Levinson & Santoro Elec. Corp. v American Home Assurance Co.
2012 NY Slip Op 32270(U)
August 27, 2012
Sup Ct, Queens County
Docket Number: 21837/2009
Judge: David Elliot

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT Justice — IAS Part 14

LEVINSON & SANTORO ELECTRIC CORP.,
Plaintiff,

- against -

AMERICAN HOME ASSURANCE COMPANY, INC., et al.,
Defendants.

Index No. 21837 2009

The following papers numbered 1 to 7 read on this motion *in limine* by defendants for an order precluding plaintiff from introducing: (1) evidence concerning profits and losses on the subject construction project; (2) evidence concerning debts to its surety, American Insurance Company (AIC); and (3) evidence regarding its financial status at the time plaintiff and defendant Morganti National, Inc. (MNI), entered into the Liquidating Agreement; and by separate motion *in limine* by plaintiff for an order precluding defendants from introducing evidence regarding MNI's two counterclaims or that, in the alternative, same made only be used as a set-off against any monies which may be recovered by plaintiff.

	Papers Numbered
Motions - Affirmations - Exhibits	1-3
Answering Affirmations - Exhibits	4-5
Reply Affirmations	6-7

I. Defendants' *Motion In Limine*

A. Evidence as to Plaintiff's Profits and Losses

In support of this branch of their motion, defendants aver that plaintiff should be precluded from offering any testimony (specifically from its president and co-owner Fred Levinson) regarding plaintiff's profits and losses in connection with the subject construction project. Counsel opines that contemporaneously-kept job cost reports are the "best evidence of a contractor's revenues and expenses on a particular project," and that plaintiff should not be permitted to use testimony in lieu of such reports.[1] Defendants further state that testimony – as opposed to the reports – may be vague, speculative, replete with faded memory or inaccuracies, all of which the best evidence rule is designed to prevent.

Plaintiff opposes to the extent that, *inter alia*, the best evidence rule does not apply in this instance, since evidence regarding plaintiff's profits and losses exists independently of the job cost reports and, thus, testimony regarding same may be introduced.

It should initially be noted that the statement by defendants' counsel that generating job costs reports are standard practice in determining a contractor's particular profits and losses on a job carries no evidentiary weight (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

"The 'oft-mentioned and much misunderstood' best evidence rule simply requires the production of an original writing where its contents are in dispute and sought to be proven" (*Schozer v William Penn Life Ins. Co. of New York*, 84 NY2d 639, 643 [1994] [internal citations omitted]; *see Billingy v Blagrove*, 84 AD3d 848 [2011]). The question to be asked to determine whether the best evidence rule applies is whether proof of the event (the event here being plaintiff's alleged profits and losses), exists independent of the writing (*see generally* 5A NYPrac, Evidence in New York State and Federal Courts § 10:1 [providing two excellent illustrations of the rule]).

Applying that principle here, a witness may certainly have knowledge of plaintiff's profits and losses which exists independently of the generated job cost reports. Job cost reports simply memorialize/record plaintiff's profits and losses as they existed during the relevant period. Stated another way, knowledge of what plaintiff's profits and losses were is not dependent upon those reports (*see e.g. Barrett v D'Elia*, 102 AD2d 890 [1984] [the best evidence rule did not apply to a personnel benefit record, containing employee sign-in sheets which recorded the time in which the employee signed in to work, since "[b]usiness summaries have been deemed to be independent from the writings or documents upon which they are drawn"]; *R & I Electronics, Inc. v Neuman*, 81 AD2d 832 [1981]). In any event, it is noted that the failure to produce the job cost reports may be dealt with in cross examination, as well as in an appropriate charge to the jury, if warranted.

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1. Defendants requested the reports and, to date, they have not been produced.

It is also noted that, while not raised in this branch of their motion, defense counsel, during oral argument held in this court on August 24, 2012, raised the issue of relevance. Counsel opined that evidence of profits and losses is irrelevant in terms of determining whether there was a breach of the Liquidating Agreement, or whether plaintiff was induced to enter into the Liquidating Agreement. However, evidence of plaintiff's profits and losses, as suggested by plaintiff's counsel, may be relevant to the issue of whether it was fraudulently induced into entering into the Liquidation Agreement.

Accordingly, the branch of defendants' motion for an order precluding plaintiff from introducing evidence as to its profits and losses during the construction period is denied.

B. Evidence as to Plaintiff's Debts to its Surety

In support of this branch of their motion, defendants argue that plaintiff should be precluded from offering evidence as to any of its debts to AIC, since it would be both irrelevant and prejudical, based on the fact that: (1) AIC is not a party to this action; (2) the relationship between plaintiff and AIC existed prior to and after the subject project; and (3) plaintiff's debts to AIC likely include projects other than this one. As such, defendants claim that introducing evidence as to debts would be irrelevant, confusing to the jury, or designed to invoke the sympathy of the jury. Further, similar to the claim above, defendants state that evidence as to plaintiff's debts to AIC have no bearing whatsoever on whether there was a breach or whether there was fraudulent inducement.

Plaintiff opposes to the extent that AIC's role is central to the dispute among the parties. For example, plaintiff references the Liquidating Agreement, which was signed by plaintiff, MNI, and AIC, with AIC acting as surety. Further, plaintiff states that MNI had numerous obligations to AIC, and the relationship between plaintiff and AIC (and Morganti) "is paramount and evidence of [plaintiff's] debts to AIC."

