

2013 WL 10722805 (Or.Cir.) (Trial Order)
Circuit Court of Oregon.
Lane County
STONECREST PROPERTIES, LLC, Plaintiff,

v.

CITY OF EUGENE, Eugene Water & Electric Board, Developers Surety and Indemnity Company, and
the Real Estate Development Group, LLC, Defendants.

No. 16-12-11098.

June 11, 2013.

Opinion and Order

[Jeffery Matthews](#), 360 W. 10th Ave., Ste. 300, Eugene, OR 97401.

[Charles R. Markley](#), 1515 SW Fifth Ave., Ste. 600, Portland, OR 97201.

Christopher Kemper, 3481 NW Thurman Street, Portland, OR 97210.

[Jonathan W. Monson](#), 1001 SW 5th Ave., Ste. 2000, Portland, OR 97204.

[Eric DeFreest](#), 777 High St., Ste. 300, P.O. Box 10747, Eugene, OR 97440.

[Karsten H. Rasmussen](#), Judge.

***1** THIS MATTER comes before the Court on Plaintiff Stonecrest Properties LLC's Motion For Partial Summary Judgment Against Defendant Developers Surety and Indemnity Company (filed Dec. 13, 2012) and Defendant Developers Surety Indemnity Company's Cross-Motion for Summary Judgment (filed Jan. 22, 2013). The Court, after hearing oral argument on February 15, 2013, receiving supplemental briefing on May 23, 2013, and reviewing the file and now being fully advised, rules as follows:

I. Introduction

This case concerns an agreement between developer Real Estate Development Group (REDG) and the City of Eugene to make public improvements to the real property referred to by the parties as "Moon Mountain." The focus of the pending motions for summary judgment is a performance bond issued by Developers Surety and Indemnity Company (DSIC) to assure performance under that agreement. The following facts are not in dispute:

On May 14, 2007, the City and REDG entered into a Planned Unit Development Agreement which anticipated a two phase development of the property. As part of the development plan that included subdividing Moon Mountain, REDG agreed to make public improvements, including streets and water and sewer systems.¹ As a statutory condition for approval of the final plat, the City required REDG to post a performance bond. On May 30, 2007, DSIC issued two performance bonds (Phase I and Phase II) to REDG.²

The City then approved the Moon Mountain subdivision plat on August 30, 2007 and recorded it on September 17, 2007. The plat divided Moon Mountain into 102 lots and designated other areas as public

streets. REDG made the required improvements and completed Phase I in 2008. REDG had financial difficulties and completed only minor grading before abandoning Phase II. On October 9, 2009, Umpqua Bank acquired ownership of the Moon Mountain lots by deed in lieu of foreclosure. Plaintiff Stonecrest bought the Moon Mountain lots from Umpqua Bank for approximately \$1.2 million on March 26, 2010. The deed transferring ownership to Stonecrest was recorded on March 30, 2010. In May 2010, Dev Mohan Singh Gulati, an individual, bought one of the lots from Stonecrest. Stonecrest owns the remaining lots. On June 16, 2010, the City informed REDG by letter that it would not seek to enforce the Phase II Bond.

Stonecrest initiated the present action on May 17, 2012 against the City and DSIC. The following claims remain in Stonecrest's Third Amended Complaint: 1) Declaratory Relief against the City; 2) Specific Performance by the City; 3) Negligence against the City; 4) Negligence and Trespass against the City; and 5) Declaratory Relief against Defendant DSIC. As part of its Declaratory Judgment action against the City, Stonecrest requests that the Court declare that the City must enforce the Bond. Third Amended Complaint, pg. 7, ¶ 20, lines 13-14.

*2 Stonecrest's Motion for Partial Summary Judgment concerns Stonecrest's fifth claim for relief, brought against DSIC, seeking a declaration that the Bond is valid and a limited judgment requiring DSIC to either make all of the improvements per the Agreement or pay the Bond amount of \$1,063,880 into a trust account to be spent on completing the improvements.³

Defendant DSIC's Cross Motion seeks summary judgment as to Stonecrest's fifth and first claims on the basis that 1) Stonecrest lacks standing to enforce the Bond, and/or 2) the duty to make the improvements lies with Stonecrest because it is a covenant that runs with the land. Defendant's Cross Motion further seeks judgment in its favor on both of Defendant's counterclaims. Defendant's first counterclaim seeks a declaration that DSIC has no obligation under the Bond to Stonecrest and the second counterclaim is a request for attorney fees.

II. Plaintiff's Fifth Claim for Relief

Both Stonecrest and DSIC move for partial summary judgment on Stonecrest's fifth claim for relief. Their arguments center on whether Stonecrest has third party standing to require DSIC to pay out the bond amount, and whether Stonecrest assumed responsibility for the improvements because the obligation was a covenant running with the land.

Stonecrest relies on *Vale Dean Canyon Homeowners Ass'n v. Dean*⁴ to argue that it has standing to bring an action against DSIC. *Vale Dean Canyon* involved a contract between the County and a developer. No bond was issued and no surety was involved.⁵ Instead, a developer promised to make improvements to a private road and deposited \$5,000 in a CD for the county to use for the improvements if the developer failed to make them. When the developer failed to make the improvements, the homeowners formed a homeowners association and petitioned the county to make the improvements. The county billed the homeowners for the cost of the improvements, and the homeowners then brought an action against the developer to recover the cost. The Court of Appeals held that the homeowners had standing as third-party beneficiaries to bring suit against the developer for the developer's failure to complete the improvements.

Stonecrest contends that it is a third party beneficiary of the Bond agreement and therefore has standing to sue for payment of the Bond principal.

Stonecrest's reading of *Vale Dean Canyon* is too expansive. The Bond in this case is a mechanism issued by a separate entity to assure performance by REDG. The Bond is a contract which has neither reach nor impact beyond the parties to the Bond agreement: the City, REDG, and DSIC. It is separate and distinct from the agreement between REDG and the City, which is the agreement that actually concerns the public improvements Stonecrest claims it was intended to benefit from. The lot owners in *Vale Dean Canyon* did not sue the issuer of the CD (i.e. the bank); they sued, and were held to have standing to sue, the developer. This is a meaningful distinction because giving Stonecrest third party standing in this case would subject DSIC to unforeseen liability, which runs counter to the Court's decision in *Vale Dean Canyon*. In that case, the defendant (a developer, not a surety) was required to do what he promised to do—make the improvements or pay \$5,000. In this case, DSIC was bound only to the City as an obligee. Granting standing to Stonecrest would subject DSIC to the unforeseen liability of paying a Bond that its only obligee, the City, has not enforced. *Vale Dean Canyon* may give Stonecrest third-party standing with regard to a possible breach of the Agreement, but does not require DSIC to pay out the Bond principal.

*3 The Court does not reach the other issue raised by DSIC in its motion of who, at this juncture, retains the obligation to complete the improvements because the issue of standing is dispositive. Accordingly, Stonecrest's Motion for Summary Judgment is DENIED. DSIC's Cross Motion for Summary Judgment is GRANTED as to Stonecrest's Fifth Claim for Relief.

III. Plaintiff's First Claim for Relief

DSIC's Cross Motion also moves for summary judgment as to Stonecrest's first claim for relief, on the basis that Stonecrest lacks standing and Stonecrest assumed responsibility for the improvements because the obligation was a covenant running with the land. Defendant DSIC's Response and Cross Motion, pg. 1, lines 7-14. At oral argument, DSIC's counsel acknowledged the unusual posture of moving for summary judgment as to a claim in which the party so moving is not named as a defendant. DSIC's counsel explained that DSIC had basis to seek summary judgment as to the first claim because that claim, as part of the requested declaration, relied on the same premises as the fifth claim: that the bond is enforceable, that Stonecrest has standing to enforce the bond, and that the obligation to make the improvements does not run to Stonecrest.

DSIC acknowledges that it is not a party to the first claim, but argues that it has standing to seek summary judgment as an “interested party.” Transcript, pg. 22-23.

[ORCP 47](#) D states that a “party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move ... for a summary judgment in that party's favor as to all or any part thereof.” DSIC fails to present authority indicating that any party other than the party against whom a claim is asserted may seek summary judgment. The Court therefore sees no reason to dismiss Stonecrest's first claim in its entirety.

However, Stonecrest's first claim for relief presents a compound declaration, which, in part, clearly implicates DSIC's rights and obligations regarding the bond. In particular, Stonecrest asks for a declaration which states that (1) “the City is in breach of its duties” under the law and under the development agreement, (2) the City must complete the improvements, and (3) that the City must enforce the Bond. Third Amended Complaint, pg. 7, ¶ 20.] This third point is, in effect, another claim against DSIC requiring them to pay out the Bond principal.

