UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE GRAY INSURANCE COMPANY,

Plaintiff,

v. CASE NO. 8:24-cv-137-SDM-TGW

HARBOR POINTE WEST CONDOMINIUM
ASSOCIATION OF DUNEDIN, INC.,

Defendant.
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ORDER

The Gray Insurance Company sues (Doc. 1) Harbor Pointe West Condominium Association of Dunedin, Inc., to discharge Gray from liability under a performance bond. Gray moves (Doc. 9) for summary judgment, Harbor Pointe responds (Doc. 19), and Gray replies (Doc. 15).

BACKGROUND[1]

After Harbor Pointe hired a construction company (the contractor) to repair Harbor Pointe's walkways, Gray issued a performance bond. (Doc. 1 ¶¶ 5–7; Doc. 9 at 1) The bond designates Harbor Pointe as the owner, the construction company as the contractor, and Gray as the surety. (Doc. 9 ¶ 2) Soon after starting construction on Harbor Pointe, the contractor realized that the balconies required restoration and

[1] The record reveals the following facts, which are resolved most favorably toward Harbor Pointe.

signed change orders with Harbor Pointe that incorporated repair to the rear balconies. (Doc. 19 ¶¶ 17–22) Because the construction project's cost "more than doubled," Harbor Pointe eventually suspended the project. (Doc. 19 ¶ 25) The contractor "recorded claims of lien" against the project, which Harbor Pointe paid. (Doc. 19 ¶¶ 26–27)

Harbor Pointe requested the contractor provide a "re-start date" for the project, but the contractor never responded. (Doc. 19-11; Doc. 19 ¶ 28) A year later, Harbor Pointe hired an expert to evaluate the repair, and the expert found "extensive defects in the work." (Doc. 19 ¶ 29; Doc. 19-12) Harbor Pointe sent to the contractor, but not to Gray, a "Notice of Construction and Design Defects." (Doc. 19 ¶ 30; Doc. 19-1 ¶ 22) In October 2022, Harbor Pointe sent to Gray a "Notice of Claim on Bond." (Doc. 19 ¶ 31; Doc. 9-1 at 60) The notice states that the contractor "continues to be in default of the Contract" and demands that Gray "proceed as provided in section five (5) of the Bond" and pay Harbor Pointe "with reasonable promptness." (Doc. 9-1 at 60) The notice mentions nothing about terminating the construction contract and mentions nothing about paying to Gray the "balance of the contract price." (Doc. 19 ¶ 31; Doc. 9 ¶ 12)

Gray informed Harbor Pointe of Harbor Pointe's failure to satisfy the bond's conditions precedent and requested documents from Harbor Pointe to investigate the claim. (Doc. 9-1 at 62–64; Doc. 19 ¶¶ 33-36) In November 2022, Gray again informed Harbor Pointe that Harbor Pointe failed to activate Gray's obligation under the bond. (Doc. 9-1 at 66–68) In March 2023, Harbor Pointe sent Gray a letter titled

"Demand Surety Perform Obligations." (Doc. 19 ¶¶ 36–37; Doc. 9-1 at 70) Five days later and without receiving a response from Gray, Harbor Pointe initiated arbitration against both Gray and the contractor and alleged breach of contract, negligence, and breach of the performance bond. (Doc. 19 ¶ 39; Doc. 9 at 2) The parties' arbitration excluded Gray's alleged breach of the performance bond (Doc. 9 ¶ 21), which means that the arbitration does not affect Gray's performance bond defenses. Gray sues (Doc. 1) and requests Gray's discharge from obligation under the bond.

DISCUSSION

The parties dispute whether Harbor Pointe satisfied the conditions precedent required by Section 3 of the bond, which activates Gray's obligation to perform. Section 3 states that Gray's obligation to perform "arises" if Harbor Pointe (1) provides the contractor and Gray notice that Harbor Pointe is considering declaring a "Contractor Default"; (2) declares "a Contractor Default," terminates the construction contract, and notifies Gray of each action; and (3) agrees to pay the balance of the construction contract's price. After Harbor Pointe satisfies these three obligations, Gray "shall" mitigate damages for Harbor Pointe by one of the means specified in Section 5 of the bond. Section 5 permits Gray to perform or arrange performance of the contract, to waive performance and investigate the claim to determine what amount Gray owes Harbor Pointe, or to deny liability. Section 6 permits Harbor Pointe a remedy if Gray fails to perform under Section 5. Gray contends that Harbor Pointe's failure to perform the conditions precedent under Section 3 relieves Gray of any obligation under Section 5.

I. Section 3.1 — Initial Notice of Default

Section 4 of the bond states that "failure on the part of [Harbor Pointe] to comply with the notice requirement in Section 3.1 shall not constitute a failure to comply with a condition precedent to the Surety's obligations, or release the Surety from its obligations, except to the extent that the Surety demonstrates actual prejudice." (Doc. 1-2 at 3) Gray shows no "actual prejudice" from Harbor Pointe's failing to send a notice of default to Gray, and Gray argues nothing to dispute that Section 4 relieves Harbor Pointe of performance under Section 3.1.[2] Section 4 excludes Section 3.1 as a condition precedent to Gray's performance.

II. Section 3.2 — Default, Termination, and Notice

Under Section 3.2, Harbor Pointe must declare default, terminate the construction contract, and notify Gray of each action. Gray contends that Harbor Pointe's October 2022 "notice of claim" on the bond "did not terminate the construction contract"[3] under Section 3.2. (Doc. 9 ¶ 12) Harbor Pointe emphasizes that the notice need not include the word "terminate" to effectively notify Gray of the construction contract's termination. Harbor Pointe contends that the October 2022 notice satisfied Section 3.2's requirement of declaring default and terminating the

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[2] Although, as Gray notes in discussing Harbor Pointe's failure to satisfy any part of the bond, "there can be no greater prejudice to Gray than being robbed of its contractually agreed-upon options under the Bond, and then being sued for defaulting on and breaching Bond obligations that never arose." (Doc. 15 at 7)

[3] The contract permits Harbor Pointe to terminate the contract if the contractor "repeatedly refuses or fails to supply enough properly skilled workers or proper materials . . . [or] otherwise is guilty of substantial breach of a provision of the Contract Documents." (Doc. 1 ¶ 5)

construction contract because the notice states that the contractor "has been and continues to be in default" and includes a deficiency report of the construction. Harbor Pointe argues that by requesting Gray to "proceed as provided" under Section 5, the October 2022 notice "should reasonably be interpreted to demonstrate intent to end its relationship with [the contractor] and hold Gray liable under the performance bond." (Doc. 19 at 12) Similarly, Harbor Pointe's March 2023 letter fails to mention terminating the construction contract but demands Gray perform under Section 6. (Doc. 9 at 11) In support, Harbor Pointe cites two decisions, a 1929 decision from the Fourth Circuit and a 2008 decision from the Southern District of West Virginia, that discuss the obligations of an insurer, not a surety. *See Maryland Cas. Co. v. Fowler*, 31 F.2d 881, 884 (4th Cir. 1929); *Mid-State Sur. Corp. v. Thrasher Eng'g, Inc.*, 575 F. Supp. 2d 731 (S.D. W.Va. 2008).[4] Neither case is binding, and neither is persuasive.

As Gray correctly notes, Florida law recognizes that a "bond is a contract, and therefore, a bond is subject to the general law of contracts" and that, because "the terms of the performance bond control," the surety's "liability will not be extended beyond the terms of the performance bond." *Am. Home Assur. Co. v. Larkin Gen. Hosp., Ltd.*, 593 So. 2d 195, 198 (Fla. 1992). Harbor Pointe bore responsibility to terminate the construction contract and notify Gray in "clear, direct, and unequivocal

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[4] Harbor Pointe cites another case, *CC-Aventura, Inc. v. Weitz Co., LLC,* WL 2937856, at *8 (S.D. Fla. 2008), *aff'd*, 492 Fed. Appx. 54 (11th Cir. 2012), which analyzed a different type of performance bond that required notifying the surety of default, but not of termination of the underlying contract, to invoke the surety's obligations.

language." *CC-Aventura, Inc. v. Weitz Co., LLC*, 2008 WL 2557434, at *3 (S.D. Fla. 2008) (Huck, J.); *see also CC-Aventura*, *aff'd*, 492 Fed. Appx. at 57 ("a surety is relieved of its obligation if the obligee/contractor fails to give the notice that is required by the bond."). Harbor Pointe received each of Gray's notifications (Doc. 9-1 at 62–68) detailing how Harbor Pointe failed to satisfy the terms of Section 3, yet Harbor Pointe persisted in failing to unequivocally terminate the construction contract and notify Gray before demanding Gray's performance. (Doc. 9 at 12)

Harbor Pointe emphasizes that the contractor never proposed a "re-start date" for continuing construction on Harbor Pointe, but the contractor's not naming a "re-start date" neither satisfies nor waives the requirement for an unequivocal termination of the contract by Harbor Pointe. Section 14.2.2 of the construction contract states that Harbor Pointe may, "after giving the Contractor and the Contractor's surety, if any, seven days' notice, terminate employment of the Contractor . . ." (Doc. 19-3 at 44) Harbor Pointe fails to establish when, or even if, Harbor Pointe delivered a termination notice to the contractor or to Gray. Instead, Harbor Pointe argues unpersuasively that the October 2022 notice shows "intent to end its relationship" with the contractor.[5] But, obviously, fixed intention does not equate to

[5] Harbor Pointe insists that filing the arbitration demand proves Harbor Pointe "directly and unambiguously" terminated the contract. But Harbor Pointe filed the arbitration demand as the "remedy available to the Owner" under Section 6, not as a formal termination of the construction contract and condition precedent under Section 3.2. Harbor Pointe offers nothing to support that an arbitration demand is an "unequivocal" notice of termination under Section 3.2. Also, as Gray notes, additional written notice under Section 6 is a condition precedent to holding a surety in default and enforcing remedies against the surety. *Int'l Fid. Ins. Co. v. Americaribe-Moriarty JV*, 681 Fed. Appx. 771, 773 (11th Cir. 2017) (affirming that the owner must provide the surety seven-days notice before the owner could enforce other remedies). In filing an arbitration demand five days after sending a notice to Gray, Harbor Pointe failed to comply with Section 6.

effective action. Intent to notify is not notice. Intent to terminate is not termination. Intent to pay is not payment.

III. Section 3.3 — Offer to Pay the Balance of the Contract's Price

Harbor Pointe admits never offering to pay Gray the balance of the contract's price in accord with Section 3.3. Instead, Harbor Pointe argues that no obligation existed to offer to pay the balance because "there was no balance to be paid to [the contractor] or Gray" at the time of the contractor's breach. Harbor Pointe explains that Harbor Pointe need not offer pay Gray the balance of the construction contract's price because Harbor Pointe previously paid the contractor the full amount of the contractor's lien on the suspended construction project. But the bond demands Harbor Pointe offer to pay the construction contract's full price, and not only the balance for construction already completed. The balance of the construction contract's price is "[t]he total amount payable by the Owner to the Contractor under the Construction Contract," which encompasses the "contract balance remaining" when Harbor Pointe declared a default. Leigh Anne Henican, the Senior Vice-President of Gray, swears that an unspecified contract balance remained on the work from the change orders. (Doc. 9-1 ¶¶ 12, 16) In any event, "the court need not resolve this issue because it has already held that [Harbor Pointe] failed to comply with the conditions precedent laid out in Paragraph 3.2 . . ." *CC-Aventura*, 2008 WL 2557434, at *5.

Also, because the parties participated briefly in discovery before Gray moved for summary judgment, Harbor Pointe maintains that "[it] cannot present facts essential to justify its opposition" and attaches an affidavit (Doc. 19-19) of Harbor Pointe's

lawyer, Hilary Morgan, who swears that she provided Gray documents about Harbor Pointe's claim on the bond and that she later requested Gray return the documents. Gray returned documents dated from March 2022 through August 2023, but Morgan remembers she "communicated" with Gray before March 2022. Morgan states documents "exist prior to March 7, 2022." But merely stating "documents exist" — without revealing the content and pertinence of the documents — fails to create a genuine dispute of material fact.[6] Further, Gray provided Harbor Pointe more than one opportunity to remedy Harbor Pointe's non-compliance with the bond, but Harbor Pointe uniformly failed to satisfy the conditions precedent.

Harbor Pointe fails to create a genuine dispute of fact over whether Harbor Pointe satisfied the conditions precedent of the bond. Because Harbor Pointe failed to comply with the bond's terms, Gray possesses no liability under the bond. *Current Builders of Fla., Inc. v. First Sealord Sur., Inc.*, 984 So. 2d 526, 530 (Fla. DCA 2008).

CONCLUSION

Harbor Pointe's failure to comply with the bond's terms releases Gray from the obligation to perform under the bond, and Gray's motion (Doc. 9) for summary judgment is **GRANTED**. *Americaribe-Moriarty JV*, 681 Fed. Appx. at 777 ("failure to comply with the [ ] bond's notice provisions stripped the surety of its bargained-for right and relieved the surety of its liability"). The clerk must enter judgment for The Gray Insurance Company and against Harbor Pointe West Condominium

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[6] Notably, Harbor Pointe sent the first notice of default to Gray in October 2022, months after March 2022.

Association of Dunedin, Inc. The judgment must state that The Gray Insurance Company is discharged from liability to Harbor Pointe West Condominium Association of Dunedin, Inc., under the performance bond. The clerk must close the case.

ORDERED in Tampa, Florida, on May 9, 2024.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE