

**National Union Fire Ins. Co. of Pittsburgh, P.a. v
American Pipe & Tank Lining Co., Inc.**

2023 NY Slip Op 31241(U)

April 13, 2023

Supreme Court, New York County

Docket Number: Index No. 654183/2022

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, P.A.

Plaintiff,

- v -

AMERICAN PIPE & TANK LINING CO., INC.,

Defendant.

-----X

INDEX NO. 654183/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion to dismiss is denied in its entirety.

Facts

Defendant AMERICAN PIPE & TANK LINING CO., INC. (American Pipe) bought an excess liability policy from plaintiff NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, P.A. (National Union). The excess policy covers bodily and personal injury claims. Defendant also obtained an appeal bond from American Home Assurance Company (AHAC) in an appeal regarding a personal injury case. Both AHAC and National Union are AIG member companies, and National Union took AHAC's place in the appeal bond. After the appeal American Pipe refused to pay the amended judgment, claiming it should be covered by the excess policy issued by National Union. Plaintiff disagreed, claiming a portion of the judgment is not covered by the policy and should be reimbursed by defendant. The suit ensued with plaintiff raising breach of contract and unjust enrichment claims against defendant.

Motion to dismiss general standard

On a motion to dismiss the court “merely examines the adequacy of the pleadings”, the court “accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff’s claim.” *Davis v Boehem*, 24 N.Y.3d 262, 268 (internal citations omitted).

CPLR § 3211(a)(1)

Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted *conclusively* establishes a defense to the asserted claims as a matter of law. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (emphasis added). “[S]uch motion may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff’s factual allegations.” *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (emphasis added). A paper will qualify as “documentary evidence” only if it satisfies the following criteria: (1) it is “unambiguous”; (2) it is of “undisputed authenticity”; and (3) its contents are “essentially undeniable”. *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 A.D.3d 189, 193 [1st Dept. 2019]. “[T]he documentary evidence, i.e., the *affidavits* and *emails* of North Shore and Inter-Reco personnel, do not qualify as ‘documentary evidence’ for purposes of CPLR 3211 (a) (1).” *United States Fire Ins. Co. v. North Shore Risk Mgt.*, 114 A.D.3d 408, 409 [1st Dept. 2014]

CPLR § 3211(a)(7)

“In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” *Leon v. Martinez*, 84 N.Y.2d 83, 88. “What the Court of Appeals has consistently said is that evidence in an affidavit used by a defendant to attack the sufficiency of a pleading “will seldom if ever warrant the relief [the defendant] seeks unless [such evidence] establish[es] conclusively that

plaintiff has no cause of action”. *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 134 [1st Dept. 2014]. “[T]he Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim.” *Id.*

Breach of contract (The second cause of action)

To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages. *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 A.D.3d 49, 58 [1st Dept. 2013].

Here, the agreement at issue is the undertaking on appeal, i.e., the appeal bond. CPLR § 5519(a)(2) provides for a stay of enforcement pending appeal from a money judgment where an undertaking is obtained. The undertaking can be obtained in two ways: it is either a deposit that equals the money judgment and is made by the appellant. CPLR § 2501(2), or a promise made by a duly licensed surety to do so. CPLR § 2501(1). The surety’s undertaking is obtained in the form of an appeal bond filed in court and the bond guarantees payment of the judgement under the specified conditions. CPLR § 2505. A surety is “an insurance company authorized to execute the undertaking within the state”. CPLR § 2502(a)(1). “Surety bonds--like all contracts--are to be construed in accordance with their terms.” *Walter Concrete Constr. Corp. v. Lederle Labs.*, 99 N.Y.2d 603, 605.

Here, the appeal bond upon which plaintiff National Union sought to recover first recited the present value of the judgement consisting of \$ 4,551,969.38 and then indicated defendant American Pipe desired to stay the enforcement of the judgement against it. The appeal bond proceeds to say in pertinent part that American Home Assurance Company (AHAC, an AIG member company) “does hereby *undertake*, pursuant to the Statute in such case made and

provided, that if said judgment so appealed from, or any part thereof, is affirmed, or the appeal is dismissed, *defendants shall pay* the amount directed to be paid by said judgment, or the part of it as to which said judgment is affirmed, . . . , but in any event *no greater than \$ 3,551,969.38.*” See NYSCEF Doc. No. 253 page 1-2 (emphasis added.)

The plain language of the appeal bond defines the role played by AHAC—a surety who undertook to “pay the amount directed to be paid by said judgment, or the part of it . . . affirmed”. The latter clause of the appeal bond does in express language limit the amount to be paid on the judgment to \$3,551,969.38, calculated from the layers of policy held by defendant when the bond was filed.

Therefore, by presenting the appeal bond, plaintiff alleged that defendant and AHAC entered into a valid agreement recognized by the court. Under the agreement, defendant’s obligation is to pay the judgement affirmed by the appellate court with a cap set on \$3,551,969.38. Failure to pay the damages set in the amended judgment is a failure to perform defendant’s promise under the appeal bond, regardless of whether defendant can be reimbursed by National Union based on the excess liability policy. See NYSCEF Doc. No. 273 page 5-6.

By presenting the *Agreement to Pay Amended Judgment* that is signed by American Pipe, National Union and AHAC, plaintiff alleged the following: 1) National Union stepped into the shoes of AHAC and assumed the latter’s role under the appeal bond, becoming a de-facto surety to defendant; 2) National Union paid the portion of the amended judgment that is rejected by defendant and performed AHAC’s promise under the appeal bond; 3) damages ensued because part of judgment paid by National Union is not covered by the excess liability policy and is refused to be indemnified by American Pipe, leaving National Union uncompensated. See NYSCEF Doc. No. 7 page 3. Accordingly, plaintiff has alleged all four elements of breach of contract.

The major evidence upon which is relied by defendant are the Undertaking on Appeal and the Commercial Excess Liability Policy (hereinafter, the Excess Policy) sold to defendant by National Union. See NYSCEF Doc. No. 14, page 3. By presenting this evidence, Defendant tried to establish the point that National Union is not entitled to reimbursement of the portion paid pursuant to the *Agreement to Pay Amended Judgment* because it should be covered by the Excess Policy. By filing the appeal bond in the court, the apparent surety, initially AHAC and later National Union, becomes collaterally liable for the money judgment if the obligor, American Pipe, fails to pay it. That's exactly what surety does in the proceeding. But the liability imposed on surety does not deny its possible right to collect the money from its principal, which is essential to the business of appeal bond and the basis for the breach of contract claim.

The affidavit proffered by American Pipe's owner Helen Silver and Defendants' statement of material facts are not documentary evidence, thus not considered by the court for the § 3211(a)(1) ground to dismiss. See NYSCEF Doc. No. 41 & 13.

Since the documentary evidence submitted by defendant neither conclusively establishes a defense to the claim of breach of contract, nor does it utterly refute plaintiff's factual allegations, the motion to dismiss the second cause of action pursuant to § 3211(a)(1) and (a)(7) should be denied.

Unjust Enrichment (The third cause of action)

While “[a] cause of action for unjust enrichment is stated where plaintiffs have properly asserted that *a benefit was bestowed . . . by plaintiffs* and that *defendants will obtain such benefit without adequately compensating plaintiffs therefor*”, it must also be pleaded and proven that the *benefit conferring services were performed for the defendant*, thereby resulting in defendant's unjust enrichment. “It is not enough that the defendant received a benefit from the activities of the

plaintiff; if services were performed at the behest of *someone other than the defendant*, the plaintiff must look to that person for recovery”. *Murphy v 317-319 Second Realty LLC*, 95 A.D.3d 443, 446 [1st Dept. 2012].

Here, plaintiff has properly asserted that a benefit was bestowed to defendant, i.e., the first layer excess policy gap made to satisfy the money judgment, it was performed for the defendant, and defendant obtained such benefit without adequately compensating plaintiff. Given that plaintiff National Union wore two hats in the present case, the court needs to dissect the facts to facilitate the legal analysis.

When AHAC executed the undertaking on appeal for American Pipe on September 22, 2020, it did so arguably as a surety and defendant was its principal. Accordingly, when defendant/principal American Pipe defaulted on the appeal bond, the surety AHAC would step in and pay off the amended judgment for its principal and fulfill its undertaking to the court. After that, the surety could demand indemnity from its principal for the judgment paid on the latter’s behalf.

Plaintiff National Union has pleaded a cognizable unjust enrichment claim: the gap payment made for American Pipe to satisfy the amended judgment is the benefit bestowed by plaintiff. The excess policy issued by National Union does not appear to cover the gap payment. Accordingly, American Pipe obtained the benefit without sufficiently compensating plaintiff. Therefore, unless the evidence submitted by defendant can either *conclusively establish a defense* or *completely refute* plaintiff’s factual allegations, the motion to dismiss the claim should be denied. That has not occurred here, so this part of the motion is denied.

Declaratory judgement (The first cause of action)

CPLR § 3001 provides in pertinent part that: “the supreme court may render a declaratory judgment having the effect of a final judgment as to the *rights and other legal relations* of the parties to a justiciable controversy whether or not further relief is or could be claimed.” “[T]he demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested.” (CPLR § 3017 [b])

Defendant moves to dismiss plaintiff’s first cause of action which seeks a declaratory judgment of National Union’s role as a surety when American Pipe refused to satisfy the judgment and National Union made the gap payment, accordingly, based on the plain language of the Appeal Bond.

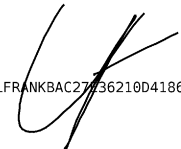
Plaintiffs also seeks a declaratory judgement that it has the right to demand reimbursement of the Gap Payments made for American Pipe and the number should be \$1,210,751.24.

Affording the complaint a liberal construction, taking its allegations as true, and providing plaintiff the benefit of every possible inference, there is a cognizable claim that National Union acted as a surety when it made the gap payment to satisfy the money judgement after American Pipe refused to do so. This is also recognized by American Pipe. National Union has the right to seek reimbursement of the gap payment from defendant as it was not covered by the excess policy. The exact number should be determined via discovery or in trial.

Therefore, plaintiff’s first cause of action is not subject to dismissal pursuant to CPLR 3211.

The Court therefore finds that in the light most favorable to the plaintiff, and for the reasons stated above, all three causes of action can survive the challenge posed by CPLR § 3211 (a)(1) and (a)(7) and defendant has failed to their burden on this aspect of the motion at this time. Accordingly, it is hereby

ADJUDGED that the motion to dismiss by defendant is denied; and it is further
ORDERED that defendant answer the above complaint not more than twenty days
following service of this Decision and Order with notice of entry.


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LYLE E. FRANK, J.S.C.

4/13/2023
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	<input type="checkbox"/> REFERENCE