UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

INFINITY GENERAL CONSTRUCTION SERVICES, INC.,

Plaintiff,

v. **Case No. 6:23-cv-01071-CEM-LHP**

ARGONAUT INSURANCE COMPANY, and CRYSTAL HOSPITALITY, LLC,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court on Defendant Argonaut Insurance Company's ("Argonaut") Motion for Summary Judgment ("Motion," Doc. 40), to which Plaintiff filed a Response (Doc. 46), and Argonaut filed a Reply (Doc. 49). For the reasons set forth below, the Motion will be granted.

I. BACKGROUND

This case stems from a construction project for the Renaissance Hotel in Daytona Beach, Florida ("the Project"). (Patel Aff., Doc. 46-1, at 2–3). Plaintiff was the general contractor for the Project, (*id.* at 3), and Defendant Crystal Hospitality, LLC ("Crystal") was a subcontractor hired to provide construction services

including drywall, plumbing, electrical, exterior, wall finishes, floor finishes, and door installation, (*id.*; Gerega Aff., Doc. 40-2, at 2). In connection with the Project, Crystal obtained Performance and Payment Bonds from Argonaut. (Doc. 46-1 at 4; Shear Aff., Doc. 40-1, at 3).

Section 3 of the Bonds provide that, so long as Plaintiff was not in default, Argonaut's obligations under the Bonds arise where: (1) Plaintiff "first provide[d] notice to [Crystal] and [Argonaut] that [Plaintiff was] considering declaring a Contractor Default; (2) Plaintiff "declare[ed] a Contractor Default, [t]erminate[d] the Construction Contract and notifi[ed]" Argonaut; and (3) Plaintiff "agreed to pay the Balance of the Contract Price in accordance with the terms of the Construction Contract to [Argonaut] or to a contractor selected to perform the Construction Contract." (*Id.* at 16). If those requirements are met and Argonaut does not take the actions proscribed under § 5 of the Bonds "with reasonable promptness" then Plaintiff may provide "additional written notice . . . demanding that [Argonaut] perform its obligations." (*Id.*). Argonaut would then have seven days after receipt of that additional notice to proceed, and if it still failed to do so, it would be deemed to be in default. (*Id.*).

During the Project, Plaintiff became unsatisfied with Crystal's performance, (*see* Doc. 46-1 at 4), and on October 11, 2022, Plaintiff sent correspondence to Argonaut, specifying those problems, (Doc. 40-1 at 25–26). Plaintiff also provided

"notice that it [was] considering declaring a Contractor Default pursuant to §3.1 of the Performance Bond." (*Id.*). Two days later, Argonaut responded, acknowledging the notice, requesting additional information and records, and scheduling a conference to discuss the matter. (*Id.* at 28–29). Over the following weeks, the parties had a telephonic conference and an in-person meeting. (*Id.* at 6). On December 21, 2022, Plaintiff sent additional correspondence to Argonaut, complaining of delays in the project caused by Crystal and acknowledging that Argonaut's "decision-making process [was] still ongoing and that [Plaintiff] [was] working to comply with [Argonaut's] document requests." (*Id.* at 36–37).

On February 10, 2023, Plaintiff again sent correspondence to Argonaut, detailing its ongoing concerns with Crystal's performance, representing that it had provided the documents requested by Argonaut, and asking that Argonaut do a site visit of the Project. (*Id.* at 40–42). Argonaut responded to "correct the misstatement of facts" made by Plaintiff, (*id.* at 55), asserting that Argonaut still had not received the requested information, and again asking for the documentation set forth in the October 13, 2022 correspondence, (*id.* at 55–56). Plaintiff responded the next day, again maintaining that Argonaut had "received all responsive documents in [Plaintiff's] possession" and asserting that Argonaut's "continued failure to take action on [Plaintiff's] notice of intent [to declare default against Crystal] constitutes a continuing breach of [Argonaut's] obligations under the bond." (*Id.* at 58). Plaintiff

also maintained that it had "complied in full with the provisions of section 3.1 of the performance bond" and therefore Argonaut was required to act under the bond. (*Id.* at 59). Plaintiff further asserted that Argonaut had failed to proceed "with reasonable promptness as required by sections 5 and 6 of the Performance Bond" and that Plaintiff was not required to provide any further documents. (*Id.* at 59–61). Plaintiff then invoked "section 6 of the bond," stating "please be advised that [Argonaut] has seven (7) business days to respond to this letter and inform [Plaintiff] of its plan of action under the performance bond." (*Id.* at 61).

In response, Argonaut again disputed that Plaintiff had provided all requested documents and pointed out to Plaintiff that the Bonds require Plaintiff to comply with all conditions of § 3, not just § 3.1, before Argonaut's obligations under the bond were triggered. (*Id.* at 86–87). On March 20, 2023, Plaintiff issued a formal notice of default and termination of the subcontract with Crystal, (*id.* at 89), copying Argonaut on the notice, (*id.* at 90). Two days later, Argonaut sent Plaintiff correspondence, acknowledging the notice of default and termination of the contract and again requesting certain supportive documentation. (*Id.* at 92–93).

On May 5, 2023, Argonaut denied Plaintiff's claim. (*Id.* at 103, 107). Plaintiff then filed this suit, alleging claims for breach of contract against Crystal (Count I) and breach of the performance bond against Argonaut (Count II). (*See generally* Compl., Doc. 1). Argonaut has now moved for summary judgment as to Count II.

II. LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it may "affect the outcome of the suit under the governing law." *Id.*

"The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Allen v. Bd. of Pub. Educ.,* 495 F.3d 1306, 1313–14 (11th Cir. 2007). In ruling on a motion for summary judgment, the Court construes the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). However, when faced with a "properly supported motion for summary judgment," the nonmoving party "must come forward with specific factual evidence, presenting more than mere allegations." *Gargiulo v. G.M. Sales, Inc.*, 131 F.3d 995, 999 (11th Cir. 1997) (citing *Anderson*, 477 U.S. at 248–49 (1986)); *see also LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366, 1371 (S.D. Fla. 1999) ("The law is clear . . . that suspicion, perception, opinion, and belief cannot be used to defeat a motion for summary judgment.").

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. "[T]he proper inquiry on summary judgment is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Stitzel v. N.Y. Life Ins. Co.*, 361 F. App'x 20, 22 (11th Cir. 2009) (quoting *Anderson*, 477 U.S. at 251–52). Put another way, a motion for summary judgment should be denied only "[i]f reasonable minds could differ on the inferences arising from undisputed [material] facts." *Pioch v. IBEX Eng'g Servs.*, 825 F.3d 1264, 1267 (11th Cir. 2016) (quoting *Allen*, 121 F.3d at 646).

III. ANALYSIS

"Under Florida law, '[a] bond is a contract, and, therefore, a bond is subject to the general law of contracts.'" *Int'l Fid. Ins. Co. v. Americaribe-Moriarty JV*, 681 F. App'x 771, 775 (11th Cir. 2017) (quoting *Am. Home Assurance Co. v. Larkin Gen. Hosp., Ltd.*, 593 So. 2d 195, 197 (Fla. 1992)). Therefore, "courts have treated [breach of bond] claims as breach of contract claims." *Berkley Ins. Co. v. Suffolk Constr. Co.*, No. 19-23059-CIV-WILLIAMS, 2019 U.S. Dist. LEXIS 252728, at *7 (S.D. Fla. Dec. 23, 2019). "A cause of action for breach of contract has three elements: (1) a valid contract, (2) a material breach, and (3) damages." *Havens v. Coast Fla., P.A.*, 117 So. 3d 1179, 1181 (Fla. 2d DCA 2013). "The intent of the

parties governs contract interpretation and that intent is to be determined from the plain language of the agreement and the everyday meaning of the words used." *Burlington & Rockenbach, P.A. v. Law Offices of E. Clay Parker*, 160 So. 3d 955, 958 (Fla. 5th DCA 2015) (collecting cases).

Plaintiff maintains that Argonaut failed to comply with its obligations under § 5 and § 6 the Bonds, thereby breaching the contract. Argonaut counters that Plaintiff did not fulfill the condition precedent set forth in § 3.3, and therefore, Argonaut's obligations under the Bonds were never triggered. As noted above, § 3.3 requires Plaintiff to "agree[ ] to pay the Balance of the Contract Price in accordance with the terms of the Construction Contract to [Argonaut] or to a contractor selected to perform the Construction Contract." (Doc. 40-1 at 16). It is undisputed that Plaintiff never complied with § 3.3. Nevertheless, Plaintiff argues that this is not a basis to grant summary judgment in favor of Argonaut, citing *Pete Vicari General Contractor, LLC v. Ohio Casualty Insurance Co.*, No. 17-23733-CIV, 2019 WL 13224959, at *14 (S.D. Fla. Feb. 8, 2019). In doing so, Plaintiff has taken a single sentence out of context to make an argument unsupported by *Pete Vicari*.

In that case, the relevant terms of the bond were the same as those here. *Id.* at *9–10. But the plaintiff in *Pete Vicari* complied with all provisions of § 3, including § 3.3. *Id.* at *13–14. The issue was that the plaintiff immediately and prematurely declared the surety in default without giving the surety the proper amount of time to

comply with its obligations. *Id.* Here, Plaintiff never complied with § 3.3, which ironically, the *Pete Vicari* Court determined was a "condition precedent to performance under the bonds." *Id.* at *12 n.10; *see also CC Aventura, Inc. v. Weitz Co., Ltd. Liab. Co.*, No. 06-21598-CIV-HUCK/O'SULLIVAN, 2008 U.S. Dist. LEXIS 49988, at *11 (S.D. Fla. June 20, 2008) (treating the requirements in § 3 as conditions precedent).

Next, Plaintiff argues that it did not have to comply with § 3.3 because there was no remaining balance on the contract with Crystal. Plaintiff cites no evidence or legal authority in support of this assertion. The Court presumes Plaintiff is referencing the doctrine of futility, which provides that "a party may be excused from performing a condition precedent to enforcement of [a] contract, if performance of the condition would be futile." *CC Aventura, Inc.*, 2008 U.S. Dist. LEXIS 49988, at *18 (quoting *Alvarez v. Rendon*, 953 So. 2d 702, 708–09 (Fla. 5th DCA 2007)).

In this vein, Plaintiff summarily argues that it was allowed to reduce the contract price by the damages it suffered due to Crystal's actions, and it suffered damages, so there was no balance. However, the record evidence establishes that at the time the subcontract with Crystal was terminated, "the balance on the Subcontract Agreement was $2,972,491.85, plus submitted change orders in the amount of $693,195.51, for a total of $3,665,687.36." (Doc. 40-2 at 2–3). Plaintiff

does not contradict this amount. Nor has Plaintiff provided even a scintilla of evidence to support its conclusory assertion that it suffered damages in an amount greater than the remaining contract price and that those damages fall within the category of damages that can be reduced from what Plaintiff owed. "[A]bsent a stipulation or agreement, unsupported factual statements in a memorandum of law do not constitute evidence." *McKenny v. United States*, 973 F.3d 1291, 1302 (11th Cir. 2020); *Bryant v. United States Steel Corp.*, 428 F. App'x 895, 897 (11th Cir. 2011) ("[C]ounsel's argument is not evidence."). Plaintiff has not shown that compliance with § 3.3 would have been futile or that it was otherwise excused from satisfying that condition.[1]

Under the plain language of the Bonds, Argonaut's obligations under § 5 can only be triggered "[w]hen [Plaintiff] has satisfied the conditions of Section 3." (Doc. 40-1 at 16). Similarly, Argonaut can only be deemed to be in default under § 6 if it has failed to proceed as provided in § 5, which is necessarily dependent on § 5 being triggered by Plaintiff's compliance with § 3. Because it is undisputed that Plaintiff never complied with § 3.3, Argonaut's obligations under § 5 were never triggered.

[1] To the extent Plaintiff argues that Argonaut was required to prove actual prejudice stemming from Plaintiff's non-compliance with § 3.3, Plaintiff is incorrect. The Bonds require a showing of actual prejudice stemming from any non-compliance with § 3.1, not § 3.3. (Doc. 40-1 at 16 ("Failure on the part of [Plaintiff] to comply with the notice requirement *in Section 3.1* shall not constitute a failure to comply with a condition precedent to [Argonaut's] obligations, or release [Argonaut] from its obligations, except to the extent [Argonaut] demonstrates actual prejudice." (emphasis added))).

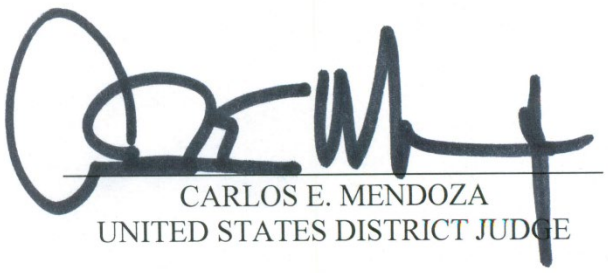
Accordingly, Plaintiff's breach of bond claim, alleging that Argonaut failed to comply with its obligations under § 5 and was in default under § 6, fails. Argonaut is entitled to summary judgment.[2]

IV. CONCLUSION

In accordance with the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. Argonaut Insurance Company's Motion for Summary Judgment (Doc. 40) is **GRANTED**.
2. The Clerk is directed to enter judgment in favor of Defendant Argonaut Insurance Company and against Plaintiff, providing that Plaintiff shall take nothing on its claim.

DONE and **ORDERED** in Orlando, Florida on May 6, 2025.



Copies furnished to:

Counsel of Record

[2] Because the Court finds that Argonaut is entitled to summary judgment on this issue, it need not address the parties' alternate arguments.