

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DESIGNED VENTURES, INC. and :
HARTFORD FIRE INSURANCE COMPANY :
 :
v. : C.A. NO. 92-286L
 :
HOUSING AUTHORITY OF THE CITY :
OF NEWPORT, a/k/a NEWPORT :
HOUSING AUTHORITY and ROBINSON, :
MYRICK AND ASSOCIATES, INC. :

MEMORANDUM AND ORDER

RONALD R. LAGUEUX, Chief Judge.

This matter is presently before the Court on the motion of defendant Robinson, Myrick and Associates, Inc. ("RMA") for summary judgment. Plaintiffs Designed Ventures, Inc. ("DVI") and Hartford Fire Insurance Company ("Hartford") brought this suit against RMA and the Newport Housing Authority in connection with a construction project on which RMA was the architect. Hartford claims that RMA negligently performed its duties under the contract by (1) improperly releasing retainages to DVI during the course of the contract, and (2) failing to timely notify Hartford of DVI's default. For the reasons given below, the Court concludes that the releases of retained amounts were in conformance with the contract, and that RMA had no duty to notify Hartford of DVI's default. Therefore RMA's motion is granted.

I. Background

In August 1987, DVI entered into a construction contract with the Newport Housing Authority for the modernization of

buildings at the Park-Holms Project in Newport, Rhode Island. RMA was the architect on the project. Hartford issued a payment and performance bond on the project for its principal, DVI. The Housing Authority was named as the obligee on the bond, which incorporated the terms of the construction contract.

DVI was notified to commence work on October 15, 1987, and the project was scheduled to be completed as of February 11, 1989. Work on the project was behind from the beginning, and DVI was encountering financial difficulties from at least late 1988. Sometime in January or February of 1989, Hartford assumed DVI's obligations under the contract, pursuant to the performance bond. At that time the project was only approximately fifty percent completed. Hartford completed the project in October 1989.

DVI filed a Chapter 11 bankruptcy proceeding in the Bankruptcy Court for the District of Rhode Island in April 1989. Hartford was assigned all of DVI's rights in the contract balances by that Court. Hartford initiated this suit as an adversary proceeding in the Bankruptcy Court, alleging that RMA negligently approved releases of retainages and failed to notify it of DVI's default. The complaint included other claims against the Housing Authority.

RMA moved for summary judgment in the Bankruptcy Court. The motion was denied by the Bankruptcy Judge on September 19, 1991. He held that RMA owed some duty to the surety, but did not address whether the undisputed facts of this case demonstrated any breach of that duty.

In May 1992 the action was withdrawn from the Bankruptcy Court by order of this Court, on the motion of RMA. RMA subsequently filed what it termed a "Motion for Reconsideration of Its Motion for Summary Judgment," requesting de novo review of the Bankruptcy Court order. Although the Bankruptcy Court order is not properly subject to review at this juncture, the Court will consider and decide this motion as an original motion for summary judgment. There has been no objection on this point from Hartford.

The parties engaged in oral argument on the motion on October 1, 1992 and the matter was taken under advisement. It is now in order for decision.

II. Discussion

Hartford alleges two bases for recovery against RMA. First, Hartford claims that RMA negligently approved two improper payments from retainages, totalling \$85,959. Second, Hartford claims that RMA negligently failed to give it notice that the contractor, DVI, was in default. RMA argues that it had no duty to the surety under either of these theories. The Court will address the two issues separately.

A. Retainages

Although neither party has provided the Court with the contract between RMA and the Newport Housing Authority, both sides agree that the contract gave RMA responsibility for overseeing and evaluating the contractor's performance and authorizing the release of progress payments to the contractor

when appropriate. See Designed Ventures, Inc. v. Housing Authority (In re Designed Ventures, Inc.), B.K. No. 89-10610, A.P. No. 90-1131, slip op. at 1 (Bankr. D.R.I., Sept. 19, 1991).

The Bankruptcy Court denied RMA's initial motion for summary judgment, holding that an architect has a common law duty to a surety to exercise reasonable care in the performance of its duties under the owner/architect contract. Id. at 2. The Court relied on the reasoning of the Rhode Island Supreme Court in Forte Brothers, Inc. v. National Amusements, Inc., 525 A.2d 1301 (R.I. 1987), where it was held that a contractor could maintain an action against an architect for negligent performance of its duties under the owner/architect contract despite the lack of privity. Id. at 1307.

This Court agrees that there is some duty owed by an architect to a surety. That result is in accord with decisions from other jurisdictions as well. See Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc., 392 F.2d 472, 475 (8th Cir. 1968) (A surety may recover for loss occasioned by an architect's negligent supervision of a contractor's work, even though there is no privity of contract between the surety and the architect.); Peerless Ins. Co. v. Cerny & Assoc., Inc., 199 F.Supp. 951, 955 (D. Minn. 1961) (Evidence established architect was negligent in certifying contractor's bills for payment, and that such negligence was the proximate cause of loss sustained by surety.). See also Sweeney Co. of Maryland v. Engineers-Constructors, Inc., 823 F.2d 805, 808 (4th Cir. 1987) (The certification of progress

payments cannot be viewed as a rubberstamp process, without creating exposure to negligence claims.); Bartak v. Bell-Galyardt & Wells, Inc., 629 F.2d 523, 529 (8th Cir. 1980) (An architect's breach of an architect/owner contract may create a negligence claim that can be asserted by third parties harmed by the breach.). However, the Bankruptcy Court did not address whether the undisputed facts in this case give rise to an inference that such a duty was breached by RMA.

The parameters of the duty owed by the architect to the surety are defined by the contracts between the owner and architect and the owner and surety. RMA argues that it is undisputed that the payments being challenged were in fact proper under the terms of those contracts. The contract between DVI and the Housing Authority, incorporated by reference into the bond, specifically provided that partial releases of retained funds would be made thirty days after completed buildings had been turned back to the Housing Authority, in an amount equal to ten percent of the value of the work on those buildings. RMA provided affidavits from its president and the executive director of Newport Housing Authority attesting to the fact that the retainages being challenged were properly authorized and paid under that provision.

Hartford does not dispute these assertions, but argues that the payments were nonetheless improper because RMA failed to obtain releases from the subcontractors before making the payments. Although there appears to be a factual dispute on this

issue, it is immaterial, because the contract clearly states that the Housing Authority had no obligation to obtain releases from subcontractors before making payments. Paragraph 7(e) of the DVI/Housing Authority contract provides:

The LHA [Local Housing Authority], before making any payment, may require the Contractor to furnish receipts or other evidence of payment from all persons performing work and supplying material to the Contractor, if the LHA deems the same necessary in order to protect its interests. The LHA may, however, make payment in part or in full to the Contractor without requiring the furnishing of such receipts or evidence of payment. . . . The failure or refusal of the LHA to withhold any moneys from the Contractor shall in nowise impair the obligations of any surety or sureties under any bond or bonds furnished under this Contract.

This provision was incorporated by reference into Hartford's agreement with the Newport Housing Authority. Hartford, thus, contractually gave up any right it may have had to challenge the failure of the Housing Authority and RMA to obtain releases from subcontractors on this project before payments were made to DVI.

B. Notice

Hartford also argues that RMA is liable for failing to give it notice that DVI was in default under the contract. However, Hartford points to no provision in RMA's contract with the Housing Authority that assigns that duty to the architect. Although the architect can be held liable to a surety for negligent performance of its duties under its contract, it is not liable for actions by the owner for which the architect has no responsibility. RMA had no duty to provide notice of default to

the surety under the contract, and this Court will not create such a duty as a matter of law.

III. Conclusion

For the reasons stated above, defendant RMA's motion for summary judgment is granted. No judgment will be entered until all claims in this case are resolved.

It is so ordered.

Ronald R. Lagueux
Chief Judge
January 29 , 1993