

International Fidelity Ins. Co. v Kulka Constr. Corp.
2011 NY Slip Op 30899(U)
April 6, 2011
Supreme Court, Suffolk County
Docket Number: 50519/2009
Judge: Emily Pines
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SHORT FORM ORDER

INDEX NUMBER: 50519-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present: **HON. EMILY PINES**

J. S. C.

Original Motion Date: 02-01-2011
 Motion Submit Date: 02-01-2011
 Motion Sequence No.: 001 MOTDCASEDISP

FINAL
 NON FINAL

_____ X

INTERNATIONAL FIDELITY INSURANCE COMPANY,

Plaintiff,

-against-

KULKA CONSTRUCTION CORP., JACK KULKA AND
HARRIET KULKA,

Defendants.

_____ X

Attorney for Plaintiff

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 By: Wendy S. Van Dorn, Esq.
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 East Meadow, New York 11554

Attorney for Defendants

John M. Brickman, Esq.
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 Brickman & Limmer, PC
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 Great Neck, New York 11021

ORDERED that the plaintiff's motion (motion sequence number 001) for summary judgment is granted to the extent indicated herein.

FACTUAL AND PROCEDURAL BACKGROUND

In this action, plaintiff International Fidelity Insurance Company ("IFIC") seeks to recover damages for breach of an indemnity agreement. On October 8, 1999, the plaintiff entered into an Agreement of Indemnity with the defendants, Kulka Construction Corp., Jack Kulka and Harriet Kulka, pursuant to which the defendants agreed, among other things, to indemnify and hold plaintiff harmless in the event plaintiff suffered any loss on any surety bond plaintiff wrote at the request of the defendants. The Indemnity Agreement provides, in relevant part:

SECOND: The Contractor and Indemnitors shall exonerate, indemnify, and keep indemnified the Surety from and against any and all liability for losses and/or expenses of whatsoever kind or nature . . . and from and against any and all such losses and/or expenses which the Surety may sustain and incur: (1) By reason of having executed or procured the execution of the Bonds, (2) By reason of the failure of the Contractor or Indemnitors to perform or comply with the covenants and conditions of this Agreement or (3) In enforcing any of the covenants and conditions of this Agreement. Payment by reason of the aforesaid causes shall be made to the Surety by the Contractor and Indemnitors as soon as liability exists or is asserted against the Surety, whether or not the Surety shall have made any payment therefor. Such payment shall be equal to the amount of the reserve set by the Surety. In the event of any payment by the Surety the Contractor and Indemnitors further agree that in any accounting between the Surety and the Contractor, or between the Surety and the Indemnitors, or either or both of them, the Surety shall be entitled to charge for any and all disbursements made by it in good faith in and about the matters herein contemplated by the Agreement under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether or not such liability, necessity or expediency existed; and that the vouchers or other evidence of any such payments made by the Surety shall be prima facie evidence of the fact and amount of the liability to the Surety.

* * *

THIRTEENTH: The Surety shall have the right to adjust, settle or compromise any claim, demand, suit or judgment upon the Bonds, unless the Contractor and the Indemnitors shall request the Surety to litigate such claim or demand, or to defend such suit, or to appeal from such judgment, and shall deposit with the Surety, at the time of such request, cash or collateral satisfactory to the Surety in kind and amount to be used in paying any judgment or judgments rendered or that may be rendered, with interest, costs, expenses and attorneys' fees, including those of the Surety.

On February 4, 2002, Plaintiff, as Surety, issued a Performance Bond and a Payment Bond ("Bond") in the amount of \$4,130,100.00, at the request of defendants for a construction contract defendant Kulka Construction Corp. entered into with St. Raphael's Roman Catholic Church for the construction of a new church.

According to Plaintiff, at some point after the Bond was issued, Kulka Construction Corp. defaulted on its obligations under the construction contract by failing to pay some of its subcontractors, suppliers and or laborers and in failing to adequately perform the construction services it was required to perform under the construction contract. Plaintiff further alleges that it received claims against the Bond as a direct result of Kulka Construction Corp.'s failure to perform its obligations under the construction contract. Notably, in opposing the instant motion, the defendants do not dispute the foregoing allegations.

