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United States District Court, S.D. New York.

WHEELABRATOR TECHNOLOGIES
OF NORTH AMERICA, INC., Plaintiff,
v.
FINANCIAL SECURITY ASSURANCE
OF OKLAHOMA, INC., Defendant.

No. 88 Civ. 7623 (LMM).
|
Nov. 15, 1990.

Attorneys and Law Firms

Debevoise & Plimpton, New York City, for plaintiff; Standish F. Medina Jr., New York City, of counsel.

Kutak Rock & Campbell, New York City, for defendant; Mark L. Davidson, New York City, of counsel.

MEMORANDUM AND ORDER

McKENNA, District Judge.

***1** Wheelabrator Technologies of North America, Inc. ("Wheelabrator") brought this action to recover a partial refund of $2 million of a $5.5 million insurance premium paid to Financial Security Assurance of Oklahoma, Inc. ("FSA") by Wheelabrator's assignor and corporate parent, The Henley Group, Inc. ("Henley"), under a letter agreement dated August 19, 1986 (the "Premium Agreement"). FSA brought a counterclaim for attorney's fees incurred in defending the action. FSA moves for summary judgment against Wheelabrator on the refund claim. Wheelabrator moves for summary judgment on FSA's counterclaim and four of FSA's defenses. For the reasons given below, FSA's motion is denied, Wheelabrator's motion is granted as to the four defenses, but denied as to FSA's counterclaim.

Henley had agreed to build a $300 million waste-to-energy project for Broward County, Florida (the "County"). For a 16 month period from August 19, 1986 to December 19, 1987, FSA was to provide a surety bond that insured Henley's financial obligations in connection with the project. Virtually all of Henley's obligations in question were to come into existence only on occurrence of the "Commencement Date," as defined in the Construction Contract between Henley and the County. The Commencement Date was defined as the date on which all of several specified conditions precedent had been met and on which, as a result, Henley became obligated to build the entire $300 million project. Among the more important of the conditions precedent were the availability of approximately $300 million in municipal bond financing necessary for the funding of the project and the issuance by the County of a formal notice to proceed. The parties appear to have contemplated that the bond financing would be available by mid–1987. Because of objections filed in the Florida courts by the bondholders, however, the bond financing did not become available until 1988.

The Premium Agreement between Henley and FSA contains a refund provision that requires FSA to refund $2 million of the $5.5 million premium if three events occur: (a) the Commencement Date does not occur for reasons beyond Henley's reasonable control; (b) FSA has made no payment on the surety bond; and (c) Henley has delivered an opinion of counsel in form and substance satisfactory to FSA that FSA has no further liability under the surety bond.

It is undisputed that for a 16 month period from August 19, 1986 until December 19, 1987, FSA served as surety and then was replaced by another party. It is also undisputed that the Commencement Date eventually did occur, at least by March 23, 1989.

The issue raised by FSA's motion is whether the language employed in condition (a) of the refund provision means that Wheelabrator is not entitled to a refund if the Commencement Date *ever* occurred, or that Wheelabrator is not entitled to the refund only if the Commencement Date occurred during the 16 month period that FSA acted as surety. FSA argues that the language of the refund provision is clear and unambiguous—it means "no refund if the Commencement Date ever occurs even if it occurs after FSA has ceased to act as surety." Wheelabrator argues that the provision is at least ambiguous as to whether occurrence of the Commencement Date after cessation of FSA's obligations as surety will deprive it of any right to the $2 million refund.

***2** After considering the documents in this case, the Court concludes that the provision is ambiguous as urged by Wheelabrator. Reading the Premium Agreement as a whole, the Court believes that provision (a) can reasonably be interpreted to mean that Wheelabrator is entitled to the refund if the Commencement Date did not occur while FSA was acting as surety. This interpretation is quite plausible considering that provisions (b) and (c) of the Premium Agreement also appear to relate to FSA's obligation as surety. It also comports with the general purpose and intent of the parties in engaging in this surety relationship, contemplating obligations on the part of FSA for a limited period only. The Court need not and does not express an opinion as to the correct application of provision (a), but concludes that the provision is capable of more than one meaning. Accordingly, FSA's motion for summary judgment is denied.

Wheelabrator contends that FSA's "waiver defense" must be dismissed as a matter of law. FSA's waiver defense is that Henley began work on the project under an Interim Construction Contract and thereby constructively waived the conditions precedent to the Commencement Date. This waiver defense is without support in law. The Commencement Date was defined in the Insurance Agreement between Wheelabrator and FSA as it was defined in the Construction Contract between Henley and the County. The Commencement Date was to be the date when all conditions precedent to the obligations of both the County and Henley were satisfied and Henley became fully obligated to construct the entire $300 million project. It was not defined as being the date upon which construction began. Moreover, the Interim Construction Contract expressly states that the conditions precedent were not being waived. Under New York law, an intentional relinquishment or waiver of a known right requires a clear manifestation of intent. *Gilbert Frank Corp. v. Fed. Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988). Here, there is not only no clear manifestation of an intent to waive the conditions precedent, there is an express statement to the contrary. FSA's argument is that there was a "constructive waiver." Such a "constructive waiver" would be insufficient as a matter of New York law. Therefore, Wheelabrator's motion for summary judgment against FSA's "waiver defense" is granted.

FSA also asserts a "control defense," in which it maintains that the refund depends upon the non-occurrence of the Commencement Date through circumstances beyond Henley's control and that Henley, in fact, exercised control to prevent the Commencement Date from occurring. The "exercise of control" by Henley that FSA relies on is Henley's failure to waive the conditions precedent to the Commencement Date. Among the conditions precedent to the Commencement Date were circumstances beyond both Henley's and the County's control, and circumstances within the control of the County but beyond the control of Henley. Specifically, the availability of the $300 million bond financing was not within the control of either the County or Henley, and the issuance by the County of the formal notice to proceed was at least beyond Henley's control, if not technically beyond the County's control as well.

***3** FSA appears to argue that Henley exercised control over the Commencement Date because it could have chosen to waive the conditions precedent but did not. This argument is without merit. If the power of waiver or non-waiver of contractual rights is deemed to be "reasonable control" over the occurrence of the Commencement Date, then paragraph (a) of the refund provision would be meaningless since Henley could always waive the conditions precedent to the Commencement Date and non-occurrence would always be within Henley's reasonable control by definition. *See Robert J. McRell Assoc. v. Ins. Co. of N. America,* 677 F.Supp. 721, 727 (S.D.N.Y.1987) ("New York contract law requires ... that each provision of a contract should be read to give reasonable and effective meaning to all its terms, so as to avoid leaving any particular provision without any effect or purpose"). Therefore, the Court grants Wheelabrator's motion for summary judgment on FSA's "control defense."

Wheelabrator also moves for summary judgment on FSA's "improper assignment" defense. The insurance agreement between Henley and FSA contains a "no-assignment" clause stating that Henley " ... shall not assign this Agreement, nor delegate any of [its] obligations hereunder, without the prior written consent of [FSA]." While the Premium Agreement contains no such clause, it is FSA's contention that the two agreements must be read together. Thus, FSA argues that Henley improperly assigned the agreements to Wheelabrator and that Wheelabrator is not a real party in interest and has no standing to sue.

Wheelabrator maintains that the "no assignment" clause of the insurance agreement has no effect upon the assignment to Wheelabrator of Henley's rights to receive the refund under the Premium Agreement. However, it is unnecessary to resolve the question of whether the two agreements must be read together. Under New York law, a "no-assignment" clause, in order to have the effect that FSA urges, must specifically use language to the effect that the assignee receives no rights from an improper assignment or that such assignment is void. If it contains no such language, the clause is merely a covenant not to assign. Assignments in violation of such a clause will give rise to a breach of contract claim, but do not make the assignment itself a nullity, nor do they deprive the assignee of any rights. *Sullivan v. International Fidelity Ins.,* 96 App.Div.2d 555, 465 N.Y.S.2d 235 (2d Dep't 1983). Therefore, even if FSA is correct that the two agreements must be read together, Wheelabrator, as assignee, is the real party in interest here and has standing to sue. Accordingly, Wheelabrator's motion for summary judgment on FSA's improper assignment defense is granted.

FSA's other defense concerns paragraph (c) of the refund provision, which requires Henley to deliver an opinion of counsel, in form and substance satisfactory to FSA, that FSA has no further liability under the surety bond. FSA asserts that the opinion of counsel delivered was not in form and substance satisfactory to it in that Chemical Bank, the trustee of the County bonds, refused to issue a release to FSA. Wheelabrator argues that a release from the trustee is not a condition of the refund. While Wheelabrator is technically correct that paragraph (c) of the refund provision does not require a release from the trustee, it does require that the opinion of counsel can be satisfactory to FSA. Whether FSA's reason for dissatisfaction with the opinion of counsel was reasonable might have presented a triable issue of fact. However, the trustee issued a release on March 23, 1989. Therefore, FSA's dissatisfaction, reasonable or not, was accommodated. Accordingly, Wheelabrator's motion for summary judgment on FSA's "unsatisfactory opinion" defense is granted.

***4** FSA has brought a counterclaim against Wheelabrator for its attorneys' fees in defending this lawsuit and for $19,310.08 in legal fees and expenses incurred in releasing Henley's collateral when FSA's surety bond was terminated. The Insurance Agreement between Henley and FSA provides that Henley agrees: "absolutely and unconditionally to pay to [FSA] as follows: ... Any costs or expenses (including attorneys' and accountants' fees and expenses) incurred by Financial Security in connection with the enforcement hereof or the exercise of any rights of Financial Security hereunder ..."

Wheelabrator argues that this counterclaim should be dismissed because (1) Wheelabrator was not a party to the Insurance Agreement; (2) FSA is not enforcing or exercising any of its rights, but rather is defending against Wheelabrator's claim; and (3) FSA has to establish that the fees and expenses incurred in releasing Henley's collateral were reasonable and document them, which it has refused to do. In response, FSA asserts that Wheelabrator is subject to the Insurance Agreement because Wheelabrator was assigned the obligations of Henley, that FSA is enforcing its right to keep the $2 million refund, not merely defending itself against Wheelabrator's claim, and that FSA has offered to provide documentation of its fees and expenses. It is clear from the contentions of the parties that there are factual issues involved in FSA's counterclaim. These factual issues must be resolved at a trial. Therefore, the counterclaim is not ripe for summary judgment and Wheelabrator's motion is denied.

CONCLUSION

For the reasons given above, FSA's motion for summary judgment on the meaning of the refund provision of the Premium Agreement is denied. Wheelabrator's motions for summary judgment on FSA's "waiver defense," "control defense," "improper assignment defense," and "unsatisfactory opinion of counsel defense" are granted, and Wheelabrator's motion for summary judgment against FSA's counterclaim is denied.

SO ORDERED.

All Citations

Not Reported in F.Supp., 1990 WL 180552