SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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DR. GERALD FINKEL, as a Chairman of the Joint Industry Board of the Electrical Industry,

Plaintiff,

-against-

M. A. ANGELIADES, INC. and FEDERAL INSURANCE COMPANY,

Defendants.

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Index No. 650028/2013
Motion Seq. Nos. 005, 006

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

This is an action concerning a guarantor's failure to pay on a guaranty. Plaintiff Dr. Gerald Finkel, as Chairman of the Joint Industry Board of the Electrical Industry ("Joint Board") moves for summary judgment pursuant to CPLR 3212(b), or in the alternative, for partial summary judgment pursuant to CPLR 3212(e) (Motion Seq. 005). In reply, Defendant M.A. Angeliades, Inc. ("MAA") opposes the motion. MAA also cross-moves for summary judgment pursuant to CPLR 3212 dismissing the complaint against it, as well as an award of costs and disbursements (Motion Seq. 006). Joint Board opposes the motion. The motions are consolidated for disposition.

BACKGROUND FACTS

This dispute stems from an agreement to pay union benefits and contributions to workers on a construction project. MAA was the general contractor on the construction of Public School 338 in the Bronx ("PS 338"). Coastal Electric Construction Corp. ("Coastal") was the electrical

subcontractor on the project. Under the terms of a collective bargaining agreement, Coastal was obligated to make contributions on behalf of its employees to the Joint Board, a union-employer organization that administers benefits to its members. At one point during the project, Coastal stopped paying its required contributions and its employees walked off the job site. To ensure a return of the workers, MAA provided a written guaranty to the Joint Board that it would pay "all benefits/contributions due or may become due" for work performed by Coastal's employees on the project (NYSCEF doc No. 83 at 1). The guaranty was memorialized by letter to the Joint Board's Associate Counsel on May 12, 2010. To ascertain what money was owed for benefits in connection with work on PS 338, MAA asked that it receive "timely accounts of amounts due to the board" (NYSCEF doc No. 94). Following the guaranty, Coastal's employees resumed work and finished the project.

On November 9, 2010, the Joint Board submitted a statement of account to MAA consisting of a spreadsheet that detailed Coastal's calculation of amounts owed to the Joint Board (NYSCEF doc No. 83 at 8). MAA argues this spreadsheet was devoid of backup details to substantiate the claims for benefits owed, and also included payment owed on a non-related construction project. As a result, MAA did not make any payments to Coastal aside from an initial $200,000 payment (NYSCEF doc No. 83 at 2). On July 26, 2011, Coastal filed for bankruptcy (*id.* at 8). The Joint Board then commenced this action against MAA and moved for summary judgment on its claim for payment of the guaranty. The Joint Board contends that Coastal's certified payroll reports show that it is owed $909,957.26, which accounts for the initial payment made by MAA (*id.*). Should the Court conclude that there are issues of material fact regarding the exact amount owed, the Joint Board moves for partial summary judgment on

the issue of liability, as well as any amount the Court may find not in dispute. In reply, MAA opposes the motion and has cross-moved for summary judgment in its favor, seeking dismissal of the Complaint. MAA argues that as the Joint Board did not provide a detailed statement of account, it did not comply with the conditional terms of the guaranty, and the guaranty is thus no longer binding on MAA.

DISCUSSION

Summary judgment is granted when "the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also, DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a prima facie showing, the court must deny the motion, *" 'regardless of the sufficiency of the opposing papers' "* (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez,* 68 NY2d at 324).

On a motion for summary judgment to enforce a written guaranty, "the creditor needs to prove an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to

perform under the guaranty" (*Davimos v Halle*, 35 A.D.3d 270 [1st Dept 2006], *citing City of New York v Clarose Cinema Corp.*, 256 A.D.2d 69 [1st Dept 1998]). However, when a guaranty is not unconditional but rather contains a condition precedent, the guarantor cannot be held liable where the conditions of the guaranty are not met (*Nat'l Westminster Bank USA v Petito*, 202 A.D.2d 193, 195 [1st Dep't 1994]). Where that condition is not met, no action can be taken upon the guarantor (*Bank of Montreal v. Recknagel*, 109 N.Y. 482, 491 [1888]).

Whether MAA's Guaranty was Conditional

Here, the Court finds that while the Joint Board has established the existence of the underlying debt, and MAA's failure to perform, summary judgment for the Joint Board is inappropriate as there are material questions of fact regarding whether the Joint Board complied with the condition of the guaranty. The Joint Board argues that the provision of the letter requesting "timely accounts" does not constitute a "condition" of the guaranty, because the language in the letter is not sufficiently clear as to establish the existence of a condition precedent. The Court of Appeals has held that there must be "unmistakable language of condition" for a finding of a condition precedent to satisfy the terms of a guaranty (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 691 [1995]). The Joint Board additionally contends that the use of the word "please" in MAA's letter regarding the timely statements of accounts renders it not a condition precedent but rather a request that the Joint Board had the option of declining.

However, the fact that MAA wrote its letter in a colloquially polite manner does not alter the Court's reading of its guaranty "in the strictest manner" (*Wesselman v Engel Co.*, 309 NY 27, 30 [1955]). Even if the Court were to analyze the language of the clause, MAA wrote "Please

insure we receive timely accounts of the amounts due" (emphasis added). The use of the word "insure" implies this was not an optional request but rather a necessary condition (*See* Merriam-Webster Online Dictionary, defining "insure" as a verb "to make certain especially by taking necessary measures and precautions").[1] Furthermore, the Joint Board complied with the condition by sending the summary of outstanding benefits in November 2010. The letter accompanying the summary even states that it is being sent "[i]n accordance with your guarantee to pay benefit contributions for the members of Local Union #3…" (NYSCEF doc No. 95 at 2). The Joint Board therefore cannot argue that its obligation to send a timely statement of account was not an express condition of the guaranty.

The Joint Board's Compliance with the Condition

Notwithstanding the Joint Board's duty to comply with the condition, the Court cannot find as a matter of law that the Joint Board violated the condition and MAA is therefore relieved from its obligation. MAA argues that the November response, sent months after the project completed, was not "timely" within the meaning of its request, but that is a subjective conjecture and nothing in the record indicates that MAA requested an earlier accounting before it received the November correspondence (NYSCEF doc No. 109 at 6). The issue is not whether the account summary sent by the Joint Board was timely, but rather whether it is an accurate accounting of the benefits owed to Coastal's workers for their work on the PS 338 project. MAA contends that the accounting pooled money that the Joint Board received from Coastal for amounts owed for benefits across other projects and did not individually account for the funds owed for the PS 338 project (NYSCEF doc No. 140 at 8). MAA alleges this is due to the fact that the Joint Board did

[1] Merriam-Webster Dictionary, insure [https://www.merriam-webster.com/dictionary/insure]

not credit Coastal's payments against any debt owed to the Joint Board for work on the project. The Joint Board disputes this contention, arguing that it had no duty to segregate payments, and that nothing in the record suggests the Joint Board was even informed which project payments were related to when it received said payments from Coastal (NYSCEF doc No. 109 at 8-9).

MAA also raises a variety of other arguments for why the documentation produced by the Joint Board does not constitute compliance with the guaranty's conditions. In support of its summary judgment motion, the Joint Board produced payroll records received from the New York City School Construction Authority ("NYCSCA") (NYCEF doc No. 116). MAA argues that the payroll records are not signed or otherwise certified and are thus inadmissible hearsay. The Joint Board counters that the records are admissible as a hearsay exception pursuant to CPLR § 4518(a) as records that were "made in the regular course of such business." The Court notes that, regardless of the admissibility of the NYCSCA reports, the reports are one of multiple sets of documentation the Joint Board has provided in support of its summary judgment motion. Internal Coastal documents and weekly foreman reports have also been submitted in discovery, which reveal differing accountings of the employees' work on the project (NYSCEF doc No. 129 at 7). The payroll reports thus raise more issues of fact than they resolve (*Jedrzeicvk v Gomez*, 985 N.Y.S.2d 18, 19, 116 A.D.3d 632, 633 (1st Dep't 2014) ("inconsistent information in the corporate documents raise issues of fact, including the validity of the documents, that preclude a summary determination...") (internal citation omitted);

MAA also argues that the monthly payments it made directly to Coastal for its work on the PS 338 project, which total $3,154,985.26, constitute Lien Law trust funds that must be paid to the trust beneficiaries before they can be used for other purpose (NYSCEF doc No. 129 at 15).

In other words, some of the payments the Joint Board previously received from Coastal may include the funds MAA paid Coastal, and those funds must be used for the "trust fund purpose" (the payment of employee benefits) before they can be used for any other purpose. MAA argues that the Joint Board therefore cannot ascertain its damages, as some of the funds that the Joint Board received indirectly from MAA should be credited against whatever benefit payments are outstanding under the guaranty. In reply, the Joint Board argues it is not subject to the Lien Law trust fund laws as it is not a contractor or subcontractor, and disputes that it allocated any money to other projects. MAA and the Joint Board also dispute what amount of funds it received from Coastal, and how much of whatever it received from Coastal should be attributed to the PS 3338 project.

This multitude of questions of law and fact present here renders summary judgment for either party to be an improper remedy. While the Joint Board is correct in asserting that it need not ascertain its damages to an exact dollar amount, "[i]n an action for a breach of contract, the damages recoverable are those which the parties may fairly be supposed when they made the contract to have contemplated as naturally following its violation. . . . Speculative, contingent, and remote damages are excluded" (*United States Trust Co. v O'Brien*, 134 NY 274, 288 [1894]. While the Joint Board has demonstrated the existence of the guaranty and the underlying debt, there is grave uncertainty regarding the exact amount owed, considering the outstanding questions of how much has already been covered by MAA's payments to Coastal, and whether the payroll certifications, assuming they are valid and admissible, specifically cover work on the PS 338 project. The Joint Board's damages thus cannot be reasonably ascertained. However, MAA has not unequivocally demonstrated that the Joint Board breached the conditions of the

guaranty, as it has clearly made several attempts to deliver an accounting, and the Joint Board's proper losses can presumably still be reasonably adjudged.

As there are material issues of fact pertaining to the Joint Board's compliance with the condition of MAA's guaranty, as well as the correct amount of damages owed, the Court finds that summary judgment is an improper remedy for either party at this juncture.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Plaintiff Dr. Gerald Finkel, as Chairman of the Joint Industry Board of the Electrical Industry's motion for summary judgment (Motion Seq. 005) is denied in its entirety; and it is further

ORDERED that Defendant M.A. Angeliades, Inc.'s motion for summary judgment (Motion Seq. 006) is denied in its entirety; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: June 13, 2019

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.