THE NEW JERSEY SURETY BOND IN THE NEW YORK COURTS

BRUCE J. BERGMAN
New York City

Lawyers, particularly those in the New York metropolitan area, will find this article of interest as it deals with some current conflict of law questions.

Introduction

Unbeknownst to most New York practitioners, the State of New Jersey has a somewhat unusual set of statutory pronouncements regarding the issuance of, and actions upon surety bonds.[1] This can be, and often is, vexatious when New York counsel is called upon by a New York subcontractor or materialman to sue a surety in New York upon a surety bond issued in New Jersey for a New Jersey public construction project. Conversely, and of similar import, is the situation where a New York surety calls upon local New York counsel to defend such an action.

New Jersey law in this area has some surprising aspects and, moreover, New York courts are bound to apply this law for reasons which go beyond general conflicts of law theories.

How the Problem Starts

Without attempting to analyze all the intricacies of New Jersey surety law, suffice it to say that it is not at all unusual for a general contractor in New Jersey to contract with a New York subcontractor for an item of work or to contract with a New York materialman to supply certain materials necessary for the project. If the contract has been let by some public entity in New Jersey, be it the state, a county, a municipality, or a school district, the general contractor will be required to supply a performance and payment bond,[2] not only for the benefit of the public body,[3] but for the benefit of the subcontractor or materialman as well.[4]

The most common situation develops either when the general contractor defaults in some manner and refuses to pay the subcontractor or

---

[1] N.J.S.A. 2A:44-143, et.seq.

[2] *Id.*

[3] Paul H. Jaehniz, Inc. v. Standard Acc. Ins. Co., 18 N.J. Super. 536, 87 A.2d 558 (1952); Newton A. K. Bugbee & Co. v. Consolidated Indemnity & Insurance Co., 111 N.J.L. 323, 168 A. 388 (1933).

[4] N.J.S.A. 2A:44-144, 44-147; E. J. Lavino & Co. v. National Surety Co., 104 N.J.L. 475, 141 A. 663, 6 N.J. Misc. 478 (1928).

materialman,[5] or if its contract is terminated and that forms the basis of its refusal or inability to pay. In either event, our subcontractor or materialman has a collection problem. Where this trouble has arisen, as it too often does, the general contractor may very well be devoid of funds. If it is not bankrupt, it may be short of cash because the public entity is holding back retainage. Even if the general contractor is solvent, if it is not doing business in this state, our New York client cannot sue him here and thus cannot avail himself of New York counsel.

Of course, the chances are that the surety which is doing business in New Jersey is also doing business in New York. Hence jurisdiction is conveniently obtained here. Bearing in mind that the surety is likely to be quite solvent, it would "appear" to be a good idea to initiate the action in New York.

The Surety May Not Be Sued Until 80 Days After Final Acceptance of the Project

Defaults often occur during the progress of a job. Even when they occur at the completion of a project, the final acceptance thereof by a public body is liable to take months or even years. In fact, it is not uncommon for a public project to be in actual use for a considerable period of time before "final acceptance". Whether it is the completion of a "punch list", the approval of the architect or engineer, or some administrative act of the public entity which delays the acceptance, it may take quite some time.

Significantly, the time of instituting suit against a surety on a New Jersey bond is a critical consideration under the relevant statute.

In addition to the requirements as to form imposed upon bonds in N.J.S.A. 2A: Article 12, there are provisions as to actions against sureties thereon. Of particular importance is N.J.S.A. 2A: 44-145, which provides as follows:

> "Any person to whom any money shall be due on account of having performed any labor or furnished any materials, provisions, provender or other supplies, or teams fuels, oils, implements or machinery in, upon, for or about the construction, erection, alteration or repair of any public building or other public work or improvement, shall, at any time before the acceptance of such building, work or improvement by the duly authorized board or officer, or within 80 days thereafter, *furnish the sureties on the bond required by this article a statement of the amount due to him.*
>
> *No action shall be brought against any of the sureties on the bond required by this article until the expiration of 80 days after the acceptance of the building, work or improvement by the duly authorized board of officer."* (emphasis supplied)

Based upon the statute, not only must the prospective plaintiff have given certain notice to the surety, it must also meet the prerequisite and assert and prove that 80 days have expired since the final acceptance of the project.

The theory and practical purpose behind the statute are well founded and have been firmly asserted by the courts of New Jersey. One formulation of the basis for the rule is found in *Samuel Braen's Sons* v. *Fondo*, 52 N.J. Super. 188, A.2d 145, wherein the Court observed that the purpose of the statutory prohibition upon the institution of an action on a bond by a materialman or supplier until after the acceptance of the project is to protect the security of the public body in the bond from depletion or impairment by prior actions against the surety before it is known whether the contractor has faithfully performed his contract, and if not, what loss has been consequently sustained by the public body.

---

[5] It is to be noted that the protection of these statutory provisions is exclusively for the public body and a subcontractor or materialman (or supplier). A bank that advanced money to a contractor who defaulted on his contract for school repair work may not make a claim upon the bond, Board of Ed. of City of Bayonne v. Kolman, 111 N.J. Super. 585, 270 A.2d 64 (1970). Similarly, a firm which supplied fill to a materialman of the general contractor was without the purview of the statute, Morris County Industrial Park v. Thomas Nicol Co., 35 N.J. 522, 173 A.2d 414 (1961).

This is simply a matter of public policy in New Jersey, and the courts are consistent in expressing it.

Graybar Elec. Co. v. *Manufacturers Casualty Co.*, 37 N.J. Super. 284, 117 A.2d 196, aff'd 21 N.J. 517, 122 A.2d 624

Attempts to defeat the language of this section or temper its effect have been rejected, and the courts demand that the acceptance to start the time running must be final, complete and unconditional.

Williamsport Planing Mill Co. v. *Maryland Casualty Co.*, 129 N.J.L. 333, 29 A.2d 731

Yale & Towne Mfg. Co. v. *Aetna Casualty & Surety Co. of Hartford, Conn.*, 110 N.J.L. 592, 166 A. 473

Johnson Service Co. v. *American Employers' Ins. Co.*, 113 N.J.L. 494, 174 A. 756

John P. Callaghan Inc. v. *Continental Casualty Co.*, 110 N.J.L. 390, 166 A. 83

The Law of New Jersey Will Be Controlling in New York

There are a number of well established theories upon which it may be asserted that the Courts of New York are bound to apply within the New Jersey provisions. Prominent among these are the following:

a) Refusal so to do would be violative of the full faith and credit clause of the Constitution of the United States (*John Hancock Ins. Co.* v. *Yates*, 299 U.S. 178; *Hartford Ind. Co.* v. *Delta Co.*, 292 U.S. 143);
b) Comity requires it (*King* v. *Sarris*, 69 N.Y. 24);
c) The center of gravity or grouping of contracts requires it (*Auten* v. *Auten*, 308 N.Y. 155);
d) Contracts are to be governed by the law of the place of performance (*Manhattan Life Ins. Co.* v. *Johnson*, 188 N.Y. 108).

The overriding reason however is that the courts of New York have ruled accordingly.

The leading judicial pronouncement in this area is by the Court of Appeals in *Graybar Electric Co.* v. *New Amsterdam Casualty Co.*, 292 N.Y. 246. In *Graybar*, a New York plaintiff supplied materials for the performance of a public work in the State of Tennessee. When there was a default in payment to it by the contractor, plaintiff sued the surety on the bond in New York. The surety defended asserting that plaintiff did not comply with certain Tennessee statutory requirements. The Tennessee statute relied upon provided that for a supplier to sue on a bond, he had to timely (90 days) give certain written notice of claim and bring suit within six months after completion of the work. In ruling that the complaint against the surety should be dismissed, the Court of Appeals rendered the following decisions:

". . . the highest court of Tennessee in the case of City of Knoxville v. Burgess, Tenn. Sup., 175 S.W. 2d 548, pronounced this same bond to be a statutory bond insofar as the rights of laborers and materialmen are concerned. The bond was made and delivered in Tennessee and was there to be performed. Hence the character of the obligation of the instrument is to be determined in accordance with the relevant law of that State whether declared as common law or by statute. Teel v. Yost, 128 N.Y. 387, 394, 28 N.E. 353, 355, 13 L.R.A. 796. We have been licensed to take judicial notice of foreign law. Civil Practice Act, §344-a. (Now CPLR 4511). Accordingly, we now acknowledge the authority of City of Knoxville v. Burgess, supra, and we recognize the statutory nature of the bond in suit."

"Inasmuch as the bond in suit was given pursuant to this statute, *the statutory text is to be read into the instrument.* The notice so prescribed was never served by this plaintiff-materialman nor was this action commenced within the six months' period so defined." (emphasis supplied)

* * *

"The Tennessee statute (as so construed by the highest court of that State) must here be accorded the full faith and credit which is enjoined by the Federal Constitution in respect of the 'public acts' of a sister State."

The point of Graybar is clear. Where the statute in a sister state imposes conditions upon a bond of the nature herein being considered, New York will, and must, construe the bond pursuant to the terms of that statute by reading the terms of the statute into the bond.

This same principle was applied where a Connecticut statute relating to a bond was at issue in New York (*Omega New York Products Corp.* v. *Parisi Bros., Inc.,* 57 Misc. 2d 1000.)[6]

Conclusion

The New York lawyer called upon to represent the subcontractor or materialman in New York who is aggrieved by non payment upon a New Jersey public works project, would be well advised to carefully review the facts and the New Jersey law, with a view towards referring his client to New Jersey counsel. The expected result would be considerable saving of wasted time and effort.

Frequently, actions in New York are instituted prior to the running of the 80 days after acceptance. This renders all prior effort void since such an action will be subject to a motion to dismiss pursuant to CPLR 3211(a)(7), based upon the law as aforecited. Even if the action is timely however, unless the defaulting contractor has in some way subjected itself to longarm jurisdiction,[7] the defendant surety, being unable to employ third party practice and sue the defaulting contractor in the main action, would have at least one reason to seek a dismissal based upon forum non conveniens.[8]

Similarly, local counsel retained by a New York surety, (sued because it is licensed to do business both in New York and New Jersey) must be aware of the grounds to move against the complaint. The 80 day period is one significant point with which he must be familiar. If the complaint is indeed premature, a CPLR 3211(a)(7) motion would be appropriate.[9]

---

[6] These additional cases are also closely in point: Burry Colonial Corp. v. A. E. Ottaviano, Inc., 21 Misc. 2d 814; Chester Airport v. Aeroflex Corp., 37 Misc. 2d 145; Cooper v. Commercial Ins. Co., 14 A.D. 2d 55; Triple Cities Construction Co. v. Dan-Bar Construction Co., 285 App. Div. 299.

[7] CPLR §302.

[8] CPLR Rule 327.

[9] CPLR 3211(a)(7) provides in substance that a party may move to dismiss a cause of action when the pleading fails to state a cause of action. Significant in this regard is the analysis at 4 Weinstein-Korn-Miller, N.Y. Civ. Prac. par. 3211.43, noting in relevant part that:

> ". . . the criterion to be applied is whether the opposing party *actually* has a cause of action . . . *not whether he has properly stated one* . . . the speaking motion tests the *factual content* of the pleadings as well." (emphasis supplied)

The case law clearly supports this postulation. In construing 3211(a)(7), the Appellate Division, Fourth Department in Kelly v. Bank of Buffalo, 32 A.D. 2d 875, 302 N.Y.S. 2d 60, ruled as follows:

> "We recognize, however, that on such a motion the court is no longer limited to a consideration of the pleading itself but may consider extrinisic matter submitted by the parties in disposing of the motion. (4 Weinstein-Korn-Miller, N.Y. Civ. Prac. par. 3211. 43; Hamilton Printing Co., Inc. v. Ernest Payne Corporation, 26 A.D. 2d 876, 273 N.Y.S. 2d 929). The inquiry is whether the pleader has a cause of action rather than whether he has properly stated one. (6 Carmody-Wait 2d, New York Practice, Section 38:19.)"

(Also see the following cases: Harris v. Sobel, 31 A.D. 2d 529, 295 N.Y.S. 2d 181 (1st Dept. 1968); Tobin v. Grossman, 30 A.D. 2d 229, 291 N.Y.S. 2d 227 (3rd Dept. 1968); Raimondi v. Fedeli, 30 A.D. 2d 802, 291

Where the complaint is dismissed as premature pursuant to N.J.S.A. 2A: 44-145, based upon a 3211(a)(7) motion, the plaintiff would undoubtedly be able to sue again when the requisite time period has run. Then, if only plaintiff and surety are New York domiciliaries, a CPLR Rule 327 motion, asserting forum non conveniens, would be worthy of consideration.

N.Y.S. 2d 90 (1st Dept. 1968); Clayco Foods, Inc. v. Service Terminals, 29 A.D. 2d 645, 287 N.Y.S. 2d 101 (1st Dept. 1968), aff'd 23 N.Y. 2d 960, 298 N.Y.S. 2d 735 (1969); Shea v. Esmay, 50 M. 2d 509, 270 N.Y.S. 2d 768 (Sup. Ct. 1968), aff'd 27 A.D. 2d 685, 276 N.Y.S. 2d 364 (1st Dept. 1967); Epps v. Yonkers Raceway, Inc. 43 M. 2d 53, 249 N.Y.S. 2d 818).

As a corollary provision, CPLR 3211(c) is important. Said section provides in relevant part thusly:

"Upon the hearing of a motion made under subdivision (a) . . . , either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment."

NOTICE

New 1975 dues schedule.

The dues schedule effective January 1, 1975 will be as follows:

$125 Sustaining Member (voluntary)
$ 70 Members admitted over 9 years
$ 55 Members admitted over 5 years
$ 25 Members admitted 4 or 5 years
$ 15 Members admitted less than 4 years
$ 35 Associate Members (Out-of-State residents not maintaining or in association with a New York law office. Year of admission has no bearing on this classification).

Please note that waiver of dues for military service has been eliminated and they pay regular dues accordingly.

Thomas A. Pritchard
Treasurer

FOUNDATION MEMORIALS

A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to the Foundation of the New York State Bar Association. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to the Foundation of the New York State Bar Association, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

Contributions to the Foundation are tax deductible.