

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ **PART** 03
Justice

FBEM

-----X
HUMPHREYS & HARDING, INC.,

Plaintiff,

INDEX NO. 601297/2002 E

-against-

MOTION DATE _____

UNIVERSAL BONDING INSURANCE COMPANY,

Defendant.

MOTION SEQ. NO. 002

-----X
UNIVERSAL BONDING INSURANCE COMPANY,

Third-Party Plaintiff,

MOTION CAL. NO. _____

-against-

WELCH CONSTRUCTION CORPORATION, EMERSON

WELCH and EMERSON WELCH as ADMINISTRATOR

for GLORIA WELCH, Deceased,

Third-Party Defendants.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: January 17, 2007

KARLA MOSKOWITZ

J.S.C.

Check one: ☐ **FINAL DISPOSITION**

☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

☐ **REFERENCE**

PAPERS NUMBERED

FILED

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 3

-----X
HUMPHREYS & HARDING, INC.,

Plaintiff,

-against-

Index No. 601297/2002

UNIVERSAL BONDING INSURANCE COMPANY,

Defendant.

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UNIVERSAL BONDING INSURANCE COMPANY,

Third-Party Plaintiff,

DECISION and ORDER

-against-

WELCH CONSTRUCTION CORPORATION, EMERSON
WELCH and EMERSON WELCH as ADMINISTRATOR
for GLORIA WELCH, Deceased,

Third-Party Defendants.

-----X
KARLA MOSKOWITZ, J:

Defendant third-party plaintiff Universal Bonding Insurance Company ("Universal") moves, pursuant to CPLR 3212, for summary judgment: (1) dismissing the complaint, (2) determining that third-party defendants Welch Construction Corporation, Emerson Welch and Emerson Welch as Administrator for Gloria Welch (together "Welch") are jointly and severally liable to Universal for its costs and (3) severing the remaining claims of Universal against Welch, or, alternatively, for a determination that Welch is liable to Universal for the amount of any damages and judgment plaintiff Humphreys & Harding, Inc. ("H&H") obtains against Universal. H&H cross-moves, pursuant to CPLR 3212, for summary judgment dismissing Welch's cross-claim against H&H, that Welch denominates as a counterclaim in its answer to the third-party complaint. Welch cross-moves for summary judgment on its cross-claim in the amount of

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\$598,529.00.

Plaintiff H&H, a general contractor, brings this action to recover damages against Universal, a surety company, based on a performance bond Universal issued on behalf of Welch, a drywall and carpentry subcontractor.

In March 1999, H&H, as general contractor, entered into a contract with Concord Nursing Home, located at 300 Madison Street in Brooklyn, New York, for the renovation of its existing facility and the construction of a new wing of the nursing home (the “Contract” and the “Project,” respectively).

The Project had two phases. Phase I consisted of constructing a new four- story wing. Phase II involved renovation of the existing structure but could not begin until plaintiff completed the new building and the residents were able to move into it. H&H acknowledges that the initial project schedule it prepared, based on an 18-month duration, showed the start of construction as no later than November 1, 1999, with completion of the new building by January 15, 2001. Thereafter, H&H was to complete the renovation of the existing building by April 27, 2001. However, subsequent to the initial agreement, Concord Nursing Home encountered delays in obtaining approvals of the Project, that delayed the closing of financing for the Project. The Project did not commence until February 2000. H&H thereafter undertook to recapture the time lost at the start of the Project and reduce the cost by compressing the schedule for the new building so that the work would commence on February 16, 2000 and achieve substantial completion on December 1, 2000 – a period of 9.5 months.

In May 2000, H&H entered into a subcontract with Welch for it to perform the rough carpentry, ceiling, drywall, door and hardware installation work for the Project in the amount of \$925,804.00 (the “Subcontract”). The preliminary schedule in Rider F to the Subcontract

indicated that the initial Phase I Welch work would begin in June 2000 with framing for the new wing, followed by drywall installation, and then substantial completion of the tape and spackling operation in October 2000. (Malamy Aff., Ex. 9).

By letter dated January 3, 2001, H&H formally notified Welch that its failure to maintain schedule because of insufficient manpower was hampering the overall schedule of completion and that, if Welch made no corrections, H&H would be forced to supplement Welch's forces at its expense. H&H sent a copy of the letter to Universal.

On February 14, 2001, Welch notified both H&H and Universal that it was in financial difficulty and unable to complete the work or pay the bills incurred on the Project. It then voluntarily abandoned the Project.

H&H alleges that, at the time of Welch's abandonment, Welch had delayed the Project's completion by a total of 141 calendar days. H&H also alleges that Universal's replacement contractor, Certified Interiors, Inc. ("Certified Interiors"), did not commence work on the Project until May 11, 2001. H&H alleges that the other trades quickly caught up to Welch's work during the nearly three-month period between Welch's abandonment and Certified Interior's appearance at the site and that the Project lay essentially dormant until Certified Interiors progressed enough to enable the other trades to re-mobilize and progress with their work.

H&H alleges that, pursuant to its Subcontract, Welch, and thus, Universal, its surety, are liable for all damages associated with Welch's defaults and abandonment of the Project. H&H first contends that, as a direct result of Welch's defaults on its Subcontract and its abandonment of the Project, the Phase I completion became delayed a total of 11 ³/₄ months to January 7, 2002. H&H states that, pursuant to its calculations, its average monthly general conditions costs, or field costs, for the project were \$66,603.68. Thus, H&H contends that its extended general

conditions delay damages, for 11 ¾ months delay, totaled \$782,593.22.

In addition, H&H alleges that, because the Project was delayed into an open winter weather state, H&H had to provide temporary heating to the Project at a cost of \$26,462.96. H&H also alleges that it made payments to others for Welch's work totaling \$109,939.03. In sum, H&H alleges that its damages, as a result of Welch's poor performance and ultimate default, including H&H's overhead and profit factor, are as follows:

Payments made to others for Welch work	\$ 109,939.03
Additional General Condition (Field) Costs	\$ 782,593.22
Additional Temporary Heat Costs:	
Generators	\$ 26,462.96
Fuel	\$ 7,435.15
Subtotal	\$ 926,430.36
 Overhead and Profit (10% + 10%)	 \$ 194,550.38
Total	\$ 1,120,980.73

Universal counters that it fulfilled its subcontract performance bond obligation by supplying a completing contractor to finish the work that Welch should have performed. Universal submits H&H's own Daily Job Diary indicating that the completing contractor, Certified Interiors, began its work on April 18, 2001, approximately two months after Welch abandoned the Project. (Malamy Aff., Ex. 19). Universal contends that, by performing on its bond, it is not liable for any other damages.

Universal further contends that, even if it were liable to H&H for delay damages, it would not be liable for damages occurring before January 2001, when H&H first notified it that Welch was causing delays.

Finally, Universal contends that other entities caused delays in completing Phase I so that the court cannot hold Universal liable for delays that would have resulted anyway even if Welch

had timely performed. Universal points out, for example, that H&H failed to coordinate the electric service for the new addition, scheduled for October 2000, but that H&H did not provide until late May 2001. The residents of the nursing home could not move into the new addition before installation of electrical service. Further, until the residents moved out of the existing building, Phase II, involving the renovation work of the existing building, could not begin.

Universal also points to a letter from H&H, dated April 19, 2002, in which H&H states that the original schedule indicated completion of the new extension by the end of June, with the completion of Phase II work in August of 2001. According to H&H, Universal's four-month delay pushed the completion of the new building back to September 2001. In apparent contradiction, H&H then states that a building department inspection occurred on September 8, 2001, but thereafter, the terrorist attacks of September 11, 2001 caused further delays. (Malamy Aff., Ex. 25). Thus, by H&H's own admission, completion of the new extension was delayed approximately two months – from the end of June 2001 until September 8, 2001, and that the September 11th attacks further caused delays.

Finally, Universal contends that the underlying subcontract agreement fails to provide performance dates for the Phase II work and that, absent these dates, H&H cannot recover delay damages. Universal also notes that, even as to the Phase I work, the schedule was subject to change and the work schedule attached to the subcontract is, in fact, designated "Preliminary." (Malamy Aff., Ex. 9).

Universal counterclaims against H&H, alleging that it has failed to pay Certified Interiors approximately \$68,714.23, remaining due on its work, as per a "Takeover Agreement" with Universal. Universal also brings a third-party action against Welch, seeking to recover \$153,652.01 Universal paid to Certified Interiors, as well as additional sums in the amount of

\$11,893.75 in administrative fees.

Welch asserts that, in fact, it experienced financial difficulty as a result of H&H's poor planning regarding the Project, causing Welch to be over-manned on the Project between August 2000 and December 2000. Welch further maintains that H&H failed to timely pay Welch for its work in accordance with its Subcontract.

Welch alleges that its initial schedule called for the framing and drywall in the new structure to take place over a period of 82 days, between June and the end of August 2000. However, because of H&H's failure in scheduling and the unsynchronized coordination of the trades, Welch had to perform the framing and drywall over a period of 190 days.

Welch further contends that, when H&H revised the work schedule in November 2000, Welch had to and did perform an extraordinary amount of work by the end of November. Welch contends that between October and the end of November 2000, Welch produced \$300,000.00 worth of work, almost $\frac{1}{3}$ of its entire contract amount. Welch points out that this factor alone tends to disprove H&H's allegation that Welch lacked sufficient manpower to keep pace with the progress. Welch contends that it completed 100% of the framing and drywall in the new structure by November 15, 2000.

Finally, Welch contends that it was paid on a 90-day cycle rather than a 30-day cycle. The Subcontract provides that Welch would be paid when H&H received payment from Concord Nursing Home. (Malamy Aff., Ex. 9, ¶ 5.2.5). The Construction Agreement between Concord Nursing Home and H&H provides that "Payments shall be made monthly following presentation of the Construction Manager's invoice for services performed during the prior month." (Malamy Aff., Ex. 8, ¶ 4.2.1).

Welch contends, for example, that by December 11, 2000, H&H had paid only

\$494,987.90, at a time when Welch had performed work totaling \$728,264.00. On December 31, 2000, Welch submitted a progress payment application for \$104,573.00. On January 31, 2001, H&H issued a check to Welch for a mere \$4,047.02. Based on a 30-day cycle, as of January 31, 2001, H&H was behind in payment in the amount of \$300,129.08. Three days thereafter, H&H issued the notice to cure in which it accused Welch of a failure to maintain the schedule because of insufficient manpower. Welch contends that this assertion was false.

Welch further states that it notified Universal of the problems it was experiencing in January 2001, when Universal's representative was on the site. At that time, according to Welch, it had completed 90% of the Subcontract, and, according to H&H's own records, it was 81% complete. Nonetheless, the next month, when Welch left the job site, a member of Universal's staff dictated the letter of default that Welch then signed.

Welch has filed a third-party answer and "counterclaim" against H&H, alleging that the delay of other trade subcontractors prevented Welch's performance and caused it to miss its deadlines and that H&H issued three change work orders causing an increase in work under the contract. Welch also contends that Universal failed to take appropriate action upon notification of H&H's delays. Welch's pleading does not contain an ad damnum clause requesting any relief other than dismissal of the complaint. Nonetheless, on this motion, Welch seeks summary judgment in the amount of \$598,529.00 that it alleges is its "Construction Costs." (Felton Aff., Ex. 4). This figure includes a job extension impact of \$120,000, plus litigation costs of \$30,000.00, plus the costs of tools H&H confiscated.

As to Welch's claim against H&H, while Welch has raised a number of issues of fact that, if proved at trial, may validate its claim for damages, nonetheless, absent a demand for monetary relief in its pleading, it may not recover summary judgment against H&H. (CPLR

3017[a]; Siegel Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3017:1; see also Public Administrators of the County of N.Y. v Frota Oceanica Brasileira, S.A., 257 AD2d 469 [1st Dept 1999]). On the other hand, the prayer for relief does not determine the sufficiency of the pleading, as Welch may amend it. (See Pietras v Gol Pak Corporation, 131 AD2d 239 [4th Dept 1987]; see also Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3017:2).

Therefore, third-party defendant Welch may, if so advised, move to amend its cross-claim. H&H's cross-motion for summary judgment dismissing Welch's "counterclaim," as well as Welch's cross-motion for summary judgment on that claim are denied.

As to Universal's motion to dismiss the complaint, Universal argues that it has performed its obligations under the bond. H&H argues that, because its underlying subcontract with Welch provides for delay damages and, in the case of default, all costs H&H incurred in performing Welch's work, including overhead, profit and attorneys' fees, Universal is now liable for those damages. H&H's reasoning is neither consistent with the terms of Universal's bond nor established law.

The purpose of a performance bond is to insure that a contract will be completed consistent with its terms. (Matter of Cataract Disposal v Town Bd. of Newfane, 53 NY2d 266 [1981]).

Ordinarily, the only obligation of a surety on a performance bond is either to complete the work or pay the obligee the amount necessary for it to have the contract completed. (Hunt v Bankers and Shippers Ins. Co. of N.Y., 73 AD2d 797 [4th Dept 1979], affd. 50 NY2d 938 [1980]; U.W. Marx, Inc. v Mountbatten Surety Company, Inc., 3 AD3d 688, 691 [3d Dept 2004]). If the surety fails to perform after the contractor defaults, the surety's liability may

include the cost of completion as well as damages from its breach. (Hunt v Bankers and Shippers Ins Co. of N.Y., 73 AD2d 797, supra). In addition, the court construes surety bonds, as all contracts, in accordance with their terms. (Walter Concrete Constr. Corp. v Lederle Laboratories, 99 NY2d 603 [2003]). When the performance bond provides that the surety will pay “other costs and damages for which [the surety] may be liable hereunder,” the bond anticipates liability for damages the subcontractor causes. (See id., at 605).

Here, Universal’s bond provides, in pertinent part, as follows:

NOW THEREFORE, THE CONDITION OF THE OBLIGATION is such that if Principal [Welch] shall promptly and faithfully perform said subcontract, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

Whenever Principal shall be, and declared by Obligor [H&H] to be in default under the subcontract, the Obligor having performed Obligor’s obligations thereunder:

- (1) Surety may promptly remedy the default, subject to the provisions of paragraph 3 herein, or;
- (2) Obligor after reasonable notice to Surety may, or Surety upon demand of Obligor may arrange for the performance of Principal’s obligation under the subcontract subject to the provisions of paragraph 3 herein;
- (3) The balance of the subcontract price, as defined below, shall be credited against the reasonable cost of completing performance of the subcontractor. If completed by the Obligor, and the reasonable cost exceeds the balance of the subcontract price, the Surety shall pay to the Obligor such excess, but in no event shall the aggregate liability of the Surety exceed the amount of this bond. If the Surety arranges completion or remedies the default, that portion of the balance of the subcontract price as may be required to complete the subcontract or remedy the default and to reimburse the Surety for its outlays shall be paid to the Surety at the times and in the manner as said sums would have been payable to Principal had there been no default under the subcontract . . .

(Malamy Aff., Ex. 10).

The bond does not provide for “other costs and damages” and makes clear that the surety is obligated to pay the “reasonable cost of completing performance of the subcontractor.” The bond also provides that aggregate liability of the surety may not exceed the amount of the bond. This is in accord with established law. (General Obligations Law § 7-301; U.W. Marx, Inc. v Mountbatten Surety Co., Inc., 3 AD3d 688, supra).

The sole issues H&H raised as to Universal’s performance are whether Universal caused the delay in obtaining a replacement contractor to complete Welch’s contract and whether this delay was unreasonable and constituted a breach under the bond. If the trier of fact finds Universal breached its bond by causing an unreasonable delay in obtaining a replacement contractor, then the trier of fact may hold it liable for the damages flowing from its breach.

As to that part of Universal’s motion for summary judgment against Welch, Universal seeks to recover \$153,652.01 that it paid to Certified Interiors, as well as administrative fees in the amount of \$11,893.75. Welch has presented evidence indicating that it completed between 80% and 90% of the work on a \$925,000.00 contract and that it had informed Universal that H&H was causing delays to the project. Welch alleges that, nonetheless, Universal jumped in and paid on its bond, even writing Welch’s letter of withdrawal. A surety seeking indemnity for losses and expenses incurred with respect to its bond has the burden of establishing that it made payments in good faith and that the amount was reasonable. (Hartford Fire Ins. Co., Inc. v Edgewater Constr. Co. Inc., 21 AD3d 1312 [4th Dept 2005]). Here, while it appears that Welch was in financial difficulty, regardless of its cause, Welch has presented sufficient evidence to raise an issue of fact as to whether the amount of Universal’s payment was reasonable.

Accordingly, based upon the foregoing, it is

ORDERED that the motion by defendant third party plaintiff Universal Bonding


Insurance Company for summary judgment: (1) dismissing the complaint, (2) determining that third-party defendants Welch Construction Corporation, Emerson Welch and Emerson Welch as Administrator for Gloria Welch are jointly and severally liable to Universal for its costs and (3) severing the remaining claims of Universal against Welch is denied in all respects; and it is further

ORDERED that the cross-motion by plaintiff Humphreys & Harding, Inc. for summary judgment dismissing the cross-claim by Welch Construction Corporation, Emerson Welch and Emerson Welch as Administrator for Gloria Welch is denied; and it is further

ORDERED that the cross-motion for summary judgment by the third-party defendants Welch Construction Corporation, Emerson Welch and Emerson Welch as Administrator for Gloria Welch is denied.

Dated: January 17, 2007

ENTER:



J.S.C.

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