In 2003, an action was commenced in Supreme Court, Suffolk County by Kristeel Construction, Inc. ("Kristeel") against IFIC, Kulka Construction Corp., and Jack Kulka ("Kristeel Action"). In that action, Kristeel, a subcontractor on the construction of the new church, claimed

that Kulka Construction Corp., the general contractor, failed to pay Kristeel for labor and materials provided on the project. Pursuant to a Stipulation of Settlement dated June 11, 2007, the Kristeel Action was settled for \$175,000.00, to be paid by IFIC. The Stipulation of Settlement was executed by, among others, Jack Kulka, and it specifically states that Mr. Kulka approved the amount of the settlement paid by IFIC to Kristeel.

IFIC commenced the instant action in 2009, asserting separate causes of action seeking contractual and common law subrogation and indemnity from the defendants in the amount of \$352,145.66, comprised of the \$175,000.00 it paid to settle the Kristeel Action and \$177,145.66 in expenses incurred by IFIC in investigating Kristeel's claim and in defending the Kristeel Action. IFIC now moves for summary judgment on both causes of action.

In support of its motion, IFIC submits, among other things, an affidavit from Genise Teich, Esq., Senior Managing Counsel for IFIC. In her affidavit, Ms. Teich states that she has oversight of the books and records maintained by IFIC relating to the Bond at issue and that she has reviewed and is familiar with same. She further states that all records and documentation attached to her affidavit are kept in the ordinary course of IFIC's business and are true and accurate copies. After setting forth the factual background, Ms. Teich states that IFIC incurred losses totaling \$352,145.66 (claims and expenses) as a result of payments on the Bond issued to defendants. She provides a Summary of the Claims Extract as demonstrating the payments made by IFIC on the Bond. Teich further states that "each payment was made with the good-faith belief that IFIC either was liable for the amount of the payment, or that such payment was necessary or expedient for IFIC to perform its Payment and Performance Bond obligations." She also states that IFIC conducted a full investigation of the claim filed by Kristeel and, in good faith, determined that it was valid, and settled the claim for \$175,000.00. In accordance with the settlement of the Kristeel Action, on June 21, 2007, IFIC issued a check in the amount of \$175,000.00 payable to Kristeel's attorney. With regard to expenses incurred by IFIC, Ms. Teich avers that it incurred various legal, consulting and other expenses, in the total amount of \$177,145.66 as part of its investigation and defense of Kristeel's claim. Ms. Teich points to the Claims Extract as evidence of payment of the various expenses for photocopying expenses, consulting engineering services and legal services, and she further states that IFIC reviewed all of the charges and determined that they were reasonable for the services performed. Ms. Teich asserts that despite IFIC's repeated demands that defendants indemnify IFIC pursuant to the Indemnity Agreement, they failed to do so.

IFIC argues that it is entitled to summary judgment on its claim for indemnification pursuant to the clear and unambiguous terms of the Indemnity Agreement because the Claims Extract, Summary of Claims Extract and Teich affidavit are prima facie evidence of the amount of the costs and expenses incurred by IFIC. Moreover, IFIC highlights the fact that Jack Kulka

executed the Stipulation of Settlement in the Kristeel Action as evidence that defendants approved the settlement amount.

The defendants oppose the plaintiff's motion for summary judgment claiming that IFIC has not met its burden of submitting proof in admissible form to demonstrate its entitlement to judgment as a matter of law. Specifically, defendants contend that the plaintiff failed to establish the admissibility of the documents attached to the Teich affidavit. Additionally, the defendants argue that the Teich affidavit and the exhibits attached thereto fail to establish that the amounts paid by IFIC were reasonable and made in good faith. Even if plaintiff met its evidentiary burden, defendants contend that the statute of limitations bars plaintiff from recovering \$39,331.94 in payments made more than six years before this action was commenced. Notably, the defendants have submitted only an attorney's affirmation and a memorandum of law in opposition to IFIC's motion.

In reply, IFIC states, among other things, that it concedes that \$39,331.94 should be deducted from the amount it seeks to recover for expenses incurred (\$177,145.66), reducing that amount to \$137,813.72. Thus, the total amount sought by IFIC is \$312,813.72 (\$175,000 [Kristeel claim] + \$137,813.72 [expenses]). In addition, in a reply affidavit Ms. Teich clarifies that she personally reviewed each of the expenses for their reasonableness before she authorized payment.

DISCUSSION

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue; however, once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2d Dept. 1996]). Speculative and conclusory allegations are insufficient to defeat summary judgment (*see, Boone v. Bender*, 74 AD3d 1111, 1113, 904 NYS2d 467, 468 [2nd Dept. 2010]).

As observed by the Appellate Division, Second Department:

New York courts have held that pursuant to an indemnity agreement . . . “the surety is entitled to

indemnification upon proof of payment, unless payment was made in bad faith or was unreasonable in amount, and this rule applies regardless of whether the principal was actually in default or liable under its contract with the obligee" (*Frontier Ins. Co. v. Renewal Arts Contr. Corp.*, 12 A.D.3d 891, 892, 784 N.Y.S.2d 698; *see International Fid. Ins. Co. v. Spadafina, supra*). Payment is made in good faith if the surety pays the claims "in the honest belief that it was liable for such claims" (*Maryland Cas. Co. v. Grace*, 292 N.Y. 194, 200, 54 N.E.2d 362).

(*Lee v. T.F. DeMilo Corp.*, 29 A.D.3d 867, 868 [2d Dept 2006]).

Here, IFIC made a prima facie showing of entitlement to summary judgment on its first cause of action for indemnification pursuant to the terms of the Indemnity Agreement by submitting an affidavit by Genise Teich, Esq., Senior Managing Counsel for IFIC, which established the amount of payments made by plaintiff under the bond at issue and that such payments were made in good-faith (*see, John Deere Ins. Co. v. GBE/Alasia Corp.*, 57 A.D.3d 620 [2d Dept 2008]; *Lee v. T.F. DeMilo Corp.*, *supra*; *Dramar Constr., Inc. v. G and A Renovation and Restoration, Inc.*, 302 A.D.2d 487 [2d Dept 2003]). Contrary to the defendants' contentions, the Court finds that the documentation attached to the Teich affidavit, including the Claims Extract, was sufficient in light of the specific language in the Indemnity Agreement "that vouchers or other evidence of any such payments made by the Surety shall be prima facie evidence of the fact and amount of the liability to the Surety." Thus, the admissibility of the IFIC documents as business records has been sufficiently established.

In opposition to IFIC's motion, the defendants failed to submit any evidence in admissible form. The conclusory assertions of defendants' counsel are insufficient to raise a trial issue as to either the bona fides of the payments made by IFIC on the bond or as to the reasonableness of the amounts (*see, Dramar Constr., Inc. v. G and A Renovation and Restoration, Inc.*, *supra*; *International Fidelity Ins. Co. v. Spadafina*, 192 A.D.2d 637, 639 [2d Dept 1993]).

Accordingly, IFIC's motion for summary judgment on its first cause of action for contractual indemnification is granted in the principal amount of \$312,813.72.

IFIC's motion for summary judgment on its second cause of action for common law subrogation and indemnification is denied and, upon searching the record pursuant to CPLR 3212(b), defendants are granted summary judgment and the second cause of action is dismissed. First, the second cause of action has not been pled as a subrogation action. In any event, as noted by the Court of Appeals:

Implied indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other (*McDermott v. City of New York, supra*, 50 N.Y.2d at 216-217, 428 N.Y.S. 2d 643, 406 N.E.2d 460; *see also, Guzman v. Have Hous. Dev. Fund Co.*, *supra*, 69 N.Y.2d at 568, 516 N.Y.S.2d 451, 509 N.E.2d 51; *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 152, 331, N.Y.S.2d 382, 282 N.E.2d 288). Generally, it is available in favor of one who is held responsible solely by operation of law because of his relation to the actual

wrongdoer

(*Mas v. Two Bridge Assocs., by National Kinney Corp.*, 75 N.Y.2d 680, 690 [1990]).

Here, IFIC's liability arose pursuant to the surety bond it wrote at the request of defendants, not by operation of law. Moreover, defendants obligation to indemnify IFIC arose pursuant to the Indemnity Agreement. Accordingly, upon searching the record, the second cause of action is dismissed.

This constitutes the **DECISION** and **ORDER** of the Court.

Submit judgment.

Dated: April 6, 2011
Riverhead, New York



EMILY PINES
J. S. C.

FINAL
 NON FINAL