

Town of Brookhaven v Navigators Ins. Co.
2018 NY Slip Op 30799(U)
April 18, 2018
Supreme Court, Suffolk County
Docket Number: 03118/2015
Judge: William G. Ford
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

COPY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

TOWN OF BROOKHAVEN,

Plaintiff,

-against-

NAVIGATORS INSURANCE COMPANY &
T.& S. BUILDERS, INC.,

Defendants.

NAVIGATORS INSURANCE COMPANY

Third-Party Plaintiff,

-against-

SALVATORE MALGUARNERA, FRANK
CAMPO, EDWARD CAMPO, MICHAEL
CAMPO & JAYNE BOULEVARD
PROPERTIERS, INC.,

Third-Party Defendants.

_____x

Motion Submit Date: 03/01/18
Motion Seq 002 MD

PLAINTIFF'S COUNSEL:

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On defendant's motion pursuant to CPLR 2221(d) &(e), for leave to renew and reargue the Court's prior order denying summary judgment, the following was considered:

1. Notice of Motion, Affirmation in Support & Memorandum of Law in Support dated January 29, 2018 and supporting papers;
2. Affirmation in Opposition dated February 14, 2018 and supporting papers;
3. Reply Affirmation & Memorandum of Law in Further Support dated February 27, 2018; it is

ORDERED that defendant's motion pursuant to CPLR 2221 (d) & (e) for renewal and/or reargument of this Court's prior Short-Form Decision and Order dated December 7, 2017

denying defendant summary judgment, having been fully considered, is **denied** as follows.

I. Background

Defendant Navigator's Insurance Company has moved for leave to reargue, or in the alternative, to renew the denial of their prior motion for summary judgment in this matter. Movant is a performance bond surety on a municipal construction project within and for the plaintiff, Town of Brookhaven.

Since the relevant facts and circumstances concerning the parties' dispute and this litigation were set forth in the Court's prior decision, they will be reiterated here in brief only as necessary for the disposition of the pending application.

Brookhaven's Town Planning Board approved a request for issuance of a performance bond by resolution on or about October 15, 2004 for a project to improve amenities in a subdivision located in the Hamlet of Coram. By that approval, the Town conditioned issuance of the bond "for a term ending on [the] Town's determination of satisfactory completion [of the project] and acceptance of public improvements so funded." On February 15, 2005, the parties then entered into a surety arrangement whereby plaintiff-bond obligee approved a municipal construction performance bond issued by defendant in an amount of \$ 255,000. The bond by its terms provide for a 3 year expiration up to February 2008. It also expressly incorporated a municipal security agreement sought by the Town's Planning Board calling for release of the bond upon municipal satisfaction with the completion of the underlying project.

The parties do not dispute that the project did not complete in a timely fashion. As a result, on May 7, 2013, the Town's Planning Board held a public meeting where a resolution holding defendant in default of its obligations under the bond. This action followed with plaintiff filing a summons and complaint on February 23, 2015.

A. Reargument

Defendant seeks reargument, principally arguing that the Court misapprehended or overlooked its arguments concerning accrual of the statute of limitations. Notably, movant points out that the Court misconstrued the appropriate accrual of plaintiff's claims in context with the bond's expiration. Movant is partly correct: the Court's prior order noted that the bond by its plain terms expired after 3 years in February 2008, however pursuant to CPLR 213(2), the 6-year statute of limitations governing the claim expired in February 2014 (*see e.g. Kamath v Bldg. New Lifestyles, Ltd.*, 146 AD3d 765, 766 [2d Dept 2017][action upon a contractual obligation or liability, express or implied,] must be commenced within six years]; CPLR 213 [2]). Thus, plaintiff's time to commence a timely action would be properly measured from then and not February 2008. Despite this, the Court's prior analysis does not materially change and as a result defendant's motion to reargue is unsuccessful and accordingly must be **denied**.

The Second Department has made clear that motions for reargument are "addressed to the sound discretion of the court" and properly lie "on a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision" (*Vaccariello v Meineke Car Care Ctr., Inc.*, 136 AD3d 890, 892 [2d Dept 2016]). A motion for leave to reargue 'shall be based upon matters of fact or law allegedly overlooked or

misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion’ ” (*Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014]). The motion “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (*Rodriguez v Gutierrez*, 138 AD3d 964, 966 [2d Dept 2016]).

In moving to dismiss a cause of action as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether the action was commenced within the applicable limitations period. To make a *prima facie* showing, the defendant must establish, *inter alia*, when the plaintiff’s cause of action accrued (*Loiodice v BMW of N. Am., LLC*, 125 AD3d 723, 724–25, 4 NYS3d 102, 103–04 [2d Dept 2015]). “In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff” (*Cataldo v Herrmann*, 154 AD3d 641, 642, 62 NYS3d 130, 131 [2d Dept 2017]).

This Court previously ruled that under Town Law § 277(9), the applicable statute governing the performance bond at issue, it was explicitly clear that:

As an alternative to the installation of infrastructure and improvements ... prior to planning board approval, a performance bond ... sufficient to cover the full cost of the same, as estimated by the planning board ... where such departmental estimate is deemed acceptable by the planning board, shall be furnished to the town by the owner.

Town Law § 277(9) (McKinney’s 2017)

Within this Department, our courts have construed the release of a performance bonds in relation to a municipal security agreement reasoning that Town Law’s definition of “performance” contemplates not merely the completion of work but that the work be of satisfactory quality” (*Town of Chester v Republic Ins. Co.*, 89 AD2d 959, 960 [2d Dept 1982][Town L. § 277[1]).

The parties’ submissions on the prior motion also made clear that the surety arrangement was subject, and indeed incorporated expressly into its body, the Brookhaven Town Planning Board approval provisions which explicitly stated:

All performance bonds and/or other security herein required shall run for a term ending upon the Town’s determination of satisfactory completion and acceptance of the public improvements so bonded or secured

Plaintiff notified that defendant that it was in default under its bond obligations in May 2013. Measuring conservatively from that point, plaintiff’s action filed in February 2015 is timely under the applicable 6-year statute of limitations. Defendant’s arguments that it did not consent or agree to an extension of the statutory 3 year limitations period are unavailing. No evidence was presented prior or on the instant application supporting a contention that it disputed or objected to the Town Board’s approval provision, accompanying and read into the bond itself.

Accordingly, defendant's motion for reargument is **denied**.

B. Renewal

Defendant alternatively seeks leave to renew its prior argument in support of dismissal, arguing that the Court's decision failed to account for plaintiff's failure to provide discovery, or otherwise adduce admissible or competent evidence raising a triable issue of fact that the Town's action was timely.

A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Elder v. Elder*, 21 AD3d 1055; see *Matter of Allstate Ins. Co. v. Liberty Mut. Ins.*, 58 AD3d 727). It must be based upon new facts, not offered on the original application, "that would change the prior determination" (CPLR 2221[e][2]; see *Matter of Korman v. Bellmore Pub. Schools*, 62 AD3d 882, 884). The new or additional facts must have either not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion (see *Cole-Hatchard v. Grand Union*, 270 AD2d 447). However, in either instance, a "reasonable justification" for the failure to present such facts on the original motion must be presented (CPLR 2221 [e][3]). The determination of what constitutes a "reasonable justification" is within the Supreme Court's discretion (*Heaven v. McGowan*, 40 AD3d 583, 586; *Dervisevic v Dervisevic*, 89 AD3d 785, 786–87 [2d Dept 2011]).

Here, movant bases its arguments on the fact that at the time of the prior summary judgment motion plaintiff had not produced responses to outstanding interrogatories questioning precisely when the Town completed the defaulted construction project, and how the Town calculated the accrual of its claim. Plaintiff responds opposing this branch of defendant's motion arguing that despite its responses being due according to the Preliminary Conference Order dated August 20, 2015 on October 1, 2015, and discovery compliance conference stipulation dated October 12, 2016 on November 4, 2016, discovery was stayed with the service/filing of the prior summary judgment motion.

Thus, in opposition to the defendant's motion, plaintiff submits documentation supporting the notion that the Town completed the defaulted project sometime between August and October 2014. Further, despite its previous claim in its pleadings, the Town now values its costs to cover at \$161,942.54.

In response, defendant contends that if the Town delayed until 2014 before undertaking efforts to complete the project, it provides proof positive that this action is time-barred. This Court remains unpersuaded. Plaintiff's submission of new and additional proof, adopted by defendant on reply, does not change the Court's analysis considering the Town's determination of unsatisfactory completion of the project in May 2013; commencement of substitute performance in 2015; and eventual litigation in 2015. Since the evidence supplied does not *prima facie* indicate that plaintiff's action was untimely under a 6-year statute of limitations measured from May 2013, defendant's motion to renew is thereby **denied**.

The foregoing constitutes the decision and order of this Court.

Dated: April 18, 2018
Riverhead, New York



WILLIAM G. FORD, J.S.C.

 FINAL DISPOSITION

 X NON-FINAL DISPOSITION