Fidelity and Guar. Ins. Co. v Apple Bldrs. & Renovators, Inc.
2020 NY Slip Op 32093(U)
June 29, 2020
Supreme Court, New York County
Docket Number: 653874/2016
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

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FIDELITY AND GUARANTY INSURANCE COMPANY, DECISION AND ORDER

Plaintiff, Index No. 653874/2016

- against -

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

Defendants.

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MELISSA A. CRANE, J.:

Plaintiff Fidelity and Guaranty Insurance Company ("Fidelity") moves for an order for attorneys' fees and expenses incurred in this action, and in an underlying class action suit for prevailing wages. Defendants Apple Builders and Renovators, Inc., Jagannathan Kuttambakkam, and Sailaja Chitta (collectively, "defendants") oppose the motion and cross-move, pursuant to CPLR 2221, for leave to renew their prior motion for summary judgment dismissing the complaint.

Background

This action arises out of a general indemnity agreement (the "Agreement") that defendants executed in favor of Fidelity in connection with surety bonds Fidelity had issued on Apple's construction projects. Apple's projects included one for the New York City School Construction Authority in Queens County. Fidelity sought compensation and indemnity from defendants for defense costs and expenses incurred in the underlying action captioned *Rodriguez v Apple Builders & Renovators, Inc.*, Sup Ct, NY County, index No. 114971/2005 (the "*Rodriguez* Action"), and in this action.

On two prior motions, Fidelity and defendants moved separately for summary judgment. In a decision and order dated April 22, 2019, this court granted Fidelity judgment on the issue of defendants' liability for the attorneys' fees and expenses it has incurred in the *Rodriguez* Action and in this action, and permitted Fidelity to move by separate application to recover its expenditures (NY St Cts Elec Filing [NYSCEF] Doc No. 45, affirmation of Paul H. Mandal [Mandal], ex A at 13-14). In the same decision and order, this court denied defendants' motion for summary judgment to dismiss the complaint (*id*. at 12). Fidelity now moves for an order fixing its fees, and defendants cross-move for leave to renew their prior motion for summary judgment.

Discussion

The court will address the cross motion first. Defendants argue that the invoices submitted on Fidelity's present application constitute new evidence for purposes of renewal. The affidavit of Timothy Snyder ("Snyder"), upon which plaintiff had relied on its earlier summary judgment motion, indicated that Travelers Indemnity Co. employed Snyder ("Travelers") (NYSCEF Doc No. 48, affirmation of Scott M. Yaffe [Yaffe], ex. A [Snyder aff], ¶ 1). Snyder stated that "Fidelity was obligated to retain counsel to represent its interests" in the *Rodriguez* Action, and that Fidelity had spent $69,570.36 in legal fees and $51,574.63 in accounting fees (*id.*, ¶¶ 9, 16-17). The invoices Fidelity submits on this motion, though, show that the law firm representing Fidelity, Dreifuss Bonacci & Parker, PC ("DBP"), had directed each bill to "St. Paul Travelers" (NYSCEF Doc No. 45, Mandal affirmation, ex. C at 3-244). Defendants argue that Fidelity has not incurred any legal fees or expenses because the documents identify St. Paul Travelers, rather than Fidelity, as the payee. They urge the court to grant renewal and dismiss plaintiff's complaint on this ground.

Fidelity, in opposition, argues that defendants have always known the identity of the payee of its bills, as evidenced in the checks made payable to the accounting firm, Nihill & Reidley, P.C. ("Nihill"). Nihill had been retained in the *Rodriguez* Action (NYSCEF Doc No. 49, Yaffe affirmation, ex. B). These checks show that the funds were drawn on an account for Travelers (*id*. at 1-3). Consequently, what defendants' claim is a new fact is not a new fact at all.

A motion for leave to renew must be based upon new facts not offered on the prior motion that would change the determination (*see* CPLR 2221 [e] [2]). The moving party must demonstrate a reasonable justification for failing to present the new facts on the earlier motion (*see* CPLR 2221 [e] [3]; *Altschuler v Jobman 478/480 LLC*, 135 AD3d 439, 441 [1st Dept 2016], *lv dismissed* 28 NY3d 945 [2016], *lv denied* 29 NY3d 903 [2017]), because "[r]enewal is not available as a 'second chance' for parties who have not exercised due diligence in making their first factual presentation" (*Galisia v Espinal*, 149 AD3d 544, 545 [1st Dept 2017] [internal quotation marks and citation omitted]). The court, though, has discretion to relax this last requirement in the interest of justice (*see Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]), and grant the motion "so as not to defeat substantive fairness" (*see Corporan v Dennis*, 117 AD3d 601, 601 [1st Dept 2014] [internal quotation marks and citation omitted]).

Here, defendants have not met their burden on renewal (*see Pinkard v New York City Dept. of Educ*., 168 AD3d 474, 474 [1st Dept 2019], *lv dismissed* 33 NY3d 1122 [2019]).[1] First, defendants' argument that they only recently learned of St. Paul Travelers' involvement lacks merit. According to defendants, Fidelity exchanged 73 invoices from DBP dating from December 31, 2005 to June 30, 2014 during pretrial discovery (NYSCEF Doc No. 11, Yaffe

[1] Ordinarily, the movant's failure to submit a complete record in support of a motion to renew, as directed under CPLR 2214, or the docket numbers associated with the prior motion, warrants denial (*see Eastern Funding LLC v San Jose 63 Corp*., 172 AD3d 818, 819 [2d Dept 2019]). Nevertheless, the court will overlook this deficiency in this instance (*see Matter of Nazor v New York City Loft Bd*., 179 AD3d 609, 611 [1st Dept 2020]).

affirmation on motion seq. no. 001, ¶ 4). The invoices that defendants submitted on their prior motion were addressed to St. Paul Travelers (NYSCEF Doc No. 20, Yaffe affirmation on motion seq. no. 001, ex. H at 1). Additionally, defendants have admitted that Fidelity previously exchanged three checks showing that Travelers, not Fidelity, paid for Nihill's services (NYSCEF Doc No. 47, Yaffe affirmation, ¶ 9). Therefore, defendants knew when they moved for summary judgment that St. Paul Travelers, as opposed to Fidelity, may have paid Fidelity's expenses. Thus, the identity of the payee of Fidelity's legal fees and expenses does not constitute new evidence as CPLR 2221 (e) (2) contemplates (*see Heather James, LLC v Day & Meyer, Murray & Young Corp*., 154 AD3d 577, 577 [1st Dept 2017]).

Even if the invoices qualified as new evidence for purposes of renewal, defendants have not demonstrated that the new evidence would change this court's prior determination (*see Sanchez v Hay*, 122 AD3d 533, 534 [1st Dept 2014], *lv dismissed* 24 NY3d 1213 [2015]). The Agreement defines the "surety" to whom indemnity is owed, in part, as "Fidelity and Guaranty Insurance Company … and all affiliated, associated, and subsidiary companies thereof, now existing or hereafter created, assumed or otherwise acquired, their successors and assigns" (NYSCEF Doc No. 54, Mandal reply affirmation, exhibit B at 8). In his affidavit, Snyder stated that Travelers was an affiliate of Fidelity, and that he was Traveler's representative charged with handling Fidelity's claim (NYSCEF Doc No. 48, ¶ 1). Defendants offered no evidence to refute Snyder's statements. Notably, the definition for "surety" in the Agreement also included St. Paul Fire and Marine Insurance Company and St. Paul Guardian Insurance Company, and the Agreement's letterhead reads "The St. Paul Surety" (NYSCEF Doc No. 54, Mandal reply affirmation, ex. B at 8). Fidelity maintains that "St. Paul" acquired it in 1998, and that St. Paul merged with Travelers in 2004 (NYSCEF Doc No. 53, Fidelity's reply memorandum of law at

4). Although Fidelity offered no direct evidence of these mergers or acquisitions, these transactions have been recognized elsewhere (*see Brown v St. Paul Travelers Companies*, 559 F Supp 2d 288, 289 [WD, NY 2008], *affd* 331 Fed Appx 68 [2d Cir 2009]; *Lochbaum v United States Fid. & Guar. Co*., 136 F Supp 2d 386, 387 [WD Pa. 2000], *affd* 265 F 3d 1055 [3d Cir 2001], *cert denied* 534 US 1066 [2001]; *Titan Indem. Co. v Hood*, 895 So 2d 138, 142 [Miss 2004], *reh denied* 2005 Miss LEXIS 195 [Sup Ct Miss, Mar. 24, 2005]).

Nor is renewal warranted because Fidelity failed to support its prior motion for summary judgment with proof of payment to DBP. CPLR 3212 (e) permits the court to grant summary judgment "as to one or more causes of action, or part thereof, in favor of any one or more parties." Thus, in the prior decision, the court properly determined that Fidelity was entitled to summary judgment on the issue of defendants' liability, with the amount of fees due to Fidelity to be determined on a later application (*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]); *Navigators Ins. Co. v Sterling Infosystems, Inc*., 2016 NY Slip Op 30609[U] [Sup Ct, NY County 2016, Coin, J.]). Consequently, the court denies defendants' cross motion to renew its prior motion for summary judgment.

Turning to Fidelity's fee application, Fidelity submits an affirmation from Mandal, a partner in DBP and the supervising attorney in this matter (NYSCEF Doc No. 45, Mandal affirmation, ¶ 1). Mandal states that a total of eight attorneys and one paralegal have worked on this matter, and that the invoices submitted with his affirmation describe the hourly fees each employee charged and the tasks that each employee performed (*id.* at ¶ 5). Because several of

the attorneys have since left DBP's employ, Mandal states that he is unable to furnish the court with copies of their curricula vitae for review (*id.*).

Defendants advance several arguments in opposition. First, they urge the court to reject Mandal's affirmation because he lacks personal knowledge, and failed to produce evidence of actual payment. Next, defendants submit that the fees DBP charged are excessive. For instance, the parties discontinued the *Rodriguez* Action on June 12, 2014 (NYSCEF Doc No. 50, Yaffe affirmation, ex C at 1), yet there are 32 additional charges after that date. Defendants also point to 110 charges for services rendered between May 31, 2015 and June 24, 2016, the date that Fidelity commenced the present action. Defendants claim these charges appear to relate to a prior action Fidelity had initiated in federal court captioned *Fidelity and Guar. Ins. Co. v Apple Builders and Renovators, Inc., et al*., ED NY, No. 1:15-cv-03710 (the "Federal Action") (NYSCEF Doc No. 51, Yaffe affirmation, ex. D at 1). Fidelity filed a stipulation of dismissal without prejudice to discontinue the action because the action did not meet the $75,000 threshold for actions brought in federal court, as indicated in the court's scheduling order of April 28, 2016 (*id.* at 4). Defendants maintain they should not be required to pay any fees for an action commenced in an improper venue.

Fidelity, in reply, argues that the failure to use the phrase "personal knowledge" in Mandal's affirmation is a scrivener's error, and that Mandal has affirmed in reply that he has "personal knowledge of the services rendered by" the firm (NYSCEF Doc No. 54, Mandal reply affirmation, ¶ 1). Fidelity also submits a printout listing each payment St. Paul Travelers made for the underlying action and copies of each corresponding canceled check (*id*., ex. A at 1-61). In addition, Fidelity argues that the value of its claim at the time it brought the Federal Action exceeded $75,000 (*id*. at ¶ 8).

It is settled that the court "has the authority and responsibility to determine that the claim for fees is reasonable" (*Solow Mgt. Corp. v Tanger*, 19 AD3d 225, 226 [1st Dept 2005]). The court must consider the "time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved" (*Matter of Freeman*, 34 NY2d 1, 9 [1974]). The burden rests with the moving party to show the reasonableness of its legal fees (*see Matter of Hofmann*, 38 AD3d 366, 367 [1st Dept 2007], *lv denied* 9 NY3d 801 [2007]). Fidelity's submissions appear to satisfy the majority of these factors, as DBP's invoices describe the firm's work for Fidelity, the identity of each employee who worked on the matter, and the amount of time it took to complete each task. Further, it is apparent that DBP was successful in its efforts, as it has obtained a judgment in Fidelity's favor in this action.

Defendants' arguments are unpersuasive. Contrary to defendants' assertion, Fidelity is not obligated to furnish an affidavit from someone with personal knowledge. Mandal is not a party to this action, and his affirmation made "under penalty and perjury" (NYSCEF Doc No. 45, Mandal affirmation, at 1) is sufficient to satisfy CPLR 2106 (*see e.g. Liberty Mut. Ins. Co. v Five Boro Med. Equip., Inc.*, 130 AD3d 465, 465-466 [1st Dept 2015]). Moreover, Mandal's statement that he serves as the supervising attorney on this matter gives him the requisite personal knowledge. For purposes of this fee application, the court will consider Mandal's affirmation.

In addition, proof of payment is not necessary to invoke indemnity. Importantly, the relevant portion of paragraph six of the Agreement states:

> "*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*"

(NYSCEF Doc No. 45, Mandal affirmation, ex. A at 4 [emphasis added]). Thus, as the court's prior decision granting Fidelity partial summary judgment explains, it is not necessary for Fidelity to have demonstrated it has paid DBP before it may seek to recover its expenses (*id*. at 4). Fidelity has furnished the requisite proof of payment on this fee application (*see Prestige Decorating & Wallcovering, Inc. v United States Fire Ins. Co*., 49 AD3d 406, 406 [1st Dept 2008] [granting judgment to a surety on an indemnity agreement where the surety provided proof of payment by way of an itemized statement of loss and expense]).

Moreover, Fidelity can recover the sums expended in the Federal Action. Paragraph 14 of the Agreement states, in pertinent part, that "in 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, included attorneys' fees, incurred by the SURETY in connection therewith …" (NYSCEF Doc No. 14, Yaffe affirmation on motion seq. no. 001, ex. B, ¶ 9). Defendants do not dispute that this action and the Federal Action rely upon the same facts and transactions, or that the stipulation of dismissal without prejudice expressly permitted Fidelity to re-file the action in state court (NYSCEF Doc No. 54, Mandal reply affirmation, ex E at 3). Further, when the amount payable to Nihill is taken into account, the amount in controversy at the time Fidelity commenced the Federal Action appears to have exceeded the $75,000 amount in controversy threshold.

That said, the court must still determine whether DBP's fees were reasonable (*see Solow Mgt. Corp.*, 19 AD3d at 226). Accordingly, the court sets this matter down for a hearing on September 15, 2020 at ten a.m. for a hearing to determine the factors referenced in *Matter of Freeman* (34 NY2d at 9).

Accordingly, it is

ORDERED that the motion of plaintiff Fidelity and Guaranty Insurance Company to fix the reasonable attorneys' fees, costs and expenses it has incurred in *Rodriguez v Apple Builders & Renovators, Inc*., Sup Ct, NY County, index No. 114971/2005 (the *Rodriguez* Action), *Fidelity and Guar. Ins. Co. v Apple Builders and Renovators, Inc., et al*., ED NY, No. 15-cv-03710, and the present action, is set for a hearing before this court via Skype on September 15, 2020 at ten a.m.; and it is further

ORDERED that the plaintiff shall serve a pre-hearing memorandum within 24 days from the date of this order and the defendant shall serve objections to the pre-hearing memorandum within 20 days from service of plaintiff's papers; and it is further

ORDERED that there shall be no further motion practice without prior conference with the court.

Dated: June 29, 2020

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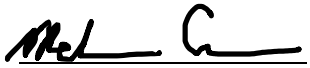

J.S.C.