Aspen Am. Ins. Co. v Albania Travel & Tour, Inc.
2015 NY Slip Op 32264(U)
November 30, 2015
Supreme Court, New York County
Docket Number: 153195/14
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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ASPEN AMERICAN INSURANCE COMPANY,

Plaintiff,

Index No. 153195/14

-against-

DECISION/ORDER

ALBANIA TRAVEL & TOUR, INC. and BEGATOR HILA,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Aspen American Insurance Company ("Aspen") commenced the instant action against defendants Albania Travel & Tour, Inc. ("Albania") and Begator Hila ("Hila") seeking to recover under a contract between the parties. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it summary judgment against defendants. For the reasons set forth below, plaintiff's motion is granted.

The relevant facts are as follows. On or about April 15, 2013, Aspen entered into a surety indemnification contract with Albania (the "Contract"). The Contract was personally guaranteed by defendant Hila, Albania's Principal. In connection with the Contract, on or about May 1, 2013, surety bond No. SU 00600 in the amount of $70,000 became effective, with Aspen named as the surety and Albania named as the Principal (the "Surety Bond"). As consideration

for entering into the Contract and being the surety on the Surety Bond, Albania paid to Aspen a $1,400 premium. Pursuant to the Contract, defendants agreed to "indemnify and save the Surety harmless from and against all liability, claims, demands, losses, costs, damages, suits, charges, and expenses of any kind whatsoever, including attorney's and counsel fees...which Surety may sustain or incur by reason of the issuance of [the Surety Bond]."

Non-party Airlines Reporting Corporation ("ARC"), is a company that, *inter alia*, serves the travel industry with financial services, accredits travel agencies and offers data products and services, ticket distribution and original travel solutions. ARC was the creditor on the Surety Bond and via the Surety Bond, Aspen guaranteed Albania's performance on a $70,000 airline ticket line of credit obligation that Albania owed ARC. In or around June 2013, Albania allegedly defaulted on its obligations to ARC. Thus, on or about June 26, 2013, following an arbitration action brought by ARC against Albania due to its default, the office of the Travel Agent Arbiter ("TAA") issued a decision against Albania which found, *inter alia*, that "the possibility of fraud existed" by Albania and found that Albania was in default of its obligations to ARC. On or about August 19, 2013, Bradford Goodwill of ARC advised Kevin Gillen of Aspen that Albania was "in Default of the Agent Reporting Agreement as the result of improperly reported sales" for airline tickets and that Albania was in default in the amount of $70,000. Thereafter, ARC demanded that Aspen pay ARC pursuant to the Surety Bond as a result of said default.

On or about August 30, 2013, Aspen wrote to defendants demanding that they indemnify Aspen pursuant to the Contract and hold Aspen harmless against ARC's claim. For the next two months, Aspen communicated with defendants regarding their alleged default. On or about

October 23, 2013, Mr. Goodwill again advised Mr. Gillen that Albania had defaulted and again demanded payment. The next day, Aspen paid to ARC $70,000 in order to discharge Aspen's obligation under the Surety Bond. On or about January 13, 2014, Aspen again demanded that defendants indemnify Aspen pursuant to the Contract. However, Aspen alleges that defendants have yet to make any payments in order to indemnify Aspen as required under the Contract and moves for summary judgment on its first cause of action for breach of contract.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant action, this court finds that Aspen has established its *prima facie* right to summary judgment on its first cause of action for breach of contract. To establish a *prima facie* right to summary judgment on a claim for breach of contract, a plaintiff must show: (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. *See Noise in Attic Prod., Inc. v. London Records*, 10 A.D.3d 303 (1st Dept 2004). "New York courts have held that pursuant to an indemnity agreement...'the surety is entitled to indemnification upon proof of payment, unless payment was made in bad faith or was unreasonable in amount, and this rule applies

regardless of whether the principal was actually in default or liable under its contract with the obligee.'" *Prestige Decorating & Wallcovering, Inc. v. United States Fire Ins. Co.*, 49 A.D.3d 406 (1st Dept 2008). In keeping with said principle, the Contract states that "the voucher or other evidence showing payment made by the Surety in good faith by reason of such Bond(s)...shall be conclusive...and in any event prima facie evidence of such payment and the propriety thereof and of the liability of the Undersigned therefore to the Surety." Moreover, "[p]ayment is made in good faith if the surety pays the claims 'in the honest belief that it was liable for such claims.'" *Lee v. T.F. DeMilo Corp.*, 29 A.D.3d 867, 868 (2d Dept 2006)(citing *Maryland Cas. Co. v. Grace*, 292 N.Y. 194, 200 (1944)).

Here, plaintiff has established its entitlement to summary judgment on its breach of contract claim as it has provided the Contract between the parties pursuant to which defendants agreed to "indemnify and save the Surety harmless" should ARC make a claim against Aspen under the Surety Bond; evidence that ARC did indeed make such a claim against Aspen in the amount of $70,000 due to defendants' default and that Aspen performed under the Contract and Surety Bond in good faith by sending a check to ARC in the amount of $70,000; evidence that defendants have breached the Contract by failing to indemnify and reimburse plaintiff for said payment; and evidence that Aspen has been damaged as a result of defendants' breach in the amount of $70,000 plus attorney's fees.

In response, defendants have failed to raise an issue of fact sufficient to defeat plaintiff's motion for summary judgment. Defendants assert that the motion should be denied on the ground that plaintiff's payment of ARC's claim was made in bad faith based on the following allegations: ARC was seeking payment for items that were previous to the effective date of the

Surety Bond; plaintiff failed to validate the amount being sought by ARC; plaintiff failed to consider a $70,000 bank check issued by defendants to ARC in April 2013 and whether such check was applied to the alleged debt; ARC commenced a lawsuit against defendant Hila to recover the $70,000 which was later discontinued by ARC; and multiple people are listed in the alleged amounts owed on numerous levels even though each person flew only once and purchased only one ticket. However, such assertion is without merit. "The burden is on the indemnitors...to prove that the surety's compromise of the claims against the performance bonds was made in bad faith." *Republic Ins. Co. v. Real Dev. Co.*, 161 A.D.2d 189, 190 (1st Dept 1990). "[I]n order to establish a prima facie case of bad faith, the [party] must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interests." *Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 N.Y.2d 445, 453 (1993). However, "conclusory allegations of bad faith are insufficient to defeat a motion for summary judgment in favor of a surety seeking to enforce an indemnification agreement." *American Home Assur. Co. v. Gemma Constr. Co.*, 275 A.D.2d 616, 620 (1st Dept 2000).

Here, defendants have failed to raise an issue of fact as to whether plaintiff's payment of ARC's claim was made in bad faith as they have failed to show that plaintiff's conduct in paying the full amount sought by ARC constituted a "gross disregard" of defendants' interests. As an initial matter, defendants have failed to provide any evidence that the $70,000 check issued to ARC by defendants, *prior* to the effective date of the Surety Bond, was not applied to defendants' existing debt or that defendants ever informed plaintiff of said bank check. Further, to the extent defendants assert that the $70,000 requested by ARC is excessive, such argument fails to raise an issue of fact as plaintiff made good faith attempts to assess the validity of the

$70,000 claim in that it reached out to defendants for records and defendants failed to provide plaintiff with proof of payment documents for the airline tickets necessary to dispute ARC's claim against Aspen to the extent any existed. Indeed, Aspen has affirmed that prior to paying ARC's claim, it corresponded with defendant Hila for approximately two months to no avail. Further, after an arbitration was conducted based on defendants default, the TAA found that defendants were indeed in default of its obligations to ARC. Additionally, the fact that ARC previously commenced a lawsuit against defendant Hila to collect the funds at issue here and that ARC discontinued said action is irrelevant as ARC only discontinued said action after receiving payment on its claim from Aspen. However, even if defendants are correct in their assertion that they are not actually liable for the alleged $70,000 debt sought by ARC, such assertion fails to raise an issue of fact sufficient to defeat plaintiff's motion as it is well-settled that "it is irrelevant whether the indemnitor was actually liable on the underlying debt." *John Deere Ins. Co. v. GBE/Alasia Corp.*, 57 A.D.3d 620, 621 (2d Dept 2008). Rather, it is only relevant that Aspen, as the Surety, had an honest belief that defendants were liable on the debt. *See Lee*, 29 A.D.3d at 868.

Finally, to the extent defendants contend that summary judgment should be denied pursuant to CPLR § 3212(f) because discovery remains outstanding, such argument is unavailing. It is well settled that "a claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment." *Hariri v. Amper*, 51 A.D.3d 146, 152 (1st Dept 2008). Here, defendants have failed to provide any basis demonstrating that discovery may lead to relevant evidence.

Accordingly, plaintiff's motion is granted. It is hereby

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of $70,000, plus costs and disbursements; and it is further

ORDERED that the portion of plaintiff's action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees plaintiff may recover against the defendants is referred to a Special Referee to hear and report unless the parties agree that the Special Referee may hear and determine. Within thirty (30) days from the date of this order, counsel for plaintiff shall serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date. This constitutes the decision and order of the court.

Date: 11/30/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C