As discussed above, Stonecrest lacks standing to enforce the bond. Stonecrest cannot avoid this lack of standing by instead suing the City to accomplish the same result, to wit, payment or performance on the Bond. Assuming, for the moment, that City has an obligation to complete the improvements, Stonecrest has not shown a basis by which it can dictate the manner in which the City will fulfill or finance that obligation. Accordingly, DSIC is entitled to summary judgment as to the first claim to the extent that DSIC is implicated in the declaration sought in that claim. DSIC's cross motion for partial summary judgment on Stonecrest's first claim is GRANTED only to the extent that the first claim seeks a declaration that establishes the validity of the bond or seeks its enforcement against DSIC. The first claim remains as alleged against the remaining defendants vis-a-vis the obligation, if any, of the City to complete the improvements.

IV. Defendant DSIC's Counterclaims

a. First Counterclaim

*4 As discussed above, Stonecrest lacks standing to enforce the bond. Therefore, DSIC is entitled to summary judgment as to its first counterclaim and a declaration to that effect.

b. Second Counterclaim

A request for attorney fees not a separate claim. That pleading defect aside, DSIC requests attorney fees under [ORS 742.061\(1\)](#). That statute provides, in the relevant part:

“...If the action is brought upon the bond of a contractor or subcontractor executed and delivered as provided in [ORS 279B.055](#), [279B.060](#), [279C.380](#), or [701.430](#) and the Stonecrest's recovery does not exceed the amount of any tender made by the defendant in such action, a reasonable amount to be fixed by the court as attorney fees shall be taxed and allowed to the defendant...”

Under [ORS 742.061\(1\)](#) and [ORS 701.430](#) (Performance Bonds), it appears that DSIC is entitled to reasonable attorney fees. DSIC may petition accordingly for their fee pursuant to [ORCP 68](#).

V. Defendant DSIC's Motion to Strike

DSIC moves to strike paragraph 12 of a declaration submitted by Stonecrest from Stonecrest manager Charles F. Kingsley. Paragraph 12 states that, based on Mr. Kingsley's reading of emails from two DSIC employees, DSIC actively tried to destroy evidence that the Bond was issued or effective. Stonecrest

admits that intentionally hiding the existence of the Bond is a tortious act giving rise to a punitive damages claim. The Complaint does not presently include an allegation for punitive damages, nor has a motion been made to allow for the addition of a claim for punitive damages. At this time, the contents of paragraph 12 are improper, and DSIC's motion is accordingly GRANTED.

VI. Conclusion

Therefore, IT IS HEREBY ORDERED:

- 1) Stonecrest's Motion for Partial Summary Judgment is DENIED.
- 2) Defendant DSIC's Cross-Motion for Summary Judgment as to Stonecrest's First Claim is GRANTED to the extent that that the first claim seeks a declaration establishing the validity of the bond or seeks to require its enforcement against DSIC. The Court does not address the City's rights or obligations regarding the Bond or the Development Agreement, nor the validity of any claim between any party and the City regarding the development of the Moon Mountain Properties.
- 3) Defendant DSIC's Cross-Motion for Summary Judgment as to Stonecrest's Fifth Claim is GRANTED.
- 4) Defendant DSIC's Motion for Judgment on its First Counterclaim is GRANTED.
- 5) Defendant DSIC's Motion for Judgment on its Second Counterclaim is GRANTED.
- 6) Defendant DSIC's Motion to Strike is GRANTED.

Laura J. Walker and Jon W. Monson, counsel for DSIC, shall submit a limited judgment which shall, by reference, incorporate this order.

Dated 11 of June, 2013.

<<signature>>

Karsten H. Rasmussen, Presiding Judge

Footnotes

¹ Eugene City Code § 9.6805 states that “as a condition of any development, the city may require dedication of public ways...for streets and alleys.” [ORS 92.175](#) states that “[l]and for property dedicated for public purposes may be provided to the city or county having jurisdiction over the land...by dedication on the land subdivision plat.”

² Eugene City Code § 9.8240(3) requires either completion of all public improvements or posting of a performance bond (or suitable substitute) before final plat approval.

³ Plaintiff also sought an order allowing it to allege a claim for punitive damages against DSIC, but it acknowledged in its reply that it needs to submit a separate motion to request leave to amend in accordance with local rules.

⁴ [100 Or App 158 \(1990\)](#).

5 The language of the agreement in *Vale Dean Canyon* does refer to the CD as a “Bond” to be used to pay for the cost of the completion of the improvements. *Vale Dean Canyon* at 160. However, it does not appear that the CD involved a surety or separate bond agreement.