Trustees of Local Union No. 580 of the Intl. Assn of Bridge, Structural, Ornamental and Reinforcing Iron Workers Emp. Benefit Funds v EE Cruz
2021 NY Slip Op 30161(U)
January 14, 2021
Supreme Court, New York County
Docket Number: 656889/2017
Judge: Shawn T. Kelly

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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TRUSTEES OF LOCAL UNION NO. 580 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS EMPLOYEE BENEFIT FUNDS,

Plaintiff,

- v -

EE CRUZ & TULLY CONSTRUCTION JOINT VENTURE, FIDELITY AND DEPOSIT COMPANY OF MARYLAND/ZURICH AMERICAN INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, CHUBB GROUP OF INSURANCE COMPANIES, TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA, FEDERAL INSURANCE COMPANY, THE CONTINENTAL INSURANCE COMPANY, XL SPECIALTY INSURANCE COMPANY

Defendant.

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INDEX NO. 656889/2017

MOTION DATE 10/27/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, it is

Plaintiffs Trustees of Local Union No. 580 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Employee Benefit Funds Workers Locals 40, 361 & 417 Union Security Funds (herein "plaintiffs" or "Funds") move for summary judgment pursuant to CPLR §3212 against defendants as there are no triable issues of fact. In support of its motion, plaintiffs contend that they are entitled to recover unpaid fringe benefit contributions and reasonable attorneys' fees, interest and costs under State Finance Law §137. In opposition, defendants argue that the motion is supported only by inadmissible evidence and

further it must be denied as discovery is still ongoing. For the following reasons, plaintiffs' motion is granted.

Background

The Funds provide fringe benefits to employees performing services within the craft and territorial jurisdiction of Iron Workers Local Union No. 580 (herein "Local 580"). The benefits provided by plaintiffs are funded by fringe benefit contributions that are remitted to plaintiffs by employers who have executed a collective bargaining agreement or other agreement with Local 580. Barden Contracting Services (herein "Barden") has executed a series of collective bargaining agreements (herein "CBAs") with Iron Workers Local 580. Pursuant to the terms of the CBA, contributing employers – such as Barden – are required to remit fringe benefit contributions to the Funds for each hour of covered work performed by the contributing employer's employees at rates specified by the CBA.

On or about May of 2012, the Metropolitan Transportation Authority, acting by the New York City Transit Authority (herein the "Authority") commenced a project referred to as the Construction of Part of Second Avenue Subway Route 132 A, 96th Street Station (herein the "Project") to expand the Second Avenue Subway line. The Project was a public works project covered by New York State's Prevailing Wage Law and New York State Finance Law § 137. The Authority was the owner of the Project. The Authority hired E.E. Cruz & Tully Construction Co., a Joint Venture, LLC, (herein "EE Cruz/Tully") to serve as the General Contractor on the Project. EE Cruz/Tully executed a subcontracting agreement with Barden to perform work on the Project. The CBAs were in full force and effect when EE Cruz/Tully retained Barden to perform work on the Project. M.C. Cohen & Sons ("Cohen") was also retained to perform work on the Project. Cohen executed a subcontracting agreement with Barden to perform work on the

Project. The CBAs were in full force and effect when Cohen retained Barden to perform work on the Project.

Pursuant to State Finance Law §137,

> [i]n addition to other bond or bonds, if any, required by law for the completion of work specified in a contract for the prosecution of a public improvement …[the] appropriate official…shall … require prior to the approval of any such contract a bond guaranteeing prompt payment of moneys due to all persons furnishing labor or materials to the contractor or his subcontractors in the prosecution of the work provided for in such contract.

Accordingly, on May 3, 2012, EE Cruz/Tully Bridge, as principal, and Liberty Mutual Insurance Company (herein "Liberty"), as surety for valuable consideration, executed and delivered to the Authority a payment bond bearing identification number PRF9070313 (herein the "Bond").

Barden employed Local 580 represented employees to perform work on the Project during the period of December 2014 to November 2015 (the "Relevant Period"). Pursuant to the terms of the CBA, Barden was required to remit fringe benefit contributions to the Funds for each hour of work performed by its Local 580 represented employees. Barden was not timely with its payment of fringe benefit contributions to the Funds.

On or about November 13, 2017, plaintiffs commenced this lawsuit to recover delinquent fringe benefit contributions due and owing from Barden for covered work performed by Barden's Local 580 represented employees on the Project.

Analysis

By enacting State Finance Law § 137, the Legislature intended to supplement the Lien Law and to guarantee payment through a bond to persons furnishing labor and material on public improvement projects even though there are insufficient funds against which a lien could be filed (*see Chittenden Lumber Co. v Silberblatt & Lasker*, 288 NY 396, 43 NE2d 459 [1942]; *Dutchess*

Quarry & Supply Co. v Firemen's Ins. Co. of Newark, N.J., 190 AD2d 36, 38, 596 NYS2d 898 [1993]; *see also Davidson Pipe Supply Co. v Wyoming County Indus. Dev. Agency*, 85 NY2d 281, 285, 648 N.E.2d 468 [1995]). A bond issued pursuant to State Finance Law § 137(1) guarantees prompt payment of money due those persons who furnish labor or material to the contractor "in the prosecution of the work provided for in such contract."

Plaintiffs allege that there is no issue of fact as to their entitlement to the fringe benefit contributions that remain outstanding pursuant to New York State Finance Law §137 and the Labor and Material Payment Bond issued with respect to the Construction of Part of Second Avenue Subway Route 132 A, 96th Street Station. In support of their motion, they submit the affirmation of Thomas P. Keane, as attorney for plaintiffs and Joseph M. Stern, principal and owner of Joseph M. Stern, CPA (herein "JMS").

Mr. Keane states that the Funds' independent, outside auditors, Joseph M. Stern, CPA perform the audits of contributing employers so that plaintiffs can determine whether all fringe benefit contributions that are required to be made to the Funds are remitted in full. Plaintiffs submit the affidavit of Joseph M. Stern, dated May 15, 2020. Mr. Stern states that as auditors for the funds, it is JMS's responsibility to examine the payroll and related records of contractors bound to the collective bargaining agreement (herein "CBA") with Local 580 in order to verify proper reporting of hours of covered employment and payment of fringe benefit contributions to the Funds as required under the terms of the CBA. Mr. Stern avers that JMS was directed by the Funds to audit Barden's books and records for the periods of January 2014 to September 2015 and from October 2015 to March 2016. Mr. Stern states that on or about December 2017, JMS was directed to prepare jobsite schedules detailing the fringe benefits owed to the Funds for work

performed by Local 580 represented employees who were employed by Barden at the Construction Project.

Mr. Stern states that JMS prepared the jobsite schedule based upon Barden's books and records that were provided to JMS for the audit period of January 2014 to September 2015 and from October 2015 to March 2016. Mr. Stern contends that JMS generated two jobsite schedules- one schedule showed hours worked by Local 580 members while Barden was under the direction of EE Cruz/Tully and the second schedule showed hours worked by Local 580 while Barden was under the direction of Cohen. Both schedules were submitted as exhibits. Mr. Stern further states that the first job site schedule revealed that Barden had failed to remit fringe benefit contributions to the Funds in the amount of $58,431.01 and that the second job site schedule revealed that Barden had failed to remit fringe benefit contributions to the Funds in the amount of $56,107.00.

Further, Mr. Stern states that JMS was subsequently provided with certified payrolls submitted by Barden for work performed on the project, which resulted in revised schedules. Mr. Stern contends that the first revised job site schedule revealed that Barden had failed to remit fringe benefit contributions in the amount of $51,077.72 and the second job site schedule revealed that Barden had failed to remit fringe benefit contributions in the amount of $73,161.77.

In opposition, defendants contend that that to make out its prima facie case, the Fund must prove that: (1) Members performed work for Barden on the project; (2) that Barden was bound by the terms of the CBA; and (3) that Barden failed to make all payments required under the CBA. Defendants allege that the Fund fails to make out its prima facie case as it has no evidence to support any of these essential elements of its claim.

Specifically, defendants allege that the only facts submitted by the Fund are derived from the Fund's unverified Complaint, Mr. Keane's Affirmation, the Affidavit of Mr. Stern, and the documents attached. Defendants contend that Mr. Keane's Affirmation and Mr. Stern's Affidavit are not admissible evidence as they have no probative value, as they are not based on personal knowledge of the facts to which they affirm.

Summary judgment may not be granted unless the movant demonstrates its entitlement to judgment, as a matter of law, by tendering "evidentiary proof in admissible form," which may include documentary evidence attached to the attorneys affirmation (*see Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Am. Exp. Centurion Bank v Badalamenti*, 30 Misc 3d 1201(A), 958 NYS2d 644 [2010]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associate Fur Manufacturers, Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). It is only thereafter incumbent upon the party opposing summary judgment to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do" (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The movant's failure to make such a showing, regardless of the sufficiency of opposing papers, mandates the denial of a summary judgment motion (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Rushmore Recoveries X, LLC v Skolnick*, 15 Misc 3d 1139(A), 841 NYS2d 823 [2007]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the *prima facie* showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every

favorable inference (*see Negri v Stop & Shop*, 65 N Y2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]. *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

An attorney affirmation is sufficient on a motion for summary judgment when the motion rests on documentary evidence as it does here (*Olan v Farrell Lines, Inc.*, 64 NY2d 1092 [1985] [proof may be put before court with an attorney affirmation on a 3212 motion for summary judgment]). However, an unverified complaint cannot be used to support a motion for summary judgment (*see ARC Mun. Sec. Corp. v Kleinberg, Kaplan, Wolff & Cohen, P.C.*, 171 AD2d 441 [1st Dept], *appeal dismissed without op*, 78 NY2d 1006 (1991)).

Plaintiffs have adequately submitted evidentiary proof as to their entitlement to summary judgment. In opposition, defendants have not raised any material issues of fact, but rather argue that plaintiffs' submissions are inadmissible. Accordingly, plaintiffs' motion for summary judgment is granted.

Defendants additionally contend that summary judgment should be denied as premature due to outstanding discovery. Because the Note of Issue was filed on March 17, 2020 and was not subsequently objected to by defendants, summary judgment cannot be denied on these grounds.

Attorneys' Fees and Costs

Plaintiffs' further move for attorneys' fees, interest and costs under State Finance Law §137. Pursuant to New York State Finance Law §137, reasonable attorneys' fees, interest and costs are available in public works bond litigation under certain circumstances. The statute provides, in pertinent part, that:

> In any action on a payment bond furnished pursuant to this section, any judgment in favor of a subcontractor or material supplier may include provision for the payment of interest upon the amount recovered … [additionally,] the court may determine and award reasonable attorney's fee to either party to such action when, upon reviewing the entire record, it appears that either the original claim or the defense interposed to such claim is without substantial basis in fact or law.
> (*see* New York State Finance Law § 137[4][c]).

While an unsuccessful defense alone does not suffice as a basis for an award of attorneys' fees under the statute, an award of attorneys' fees is appropriate to a prevailing party in an action on a contractor's payment bond where there was no plausible ground for the surety's defense (*see Beninati Roofing & Sheet Metal Co., Inc. v Gelco Builders, Inc.*, 720 NYS2d 37 [1st Dept 2001][awarding attorneys' fees where defendant surety's arguments were "without substantial basis" since there was "no plausible ground for [the surety's] claim."]; *Better Engineered Sys. Tech., Inc. v Sound Elec. Corp.*, 736 NYS2d 316, 318 [1st Dept 2001][granting attorneys' fees where "insurance company's defense to payment of its bond lacked a substantial basis in law or fact."]). In the present matter, defendants fail to present any opposition aside from attacking the admissibility of the affirmation and affidavits. Defendants do not address the terms of bond, nor the allegations of deficiency of payments. Accordingly, plaintiffs' motion for attorneys' fees and costs is granted.

It is hereby,

ORDERED that the plaintiffs' motion for summary judgment is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of $124,239.49 together with statutory interest from the date of November 13, 2017 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with attorneys' fees, costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

1/14/2021
DATE

SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE