

**Northern Val. Contr. Co., Inc. v Fidelity & Deposit
Co. of Maryland**

2017 NY Slip Op 32121(U)

August 21, 2017

Supreme Court, Queens County

Docket Number: 476/2009

Judge: Robert J. McDonald

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OS

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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NORTHERN VALLEY CONTRACTING CO., INC., Index No.: 476/2009
Plaintiff, Motion Date: 8/10/17
- against - Motion No.: 116

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Motion Seq.: 2
Defendant.

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FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Third-Party Plaintiff,
- against -

TRUSTEES OF THE MASON TENDERS DISTRICT COUNCIL WELFARE FUND, PENSION FUND, ANNUITY FUND, and TRAINING PROGRAM FUND,

FILED
AUG 30 2017
COUNTY CLERK
QUEENS COUNTY

and

MASON TENDERS DISTRICT COUNCIL OF GREATER NEW YORK, by its business manager Robert Bonanza,

Third-Party Defendants.

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The following papers numbered 1 to 16 read on this motion by plaintiff for an Order pursuant to CPLR 3212, dismissing the third-party complaint; and on this cross-motion by defendant/third-party plaintiff FIDELITY & DEPOSIT COMPANY OF MARYLAND (Fidelity) for an Order pursuant to 22 NYCRR 130-1.1 awarding Fidelity costs and attorney's fees from plaintiff and imposing financial sanctions against Emanuele J. DeStefano, Esq.:

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits-Memo. of Law..	5 - 10
Affirmation in Opposition-Exhibits.....	11 - 13
Reply Affirmation-Exhibits.....	14 - 16

This is an action to recover outstanding amounts due under various subcontracts between plaintiff, as subcontractor, and non-party WDF Inc. (WDF), as general contractor. As the subcontracts pertained to public works projects, WDF was required to file with the public agencies a material and payment bond to assure payment to subcontractors and material suppliers who perform work or supply materials for WDF's benefit. Fidelity served as the surety on the bonds posted by WDF regarding the subject construction projects.

Plaintiff commenced this action against Fidelity by filing a summons and complaint on January 12, 2009 to recover the amounts due and owing by WDF. Fidelity served an answer and third-party complaint on February 19, 2009. The third-party complaint seeks a declaratory judgment. Third-party defendants (The Funds) are union benefit funds which obtained a judgment against plaintiff in the United States District Court for the Southern District of New York due to plaintiff's non-payment of benefit contributions to The Funds. The Funds served Fidelity with a restraining notice dated February 23, 2009. Based on such, Fidelity seeks a declaratory judgment declaring the legal rights and obligations of WDF and the parties to the action, specifying the extent of monies due, if any, from WDF or Fidelity to plaintiff, and declaring the right of The Funds to monies allegedly due and owing to plaintiff from WDF or Fidelity.

Plaintiff now moves to dismiss the third-party complaint on the grounds that the third-party complaint is not a proper use of CPLR 1007.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form, eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]). A court deciding a motion for summary judgment is required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and proof submitted by the parties in favor of

the opponent to the motion (see Myers v Fir Cab Corp., 64 NY2d 806 [1985]).

Plaintiff contends that since the third-party complaint does not plead that The Funds may be in any manner liable to plaintiff for any portion of the claims of the plaintiff asserted against Fidelity, the third-party complaint must be dismissed.

In opposition, Fidelity contends that The Funds are a necessary party to the proceeding because WDF and Fidelity were previously restrained by The Funds from paying sums due, if any, to plaintiff in connection with the subject construction projects. The Funds also oppose the motion, contending that since plaintiff has not sued The Funds directly, it has no standing to seek dismissal of the third-party complaint. The Funds also contend that as they have restrained any monies owed by Fidelity to plaintiff, they are a necessary party to this action.

