

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINDMILL HOLDINGS, INC.,

Plaintiff,

v.

Case No. 10-13512

THE HANOVER INSURANCE COMPANY,

Honorable

Defendant.

Complaint

Plaintiff Windmill Holdings, Inc., for its Complaint for Declaratory Judgment, Accounting, and Tortious Interference against Defendant The Hanover Insurance Company, states:

Parties, Jurisdiction, and Venue

1. Windmill Holdings, Inc. (“**Windmill**”) is a Michigan corporation with a principal place of business in Farmington Hills, Michigan.
2. Upon information and belief, Defendant The Hanover Insurance Company (“**Hanover**”) is a New Hampshire corporation with a principal place of business in Worcester, Massachusetts.
3. This Court has subject-matter jurisdiction under 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties and the amount in controversy, exclusive of interest and costs, exceeds \$75,000.
4. This Court has personal jurisdiction over Defendant.
5. Venue is proper in this district under 28 U.S.C. § 1391(a)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this district and the property

that is the subject of the action is situated in this district. Further, Hanover is subject to personal jurisdiction in this district for purposes of venue under 28 U.S.C. § 1391(c) because it does business in this district and/or caused injury in this district.

General Allegations

Windmill purchased AGM's indebtedness from Citizens Bank.

6. American Glass and Metals Corporation (“**AGM**”) obtained secured financing from Citizens Bank (“**Citizens**”) pursuant to certain loan documents including the Note, the Business Loan Agreement, the Security Agreement, and certain ancillary documents, including certain guaranty documents (collectively, the “**Financing Documents**”). Copies of the Note, Business Loan Agreement, and Security Agreement are attached as collective **Exhibit A**.

7. On or about June 9, 2010, Citizens sold and assigned to Windmill all of its rights in and to the Financing Documents pursuant to a Note Purchase Agreement and Assignment of Loan Documents dated as of June 3, 2010 and Amendment to Note Purchase Agreement and Assignment of Loan Documents, copies of which are attached as collective **Exhibit B**.

8. AGM's obligations under the Financing Documents are secured by valid first-priority liens and security interests in substantially all of AGM's assets (collectively, the “**Windmill Collateral**”), which includes inventory, equipment, and accounts receivable, among other collateral.

9. Citizens perfected its security interest in the Windmill Collateral by filing UCC-1 financing statements with the Michigan Department of State, Uniform Commercial Code Section, copies of which are attached as **Exhibit C**.

10. Citizens had a properly perfected first-priority lien and security interest in the Windmill Collateral.

11. UCC statements were filed regarding Windmill's interest in the Windmill Collateral, copies of which are attached as **Exhibit D**.

AGM defaulted under the Financing Documents.

12. As of March 31, 2010, AGM was in default under the Financing Documents. Accordingly, Citizens, the original lender, exercised its rights under the Financing Documents to accelerate the loan and demand payment in full of all liabilities from AGM and the guarantors.

13. As of September 1, 2010, no less than \$570,664.21 in principal and interest remains due and owing to Windmill under the Financing Documents, which does not include fees, costs, reimbursements, and attorney and consultant fees, which continue to accrue.

Hanover provided payment and performance bonds for certain AGM projects.

14. In a written agreement dated June 27, 2008, AGM agreed to perform work as a subcontractor for general contractor Walbridge Aldinger Company ("**Walbridge**") on the University of Michigan North Quad construction project (the "**North Quad Project**"). Hanover subsequently issued payment and performance bonds dated July 22, 2009, regarding AGM's performance on the North Quad Project (the "**North Quad Project Bonds**"). Copies of the North Quad Project Bonds are attached as collective **Exhibit E**.

15. In a written agreement dated February 2, 2009, AGM agreed to perform work as a subcontractor for general contractor Walbridge on the Delta Dental Data Center Corporate Office construction project (the "**Delta Dental Project**"). Hanover subsequently issued payment and performance bonds dated March 10, 2009, regarding AGM's performance on the Delta Dental Project (the "**Delta Dental Project Bonds**"). Copies of the Delta Dental Project Bonds are attached as collective **Exhibit F**.

16. In a written agreement dated June 3, 2009, AGM agreed to perform work as a subcontractor for general contractor Barton Malow Company on the University of Michigan C.S. Mott Children's and Women's Hospital construction project (the "**Mott Project**"). Hanover subsequently issued payment and performance bonds dated September 24, 2009, regarding AGM's performance on the Mott Project (the "**Mott Project Bonds**"). Copies of the Mott Project Bonds are attached as collective **Exhibit G**.

17. In a written agreement dated June 5, 2009, AGM agreed to perform work as a subcontractor for general contractor Clark Construction Company on the Michigan State University Brody Hall construction project (the "**Brody Project**"). (The North Quad Project, Delta Dental Project, Mott Project, and Brody Project are collectively referred to as the "**Projects**," and individually as a "**Project**.") Hanover issued payment and performance bonds dated July 22, 2009, regarding AGM's performance on the Brody Project (the "**Brody Project Bonds**"). (The North Quad Project Bonds, Delta Dental Project Bonds, Mott Project Bonds, and Brody Project Bonds are collectively referred to as the "**Bonds**," and individually as a "**Bond**.") Copies of the Brody Project Bonds are attached as collective **Exhibit H**.

AGM had previously executed an Agreement of Indemnity in favor of Hanover.

18. AGM and others had previously executed an Agreement of Indemnity in favor of Hanover dated September 28, 2006. A copy of the Agreement of Indemnity is attached as **Exhibit I**.

19. Paragraph 5 of the Agreement of Indemnity provides:

With respect to each bond executed by the Surety in connection with a contract, the Indemnitors hereby assign, transfer, convey and set over to the Surety:

- (a) all right, title and interest of the Indemnitors in and to all tools, plants, equipment and materials of every nature and description that may now or hereafter be upon the site of the contracted work or elsewhere for the purpose of the contract; and

(b) all right, title and interest of the Indemnitors in and to the contract including all rights in and to all subcontracts or purchase orders let or to be let in connection therewith; and

(c) all monies retained, due or due in the future on account of any contract, whether bonded or unbonded, in which any or all the Indemnitors have an interest; and

(d) all right, title and interest, or use of any license, patent, trademark or copyright held by Indemnitors in connection with contracted work or required for the completion of any contract.

The assignments shall be effective as of the execution dates of the bonds, but only enforceable upon the occurrence of one or more of the events described in Paragraph 6 (a-f).

Hanover failed to perfect any interest in AGM's inventory, equipment, or accounts receivable.

20. Hanover did not file any UCC-1 financing statement against AGM to evidence any interest arising from the Agreement of Indemnity or take any other action to perfect a security interest arising from the Agreement of Indemnity. A copy of the results of a UCC search dated May 27, 2010, is attached as **Exhibit J**.

21. Although the Agreement of Indemnity granted Hanover a security interest, Hanover never perfected it.

22. Because Hanover did not perfect its security interest in the Windmill Collateral, its rights as an unperfected secured creditor are junior in priority to Windmill's rights in the Windmill Collateral.

23. As a matter of law, Hanover's rights of equitable subrogation for expenditures on a Bond for an individual Project are limited to that individual Project and do not apply to other Projects.

Hanover's alleged obligations under the Delta Dental Project Bonds and North Quad Project Bonds.

24. AGM has fully performed or will fully perform its obligations on the Delta Dental Project.

25. Hanover alleges it has incurred obligations under the Delta Dental Project Bonds. Despite Windmill's requests, Hanover has failed to provide Windmill information supporting such alleged obligations.

26. AGM has fully performed or will fully perform its obligations on the North Quad Project.

27. Hanover alleges it has incurred obligations under the North Quad Project Bonds. Despite Windmill's requests, Hanover has failed to provide Windmill information supporting such alleged obligations.

Hanover may incur obligations under the Mott Project Bonds and Brody Project Bonds.

28. AGM did not fully complete its obligations on the Mott Project. A replacement subcontractor has been retained to complete AGM's obligations on the Mott Project.

29. Hanover may incur obligations under the Mott Project Bonds.

30. AGM did not fully complete its obligations on the Brody Project. A replacement subcontractor has been retained to complete AGM's obligations on the Brody Project.

31. Hanover may incur obligations under the Brody Project Bonds.

Hanover instructed Walbridge not to pay AGM on the North Quad Project.

32. On June 11, 2010, Windmill advised Hanover of its understanding that Hanover had not made any payments on the North Quad Project and further advised that Hanover therefore had no right of equitable subrogation with respect to the North Quad Project.

33. On June 11, 2010, Windmill requested that Hanover provide a list of any payments it had made on the North Quad Project and that Hanover forward any future requests for payment to Windmill.

34. Hanover has failed to provide information to Windmill regarding any alleged payments it has made relating to the North Quad Project.

35. According to AGM's records, as of August 30, 2010, Walbridge owes AGM \$397,255.67 for AGM's work on the North Quad Project (the "**Walbridge Receivable**").

36. Upon information and belief, after June 11, 2010, Hanover instructed Walbridge not to pay the Walbridge Receivable.

37. Walbridge has not paid the Walbridge Receivable.

Hanover's demands and refusal to cooperate.

38. AGM is in possession of inventory, which is part of the Windmill Collateral.

39. Hanover has demanded that AGM and Windmill turnover inventory relating to the Brody Project, which inventory is part of the Windmill Collateral.

40. Windmill has advised Hanover of its properly perfected first-priority lien and security interest in the Windmill Collateral, including AGM's inventory.

41. Windmill and AGM have offered to cooperate with Hanover so that the AGM inventory relating to the Brody Project may, in exchange for payment, be used for completion of the Brody Project in mitigation of Hanover's damages, if any.

42. Windmill has requested information from Hanover regarding any obligations it has incurred on the Bonds, but Hanover has failed to provide such information.

43. Hanover asserts a superior right in AGM's inventory. Windmill has repeatedly asked Hanover to state the basis for its asserted right and to specifically identify the AGM inventory in which it asserts such a right, but Hanover has failed to provide such information.

Count I
Declaratory Judgment

44. Windmill restates its allegations in paragraphs 1 through 43.

45. Windmill is entitled to a declaration that to the extent Hanover has a lien or security interest in the Windmill Collateral, Hanover never perfected it.

46. Windmill is entitled to a declaration that it has a valid and properly perfected first-priority lien and security interest in the Windmill Collateral, which includes AGM's inventory, equipment, and accounts receivable, among other collateral.

47. Windmill is entitled to a declaration that its rights in the Windmill Collateral, which includes AGM's inventory, equipment, and accounts receivable, among other collateral, are superior to any rights of Hanover in the Windmill Collateral.

48. Windmill is entitled to a declaration that to the extent Hanover has rights arising from a Bond relating to an individual Project as a surety under the doctrine of equitable subrogation, such rights are limited to that individual Project and Hanover has no right under the doctrine of equitable subrogation to recover losses on an individual Project from a different Project.

49. Windmill is entitled to a declaration that to the extent Hanover has rights arising from an individual Project as a surety under the doctrine of equitable subrogation, any interests in AGM's inventory or equipment relating to such rights are junior to Windmill's valid and properly perfected first-priority lien and security interest in the Windmill Collateral, which includes AGM's inventory, equipment, and accounts receivable, among other collateral.

50. Windmill is entitled to a declaration that Hanover has no right of equitable subrogation with respect to the North Quad Project Bonds.

51. Windmill is entitled to a declaration that Hanover has no right of equitable subrogation with respect to the Delta Dental Project Bonds.

52. Windmill is entitled to a declaration that Hanover has no right to demand turnover of any AGM inventory or equipment that Hanover has not paid AGM for.

53. Windmill is entitled to a declaration that Hanover has no interest in or right to the Walbridge Receivable and that Hanover shall not interfere with Walbridge paying the Walbridge Receivable to Windmill.

54. By reason of the foregoing, there is a case of actual controversy between the parties within the jurisdiction of this Court under 28 U.S.C. § 2201(a), and the Court can declare the rights and other legal relations of the parties.

Accordingly, Windmill requests that the Court enter a declaratory judgment in favor of Plaintiff Windmill and against Defendant Hanover:

a. Declaring that to the extent Hanover has a lien or security interest in the Windmill Collateral, Hanover never perfected it;

b. Declaring that Windmill has a valid and properly perfected first-priority lien and security interest in the Windmill Collateral, which includes AGM's inventory, equipment, and accounts receivable, among other collateral;

c. Declaring that Windmill's rights in the Windmill Collateral, which includes AGM's inventory, equipment, and accounts receivable, among other collateral, are superior to any rights of Hanover in the Windmill Collateral;

d. Declaring that to the extent Hanover has rights arising from a Bond relating to an individual Project as a surety under the doctrine of equitable subrogation, such rights are limited to that individual Project and Hanover has no right under the doctrine of equitable subrogation to recover losses on an individual Project from a different Project;

e. Declaring that to the extent Hanover has rights arising from an individual Project as a surety under the doctrine of equitable subrogation, any interests in AGM's inventory or equipment relating to such rights are junior to Windmill's valid and properly perfected first-priority lien and security interest in the Windmill Collateral, which includes AGM's inventory and equipment;

f. Declaring that Hanover has no right of equitable subrogation with respect to the North Quad Project Bonds;

g. Declaring that Hanover has no right of equitable subrogation with respect to the Delta Dental Project Bonds;

h. Declaring that Hanover has no right to demand turnover of any AGM inventory or equipment that Hanover has not paid AGM for;

i. Declaring that Hanover has no interest in or right to the Walbridge Receivable and that Hanover shall not interfere with Walbridge paying the Walbridge Receivable to Windmill; and

j. Granting Windmill such further relief as is just and proper.

Count II
Accounting

55. Windmill restates its allegations in paragraphs 1 through 54.

56. Hanover has exerted control over money and property, including but not limited to the Walbridge Receivable and certain of AGM's inventory, in which Windmill has superior rights.

57. Windmill cannot reasonably be expected to ascertain the amount of Hanover's obligations under each Bond, if any.

58. The determination of what is due to Windmill with respect to each Project involves time-consuming and complex inquiries into information that is in the possession of Hanover and potentially numerous third parties, the identity of which are unknown to Windmill.

Accordingly, Windmill requests that the Court enter a judgment in favor of Plaintiff Windmill and against Defendant Hanover:

- a. Compelling Hanover to prepare, at its sole expense, a separate true and accurate accounting of the liabilities that Hanover has incurred or will incur on the North Quad Project Bonds;
- b. Compelling Hanover to prepare, at its sole expense, a separate true and accurate accounting of the liabilities that Hanover has incurred or will incur on the Delta Dental Project Bonds;
- c. Compelling Hanover to prepare, at its sole expense, a separate true and accurate accounting of the liabilities that Hanover has incurred or will incur on the Mott Project Bonds;

d. Compelling Hanover to prepare, at its sole expense, a separate true and accurate accounting of the liabilities that Hanover has incurred or will incur on the Brody Project Bonds; and

e. Granting Windmill such further relief as is just and proper.

Count III
Tortious Interference

59. Windmill restates its allegations in paragraphs 1 through 58.

60. Windmill has a contractual right to the Walbridge Receivable.

61. Windmill's interest in the Walbridge Receivable is superior to Hanover's alleged interest.

62. Windmill has advised Hanover of its superior interest in the Walbridge Receivable.

63. Windmill has requested, but Hanover has refused to provide, information that would support any right of Hanover to receive any portion of the Walbridge Receivable.

64. Despite having knowledge of Windmill's superior right to the Walbridge Receivable, Hanover intentionally, improperly, and wrongfully instructed Walbridge not to pay the Walbridge Receivable.

65. Walbridge has not paid the Walbridge Receivable.

66. Hanover's instruction that Walbridge not pay the Walbridge Receivable was intended to and did interfere with and disrupt Windmill's contracts, business relationships, and expectancies.

67. Hanover's instruction that Walbridge not pay the Walbridge Receivable has directly and proximately caused Windmill damages including economic injury, harm to its business reputation, and loss of business opportunities.

68. Hanover's instruction that Walbridge not pay the Walbridge Receivable has disrupted the benefit Windmill expected to receive from AGM and Walbridge.

Accordingly, Windmill requests that the Court enter a judgment in favor of Plaintiff Windmill and against Defendant Hanover:

- a. Awarding Windmill damages of no less than \$397,255.67, plus expenses, costs, pre- and post-judgment interest, and attorneys' fees; and
- b. Granting Windmill such further relief as is just and proper.

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