SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: SCARPULLA, SALIANN **PART** 39

Justice

INDEPENDENT TEMPERATURE CONTROL SERVICES, INC.,

INDEX NO. 652412/2014

MOTION DATE

- v -

PARSONS BRINCKERHOFF, INC. F/K/A PB AMERICAS, INC., ET AL.,

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this application to/for partial summary judgmer

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits ..... No(s) _____

Answering Affidavits - Exhibits ..... No(s) _____

Replying ..... No(s) _____

Upon the foregoing papers, it is hereby

ORDERED that the motion, in conjunction with motion seq. 002, is determined in accordance with the accompanying decision/order.

DATE : 1/20/17

SCARPULLA, SALIANN , JSC

1. CHECK ONE	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION			
2. APPLICATION	☐ GRANTED	☐ DENIED	☐ GRANTED IN PART		☐ OTHER	
3. CHECK IF APPROPRIATE	☐ SETTLE ORDER		☐ SUBMIT ORDER			
	☐ DO NOT POST		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE	

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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INDEPENDENT TEMPERATURE CONTROL SERVICES, INC.,

Plaintiff,

Index No.: 652412/2014

-against-

DECISION AND ORDER

PARSONS BRINCKERHOFF, INC., f/k/a PB AMERICAS, INC., THE POWER AUTHORITY OF THE STATE OF NEW YORK, and VAMCO SHEET METAL, INC., TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA and RLI INSURANCE COMPANY,

Defendants.

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Saliann Scarpulla, J.:

In this action to recover damages for breach of contract, defendant Travelers Casualty and Surety Company of America ("Travelers") moves for partial summary judgment dismissing the 14th cross claim of defendant Parsons Brinckerhoff, Inc. ("PB") (mot. seq. 001) and defendant RLI Insurance Company ("RLI") moves for summary judgment dismissing plaintiff Independent Temperature Control Services, Inc.'s ("ITC") 19th and 20th causes of action (mot. seq. 002).

Both motions for summary judgment seek to dismiss claims that arise from the breach of performance bonds, each of which require compliance with conditions precedent. Both moving parties, Travelers and RLI, argue that the conditions precedent set forth in performance bond sections 3.2 and 3.3 were not met, and, therefore, their

obligations to act under section 5 of the bonds have not been triggered.

PB is the engineer of record on a pending construction project at the New York City Police Department ("NYPD") headquarters at One Police Plaza ("Project"). The Department of Citywide Administrative Services engaged the Power Authority of the State of New York ("NYPA") to upgrade certain mechanical and electrical systems in order to reduce and conserve energy consumption. On July 1, 2009, NYPA contracted with PB to perform certain engineering and construction management services at the Project ("NYPA Contract"). After a competitive bidding process, NYPA awarded the contract to ITC for mechanical/systems controls work and, accordingly, PB executed a subcontract with ITC, dated September 25, 2012 ("PB/ITC subcontract"). Under the PB/ITC subcontract, ITC was obligated to perform its work and furnish equipment in a substantial and workman-like manner in accordance with the drawings, specifications and contract documents, which incorporated by reference the prime agreement between PB and NYPA. ITC secured the performance of its work by obtaining an AIA 312-2010 performance bond issued by Travelers for $8,197,000.00, the amount of the PB/ITC subcontract, on October 5, 2012 ("Travelers Bond"). PB is listed as the owner on the bond.

On November 29, 2012, ITC entered into a written sub-subcontract with defendant Vamco Sheet Metals, Inc. ("Vamco"), in which Vamco agreed to furnish and install all sheet metal work at the specific request of ITC for the Project. On February 1, 2013,

ITC entered into a written sub-subcontract with Vamco, in which Vamco agreed to furnish and install all piping and related mechanical work at the specific request of ITC for the Project (collectively referred to as "ITC/Vamco subcontracts"). RLI, at the request of Vamco, issued a performance bond, dated March 28, 2013, on behalf of Vamco, as principal, in favor of ITC, as owner ("RLI Bond").

By letter dated May 30, 2014, PB notified ITC that it was canceling its sub-contract with ITC "pursuant to Article 14, subparagraph B, 1, (ii), of the [PB/ITC subcontract]. PB is cancelling the Agreement for the best interests of the [NYPA]." The letter further states that "as required by the Agreement, we will send a copy of this letter to your surety." Subsequently, several days later, by letter dated June 3, 2014, ITC notified Vamco that its contract with PB had been "terminated" by PB, and "we are therefore terminating your subcontractor agreement in accordance with Article 6.1 of said agreement."

