

JDS Constr. Group LLC v Copper Servs., LLC
2022 NY Slip Op 31688(U)
May 23, 2022
Supreme Court, New York County
Docket Number: Index No. 656912/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

-----X
JDS CONSTRUCTION GROUP LLC,

INDEX NO. 656912/2020

Plaintiff,

MOTION DATE _____

- v -

COPPER SERVICES, LLC, TALISMAN CASUALTY
INSURANCE COMPANY, LLC

MOTION SEQ. NO. 001

Defendant.

**DECISION + ORDER ON
MOTION**

-----X
HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

JDS Construction Group LLC's (the **Owner**) motion for summary judgment as to liability on its cause of action for breach of the Payment Bond (hereinafter defined) against Talisman Casualty Insurance Company, LLC (the **Surety**) is denied without prejudice because issues of fact exist as to whether the was an Owner Default (hereinafter defined) under the Construction Contract (hereinafter defined) pursuant to the default notices sent by the Contractor (hereinafter defined). Discovery must go forward as to whether these default notices were legitimate or without merit.

The Relevant Facts and Circumstances

Copper Services LLC (the **Contractor**), the Surety, and the Owner entered into a Payment Bond (the **Payment Bond**; NYSCEF Doc. No. 35) dated April 1, 2016, in the amount of \$11,725,000, in connection with an Agreement Between Construction Manager and Contractor (the

Construction Contract; NYSCEF Doc. No. 34) dated April 1, 2016, between the Owner¹ and the Contractor. For completeness, the parties also entered into a Performance Bond (the **Performance Bond**; NYSCEF Doc. No. 36) in connection with the Construction Contract.

Pursuant to the Payment Bond:

§ 1 The Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner to pay for labor, materials and equipment furnished for use in the performance of the Construction Contract, which is incorporated herein by reference subject to the following terms.

§ 2 If the Contractor promptly makes payment of all sums due to Claimants and defends, indemnifies and holds harmless the Owner from claims, demands, liens or suits by any person or entity seeking payment for labor, materials or equipment furnished for use in the performance of the Construction Contract, then the Surety and the Contractor shall have no obligation under this Bond.

§ 3 If there is no Owner Default under the Construction Contract, the Surety's obligation to the Owner under this Bond shall arise after the Owner has promptly notified the Contractor and the Surety (at the address described in Section 13) of claims, demands, liens or suits against the Owner or the Owner's property by **any person or entity** seeking payment for labor, materials or equipment furnished for use in the performance of the Construction Contract and tendered defense of such claims, demands, liens or suits to the Contractor and the Surety

(NYSCEF Doc. No. 35, §§ 1-3 [emphasis added]). An Owner Default is defined under the Payment Bond as the “[f]ailure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract” (*id.*, § 16.4).

¹ The Payment Bond and the Construction Contract were initially entered into by 111 Construction Manager LLC, who then assigned its interests to the Owner (NYSCEF Doc. No. 56). It is undisputed that the assignment was never entered with the office of the County Clerk.

On November 5, 2018, April 17, 2019, September 18, 2019, and October 21, 2019, the Owner sent various notices of delay to the Contractor (NYSCEF Doc. Nos. 37-38, 40-41), based on the Contractor's alleged failure to comply with the Construction Agreement. Additionally, on October 30, 2019 the Owner sent the Contractor a notice (NYSCEF Doc. No. 42) of liens filed against the Property by the Contractor's suppliers and/or subcontractors and demanding that the Contractor discharge the liens within 10 days.

The Owner sent a notice to the Surety dated June 13, 2019 (NYSCEF Doc. No. 39), informing the Surety that it was contemplating declaring a Contractor default under the Construction Contract. The Owner subsequently sent notices dated October 1, 2020 (NYSCEF Doc. No. 45) and November 16, 2020 (NYSCEF Doc. No. 46) to the Surety of liens or claims filed against the Owner or the Project and demanding payment.

By letter dated November 30, 2020 (NYSCEF Doc. No. 47), the Surety denied the claim under the Payment Bond and the Performance Bond because, among other things, (i) the Owner hired contractors to replace the Contractor, which was a material breach of the Payment Bond, (ii) the Owner was in breach of the Construction Contract by failing to make payments for work performed by the Contractor, and (iii) the Owner failed to file notice of the assignment of the Construction Contract with the office of the County Clerk.

For its part, on September 16, 2019, November 7, 2019, and December 2, 2019, the Contractor had sent various notices of nonpayment to the Owner (NYSCEF Doc. Nos. 59-61) alleging that the Owner failed to pay the Contractor as required under the Construction Contract. When the

Owner did not make the requested payments, on September 11, 2020, the Contractor filed liens against the Owner and the Project. The Owner informed the Contractor that the Owner denied any liability to the Contractor and demanded that the Contractor discharge all liens it had filed on the Property within 10 days (NYSCEF Doc. No. 44).

Ultimately, the Owner terminated the Construction Contract based on the Contractor's default (NYSCEF Doc. No. 43) on February 26, 2020. The Owner subsequently sent notices to the Surety dated March 5, 2020, and March 20, 2020 (NYSCEF Doc. Nos. 62-63), informing the Surety that it had terminated the Construction Contract and demanding that the Surety pay the balance of the price for the Construction Contract. The Surety responded by letter dated April 1, 2020 (NYSCEF Doc. No. 64) that it had no record of the Owner being the Owner under the Construction Contract or the Payment Bond and, therefore, the Owner lacked standing to make a claim under the Payment Bond.

The Owner then sued alleging causes of action for breach of the Construction Contract (first cause of action), a declaratory judgment for willful exaggeration of liens (second cause of action), damages for willful exaggeration of liens (third cause of action), breach of the Performance Bond (fourth cause of action), specific performance of the Payment Bond (fifth cause of action), and breach of the Payment Bond (sixth cause of action).

The Owner moved for a default judgment against the Contractor. By decision and order dated October 28, 2021, the Court granted the motion for a default judgment without opposition and

adjudged that the Owner was entitled to a declaration that the ten liens filed by the Contractor against the Owner and the Project were invalid (NYSCEF Doc. No. 82).

In support of its motion, the Owner adduces that the Construction Contract was properly assigned to it (NYSCEF Doc. No. 56), that various sub-contractors have filed liens against the Owner and the Project, and that demand for payment was properly made under the Payment Bond. This establishes its standing to assert the claims here and otherwise meets its prima facie burden of entitlement to summary judgment.

In its opposition papers, the Surety argues that an issue of fact exists as to whether the Owner was in default for failure to make payments under the Construction Contract, that the Surety is not obligated under the Payment Bond for liens filed by the Contractor, and that pursuant to NY Lien Law § 15 the Owner is not obligated to pay under the Payment Bond because the assignment of the Construction Contract was not properly recorded. The Surety adduces letters predating the default judgment against the Contractor which indicate substantial underpayment to the Contractor by the Owner (NYSCEF Doc. Nos. 59-61).

Discussion

On a motion for summary judgment, the proponent must make a prima facie showing of its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once such a showing has been made, the party opposing the motion must produce evidence in

admissible form sufficient to establish the existence of material issues of fact which require trial (*id.*).

The Owner has standing to assert claims under the Performance Bond. It cannot be disputed that the assignment of the Construction Contract to the Owner was proper. Although the Surety stated in its April 1, 2020, letter that it had no record of the Owner being the Owner, it does not dispute that it has subsequently received such notice. As discussed below, the Surety's argument that the Owner lacks standing to bring claims because the assignment of the Construction Contract was not recorded with the office of the County Clerk is unavailing, and the Owner has standing.

It is clear pursuant to Section 3 of the Payment Bond that the Surety is liable for claims or liens filed by the Contractor or its sub-contractors. The explicit language provides that the Surety is obligated to pay claims or liens by *any person* or entity seeking payment in connection with the Construction Contract. The Contractor is not excluded, and in fact, an Owner Default precludes the Surety's obligations under the Payment Bond, and therefore the Contractor's liens would have been covered by the Payment Bond had the Court not declared them invalid. The remaining liens filed against the Owner and the Project by the sub-contractors are properly considered under the Payment Bond.

The Surety also cannot invoke NY Lien Law § 15 as a defense to nonpayment under the Payment Bond. By its plain language, NY Lien Law § 15 is applicable to subcontractors, laborers, and materialmen, which the Surety is not. The Surety therefore cannot seek to avoid

liability pursuant to NY Lien Law § 15. Nor can the Surety argue that the assignment of the Construction Contract is void as against it because it was not properly registered with the County Clerk pursuant to NY Lien Law § 15. The Surety cannot seek to void the assignment under a statute that affords it no protection.

The Owner is now however entitled to summary judgment. The Contractor filed several notices of nonpayment and ultimately filed liens against the Owner for allegedly failing to pay pursuant to the Construction Contract. Although the Owner disputes these claims and seeks a declaration in this action that the liens filed by the Contractor were willfully exaggerated, summary judgment is not appropriate. It is of no moment that the liens have been adjudged and declared invalid. Given the fact and amount of underpayment, the Surety has raised an issue of fact as to whether an Owner Default existed. The Surety is entitled to discovery as to whether these alleged underpayments were legitimate complaints raised by the Contractor or whether they were fabricated in defense of the defaults asserted by the Owner. Thus, summary judgment must be denied without prejudice. The sole issue of fact remains whether there was an Owner Default based on the notices of default sent by the Contractor.

For completeness, the Court has considered the Surety's remaining arguments and finds them unavailing.

It is hereby ORDERED that the Owner's motion for summary judgment as to liability on its cause of action for breach of the Payment Bond is denied without prejudice.

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5/23/2022

DATE

ANDREW BORROK, JSC

CHECK ONE:

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CASE DISPOSED

☒

NON-FINAL DISPOSITION

☐

GRANTED

☒

DENIED

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE