

**Prismatic Dev. Corp. v International Fid. Ins. Co.**

2022 NY Slip Op 30618(U)

February 28, 2022

Supreme Court, New York County

Docket Number: Index No. 650402/2013

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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PRISMATIC DEVELOPMENT CORPORATION	INDEX NO.	650402/2013
Plaintiff,	MOTION DATE	N/A
- v -	MOTION SEQ. NO.	001
INTERNATIONAL FIDELITY INSURANCE COMPANY,		
Defendant.	<b>DECISION + ORDER ON MOTION</b>	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53

were read on this motion to DISMISS.

This is an action by a general contractor (Prismatic) to enforce Performance and Payment Bonds issued by a surety (International) that guaranteed, subject to terms and conditions, the contractual performance of a subcontractor (Nacirema) in a large municipal construction project. In the typical case, the surety is called upon to ensure completion of a terminated subcontractor's incomplete or shoddy construction work and ensure that the subcontractor has paid its bills. Here, by contrast, Nacirema finished its work and was paid without being terminated, and the construction project is long since complete. Now, Prismatic is facing a lawsuit from a *different* subcontractor (EIC Associates, Inc.) that claims it had to work around or complete Nacirema's allegedly faulty work years earlier.<sup>1</sup>

<sup>1</sup> *EIC Associates, Inc v Prismatic Development Corp et al*, Index No. 654256/2013 (Sup Ct, NY County).

Prismatic asserts that International, as surety, must defend that suit and indemnify Prismatic for any losses. International moves to dismiss Prismatic's claim on the ground that Prismatic failed to satisfy the contractual conditions precedent for triggering the surety's obligations under the bonds.

For the reasons that follow, International's motion is granted.

### **Discussion**

On a motion to dismiss pursuant to CPLR §§ 3211 (a)(1) and (7), the Court must “accept the complaint’s factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within a cognizable legal theory” (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 367, 270-71 [1st Dept 2014] [internal quotation marks and citation omitted]; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, bare legal conclusions and “factual claims which are either inherently incredible or flatly contradicted by documentary evidence” are not “accorded their most favorable intendment” (*Summit Solomon & Feldman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]).

#### *A. Performance Bond (First Cause of Action)*

The Performance Bond (NYSCEF 17), in the amount of \$2 million, is a standard form surety agreement known as AIA Document A312. The parties to the agreement are the Contractor (Nacirema), the Owner (Prismatic), and the Surety (International). Paragraph 1 of the agreement provides that “[t]he Contractor and the Surety, jointly and severally, binding themselves ... to the Owner for the performance of the Construction Contract [Prismatic and Nacirema], which is incorporated herein by reference” (*id.* ¶ 1).

Paragraph 3 of the Performance Bond sets forth three key conditions precedent to the surety's liability under the agreement:

3. If there is no Owner Default, the Surety's obligation under this Bond shall arise after:

3.1. The Owner has notified the Contractor and the Surety at its address described in Paragraph 10 below that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract. 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; and

3.2. The Owner has declared a Contractor Default and formally terminated the Contractor's right to complete the contract. Such Contractor Default shall not be declared earlier than twenty days after the Contractor and the Surety have received notice as provided in Subparagraph 3.1; and

3.3. The Owner has agreed to pay the balance of the Contract Price to the Surety in accordance with the terms of the Construction Contract or to a contractor selected to perform the Construction Contract in accordance with the terms of the contract with the Owner

(*id.* ¶ 3).

Paragraph 4, in turn, provides that “[w]hen the Owner has satisfied the conditions of Paragraph 3, the Surety shall promptly and at the Surety's expense take” one of a number of different actions, including arranging for the Contractor “to perform and complete the Construction Contract” or “[u]ndertake to perform and complete the Construction Contract itself, through its agents or through independent Contractors” or obtain bids from qualified contractors to perform and complete the Construction Contract or “[w]aive its right to perform and complete,

arrange for completion, or obtain a new contractor” and either reach a settlement with the Owner or deny liability (*id.* ¶4 [emphasis added]).

“It has been specifically held that the conditions contained in paragraph 3 of the AIA 312 performance bond at issue in this action constitute conditions precedent that require strict compliance, and that the failure to strictly comply with these conditions precedent are fatal to an obligee’s claim under a performance bond” (*E. 49th St. Dev. II v Prestige Air & Design, LLC*, 33 Misc 3d 1205(A) [Sup Ct, King’s County 2011]; *see also Walter Concrete Const. Corp. v Lederle Labs.*, 99 NY2d 603, 605 [2003] [noting that an AIA-312 bond “by its terms requires predefault notification be given to the contractor and surety by the owner”]; *150 Nassau Assoc., LLC v Liberty Mut. Ins. Co.*, 36 AD3d 489 [1st Dept 2007] [“Plaintiff property owner failed to comply strictly with the conditions of the performance bond, which went directly to the surety’s liability and thus warranted summary dismissal of that portion of the complaint addressed to the bond”] [internal citations omitted]; *Tishman Westwide Const. LLC v ASF Glass, Inc.*, 33 AD3d 539, 539 [1st Dept 2006] [“The conditions of the bond with which plaintiff owner failed to comply went directly to the surety’s liability, and required strict compliance”]; *Granger Constr. Co. v TJ, LLC*, 134 AD3d 1329, 1331 [3d Dept 2015] [“TJ must have strictly complied with each condition precedent before Liberty Mutual could be held liable under the bond.”]).

