AMENDED SHORT FORM ORDER

INDEX
NO.: 45644-09

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 4-15-12
SUBMITTED: 7-5-12
MOTION NO.: 001-MOT D

TOWN OF SMITHTOWN,

Plaintiff,

-against-

BEECHWOOD TIFFANY, LLC and UTICA MUTUAL INSURANCE CO.,

Defendants.

-and-

ROSEMAR CONSTRUCTION, INC.,

Third Party-Defendant,

PLANNING BOARD OF THE TOWN OF SMITHTOWN,

Additional Counterclaim Defendant.

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Upon the following papers numbered 1-18 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-15 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 16-17 ; Replying Affidavits and supporting papers 18 ; it is,

ORDERED that the branch of the motion by the defendants Beechwood Tiffany, LLC, and Utica Mutual Insurance Co. which is for judgment as a matter of law on their counterclaim pursuant to CPLR 7803 (3) to annul Resolution 2009-1021 of the Planning Board of the Town of Smithtown is granted; and it is further

ORDERED that the motion is otherwise denied.

The defendant Beechwood Tiffany, LLC ("Beechwood"), is the sponsor and developer of a 20-acre, 88-unit townhouse development located in Smithtown, New York. In accordance with Town Law § 277 and the Smithtown Town Code, the Town of Smithtown (the "Town") required Beechwood to tender a performance bond in the penal sum of $616,897 and a cash deposit in the amount of $3,000 to guarantee the construction of certain infrastructure improvements such as streets, sidewalks, drainage, and roadways. On December 31, 2001, the bond was executed by Beechwood, as principal, and Utica Mutual Insurance Co. ("Utica"), as surety. Beechwood hired the third-party defendant, Rosemar Construction, Inc. ("Rosemar"), to perform the work. The roadways were to be constructed in accordance with the Town's specifications for public improvement, which incorporated the specifications of the New York State Department of Transportation (NYSDOT).

In a letter to Rosemar dated November 28, 2006, which was copied to Beechwood, among others, the Town Engineer advised Rosemar that, after several site visits and a review of the relevant documentation, the Town could not approve the final lift of pavement for the following reasons:

1. The material does not meet NYSDOT specifications for aggregates, Section 703, as amended by NYSDOT Engineering Instruction (EI) 03-042 (copy attached). This topic is addressed in further detail, below.
2. Periodic field inspections have revealed that the bituminous mix used for the top course contains large pieces of glass, which are present in a wide variety of colors. The final lift has also unraveled (and continues to do so as the pavement ages) leaving the roadway rutted, and in some places (particularly in cul-de-sacs and along bends) with no top course left at all.
3. In its present condition, the Superintendent of Highways will not sign off on the roads nor accept them for dedication.

While the laboratory tests from both Advance Testing (Report No. 040115, dated 9/12/06) and Soil Mechanics Drilling Corp. (Report dated 5/3/06) indicated that the grain size distribution met specifications for NYSDOT 7F Top Course, both analyses indicated that glass (on the order of 2%-3%) was present in the mix used for the top course.

In the past, NYSDOT Specification 703-02, Coarse Aggregate,

> allowed up to 5.0% glassy pieces in the mix. On November 21, 2003, however, the NYSDOT issued Engineering Instruction (EI) 03-042, which deleted Table 703-3, and replaced it with a new table (with the same number), which specifically removed "glassy pieces" from the allowable materials. We have confirmed this interpretation of the applicable rules with staff at NYSDOT's Materials Bureau, and we have concluded that these requirements were in place prior to the placement of the material in question.
>
> We therefore require that the final lift of asphalt pavement be removed in its entirety and replaced with new material that is in full conformance with NYSDOT's latest requirements for Type 7F Top Course.

By a letter dated December 8, 2006, which was copied to Beechwood, among others, Rosemar responded to the Town as follows:

> First, we disagree with your premise that the material does not meet the New York State Department of Transportation (NYSDOT) specification for aggregates.
>
> The Town of Smithtown required the asphalt pavement to conform to NYSDOT specifications. The asphalt that was placed on these roads was manufactured in a NYSDOT approved asphalt plant, with NYSDOT approved materials.
>
> Your letter of 11/28/06 referenced a NYSDOT Engineering Instruction (EI) 03-042. You point out that "glassy pieces" were removed from the table. You realize that "glassy pieces" were listed in crushed slag material. This is the material that New York State removed the term "glassy pieces" from. Our asphalt manufacturer did not purchase any crushed slag. They manufactured asphalt with crushed stone and/or crushed gravel. Neither of these items was allowed "glassy pieces" in them before or after EI 03-042. Our coarse aggregate source would not have been the source for the glass pieces.
>
> In addition our asphalt plant did not have a stockpile of glass that would be incorporated into the asphalt mix as a substitute aggregate.
>
> The reason the glass was in the mix is because it was part of the fine aggregate supply. The source of the fine aggregate was

Grimes Contracting, Riverhead New York.

When New York State approved this material the sample showed excessive amounts of deleterious material. At least some of this material included glass. Apparently NYSDOT did not consider there was enough glass to be an injurious amount in the mixture of Hot Mix Asphalt. Trace amounts of glass were therefore deemed acceptable for use in the manufacture of Hot Mix Asphalt in accordance with New York State Standard Specifications.

Again, the asphalt placed on these roads conforms to New York State Specifications. That is the guideline that the Town of Smithtown gave us to follow and those were the guidelines we followed.

The second reason in your letter stated that the roadway is rutted and some places have "no top course left at all". Your letter states that "particularly in the cul-de-sacs" this is the case.

We disagree with that premise. After a number of site visits we do not see the final lift unraveled leaving the pavement with no top course, especially in the cul-de-sacs. Some of this top pavement has been in place for more than two years. In our opinion it looks like a typical asphalt pavement roadway that is over two years old. This pavement has held up under normal everyday usage since it has been in place.

Again, we do not see the final lift unraveled leaving no top course at all. That is not the case with these roads.

The third reason you listed for not approving the final lift of pavement was that the Superintendent of Highways would not sign off on them. We believe that since the material in place conforms to NYSDOT specifications (and therefore Town of Smithtown specifications) and that there is no unraveling of the roads that the Superintendent of Highways should sign off on the roads and accept them for dedication.

By a letter dated July 10, 2008, which was copied to Utica, among others, the Town Engineer advised Beechwood that its performance bond had expired and that it still had not remedied the issue of sub-standard paving at the site. The Town Engineer stated, in pertinent part, as follows:

> As outlined in my letter of November 28, 2006, we have rejected the final lift of asphalt. At our meeting of April 4, 2008, you agreed to propose a solution to this problem. Again, we have heard nothing in this regard.
>
> Kindly make arrangements to extend your Performance Bond and have the necessary paving work accomplished so that we might be able to accept the public improvements. At such time as you have scheduled the necessary work, please notify the Engineering Department at least 72 hours prior to the commencement of said work so that an inspection can be made while work crews are at the site.
>
> Failure to complete all of the unfinished items within 45 days of the receipt of this letter will leave us no other option but to declare the Performance Bond in default and initiate litigation.

On December 1, 2009, the Smithtown Town Board (the "Town Board") adopted Resolution 2009-1021 declaring the performance bond and cash deposit posted by Beechwood to be in default and authorizing the Town Attorney to commence litigation on the bond pursuant to the recommendation of the Engineering Department. This action to recover the penal sum of $616,897 under the bond and the $3,000 cash deposit ensued. Beechwood and Utica counterclaimed against the Town and the Town Board (1) for a judgment declaring that the roadways had been constructed in accordance with all applicable requirements of the performance bond, approved plans, and NYSDOT standards and (2) for a judgment pursuant to CPLR article 78 compelling the Town and the Town Board to release and cancel the performance bond (CPLR 7803 [1]) and declaring Resolution 2009-1021 to be null and void (CPLR 7803 [3]). Beechwood and Utica now move for summary judgment dismissing the complaint and for summary judgment on their counterclaims against the Town and the Town Board. In opposition, the plaintiff contends, inter alia, that the counterclaims are barred by the statute of limitations and by the moving defendants' failure to file a notice of claim pursuant to Town Law § 65.

The plaintiff has waived the statute-of-limitations defense by failing to raise it in a motion to dismiss pursuant to CPLR 3211 or as a defense in its reply (*see*, CPLR 3211[e]; Siegel, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, C3211:62, C3212:20). In any event, a counterclaim is deemed interposed at the same time as the complaint (*see*, **Splinters, Inc. v Greenfield**, 63 AD3d 717, 719). The moving defendants' counterclaims were interposed on December 11, 2009, when the complaint was filed. Accordingly, the court finds that they are not time-barred.

The filing of a notice of claim pursuant to Town Law § 65 (3) is a condition precedent to the maintenance of an action against a town arising out of a contractual relationship between a plaintiff and a town (*see*, **McCulloch v Town of Milan**, 92 AD3d 734, 735).

Likewise, the timely filing of a notice of claim pursuant to Town Law § 65 (3) is a condition precedent to the maintenance of a counterclaim against a town sounding in contract (*see*, **Town of Nassau v Westchester Fire Ins. Co.**, 281 AD2d 803, 804-805; **Hart v East Plaza, Inc.**, 62 AD2d 113, 117). The moving defendants' counterclaims against the Town seek the release of the performance bond. Beechwood was required to post a performance bond pursuant to statute (*see*, Town Law § 277 [b]; Smithtown Town Code § 248.17 *et seq*.), and not pursuant to any contract or agreement with the Town. Since the counterclaims are not based upon a contract lawfully made with the Town (*see*, Town Law § 65 [1]), the notice-of-claim requirement found in Town Law § 65 (3) is inapplicable.

Smithtown Town Code § 248.18 provides, in pertinent part, as follows:

> In the event that the public improvements covered by the performance bond and cash deposit have not been constructed to the satisfaction of the Town Engineer and Town Highway Superintendent, they shall forward, within 30 days of the inspection, a written report jointly signed by representatives of their departments to the subdivider, giving him a period of six months or less within which time he has to complete said public improvements to their satisfaction. If, upon the expiration of this period, the public improvements have still not been completed to the satisfaction of said Town Engineer and Town Highway Superintendent, or additional items are uncovered which are incomplete, a second written report will be sent to the subdivider wherein he will be given 45 days or less to complete the enumerated items. If, at the expiration of the second period, the public improvements still have not been completed to the satisfaction of the Town Engineer and Town Highway Superintendent as stated aforesaid, then the Town Board may declare the performance bond and cash deposit in default.

It is undisputed that the plaintiff failed to comply with the aforementioned requirements before declaring the performance bond and cash deposit in default. The record reflects that it was the Town Engineer who advised Beechwood by a letter dated November 28, 2006, that the roadways had not been constructed to the Town's satisfaction. The Town Highway Superintendent was not a signatory to that letter, nor was he a signatory to the second letter dated July 10, 2008, which advised Beechwood that it still had not remedied the issue of sub-standard paving at the site. Resolution 2009-1021 declaring the performance bond and cash deposit posted by Beechwood to be in default was adopted on December 1, 2009. It was based on the recommendation of the Town Engineer and not a joint written report signed by the Town Engineer and Town Highway Superintendent, as required by Smithtown Town Code § 248.18. By relying on the recommendation of the Town Engineer alone, the Town Board's resolution was made of violation of lawful procedure (CPLR 7803 [3]). The Town Board lacked the authority to

consider and determine whether the performance bond and cash deposit were in default without receiving and reviewing the required joint report of the Town Engineer and Town Highway Superintendent (*see*, **Matter of Bayswater Gracewood, LLC v Planning Bd. of Inc. Vil. of N. Hills**, 19 AD3d 411, 412; *see also*, **Matter of Wright v Town of La Grange**, 181 Misc 2d 625, 630-634). Accordingly, the branch of the motion which is for a judgment pursuant to CPLR 7803 (3) declaring Resolution 2009-1021 to be null and void is granted.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact (**Winegrad v New York Univ. Med. Ctr.** 64 NY2d 851, 853; **Zuckerman v City of New York**, 49 NY2d 557, 562). The failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers (**Winegrad v New York Univ. Med. Ctr.**, *supra*).

The purpose of a performance bond is to ensure, not only completion of the work, but that the work is of satisfactory quality (*see*, **Town of Chester v Republic Ins. Co.**, 89 AD2d 959). The moving defendants have failed to establish, prima facie, that the roadways were of satisfactory quality and constructed in accordance with NYSDOT standards. In support of their contention that the roadways were properly constructed in accordance with NYSDOT standards, the plaintiff relies on the December 8, 2006, letter authored by its roadway contractor, Rosemar, and e-mails from NYSDOT engineer William Skerritt that, in his opinion, the Town has misinterpreted EI 03-042. Such evidence is unsworn and not in admissible form. In any event, even if the court were to consider such evidence, the conflicting opinion of the Town Engineer (which is also unsworn and not in admissible form) raises issues of fact. When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution (*see*, **Shields v Baktidy**, 11 AD3d 671, 672). Accordingly, the branches of the moving defendants' motion which are for summary judgment dismissing the complaint and for judgment as a matter of law on their declaratory judgment and CPLR article 7803 (1) counterclaims are denied.

Dated: November 28, 2012

HON. ELIZABETH HAZLITT EMERSON

J.S.C.