Regarding third-party practice, "a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant" (CPLR 1007). "The liability to be imposed upon a third-party defendant in a third-party action commenced pursuant to CPLR 1007 should arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action" (Lucci v Lucci, 150 AD2d 649, 649 [2d Dept. 1989] [internal quotation marks omitted]).

Here, the third-party complaint is not permitted by CPLR 1007 since it fails to state any cause of action arising from or conditioned upon the liability asserted against Fidelity in the main action (see Oosina Corp. v C & N Packaging, Inc., 96 AD3d 1032 [2d Dept. 2012]; Galasso, Langione & Botter, LLC v Liotti, 81 AD3d 880 [2d Dept. 2011]). Although the declaratory judgment action is not sufficiently related to the allegations in the complaint to provide a proper basis for a third-party complaint under CPLR 1007, the allegations asserted in the third-party complaint constitute proper grounds for an independent action. Accordingly, rather than dismissing the third-party action, the third-party action shall be severed from plaintiff's complaint.

Turning to that branch of the cross-motion seeking costs and sanctions, counsel for Fidelity, Emily D. Anderson, Esq., affirms that counsel for plaintiff, Emanuele J. DeStefano, Esq., engaged in frivolous conduct. Specifically, Ms. Anderson affirms that she believed that the motion was being adjourned so that plaintiff and The Funds could engage in settlements negotiations. On July 21, 2017, she spoke with counsel for The Funds who represented

that plaintiff and The Funds had made substantial progress in settling their claims, and Mr. DeStefano had agreed to withdraw the instant motion. She reached out to Mr. DeStefano on July 1, 2017, July 24, 2017, and July 25, 2017 to confirm Mr. DeStefano's intent to withdraw this motion. The day before opposition was due, Mr. DeStefano stated that he was not going to withdraw the motion. Based on such, counsel for Fidelity seeks costs and reasonable attorney's fees as well as sanctions against Mr. DeStefano for his frivolous conduct and efforts taken to injure Fidelity and The Funds.

Pursuant to 22 NYCRR 130-1.1, an award of costs, including an attorney's fee, may be imposed against a party for frivolous conduct. Frivolous conduct includes conduct determined to be "completely without merit in law" or "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (see NYCRR 130-1.1[c][1], [2]; Finkelman v SBRE, LLC, 71 AD3d 1081 [2d Dept. 2010]; Glenn v Annunziata, 53 AD3d 565 [2d Dept. 2008]).

Under the circumstances of this case, plaintiff's conduct was not frivolous because plaintiff raised a genuine legal dispute. Moreover, plaintiff's counsel affirms that he never represented to defendant's counsel that he was withdrawing the instant motion and that he informed defendant's counsel of the Centralized Motion Part's Rules permitting only one adjournment. Here, this Court finds that the alleged conduct does not warrant the imposition of an award of costs or sanctions.

Accordingly, and based on the above reasons, it is hereby,

ORDERED, that plaintiff's motion to dismiss is denied; and it is further

ORDERED, that defendant's cross-motion for costs, attorney's fees and sanctions is denied; and it is further

ORDERED, that the third-party action shall be severed from plaintiff's action; and it is further

ORDERED, that the title of this action shall be amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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NORTHERN VALLEY CONTRACTING CO., INC.,

Index No. 476/2009

Plaintiff,

- against -

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Defendant.

----- x
and, it is further

ORDERED, that the Clerk of the Supreme Court, Queens County, upon being served with a copy of this order with notice of entry and payment of any required fees is directed to sever the third-party action and transfer all papers filed in this action as they pertain to the third-party action, and upon the third-party plaintiff FIDELITY & DEPOSIT COMPANY OF MARYLAND's purchasing of a new Index Number, assign a Queens County Index Number to the file transferred pursuant to this order.

Dated: August 21, 2017
Long Island City, N.Y

ROBERT J. MCDONALD
J.S.C.

FILED
AUG 30 2017
COUNTY CLERK
QUEENS COUNTY