

KOREA INSURANCE CORP.

vs.

Ignacia VILLALUZ, et al.

**DCA No. 85-9013
District Court NMI
Appellate Division**

Decided March 18, 1987

1. Contracts - Indemnity

Where indemnity agreement authorized the assignment of a performance bond, the principal contractor remained bound by the indemnification agreement notwithstanding assignment of the performance bond.

2. Contracts - Indemnity

Where the surety and indemnitee have the power pursuant to its contract of indemnity to settle claims, it is only necessary that such an adjustment or settlement be a reasonable one and made in good faith.

3. Contracts - Construction - Performance Bond

Surety was bound to pay delay damages because the contractor's performance bond incorporated by reference the construction contract and thus, all provisions of the construction contract became provisions of the bond.

4. Evidence - Probative Value

Admission of exhibits in suit upon indemnity agreement was not error where they were probative as to the issue of whether the contract had actually been completed to the satisfaction of the parties.

5. Evidence - Reversible Error

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FILED
Clerk
District Court

MAR 18 1987

For The Northern Mariana Islands

UNITED STATES DISTRICT COURT

(Deputy Clerk)

FOR THE NORTHERN MARIANA ISLANDS

APPELLATE DIVISION

KOREA INSURANCE CORP.,)	
)	
Plaintiff-Appellee,)	DCA 85-9013
)	
vs.)	
)	
IGNACIA VILLALUZ, ET AL.,)	OPINION
)	
Defendants-Appellants.)	

BEFORE: DUENAS, LAURETA, and REAL,* District Judges
DUENAS, District Judge

For Plaintiff-Appellee

For Defendants-Appellants

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*The Honorable Manuel L. Real, Chief Judge, United States District Court, Central District of California, sitting by designation.

1 This action was initiated on July 27, 1984, with the filing
2 of a complaint for indemnity by Plaintiff-Appellee Korea
3 Insurance Corporation (hereinafter referred to as
4 Plaintiff-Appellee or "KIC") against Defendants-Appellants
5 Ignacia Villaluz and Pacific Enterprises, Inc., seeking
6 recovery under a written indemnity agreement for amounts
7 allegedly lost by KIC as a surety on a construction performance
8 bond. Defendants-Appellants filed an answer on August 23,
9 1984, denying any liability.

10 A court trial was held on June 10, 1985, and the court
11 entered its findings of facts and conclusions of law on June
12 14, 1985. The court entered judgment on July 12, 1985, in
13 favor of KIC in the amount of \$9,675.50 plus costs of suit
14 against Defendants-Appellants. On August 8, 1985, the trial
15 court entered an order awarding attorney's fees to KIC in the
16 amount of \$2,900 and taxing costs in favor of KIC in the amount
17 of \$185.50. Defendants-Appellants filed a timely notice of
18 appeal.

19
20 STATEMENT OF FACTS

21 Plaintiff KIC is a corporation licensed to do business in
22 the Commonwealth of the Northern Mariana Islands (NMI).
23 Pacific Enterprises, Inc., is a corporation primarily engaged
24 in the construction and hardware business in the Commonwealth
25 of NMI, and Ignacia Villaluz, a part owner of Pacific
26 Enterprises, Inc., is a resident of the Commonwealth.

1 On or about October 19, 1981, Marianas Pacific Construction
2 Company (hereinafter referred to as "Marianas") and Frieda and
3 Ignacio Demapan (hereinafter referred to as "Demapans") entered
4 into a construction contract for the construction of a concrete
5 store and laundromat in Dandan, Saipan. In connection with
6 said construction contract, KIC issued a performance bond No.
7 KIC-1665-PF on behalf of Marianas (contractor) as principal and
8 in favor of the Saipan Economic Development Loan Fund
9 (hereinafter referred to as "EDLF") as obligee.

10 In connection with and in consideration for the issuance of
11 said performance bond, Defendants-Appellants executed on March
12 4, 1982, an indemnity agreement on behalf of Marianas
13 (contractor) and in favor of EDLF. Paragraph 4 of the
14 indemnity agreement provided in pertinent part as follows:

15 That the undersigned will indemnify the
16 Company, and keep it indemnified for, and hold
17 and save it harmless from, any and all
18 damages, payments, advances, losses, costs,
19 stamps, taxes, penalties, charge, attorney's
20 fees, and expenses for (sic) whatever kind of
21 (sic) nature that the Company may at any time
22 sustain or incur as a consequence of having
23 become surety upon the aforementioned Bond,
24 its renewals, extensions, modifications or
25 substitutions, and without limiting the
26 generality of the foregoing, to pay, to
reimburse, and make good to the Company, its
successors and assigns, all sums of money
which it shall pay or cause to be paid by
virtue of said Bond, its renewals, extensions,
modifications or substitutions. In no case
shall the indemnity for attorney's fees be
less than 15% of the amount claimed by the
Company, regardless of whether the Company's
claim is satisfied through court action or
settled out of court.

1 Construction on the project proceeded through August 16,
2 1982, at which time the sixth and seventh increment billing was

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4 submitted to the Demapans for their approval. The Demapans,
5 their inspector, and the manager of Marianas signed off on the
6 billing thereby releasing funds for the final two payments
7 under the contract less ten percent (10%) retention (\$8,000).
8 EDLF issued its check for \$14,400 and held the \$8,000 retention
9 of contract balances.

10 In or about March, 1983, the Demapans declared Marianas in
11 default under the construction contract and notified KIC to
12 complete the project pursuant to the terms and conditions of
13 the performance bond. The trial court found that Marianas was
14 in default under the construction contract with the Demapans.

15 As a result of the default, KIC retained the services of
16 the law firm Klemm, Blair & Barusch, A Professional
17 Corporation, to resolve the disputes arising out of the
18 default, and to defend KIC in Civil Action No. 84-05 in the
19 Commonwealth Trial Court which was filed by the Demapans
20 against KIC seeking damages allegedly arising out of the
21 default. Attorney's fees in the total amount of \$3,242 were
22 incurred by KIC.

23 In connection with the evaluation of the declaration of
24 default, KIC, through its attorneys, retained the independent
25 architectural firm of Taniguchi-Ruth AIA Associates, Inc., to
26 evaluate the construction project and to advise KIC as to

1 whether, in that firm's professional opinion, Marianas, the
2 contractor, was in default and if so, to provide KIC with an
3 estimate of the probable cost of completion of the project. On
4 May 27, 1983, the Taniguchi-Ruth firm rendered their report
5 advising KIC that in their professional opinion, the contractor
6 was in default and that the estimated probable cost of
7 completing construction was \$6,384. The amount of architect's
8 fees incurred by KIC was \$511.

9 On July 15, 1983, KIC notified Defendants-Appellants in
10 writing, that a demand had been made on KIC to complete the
11 construction project in strict conformity with the plans and
12 specifications pursuant to the terms of the performance bond.
13 Defendants-Appellants were also advised that the remaining
14 contract balances (\$8,000) might not be sufficient to complete
15 the construction project and that they would be held
16 responsible for all losses incurred by KIC.

17 At the time of the default, EDLF held an \$8,000 retention
18 of contract balances. On September 16, 1983, EDLF as obligee
19 under the performance bond, KIC 1665-PF, executed and delivered
20 its written assignment of rights whereby all of the EDLF rights
21 in said bond were transferred to the Demapans.

22 Pursuant to advice of counsel, KIC then assisted the
23 Demapans in locating a new contractor to complete the project.
24 In December, 1983, the Demapans executed a completion contract
25 with Ma-Ko Corporation for the amount of \$6,000 and this amount
26 was paid to Ma-Ko out of the \$8,000 retention held by EDLF.

1 KIC settled the Demapans' \$14,000 delay damage claim which had
2 been asserted in Civil Action No. 84-05, by virtue of a \$7,000
3 settlement payment. KIC paid \$5,000 and the \$2,000 balance was
4 paid out of the retention held by EDLF. The trial court found
5 that the above settlement was made by KIC in good faith.

6 On April 9, 1984, counsel for KIC made a written demand for
7 repayment by its indemnitors, the Defendants-Appellants, for
8 all losses suffered. The Defendants-Appellants made no payment
9 to KIC and this litigation was instituted.

10 The following issues are presented on appeal:

- 11 1. Whether the indemnity agreement is enforceable
12 against Defendants?
- 13 2. Whether it was reversible error to admit
14 Plaintiff's Exhibit Nos. 8, 9, 10, 11 and 12 into evidence?
- 15 3. Whether the trial court erred in awarding
16 attorney's fees for prosecution under the indemnity agreement?

17
18 ANALYSIS

19 I. The Indemnity Agreement Is Enforceable Against
20 Defendants-Appellants.

21 The Defendants-Appellants first argue that they are not
22 bound by the indemnification agreement because an assignment of
23 the performance bond (KIC 1665-PF) was made by EDLF to the
24 Demapans on September 11, 1983. Defendants-Appellants contend
25 that this alleged assignment invalidates their indemnity
26 agreement because Section 23 of the indemnity agreement states

1 that it may not be changed or modified orally nor shall any
2 change be effective unless specifically agreed in writing.

3 Contrary to Defendants-Appellants' argument, Sections 11
4 and E of the indemnity agreement deal specifically with the
5 rights of KIC under the performance bond.

6 Section 11 states in pertinent part as follows:

7 The undersigned (Defendants-Appellants)
8 hereby authorize the Company (KIC) at its
(sic) sole discretion to do the following:
9 (a) from time to time to make or consent to
any change in, or issue any substitute (sic)
10 for or renewal of, any such bond, ... (c) to
take such steps as the Company may deem
11 necessary or proper to obtain release from
liability from any such bond.

12 Subsection E states as follows:

13 The undersigned hereby empower and authorize
the corporation to grant or consent to the
14 granting of, any and all extensions,
continuations, increases, modifications,
15 changes, alterations and/or renewals of the
original bond herein referred to, and to
16 execute or consent to the execution of any
and all substitutions for said bond with the
17 same or different conditions and parties, and
the undersigned hereby hold themselves
18 jointly and severally liable to the Company
for the original bond herein above-mentioned
19 or for any and all extensions, continuations,
increases, modifications (sic), changes,
20 alterations, renewals or substitutions
thereof, until the full amount including
21 principal, interests, premium costs, and
other expenses due to the Company thereunder
22 is fully paid up. The undersigned hereby
also waive notice of such extensions,
23 renewals, alterations, and substitutions.

24 [] Clearly, Sections 11 and E authorize the aforementioned
25 assignment of the performance bond and, therefore, Defendants-
26 Appellants remain bound by the indemnification agreement.

1 Defendants-Appellants' next contention is that the final
2 acceptance of the contract, as evidenced by the final
3 installment payments made under the contract, served to
4 discharge KIC as surety and the Defendants-Appellants as
5 indemnitors. As a general principle of law this would be true,
6 but in this particular case there was an \$8,000 retention fund
7 consisting of 10 percent of each increment payment and held by
8 EDLF as security for completion pursuant to Paragraph B of
9 Article IV of the construction contract. Paragraph B provides
10 as follows:

11 In order to insure the proper
12 performance of this contract, the Owners or
13 EDLF shall retain ten percent (10%) of the
14 total amount on each estimate for a period of
15 thirty (30) calendar days after completion of
16 the store and laundry mat unit.

17 Thus, KIC and Defendants-Appellants remain as surety and
18 indemnitors, respectively.

19 The Defendants-Appellants next challenge the trial court's
20 factual finding "[t]hat at all times herein KIC proceeded and
21 acted in good faith...." [Finding of Fact #13, June 14,
22 1985]. The Defendants-Appellants cite National Surety
23 Corporation v. Peoples Milling Co., Inc., 57 F.Supp. 281 (D.C.
24 Kentucky, 1944), and argue that KIC should not have made
25 payment on a claim that could have been successfully defended.
26 They further contend that since KIC paid said invalid claim,
the Defendants-Appellants, as indemnitors, are relieved from
their liability under the indemnity agreement.

1 [2] KIC, however, correctly argues that National Surety
2 Corporation, Id., stands for the proposition that where the
3 surety and indemnitee has the power pursuant to its contract of
4 indemnity to settle claims, "it is only necessary that such an
5 adjustment or settlement be a reasonable one and made in good
6 faith." Id. at 283. Paragraphs 3 and 10 of the Indemnity
7 Agreement support this position. Paragraph 3 provides that
8 Defendants-Appellants would indemnify KIC against "any and all
9 liability, loss, costs, damages, fees of attorneys and other
10 expenses which the company may sustain or incur by reason of,
11 or in consequence of the execution of such bonds. . ." [Bond
12 No. KIC-1665-PF/PM].

13 Paragraph 10 provides:

14 The Company shall have the exclusive right to
15 decide and determine whether any claim,
16 liability, suit or judgment made or brought
17 against the Company or the undersigned or any
18 one of them on any such bond shall or shall
19 not be paid, compromised, resisted, defended,
20 tried or appealed, and the Company's decision
21 thereon, if made in good faith, shall be
22 final and binding upon the undersigned unless
23 the undersigned, or any of them, shall
24 request the Company to litigate such claim or
25 demand, or to defend such suit, or to appeal
26 from such judgment, and shall deposit with
the Company, at the time of such request,
cash or collateral satisfactory to the
Company in kind and amount, to be used in
paying any judgment or judgments rendered or
that may be rendered, with interest, costs,
expenses, and attorneys' fees, including
those of the Company. An itemized statement
of payments made by the Company for any of
the purposes specified herein, sworn to by an
officer of the Company, or the voucher or
vouchers for such payments, shall be prima
facie evidence of the liability of the

1 undersigned to reimburse the Company for such
2 payments with interest.

3 The trial court's finding of fact that it proceeded and
4 acted in good faith in handling the Demapans claim is supported
5 by substantial evidence adduced at trial. Specifically, KIC
6 retained attorneys and architects to determine its proper
7 responsibilities pursuant to the terms of the performance bond.
8 KIC decided to enter into a completion contract upon the advice
9 of its attorneys which was based on the architect's
10 professional determination that the project had not been
11 completed in accordance with the plans and specifications.
12 Suit had been instituted by the Demapans against KIC in
13 connection with the Demapans' delay damage claim. The
14 construction project was completed approximately 19 months late
15 and the contract called for liquidated damages in the amount of
16 \$25 per day which totaled in excess of \$14,000. KIC finally
17 settled such delay claim for \$7,000 after an offer of \$5,450
18 was rejected by the Demapans.

19 [3] Additionally, KIC was bound to pay the delay damages
20 because the contractor's performance bond incorporated by
21 reference the construction contract between the Demapans and
22 Marianas and thus, all provisions of the construction contract
23 became provisions of the bond. Continental Casualty Co. v.
24 Hartford Accident & Indemnity Co., 243 Cal. App. 2d 565, 52
25 Cal. Rptr 533 (1966).

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1 In a case involving the almost identical issues, indemnity
2 agreement provisions and presentation of evidence by the
3 surety, the court reasoned as follows:

4 The surety was authorized to incur
5 expense for investigating and defending the
6 claims asserted against it and to employ
7 accountants, attorneys and investigators to
8 perform this service.

9 The surety had the right to settle and
10 compromise the claims which were asserted
11 against it but in so doing it was required to
12 act in good faith. The uncontroverted
13 evidence in this case demonstrated that the
14 surety did act in good faith.

15 Provisions in indemnity agreements
16 granting to the indemnitor the right to
17 compromise and settle claims, and providing
18 that vouchers and other evidence of payment
19 shall be prima facie evidence of the
20 propriety thereof, have been upheld as not
21 against public policy and enforced by the
22 courts.

* * *

23 The purpose of clauses in indemnity
24 agreements of the type here involved is to
25 facilitate the handling of settlements by
26 sureties and obviate unnecessary and costly
litigation.

18 Transamerica Insurance Co. v.
19 Bloomfield, 401 F.2d 357, 362-363 (6th Cir.,
20 1968).

21 The record below overwhelmingly supports that KIC acted in
22 good faith in settling the claim on the bond with the Demapans.

23 II. It Was Not Reversible Error To Admit Plaintiff's
24 Exhibits 8, 9, 10, 11 and 12 Into Evidence.

25 [4] The Defendants-Appellants next raise the issue that Exhibit
26 Nos. 8, 9, 10, 11 and 12 should never have been admitted in

1 evidence. These exhibits constitute various unexecuted
2 documents which Mr. Demapan testified were submitted to various
3 parties to be executed in connection with the closing out of
4 the project. Defendants-Appellants objected to the
5 introduction of such documents at trial because no foundation
6 had been laid and because they were unauthenticated in that
7 they were not signed and, thus, had no probative value.
8 However, the primary defense of Defendants-Appellants is that
9 the construction project had been completed, accepted and final
10 payment had been made, which allegedly served to exonerate the
11 bond. Therefore, Exhibits 8, 9, 10, 11 and 12, along with
12 Mr. Demapan's testimony, were probative as to the issue of
13 whether the contract had actually been completed to the
14 satisfaction of the parties. Mr. Demapan testified that he was
15 asked to execute these documents by Marianas, the contractor,
16 and refused to do so. These exhibits just support the
17 overwhelming evidence before the court, that the construction
18 project had not been completed.

19 [5] Even if it was error to admit these exhibits, it was
20 certainly not reversible error because, as stated above, the
21 evidence that the project had not been completed pursuant to
22 the terms and specifications of the construction contract was
23 overwhelming.

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1 III. The Trial Court's Award of Attorney's Fees
2 Incurred by KIC in Enforcing the Indemnity
3 Agreement Was Proper.

4 The trial court found in its Findings of Fact and
5 Conclusions of Law filed June 14, 1985, that
6 Defendants-Appellants, as indemnitors, were responsible
7 pursuant to their indemnity agreement, for attorney's fees in
8 the amount of \$3,242 incurred by KIC in "resolving the disputes
9 arising out of the default and for the purpose of defending
10 Civil Action No. 84-05 in the Commonwealth Trial Court which
11 was filed by the Demapans against KIC seeking damages allegedly
12 arising out of the default." (Finding of Fact #10). The
13 Defendants-Appellants do not dispute this amount. The
14 Defendants-Appellants, however, dispute the trial court's order
15 entered August 8, 1985, awarding attorney's fees and costs in
16 the amount of \$3,085.50 allegedly incurred by KIC in seeking to
17 enforce the terms of the indemnity agreement against them. The
18 Defendants-Appellants contend that Paragraph 4 of the indemnity
19 agreement is not broad enough to include within its ambit these
20 attorney's fees charged against Defendants-Appellants.
21 Paragraph 4 of the indemnity agreement expressly provides as
22 follows:

23 That the undersigned will indemnify the
24 Company, and keep it indemnified for, and
25 hold and save it harmless from, any and all
26 damages, payments, advances, losses, costs,
stamps, taxes, penalties charge, attorney's
fees, and expenses for (sic) whatever kind of
(sic) nature that the Company may at any time
sustain or incur as a consequence of having
become surety upon the abovementioned Bond,

1 its renewals, extensions, modifications or
2 substitutions, and without limiting the
3 generality of the foregoing, to pay,
4 reimburse, and make good to the Company, its
5 successors and assigns, all sums of money
6 which it shall pay or cause to be paid by
7 virtue of said Bond, its renewals,
8 extensions, modifications or substitutions.
9 In no case shall the indemnity for attorney's
10 fees be less than 15% of the amount claimed
11 by the Company, regardless of whether the
12 Company's claim is satisfied through court
13 action or settled out of court.


14 As can be seen by the clear language of Paragraph 4 of the
15 Indemnity Agreement, KIC is entitled to complete reimbursement
16 for all expenses incurred at any time as a consequence of
17 having issued the performance bond. Thus, the trial court's
18 award to KIC of attorney's fees and costs incurred pursuing
19 this indemnification claim against Defendants-Appellants is
20 affirmed.

21 CONCLUSION

22 The trial court's judgment is affirmed in all respects.

23 
24 CRISTOBAL C. DUENAS, District Judge

25 
26 ALFRED LAURETA, District Judge


MANUEL L. REAL, District Judge