

Anthony T. Rinaldi, LLC v Anchorage Constr. Corp.
2021 NY Slip Op 30126(U)
January 14, 2021
Supreme Court, New York County
Docket Number: 450691/2016
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

ANTHONY T. RINALDI, LLC d/b/a THE RINALDI GROUP,
LLC,

Plaintiff,

-against-

ANCHORAGE CONSTRUCTION, CORP., NORTH
AMERICAN SPECIALITY INSURANCE COMPANY,
NAS SURETY GROUP, and SWISS RE CORPORATE
SOLUTIONS GLOBAL MARKETS INC.,

Defendant[s].

INDEX No.: 450691/2016

MOT. DATE: 10/20/2020

MOT. SEQ. No.: 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 166, 167, 168, 169,
170, 171, 172, 173, 174, 175, 176, 177
were read on this motion to/for DISMISSAL

Plaintiff Anthony R. Rinaldi, LLC (“Rinaldi”) and Intervenor-Plaintiff Red Apple 81 Fleet
Place Development LLC move to dismiss defendant Anchorage Construction Corp.’s
 (“Anchorage”) counterclaims pursuant to CPLR 321 and CPLR 3211.

I. BACKGROUND

Plaintiff began this action in 2016 for breach of contract against defendant Anchorage for
recovery under a subcontract performance and payment bond of which Anchorage is the Bond
principal and Rinaldi is a Bond obligee (Compl. at 1 [Doc. No. 1]).

Defendant provides a summation of facts in its affirmation in opposition (Def. Aff. [Doc.
No. 171]). Defendant North American Specialty Insurance Company (“NAS” or “Surety”) issued
payment and performance bond number 2165754 (the “Bond”) in the amount of \$3,500,000 to
Anchorage as principal and Rinaldi as bond obligee for certain work performed by Anchorage on
a construction project located at 81 Fleet Place (the “Project”) (Def. Aff. ¶ 3). Plaintiff Rinaldi’s
complaint alleges breach of contract against Anchorage and seeks recovery under the bond against
NAS (*id.* ¶¶ 4-5; Compl. ¶¶ 48-50, 57-58 [Doc. No. 1]). Defendant Anchorage’s Answer (Doc.

No. 23) asserts affirmative defenses including failure to state a claim, Anchorage's fulfillment of all its obligations, and Rinaldi's lack of actual damages (Def. Aff. ¶ 6). The Answer further asserts counterclaims for breach of contract, quantum meruit, and account stated (*id.* ¶¶ 6-8). NAS alleges it is subrogated to Anchorage's claims and has asserted defenses and counterclaims as subrogate (*id.* ¶ 10). On August 6, 2013, NAS alleges Anchorage executed a General Agreement of Indemnity in favor of NAS, assigning its claims, including the counterclaims herein, to NAS (*id.* ¶ 11; Ex. C. [Doc. No. 174]).

II. ARGUMENTS

A. Plaintiff's Affirmation in Support

In support of its motion, plaintiff notes that, on December 18, 2019, this court entered a Decision and Order granting Anchorage's prior attorney's motion to be relieved as counsel (Pl. Aff. ¶ 3 [Doc. No. 167]; Ex. C, Decision and Order [Doc. No. 169]). Plaintiff argues that Anchorage has still not retained new counsel despite the December 2019 Decision staying this action for forty days to allow Anchorage to do so (Pl. Aff. ¶ 4). Plaintiff argues that CPLR 321(a) mandates a corporation "shall appear by attorney" in connection with the prosecution or defense of an action and notes that corporations cannot litigate *pro se* (*id.* ¶ 5; *see Center for Jud. Accountability, Inc. v Cuomo*, 167 AD3d 1406, 1409 [3d Dept 2018]; *135 Bowery LLC v 10717 LLC*, 145 AD3d 1225, 1228 [3d Dept 2016]; *Cinderella Holding Corp. v Calvert Ins. Co.*, 265 AD2d 444 [2d Dept 1999]). Plaintiff argues that, because Anchorage is a corporation that is not being represented by an attorney in this action, its prosecution of counterclaims are not permissible as a matter of law and must be dismissed pursuant to CPLR 321 and CPLR 3211 (Pl. Aff. ¶ 6).

B. Defendant NAS's Memorandum in Opposition

Counsel for NAS submits opposition to plaintiff's motion (Doc. Nos. 171, 175). Defendant argues that Anchorage's counterclaims against Rinaldi are asserted by NAS as subrogee and assignee and should be determined on their merits (Def. Br. at 1 [Doc. No. 175]). Defendant argues that dismissal of Anchorage's counterclaims at this stage due to a "procedural lapse" in retaining new counsel would be inequitable and would permit Rinaldi to avoid payment for work that Anchorage performed (Def. Br. at 2; Def. Aff. ¶¶ 10-12, 14-20). NAS argues that it has the right to assert Anchorage's defenses and counterclaims against Rinaldi as both subrogee and assignee of those claims, and this right would prevent those claims from being dismissed due to Anchorage's lapse in counsel (Def. Br. at 2-3; *John Galt Corp. v Travelers Cas. & Sur. Co. of Am.*,

2010 NY Misc LEXIS 1287 *8-10 [NY County 2010] [“A surety on a performance bond, who answers for the default of its principal, is entitled to be subrogated to any claims its principal may have against third parties responsible for the default”]). Defendant here argues that it is subrogated to Anchorage’s rights to any funds owed to Anchorage by Rinaldi and Red Apple, and it is not necessary that NAS have paid Rinaldi or Red Apple on behalf of its claim to be subrogated to Anchorage’s claims (Def. Br. at 3). Defendant argues judicial efficiency is served by permitting the claims and counterclaims to be resolved in this matter at one time and on the merits (*id.*).

NAS next argues that it is asserting the counterclaims asserted by Anchorage as Anchorage’s assignee pursuant to the Indemnity Agreement (Def. Br. at 3-4; Def. Aff., Ex. C ¶¶ 4-5). Based on the Indemnity Agreement and general precepts of surety law, defendant argues that it has the right to pursue any and all claims that Anchorage possesses against Rinaldi, including Anchorage’s counterclaims, and this right prevents dismissal pursuant to CPLR 321 (Def. Br. at 4; *see Traktman v New York*, 182 AD2d 814, 815 [2d Dept 1992] [“the assignment does not violate CPLR 321(a) the statutory prohibition [against a corporation appearing *pro se*] does not extend to an assignee of a corporation, despite the fact that the assignment may have been made to circumvent the statutory prohibition”]). Defendant argues assignment is valid even when assigned solely to avoid dismissal pursuant to CPLR 321(a) (Def. Br. at 4; *see Groomingdales Doggie Day Care & Salon, LLC v Sara Galiagher*, 2018 NY Misc LEXIS 8040 at *2 [Dutchess County 2018]). Defendant argues the Indemnity Agreement executed on August 6, 2013 assigned Anchorage’s claims to the Surety, has been in force throughout this proceeding, and now warrants dismissal of Rinaldi’s motion to dismiss (Def. Br. at 4).

Defendant argues that plaintiff is trying to stop this matter from being resolved on the merits by ignoring tenets of Surety law, the surety principal relationship between NAS and Anchorage, and the Indemnity Agreement (Def. Br. at 4-5). Defendant argues that courts have previously allowed individual parties to obtain an unrepresented corporation’s claims thus rendering CPLR 321(a) inapplicable (*id.* at 5; *Kinlay v Henley*, 57 AD3d 219, 220 [1st Dept 2008]; *see also Med. Facilities, Inc. v Pryke*, 172 AD2d 338 [1st Dept 1991]). Defendant argues that the cases cited by plaintiff are factually inapposite as they deal with *plaintiff* corporations failing to retain replacement counsel as opposed to a defendant corporation (Def. Br. at 5). Defendant concludes by arguing plaintiff will not be prejudiced by continuing to litigate Anchorage’s counterclaims (*id.* at 6).

III. DISCUSSION

Plaintiff's motion to dismiss must be denied. Though it is true that a corporation cannot appear without an attorney subject to CPLR 321(a), prevailing caselaw holds that dismissal of claims pursuant to 321(a) can be avoided by assignment to a different plaintiff (see CPLR § 321(a); Kinlay v Henley, 57 AD3d 219, 220 [1st Dept 2008]; Traktman v City of New York, 182 AD2d 814, 815 [2d Dept 1992]). Here, Anchorage's claims were assigned to NAS (see Def. Aff., Ex. C ¶¶ 4, 5). Accordingly, plaintiff's motion to dismiss defendant Anchorage' counterclaims is DENIED.

1/14/2021
DATE


O. PETER SHERWOOD, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

GRANTED DENIED GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE