Fidelity and Guar. Ins. Co. v Apple Bldrs. and Renovators, Inc.
2019 NY Slip Op 31226(U)
April 22, 2019
Supreme Court, New York County
Docket Number: 653874/16
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15
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FIDELITY AND GUARANTY INSURANCE COMPANY,

Plaintiff,

DECISION AND ORDER

Index No.: 653874/16

-against-

APPLE BUILDERS AND RENOVATORS, INC., JAGANNATHAN KUTTAMBAKKAM, and SAILAJA CHITTA,

Mot Seqs 001 and 002

Defendants.
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HON. MELISSA A. CRANE, J.

Motion sequence numbers 001 and 002 are consolidated for disposition.

Plaintiff, a surety ("Fidelity"), seeks compensation for indemnification of certain expenditures and fees, including attorneys' fees, that Fidelity alleges it incurred to defend itself in a separate action, captioned *Rodriguez v Apple Builders & Renovators, Inc.* which was adjudicated in this court, under Index No. 114971/05 (the "underlying action").

In motion sequence number 001, defendant, Apple Builders and Renovators, Inc. (Apple), a construction company, and its president, defendant Jagannathan Kuttambakkam, who with defendant Sailaja Chitta, are parties to a general indemnification agreement ("Agreement") in favor of Fidelity, move for an order granting summary judgment dismissing the complaint (CPLR 3212). In motion sequence number 002, Fidelity moves for an order granting summary judgment on the complaint,[1] for liability, and permitting plaintiff to submit later a declaration of services as to plaintiff's attorneys' fees and costs in prosecuting this motion.

[1] The causes of action in the complaint are for: (1) specific performance; (2) contractual indemnification; (3) exoneration, pursuant to a provision in the Agreement; and (4) common law indemnification.

In 2001, Fidelity and defendants executed the Agreement as part of a transaction in which Fidelity issued surety bonds in connection with school construction projects. Fidelity, Apple and Kuttambakkam were later named as defendants in a class action for prevailing wages, which had been consolidated with another such suit involving other Apple construction projects and sureties (together, the underlying action).

Fidelity retained counsel in the underlying action and, together with the other defendant sureties, engaged a firm, Nihill & Riedley ("Nihill"), to provide an analysis of Apple's records to determine Apple's prevailing wage obligations for each of the construction projects involved in the underlying action. Plaintiff states that it has incurred $51,674.63 in fees from Nihill and $69,570.36 in legal fees for its defense in both the underlying action and in this action. Moreover, it expects to incur, and thus seeks, additional legal fees prosecuting this action.

On a motion for summary judgment, the movant must, through admissible evidence, make a prima facie showing of entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and it must be clear that no material or triable issues of fact exist (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Once the movant has demonstrated such entitlement, the burden shifts to the opposing party to produce evidence sufficient to raise an issue of fact warranting a trial "or [to] tender an acceptable excuse for [the] failure to do so" (*Zuckerman*, 49 NY2d at 560).

Defendants' Motion for Summary Judgment

In moving, defendants argue that Fidelity's expenditures for attorneys' fees were unnecessary and not in good faith because Apple offered to provide counsel for Fidelity. In making its arguments, defendants rely on paragraph six of the Agreement:

> [T]he UNDERSIGNED will indemnify the SURETY and hold it harmless from and against all liability, losses, costs, damages, attorneys' fees, disbursements and

> expenses of every nature which the SURETY may sustain or incur by reason of, or relating to, having executed or procured execution of any such BOND, or that may be sustained or incurred by reason of making any investigation of any matter, or prosecuting or defending any action in connection with any such BOND, or recovering any salvage or enforcement of any provision of this Agreement. The UNDERSIGNED shall pay to the SURETY all money which the SURETY or its representatives may pay or cause to be paid and shall pay to the SURETY such sum as may be necessary to exonerate and hold it harmless, with respect to any liability which may be asserted against the SURETY as soon as liability exists or is asserted against the SURETY, whether or not the SURETY shall have made any payment therefor. In the event of any payment by the SURETY, the UNDERSIGNED further agree that in any accounting between SURETY and the UNDERSIGNED, the SURETY shall be entitled to charge for any and all disbursements made by it in good faith under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether or not such liability, necessity or expediency existed. As used herein, "payments made in good faith" shall be deemed to include any and all payments made by the SURETY except those made with deliberate and willful malfeasance"

(Complaint, exhibit A [emphasis added]).[2]

Surety indemnity agreements, like the one at issue in this case, are consistently enforced (*see Prestige Decorating & Wallcovering, Inc. v United States Fire Ins. Co.*, 49 AD3d 406, 406 [1st Dept 2008]; *American Home Assur. Co. v Gemma Constr. Co.*, 275 AD2d 616, 619 [1st Dept 2000]). "[T]he 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*, 49 AD3d at 406 [internal quotation marks and citation omitted]).

Defendants assert that paragraph six of the Agreement does not specify the manner in which defendants were to meet their obligation to indemnify and hold Fidelity harmless against liability for attorneys' fees. Therefore, according to defendants, they could fulfill any

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[2] In quoting the first sentence of paragraph six of the Agreement, in more than one instance defendants omit the word "losses."

indemnification obligation to Fidelity relating to attorneys' fees by offering to provide counsel to take over Fidelity's defense in the underlying action. Defendants contend that Fidelity's choice not to accept defendants' offer of counsel was a failure to mitigate damages. Thus, defendant's contend, in order for plaintiff to prevail in this action, the Agreement and the common law require Fidelity to demonstrate that its declination of legal representation was necessary and in good faith.

The plain language of the Agreement, read as a whole, does not support defendants' interpretation that it is possibly to fulfill the Agreement's indemnification obligation merely by offering to provide plaintiff a defense. Paragraph six of the Agreement concerns reimbursement and payment for plaintiff's expenditures relating to the surety bonds it issued, including attorneys' fees. Reimbursement for expenditures is not the equivalent of the offer of a defense. Defendants contend that the Agreement only requires that defendants pay to Fidelity "such sum as may be necessary to exonerate and hold it harmless," and limited to disbursements "made by it in good faith . . . or that it was necessary or expedient to make such disbursements" (Yaffee moving affirmation, ¶ 8, quoting Agreement, ¶ 6). Defendants ignore that paragraph 6, when read in full, is not intended as a limitation favoring Agreement's indemnitors, but as a mandate ("the Undersigned shall pay the SURETY") concerning the indemnitors' payments to Fidelity for Fidelity's expenditures.

Defendants do not provide authority to support its contention that, under New York law and the particular circumstances in the underlying action, Fidelity was obligated to forego its own counsel in favor of Apple's then counsel, Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (Ogletree) (*see Triangle Engineering Corp. v Travelers Indemnity Co.* (72 F Supp 112, 115 [ED

NY 1947]).[3] Moreover, defendants' mere challenge to plaintiff's ultimate ability to prevail in this action does not establish their burden to demonstrate that dismissal of the complaint is proper.

Assuming, *arguendo*, that, in order to mitigate damages, Fidelity was required to use Apple's counsel under the Agreement, defendants' moving submissions do not sufficiently demonstrate that Fidelity refused to permit Ogletree to take over defense of the action. The correspondence plaintiff submits shows that, in response to Fidelity's counsel's request that Ogletree provide documentation for Fidelity relating to the request to permit Ogletree to take over as Fidelity's counsel, Ogletree replied "[l]etter to follow." There is nothing in the record to show that a letter did follow. While Kuttambakkam, affirms that Apple authorized its own counsel to represent Fidelity, Kuttambakkam has no direct knowledge that counsel did offer to represent Fidelity.

Defendants also do not point to authority demonstrating that, under New York law, the attorneys' fee provision of an indemnification agreement is waived absent the surety's agreement to accept the indemnitor's or principal's offer of its own defense counsel, or that the failure to accept such an offer demonstrates a failure to mitigate damages. In reply, defendants' counsel asserts that Fidelity probably knew that it had no liability, and wanted its own counsel, as opposed to being represented by counsel that also represented Apple and another surety in the underlying action. Without evidentiary support, that argument is supposition. Regardless, plaintiff's preference to hire its own counsel is not a sufficient basis to demonstrate bad faith (*see*

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[3] While plaintiff states otherwise in its brief, Exhibit J of plaintiff's moving submission does not contain an email from Apple stating "regarding [the role of Apple's counsel, Eric Stuart,] as discussed over the phone, he will be representing all defendants in the class action" (Yaffe moving affirmation [motion sequence number 001], ¶ 6). In addition, Apple's counsel affirms that an email was to another insurance company, "Centennial" and, therefore, not Fidelity (*id.*).

Colonial Sur. Co. v Eastland Constr., Inc., 160 AD3d 437, 438 [1st Dept 2018] [bad faith not demonstrated where there was no allegation of "fraud or collusion by plaintiff in connection with its acceptance of liabilities or payment of claims"]; *John Deere Ins. Co. v GBE/Alasia Corp.*, 57 AD3d 620, 621 [2d Dept 2008]). Defendants do not state that any of Fidelity's counsel's fees in the underlying action, where Apple and Kuttambakkam were also defendants, were unreasonably high or otherwise inappropriate.

Defendants argue that plaintiff's claim is time-barred in part. Both sides agree that a six-year statute of limitations governs, but differ as to its accrual. Defendants argue that, based upon the specific language of paragraph six of the Agreement, the claim accrues as soon as Fidelity incurred a liability, that this action commenced on June 25, 2015, and that Fidelity's claim for indemnification for any bill or liability older than June 25, 2009 is therefore time-barred. Defendants provide a list of bills that they obtained through discovery. They contend that bills with a date of May 31, 2009, and earlier, are time-barred, as are payments that plaintiff claims it made to Nihill in 2008.

In opposition, plaintiff argues that the six-year statute of limitations commences when the last payment is made in the underlying action. Plaintiff also contends that because defendants admit that a portion of legal fees, specifically $16,974.32, was incurred after June 25, 2009, they are not entitled to summary judgment. In reply, defendants argue, the statute of limitations accrued when liability arose, or at the latest when plaintiff paid Nihill and the attorneys' fees.

A surety is entitled to full indemnity. Thus, the indemnity claim encompasses attorneys' fees and litigation costs (*see Chapel v Mitchell*, 84 NY2d 345, 346 [1994]; *Hoffert v Katz*, 118 AD3d 1393, 1394 [4th Dept 2014]). In cases where a surety is sued and is defending in an underlying action relating to a bond, and there is an agreement that provides for indemnification

of expenditures and attorneys' fee. The statute of limitations for contractual indemnification do not accrue until the amount of the payout to the plaintiff in the underlying action on the bond is fixed (*755 Seventh Ave. Corp. v Carroll*, 266 NY 157, 161 [1935]; *Varo, Inc. v Alvis PLC*, 261 AD2d 262, 265 [1st Dept 1999]; *Hutton Construction Co., Inc. v County of Rockland*, 52 F3d 1191, 1193 [2d Cir 1995], citing *Smith v Hooker Chems. & Plastics Corp.*, 89 AD2d 361, 366 [4th Dept 1982]; *United States Fidelity & Guaranty Com. v Sequip Participacoes, S.A.*, 2003 WL 22743430, 2003 US Dist Lexis 20945 [SD NY, No. 98 Civ. 3099 (THK)] [judgment triggered obligation to indemnify]; *see also Tedesco v A.P. Green Indus., Inc.*, 8 NY3d 243, 247 [2007] ["statute of limitations on a claim for indemnity or contribution accrues only when the person seeking indemnity or contribution has paid the underlying claim"]; *Residential Bd. of Mgrs. of Platinum v 46th St. Dev., LLC*, 154 AD3d 422, 422-423 [1st Dept 2017] [same]).[4] Fidelity did not make a payment to the plaintiffs in the underlying action. However, liability in that action was not fixed until there was a determination as to what Fidelity had to pay out on the bond. It was, at that time, that the indemnity claim, with its associated attorneys' fees, accrued. Fidelity argues that it yet may be called upon to pay out to the plaintiffs in the underlying case, if Apple does not fulfill its settlement obligations. However, for statute of limitations purposes it was only, upon the settlement of the underlying action that Fidelity's liability to plaintiffs became fixed, but at zero.[5] Because the settlement was less than six years prior to plaintiff's

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[4] *State of New York v Stewart's Ice Cream Co.* (64 NY2d 83 [1984]), cited by plaintiff to support that the statute of limitations for indemnification is six-years, did not involve an underlying lawsuit, but involved the State's expenditures for an environmental clean up, for which the State sought common law indemnification. The Court determined that, under those circumstances, the claim accrued when the State made the expenditures.

[5] Although, in the underlying action, Fidelity states that it did not join in the class action settlement, Supreme Court Justice Carol R. Edmead signed a final order approving the settlement therein on June 12, 2014. As to the accrual date of the statute of limitations, Fidelity proposes another date, in 2011, when a court order reflects that Fidelity made an application for approval of a stipulation of settlement for the class action. Under either date, Fidelity's action is not time-barred.

2015 commencement of this claim, this action is not time-barred, and dismissal of the complaint on that basis is unwarranted.

Dismissal of the complaint is also unwarranted because defendants represent that $16,974.32 of plaintiff's claim is not time-barred. In addition, defendants address only plaintiff's contractual indemnification claim and not its common law indemnification or other claims.

Plaintiff's Motion for Summary Judgment

In support of the motion, plaintiff provides the Agreement, a copy of Nihill's retainer letter, and a spreadsheet with details concerning payments made by Fidelity. Plaintiff's representative avers that the spreadsheet represents payments made to both Nihill and plaintiff's law firm relating to attorneys' fees and defense costs in the underlying action. The representative also avers that to date, Fidelity has incurred $69,570.36 in legal fees in defending its interests in the underlying litigation and in prosecuting this action. Concerning legal fees, the spreadsheet contains details relating to several checks issued to Nihill. The spreadsheet also lists checks issued to plaintiff's law firm, on various dates from August 2, 2006 through March 2, 2018, totaling $69,570.36. Without specifying a date, Fidelity states that a demand was made upon defendants for indemnity, but that they refused to pay. Paragraph six of the Agreement provides that "vouchers or other evidence of payments made by the SURETY shall be prima facie evidence of the fact and amount of the liability of the UNDERSIGNED to the SURETY." Plaintiff's showing is sufficient to demonstrate that Fidelity incurred attorneys' fees and expenses relating to its defense in the underlying case.

In opposition, defendants argue that they have pleaded eight affirmative defenses, each of which is supported by facts, but point to nothing to demonstrate that plaintiff must defeat these

defenses in order to meet its burden on summary judgment. One of these defenses is that the statute of limitations precludes recovery for expenditures that pre-date June 25, 2009. As addressed above, plaintiffs have not prevailed on that argument.

Concerning the claim for contractual indemnification of the amount of Nihill's fees, defendants argue that the motion should be denied. In support, defendants submit the retainer agreement with Nihill. The retainer states that, after a determination of potential liability in the underlying action was made, the involved sureties would reallocate the total amount of the fees paid to Nihill among themselves, in proportions equal to each surety's liability in the underlying action. Defendants also submit the October 5, 2010 letter of Fidelity's counsel, stating that the Nihill audit showed that Fidelity did not owe Nihill any fees, and that counsel for Centennial, another defendant surety in the underlying case, had a check from Centennial for $50,120.86 to reimburse Fidelity for the Nihill fees. Defendants argue: (1) that these two letters demonstrate that the other sureties in the underlying action are liable to Fidelity for Nihill's fees; (2) that defendants are not obligated to indemnify Fidelity for expenses incurred due to a breach of the Nihill retainer agreement by one of the sureties; (3) that if defendants must pay Fidelity for the auditing fees owed by Centennial, they would be left without recourse, as they were not parties to the Nihill retainer agreement; (4) that Fidelity failed to mitigate damages because it did not submit a claim in Centennial's insurance liquidation proceeding; and (5) that plaintiff has improperly failed to join a necessary party, Centennial's law firm, McElroy Deutsch Mulvaney & Carpenter, LLP (McElroy), Centennial, and the other surety in the underlying action.

In reply, plaintiff contends: (1) that it incurred the Nihill fees; (2) that defendants should have deposed Centennial about the Nihill payment, but did not; (3) that defendants' obligation to indemnify is not absolved by an obligation among the various sureties to apportion fees; (4) that

there are no other necessary parties; and (5) defendants failed to implead those parties that it claims are necessary. Also in reply, defendants submit the affirmation of Paul H. Mandal, who avers that he is a partner from plaintiff's law firm, that also represented plaintiff in the underlying case. Mandal avers that he has reviewed the firm's files and that it did not receive the funds from the McElroy. Plaintiff argues that, even if Centennial had issued a check, "it appears that Centennial went into liquidation at the time of any such alleged check and thus they were prohibited from disbursing such a check" (plaintiff's reply memorandum of law at 11). Plaintiff maintains that even if it had submitted a claim in Centennial's liquidation proceeding, defendants only speculate that this would have resulted in plaintiff's recovery of the Nihill fee.

Defendants demonstrate that a fact issue exists as to plaintiff's reimbursement for the Nihill expense. Plaintiff's reply submission demonstrates only that McElroy did not receive the funds, and not that Fidelity did not receive the funds. In light of this fact issue, it is unnecessary to reach the parties' other arguments at this juncture.

Defendants argue that the defense of laches applies, with defendants prejudiced in that they did not receive reasonable notice of the fees that plaintiff claims here. Defendants contend that had they known about the fees, or known earlier, they could have taken steps to minimize their obligations, such as commencing a declaratory judgment action to establish that they were not liable for the expenses, or having Apple's counsel take steps to minimize the work of Fidelity's counsel. Defendants argue that they are also prejudiced because Ogletree was unwilling to submit an affidavit on defendants' behalf in this motion, due to the lapse of time between when plaintiff incurred fees and when demand for the fees was made. These arguments are unpersuasive as to the contractual indemnification claim, where laches is not available as a

defense as "dispositive consideration must be given to the applicable statute of limitations" (*Republic Ins. Co. v Real Dev. Co.*, 161 AD2d 189, 190 [1st Dept 1990]).[6]

Plaintiff has demonstrated entitlement to summary judgment for liability for the legal fees it seeks from the underlying action (*American Home Assur. Co.*, 275 AD2d at 620). Defendants have not demonstrated the existence of a material issue of fact. There is no genuine issue raised of bad faith concerning the fees and no claim or showing that any of the fees were excessive (*id.*). However, plaintiff's submissions do not distinguish between the fees that were expended in the underlying action and those that were expended in this action. Consequently, based upon the current record, the court is unable to grant a judgment for damages incurred in the underlying action. However, plaintiff may make an attorneys' fee application, as addressed below, in which it specifies which payments were made in the underlying action.

Plaintiff seeks legal fees in this action, pursuant to paragraph 14 of the Agreement, that provides:

> "[I]n any action, suit, or proceeding brought by the SURETY to enforce any of the covenants of this Agreement, the SURETY shall be entitled to receive from the UNDERSIGNED the costs and expenses, including attorneys' fees, incurred by the SURETY in connection therewith, and such costs and expenses may be included in any judgment or decree rendered against the UNDERSIGNED"

(Snyder aff., exhibit A [NYSCEF document No. 26]). Defendants argue that an attorneys' fees award is warranted only if the fees are necessary, and that they are not necessary if Fidelity does not obtain a judgment for its fees in the underlying action, or recovers only a small part of its fees, such as $16,974.32. Defendants contend that, absent Fidelity's attempt to seek $120,000 in

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[6] Even if notice was required under the Agreement, which defendants do not show, Apple and Kuttambakkam were defendants in the underlying action and notice of Fidelity's representation there is imputed to them through their counsel. Plaintiff also provides no evidence that defendant Chitta did not know that Fidelity was incurring expenses and fees relating to the underlying action.

fees, including time-barred fees, the parties would have compromised for a reasonable amount, without the need for litigation.

Defendants' arguments about settlement difficulties due to plaintiff's inflexibility are not persuasive absent a showing of any legal obligation on plaintiff's part to settle the case. However, to demonstrate the amount of the fees it seeks to recover in this action, plaintiff relies solely on a spreadsheet with payment dates, and also seeks additional fees that it claims it is still incurring or will incur. Concerning the attorneys' fees in this action, plaintiff must make some showing that the award is warranted for the services rendered (*see People's United Bank v Patio Gardens III, LLC*, 143 AD3d 689, 691 [2d Dept 2016]; *Prestige*, 49 AD3d at 406; *Sempra Energy Trading Corp. v PG&E Tex. VGM*, 284 AD2d 253, 253 [1st Dept 2001] [fees that are not excessive are recoverable]). Plaintiff did not submit bills for the attorneys' fees that it claims to have incurred in this action and may not simply submit a declaration after judgment. The issue of the amount of an attorneys' fees award may be determined by a fee application, upon plaintiff's submission of proper evidentiary support (*see Moses Production, Inc. v Sweetland Films B.V.*, 2006 NY Misc, LEXIS 2394, *3 [Sup Ct, NY County, July 31, 2006, Fried, J.), citing *Paganuzzi v Primrose Mgt. Co.*, 268 AD2d 213, 213 [1st Dept 2000]); *see e.g. Navigators Ins. Co. v Sterling Infosystems, Inc.*, 2016 NY Slip Op 30609[U] [Sup Ct, NY County 2016, Coin, J.]).

Accordingly, it is

ORDERED that defendants' motion for an order granting summary judgement dismissing the complaint (motion sequence No. 001) is denied; and it is further

ORDERED that plaintiff's motion for summary judgment (motion sequence No. 002) is granted in part, to the extent that plaintiff is granted summary judgment as to liability for

attorney fees and expenses that it incurred in the action captioned *Rodriguez v Apple Builders & Renovators, Inc.*, (Supreme Court, NY County, index No. 114971/05) and in this action; and it is further

ORDERED that plaintiff's counsel may make an application for attorneys' fees, by motion on notice, within 45 days of the date of this order, to include evidence supporting the fee application in this action and the amount of fees that were incurred in plaintiff's defense in *Rodriguez v Apple Builders & Renovators, Inc.*, (Supreme Court, NY County, Index No. 114971/05).

Dated:

4-22-2019

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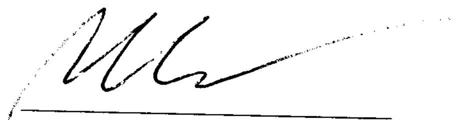

J.S.C.

HON. MELISSA A. CRANE
J.S.C.