

10-6-2010

Order on American Southern Insurance  
Company's Motion for Summary Judgment on  
Crossclaims of Place Collegiate Development, LLC  
and Cecil M. Phillips (KENNESAW STATE  
UNIVERSITY FOUNDATION, INC.)

Alice D. Bonner  
*Superior Court of Fulton County*

Follow this and additional works at: [http://scholarworks.gsu.edu/col\\_businesscourt](http://scholarworks.gsu.edu/col_businesscourt)

---

**Recommended Citation**

Bonner, Alice D., "Order on American Southern Insurance Company's Motion for Summary Judgment on Crossclaims of Place Collegiate Development, LLC and Cecil M. Phillips (KENNESAW STATE UNIVERSITY FOUNDATION, INC.)" (2010). *Georgia Business Court Opinions*. Paper 166.  
[http://scholarworks.gsu.edu/col\\_businesscourt/166](http://scholarworks.gsu.edu/col_businesscourt/166)

This Court Order is brought to you for free and open access by the College of Law at ScholarWorks @ Georgia State University. It has been accepted for inclusion in Georgia Business Court Opinions by an authorized administrator of ScholarWorks @ Georgia State University. For more information, please contact [scholarworks@gsu.edu](mailto:scholarworks@gsu.edu).

**COPY**

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

**KENNESAW STATE UNIVERSITY  
FOUNDATION,**

**Plaintiff,**

v.

**PLACE COLLEGIATE DEVELOPMENT  
LLC, CECIL M. PHILLIPS, and  
MANHATTAN CONSTRUCTION  
COMPANY.,**

**Defendants.**

---

**MANHATTAN CONSTRUCTION  
COMPANY.,**

**Counter/Cross and Third-Party  
Plaintiff,**

v.

**KENNESAW STATE UNIVERSITY  
FOUNDATION, INC., PLACE COLLEGIATE  
DEVELOPMENT, LLC, and CECIL M.  
PHILLIPS, et al.,**

**Counter/Cross Defendants,**

and

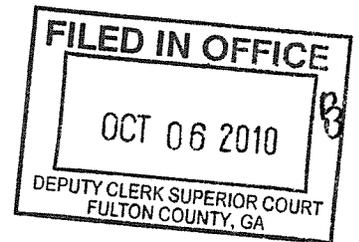
**CPD PLASTERING, INC., ST. PAUL FIRE  
AND MARINE INS. CO., TC DRYWALL  
AND PLASTER, INC. THE GUARANTEE CO.  
OF NORTH AMERICA USA, ATLANTA  
DRYWALL AND ACOUSTICS, INC.,  
AMERICAN SOUTHERN INS. CO., METRO  
WATERPROOFING, INC. and WESTERN  
SURETY CO.**

**Third Party Defendants.**

---

Civil Action File No.

2008-CV-156905



**ORDER ON AMERICAN SOUTHERN INSURANCE COMPANY'S  
MOTION FOR SUMMARY JUDGMENT ON CROSSCLAIMS OF  
PLACE COLLEGIATE DEVELOPMENT, LLC AND CECIL M. PHILLIPS**

On September 13, 2010, counsel appeared before the Court to present oral argument on the Motion for Summary Judgment of Third-Party Defendant American Southern Insurance Company ("ASIC") as to the cross claims filed against it by Place Collegiate Development, LLC and Cecil Phillips. After hearing the arguments made by counsel, and reviewing the briefs submitted on the motion and the record in the case, the Court finds as follows:

Plaintiff Kennesaw State University Foundation ("KSUF") contracted with Defendants Place Collegiate Development LLC and Cecil Phillips (collectively "Place") for the construction of two dormitories on the campus of Kennesaw State University (the "Project"). Place in turn entered into a contract with Manhattan Construction Company ("Manhattan"), a general contractor, for the actual construction of the Project.

In December 2003, Manhattan entered into a subcontract with Atlanta Drywall and Acoustics, Inc. ("ADA") for the installation of a load bearing metal wall system. ASIC was the performance bond ("Bond") surety for ADA's work on the Project. Under the terms of the Bond, ADA was listed as the principal, ASIC as the surety, and Manhattan as the obligee. During ADA's work, alignment problems arose relating to the installation of the load bearing walls. These problems were discussed openly between ADA, Manhattan, and Place, after which ADA was not required to modify any of its work.

In August 2007, Manhattan and Place participated in arbitration proceedings concerning sums owed to Manhattan by Place. Although ADA was not a party to that arbitration, ADA participated in the proceedings on behalf of Manhattan.

In September 2008, KSUF initiated the instant suit against Place and Manhattan for alleged water infiltration that damaged the Project. KSUF attributes the water infiltration to a number of alleged construction defects which include, in part, portions of the work completed by ADA. Place has filed crossclaims against ADA and ASIC for indemnity and contribution, seeking to recover from ASIC under the Bond. ASIC has moved for summary judgment as to Place's crossclaims.

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

In support of its motion for summary judgment, ASIC first argues that Place does not have a valid claim under the Bond because the Bond lists ADA as principal, Manhattan as obligee, and ASIC as surety. ASIC further argues that because Place is not mentioned anywhere in the Bond, it cannot assert a claim on the Bond. However, paragraph 17.7 of ADA's subcontract provides that it shall "defend, indemnify, and hold harmless the Owner" and its "officers, agents, employees, and indemnities from and against any and all claims ... arising out of or in any way connected with the Subcontractor's Work." The term "Owner" is defined on page two of the subcontract as Place. In addition, the Bond incorporates ADA's subcontract "in its entirety" and guarantees to remedy any default by ADA by completing the subcontract which, in this case, includes ADA's obligation to indemnify Place. According to the plain language of ADA's subcontract and the Bond, Place may pursue indemnity claims against ASIC.

Second, ASIC argues that Place has waived its claims against ASI because it allowed ADA's non-conforming work. A waiver is a "voluntary relinquishment of some known right, benefit or advantage, which, except for such waiver, the party otherwise would have enjoyed." Aaron Rents, Inc. v. Corr, 133 Ga. App. 296, 302 (1974). Generally, waiver "must be made with knowledge and intent." Id. at 303. Under the facts and the record in this case, the Court finds that there is nothing to support a finding that Place has waived its right to assert claims against ASIC.

Third, ASIC argues that it has been prejudiced by Place's actions and is therefore discharged from any obligation under the performance bond. ASIC relies on O.C.G.A. § 10-7-22, which states that "any act of the creditor . . . which injures the surety or increases his risk or exposes him to greater liability shall discharge him[.]" Because it was not notified of any default at the time of the construction, ASIC argues that it was unable to respond to the default when such default could have been easily remedied, thus increasing its potential liability. The Court finds that notice to ASIC of its indemnification obligations under the Bond, if ADA failed to meet those indemnification obligations, could not have been made at the time of construction because KSUF's allegations were not known at the time of construction. The Court further finds that any alleged prejudice suffered by ASIC is not due to any act by Place.

Finally, ASIC asserts that the default attributed to ADA has previously been arbitrated, precluding the instant action on the basis of res judicata and collateral estoppel. ASIC argues that the issues concerning the work completed by ADA on the Project were arbitrated during the arbitration proceedings between Place and Manhattan, thereby barring re-litigation of those issues here. Although ADA was not a

party to that arbitration, ASIC asserts that ADA was an active participant. Furthermore, ASIC argues that any matter concerning the misalignment of the walls or the bulging floor joints were issues decided during the arbitration proceedings and are, thus, barred by collateral estoppel.

An affirmative defense of res judicata requires three elements: (1) identity of the parties; (2) identity of the cause of action; and (3) adjudication by a court of competent jurisdiction. Trend Development Corp. v. Douglas County, 259 Ga. 425, 426 (1989). The Court finds that ASIC has failed to establish an identity of cause of action because the arbitration between Place and Manhattan involved claims by Manhattan concerning extra work and delays in building the Project and the present litigation concerns water infiltration into the Project. The Court also finds that ASIC has failed to establish an identity of the parties in order to assert res judicata. Neither ASIC nor its principal ADA were parties to the prior arbitration proceedings between Place and Manhattan. ASIC's argument that it is in privity with Manhattan by virtue of the Bond is unpersuasive. For the purposes of res judicata, "[p]rivacy is established where a party's interests are fully congruent with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right." Dennis v. First Nat. Bank of the South, 293 Ga. App. 890 (2008). Because ASIC is now adverse to Manhattan, ASIC's current interests cannot be fully congruent with Manhattan's previously asserted legal rights in the prior arbitration proceeding, during which ADA participated on behalf of Manhattan. Accordingly, this Court finds ASIC's affirmative defense of res judicata to be without merit.

Collateral estoppel similarly involves stringent requirements:

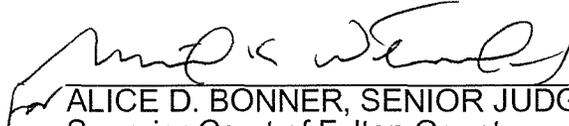
The doctrine of collateral estoppel does not bar a prosecution unless the issues of fact central to that prosecution were *necessarily* determined in the former trial. Unless the record of the prior proceeding affirmatively demonstrates that an issue involved in the second trial was definitely determined in the former trial, the possibility that it may have been does not prevent relitigation of that issue.

Phillips v. State, 272 Ga. 840, 841 (2000) (emphasis in original, internal quotations omitted). In this case, the present record is devoid of any documentation concerning the previous arbitration, except for the final order of the arbitration proceedings.

Because there is no documentation in the record as to the issues decided by the previous arbitration, the Court cannot find that they were necessarily determined during the prior arbitration between Place and Manhattan. Thus, the Court finds that ASIC's affirmative defense of collateral estoppel is similarly without merit.

For the foregoing reasons, ASIC's Motion for Summary Judgment on Place's cross claims is hereby **DENIED**.

**SO ORDERED** this 6<sup>th</sup> day of October, 2010.

  
\_\_\_\_\_  
ALICE D. BONNER, SENIOR JUDGE  
Superior Court of Fulton County  
Atlanta Judicial Circuit

**Copies to:**

**Attorneys for Kennesaw State University Foundation:**

Anthony D. Lehman, Esq.  
DLA Piper LLP (US)  
1201 West Peachtree Street, Suite 2800  
Atlanta, GA 30309-3450  
404-736-7805  
Anthony.lehman@dlapiper.com

Dennis J. Powers, Esq.  
DLA Piper LLP (US)  
203 North LaSalle Street  
Suite 1900  
Chicago, IL 60601  
312-368-7273  
Dennis.powers@dlapiper.com

**Attorneys for Place Collegiate Development, LLC & Cecil M. Phillips:**

Mark C. de St. Aubin, Esq.  
J. David Mura, Esq  
Smith Gambrell & Russell, LLP  
Promenade II, Suite 3100  
1230 Peachtree Street, N.E.  
Atlanta, GA 30309-3592  
404-815-3676  
mdestaubin@sgrlaw.com

**Attorneys for Manhattan Construction Company:**

Roger Sumrall  
Sean Gill  
Bendin, Sumrall & Ladner, LLC  
One Midtown Plaza  
1360 Peachtree Street NE, Suite 800  
Atlanta, GA 30309  
404-671-3100  
404-671-3080 (fax)  
[sgill@bsllaw.net](mailto:sgill@bsllaw.net)  
[rsumrall@bsllaw.net](mailto:rsumrall@bsllaw.net)

**Attorneys for CPD Plastering, Inc.**

Harry W. Bassler  
Ann Gower  
Crim & Bassler, L.L.P.  
100 Galleria Parkway  
Suite 1510  
Atlanta, GA 30339  
770-956-1813

**Attorneys for St. Paul Fire and Marine Ins. Co.**

Neil L. Wilcove, Esq.  
Arthur A. Ebbs, Esq.  
Freeman Mathis & Gary, LLP  
100 Galleria Parkway, Suite 1600  
Atlanta, GA 30339-5948

**Attorneys for TC Drywall and Plaster, Inc. and the Guarantee CO. of North America USA**

Scott W. McMickle  
Kevin P. Branch  
McMickle, Kurey, & Branch, LLP  
178 South Main Street, Suite 225  
Alpharetta, GA 30009  
678-824-7800  
678-824-7801 (fax)  
smcmickle@mkblawfirm.com  
kbranch@mkblawfirm.com

**Attorneys for Atlanta Drywall and Acoustics, Inc.**

L Judson "Tip" Carroll, III, Esq.  
All Star Financial Group, Inc.  
1301 Hightower Trail, Suite 210  
Atlanta, GA 30350

**Attorneys for American Southern Ins. Co.,**

Brenda K. Orrison  
Porter & Orrison, LLP  
Lenox Towers – Suite 1135  
3400 Peachtree Road, N.E.  
Atlanta, GA 30326  
404-233-2334