

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

SBW, INC., . Case No. 07-4199 (MLC)  
. .  
v. .  
. 402 East State Street  
ERNEST BOCK & SONS, INC.,. Trenton, NJ 08608  
. .  
Defendants. . March 17, 2009  
. . . . . 2:39 p.m.

TRANSCRIPT OF ORAL ARGUMENT  
BEFORE HONORABLE MARY L. COOPER  
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff: Law Office of John W. Wopat, III  
By: JOHN W. WOPAT, III, ESQ.  
130 Maple Avenue  
Red Bank, NJ 07701

For Liberty Mutual: Stradley, Ronon  
By: PAT KINGSLEY, ESQ.  
30 Valley Stream Parkway  
Malvern, PA 19355

Audio Operator: Jim Quinlan

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(Pause)

22

THE COURT: Liberty Mutual the surety here, I think,

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actually has the better argument on every point that has been

24

raised in this motion. It's worth airing these points from

25

time to time because the law in New Jersey continues to evolve,

1 to be sure. But the current State of New Jersey law as we  
2 review it appears to favor each and every one of the four  
3 points that the surety raises here. This is a payment bond, it  
4 was issued in New Jersey, the surety has a New Jersey address,  
5 the work was performed in New Jersey, New Jersey has a strong  
6 public policy interest, and to the degree that this type of  
7 transaction is regulated and interpreted by the laws and the  
8 courts, New Jersey has its own body of law governing this  
9 particular type of transaction.

10           The contract itself has not been challenged in any  
11 way, and it is in form provided by the New Jersey Bond Act and  
12 it is unambiguous, nor is there any claim in the complaint that  
13 it is ambiguous.

14           The limit of the surety's obligation is clearly set  
15 forth. It says, "The surety's total obligation shall not  
16 exceed the amount of this bond, and the amount of this bond  
17 should be credited for any payments made in good faith by the  
18 surety." And it says that the items that will be paid under  
19 this bond are the supplies and utilities and labor and costs of  
20 the claimant. It provides a procedure for making a claim. It  
21 provides a procedure for responding to a claim, and it conforms  
22 to the statute.

23           Consequential damages are not permitted under the  
24 bond and have not in any way been sanctioned or approved in any  
25 New Jersey case law and plaintiff cites none. The issue of

1 attorney's fees continues to crop up in New Jersey case law,  
2 and there are some types of disputes where even when the  
3 contract does not provide for recovery of counsel fees, the  
4 Rules of Court or case law will permit it. But this is not one  
5 of those cases.

6           And the New Jersey Supreme Court in its latest  
7 announcement has made clear that the line of cases that  
8 included Lash, L-a-s-h, and permitted recovery of attorney's  
9 fees for some forms of attorney negligence or misconduct, that  
10 line of cases is limited to what the bar does to the public  
11 rather than any other kind of actionable conduct that might  
12 give rise to attorney's fees. And for that we can cite, as has  
13 the movant, the Supreme Court of New Jersey's 2005 decision in  
14 the V-a-y-d-a, Vayda case. It was an action contesting a will  
15 seeking to remove the executor. That was successful, but the  
16 claim for attorney's fees was not because the executor happened  
17 to be a layperson and not an attorney.

18           And the New Jersey Supreme Court reviewed the status  
19 of the so-called American Rule which is the general rule here  
20 in New Jersey requiring each party to bear its own counsel fees  
21 and said that under the circumstances in Vayda, and in most  
22 circumstances indeed, attorney's fees are not recoverable. So  
23 although Lash was an action on an estate administrator's bond,  
24 it is not instructive here. And there's no authority cited for  
25 recovering attorney's fees on a surety bond in New Jersey.

1           The claim for breach of the covenant of good faith  
2 and fair dealing has been thoroughly vetted in the briefing  
3 material. This case is not analogous to Sons of Thunder or  
4 Wilson v. Hess or any of the other cases in which an  
5 independent cause of action for breach of that covenant has  
6 been recognized. Rather, it is another way of stating exactly  
7 what the breach of contract claim in this case states which is,  
8 I did the work, I didn't get paid, the surety stands behind the  
9 contractor, the surety owes me the money that I have not been  
10 paid in this construction project.

11           So I do not find that there is an independent cause  
12 of action under the covenant of good faith and fair dealing.  
13 That is a covenant which inhered in every contract both formal  
14 and informal, express and implied, entered into and governed  
15 under New Jersey law. And so it folds into Count 12 rather  
16 than sitting independently in Count 13.

17           Come to the bad faith claim, and I respectfully do  
18 not share the optimism of my esteemed colleague, Judge Irenas,  
19 who very ably penned the Atul, A-t-u-l case in 2000 here in the  
20 District of New Jersey in which he predicted that the Supreme  
21 Court of New Jersey, if presented with an issue of whether a  
22 surety on a payment or performance that was a payment bond,  
23 whether such an action could be framed as a cause of action for  
24 bad faith.

25           Judge Irenas was interpreting New Jersey law through

1 the lens of litigating -- adjudicating a Miller Act federal  
2 claim. It turns out that he probably did not have jurisdiction  
3 to entertain the supplemental state law claims because the  
4 Miller Act was subsequently found to preempt supplemental state  
5 law claims asserted under a payment bond. He surveyed some  
6 case law elsewhere in the country that included the Supreme  
7 Court of Arizona, an appeals court in Ohio, and Supreme Court  
8 of Colorado where those jurisdictions, those state court  
9 jurisdictions have determined that their public policy is that  
10 a surety should have some kind of stick to be pointed at them  
11 so that they do not endlessly delay processing a claim,  
12 responding to a claim. But that was the limit of even the bad  
13 faith cause of action that this actual case discussed. The  
14 facts in that case were that the claimant made a claim in  
15 August and sued in January and had not heard from the surety in  
16 any way, shape or form. And the Atul case said, "That the  
17 limit of this claim would be alleged bad faith conduct where no  
18 valid reasons existed to delay processing the claim."

19           So it was an action for bad faith in delay in  
20 processing, actually, not in delay in paying on a surety bond.  
21 But be that as it may, there have been nine -- almost nine  
22 years elapsed since this 2000 decision in the District of New  
23 Jersey, and construction disputes happen all the time. It's  
24 sad to see how many public projects degenerate into  
25 construction disputes and claims on surety bonds. And we've

1 got no even Appellate Division much less New Jersey Supreme  
2 Court authority picking up on the prediction that the Atul case  
3 made.

4           The statutory scheme in New Jersey, sure, it includes  
5 surety transactions as under the broad umbrella of potential  
6 regulation by the relevant state executive branch department,  
7 but that is as far as the proposition runs, because the Fair  
8 Settlement Claims Practices Act does not apply to surety bonds  
9 and the Bond Act applies to bonds, surety bonds, and the twain  
10 do not meet other than at the umbrella top of the Department of  
11 Banking and Insurance and its statutory authority over all such  
12 financial providers, shall we say.

13           Liberty Mutual, the surety here, cites some further  
14 case law that tends to support, at least in a general way, the  
15 policies and principles that would tend to negate the existence  
16 of a cause of action for bad faith in processing a claim on a  
17 payment bond. But there being no authoritative New Jersey  
18 statute or case law establishing that there is such a cause of  
19 action, this Court is satisfied that at this time, at least,  
20 Count 14 of this complaint does not state a cause of action  
21 under New Jersey law. So for these reasons, the motion is  
22 granted. Counts 13 and 14 will be dismissed, and the claim for  
23 the relief of attorney's fees and consequential damages will be  
24 stricken from Count 12. And the case will proceed.

25           MR. WOPAT: Thank you, Your Honor.