Filed 8/30/18 Insurance Co. of the West v. King CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

INSURANCE COMPANY OF THE WEST, Plaintiff and Respondent, v. JOHN E. KING et al., Defendants and Appellants.	2d Civil No. B286027 (Super. Ct. No. 16CV0058) (San Luis Obispo County)

The surety on a subdivision performance bond brought this action for indemnity and breach of contract against the indemnitors under the bond's indemnity agreement. The trial court granted the surety summary judgment. We affirm.

FACTS

Spanish Springs, LLC entered into a subdivision agreement with the County of San Luis Obispo (County). Spanish Springs agreed to complete all subdivision improvements on or before February 7, 2006. The agreement required Spanish Springs to furnish a performance bond in favor of the County in the amount

of $7,406,800. Insurance Company of the West (ICW) issued the bond.

In consideration for the bond, John E. King, as principal in Spanish Springs, and Carol D. King (the Kings) executed an indemnity agreement in favor of ICW.

The agreement provides for indemnity to ICW as follows: "The Undersigned shall indemnify and keep indemnified the Surety against any and all liability for losses and expenses of whatsoever kind or nature, including attorney fees and costs, by reason of having executed or procured the execution of Bonds, or by reason of the failure of the Principal or Indemnitors to perform or comply with the covenants and conditions of this Agreement."

The agreement also provides that ICW can compromise claims and that if the Kings wish to contest a claim, they must make a written request and post cash or collateral.

On September 4, 2009, Spanish Springs conveyed the subdivision tract to North Spanish Springs VRE, LLC (VRE).

In spite of having previously conveyed the subdivision tract to VRE, on April 12, 2010, John King requested that the County grant an extension of time for performance of the subdivision agreement. The County agreed to extend time to February 7, 2012. John King signed the extension agreement on April 20, 2010, as managing partner of Spanish Springs.

Neither VRE nor VRE's successor completed the subdivision improvements by the extended deadline of February 7, 2012.

On January 15, 2015, the County made a demand on ICW that it satisfy its obligations under the bond. The County claimed it was entitled to recover the entire $7,406,800 amount of the bond.

John King was aware of the County's claim but never made a written request to ICW to resist the claim nor posted collateral as required by the indemnity agreement.

ICW settled with the County for $5,000,000. ICW brought this action against Spanish Springs and against the Kings for indemnity and breach of contract.

DISCUSSION

I

Summary judgment is properly granted only if all papers submitted show there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The court must draw all reasonable inferences from the evidence set forth in the papers except where such references are contradicted by other inferences or evidence that raise a triable issue of fact. (*Ibid.*) In examining the supporting and opposing papers, the moving party's affidavits or declarations are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

II

It is undisputed that the Kings did not give ICW notice of their desire to resist the County's claim or post collateral as required by the bond's indemnity agreement. Nevertheless, the Kings assert they are not obligated to indemnify ICW because the statute of limitations had passed on the County's claim.

The Kings rely on Code of Civil Procedure section 359.5, which provides: "If the obligations under a surety bond are conditioned upon performance of the principal, the expiration of

the statute of limitations with respect to the obligations of the principal, other than the obligations of the principal under the bond, shall also bar an action against the principal or surety under the bond, unless the terms of the bond provide otherwise."

The statute of limitations on a written contract is four years. (Code Civ. Proc., § 337.) The subdivision agreement originally required performance by February 7, 2006. The time for performance was extended by agreement of the parties to February 7, 2012. The County made its claim on the bond on January 15, 2015, well within four years of the extended time for performance.

The Kings claim, however, that the agreement extending time for performance was void ab initio. The Kings point out that, months prior to signing the extension agreement, they had transferred their interest in the land and subdivision agreement to VRE. They reason that because they no longer had an interest in the subdivision at the time they signed the extension agreement, the agreement is a nullity.

The Kings do not claim that the County acted fraudulently or in any way in bad faith in agreeing to the extension, or that the County even knew the Kings had transferred their interest prior to signing the extension. The Kings simply believe they can induce the County into extending time for performance, then claim the extension agreement is a nullity under circumstances they unilaterally created, thus barring the County's action based on the original time for performance. In how many ways is that wrong? Read on. In addition to the Kings' breach of the covenant of good faith and fair dealing and the application of the doctrine of estoppel, the Kings' analysis of the effect of their assignment to VRE is faulty.

The Kings point out that the subdivision agreement states it is binding on the successors and assigns of the parties. The Kings cite *Citizens Suburban Co. v. Rosemont Development Co.* (1966) 244 Cal.App.2d 666, 675-680, for the proposition that under such a clause a successor to a developer may be bound by the developer's contracts. Of that proposition, we have no doubt. The flaw in the Kings' argument is that it assumes the assignment itself has the effect of releasing the original promissor. That is not the case. After assignment, the original promissor remains obligated on the contract unless the promissee gives the promissor a release. (1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 752, pp. 805-806.) Here the Kings point to no such release by the County.

Thus, even after assignment, the Kings remained liable for the performance of the subdivision contract. They present no authority, or even a cogent argument, why their contract extending time for the performance of their obligations should be treated as a nullity. The statute of limitations was never a viable defense to the County's action.

The Kings argue that ICW did not act in good faith in settling the County's claim. The argument is based on the theory that the Kings had a viable statute of limitations defense. They did not.

Finally, the Kings argue that the trial court erred when it improperly weighed the evidence. John King's declaration in opposition to the motion for summary judgment stated he does not recall the reason he requested the extension. With an abundance of charity, the trial court called King's statement "implausible." But the reason for the extension request is

irrelevant. It has no effect on the trial court's grant of summary judgment.

The judgment is affirmed. Costs are awarded to ICW.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Charles S. Crandall, Judge

Superior Court County of San Luis Obispo

Glick Haupt Marino LLP, Michael D. Haupt, Lisa R. Hamon for Defendants and Appellants.

Robins Kaplan LLP, David C. Veis, Jason R. Fair for Plaintiff and Respondent.