STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
East Coast Concrete Cutting, LLC, Plaintiff, v. National Bridge Builders, LLC, and Frankenmuth Insurance Company, Defendants.	C/A No.: 2023-CP-29-01568 **ORDER**

THIS MATTER came before the undersigned for a hearing on three pending motions. First, the Plaintiff, East Coast Concrete Cutting, LLC ("Plaintiff" or "East Coast"), moved on March 5, 2024, for judgment on the pleadings or, in the alternative, for summary judgment on its seventh cause of action to recover interest and attorney's fees pursuant to S.C. Code Ann. § 27-1-15. Second, on March 22, 2024, Defendant Frankenmuth Insurance Company ("Frankenmuth" or "Surety") moved to compel discovery responses from the Plaintiff. Finally, on March 26, 2024, Plaintiff moved for summary judgment on its first cause of action to recover from Frankenmuth under the payment bond issued for the construction project giving rise to this dispute.

At a hearing on April 8, 2024, at the Lancaster County Courthouse in Lancaster, South Carolina, Benjamin C. Bruner, Esquire appeared on behalf of the Plaintiff, and Jarrod W. Stone, Esquire[1] appeared on behalf of Frankenmuth. The Court heard arguments from both parties, who indicated that Frankenmuth's motion to compel had been resolved. The Court allowed the parties time following the hearing to submit additional materials to supplement both the record and their

[1] Mr. Stone is not licensed to practice in South Carolina but was admitted *pro hac vice* by Order entered March 21, 2024.

arguments on the motions. Having carefully considered the record and the arguments and submissions of counsel, as well as their supplemental materials, I find the Plaintiff's motions for summary judgment should be granted for the following reasons.

FACTS

East Coast was a subcontractor on a bridge repair project in Lancaster County referred to as the South Carolina Department of Transportation ("SCDOT") Lancaster County US 521 NB Bridge Replacement Project, SCDOT File No. 2989640, Project No. P026827 in Lancaster County, South Carolina ("the Project"). East Coast was a bridge subcontractor hired by National Bridge Builders, LLC ("NBB"), the general contractor on the Project working for SCDOT, to perform work related to demolition. In addition, Christopher Myles, the owner of East Coast served as Operations Manager on the Project for NBB. Frankenmuth was the surety that issued payment and performance bonds on the Project as required by S.C. Code Ann. § 57-5-1660 to ensure payments to subcontractors and suppliers.

While the Project was being constructed, a dispute arose between NBB and its surety, Frankenmuth, about whether NBB defaulted on a General Agreement of Indemnity ("GAI") with the surety relating to a bonding program that involved the Project as well as many others in South Carolina and other states. As a result, in December of 2021 Frankenmuth directed SCDOT to cease sending payments for the Project to NBB. Instead, at Frankenmuth's request, SCDOT sent the payments to the Surety. This dispute arises from the events that followed that shift on the Project.

The Project was completed, and SCDOT sent all the payments to the Surety. On August 9, 2022, East Coast invoiced Frankenmuth in the amount of $574,524.00. The Surety evaluated the invoices and made a partial payment to East Coast in the amount of $293,674.50.

(Frankenmuth Ans. ¶ 16.) Frankenmuth also made another payment to a second-tier subcontractor to East Coast, which the Surety contends was made under the payment bond. Id.

In November of 2022, East Coast submitted three additional invoices to Frankenmuth totaling $602,530.19 for work on the Project through NBB's Pay Estimate 20 to SCDOT. While evaluating those invoices, Frankenmuth requested a copy of East Coast's January 2022 subcontract with NBB, which East Coast provided. Frankenmuth's Director of Surety Claims reviewed the invoices and determined that as of May 30, 2023, East Coast was due $44,001.04 "for all work performed through estimate 20." (E-mail from Maloney to Myles, May 30, 2023, Exhibit B to Frankenmuth's Answer.) That amount accounted for liquidated damages which Frankenmuth claimed it was entitled to withhold due to East Coast's delays on the Project. Id. At no time during that determination did Frankenmuth indicate it suspected collusion or fraud with the invoices or any portion of East Coast's claim. While the Surety determined East Coast was entitled to be paid $44,001.04, Frankenmuth made no payment to East Coast.

On August 31, 2023, East Coast served Frankenmuth a written demand for payment in the amount of $602,530.19 pursuant to S.C. Code § 27-1-15. Still, Frankenmuth made no payment to East Coast.

On December 4, 2023, East Coast commenced this action asserting causes of action against Frankenmuth and NBB for: (i) claim on a payment bond, (ii) breach of contract, (iii) quantum meruit, (iv) statutory, common law and equitable liens; (v) constructive trust, (vi) conversion, and (vii) interest and attorney's fees under S.C. Code Ann. § 27-1-15. Frankenmuth filed an answer on January 31, 2024, and attached a copy of the May 30, 2023, e-mail from its Director of Surety Claims as an exhibit to its pleading. NBB was served but failed to respond.

On March 5, 2023, East Coast moved for judgment on the pleadings or, in the alternative, for summary judgment on its seventh cause of action for attorney's fees and interest under S.C. Code § 27-1-15 based upon the Maloney's e-mail and the lack of payment. On March 25, 2024, after no one responded to the complaint on behalf of NBB, the Court entered default judgment against NBB in the amount of $642,481.53. That judgment was based in part upon an affidavit of Myles that East Coast was owed $559,378.78 for its work through SCDOT-approved Pay Estimate 20. The day after default judgment was entered against NBB, East Coast moved for summary judgment against Frankenmuth on its first cause of action to recover under the payment bond on the grounds that the judgment against NBB was "binding on Frankenmuth Insurance Company as the surety on the payment bond." (Motion for Summary Judgment, March 26, 2024.)

STANDARD

Under Rule 56(c), SCRCP, summary judgment "shall be rendered forthwith 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 a judgment as a matter of law." "In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Med. Univ. of S.C. v. Arnaud, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). "[I]t is not sufficient for a party to create an inference that is not

reasonable or an issue of fact that is not genuine." Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023).

DISCUSSION

I. S.C. Code Ann. § 27-1-15.

East Coast contends there is no genuine dispute of fact that Frankenmuth failed to comply with S.C. Code § 27-1-15. I agree.

Under S.C. Code Ann. § 27-1-15, a party served by a contractor, laborer, design professional or material supplier with a written demand by certified or registered mail has an affirmative duty "to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand." S.C. Code Ann. § 27-1-15.

Here, Frankenmuth's Director of Surety Claims stated in writing on May 30, 2023 that East Coast was entitled to be paid $44,001.04 of the $602,530.19 it invoiced. "Based upon our evaluation of the work performed by East Coast which has been approved and paid by the SCDOT, the sum of $44,001.04 is due to East Coast for all work performed through estimate 20. This amount accounts for the liquidated damages that are being assessed by the SCDOT for the time periods that East Coast was performing work." (E-mail from Maloney to Myles, May 30, 2023, Exhibit B to Frankenmuth's Answer.) However, Frankenmuth never paid that amount to East Coast. When East Coast served its written demand pursuant to the statute on August 31, 2023, Frankenmuth had a statutory duty to conduct a reasonable investigation and, at a minimum, to pay the $44,001.04 undisputed portion of East Coast's claim by October 15, 2023 (forty-five days from

the date of mailing the demand). That portion had been owed since at least May 20, 2023. However, the Surety failed to discharge that statutory duty.

Frankenmuth acknowledged during the hearing that it received the contract proceeds from SCDOT for the Project. It argued, however, that it did not have any of the money left; all the contract proceeds had been spent. The fact that the surety spent the contract proceeds it received from SCDOT for purposes other than paying a subcontractor does not excuse the obligations under S.C. Code Ann. § 27-1-15.

Frankenmuth also argued at the hearing that there is no undisputed portion of East Coast's claim because East Coast colluded with NBB to defraud the surety. Frankenmuth failed, however, to point to evidence or inference therefrom supporting its speculation about collusion or, for that matter, refuting the statement from its own Director of Surety Claims that the $44,001.04 was owed. Even viewing the evidence and inferences therefrom in the light most favorable to the Surety, the only reasonable conclusion a fact-finder could draw is that Frankenmuth failed to comply with the statute. Having violated its statutory duty and unreasonably failed to pay, Frankenmuth is liable to East Coast "for reasonable attorney's fees and interest at the judgment rate from the date of the demand." S.C. Code § 27-1-15.

II. Payment Bond Claim

Plaintiff also contends it is entitled to summary judgment on its first cause of action to recover under the payment bond based on the default judgment entered against NBB. I agree.

The law in South Carolina has long recognized a surety is bound by a judgment entered against a principal unless the surety can show the judgment was obtained by fraud or collusion or the court lacked jurisdiction to enter it. Ward v. Fed. Ins. Co., 233 S.C. 561, 564, 106 S.E.2d 169, 170 (1958); see also Int'l Fid. Ins. Co. v. China Const. Am. (SC) Inc., 375 S.C. 175, 180, 650

S.E.2d 677, 679 (Ct. App. 2007). It is a Draconian but long-standing rule. In Ward, the supreme court recognized,

> As a general rule, in all cases where the liability of a surety is dependent on the outcome of litigation in which his principal is or may be involved, a judgment against the principal is binding and conclusive on the surety, and the surety may not interpose defenses which should or might have been set up in the action in which the judgment was recovered, or require proof of the facts on which the judgment rests, or attack the validity of the judgment, except for fraud or collusion or want of jurisdiction. The rule is applicable even though the surety had no notice of the suit or opportunity to defend, * * *.

