

STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

MODERN MOSAIC, LTD.,

Plaintiff,

-against-

DECISION
AND
ORDER

SWEET ASSOCIATES, INC., STATE
UNIVERSITY CONSTRUCTION FUND,
STATE OF NEW YORK, NATIONAL UNION
FIRE INSURANCE COMPANY OF PITTSBURGH,
PA, and JOHN DOE and JANE DOE (said
fictitious names being designated to represent any
and all other persons having any interest in the property
which is the subject of this action),

Defendants.

Index No. 1656-99
(RJI No. 01-03-072764)

(Judge Richard M. Platkin, Presiding)

APPEARANCES: Whiteman, Osterman & Hanna LLP
Attorneys for Plaintiff
(Christopher E. Buckey, Esq. of Counsel)
One Commerce Plaza
Albany, New York 12260

McElroy, Deutsch, Mulvaney & Carpenter, LLP
Attorneys for National Union Fire Ins. Co.
of Pittsburgh, PA
(Louis A. Modugno, Esq., of Counsel)
Wall Street Plaza
88 Pine Street, 24th Floor
New York, New York 10005

Hon. Richard M. Platkin, A.J.S.C.

Plaintiff moves pursuant to Lien Law § 37, for a judgment against the bond posted by defendant National Union Fire Company of Pittsburgh, PA (“National Union”). Alternatively, plaintiff seeks to resettle a judgment entered against defendant Sweet Associates, Inc. (“Sweet”) to specifically impose liability on National Union as surety. National Union contends that plaintiff’s claim under the Lien Law is barred by *res judicata* and that resettlement cannot be used to make substantive changes to a judgment entered more than thirty months ago.

In October 1996, defendant Sweet Associates, Inc. (“Sweet”), a general contractor, subcontracted with plaintiff for the fabrication and installation of approximately 500 precast concrete panels on the exterior of a building that Sweet was to construct. In April 1998, after completion of the work, there was a dispute between plaintiff and Sweet concerning the balance owed on the sub-contract, as well as a claim by plaintiff that it had been damaged by project delays attributable to Sweet.

In September 1998, plaintiff filed a mechanic’s lien against the property improved by its work under the contract. In October 1998, this Court (Malone, J.) issued an order discharging the mechanic’s lien, based on the filing of an undertaking posted by Sweet, as principal, and National Union, as its surety.

Plaintiff commenced this action in March 1999. When plaintiff moved for summary judgment against Sweet for the balance owed on the subcontract, this Court (Benza, J.) granted the motion in part and reserved for trial the issues of damages for delay and the date upon which prejudgment interest would accrue. Following a non-jury trial, the Court dismissed plaintiff’s claim for delay damages, but adjudged Sweet liable to plaintiff for prejudgment interest. All

claims against the remaining defendants were dismissed. Plaintiff appealed, and the Third Department affirmed (23 AD3d 880 [3rd Dept. 2005]).

On this motion, plaintiff contends that Sweet has failed to pay any of the interest awarded to it, which it calculates to be \$63,867.83 as of January 15, 2007. Plaintiff further contends that National Union has refused to tender payment for the unpaid obligation of its principal. Accordingly, plaintiff seeks an order pursuant to Lien Law § 37, granting judgment against the bond posted by defendant National Union Fire Company of Pittsburgh, PA (“National Union”). Alternatively, plaintiff asks this Court to resettle the Statement of Judgment dated July 14, 2004 and entered July 15, 2004 to specifically impose liability on National Union as surety for defendant Sweet Associates, Inc.

Res Judicata

Defendant National Union contends that plaintiff’s application for an order pursuant to the Lien Law § 37, is barred by principles of *res judicata*. In particular, National Union argues that plaintiff’s cause of action against it under the Lien Law was expressly dismissed by the Court’s September 5, 2003 and June 17, 2004 decisions, and these determinations are reflected in the July 14, 2004 judgment, which imposed liability only upon Sweet.

“Res judicata bars future litigation between the same parties, or those in privity with the parties, of a cause of action arising out of the same transaction or series of transactions as a cause of action that was either raised or could have been raised in a prior proceeding" (*Evergreen Bank v Dashnaw*, 246 AD2d 814 , 815 [3rd Dept. 1998] [internal quotation omitted]). Here, plaintiff’s complaint plainly sought recovery against defendant National Union based on the undertaking that it filed as surety to Sweet. The causes of action against National Union (and all defendants

other than Sweet) were dismissed by this Court's prior rulings, and judgment was entered solely against Sweet. If plaintiff was aggrieved by that portion of the Court's ruling, its remedy was to appeal and/or file appropriate post-trial motions.

