

City of New York v American Safety Cas. Ins. Co.

2013 NY Slip Op 33655(U)

March 8, 2013

Supreme Court, New York County

Docket Number: 450214/2012

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 450214/2012

CITY OF NEW YORK

vs.

AMERICAN SAFETY CASUALTY

SEQUENCE NUMBER : 002

SUMMARY JUDGEMENT

INDEX NO.

MOTION DATE 2/20/13

MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 33-46

Answering Affidavits — Exhibits No(s) 52-61

Replying Affidavits No(s) 64

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

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/8/13

SHIRLEY WERNER KORNREICH
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: PART 54

-----X

THE CITY OF NEW YORK,

Plaintiff,

Index No.: 450214/2012

DECISION & ORDER

-against-

AMERICAN SAFETY CASUALTY INSURANCE
COMPANY,

Defendant.

-----X

AMERICAN SAFETY CASUALTY INSURANCE
COMPANY,

Third-Party Plaintiff,

-against-

PULLINI SUBSURFACE CONTRACTORS, INC.,
and EDWARD PULLINI,

Third-Party Defendants.

-----X

SHIRLEY WERNER KORNREICH, J.:

Plaintiff, the City of New York (the City), moves for summary judgment against defendant American Safety Casualty Insurance Company (ASCI). CPLR 3212. ASCI cross-moves for partial summary judgment against the City. The motions are granted in part and denied in part for the reasons that follow.

I. Background and Procedural History

This action arises from roadwork performed by third-party defendants Pullini Subsurface Contractors, Inc. (PSC) and Edward Pullini (Pullini). Pursuant to 34 RCNY § 2-02(a)(4), PSC obtained surety bonds from ASCI prior to obtaining street opening permits from the Department of Transportation (DOT) in connection with the roadwork. On August 19, 2008 and December 18, 2008, PSC and ASCI executed Permit Bonds (the Bonds) obligating ASCI to pay the City up to \$250,000 in the event that PSC failed to properly perform the roadwork. The Bonds provide:

The Surety [agrees to pay] up to [\$250,000] to either pay to complete the work and/or obligations, including repair and maintenance thereof (the “Permitted Work”), or to fully complete the Permitted Work specified herein to be performed under [PSC’s] permits . . . if [PSC], for any cause, has failed or neglected to fully perform and complete such Permitted Work.

On August 19, 2008, ASCI, PSC, and Pullini entered into a General Agreement of Indemnity (the Indemnity Agreement), whereby PSC and Pullini agreed to indemnify ASCI for any liability incurred under the Permit Bonds.

After DOT issued permits for the roadwork, the City alleged that PSC committed violations of numerous city regulations. These violations were adjudicated by the New York City Environmental Control Board (ECB). ECB issued fines against PSC totaling \$91,450, which have not been paid. The City also seeks \$2,840 for the 71 Corrective Action Requests (CARs) issued to PSC (\$40 per CAR).

The City commenced this action on February 16, 2012, asserting a claim for \$94,290 against ASCI for PSC’s liability for the ECB fines and the CAR fees. On May 30, 2012, ASCI commenced a third-party action, asserting two causes of action against PSC and Pullini: (1) specific performance of the Indemnity Agreement; and (2) breach of the Indemnity Agreement. In an Order dated January 10, 2013, this court granted ASCI’s motion for summary judgment

against PSC and Pullini, ordering them to deposit \$94,290 and \$10,933.12 (for costs), pursuant to the terms of the Indemnity Agreement, so that such money could be used to indemnify ASCI in the event ASCI is found to be liable to the City.

II. Discussion

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

“Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced

according to its terms. The court should construe the agreements so as to give full meaning and effect to the material provisions. A reading of the contract should not render any portion meaningless. Further, a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.” *Beal Savings Bank v Sommer*, 8 NY3d 318, 324-25 (2007) (internal citations and quotation marks omitted). “Whether a contract is ambiguous is a question of law, and extrinsic evidence may not be considered unless the document itself is ambiguous.” *Savoy Mgmt. Corp. v Leviev Fulton Club, LLC*, 51 AD3d 520, 521 (1st Dept 2008).

It is well established that “[w]here comprehensive words in a contract are followed by an enumeration of specific things, under the rule of [e]jusdem generis the things coming within the comprehensive words will be limited to those of a like nature to those enumerated.” *Popkin v Sec. Mut. Ins. Co. of New York*, 48 AD2d 46, 49 (1st Dept 1975), quoting 10 NY Jur, Contracts s 217; *see also 242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 103-04 (1st Dept 2006), citing McKinney’s Statutes § 239 (“words employed in a statute are construed in connection with, and their meaning is ascertained by reference to the words and phrases with which they are associated.”).

The city contends that the Bonds do not merely obligate ASCI to pay for repairs and the cost of completing PSC’s unfinished work. Rather, the City avers that ASCI must pay for all of PSC’s “obligations”, including the ECB fines. ASCI argues that the Bonds do not cover the ECB fines because (1) the fines are not specifically mentioned in the Bonds; and (2) the word “obligations” must be read in context, which clearly does not support the notion that the “obligations” include fines.

The principle of *eiusdem generis* applies to the Bonds. The words “work and/or obligations” are immediately followed with enumerated examples of corrective construction work, such as “repair and maintenance”, not examples of other financial liabilities, such as fines. Moreover, the fact that the Bonds otherwise provide that PSC “must strictly comply with the terms and conditions of [the] permits” (which require PSC to follow the city regulations that PSC was fined by ECB for violating) does not evince the parties’ intent to require ASCI to pay PSC’s fines. The Bonds are arm’s length commercial agreements. If the parties intended ASCI to be liable for fines, the Bonds would explicitly say so.

The City, however, argues that, even though fines are not mentioned in the Bonds, “the Bonds must be interpreted consistent with the provisions of the statute that requires them.” *Plaint. Reply Mem*, p. 5 (citing *Harsco Corp. v Gripon Const. Corp.*, 301 AD2d 90, 92 (2d Dept 2002)). This is true. The statute at issue, 34 RCNY § 2-02(a)(4), provides that “[a] permit bond shall be submitted . . . to cover *all costs and expenses* that may be incurred by the City as a result of the activity for which the permit is issued or for the purpose of otherwise safeguarding the interests of the City” (emphasis added). Indeed, the rationale behind the permit bond requirement is quite sensible, as the City wants to ensure that it does not have to pay for repair work in a situation where the contractor fails to finish the job. The ECB fines do not represent out-of-pocket costs incurred by the City. Rather, they serve to incentivize contractors to adhere to the relevant regulations.

That being said, there is nothing stopping the City from insisting that permit bonds must cover ECB fines. However, the City may not materially rewrite the terms of the Bonds out of frustration that their express terms do not provide the coverage that the City desires. Therefore,

ASCI is granted partial summary judgment against the City and the City's claim for the ECB fines is dismissed.

Finally, the City is granted summary judgment against ASCI on liability for the costs incurred to repair and complete the subject roadwork. Such costs are clearly covered by the Bonds. But, ASCI is not liable for the CAR fees, which total \$2,840, for the same reasons that ASCI is not liable for the ECB fines. ASCI is only liable for the City's actual costs.

The City submitted invoices attached to a letter it sent to ASCI dated January 10, 2012, in which the City indicated that its costs totaled \$4,040, including \$2,840 of CAR fees. *See* Ex. B to the Aff. of Sabina Krishnan, dated Sep. 13, 2012. Consequently, according to the City, its actual expenses as of the date of the letter totaled \$1,200. The City is entitled to that amount. It is not clear from the record if the City has been paid the \$1,200 for these costs or if the City has incurred any additional costs since January 10, 2012. The parties are referred to a Special Referee to hear and report on these issues. Accordingly, it is

ORDERED that the cross-motion for partial summary judgment by defendant American Safety Casualty Insurance Company against plaintiff The City of New York is granted and said plaintiff's claims against said defendant for ECB fines and CAR fees incurred by third-party defendants Pullini Subsurface Contractors, Inc. and Edward Pullini, are dismissed with prejudice; and it is further

ORDERED that the motion for summary judgment by plaintiff, The City of New York, against defendant American Safety Casualty Insurance Company is granted in part on liability as to plaintiff's actual repair and completion costs, and the motion is otherwise denied; and it is further

ORDERED that the following issues are referred to a Special Referee to hear and report with recommendations, unless the parties consent to a determination by the Special Referee, in which case the Special Referee may hear and determine said issues: (1) the calculation of plaintiff's actual repair and completion costs; and (2) if and how much of such costs have been paid by defendant American Safety Casualty Insurance Company; and it is further

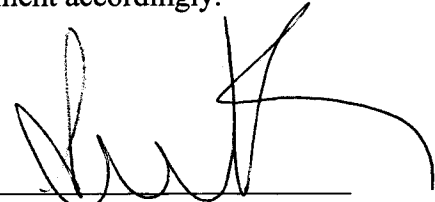
ORDERED that pending receipt of the report and a motion pursuant to CPLR 4403, final determination of that branch of the motion is held in abeyance, unless the parties consent to a determination by the Special Referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing before the Special Referee; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: March 9, 2013

ENTER:



J.S.C.