233 S.C. at 564, 106 S.E. at 170 (quoting 72 C.J.S. Principal and Surety, § 261.) See also Drill South, Inc. v. International Fidelity Ins. Co., 234 F.3d 1232 (2000) ("Nevertheless, the general rule that has emerged is that a surety is bound by any judgment against its principal, default or otherwise, when the surety had full knowledge of the action against the principal and an opportunity to defend.") (citations omitted). "Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other, in order to obtain the decision of a judicial tribunal for some sinister purpose…Collusion is fraud." Walker v. New Amsterdam Cas. Co., 157 S.C. 381, 154 S.E. 221, 223 (1930).

As an initial matter, no party to this case has argued the default judgment was somehow improper or obtained by fraudulent means or should be set aside. The existence, amount, and date of entry of the default judgment are all undisputed. Applying the general rule, therefore, the judgment is enforceable against Frankenmuth as the surety on the statutory payment bond, subject to the collusion or fraud exception. To avoid summary judgment, therefore, Frankenmuth must point to some evidence or reasonable inference therefrom creating a genuine dispute that the default judgment was obtained as the result of "a secret agreement" between East Coast and NBB "for some sinister purpose."

In its responsive briefs and at the hearing, Frankenmuth argued summary judgment should be denied because a genuine dispute exists because whether a contractor-subcontractor relationship existed between NBB and East Coast. However, Frankenmuth's counsel acknowledged during the hearing that East Coast had in fact been a subcontractor earlier on the Project. Furthermore, Frankenmuth admitted in its responsive pleading that East Coast was a subcontractor. (See also Frankenmuth Answer ¶ 2 ("Frankenmuth admits, upon information and belief, that the Plaintiff is a South Carolina limited liability company whose member/members are citizens of South Carolina. Frankenmuth further admits, upon information and belief, that the Plaintiff furnished certain labor and/or materials to NBB in relation to the Project.").) Having admitted East Coast was a subcontractor, Frankenmuth is bound by its pleadings and is judicially estopped from taking a different position (i.e., claiming no contractor-subcontractor relationship existed) simply to avoid summary judgment. Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 425, 559 S.E.2d 362, 364 (Ct. App. 2001) ("It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise . . . Any allegations, statements, or admissions contained in a pleading are conclusive against the pleader, and a party cannot subsequently take a contrary or inconsistent position.") (internal citations omitted). Thus, there is no factual dispute that East Coast and NBB are two separate entities or that East Coast was in fact a subcontractor on the Project.

Frankenmuth attempts to distinguish its argument by contending that while East Coast was a subcontractor earlier on the Project, it was not one after January 2022. The Surety points to an absence of certain documents to support its suspicion. However, it is undisputed that Frankenmuth determined on May 30, 2022 that East Coast was entitled to be paid $44,001.04 and that Frankenmuth had already paid East Coast $293,674.50 for its work from January to August of

2022. Furthermore, at no point in this case has Frankenmuth denied that East Coast in fact performed the work, or for that matter that Frankenmuth received the money from SCDOT for the work East Coast performed. The Surety argues instead that "collusion" occurred because NBB subcontracted the work to East Coast after the Surety diverted the project funds. That argument, it true, falls short of proving a "a secret agreement . . . to obtain the decision of a judicial tribunal for some sinister purpose." If anything, NBB and East Coast entered an open agreement—the January 2022 subcontract they provided to Frankenmuth—to complete the Project, which occurred. That agreement and the work performed pursuant to it resulted in SCDOT paying an additional hundreds of thousands of dollars to Frankenmuth. There is no reasonable way to construe these facts as fraud or collusion. See Ward, supra. Frankenmuth contemplated subcontracts when it issued the payment bond in the full amount of NBB's contract with SCDOT for the Project. That is why the statute requires the payment bond in the first place.

Frankenmuth also argues a triable issue exists as to collusion because Christopher Myles served as the Operations Manager for NBB. However, that fact fails to create a triable issue about fraud or collusion. It is undisputed that NBB and East Coast are two separate entities, and Frankenmuth pointed to no evidence or reasonable inference therefrom indicating the default judgment was obtained as the result of Myles acting on behalf of both entities. Again, the Project work was completed, and SCDOT paid Frankenmuth for the work. The Surety has failed to point to anything "sinister" about Mr. Myles' involvement.

Frankenmuth also argues the fact that NBB "allowed" a default judgment to be entered against it shows collusion. The record belies this argument and overlooks Frankenmuth's deliberate decision not to seize the opportunity to defend its principal, NBB, when it had the chance. East Coast was forced to go to great lengths to obtain service on NBB. After attempting

service by certified mail, by process server multiple times, and by requesting that NBB accept service of process, East Coast ultimately resorted to service through the Secretary of State's Office. Such facts do not smack of collusion or an agreement to defraud. Furthermore, Frankenmuth is a party to the lawsuit and, therefore, had the ability to appear and defend NBB had it desired. Had East Coast and NBB agreed and desired to defraud the surety, they could have omitted the surety from the lawsuit entirely and still held the Surety liable for the judgment. See Ward, supra (noting that the general rule holding sureties liable for judgments against principals "is applicable even though the surety had no notice of the suit or opportunity to defend."), and Drill South, 234 F.3d at 1235-36. That did not happen here. Frankenmuth was named as a defendant, knew NBB was being sued, too, and had the opportunity to defend NBB had it desired. It elected to allow NBB to go into default.

While not binding precedent, the Eleventh Circuit's reasoning in Drill South is persuasive. In that case, the Eleventh Circuit rejected a payment bond surety's efforts to avoid liability for a default judgment entered against its co-defendant principal after the surety hired counsel to appear and defend the claim, chose not to assert a defense on behalf of its co-defendant principal, allowed the principal to go into default.

> In this action, it is clear from the record that International Fidelity had full knowledge of the potential for the default judgment against Enviro–Group and possessed numerous opportunities to defend the ultimate judgment. The record is replete with instances in which the district court afforded International Fidelity both notice and opportunity to step in and defend the merits of Drill South's claims against Enviro–Group and the extent of its liability . . . We agree with the district court that because International Fidelity had the right, and therefore the opportunity, to defend Enviro–Group as its surety and attorney-in-fact, International Fidelity should not be permitted to stand back and allow a judgment to be taken setting the amount of recovery against its principal without similarly being bound by the judgment.
>
> To the extent that International Fidelity argues that it had no obligation to defend the action against Enviro–Group, we are not persuaded . . . The law requires only

> that a surety have notice and an opportunity to defend before it is bound by a judgment against its principal. We believe International Fidelity had this right and opportunity, and simply chose, for whatever reason, not to exercise its right.

Id. In Drill South, the surety even moved to set aside the default judgment. Here, not only has Frankenmuth passed up the opportunity to defend its principal, NBB, the Surety has taken no action to obtain relief from the default judgment. Frankenmuth "simply chose, for whatever reason, not to exercise its right." Id. That decision is on Frankenmuth; it is not evidence of collusion or fraud.

For these reasons, even viewing the evidence and inferences therefrom in the light most favorable to the nonmoving party, Frankenmuth has failed to point to any evidence or inference creating a genuine dispute that East Coast and NBB colluded to obtain the default judgment. I therefore find East Coast has carried its burden of proof on it claim to recover from Frankenmuth under the payment bond, and Frankenmuth has failed to point to any genuine dispute of fact preventing summary judgment.

III. Damages

Having found East Coast entitled to summary judgment, the Court finds East Coast entitled to judgment against Frankenmuth for the full amount of the default judgment entered on March 26, 2024 in the amount of Six Hundred Forty-Two Thousand, Four Hundred Eighty-One and 53/100 ($642,481.53) Dollars, plus interest thereon at the judgment rate and attorney's fees and costs pursuant to S.C. Code Ann. § 27-1-15.

The current interest rate applicable to judgments is 12.5%, compounded annually, pursuant to Supreme Court Order 2021-01-04-01. Because the default judgment already includes prejudgment interest accrued prior to entry of the judgment on March 26, 2024, the Court need only address interest accrued after entry of the default judgment. Interest on the default judgment

at 12.5% per annum amounts to $220.03 per day. Plaintiff is entitled to that amount by statute. Interest from the date of entry of the judgment to April 29, 2024, amounts to an additional $7,480.95.

With regard to attorney's fees, East Coast has submitted an affidavit of counsel seeking attorney's fees in the amount of $36,871.50 and costs in the amount of $675.35, for a total of $37,546.85. This request is supported by an affidavit of counsel. South Carolina courts rely on six common factors to determine the reasonableness of fees: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). Each factor is addressed in turn.

(1) The nature, extent, and difficulty of the case.

In this case, the nature, extent and difficulty of the case justifies the requested fee. This is not a simple case. Rather, it is one that involves intricate issues of construction and surety law. While the case has been pending since December, the result obtained to date does not mean it has been an easy case. Plaintiff's counsel had to navigate the intricate legal issues and the conduct of the surety trying to avoid liability for paying any portion of the Plaintiff's claim, even though the surety was paid for that work. Plaintiff's counsel investigated not only the nature of the Project but also was required to respond to discovery based upon the surety's insistence prior to the motions hearing. While the judgment against NBB was obtained based upon that defendant's default, the default judgment came only after weeks of attempts to serve NBB through various means. I therefore find nature, extent, and difficulty of this case justify the fee request.

(2) The time necessarily devoted to the case.

I find based on the Affidavit of Counsel and supporting documents that the time necessarily devoted to the case is reasonable and also justifies the requested fee. Counsel's fee request seeks recovery for a total of 127.8 hours of time dedicated to this case, which amounts to approximately 16 hours per month since August 31, 2023, the date the written demand for payment was served. That amount of time is reasonable.

(3) Professional standing of counsel.

I find the attorneys representing the Plaintiff from the law firm of Bruner, Powell, Wall & Mullins, LLC are all in good professional standing in the community and the State and combined have decades of experience in construction law.

(4) Contingency of compensation.

According to the affidavit of counsel, Plaintiff's counsel is billing on an hourly fee plus cost basis. The fee counsel is paid is not contingent.

(5) Beneficial results obtained.

The result obtained is beneficial because Plaintiff has prevailed on two of its seven causes of action and have obtained court rulings entitling it not only to recover from the surety on the payment bond but also to recover interest at the judgment rate and attorney's fees and costs.

(6) Customary legal fees for similar services.

The rates charged by Plaintiff's firm for this work are at or below rates commonly charged in the market for litigation of this type. Attorneys in South Carolina routinely charge $350, $450, and even more per hour for complex litigation work. In Layman v. State, the supreme court awarded fees based on a lodestar analysis using rates as high as $600 per hour. Layman v. State, 376 S.C. 434, 460, 658 S.E.2d 320, 334 (2008). Here, Plaintiff's counsel's fee request is based on

rates of $95 for paralegal and legal assistant work and $295 and $395 for attorneys. The nature and character of the claims, the amount of money at stake, and the various legal issues involved in this case, coupled with the beneficial result obtained, justify the rates upon which Plaintiff has based its request.

Accordingly, I find the Plaintiff's request for attorney's fees in the amount of $36,871.50 is reasonable and should be granted. I further find the costs Plaintiff has requested in the amount of $675.35 were necessarily incurred, are supported in the record, and, therefore, are recoverable.

For the foregoing reasons, the Court finds Plaintiff entitled to judgment against Defendant Frankenmuth Insurance Company in the amount of $642,481.53, plus prejudgment interest in the amount of $6,380.81 (through April 24, 2024), plus fees and costs in the amount of $37,546.85, for a total judgment of $686,409.19, plus additional interest, reasonable attorney's fees and costs accrued after entry of judgment.

IV. Motion to Compel

At the hearing, counsel for both parties indicated Frankenmuth's motion to compel was resolved because the surety had received discovery responses from East Coast. The Court allowed the parties and their attorneys additional time to supplement the record in the event Frankenmuth found some deficiency in East Coast's production, and the Court received nothing further on the matter. Because the motion to compel has been resolved, it is denied as moot.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's motion for summary judgment in its seventh cause of action shall be and hereby is **GRANTED**.

IT IS FURTHER ORDERED that Defendant Frankenmuth Insurance Company's motion to compel is **DENIED** as moot.

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment in its first cause of action shall be and hereby is **GRANTED**. Plaintiff is entitled to recover against Frankenmuth Insurance Company in the amount of $642,481.53, plus prejudgment interest in the amount of $7,480.95 (through April 29, 2024), plus reasonable attorney's fees and costs in the amount of $37,546.85, for a total sum due of $687,509.33. Nothing in this order is intended to bar Plaintiff's ability to apply in the future for an award of additional reasonable attorney's fees and costs; rather, Plaintiff may so apply if necessary.

AND IT IS SO ORDERED.

[JUDGE'S SIGNATURE ON FOLLOWING PAGE]

Lancaster Common Pleas

Case Caption: East Coast Concrete Cutting, Llc VS National Bridge Builders, Llc , defendant, et al

Case Number: 2023CP2901568

Type: Order/Summary Judgment

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge