

**Nova Casualty Co. v New York City Hous. Auth.**

2012 NY Slip Op 32962(U)

December 14, 2012

Sup Ct, New York County

Docket Number: 602527/2008

Judge: Marcy S. Friedman

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, J.S.C.  
Justice

PART 57/60

Index Number : 602527/2008  
NOVA CASUALTY  
vs.  
NEW YORK CITY HOUSING  
SEQUENCE NUMBER : 004  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for by Nova Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1

Answering Affidavits — Exhibits \_\_\_\_\_ No(s) \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s) 2

Upon the foregoing papers, it is ordered that this motion is

NYCHA Memo in Opp MT  
determined in accordance with accompanying  
Decision/Order dated 12-14-12

**FILED**  
DEC 17 2012

*the clerk*  
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S): for random reassigned  
THIS was a part 57 case  
*leg*

Dated: 12-14-12

[Signature] J.S.C.  
**MARCY S. FRIEDMAN, J.S.C.**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 57

-----X  
NOVA CASUALTY COMPANY,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,  
Defendant.

-----X  
**FRIEDMAN, J.:**

Index No. 602527/2008  
**FILED**  
DEC 17 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

Motion sequence numbers 004 and 005 are consolidated for disposition.

This action arises out of performance and payment bonds issued by plaintiff surety, Nova Casualty Company (Nova), in connection with two construction contracts for defendant owner-obligee, New York City Housing Authority (NYCHA). Nova is seeking reimbursement for the payments that it made to settle the claims of laborers and suppliers under its two payment bonds. NYCHA is seeking damages resulting from Nova's refusal to complete the work under the two performance bonds, after the contractors were declared in default.

In motion sequence number 004, Nova moves for summary judgment on a first cause of action, seeking a declaratory judgment that the two performance bonds were discharged by NYCHA's failure to provide Nova with adequate assurances of payment; a second and third cause of action, to recover for the payments that it made, prior to the defaults, under each of the two payment bonds; and, a fourth cause of action, to recover the contract balances under a trust provision of a General Agreement of Indemnity executed by the contractors' principals.

Alternatively, Nova seeks imposition of a constructive trust on the remaining contract balances held by NYCHA at the time of default.

In motion sequence number 005, NYCHA moves for summary judgment against Nova on

two counterclaims for breach of the performance bonds. NYCHA also seeks summary judgment dismissing Nova's complaint.

### BACKGROUND

The following facts are not in dispute:

Nova issued the subject performance and payment bonds in connection with construction contracts to replace the boilers at two separate NYCHA apartment complexes – the Reid Apartments (Reid project) and the O'Dwyer Gardens apartments (O'Dwyer project). (See Pisem Affirm., Exhs. 1 & 2.) NYCHA declared the contractors on both projects in default on October 22, 2007. (Id., Exhs. 17 & 18.) NYCHA then demanded that Nova complete the work on the two projects under its respective performance bonds. (Id., Exhs. 21 & 22.)

At the time of defaults, the Reid project was estimated to be 87% complete, and the O'Dwyer project was estimated to be 95% complete. (Id., Exhs. 21 & 22.) Out of the original \$868,000 contract price for the Reid project, \$37,495 in retainage and an unpaid contract balance of \$119,867 remained at the time of default. (Id., Exh. 21.) Out of the original \$1,120,000 contract price for the O'Dwyer project, an unpaid contract balance of \$41,138 remained at the time of default. (Id., Exh. 22.)

Nova refused to complete the work, asserting that any obligations that it may have had under its performance bonds had been fully discharged by NYCHA's failure and refusal to provide Nova with adequate written assurances of payment in the event Nova agreed to complete the projects. (Id., Exh. 23.) Nova thereafter demanded that NYCHA reimburse it, from the contract balances remaining at the time of default, for Nova's payments to satisfy the claims of laborers and suppliers under the payment bonds. (Id., Exh. 24.)

After two additional demands on Nova to complete the work (id., Exhs. 25 & 26), NYCHA declared Nova in default of the contracts and performance bonds on August 15, 2008. (Id., Exh. 27.) On May 28, 2009, NYCHA engaged another contractor to complete work on the Reid project for a contract price of \$335,852. (Brennar Aff., ¶ 8; Exh. 28.) With change orders, the total cost of completion was \$363,802. (Brennar Aff., ¶ 8; Exhs. 28 & 29.)

## DISCUSSION

A party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. (Alvarez v Prospect Hosp., 68 NY2d 320 [1986].) Once that initial showing has been made, the party opposing the motion has the burden of producing evidentiary facts sufficient to raise a triable issue of fact. (See Zuckerman v City of New York, 49 NY2d 557 [1980].)

