

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROTONDO WEIRICH ENTER., INC., : CIVIL ACTION
et al. :
 :
 :
 v. :
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 :
 GLOBAL EMPLOYMENT SOLUTIONS, :
 INC. : NO. 99-CV-3661

MEMORANDUM

Padova, J.

September , 2000

Before the Court is Counterclaim and Additional Defendants’ Motion to Dismiss. For the reasons that follow, the Court will grant the Motion and dismiss Counts V and VI of Defendant’s counterclaim.

I. Legal Standard

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle her to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true. Id.

II. Discussion

Plaintiffs, Rotondo Weirich Enterprises, Inc. (“RWE”) and Rotondo Weirich & Associates, LLC (“RWA”), have filed suit against Defendant Global Employment Solutions, Incorporated (“Global”) alleging breach of contract, negligence, and fraudulent misrepresentation. Plaintiffs allege that Global contracted to provide temporary workers for RWE’s construction project in San

Diego, California (“California Project”) and RWA’s construction project in Tutwiller, Mississippi. Plaintiffs claim that Global failed to adequately screen the applicants whom they interviewed for the two projects. As a result, Global allegedly hired unskilled and incompetent workers, causing monetary losses and damage to Plaintiffs’ business reputation.

In its Amended Answer, Affirmative Defenses, Counterclaims and Counterclaims Against Additional Defendants (“Answer”), Global asserts four counterclaims against RWE and eight claims against four other entities: Modular Finishing Corporation (“Modular”), Centex-Rooney Construction Company (“Centex-Rooney”), Reliance Insurance Company (“Reliance”), and Corrections Corporation of America (“CCOA”) (collectively “Additional Defendants”). Pursuant to Global’s Motion, the Court joined all four entities to the case. Global’s Answer also identifies two additional entities as proper Defendants to the overall action: Temporary Placement Service of Augusta, Incorporated d/b/a TPS Staffing and Recruiting (“TPSA”), and Temporary Placement Service, Incorporated d/b/a TPS Staffing, Incorporated (“TPS”).

RWE and Additional Defendants (collectively “Movants”) filed the instant Motion requesting dismissal of Counts V, VI, and VIII. On July 10, 2000, Global consented to dismissal of Count VIII. The Court, therefore, will only decide Movant’s challenge to Counts V and VI.

Both Counts V and VI are brought by an entity named Temporary Placement Service of Augusta, Incorporated (“TPSA”). Both counts arise from TPSA’s alleged provision of temporary laborers to the California project. In January 1998, CCOA hired Centex-Rooney to act as prime contractor for the California Project. Centex-Rooney thereafter subcontracted work to RWE and Modular. Between July of 1998 and 1999, TPSA provided temporary laborers for the California Project. The Court will discuss each count in turn.

A. Count V - Centex-Rooney Payment Bond

TPSA asserts Count V against RWE, Modular, Centex-Rooney and Reliance seeking enforcement of a payment bond for \$54,000,000.00 executed by Centex-Rooney, acting as principal, and Reliance, as surety, to CCOA on April 23, 1998 (“Centex-Rooney Bond”). (Answer Ex. A). The Centex-Rooney Bond guarantees payment to all persons supplying labor, materials and/or supplies to the California Project. Id. Around August 4, 1999, Global, d/b/a TPS Staffing, Incorporated, allegedly sought to enforce the Bond by providing Centex-Rooney and Reliance with a Notice to Principal and Surety on Payment Bond on Private Works (“Notice”). (Answer Ex. B). TPSA now seeks payment of over \$500,000.00 through the Centex-Rooney Bond for RWE’s and Modular’s alleged failure to pay for the temporary laborers supplied to the California Project. Movants argue that TPSA is not entitled to enforce the Centex-Rooney Bond because it failed to comply with the conditions precedent to enforcement outlined in the Bond itself as well as those required under California law.

The Centex-Rooney Bond outlines the conditions under which the surety, Reliance, is obligated to pay a ‘Claimant,’ defined as “an individual or entity having a direct contract with the Contractor¹ or with a subcontractor of the Contractor to furnish labor, materials, or equipment for use in the performance of the Contract.” (Answer Ex. A ¶15.1). Reliance is only obligated to pay Claimants who do not have a “direct contract” with Centex-Rooney upon their compliance with certain conditions, including:

furnish[ing] written notice to the Contractor [Centex-Rooney] and sent a copy, or notice thereof, to the Owner [CCOA] within 90 days after having last performed labor or last furnished materials or

¹The Centex-Rooney Bond identifies Centex-Rooney as the Contractor.

equipment included in the claim stating, with substantial accuracy, the amount of the claim and the name of the party to whom the materials were furnished or supplied or for whom the labor was done or performed.

(Answer Ex. A ¶ 4.2).

Under the allegations and admissions made in its pleading, neither Global nor TPS are proper Claimants. Count V alleges that Centex-Rooney and Reliance were served with a Notice stating that “Global Employment Solutions, Inc. dba TPS Staffing, Inc.” provided labor for the California Project. (Answer ¶ 150; Answer Ex. B). The Answer, however, fails to allege any direct contract between Global or TPS and Centex-Rooney or any other subcontractor on the California Project. To the contrary, the Answer admits that TPSA contracted with RWE in connection with the California Project, and specifically denies that any Defendant other than TPSA contracted with RWE. (Answer ¶¶ 12, 16). Similarly, Count V alleges that TPSA alone provided the laborers. (Answer ¶ 149). Assuming the truth of all of these allegations, Global can prove no set of facts demonstrating that it is a Claimant under the Bond, or is otherwise entitled to enforce the payment bond under California law². Similarly, TPSA is unable to prove a set of facts demonstrating that it complied with the Notice requirements of the Bond.³ For this reason, the Court will dismiss Count V for

²See Cal. Civ. Code §3110 (West 1999)(identifying a claimant as a person “performing labor upon or bestowing skill or other necessary services on, or furnishing appliances, teams, or power contributing to the work of improvement”).

³In its Response to Movants, Global claims that it “conducting business through its wholly-owned subsidiaries, TPSA and TPS, provided temporary laborers for RWE and Modular’s use on the California Project.” (Resp. at 12). Global, therefore, “had the requisite “direct contact” contemplated by the bond.” *Id.* The Answer, however, contains no such allegations. This Court is obligated to decide this Motion with reference solely to allegations and statements made in the pleadings, and not to assertions by counsel in legal memoranda. See ALA, Inc., 29 F.3d at 859.

failure to state a claim for which relief may be granted.

B. Count VI - RWE Payment Bond

TPSA asserts Count VI against RWE, Modular, and Reliance to enforce another payment bond allegedly executed by RWE, as principal/subcontractor, and Reliance, as surety, and delivered to Centex-Rooney in April 1998 (“RWE Bond”). (Answer Ex. C). TPSA claims it provided temporary laborers for use in the California Project between July 1998 and 1999, pursuant to RWE’s and Modular’s request. TPSA seeks payment under the RWE Bond of over \$500,000.00 for RWE’s and Modular’s alleged failure to pay TPSA for the provided laborers. Movants assert that TPSA’s claim fails because it does not allege that TPSA provided the requisite statutory notice.

California law requires claimants under private work payment bonds provide the 20-day private work preliminary notice outlined in California Civil Code § 3097 (“preliminary notice”). Cal. Civ. Code § 3242(a) (West 1999). If the claimant fails to provide the preliminary notice, the claimant may still enforce the claim by giving written notice to the surety and the bond principal as provided in California Civil Code § 3227 within either fifteen days of the recordation of a notice of completion, or, if none is recorded, 75 days after completion of the work. Cal. Civ. Code § 3242(b) (West 1999).

Section 3097⁴ defines the preliminary notice as “a written notice from a claimant that is given . . . prior to asserting a claim against a payment bond.” Cal. Civ. Code § 3097 (West 2000). Claimants who are not under direct contract with the property owner or performing actual wage labor must give a written preliminary notice to the owner, original contractor, and construction lender. Cal. Civ.

⁴The California legislature amended section 3097 on April 17, 2000, in ways that do not affect this case. See 2000 Urgency Measure, 2000 Cal. Legis. Serv. 13 (West).

Code § 3097(a) (West 2000). Claimants with a direct contract with the owner must give a preliminary notice to the construction lender. Cal. Civ. Code § 3097(b) (West 2000). For both types of claimants, preliminary notice is required as “a necessary prerequisite to the validity of any claim” on a payment bond. Cal. Civ. Code §§ 3097(a), (b) (West 2000). The Answer fails to allege that TPSA provided a written preliminary notice to anyone, or generally provided any written notice to RWE and Reliance.

Global argues that TPSA was not required to give any notice prior to enforcing the RWE Bond because it had a direct contractual relationship with RWE, the bond’s principal. The Court rejects this argument because it does not comport with the express language of section 3097⁵ that requires “every person who furnishes labor, service, equipment, or material for which a lien or payment otherwise can be claimed under this title,” and who has no direct contract with the property owner to serve a written preliminary notice on the owner, original contractor⁶, and construction lender. See Cal. Civ. Code § 3097(a) (West 2000). The Answer fails to allege that TPSA had a contract with CCOA, the property owner. Even if TPSA had a direct contract with the owner, section 3097(b) would still require TPSA to provide written preliminary notice to the construction lender. See Cal. Civ. Code § 3097(b) (West 2000).

Global attempts to bolster its argument by citing section 3226 that provides:

Any bond given pursuant to the provisions of this title will be construed most strongly against the surety and in favor of all persons for whose benefit such bond is given . . .

⁵Section 3242's general requirement of written notice for claimants under payment bonds also contradicts Global’s argument. See Cal. Civ. Code § 3242 (West 1999).

⁶The original contractor is any contractor with a direct contractual relationship with the owner. Cal. Civ. Code §3095 (West 2000).

Cal. Civ. Code §3226 (West 1999). Reliance on this statement is misplaced. The remainder of section 3226 places this rather broad statement in context by specifying that sureties should not be released from liability under bonds merely because of a breach of contract between the owner and original contractor or a breach of contract on the part of any obligee named in the bond. Id. The Court will not ignore the express requirements outlined in section 3097 in favor of a broad policy statement made in an incomparable context.

Furthermore, California courts require strict adherence to the statutory procedural requirements of notice for mechanics liens and payment bonds. Harold L. James, Inc. v. Five Points Ranch, Inc., 204 Ca. Rptr. 494, 496 (Cal. Ct. App. 1984)(surveying cases)(“[W]here the Legislature has provided a detailed and specific mandate as to the manner or form of serving notice upon an affected party that its property interests are at stake, any deviation from the statutory mandate will be viewed with extreme disfavor.”); Romak Iron Works v. Prudential Ins. Co. of Am., 163 Cal. Rptr. 869, 875-76 (Cal. Ct. App. 1980). The statutory notice scheme is designed to alert owners and construction lenders to possible claims against property or funds arising from contracts otherwise unknown to them. Romak, 163 Cal. Rptr. at 875. Strict compliance with the notice requirements is critical to this function.

Since the Answer fails to allege that TPSA served any notice pursuant to any statutory provision on an appropriate party, the Court concludes that Count VI also fails to state a claim for which relief may be granted. An appropriate Order follows.