

STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 15 CVS _____

TOWN OF SUNSET BEACH, a North Carolina)
Municipal Corporation and Body Politic,)
)
Plaintiff,)
)
vs.)
)
BOND SAFEGUARD INSURANCE COMPANY,)
)
Defendant.)
_____)

VERIFIED COMPLAINT

NOW COMES Plaintiff, TOWN OF SUNSET BEACH, a North Carolina municipal corporation and body politic, and hereby states and alleges unto the Court as follows:

FACTS

1. The Town of Sunset Beach (“Town”) is a municipal corporation and body politic organized and existing under the laws of the State of North Carolina.
2. As per the materials attached hereto as Exhibit A, Defendant Bond Safeguard Insurance Company (“Defendant Surety”) is an insurance company presently incorporated and existing under the laws of the State of South Dakota and doing business in many states including the State of North Carolina. Prior to being a company incorporated in South Dakota, Defendant Surety had been incorporated in and existed under the laws of the State of Illinois.
3. Defendant Surety, as surety, issued several subdivision bonds related to Sections 1, 2.A., 2.B., and 2.C. (collectively referenced herein as, “Sections”) in Phase VI of the Ocean Ridge Plantation located in Brunswick County, North Carolina (“Subdivision”).

4. For Section 1 of the Subdivision, Defendant Surety issued Bond No. 5028388 in the total amount of \$1,234,541.00. A true and correct copy of this Section 1 Bond is attached hereto as Exhibit B.

5. For Section 2.A. of the Subdivision, Defendant Surety issued Bond No. 5028382 in the total amount of \$588,590.63. A true and correct copy of this Section 2.A. Bond is attached hereto as Exhibit C.

6. For Section 2.B. of the Subdivision, Defendant Surety issued Bond No. 5028389 in the total amount of \$799,951.00. A true and correct copy of this Section 2.B. Bond is attached hereto as Exhibit D.

7. For Section 2.C. of the Subdivision, Defendant Surety issued Bond No. 5035924 in the total amount of \$398,131.36. A true and correct copy of this Section 2.C. Bond is attached hereto as Exhibit H.

8. The Bond for Section 1 of the Subdivision is an “all or nothing” Bond meaning that all of the work covered by said Bond must be finished before any of the Bond amount is released by the Town as the obligee unless the Town agrees otherwise.

9. Unlike the Section 1 Bond, the Bonds for Sections 2.A., 2.B., and 2.C. are Bonds that can be partially released once the work covered by said Bonds is completed.

10. The total face value of the Bonds for all of the Subdivision’s Sections is the sum of **\$3,021,213.99** (hereinafter, “Total Bond Amount”).

11. Each of the above-referenced Bonds for the Subdivision’s Sections 1 and 2.A.-2.C. provides that Defendant Surety is the surety and that the Town is the obligee.

12. Defendant Surety signed, sealed, dated and delivered said Bonds for the Subdivision’s Sections.

13. The Subdivision's developer under each of the Bonds is and has been at all relevant times herein Coastal Communities at Ocean Ridge Plantation, LLC ("Developer").

14. The Bonds for Sections 1, 2.A. and 2.B. were all initially issued in favor of the Town by Defendant Surety in February 2008, while the Bond for Section 2.C. was issued in November 2009.

15. On or about 27 February 2009, the Town and Developer entered into an Agreement modifying previously agreed upon dates for completion of improvements in Sections 1, 2.A., and 2.B. of the Subdivision (hereinafter, "February 2009 Agreement"). A true and correct copy of the February 2009 Agreement is attached hereto as Exhibit E.

16. Defendant Surety consented and agreed to the February 2009 Agreement as evidenced by, *inter alia*, the General Purpose Riders it signed for each of the Bonds covering Subdivision Sections 1, 2.A. and 2.B, true and correct copies of which are collectively attached hereto as Exhibit F.

17. On or about 2 November 2009, the Town and Developer entered into an Improvement Agreement concerning the posting of the required Bond for Section 2.C. and to cover improvements within Section 2.C. (hereinafter, "November 2009 Agreement"). A true and correct copy of the November 2009 Agreement is attached hereto as Exhibit G.

18. On or about 10 November 2009, Defendant Surety issued its Bond for Section 2.C. of the Subdivision, a true and correct copy of which is attached hereto as Exhibit H.

19. On or about 1 May 2012, the Town, Defendant Surety, and the Developer all entered into a Tolling Agreement ("Tolling Agreement"), a true and correct copy of which is attached hereto as Exhibit I.

20. Per its provisions, the Tolling Agreement expired on or about 21 May 2015.

21. On or about 3 December 2012, the Town and Developer entered into a Subdivision Improvements Agreement (“2012 SIA”), a true and correct copy of which is attached hereto as Exhibit J.

22. The 2012 SIA established new completion dates for improvements in Subdivision Section 1.

23. The 2012 SIA also provided that the Town and Developer “agreed to continue to negotiate the terms for [Subdivision] Sections 2A, 2B and 2C” and to “use their best efforts to reach an agreement on or before August 15, 2013.”

24. The 2012 SIA extended the improvements completion dates for Section 1 as follows:

Storm water	July 31, 2013
Sewer	September 30, 2013
Water	September 30, 2013
Electric	November 30, 2013
Roads	December 31, 2013

25. The 2012 SIA further provided that “[u]pon completion of all required improvements in Section 1 and the approval of Town’s designated engineer, Town agrees to release Surety Bond No. 5028388 [for Section 1].”

26. On or about 20 December 2012, Defendant Surety consented and agreed to the 2012 SIA as evidenced by, *inter alia*, the General Purpose Rider it signed and issued in favor of the Town, a true and correct copy of which is attached hereto as Exhibit K.

27. On or about 21 November 2013, the Town and Developer into a Subdivision Improvements Agreement (“2013 SIA”), a true and correct copy of which is attached hereto as Exhibit L.

28. The 2013 SIA recites that its purpose, in pertinent part, was as follows:

WHEREAS, Developer and Town have now agreed to the terms of a new development agreement to set forth new completion dates for improvements required in [Subdivision] Sections 2A (lots 1-40) and 2B (lots 41-95) (collectively, the ‘2A and 2B lots’), and have agreed to negotiate in good faith the terms of a new agreement for other lots in Section 2B and all of Section 2C.

29. The 2013 SIA then set out the new completion dates for Subdivision Sections 2A and 2B lots as follows with Developer – per Paragraph 1 – using its “best efforts”:

Storm water	February 1, 2015
Sewer	June 1, 2015
Water	June 1, 2015
Electric road crossings	September 1, 2015
Roads	December 31, 2015

30. Per Paragraph 4 of the 2013 SIA:

Failure of Developer to comply with the terms and conditions of this [2013 SIA] or the surety bond or the Town’s applicable ordinances and policies shall constitute a material breach of [the 2013 SIA] and shall entitle Town to give notice under the Tolling Agreement and to proceed under said bond(s) and this [2013 SIA] against Developer and the surety.

31. Per Paragraph 6 of the 2013 SIA, it became null and void if the storm water, sewer, water, electric road crossings, and road work in the Subdivision’s Section 1 was not completed by 31 March 2014, subject to “delays caused by circumstances beyond the Developer’s control, including adverse weather conditions.”

32. Finally, per Paragraph 7 of the 2013 SIA, it constituted a “modification of the [2012 SIA]” and that upon completion of “*all* required improvements in Section 1 *and* the approval of the Town’s designated engineer” (emphasis added), the Town agreed it would release all of the Section 1 Bond.

33. By letter dated 13 May 2014, the Town's Mayor, Ron Watts, confirmed: (1) the Town's and Developer's prior agreement to extend the Section 1 improvements deadline from 31 December 2013 until 31 March 2014 subject to "adverse weather conditions"; and, (2) the Developer would not be able to satisfy the new date of 31 March 2014 due to "adverse weather conditions" (hereinafter, "Mayor Letter"). A true and correct copy of the Mayor Letter is attached hereto as Exhibit M.

34. The Mayor Letter further notified Developer that even 40 days after the 31 March 2014, sufficient time had passed to allow the Developer to complete all of the Section 1 improvements but that "very little, if any, work was performed by [Developer]."

35. The Section 1 Bond covered, among other things, (1) curb and guttering for all of the roads in Section 1; and, (2) electric conduits or crossings through which electrical service wires can be extended by Brunswick Electric Membership Corporation ("BEMC") to provide electrical service to the residential homes in the Subdivision's Section 1.

36. As of the filing of this action, the Developer has not completed the curb and guttering at the entrance of the Subdivision's Section 1.

37. As of the filing of this action, the Developer has not installed the electric conduits throughout Section 1.

38. As of the filing of this action, with the exception of storm water improvements, the Developer's required improvements for sewer, water, electric, and roads in Sections 2.A., 2.B., and 2.C. have not been completed. In fact, the vast majority of the improvements work by the Developer for Sections 2.A., 2.B., and 2.C. have not been completed.

39. Even though the outside date of 31 December 2015 is allowed for the Developer to complete the roads in Sections 2.A., 2.B., and 2.C. under the 2013 SIA, there is no realistic

chance the Developer will have completed all of the work and improvements in said Sections of the Subdivision covered by the Defendant Surety's Bonds.

40. By letter dated 28 May 2015, the Town notified Defendant Surety of Developer's defaults under the Bonds for the Subdivision's Sections as outlined herein and demanded that Defendant Surety perform its obligations under the Bonds and pay the Total Bond Amount for the Subdivision ("Town Demand"). A true and correct copy of the Town's Demand on Defendant Surety is attached hereto as Exhibit N.

41. Defendant Surety has not responded to the Town's Demand other than to request information from the Town (which has been provided to Defendant Surety) and to try to seek a mutual settlement and resolution between the Town and Developer to no avail.

42. The infrastructure improvements for the Subdivision's Sections, as covered by the Bonds, have not been timely completed and/or will not be timely completed under the parties' various agreements and Bonds.

FIRST CAUSE OF ACTION

Defendant Surety's Breach of Contract – Refusal to Pay Total Bond Amount to Town

43. The Town restates and realleges all of the foregoing allegations of this Complaint as if fully set forth herein verbatim.

44. Defendant Surety's failure and refusal to pay the Total Bond Amount to the Town as obligee, as a result of the Developer's defaults under the Bonds is in breach of Defendant Surety's bond obligations.

45. As a result of said actions and conduct of Defendant Surety, the Town has been substantially and materially prejudiced and damaged by Defendant Surety's breach and refusal to

perform in the amount of the Total Bond Amount, together with interest thereon from at least 28 May 2015 through the present and continuing.

SECOND CAUSE OF ACTION

Attorney's Fees, Costs and Expenses, *inter alia*, N.C.G.S. §§ 6-21.5

46. The Town restates and realleges all of the foregoing allegations of this Complaint as if fully set forth herein verbatim.

47. Pursuant to, *inter alia*, N.C.G.S. § 6-21.5, Defendant Surety is liable to the Town for an award of the Town's attorneys' fees, costs and expenses for the Town having to bring this action to compel the Defendant Surety's obligations on the Bonds when knowing that Developer has failed and refused to complete barely a scintilla of the improvements on the Bonds for Sections 2.A., 2.B., and 2.C. in the Subdivision and while knowing that Developer has still not completed all of the work for Section 1, and Defendant Surety's position in refusing to issue any of the Total Bond Amount to the Town, despite the Town's Demand is completely void of a justiciable issue of either law or fact.

48. Pursuant to, *inter alia*, N.C.G.S. § 44A-35, Defendant Surety is also liable to the Town for an award of the Town's attorneys' fees, costs and expenses as the prevailing party in this action.

PRAYER FOR RELIEF

WHEREFORE, the Town respectfully prays unto the Court as follows:

1. That summary judgment be entered in favor of the Town against Defendant Surety as to the Town's claims and causes of action against Defendant Surety and that the Town have and recover payment in the amount of **\$3,021,213.99** (the Total Bond Amount) plus interest and costs as allowed by law.

2. That the Town have and recover on each of its causes of action and the relief requested under each said cause of action against Defendant Surety, as set forth and requested herein.

3. That the Town have and recover all of its costs in this action, including court costs, expenses, and attorneys' fees.

4. That the Town have and recover interest from the date of at least 28 May 2015, the date of the Town's Demand, up through and until the date that Defendant Surety satisfies and completes its performance on the Bonds.

5. For trial by jury on all issues so triable.

6. For such other and further relief as the Court may deem just and proper.

This the _____ day of September 2015.

LAW OFFICES OF G. GRADY RICHARDSON, JR., P.C.

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VERIFICATION

STATE OF NORTH CAROLINA

COUNTY OF BRUNSWICK

I, SUSAN R. PARKER, after first being duly sworn, deposes and says that I am the Town Administrator for the Plaintiff Town of Sunset Beach in the foregoing cause of action, that I have read the foregoing Verified Complaint, and the same is true of my own personal knowledge, except as to such matters and things therein set forth upon information and belief, and, as to those matters I believe them to be true.

SUSAN R. PARKER, Affiant, Town Administrator
For and On Behalf of the Plaintiff,
Town of Sunset Beach

Sworn To and Subscribed Before
Me, this ____ day of September 2015.

NOTARY PUBLIC

My Commission Expires: _____