

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA, FOR)
THE USE AND BENEFIT OF)
FAIRFIELD LUMBER COMPANY,)
)
Plaintiff)
)
v.) Civil No. 96-0094-B
)
GULF INSURANCE GROUP, et al.,)
)
Defendants)

MEMORANDUM OF DECISION¹

The issue presented on this Motion for Partial Summary Judgment is the extent to which a default judgment entered against a principal is binding on the surety. On the record presently before the Court, the Court concludes that summary judgment is inappropriate.

Procedural History

Plaintiff commenced this action in March, 1996, seeking to recover damages for the alleged breach of a contract to purchase replacement windows. Defendants are SLS Contracting Services, Inc. ["SLS"], the subcontractor on a construction project for a United States Coast Guard facility in Southwest Harbor, Maine, and its surety, Gulf Insurance Group ["GULF"]. Default judgment entered in Plaintiff's favor against SLS following its failure to appear in the action on May 6, 1996. Plaintiff now seeks judgment as a matter of law on the question whether that judgment is binding against Gulf.

Summary Judgment

¹ Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

1. The parties' submissions.

As a preliminary matter, Gulf objects to Plaintiff's Statement of Material Facts as "an unsworn recitation by counsel." Gulf Memo. at 1-2 (Docket No. 23). This objection is overruled. Plaintiff's submission sets forth three "facts" in support of its Motion. The first is based upon Defendant's Answer to Plaintiff's Complaint, and the third is apparent from the docket in this matter. It is a matter of dispute whether the second "fact," that Defendant had notice of Plaintiff's Complaint against SLS, is a matter of public record. However, we decline to strike the statement, inasmuch as Plaintiff is clearly relying on Defendant's participation in this suit as constituting "notice."

The Court further notes that, while it is the movant's burden to "adumbrate 'an absence of evidence to support the nonmoving party's case,'" if that burden is satisfied it would be incumbent upon Defendant to "adduce specific, provable facts demonstrating that there is a triable issue." *Brennan v. Hendrigan*, 888 F.2d 189, 191 (1st Cir. 1989) (citation omitted). The Court's Local Rules provide that "[a]ll material facts set forth in the statement required to be

served by the moving party . . . will be deemed to be admitted unless properly controverted by the *statement* required to be served by the opposing party.” D. Me. R. 19(b)(2) (emphasis added). Accordingly, Defendant submitted its response to the Motion for Summary Judgment, without including its own statement of fact, at its peril. In this case, however, Defendant suffers no detriment inasmuch as the Court concludes Plaintiff is not entitled to judgment as a matter of law on the record presented with the Motion for Summary Judgment.

2. *The merits of the Motion for Summary Judgment.*

Plaintiff asserts, and we accept for purposes of this Motion, the following three facts:

1. Defendant Gulf Insurance Group, was the surety for its principal, Defendant SLS Contracting Services, Inc., under payment bond GE5634666. Answer of Gulf Insurance Company, ¶ 10, p. 2.

2. Defendant Gulf Insurance Group had notice of the Plaintiff’s Complaint against Defendant SLS Contracting Services, Inc.

3. On May 22, 1996, a Default Judgment was entered for the Plaintiff against Defendant SLS Contracting Services, Inc. for \$31,846.88, with interest and costs, including reasonable attorney fees. Entry of Default and Default Judgment By the Clerk, May 22, 1996.

Pl. Statement of Facts at 2.

Plaintiff’s legal argument is that Gulf is bound by the terms of its bond to satisfy the judgment entered against SLS. On its face, however, Plaintiff’s submission provides an insufficient basis upon which to make that finding.

The Court agrees the general rule is that “a judgment against a principal conclusively establishes against a surety the fact of and the amount of the principal’s liability *as long as the surety has notice of the proceeding against the principal.*” *United States ex rel. Aurora Painting v. Fireman’s Fund. Ins.*, 832 F.2d 1150, 1153 (9th Cir. 1987) (emphasis added). The “notice”

requirement, however, has been widely interpreted to include a “full opportunity to defend” the proceeding. *Eg.*, *United States Fid. & Guar. v. Hendry Corp.*, 391 F.2d 13, 17 (5th Cir. 1968). The record in this matter provides no basis upon which to conclude, for example, that SLS is still in existence and would cooperate with Gulf, or that the bond gave Gulf the right to defend SLS directly. On this record, the Court would find that Gulf had no more opportunity to prevent the default judgment than the defendants in those cases where the judgment against the principal was had in state court. *Eg.*, *Aurora Paint.*, 832 F.2d at 1152 (noting that the exclusivity of federal jurisdiction under the Miller Act prevented the surety from protecting its rights in the state proceeding); *see also*, *Heritage Ins. Co. v. Foster Elec.*, 393 So.2d 28, 29 (concluding that a default against the principal is not conclusive against the surety after finding the surety, although a co-defendant, was “unable to defend against the default judgment”)

Further, Plaintiff has set forth no factual basis upon which to conclude that payment bond GE5634666 bears any relationship whatsoever to the liability for which the May 22 Judgment issued. While the Court assumes that connection is presented in Plaintiff’s Complaint, we are not required to peruse the record in search of a factual predicate for judgment. Rather, the parties are bound by the Statements of Material Fact they present pursuant to Local Rule 19(b).

Default Judgment

The Court further determines that default judgment should not have entered in any case against Defendant SLS when the matter had yet to be completed against Gulf. The general rule is that an entry of default simply deprives the allegedly jointly liable party of standing to participate in further proceedings, although the party will be bound by the final resolution of the merits.

Frow v. De La Vega, 82 U.S. 552 (1872), *quoted in* 10 CHARLES A. WRIGHT, ARTHUR R. MILLER

AND MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2690 (1983). It does not, nor should it, operate to deprive the remaining party or parties of the right to defend the merits of the action. See *Heritage Ins.*, 393 So.2d at 29 (citing *Marc Bellaire, Inc. v. Fleischman*, 185 Cal.App.2d 591, 8 Cal. Rptr. 650; *Fawkes v. National Refining Co.*, 341 Mo. 630, 108 S.W.2d 7).

Conclusion

Accordingly, Plaintiff's Motion for Partial Summary Judgment is hereby DENIED. The Default Judgment entered in this matter in Plaintiff's favor as against Defendant SLS on May 22, 1996 is hereby VACATED pending final resolution of this matter.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated at Bangor, Maine on October 3, 1996.