Pursuant to the amended verified complaint, plaintiff alleges, inter alia, that it was induced by defendants Morganti and its surety, American Home, to enter into a "Liquidating Agreement" (to which AIC was also a signatory as surety to plaintiff). Said agreement listed monies which had not been paid by the Federal Bureau of Prisons (FBOP) to these defendants, which in turn resulted in an outstanding balance due to plaintiff for its work. Plaintiff further alleges that these defendants were, indeed, paid by FBOP and withheld such information and monies, thereby inducing plaintiff to enter into the Liquidating Agreement, causing financial hardship.

As such, it appears that the allegation is that plaintiff would not be indebted to AIC but for the alleged inducement by defendants to enter into the Liquidating Agreement, and

any such debts to AIC would indeed be relevant as to plaintiff's measure of damages. Of course, plaintiff may not testify as to other projects or other debts owed to AIC as a result of those projects (though same should already be apparent, since debts to plaintiff's surety are likely transactional in nature).

Accordingly, the branch of defendants' motion for an order precluding plaintiff from introducing evidence as to the debts to its surety is denied.

C. Evidence as to Plaintiff's Overall Financial Condition

In support of this branch of their motion, defendants state that evidence of plaintiff's financial hardship at the time the Liquidating Agreement was entered into should be precluded. Defendants first claim that "why a party enters into a contract is not relevant to its enforceability"; further, motive for entering into a contract is only relevant if plaintiff is claiming economic duress and unconscionability. However, the cases relied upon by defendants are inapposite and speak to the issue of the existence or enforceability of a contract (*see Zheng v City of New York*, 93 AD3d 510 [2012] [the existence of a binding contract does not depend on subjective intent of the parties]; *Gillman v Chase Manhattan Bank*, 73 NY2d 1 [1988] [an unconscionable contract is unenforceable]). Thus, testimony as to plaintiff's financial condition at the time it entered into the Liquidating Agreement (referred to in ¶¶ 64 and 68 of the amended verified complaint) are not being used to prove that a binding contract did not exist or is unenforceable. Indeed, it appears that, according to plaintiff's first cause of action, plaintiff presupposes that such a contract does exist and is suing for defendants' breach thereof.

Defendants next claim that any such evidence would be highly prejudicial because it is being used to generate sympathy from the jury. However, the existence of plaintiff's financial condition during the relevant period is germane to plaintiff's claim for fraudulent inducement to enter into the Liquidating Agreement (i.e., that plaintiff relied to its detriment), proof of damages/loss, *et cetera*. To the extent that plaintiff's financial condition goes beyond the scope of the cause of action for fraudulent inducement, proper objections at trial may be made.

Accordingly, the branch of defendants' motion for an order precluding plaintiff from introducing evidence as to its financial status is denied.

II. Plaintiff's Motion *In Limine*

A. Evidence as to MNI's Counterclaims

To the extent that plaintiff seeks to limit evidence as to MNI's counterclaims to be utilized only as a set-off to monies potentially recovered by plaintiff, same is granted, as MNI concedes that their counterclaims are recoupment claims ("MNI does ***not*** dispute [plaintiff's] assertion that MNI's counterclaims herein are a Recoupment pursuant to CPLR §203(d). Nor does MNI dispute that MNI is not entitled to an affirmative recovery thereunder, but rather merely to offset damages which would otherwise be due from MNI to [plaintiff]" (emphasis in original).

Plaintiff further argues that defendants, in any event, have no right to setoff their obligations, as recoupment under CPLR 203 (d) does not apply. Plaintiff claims that the counterclaims are unrelated to the transactions or facts alleged in its amended verified complaint (the counterclaims being based upon an alleged breach of "pre-termination work" arising prior to 1997 under the original construction subcontract, while plaintiff's claims being based upon the Liquidating Agreement), or that they are "distinct and independent units with that transaction."

MNI opposes to the extent that plaintiff's second cause of action is to declare the Liquidating Agreement null and void. It follows, MNI argues, that if plaintiff prevails on this cause of action, the only basis by which plaintiff may collect is under the original construction subcontract.

Interestingly, what was never really discussed by the parties was plaintiff's third cause of action for impact costs for the time period between the default (April 1997) and August 1997, which directly stems from its performance under the October 28, 1993 subcontract. The recoupment claims are, too, claims directly stemming from plaintiff's performance under that contract. Thus, the counterclaims qualify for recoupment because it is part of the same transaction upon which plaintiff's claim is based (*see e.g. Carlson v Zimmerman*, 63 AD3d 772 [2009]; *see also* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C203:9 [commenting that the case of *Carlson* illustrated a "liberal approach" to recoupment counterclaims]; *United States Fid. & Guar. Co. v Delmar Dev. Partners, LLC*, 22 AD3d 1017 [2005]).

Accordingly, plaintiff's motion for an order precluding defendants from offering evidence concerning MNI's two counterclaims is denied.

As a final matter, the court notes that these rulings are based upon the limited issues as framed by the attorneys in their respective motions. That being said, they are determined without prejudice to reconsideration by this court during trial based on evidence proffered at trial and related objections.

Dated: August 27, 2012

J.S.C.