

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 09, 2023

SEAN F. MCAVOY, CLERK

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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
8

9 STERLING AND WILSON SOLAR

No. 1:22-CV-03076-SAB

10 SOLUTIONS, INC., a Delaware

11 Corporation,

ORDER DENYING MOTION

12 Plaintiff,

FOR SUMMARY JUDGMENT

13 v.

14 FIDELITY AND DEPOSIT COMPANY

15 OF MARYLAND, an Illinois insurance

16 company, and ZURICH AMERICAN

17 INSURANCE COMPANY, an Illinois

18 insurance company,

19 Defendants.
20

21 Before the Court are Defendants Fidelity & Deposit Company of Maryland
22 and Zurich American Insurance Company's Motion for Summary Judgment, ECF
23 No. 18, and Plaintiff's Motion to Strike or Leave to File Sur-Reply, ECF No. 30.

24 The Court held a hearing on the motion in Yakima, Washington on January 25,
25 2023. Defendants were represented by Paul Friedrich. Plaintiff was represented by
26 Ana-Maria Popp and Justin T. Scott.

27 The Court took the motions under advisement. After considering the
28 briefing, the caselaw, and the parties' arguments, the Court denies Defendants'

ORDER DENYING MOTION FOR SUMMARY JUDGMENT # 1

1 Motion for Summary Judgment and finds Plaintiff’s Motion to Strike as moot.

2 **I. Facts**

3 Around June 23, 2020, Plaintiff Sterling and Wilson Solar Power Solutions,
4 Inc. entered into a construction contract with Lund Hill Solar, LLC for the
5 development of a 152.5 MW AC at the Delivery Point solar photovoltaic power
6 plant located in Klickitat County, Washington. Plaintiff entered into a subcontract
7 with Conti, LLC (“Conti”) for Conti to perform work on the photovoltaic power
8 plant.

9 Defendant Zurich American Insurance Company (“Zurich”) issued a
10 performance bond (“the Performance Bond”), Bond No. 9368480, on behalf of
11 Plaintiff subcontractor, Conti, and in favor of Plaintiff worth Thirty million Eight
12 Hundred Seventy-Two Thousand Four Hundred Twenty-Nine and 50/100 Dollars
13 (\$30,872,429.50). The Performance Bond was a widely-used “AIA – A312” bond
14 form, drafted by the American Institute of Architects. The Performance Bond lists
15 Plaintiff as “Owner” and Conti as the “Contractor.” This Performance Bond
16 guaranteed Conti’s performance under the Subcontract for just under \$31 million.
17 On or about November 2021, Conti began to falter in its performance under the
18 Subcontract, and on February 18, 2022, Plaintiff terminated Conti’s Subcontract
19 for default.

20 On February 21, 2022, Plaintiff sent its written notice (“Plaintiff’s Notice”)
21 to Defendant Zurich, advising that Conti defaulted on the Subcontract and stated
22 that the Notice was being provided pursuant to Section 3 of the Performance Bond
23 contract. Plaintiff’s Notice expressly stated: “Should you believe a preliminary
24 meeting would be helpful, in accordance with Section 3.1, please do not hesitate to
25 contact me, thanks.”

26 Plaintiff’s Notice was delivered to Defendant Zurich on February 23, 2022
27 at 1299 Zurich Way, Schaumburg, Illinois, the address listed on the Performance
28 Bond. The Performance Bond stated that: “Notice of the Surety...shall be mailed

1 or delivered to the address shown on the page on which their signature appears.”
2 The Performance Bond did not provide an email address for receipt of notices.
3 Defendant Zurich attempted to route Plaintiff’s Notice to Defendant Zurich’s
4 Chicago office but it appears that Defendant Zurich lost Plaintiff’s Notice.
5 Defendant Zurich acknowledges that “it remains unclear what happened to the
6 Notice Letter after it was placed with the internal courier on February 25, 2022.”

7 Under Section 5 of the Performance Bond, Defendant Zurich had ten (10)
8 days to respond to Plaintiff’s Notice indicating whether it would either arrange for
9 Conti to complete the work under the construction contract or obtain a bid from
10 another contractor to complete the work. After losing Plaintiff’s Notice, Defendant
11 Zurich never provided any response. On March 11, 2022, more than ten (10)
12 business days after Defendant Zurich’s receipt of Plaintiff’s Notice, Plaintiff
13 signed a subcontract with OLG, Inc. to complete Conti’s scope of work.

14 Plaintiff filed this lawsuit on May 31, 2022, alleging breach of contract.
15 Defendants now moves for summary judgment. Defendants argue that due to
16 Plaintiff’s failure to satisfy the Performance Bond’s express conditions precedent,
17 Plaintiff does not have a viable claim. Defendants go on to assert that Plaintiff’s
18 “failure to comply with the contractual conditions precedent prejudiced Zurich
19 because it deprived Zurich of its ability to exercise any of its bargained-for
20 performance options under Section 5.”

21 Plaintiff responds that Defendants’ legal analysis ignores applicable
22 Washington law; overlooks questions of fact that exist as to Plaintiff’s Notice, and
23 purposefully omits their own loss of Plaintiff’s Notice.

24 **II. Discussion**

25 **A. Legal Standard for Summary Judgment**

26 Summary judgment is appropriate “if the movant shows that there is no
27 genuine dispute as to any material fact and the movant is entitled to judgment as a
28 matter of law.” Fed. R. Civ. P. 56(a). There is no genuine issue for trial unless

1 there is sufficient evidence favoring the non-moving party for a jury to return a
2 verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250
3 (1986). The moving party has the initial burden of showing the absence of a
4 genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).
5 If the moving party meets its initial burden, the non-moving party must go beyond
6 the pleadings and “set forth specific facts showing that there is a genuine issue for
7 trial.” *Anderson*, 477 U.S. at 248.

8 In addition to showing there are no questions of material fact, the moving
9 party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of*
10 *Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled
11 to judgment as a matter of law when the non-moving party fails to make a
12 sufficient showing on an essential element of a claim on which the non-moving
13 party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party
14 cannot rely on conclusory allegations alone to create an issue of material fact.
15 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

16 When considering a motion for summary judgment, a court may neither
17 weigh the evidence nor assess credibility; instead, “the evidence of the non-movant
18 is to be believed, and all justifiable inferences are to be drawn in his favor.”
19 *Anderson*, 477 U.S. at 255.

20 **B. Applicable Law**

21 *a. Choice of Law – Washington*

22 In Washington, a “choice of law” provision in insurance contracts that calls
23 for applying another state’s law is unenforceable. Wash. Rev. Code § 48.18.200
24 states that “no insurance contract ... to be performed in this state, shall contain any
25 condition ... requiring it to be construed according to the laws of any other state.”
26 RCW 48.18.200(1)(a). Previous courts have applied this statute to performance
27 bonds. *Stellar J. Corp. v. Argonaut Ins. Co.*, No. 3:12-CV-05982 RBL, 2014 WL
28 1513292, at *3 (W.D. Wash. Apr. 16, 2014). Washington case law states that “the

1 undertakings of compensated sureties are regarded as “in the nature” of insurance
2 contracts, ... and subject to the rules of applicable to simple contract law.”
3 *Colorado Structures, Inc. v. Ins. Co. of the W.*, 161 Wash. 2d 577, 586 (2007).
4 Given Wash. Rev. Code § 48.18.200 and Washington case law, Washington law
5 applies in this matter.

6 *b. Prejudice*

7 Under Washington law, a “violation of a notice requirement exonerates
8 surety only to the extent of resulting prejudice even when notice is an express
9 condition precedent to liability under the performance bond.” *Colorado Structures,*
10 *Inc.*, 161 Wash. 2d at 619 (2007); *See Lazelle v. Empire State Sur. Co.*, 58 Wash.
11 589, 592, 109 P.195, 196 (1910) (where “the surety cannot complain when it can
12 show no loss or substantial damage by reason of the failure to receive notice, in the
13 exact and technical language of the contract, or make it appear that its failure to
14 receive notice has prevented it from taking proper steps for its protection.”)

15 Additionally, Washington and Federal Courts have indicated that, “when
16 notice serves its purpose as well when given after the prescribed as it does
17 before—that is, when it is equally effective in protecting the surety from loss—it is
18 inequitable and a manifold abuse of the purposes of this provision of the bond to
19 hold that the mere technical variance shall relieve the obligor entirely.” *Heffernan*
20 *v. U.S. Fid. & Guar. Co.*, 37 Wash. 477, 481 (1905); *see also Providence Health &*
21 *Servs. v. Certain Underwriters at Lloyd’s London*, 358 F. Supp. 3d 1195 (W.D.
22 Wash. 2019) (granting partial summary judgment in favor of the insured, despite
23 an insured’s non-compliant notice, because the insurer failed to establish actual
24 prejudice).

25 **C. Defendants’ Motion for Summary Judgment**

26 Summary judgment is not appropriate at this time. Construing the facts in
27 the light most favorable to Plaintiff, genuine disputes of material fact and genuine
28 issues for trial exist. Notably, both parties argue they did nothing wrong yet admit

1 some of their own failures. Defendants have not shown that no reasonable jury
2 would find in favor of Plaintiff, or that it is entitled to judgment as a matter of law.
3 Accordingly, the Court denies Defendants' Motion for Summary Judgment.

4 **D. Plaintiff's Motion to Strike**

5 Plaintiff requests that the Court strike Defendants' supplemental Declaration
6 of David Bresel in support of its Motion for Summary Judgment. Because the
7 Court did not rely on Defendants' supplemental Declaration of David Bresel to
8 find genuine disputes of material fact, the Court dismisses Defendants' Motion to
9 Strike as moot.

10 Accordingly, **IT IS HEREBY ORDERED:**

11 1. Defendants Fidelity & Deposit Company of Maryland and Zurich
12 American Insurance Company's Motion for Summary Judgment, ECF No. 18, is
13 **DENIED.**

14 2. Plaintiff's Motion to Strike or Leave to File Sur-Reply, ECF No. 30,
15 is **DENIED**, as **MOOT**.

16 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to file
17 this Order and provide copies to counsel.

18 **DATED** this 9th day of February 2023.



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A handwritten signature in blue ink that reads "Stanley A. Bastian".

24 Stanley A. Bastian
25 Chief United States District Judge
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