On August 6, 2014, ITC commenced this action, claiming that it was not paid in full for the work it performed on the Project. ITC sought, *inter alia,* a subcontract balance due of $2,560,881.71, and foreclosure of a mechanics lien in the same amount. On March 20, 2015, ITC filed an amended complaint, in which ITC also asserted a claim against PB for breach of the duty of good faith and fair dealing, alleging that "[PB] approved ITC and Vamco's work [Vamco is a subcontractor of ITC], which was near completion, throughout the entire time ITC was performing its work for the Project . . ."

ITC alleges that it was never notified that its work was defective or deficient or that the work of its subcontractor was defective or deficient. ITC responded to PB's answer: "[PB] now alleges, for the first time, on March 6, 2015, that ITC and Vamco's work was defective and deficient and inadequately installed." "[PB] neither terminated for cause, nor for a material breach, nor defaulted ITC. [PB] cancelled ITC's contract at the direction and convenience of NYPA."

In its March 6, 2015 answer with counterclaims and crossclaims, PB set forth several crossclaims against co-defendant Travelers. In the fourteenth crossclaim, PB alleged that ITC, as subcontractor, and Travelers, as surety, executed and delivered the performance bond to PB; that NYPA has directed PB to pursue a claim against the performance bond due to the alleged "defective and deficient work of ITC at the Project" and that PB was not paid under the performance bond. PB demanded damages in an amount to be determined at trial. In its answer to PB's crossclaims, Travelers asserted affirmative defenses, including an assertion that PB failed to comply with the conditions precedent of Travelers' performance bond. On March 25, 2015, ITC filed and served its third amended verified complaint, adding RLI as a defendant.

Both Travelers and RLI issued a standard subcontract performance bond for the Project, referred to as "AIA Document A312 - 2010." Under section 3 of form A312 - 2010, the conditions precedent are set forth as follows:

> "§ 3 If there is no Owner Default under the Construction Contract, the Surety's obligation under this Bond shall arise after

.1 the Owner first provides notice to the Contractor and the Surety that the Owner is considering declaring a Contractor Default. Such notice shall indicate whether the Owner is requesting a conference among the Owner, Contractor and Surety to discuss the Contractor's performance. If the Owner does not request a conference, the Surety may, within five (5) business days after receipt of the Owner's notice request such a conference. If the Surety timely requests a conference, the Owner shall attend. Unless the Owner agrees otherwise, any conference requested under this Section 3.1 shall be held within ten (10) business days of the Surety's receipt of the Owner's notice. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default;

.2 The Owner declares Contractor Default, terminates the Construction Contract and notifies the Surety; and

.3 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."

"Contractor Default" is defined at section 14.3 as follows: "Failure of the Contractor, which has not been remedied or waived, to perform or otherwise to comply with a material term of the Construction Contract." Under section 12, notice to the surety, the owner or the contractor "shall be mailed or delivered to the address shown on the page on which their signature appears."

According to article 14 of the PB/ITC subcontract, "Interruption of Contract Performance," sub-article "B," "Right to stop Work or Cancel Contract," ITC's work can be terminated or its subcontract could be cancelled as follows:

"It is further mutually agreed that if at any time during the prosecution of the work, the Engineer determines that the Work under the Contract is not

being performed according to the Contract or for the best interests of the Authority, the Engineer may elect either of two alternatives, (i) terminate the Installer's employment under the Contract while it is in progress, and in accordance with Paragraph C, Termination of this Article, and thereupon complete the work, at the expense of the Installer, in such a manner as will be in accord with the Contract Documents and be for the best interests of the Authority, or call upon the Surety, at its own expense, to do so, or (ii) the Engineer may cancel the Contract itself and have the Work completed by contract with or without public letting, as it may deem advisable, utilizing for such purpose such of the Installer's plant, materials, equipment, tools and supplies obtained by the Installer for prosecution of the Work of the Contract and remaining on the site, and also such subcontracts or sub-installers as it may deem advisable."

Under article 6.1 of the ITC/Vamco subcontracts, "Termination by the subcontractor," ITC may terminate Vamco as follows:

"The Subcontractor may terminate the Subcontract for the same reasons and under the same circumstances and procedures with respect to the Contractor as the Contractor may terminate with respect to the Owner under the Prime Contract, or for nonpayment of amounts due under this Subcontract for 60 days or longer. In the event of such termination by the Subcontractor for any reason which is not the fault of the Subcontractor, the Sub-subcontractors or their agents or employees or other persons performing portions of the Work under contract with the Subcontractor, the Subcontractor shall be entitled to recover from the Contractor payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages."

According to Cary Siegel, senior counsel for PB, on November 21, 2014, Siegel telephoned Stuart Jones, Esq. of Travelers and "confirmed that the contract with ITC was terminated and that Dynamic Mechanical replaced ITC as the completing contractor at One Police Plaza."

Discussion

Travelers' Motion

Travelers argues that PB cannot sustain its 14th crossclaim against Travelers, because PB failed to satisfy the conditions precedent in the Travelers Bond that would have triggered Travelers' obligations under the Bond. Specifically, Travelers argues that Travelers Bond sections 3.2 and 3.3 set forth conditions precedent that must be satisfied before Travelers' obligations arise. Travelers claims that PB failed to satisfy the requirements set forth under section 3.2 because PB did not notify Travelers, properly declare a contractor default, and agree to pay the balance of the contract price in accordance with the terms of the construction contract.

In opposition, PB argues that it did notify Travelers, but even if it did not, pursuant to section 4 of the bond, Travelers must establish actual prejudice before defeating PB's claim. Travelers argues that section 4 of the Bond, the AIA 312 2010 version, explicitly relates to the requirements of section 3.1, and not to section 3.2. Section 4 states that failure "to comply with the notice requirement of Section 3.1 [regarding a pre-default conference] shall not constitute a failure to comply with a condition precedent to the surety's obligations, except to the extent that surety demonstrates actual prejudice."

Further, according to section 5 of the Travelers Bond, the surety's obligations are only triggered "[w]hen the Owner has satisfied the conditions of Section 3, . . ." Thus, Travelers argues that because PB has not satisfied the conditions precedent of section 3.2

and 3.3, and while prejudice need not be demonstrated, Travelers has suffered prejudice because PB prevented Travelers from protecting itself through the exercise of its Bond options.

Travelers argues that the PB/ITC subcontract at Article 14, subparagraph B, 1, contains two alternatives, which are (i) termination for cause, which includes the option of "call[ing] upon the Surety, or (ii) cancellation for the best interests of NYPA," which does not include this option. PB stated in its May 30, 2014 letter that it was cancelling the agreement for the best interests of the Power Authority pursuant to article 14, subparagraph B, 1 (ii) of the PB/ITC sub-agreement. Travelers argues that this option cannot meet the requirements of section 3.2 of contractor default.

"'Surety bonds–like all contracts–are to be construed in accordance with their terms' (internal citations omitted)." *WBP Cent. Assoc., LLC v. DeCola*, 91 A.D.3d 861, 862 (2nd Dept. 2012). "Where the terms are unambiguous, interpretation of the surety bond is a question of law." *Id.* at 862. "'[A] surety bond attaches to the principal contract and must be construed in conjunction with it' (internal citations omitted)." *Id.* at 863.

"'[B]efore a surety's obligations under a bond can mature, the obligee must comply with any conditions precedent' (internal citations omitted)." *See Travelers Cas. and Sur. Co. v. Dormitory Auth.-State of New York*, 735 F.Supp.2d 42, 83 (S.D.N.Y. 2010). In *Archstone v. Tocci Bldg. Corp. of N.J., Inc.* (119 A.D.3d 497, 498 [2d Dept. 2014]), the Second Department found that "[c]ontrary to the plaintiffs' contention, paragraph 3 of the

subject AIA A312 performance bond contains express conditions precedent to the liability of the surety under the bond." The Court concluded that because plaintiff owners "failed to strictly comply with the conditions of the bond, the Supreme Court properly granted Liberty Mutual's motion for summary judgment dismissing all causes of action in the second amended complaint insofar as asserted against it" (*id.*).

Likewise, in *Granger Constr. Co., Inc. v. TJ, LLC* (134 A.D.3d 1329, 1331 [3d Dept. 2015]), the court found that the language set forth in AIA 312-2010, section 3, "unambiguously created conditions precedent to be performed in the order that they are listed," and, therefore, the plaintiff must have strictly complied with each condition precedent before the surety could be held liable under the bond. The contractor's failure to send notice to the surety under section 3.2 prior to paying outside contractors under section 3.3 precludes the surety's liability. *Id.*

Here, form AIA 312-2010 was also used and the identical language obligating the surety to act only after the owner meets its obligations listed therein is at issue here: "If there is no Owner Default under the Construction Contract, the Surety's obligation under this Bond shall arise after . . .." Regarding this precise language, the courts have found:

> "Inasmuch as paragraph 3 clearly states that Liberty Mutual's obligation under the bond 'shall arise' only after TJ had performed the three conditions detailed in sections 3.1 to 3.3, this language unambiguously created conditions precedent to be performed in the order that they are listed. Therefore, TJ must have strictly complied with each condition precedent before Liberty Mutual could be held liable under the bond." *Granger Constr. Co.*, 134 A.D.3d at 1331 (citations omitted).

"The conditions of the bond with which plaintiff owner failed to comply went directly to the surety's liability, and required strict compliance. *Tishman Westwide Constr. LLC v. ASF Glass, Inc.*, 33 A.D.3d 539, 539 (1st Dept. 2006); *see also 150 Nassau Assoc., LLC v. Liberty Mut. Ins. Co.*, 36 A.D.3d 489 (1st Dept. 2007). "The conditions precedent of the Performance Bonds are set forth in 'unmistakable language of condition,' and as 'express conditions,' they 'must be literally performed'." *Travelers Cas. and Sur. Co.,* 735 F.Supp.2d at 84.

In contention is whether PB complied with the conditions precedent set forth in Section 3.2 of the performance bond, which are listed as: "the Owner declares a Contractor Default, terminates the Construction Contract and notifies the Surety." Section 12 of Travelers Bond states, "notice to the Surety, the Owner or Contractor shall be mailed or delivered to the address shown on the page on which their signature appears."

With respect to the question of notice, Travelers argues that PB did not provide notice to Travelers of the cancellation of the PB/ICT subcontract. Travelers argues that it did not receive PB's May 30, 2014 cancellation letter from PB. It did, however, receive a copy of the letter from ITC via email on September 9, 2014.

PB argues in opposition that it provided adequate notice to Travelers. In support of this contention, PB offers two affidavits concerning its office practice and procedure

with respect to mailing. In the alternative, PB relies on ITC's commencing its lawsuit on August 29, 2014 as notice to Travelers of the contract default, or upon PB informing Travelers by phone in November 2014. However, under the language of the bond, PB was to notify Travelers, which meant PB was to mail or deliver the notice. So, the alternative arguments, that ITC filed its lawsuit, and that PB informed Travelers by phone, are unavailing.

PB itself argues that: "[u]nder the Bond, PB need only mail a letter to the surety to effect notice," and PB states that it did so. PB submits two affidavits to establish its office's mailing procedures. In his affidavit, Salvatore R. Prestano, former Senior Vice President of PB, avers that he notified ITC of its termination through the May 30, 2014 letter. Of the mailing to Travelers, he states:

> "I cannot presently recall if I personally sent the letter or not. But consistent with PB's practice and procedure, if I did not personally mail copies of a letter I wrote, then it would be because I asked a project manager to mail it. Upon information and belief, if a Senior Vice President requested a project manager to mail a letter, then the letter would be sent."

In an affidavit in support of PB's position, Cary M. Siegel, Senior Counsel of PB, notes that the performance bond states, with respect to notice to the surety, that it must be "mailed or delivered to address shown on the page which [sic] their signature appears." Siegel avers that: "In the event that a bonded subcontractor or vendor of PB defaults under its agreement, it is PB's practice and procedure to notify the subcontractor or vendor's surety." Siegel further states: "[o]n or about November 21, 2014, I telephoned

Stuart Jones, Esq. of Travelers and confirmed that the contract with ITC was terminated and that Dynamic Mechanical replaced ITC as the completing contractor at One Police Plaza."

I find that the affidavits are insufficient to raise a presumption that the notice had been duly addressed and mailed and received by Travelers, as required in the performance bond. Neither affiant has personal knowledge of the actual mailing of the notice. Neither affiant swears to having mailed the notice. Both affiants describe PB's mailing practices and procedures in only the most general terms. Prestano's affidavit informs the court in general terms that if his project manager is instructed to mail a letter, it is done. This is not unlike the facts addressed by the First Department in *Matter of Union Indem. Ins. Co. of N.Y.* (220 A.D.2d 341, 341 [1st Dept. 1995]), in which the Court found: "The mailing presumption did not apply in the absence of testimony by a person with knowledge of claimant's regular office practice. The testimony of claimant's vice president that his secretary usually did what she was told was insufficient for this purpose."

As a result, PB is unable to establish that it notified Travelers either by "mail or delivery" of a contractor default in connection with the Project. This was PB's obligation under the Travelers Bond, which PB was required to satisfy before Travelers' obligations arose. Where the language of the contract is clear and unambiguous, the court must "ascertain the intent of the parties from the plain meaning of the language

employed, giving terms their plain ordinary, popular and non-technical meanings." *Tigue v. Commercial Life Ins. Co.*, 219 A.D.2d 820, 821 (4th Dept. 1995). These "[e]xpress conditions must be literally performed," *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690 (1995). Here, the terms set forth in Section 3 unambiguously set forth the condition precedent of notice that PB must satisfy. The court is constrained to interpret that language without any alteration. Thus, the fact that ITC, and not PB itself, sent PB's May 30, 2014 letter to Travelers does not satisfy PB's obligations under the Bond. Nor does the November 21, 2014 telephone call from Cary Siegel. As PB cannot establish that it satisfied those conditions, Travelers' obligations under the bond were not triggered.

Further, it is unnecessary to make any inquiry into whether Travelers demonstrated actual prejudice. Actual prejudice pertains only to section 3.1 of the performance bond, as explicitly set forth in section 4. Section 4 states: "Failure on the part of the Owner to comply with the notice requirement in section 3.1 shall not constitute a failure to comply with a condition precedent to the Surety's obligations, or release the Surety from its obligations, except to the extent the Surety demonstrates actual prejudice." Section 4 does not refer to section 3.2. The AIA Bond Form Commentary and Comparison, which reviews and describes the changes made to the A312 1984 form, does not state otherwise.

RLI's Motion

RLI argues that ITC did not satisfy the conditions precedent set forth in section 3 of the performance bond and thus, ITC's 19th and 20th causes of action must be dismissed. Specifically, RLI argues that ITC's June 3, 2014 letter did not constitute a declaration of contractor default under section 3.2. The letter states that ITC is terminating the ITC/Vamco subcontracts "in accordance with Article 6.1 of said agreement." Article 6.1 of the sub-contracts sets forth the terms under which Vamco may terminate the sub-contracts.

According to RLI, if ITC sought to declare a contractor default, it would have cited article 6.2 of the subcontracts in the June 3, 2014 letter. RLI argues that ITC failed to satisfy the requirements of Section 3.2, by not declaring a contractor default, and not notifying RLI, and additionally failed to satisfy the requirements of section 3.3, by not agreeing to pay the contract balance to either RLI or a completion contractor selected by RLI. As a result, RLI's obligations were not triggered.

According to RLI, ITC did not provide notice to RLI, as required under the terms of the performance bond, that it terminated the subcontracts, since it was not until April 2015, approximately 10 months after the subcontracts were terminated, that ITC served RLI with the complaint. This was the first notice received by RLI from ITC.

In opposition, ITC argues that, at a minimum, there are factual questions as to whether it sufficiently complied with the requirements set forth in section 3 of the performance bond. ITC argues that its obligation under the performance bond to provide

notice to RLI is not precisely defined. The bond's section 3.2 does not define by when ITC must notify RLI of a contractor default, nor does it state that service of a complaint cannot constitute notice. Consequently, its service of its complaint upon RLI was either sufficient to satisfy the condition precedent, or raises questions as to its sufficiency.

According to ITC, when it received PB's May 30, 2014 letter, it did not understand it to be a declaration of a contractor default. ITC argues that it understood the language of the letter, that PB is cancelling its contract with ITC "for the best interests of [NYPA]," to mean that PB was cancelling the contract for convenience. In fact, ITC argues that PB did not use the word default in its letter, and ITC had no reason at the time to believe that its work was defective or deficient in any way. ITC states that it was not until it received PB's answer to the amended verified complaint in March 2015, that it learned that PB was stating that the work was defective. ITC states that PB did not express any problems with the work on the Project. As a result, when ITC sent its June 3, 2014 letter to Vamco, its subcontractor, it simply stated that it was cancelling its contract with Vamco as PB had cancelled the contract with ITC. It is, therefore, ITC's position that its notice was appropriate, because it notified RLI of the "contractor default" as soon as it reasonably could by serving RLI with its third amended verified complaint in March 2015.

"It is well established under New York law that '[t]he interpretation of a contract of suretyship is governed by the standards which govern the interpretation of contracts in

general'." *120 Greenwich Dev. Assoc., LLC v. Reliance Ins. Co.*, 2004 WL 1277998, *11, 2004 U.S. Dist. LEXIS 10514, *31 (S.D.N.Y. 2004). "It is the responsibility of the courts to interpret written instruments." *Tigue v. Commercial Life Ins. Co.*, 219 A.D.2d at 821. Where the language of the contract is clear and unambiguous, the court must "ascertain the intent of the parties from the plain meaning of the language employed, giving terms their plain ordinary, popular and non-technical meanings." *Id.* at 821.

> "Historically, [New York courts] have been extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include . . . [C]ourts may not by construction add or excise terms, nor distort the meanings of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *ACE Sec. Corp. Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 597 (2015)(internal quotation marks and citations omitted).

"An agreement is ambiguous when 'the agreement on its face is reasonably susceptible of more than one interpretation'." *Nappy v. Nappy*, 40 A.D.3d 825, 826 (2d Dept. 2007), quoting *Chimart Assoc. v. Paul*, 66 N.Y.2d 570, 573 (1986). Such an ambiguity might raise a question of material fact not appropriate for resolution by the court on a dispositive motion. Further, "[w]hen a contract does not specify time of performance, the law implies a reasonable time (internal quotations and citations omitted)." *Schwartz v. Rosenberg*, 67 A.D.3d 770, 771 (2d Dept. 2009). "What constitutes a reasonable time for performance depends upon the circumstances of the particular case." *Id.* at 771.

Here, the performance bond, section 3.2, is a condition precedent that, when

satisfied, triggers RLI's options under the contract. The language of this section, therefore, requires strict compliance. *Archstone*, 119 A.D.3d at 498. Section 3.2 states: "§ 3 If there is no Owner Default under the Construction Contract, the Surety's obligation under this Bond shall arise after [3.2] the Owner declares a Contractor Default, terminates the Construction Contract and notifies the Surety." Pursuant to section 5, the surety's obligations arise only when the Owner has satisfied the conditions precedent: "[w]hen the Owner has satisfied the conditions of Section 3, the Surety shall promptly and at the Surety's expense take one of the following actions."

Under section 12, notice to the surety, the owner or contractor "shall be mailed or delivered to the address shown on the page on which their signature appears." Under section 14.3, a contractor default is "failure of the contractor, which has not been remedied or waived, to perform or otherwise to comply with a material term of the Construction Contract."

On the question of notice, ITC concedes that it provided notice to RLI of the contractor default when it served its third amended complaint upon RLI. However, this does not satisfy the condition precedent under the RLI Bond. The Bond requires ITC to notify RLI in writing of a contractor default. It does not specify a time period. It is silent as to whether filing a complaint against ITC is sufficient notice. However, the Bond does state that ITC's obligations as set forth in section 3 must be satisfied before RLI's obligations arise. ITC has offered no New York law to support the proposition

that filing a lawsuit would suffice as notice under AIA 312. When an obligee fails to notify the surety, it deprives the surety of its ability to protect itself pursuant to the performance options. Construing service of the complaint as notice under the Bond deprives the surety of this opportunity. As a result, because ITC did not satisfy the conditions precedent prior to serving RLI with the complaint, RLI could not have breached its contractual obligations, because, pursuant to sections 3 and 5 of the bond, those obligations never arose. Consequently, there is no question of fact that RLI had no opportunity, prior to the commencement of this lawsuit, to meet its obligations under the performance bond. The court, therefore, grants RLI's motion for summary judgment.

In accordance with the foregoing, it is

ORDERED that the defendant Travelers' Casualty and Surety Company of America's motion for partial summary judgment is granted and the fourteenth cross claim set forth in defendant Parsons Brinckerhoff, Inc.'s answer to the third amended verified complaint is dismissed; and it is further

ORDERED that defendant RLI Insurance Company's motion for summary judgment dismissing plaintiff Independent Temperature Control Services, Inc.'s nineteenth and twentieth causes of action is granted and those causes of action are dismissed; and it is further

ORDERED that the remaining claims, cross claims and counterclaims are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
January 20, 2017

ENTER:

J.S.C.
HON. SALIANN SCARPULLA