

Allied World Specialty Ins. Co. v Expedite Constr. & Mgt. Servs., Inc.

2016 NY Slip Op 32370(U)

December 2, 2016

Supreme Court, New York County

Docket Number: 653168/2016

Judge: Eileen A. Rakower

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
Allied World Specialty Insurance Company,

Plaintiff,

Index No.
653168/2016

**DECISION
AND ORDER**

- against -

Mot. Seq. #001

Expedite Construction & Management Services,
Inc., Expedite Roofing & Waterproofing, Inc.,
Tauseef Haque, and Saima Tauseef,

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Allied World Specialty Insurance Company (“Plaintiff”), moves, pursuant to CPLR § 3213, for summary judgment in lieu of complaint against defendants Expedite Construction & Management Services, Inc. (“Expedite Construction”), Expedite Roofing & Waterproofing, Inc. (“Expedite Roofing”), Tauseef Haque (“Haque”), and Saima Tauseef (“Tauseef”)(collectively, “Defendants”), based on an Agreement of Indemnity, dated July 25, 2014 (“the Agreement”), which each of the defendants executed in Plaintiff’s favor. Defendants oppose.

In support, Plaintiff submits the affidavit of James A. Keating, who is employed as the Assistant Vice President, North American Claims Group, of Allied World Insurance Company. Keating states he handles claims against surety bonds executed by Plaintiff, which was formerly known as Darwin National Assurance Company.

In opposition to Plaintiff's motion, Defendants submit the attorney affirmation of Joyce J. Sun and the affidavit of Haque, President of Expedite Construction.

As averred to by Keating, Plaintiff executed certain payment and performance bonds on behalf of Expedite Construction at Defendants' request in reliance on the execution of the Agreement.

Keating states that two of the bonds included:

- (1) Bond No.: S001-0342 (Performance and Payment bond)
Obligee: State of New York Penal Sum: \$1,283,990.00
Project: Replace Roof, Building No. 3, State OB
Campus, 1220 Washington Avenue, Albany, NY,
Project No. 45034C; and
- (2) Bond No.: S001-0006 (Performance and Payment bond)
Obligee: APS Contracting, Inc. Penal Sum:
\$1,994,205.00 Project: Pomonk Houses (North), 67-10
Parsons Boulevard, Queens, NY.

In his affidavit, Keating attests, subsequently, Plaintiff "has received numerous claims against these bonds" including "a demand that the Surety complete the State of New York project pursuant to its performance bond, as a result of the State's default termination of Expedite, a performance bond claim on the APS Contracting bond arising from Expedite's supposed failure to maintain required insurance coverage ("APS/Pomonok Houses Project"), and numerous claims against the payment bond on the State of New York project by subcontractors and suppliers who allege that Expedite failed to pay them for labor and/or materials they supplied to Expedite."

Keating states, that based upon the terms of the Agreement, "Other than the Surety's [Plaintiff] issuance of a written demand, this obligation

to deposit funds with the Surety in whatever amount the Surety determines is appropriate to protect it against loss, cost, and expense is unconditional.” Keating states that on December 2, 2015, on behalf of Plaintiff, he made a written demand upon Defendants that they deposit the sum of \$550,000.00 with Plaintiff pursuant to paragraph 3.3(a) of the Agreement. In that letter, Keating writes:

As you know, Allied World received a copy of the default and contract termination letters from New York Office of General Services on Contract No. 45034-C, State Office Building Campus, Replace Roof, Building No. 3 project. Allied World also received a formal performance bond claim on this same project. Allied World has accepted the claim and has found a new contractor to complete Expedite's scope of work.

As a result, Allied World currently faces losses estimated at over \$550,000, including expenses related to Expedite's failure to complete the work. Allied World now makes demand upon each of you jointly, severally and in the alternative, collateral security in the amount of \$550,000.00 (the “Collateral Security”) in cash or certified funds. This demand is made pursuant to the terms of the Agreement of Indemnity each of you signed. Allied World will seek a judgment against each of you for the full amount unless we receive the Collateral Security in full by the close of business on December 16, 2015.

Keating states to date, Defendants have not paid any portion of this sum to Plaintiff and the sum of \$550,000.00 is due and owing.

In opposition to Plaintiff's motion, Defendants submit the attorney affirmation of Joyce J. Sun and the affidavit of Haque, President of Expedite Construction.

In relevant part, the Agreement contains the following provisions:

Article III, "Indemnitor Covenants"

Each Indemnitor hereby agrees and covenants with the Surety as follows:

3.1 PREMIUMS - to pay the Surety, when due or otherwise promptly upon Surety's demand, all of the premiums, costs and charges for Bonds requested from and/or issued by the Surety in accordance with its rate filings, its manual of rates, or as otherwise agreed ...

3.2 INDEMNITY- at all times jointly and severally to indemnify and to hold the Surety harmless from and against any and all liability for any and all Loss, and in such connection, Indemnitors will pay the Surety for all Losses specified or otherwise described in Surety's notice no later than close of business on the Due Date with respect to such notice whether or not the Surety has actually made any payment thereon as of such Due Date.

3.3 DEPOSIT OF FUNDS - (a) to deposit with the Surety as collateral by the Due Date and after receipt of the Surety's written demand, the sum equal to an amount determined by the Surety to cover liability for Loss covered by Section 3.2, as determined by the Surety. At Surety's sole option, such collateral will be in addition to and not in lieu of any other collateral previously provided to the Surety. Further, if an Event of Default (as defined in this Agreement below) has occurred, the Surety will be entitled to demand that the Indemnitors place with Surety funds equal to the aggregate penal sum of all then-outstanding Bonds, as such sum is determined by the Surety in its sole discretion (regardless of whether any actual liability for Loss exists under any of the Bonds).

“Claim” is defined as “any claim, notice of default, notice of termination, demand for payment, suit, or any other form of notice or claim or demand that the Surety receives in connection with any Bond.” “Loss” is defined:

[T]he underlying dollar amount of all Claims and of all damages, expenses, costs, professional and consulting fees ..., interest and expenses of every nature ... which the Surety sustains or incurs or becomes liable for by reason of (a) being requested to execute or procure the execution of any Bond; or (b) having executed or procured the execution of any Bond; or (c) the administration of any amendment, waiver or supplement to any Bond; or (d) any Indemnitor’s failure to perform or comply with any of the covenants and conditions of this Agreement; or (e) enforcement of, attempted enforcement of, or presentation of rights under any Bond or this Agreement.

CPLR §3213 provides that, “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” A document comes within CPLR § 3213 “if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms.” (*Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 [1996] [internal citations omitted]). By contrast, the instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document. (*Id.*). The test “is not what the instrument may be reduced to by part performance or by elision of a portion of it ... but rather how the instrument read in the first instance.” (*Weissman*, 88 N.Y.2d at 445). To prevail on a motion for summary judgment in lieu of complaint under CPLR § 3213, the plaintiff must present proof of the “instrument for the payment of money only” and evidence of the defendant’s failure to make the payment called for by the instrument’s terms. (*Matas v. Alpargatas S.A.I.C.*, 274 A.D.2d 327, 328 [1st Dep’t 2000]).

Plaintiff, in its motion, claims that the payment obligation set forth in paragraph 3.3(a) of the Agreement falls within the ambit of 3213 because it constitutes an unconditional obligation on Defendants' part to pay to Plaintiff the amount that Plaintiff demands upon written demand and "the de minimis proof of Surety's demands of Defendants' nonpayment." Plaintiff further claims:

[The] Surety is not seeking summary judgment in lieu of complaint based upon Defendants' obligation to indemnify the Surety, as described in paragraph 3.2 of the Agreement of Indemnity, or on any other basis that requires proof outside of the language of paragraph 3.3(a), the demand for payment, and proof of Defendants' nonpayment. The obligation to indemnify under paragraph 3.2 pertains to liabilities that have yet to be established and that will require separate proof. The obligation under paragraph 3.3(a), on other hand, is a completely separate obligation, guarantying payment to the Surety unconditionally, based only upon the Surety's written demand. The fact that paragraph 3.3(a) does not recite a specific sum does not preclude judgment under CPLR 3213.

Defendants, in opposition, argue that there is no basis for Plaintiff's inclusion of the APS/Pomonok Houses Project claim as a potential bond claim because Plaintiff has previously denied liability for the claim. Defendants further argue that the Agreement is not "an instrument for payment of money only" within the ambit of CPLR 3213. Defendants argue that contrary to Plaintiff's interpretation of Section 3.3(a) of the Agreement, "[t]he obligation to deposit collateral is not 'unconditional,' but limited" and is required only "to cover liability for Loss covered by Section 3.2 [which Section 3.3(a) allegedly incorporates by reference], as determined by the Surety . . .". Haque, in his affidavit, states that Plaintiff "never provided any written specification or explanation of any 'Losses' actually sustained or incurred by it as required by Section 3.2 of the Agreement of Indemnity -- not with its December 2, 2015 Demand letter,

and not after Defendants' counsel requested that information from Allied World." Defendants further argue that Plaintiff has failed to substantiate its current demand for \$550,000.00 in cash collateral. Haque states:

The penal sum of the performance bond provided by Allied World for the NYSOGS Project was \$1,283,990.00. A Takeover Agreement between the NYSOGS and Allied World (executed by Mr. Keating for Allied World), dated November 10, 2015, shows that Allied World agreed with NYSOGS that it would take over the work on the aforesaid Contract for which it would be paid the remaining, unexpended Contract funds of \$1,277,227.00. (A true and correct copy of the Takeover Agreement, dated Nov. 10, 2015, is attached hereto as "Exhibit 3.") On around the same date, Plaintiff and Aktor Corporation, a contractor hired by Plaintiff, entered into a Completion Agreement for Aktor to complete the NYSOGS Project for the price of \$1,293,898.00. (A true and correct copy of the Aktor Completion Agreement, dated Nov. 13, 2015, is attached hereto as "Exhibit 4.") 22. Thus, the difference between the Aktor Completion Agreement price and the funds remaining in Expedite Construction's Contract is only \$16,671.00. Assuming that Allied World is responsible for that difference, still it has never specified what constitutes the rest of its supposed "Losses" of over a half-million dollars.

Here, Plaintiff has failed to demonstrate its entitlement to a money judgment; further, the subject Agreement of Indemnity is not an instrument for the payment of money only within the ambit of CPLR 3213. Accordingly, Plaintiff's motion for summary judgment in lieu of complaint is denied.

Wherefore, it is hereby

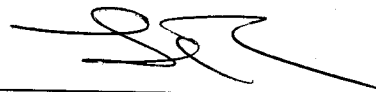
ORDERED that Plaintiff's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that Plaintiff's moving papers are hereby deemed the complaint in this action and Defendants' answering papers are hereby deemed the answer.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: December 2, 2016

DEC 02 2016



Eileen A. Rakower, J.S.C.