Parties’ Positions

Defendants submit that 1) Plaintiff waived its right to a jury trial pursuant to the express terms of the Subcontract and the jury waiver provision, which is broadly worded and contains mandatory language, and clearly applies to Plaintiff’s claims which all arise out of or in connection with the Subcontract; 2) the second cause of action in the Complaint, the lien claim against Western, is an equitable claim for the Court to decide, as is Defendants’ second counterclaim for willful exaggeration of lien; 3) even if there were no contractual jury waiver, Plaintiff has waived its right to a jury trial by joining claims for equitable and legal relief that arise out of the same transaction; and 4) Western, as the surety, has the same right to enforce the jury waiver as Kiska, its principal and, therefore, Plaintiff’s bond claims against Western are subject to the contractual jury waiver.

By letter to the Court dated August 5, 2016, counsel for Plaintiff advised the Court that Plaintiff offers no position with regard to the motion and will not be submitting opposition.

RULING OF THE COURT

A. Waiver of Right to Jury Trial

A party who has signed an agreement may not simultaneously rely upon it as the foundation of the claim for damages and repudiate a provision contained herein to the effect that the right to a trial by jury is waived. *O’Brien v. Moszynski*, 101 A.D.2d 811, 812 (2d Dept. 1984) citing, *inter alia*, *Ripple’s of Clearview v. Le Havre Assoc.*, 85 A.D.2d 660 (2d Dept. 1981).

The prevailing rule is that the deliberate joinder of claims for legal and equitable relief arising out of the same transaction amounts to a waiver of the right to demand a jury trial. *Anesthesia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center*, 59 A.D.3d

481, 482 (2d Dept. 2009) quoting *Hebranko v. Bioline Labs.*, 149 A.D.2d 567, 567-568 (2d Dept. 1989). In *Grutman Katz Greene & Humphrey v. Goldman*, 251 A.D.2d 7 (1st Dept. 1998), the First Department held that the trial court had properly struck the plaintiff's jury demand from the note of issue in light of the fact that plaintiff, in its sole cause of action remaining for trial, sought determination and enforcement of a charging lien, an equitable claim triable by the court. *Id.*, citing *Matter of King*, 168 N.Y. 53, 58 (1901); *Flores v. Barricella*, 123 A.D.2d 600 (2d Dept. 1986).

B. Relevant Surety Principles

A surety paying on a bond at the behest of a creditor is entitled by operation of law to be subrogated to the rights and remedies available to the creditor for enforcement of the debtor's obligation. *Pep'e v. McCarthy*, 249 A.D.2d 286, 287 (2d Dept. 1998) citing, *inter alia*, *Romano v. Key Bank*, 90 A.D.2d 679, 680 (4th Dept. 1982); *Carrols Equities Corp. v. Villnave*, 57 A.D.2d 1044 (4th Dept. 1977), *lv. app. den.* 42 N.Y.2d 810 (1977).

C. Application of these Principles to the Instant Action

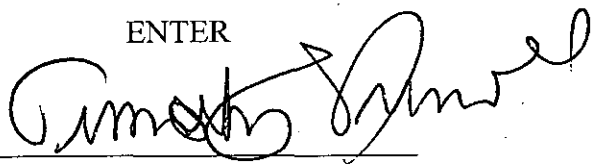
The Court grants the motion and strikes Plaintiff's jury demand based on its conclusion that 1) Plaintiff waived its right to a jury trial pursuant to the express terms of the Subcontract and the jury waiver provision, which applies to Plaintiff's claims which all arise out of or in connection with the Subcontract; 2) Western, as the surety, has the same right to enforce the jury waiver as Kiska, its principal and, therefore, Plaintiff's bond claims against Western are subject to the contractual jury waiver; and 3) even if there were no applicable jury waiver provision, in light of the fact that Plaintiff's lien claim against Western is an equitable claim for the Court to decide, Plaintiff has waived its right to a jury trial by joining claims for equitable and legal relief that arise out of the same transaction.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Pre-trial Conference on October 6, 2016 at 10:30 a.m.

DATED: Mineola, NY
September 27, 2016

ENTER


HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

OCT 03 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE