

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 11

NASSAU COUNTY

THE CONTINENTAL INSURANCE COMPANY,

Plaintiff(s),

-against-

INDEX No. 11124/00  
XXX

DAVID SBIROLI, RITA SBIROLI a/k/a ROSARIA  
SBIROLI, TRADE CONNECTIONS and  
AIRCON ENTERPRISES, INC.,

Defendant(s).

MOTION DATE: 9/19/01

MOTION SEQ. No. 1, 2

The following papers read on this motion:

Notice of Motion/Affidavit/Affirmation/Exhibits A-K, A-C

Memorandum of law

Notice of Cross Motion/Affidavit/Exhibits Memorandum of law

Reply

Reply

Plaintiff seeks an Order granting it partial summary judgment against the defendants DAVID and RITA SBIROLI pursuant to CPLR § 3212. Defendant DAVID SBIROLI opposes and seeks an Order dismissing the Complaint pursuant to CPLR § 3211, alleging that it is barred by the applicable statute of limitations and naming of improper parties.

In this action CONTINENTAL claims that the defendants owe it the sum of \$1,961,170.18. Plaintiff claims that in 1992 defendant DIRECT AIRE entered into a contract with the State of New York to perform certain work with relation to the ventilation and air-conditioning system at the Kingsboro Alcoholism

The Continental Insurance Co. v. Sbiroli, et al.

Treatment Center. On or about December 28, 1992 at the request of DIRECT AIRE, the plaintiff surety issued a performance bond for labor and material in relation to this project.

Two bonds were issued, each in the sum of \$1,968,000.00 on behalf of DIRECT AIRE and in favor of the State, as obligee. Pursuant to these bonds, CONTINENTAL became liable to the State to perform the contract in the event DIRECT AIRE did not, and had to pay DIRECT AIRE's employees, subcontractors, suppliers on the project if DIRECT AIRE failed to do so.

As a condition of these bonds DIRECT AIRE, as well as DAVID and RITA SBIROLI, officers and shareholders of that corporation, executed written agreements to indemnify CONTINENTAL. Pursuant to the Indemnity Agreements, CONTINENTAL was to be compensated for any losses and expenses which it actually sustained pursuant to the bonds. It further entitled CONTINENTAL to an Accounting to reimburse it for disbursements made in good faith under the terms of the bonds.

CONTINENTAL contends that in May, 1994, DIRECT AIRE became financially incapable of completing performance of the Contract with the State, and notified CONTINENTAL by letter dated May 3, 1994, that it would not be completing the project. By letter, dated May 27, 1994 the State notified DIRECT AIRE and CONTINENTAL that it was therefore terminating DIRECT AIRE. The State demanded CONTINENTAL perform to complete the project pursuant to the bonds.

On July 12, 1994 CONTINENTAL, DIRECT AIRE and the State entered into a Completion Agreement. In this Agreement DIRECT AIRE acknowledged that it could no longer perform and agreed not to contest its termination by the State. In this Agreement CONTINENTAL agreed to complete the performance of the job using DIRECT AIRE's forces, meet its payrolls and pay the laborers, subcontractors and suppliers. Defendant DAVID SBIROLI executed the contract on behalf of DIRECT AIRE and also in the agreement, ratified his responsibility under his Indemnity Agreement.

According to CONTINENTAL, DIRECT AIRE did not finish its performance in a timely or workmanlike fashion or in accordance with the Completion Agreement. On December 2, 1994, DIRECT AIRE filed for bankruptcy. The proof presented demonstrates that the plaintiff was a noticed creditor, and appropriately filed a Notice of Claim in that proceeding.

The Continental Insurance Co. v. Sbiroli, et al.

CONTINENTAL completed the project with the services of a different contractor, but offers proof that it continued to pay to DIRECT AIRE's claimants and incurred fees and expenses with respect to DIRECT AIRE's performance, and bankruptcy. CONTINENTAL seeks summary judgment against the SBIROLIs pursuant to their Indemnity Agreements.

Defendant DAVID SBIROLI opposes, largely contending that the monies sought from DIRECT AIRE are inappropriate. Further, he claims that the parties never fully executed the Completion Agreement. SBIROLI contends that he advised the plaintiff that it was spending too much money to complete the project, and that plaintiff was unqualified to complete it, thus creating unnecessary costs, not mitigating its costs.

The defendant offers no actual proof to support any of his contentions. The unsupported allegations of the defendant that the damages sought are not reasonable, and do not raise a legitimate issue of fact to defeat summary judgment on liability. Plaintiff offers documentary evidence of its expenses for which it seeks indemnification. Other than speculation, defendants offer no proof that these payments were not made in good faith pursuant to the contracts with the defendant. SBIROLI also contends that the plaintiff waited more than six years prior to bringing this action and argues that it is unfair and untimely and that the matter should be dismissed. He claims that the six year statute of limitations for breach of contract has expired and that the doctrine of laches prohibits this action. SBIROLI contends that the date of DIRECT AIRE's default was May 3, 1994 and had run prior to commencement of this action on July 14, 2000.

SBIROLI also contends that the defendants are also entitled to a dismissal of the claims against TRADE CONNECTIONS and AIRCON ENTERPRISES as they are not parties to any of the contracts or agreements in question.

The application of the defendants for a dismissal as untimely or as barred by the statute of limitations, pursuant to CPLR § 3211 is Denied. The limitation period for the breach of the Indemnity Agreements is six years. CPLR § 213(2). This cause of action arises when liability is incurred by way of an actual payment. *Varo, Inc. v. Alvis PLC*, 261 A.D.2d-262 (1<sup>st</sup> Dept. 1999); *McDermott v. City of New York*, 50 N.Y. 211 (1980). The uncontested proof presented demonstrates that CONTINENTAL did not make a payment until July 27, 1997. Thus this action was commenced within the applicable six years. Defendants' argument that the agreements should be considered guaranties is without merit and clearly in contravention of the unequivocal language of the Indemnity Agreements presented.

The Continental Insurance Co. v. Sbiroli, et al.

The defendants' contention that the action should be barred by the equitable defense of laches is also Denied. While the defendant speculates that witnesses may no longer be available, and documents have since been destroyed or made unavailable, a review of the evidence presented does not demonstrate a need for the witness or documents now claimed to be unavailable. The party asserting this defense must show that he had no knowledge that the plaintiff would assert this claim and actually demonstrate real prejudice so that the Court should actually bar a claim for the relief sought. *Cohen v. Krantz*, 227 A.D.2d 581 (2<sup>nd</sup> Dept. 1986). As noted previously, the plaintiff made a claim against DIRECT AIRE in the Bankruptcy proceeding that the defendants knew or should have known as, DAVID SBIROLI being president of that corporation. Further, defendant SBIROLI does not offer real proof to contest liability under the Indemnity Agreements. There is no demonstration that the unavailable witness or documents would raise a triable issue of fact to preclude recovery by plaintiff.

In light of the conclusive documentation supporting its claims provided by the plaintiff, the mere contentions of the defendant are insufficient to demonstrate the existence a real triable issue of fact in dispute. Defendants offer no actual proof or evidence that the payments made by CONTINENTAL were in bad faith or not appropriate pursuant to its surety contract or the Completion agreement executed in relation to this project. CONTINENTAL has offered vouchers for payment from various entities and sworn statements that these vouchers were paid, all relating to the project defaulted upon by DIRECT AIRE. *The Home Indemnity Company v. Wachtler*, 115 A.D.2d 590 (2<sup>nd</sup> Dept. 1985); *United States Fidelity & Guaranty Co. v. Green*, 34 A.D.2d 935 (1<sup>st</sup> Dept. 1970).

The opposition raised by DAVID SBIROLI does not raise an actual triable issue of fact to dispute the reasonableness and appropriateness of the damages sought. SBIROLI offers no proof or evidence to raise a triable issue of fact with respect to the enforceability of the Indemnity agreements executed by the defendants, thus, the Court finds that partial summary judgment determining that these defendants are liable to indemnify CONTINENTAL for any damages sustained pursuant to its contracts with DIRECT AIRE, is appropriate.

The plaintiff's motion for partial summary judgment against the defendant DAVID and RITA SBIROLI on the issue of liability is Granted.

The Continental Insurance Co. v. Sbiroli, et al.

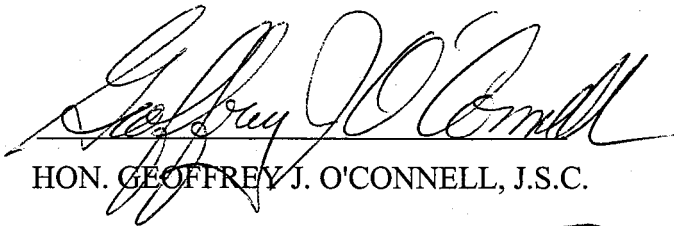
There being no opposition, the motion of the defendants for an Order dismissing the Complaint with respect to defendants TRADE CONNECTIONS and AIRCON ENTERPRISES, INC. is Granted CPLR § 3211(a)(7).

Plaintiff is awarded and judgment is directed to be entered against the defendants DAVID and RITA SBIROLI a/k/a ROSARIA SBIROLI in the sum of \$1,961,170.18 plus prejudgment interest from January 1, 1998 through August 1, 2001, in the sum of \$632,516.34, plus interest.

It is, SO ORDERED.

Dated:

*Dated Dec 21, 2001*

  
HON. GEOFFREY J. O'CONNELL, J.S.C.

**ENTERED**

5

**DEC 26 2001**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**