In arguing that *res judicata* should not be held to bar to its Lien Law claim, plaintiff relies upon the following assertions: (1) by its terms, the undertaking issued by National Union provides that it will remain in effect until such time as Sweet shall pay any judgment which may be rendered in favor of plaintiff for enforcement of the lien; (2) there is no dispute that the amounts recoverable pursuant to the interest judgment fall within such undertaking; (3) there is no dispute that Sweet failed to perform the obligations necessary to relieve National Union of liability under the bond; and (4) National Union's liability as a surety does not depend on an independent adjudication of liability; rather, its liability is derivative of Sweet's (unsatisfied) liability.

While these contentions might be persuasive if this Court were adjudicating plaintiff's claim against National Union *de novo*,¹ the fact remains that plaintiff previously asserted an identical claim against National Union and that claim was dismissed after a trial on the merits, with judgment being entered only against Sweet. Absent some exception to the ordinary principles of *res judicata* – which plaintiff has not identified – this Court's prior judgment must be held to have extinguished all claims that plaintiff brought (or could have brought) against National Union arising out of the same factual grouping (*see Smith v Russell Sage Coll.*, 54 NY2d

¹ With respect to plaintiff's argument that National Union's liability is derivative and therefore an independent adjudication is unnecessary, the Court notes that plaintiff seeks an order pursuant to Lien Law § 37, which makes recovery against a bond available only in an action brought in compliance with the statutory requirements.

185, 193-94 [1981]), including the Lien Law claim plaintiff now seeks to assert.²

As the Court of Appeals has explained, “[c]onsiderations of judicial economy as well as fairness to the parties mandate, at some point, an end to litigation. Afterthoughts or after discoveries however understandable and morally forgivable are generally not enough to create a right to litigate anew” (*Matter of Reilly v Reid*, 45 NY2d 24, 28 [1978]). After a full trial on the merits and a plenary appeal to the Appellate Division, it cannot be said that application of *res judicata* would deny plaintiff its day in court. Unfortunately for plaintiff, that day has long passed.

In the alternative, plaintiff seeks to resettle the Statement of Judgment dated July 14, 2004 and entered July 15, 2004 to specifically impose liability on National Union as surety for Sweet. “Resettlement of an order is a procedure designed solely to correct errors or omissions as to form, or for clarification . . . [and] may not be used to effect a substantial change in or to amplify the prior decision of the court” (*Tidball v Tidball*, 108 AD2d 957 [3rd Dept. 1985], quoting *Foley v Roche*, 68 AD2d 558 [1st Dept. 1979]; see also *Matter of Kolasz v Levitt*, 63 AD2d 777 [3rd Dept. 1978][purpose is to correctly express court’s decision]). It is difficult to envision a more substantial or substantive change than imposing liability on a party that obtained dismissal of all claims against it after trial (see e.g. *Haggerty v Market Basket Enters.*, 8 AD3d 618 [3rd Dept. 2004] ; *Garrick Aug Assoc. Store Leasing, Inc. v. Scali*, 278 AD2d 23 [1st Dept. 2000]). Accordingly, this prong of plaintiff’s motion must also be denied.

² An action upon a bond under Lien Law § 37 “shall be begun within one year after the completion of the improvement” (¶ 9). Thus, plaintiff’s cause of action clearly had accrued at the time of trial (*cf. Maflo Holding Corp. v S. J. Blume, Inc.*, 308 NY 570, 575-76 [1955]).

The Court has considered plaintiff's remaining arguments and finds them to be without merit.

Accordingly, it is

ORDERED that plaintiff's motion is hereby **DENIED** in its entirety.

This constitutes the Decision and Order of the Court. All papers including this Decision and Order are returned to National Union's counsel. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York
April 18, 2007

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

Notice of Motion, dated January 17, 2007;
Memorandum of Law in Opposition, dated February 15, 2007;
Reply Affidavit of Christopher M. McDonald, Esq., sworn to February 22, 2007