In this case, Prismatic asserts that Nacirema has failed to perform under an indemnification provision in the Construction Contract, which it claims requires Nacirema (and therefore International as surety) to defend against and indemnify claims asserted by EIC arising out of Nacirema’s work on the project. The relevant provision in the Construction Contract states:

HOLD HARMLESS: The Subcontractor [Nacirema] agrees to indemnify, defend and hold the Contractor [Prismatic] harmless from any claims, disputes, or lawsuits brought against the Contractor for any reason whatsoever which may arise out of any act of the Subcontractor, its servants, agents, or employees, and all expenses of the Contractor which may be incurred in connection with said claim, dispute, or lawsuit including reasonable attorney's fees shall be chargeable to and paid by the Subcontractor

(NYSCEF 31 ¶ 10).

International argues that Prismatic's claims under the Performance Bond must be dismissed because Prismatic failed to satisfy the conditions in Paragraph 3 and therefore cannot recover under the Bond. The Court agrees. The obligation to indemnify, if any, necessarily flows from alleged failures by Nacirema during its construction work, which is the core performance covered by the bond. Although the record shows that Prismatic was aware of EIC's complaints about Nacirema's work at the time, and that EIC was going to undertake to correct the work (purportedly at Prismatic's direction), Prismatic did not provide notice to International that it was considering declaring a Contractor Default; it did not declare a Contractor Default or formally terminate the Contractor's right to complete the contract; and it did not agree to pay International the balance of the Contract Price or to a contractor selected to perform the Construction Contract. In these circumstances, International was not given the opportunity, expressly provided under the contract, to take steps to remedy any purported default by Nacirema. Accordingly, International's obligations under the Performance Bond were not triggered.

Prismatic's argument that conditions precedent in the Performance Bond are inapplicable to International's indemnification obligations is unpersuasive. Paragraph 3 sets forth conditions precedent to *all* of the surety's obligations under the agreement, without limitation. Those

conditions give the surety comfort both as to the timing of its obligation and its ability to intercede before the liability attaches to propose options to minimize that liability. Prismatic's reading would leave the surety on the hook indefinitely (pending EIC's decision to sue Prismatic, then Prismatic's inability to have Nacirema satisfy its indemnity obligation) and without any ability to take steps to resolve the dispute or minimize its exposure at the time it arose (*i.e.*, when EIC first raised questions about Nacirema's work).

A similar question was presented in *Archstone v Tocci Bldg. Corp. of New Jersey, Inc.*, 119 AD3d 497 [2d Dept 2014]. In that case, an apartment complex sustained water damage after the contractor had substantially completed the project. As in this case, the property owner plaintiff sought to hold the surety liable under the contractor's indemnification obligations. The surety sought summary judgment on the ground that the property owner failed to comply with the conditions precedent in the A312 agreement. The trial court rejected the plaintiff's argument that the conditions precedent were inapplicable to a claim under the contractor's indemnification obligation (NYSCEF 1114 at 8-9). On appeal, the property owner again argued that "Section 3 procedures that apply to the completion of work on an unfinished product are irrelevant to enforcement of a surety's post-completion indemnity obligations incorporated by reference under Section I" (*see* brief for plaintiffs-appellants in *Archstone*, available at 2013 WL 12201841, \*46). The Appellate Division rejected that argument: "Contrary 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. Since the plaintiffs 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” (*Archstone*, 119 AD3d at 498).<sup>2</sup> The same reasoning applies here.

Prismatic’s alternative argument that it satisfied its obligations by declaring Nacirema in default in a June 29, 2021 letter to Nacirema’s counsel (six years after the completion of construction) is also unpersuasive. The letter failed to comply with subparagraph 3.1 of the performance bond, as it was submitted approximately nine years after Nacirema completed its work (and was paid by Prismatic) (*see 153 Hudson Dev., LLC v DiNunno*, 2003 WL 25520440 [Sup Ct, NY County 2003] [“the actions of [Plaintiff] in retaining replacement contractors to complete the work on the renovation project, and waiting one and a half years to notify [Defendant] of [contractor’s] alleged default or otherwise attempting to comply with the default and terminate requirements in paragraph 3 precludes any claim for relief under the Performance Bond. [Plaintiff’s] actions unreasonably deprived [Defendant] of the ability to investigate or remedy the immediate consequences of [Contractor’s] alleged default, and, thus, the claims against it . . . must be dismissed”], *affd* 8 AD3d 77 [1st Dept 2004]). Further, Prismatic does not allege that it formally terminated Nacirema’s right to complete the subcontract, as required by paragraph 3.2. For similar reasons, Prismatic’s argument that it could simply assert a default and terminate Nacirema *now* – years after completion of its work – is unavailing.

In sum, Prismatic’s claim under the Performance Bond fails as a matter of law for failure to satisfy contractual conditions precedent.

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<sup>2</sup> On appeal, the property owner plaintiff/appellant argued that “Section 3 procedures that apply to the completion of work on an unfinished product are irrelevant to enforcement of a surety’s post-completion indemnity obligations incorporated by reference under Section I” (*see* brief for plaintiffs-appellants in *Archstone*, available at 2013 WL 12201841, \*46).

B. *Payment Bond (Second Cause of Action)*

Prismatic's claim under the Payment Bond also fails. Paragraph 2.2 of the Payment Bond provides that International shall defend, indemnify, and hold Prismatic harmless from claims, demands, liens, or suits by any person or entity whose claim, demand, lien, or suit is for the payment for labor, materials, or equipment furnished for use "in the performance of the Construction Contract" (NYSCEF 18). Prismatic argues that International is obligated under the Payment Bond to compensate EIC for its additional costs incurred in performing work required under the Nacirema Subcontract and is, therefore, obligated to defend and indemnify Prismatic from such claims in the EIC Lawsuit.

The flaw in Prismatic's claim is that EIC's work was not "in the performance of the [Nacirema] Construction Contract." The Payment Bond covers only work ordered or directed by Nacirema. "A payment bond is an undertaking whereby a surety guarantees to an obligee that all bills for labor and materials contracted for, and actually used by the contractor, will be paid by the surety if the contractor defaults" (*E. 49th St.*, 33 Misc 3d 1205(A), citing *Travelers Cas. and Sur. Co. v Dormitory Auth.-State of New York*, 735 F Supp 2d 42, 85 [SDNY 2010] [applying New York law]; *Area Masonry, Ltd. v Dormitory Auth.*, 64 AD2d 810, 810-811 [4th Dept 1978]; 11 NY Jur 2d, Bonds § 61). "It is well established that 'the owner-obligee may generally not recover damages from the surety under the payment bond, as the bond is intended to provide payment to persons supplying labor and material to the contractor, not to provide a financial recovery to the owner-obligee'" (*E. 49th St.*, 33 Misc 3d 1205(A), quoting *Travelers*, 735 F Supp 2d at 87). "Indeed, '[n]umerous courts have denied recovery to an owner-obligee under a payment bond, or at least observed that the caselaw generally disfavors' such a suit" (*E. 49th St.*, 33 Misc 3d 1205(A), quoting *Travelers*, 735 F Supp 2d at 87; *Fed. Ins. Co. v Me. Yankee*

*Atomic Power Co.*, 183 F Supp 2d 76, 81 [D Me 2001] [collecting cases]). In the related action, EIC is not asserting liens or claims predicated upon non-payment or underpayment by Nacirema (that claim was already asserted and subsequently settled by the parties, see *EIC Assocs., Inc. v. Nacirema Envt'l Servs. Co.*, Index No. 650401/2012 [Sup Ct, NY County]). Rather, EIC alleges that it was underpaid by Prismatic for work that Prismatic directed (see Index No. 654256/2013, NYSCEF 4 ¶¶ 36-44).

Here, there is no allegation that Nacirema asked EIC to perform work under the Construction Contract. Indeed, EIC's interrogatories, on which Prismatic's claim for indemnification is based, state that EIC was directed *by Prismatic* to address Nacirema's prior defective performance (see e.g., NYSCEF 40 at 4 ["EIC and its dredging subcontractor were directed by Prismatic to proceed with the removal of demolition debris which was left behind by Prismatic's demolition subcontractor (Nacirema) . . . EIC and its dredging subcontractor were told by Prismatic that they would be compensated with a change order for this and other additional dredging-related costs, but no payment has been processed to date"]). International is not obligated under the terms of the Payment Bond to compensate Prismatic for such work.

\* \* \* \*

The Court has considered Prismatic's remaining arguments and finds them to be without merit.

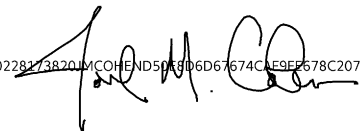
**ORDERED** that Defendant's motion to dismiss is **GRANTED**; it is further

**ORDERED** that the Clerk enter judgment dismissing the Complaint with prejudice; and it is further

**ORDERED** that the parties upload to NYSCEF a copy of the oral argument transcript upon receipt.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

2/28/2022

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED  DENIED

GRANTED IN PART  OTHER

APPLICATION:  SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT  REFERENCE