Nova's motion for summary judgment on its first cause of action is denied, and NYCHA's motion to dismiss that cause of action is granted.

Nova argues that it is entitled to a declaratory judgment that it was discharged from all of its obligations under the performance bonds, based upon the doctrine of adequate assurances. Nova argues that it was warranted in demanding assurances of payment from NYCHA before agreeing to complete the work, based on NYCHA's past conduct in unjustifiably refusing to pay Nova upon its completion of other construction projects. In the alternative, Nova argues that NYCHA waived any rights it may have had under the performance bonds by failing to provide Nova with such adequate assurances.

The doctrine of adequate assurances arises out of the doctrine of anticipatory repudiation and is codified in Uniform Commercial Code (UCC) § 2-609 (1) which provides, with respect to

contracts for the sale of goods:

“When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.”

In Norcon Power Partners, L.P. v Niagara Mohawk Power Corp., 92 NY2d 458 (1998), the Court of Appeals extended this doctrine beyond the UCC context to contracts that, although not governed by the UCC, were closely analogous to contracts for the sale of goods. (Id. at 468 [adequate assurances doctrine extended to a complex contract to supply electricity generated at Norcon facility to public utility provider for 25-year period].) Although recognizing that some states, in varying degrees, had adopted the adequate assurances doctrine as their common law of contracts, the Court of Appeals expressly declined to do so. (Id. at 467.)

Since Norcon, New York courts that have addressed the issue have continued to limit the common-law extension of this doctrine to contracts that are analogous to sales contracts. (See Bank of New York v River Terrace Assocs., LLC, 23 AD3d 308 [1<sup>st</sup> Dept 2005][doctrine of adequate assurances inapplicable to long-term construction loan agreement, as such agreement is not analogous to a sales contract]; see also Peng v Willets Point Asphalt Corp., 81 AD3d 618 [2<sup>nd</sup> Dept 2011] [trial court erred in determining that adequate assurance doctrine was applicable to contract for sale of real property].)

The court finds that the performance bonds at issue are not analogous to a sales contract. Extension of the adequate assurances doctrine to these bonds therefore is not warranted.

The court is also unpersuaded by Nova’s alternative contention that NYCHA’s failure to provide Nova with adequate assurances of payment constitutes a waiver of NYCHA’s rights

under the performance bonds. Waiver is the “intentional relinquishment of a known right” that “must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act.” (Echostar Satellite, L.L.C. v ESPN, Inc., 79 AD3d 614, 617 [1<sup>st</sup> Dept 2010][internal citations and quotation marks omitted].) Mere silence or inaction is insufficient to establish an intent to waive a known right. (Id. at 618.) Nova has identified no affirmative action on the part of NYCHA that might establish an intent to waive its rights under the performance bonds. To the contrary, the record reflects that NYCHA expressly rejected Nova’s assertion that it was entitled to such assurances when demanding that Nova perform and complete the work under its performance bonds. (See Pisem Affirm., Exh. 25.)

Nova’s motion for summary judgment on its second and third causes of action, to recover for the payments that it made under the payment bonds, also is denied, and NYCHA’s motion to dismiss these causes of action is granted.

Nova argues that it is entitled to recover for the payments that it made under its payment bonds because, by fully satisfying all of the outstanding claims of laborers and suppliers under the bonds, it became subrogated to their rights to recover against whatever contract balances remained at the time of the defaults. Alternatively, Nova argues that NYCHA’s failure to reimburse Nova from the remaining contract balances constitutes an unjust enrichment.

It is well settled that “a completing surety succeeds under equitable subrogation principles to all rights that the obligee/owner has against the contractor, including the right to use the unpaid contract balance to complete the project or satisfy outstanding claims for labor and materials furnished.” (Matter of RLI Ins. Co., Sur. Div. v New York State Dept. of Labor, 97 NY2d 256, 265 [2002].) In contrast, a surety that performs solely under a payment bond

becomes subrogated to the rights of the laborers and suppliers whose claims it has paid, as well as the rights of the contractor who owed the debt. (Nova Cas. Co. v United States, 69 Fed Cl 284, 295 [Fed Cl 2006]. See Tri-City Elec. Co., Inc. v People of the State of New York, 96 AD2d 146, 149-150 [4<sup>th</sup> Dept 1983], affd on other grounds 63 NY2d 969 [1984].)

Although Nova was not a completing surety, Nova argues that its refusal to complete the work under its performance bonds does not preclude it from recovering the contract balances under its payment bond, because “[a] surety can establish a right of subrogation in either of two ways: by completing the contract pursuant to its obligation under the performance bond or by paying off materialmen's claims brought under the payment bond.” (Nova Cas. Co. v U.S., 69 Fed Cl at 292, quoting Transamerica Premier Ins. Co. v U.S., 32 Fed Cl 308, 312 [Fed Cl 1994].) Nova cites a number of cases in which the courts have determined that a surety that had not performed on its performance bond, but had fully performed all of its obligations under its payment bond, was entitled to subrogation against unexpended contract balances. (See e.g. Pearlman v Reliance Ins. Co., 371 U.S. 132 [1962]; Henningsen v U.S. Fid. & Guar. Co., 208 U.S. 404 [1908]; North Denver Bank v U.S., 432 F2d 466 [Ct Cl 1970]; Fireman's Fund Ins. Co. v U.S., 421 F2d 706 [Ct Cl 1970].)

In each of the cases cited by Nova, however, the surety's entitlement to subrogation was limited to those unexpended contract balances that remained after work on the contract had been completed. In such cases, the owner-obligee had become a mere stakeholder, with no rights of its own to assert against the remaining balances. Here, Nova seeks to recover the contract balances remaining at the time of default, prior to completion of the projects. Additionally, NYCHA has asserted its own contractual right to apply the remaining contract balances against



the costs that it incurred in having to complete the projects. An owner/obligee's contractual right to complete the work following a contractor's default, and to retain and apply the remaining contract balances to the cost of completion, generally is considered superior to the subrogation rights of a surety whose claim is based solely upon its performance under a payment bond, and not as a completing surety. (See Nova Cas. Co. v U.S., 69 Fed Cl at 292 [surety that performs under a payment bond is entitled to funds retained by government under the contract, but only after the government has satisfied any claims it might possess as a superior creditor].)

While Nova acknowledges that the projects were not fully complete at the time of the default, Nova argues that it still is entitled to the remaining contract balances because each of the projects was substantially complete as a result of its payment. Specifically, Nova argues that it is entitled to recover the remaining contract balances that existed on the O'Dwyer project because NYCHA has not alleged that any additional work was required to complete that project. Nova argues that it is entitled to recover the remaining contract balance on the Reid project, because NYCHA has failed to establish that the \$363,802 that it claims to have spent to complete the project was either necessary or within the scope of the work that was to be performed under the original contract.

The construction contracts provide, however, that upon a written declaration of default, NYCHA has a right to complete the work and to withhold, from any open contract that the contractors had with NYCHA, such sums as NYCHA deems necessary to protect itself against loss or to assure the payment of any claim that NYCHA has against the contractor. (See Pisem Affirm., Exhs. 1 & 2: General Conditions §§ 7 [a], 20 [b].) Specifically, section 7 (a) of General Conditions, as amended by the Amendments to General Conditions, provides:

“If the Work is not performed in strict accordance with the Contract, or if the work of any other contract between the Contractor herein and the Authority is not performed in strict accordance with its terms, or if the Authority has a claim against the contractor herein for any other reason whatsoever, ... the Authority shall have the right to withhold out of any payment, final or otherwise, such sums as the Authority may deem ample to protect it against delays or loss or to assure the payment of such claims on this, or any other open contract which the Contractor has with the Authority.”

(Id., General Conditions § 7 [a]; Amendments to General Conditions at 2.) Section 20 (b) of the General Conditions provides, in pertinent part, that upon the written declaration of default to the contractor,

“the Authority may take over the Work and prosecute the same to completion as agent for and at the expense of the Contractor, either directly or through other contractors, with or without public advertisement, or by calling upon the surety or sureties, if any, to complete the Contract as provided for in the Performance Bond, and the Contractor and sureties shall be liable to the Authority for any loss, damage, extra cost, or detriment to the Authority thereby. . . . The Authority’s certificate as to the excess cost and excess time, if any, of completing the Work, and the amount of damage suffered, shall be binding and conclusive upon the Contractor and his sureties.”

(Id., General Conditions § 20 [b]).

NYCHA has proffered evidence that it exercised its right to engage a contractor to complete the Reid project following Nova’s refusal to perform under its performance bond (Brenner Aff. ¶ 8; Exh. 28), and that the cost of completing the Reid project exceeded the combined retainage and contract balances that remained on the Reid and O’Dwyer projects at the time of default. (Id., Exh. 29.)

Nevertheless, Nova argues that it is not subject to NYCHA’s contractual right to withhold and set-off sums from any open contracts between NYCHA and the contractor, and that such right applies only to NYCHA’s claims against the contractor. In support of this contention, Nova

argues that it was not a party to the construction contracts and that its performance bonds did not expressly incorporate the construction contracts by reference. Nova further argues that even assuming that the contracts were incorporated by reference in its performance bonds, Nova could be bound only to provisions relating to the completion of the physical work at the projects.

While Nova's performance bonds did not use the exact words "incorporate by reference," they expressly provide that "a copy of [the referenced] Contract is annexed to and hereby made a part of this bond as though herein set forth in full." (See Pisem Affirm., Exhs. 1 & 2: Performance Bonds at 1.) Where, as here, a performance bond expressly makes the contract a part of the bond, the surety's liability under the bond will be co-extensive with that of the contractor. (See Babylon Assocs. v County of Suffolk, 101 AD2d 207, 218 [2<sup>nd</sup> Dept 1984]).

As NYCHA's costs of completing the work on the Reid project have exceeded the combined contract balances remaining at the time of the default, there are no unexpended contract balances to which Nova might be entitled to by virtue of equitable subrogation. Additionally, as NYCHA has a clear contractual right to use any remaining contract balances to off-set the costs it incurred in completing the work, Nova's claim of unjust enrichment fails as a matter of law.

NYCHA's motion for summary judgment dismissing Nova's fourth cause of action is granted, as NYCHA was not bound by the General Agreement of Indemnity on which this cause of action is based. Nor has Nova established, or raised a triable issue of fact, as to any of the requisite elements for the imposition of a constructive trust.

To the extent that Nova opposes NYCHA's motion for summary judgment or claims entitlement to summary judgment based on unpleaded causes of action asserting estoppel or

seeking restitution, Nova also wholly fails to establish, or raise a triable issue of fact, as to any of the requisite elements of such claims.

NYCHA's motion for summary judgment on its two counterclaims is granted solely with the respect to the second counterclaim, and is otherwise denied.

"The purpose of a performance bond is to insure that a contract will be completed consistent with its terms" upon a contractor's default. (U.W. Marx, Inc. v Mountbatten Sur. Co., 3 AD3d 688, 691 [3d Dept 2004].) Upon such default, the surety's obligation generally will be either to complete the work or to pay the obligee the amount necessary for it to have the contract completed. (Id.) Although a surety's liability is generally limited to the amount of its bond, where the surety has failed to perform its obligation under the bond, "the surety's liability may include the cost of completion, as well as damages flowing from its breach." (Id.; 11 NY Jur 2d, Bonds § 115).

Each of Nova's two performance bonds provides, in pertinent part:

"The Surety, for value received, hereby stipulates and agrees, if requested to do so by the Owner, to fully perform and complete the Work to be performed under the Contract, pursuant to the terms, conditions, and covenants thereof, if for any cause, the Principal fails or neglects to so fully perform and complete such Work."

(Pisem Affirm., Exhs. 1 and 2, Performance Bond.) It is undisputed that Nova refused to undertake to complete the projects following NYCHA's written declaration of default.

NYCHA has submitted evidence that it was required to complete the work on the Reid project because the boiler at the Reid Apartments was inoperable. (Brennar Aff., ¶ 8.) NYCHA further has established that the cost of completing that work totaled \$363,802. (Brennar Aff., ¶ 8; Exhs. 28 & 29.) Although Nova questions whether the work performed on the Reid project

was necessary or within the scope of the work that was to be performed under the original contract, the construction contracts provide that NYCHA's certificate "as to the excess cost and excess time, if any, of completing the Work, and the amount of damage suffered, shall be binding and conclusive upon the Contractor and his sureties." (Pisem Affirm., General Conditions § 20 [b].)

As NYCHA has established its damages resulting from Nova's breach of its obligations under the performance bond on the Reid project, NYCHA's motion for summary judgment on its second counterclaim is granted in the amount of \$363,802, the cost that NYCHA incurred to complete the work, less the \$198,500 combined contract balances and retainage remaining on the two projects at the time of default. (See Pissem. Affirm., Exhs. 21 & 22; NYCHA Reply Memo. at 9 [acknowledging that contract balances and retainage should be deducted from cost of completion of work at Reid project].) As NYCHA has not set forth any damages with respect to the O'Dwyer project, NYCHA's motion for summary judgment on its first counterclaim is denied.

Accordingly, it is


ORDERED that the plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's motion for summary judgment is granted to the extent of: (1) awarding defendant New York City Housing Authority judgment against plaintiff Nova Casualty Company on defendant's second counterclaim in the amount of \$165,302, with interest at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and (2) dismissing plaintiff's complaint in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further  
ORDERED that defendant's first counterclaim in this action is severed and shall continue  
as an action under the same index number and under the existing pleadings; and it is further  
ORDERED that the action is transferred to the Clerk of this Court for random  
reassignment, as the action is on the Part 57 docket.

Dated: New York, New York  
December 14, 2012

ENTER:

  
MARCY FRIEDMAN, J.S.C.

**FILED**  
DEC 17 2012  
NEW YORK  
COUNTY CLERK'S OFFICE