

Endurance Am. Ins. Co. v Green Is. Constr. Group, LLC
2022 NY Slip Op 33580(U)
October 18, 2022
Supreme Court, New York County
Docket Number: Index No. 653714/2014
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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ENDURANCE AMERICAN INSURANCE COMPANY,

INDEX NO.

653714/2014

Plaintiff,

MOTION DATE

04/08/2019

- v -

GREEN ISLAND CONSTRUCTION GROUP, LLC, GREEN
ISLAND CONTRACTING, LLC, STANLEY DISTEFANO,
CHRISTI L. DISTEFANO, DOUGLAS B. BURBRIDGE,
PATRICK REEDY, NANCY J. BURBRIDGE, DOUGLAS B.
BURBRIDGE, LAURIE A. TODD

MOTION SEQ. NO.

010

**DECISION + ORDER ON
MOTION**

Defendants.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 274, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 363

were read on this motion for

SUMMARY JUDGMENT

This is a case to enforce an Indemnity Agreement (NYSCEF 223) related to several surety insurance agreements. Plaintiff Endurance American Insurance Company ("Endurance" or "Plaintiff") moves for summary judgment against Defendants Green Island Construction Group, LLC ("GIGC"), Green Island Contracting, LLC ("Green Island Contracting" and with GIGC "Green Island"), Christi L. DiStefano, Patrick Reedy, Nancy J. Burbridge, and Douglas B. Burbridge on its claims for indemnification and specific performance. Following the submission of its motion, Endurance settled its claims against Nancy J. Burbridge and Douglas B. Burbridge (NYSCEF 379) and withdrew its claims against Douglas B. Burbridge (NYSCEF 387 [Endurance's August 9, 2022 Status Letter]).

Endurance's claims against Stanley DiStefano, Jr. and Laurie A. Todd are stayed due to pending bankruptcy proceedings in which Endurance has filed claims (*Id.*). Mr. DiStefano, a member of Green Island, submitted an affidavit in opposition to Endurance's motion (NYSCEF 278). Endurance requests, in its status letter, that the Court proceed to decide its motion vis-à-vis Green Island, Christi L. DiStefano and Patrick Reedy ("Indemnitors") (*Id.*).

Other than the Burbridges, who have settled, only Green Island submitted opposition (NYSCEF 278-299). Green Island does not dispute Endurance's right of recovery and to access books and records. Instead, Green Island argues that triable issues exist as to damages – specifically claiming that Endurance paid claims that were time-barred – and that Endurance's professional fees incurred are inflated (Memorandum in Opposition ["Opp. Memo"] [NYSCEF 298]). As set forth below, Endurance's motion is GRANTED.

BACKGROUND

In September of 2011, the Indemnitors executed a General Agreement of Indemnity in favor of Endurance, as indemnitee (the "Indemnity Agreement") (Affidavit of John P. Wilson, Endurance's VP, Surety Claims [NYSCEF 222] Ex. A [NYSCEF 223]). Endurance subsequently issued payment and performance bonds on behalf of GIGC concerning multiple construction projects in upstate New York, including the Watertown International Airport, Route I-87, the Saranac Central School District, and Route 9W (the "Bonds") (Wilson Aff. Exs. B-E [NYSCEF 224-227]). The authenticity of the Indemnity Agreement and Bonds are not in dispute (NYSCEF 299 ¶¶1-18 [Green Island Rule 19-a Counterstatement]).

Beginning in 2014, Endurance received multiple claims ("Claims") by GIGC subcontractors claiming more than \$2.2 million in non-payment by GIGC (Wilson Aff. ¶23; Green Island Counterstatement ¶¶19-20). In November of 2014, Endurance demanded in writing

that Indemnitors deposit collateral and provide access to their financial data, books, and records (Wilson Aff. ¶¶25-27 and Exs. F-G [NYSCEF 25-27]; Green Island Counterstatements ¶¶21-23).

Thereafter, multiple defendants declared bankruptcy in the Northern District of New York (Wilson Aff. ¶¶28-51). This case was commenced on December 3, 2014 (NYSCEF 1).

Following its receipt of the Claims, Endurance resolved them for a total of \$1,979,200.70 and supports this figure with payment vouchers (Wilson Aff. Ex. DD [NYSCEF 252]). Endurance also claims that it incurred \$1,101,070.84 in legal fees and \$59,341.94 in consulting fees because of the Claims (Wilson Aff. Exs. EE-FF [NYSCEF 252-253]) resulting in a total loss (as defined in the Indemnity Agreement) of \$3,139,613.48 (Wilson Aff. ¶55). Counsel for Endurance has represented Endurance in seventeen New York state and federal lawsuits arising out of the Indemnity Agreement, including efforts by the Indemnitors to avoid repayment, resulting in significant legal fees (Affirmation of Kevin S. Brotspies ¶¶7-15 [NYSCEF 262]).

Endurance recovered certain funds, leaving an unreimbursed loss (“Loss”) of \$2,089,696.08 (Wilson Aff. ¶¶56-61 and Exs. GG-KK [NYSCEF 257-261]). Green Island Contracting is currently seeking at least \$748,793.25 from the State of New York in *Green Island Contracting LLC v. State*, (Ct. Claims No. 2014-015-495) (“Court of Claims Case”) (Brotspies Aff. Ex. F [NYSCEF 268]) and Endurance seeks an assignment of any recovery under the terms of the Indemnity Agreement to compensate it for the Loss.

In opposition, Green Island alleges that Endurance paid \$198,221.25 of claims beyond the applicable statute of limitations (Opp. Memo at 8-10). Green Island also argues that the attorney’s fees sought by Endurance are excessive (Opp. Memo at 11-14). Additionally, Green Island argues that Endurance failed to mitigate its damages (Opp. Memo at 14-15). With respect to book and records, Green Island disputes the “degree, manner, and extent” to which they must

provide documents (Green Island Counterstatement ¶23). Finally, Green Island argues that discovery as to damages remains outstanding because it sought information in the bankruptcy proceedings (Opp. Memo at 15-17).

After briefing was closed, the Bankruptcy Court for the Northern District of New York rejected Green Island member Stanley DiStefano, Jr.'s defenses – mirroring those of Green Island's in this case – that Endurance was not entitled to recover under the Indemnity Agreement for paying untimely claims or that its attorney's fees were overstated (*In re DiStefano*, 16-10694, 2019 WL 5616910, at *3 [Bankr NDNY Oct. 30, 2019]). The Bankruptcy Court noted that Mr. DiStefano Jr. sought to use this case to delay bankruptcy proceedings (*Id.*). The same result was reached in Laurie A. Todd's bankruptcy case (NYSCEF 386).

DISCUSSION

Summary judgment is warranted when the movant sets forth a *prima facie* case based on admissible evidence and, considering the facts in a light most favorable to the non-movant, the non-movant fails to establish a contested issue of material fact warranting a trial (*Zuckerman v City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]; *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]).

Endurance Is Entitled To Contractual Indemnity

Paragraph 3.2 of the Indemnity Agreement provides that Indemnitors would:

at all times exonerate, hold harmless, defend, indemnify, and keep indemnified [Endurance] from and against any and all liability for Loss which [Endurance] may pay, sustain or incur by reason of: (1) having executed or procured the execution of any Bond or any commitment letter, consent of surety, or any other document related to the issuance of any Bond; (2) the failure of [Green Island Construction] or any of the other Indemnitors to perform or comply with any of the covenants and conditions of [the Indemnity Agreement] or any obligation under any Other Agreement or Bond or any obligation under any agreements with respect to which a Bond has been executed by

[Endurance]; or (3) seeking enforcement of any representations, warranties, covenants and conditions of [the Indemnity Agreement].

Paragraph 4.3 of the Indemnity Agreement provides that “vouchers or other evidence of any Loss payments made by [Endurance] shall be *prima facie* evidence of the fact and amount of [Green Island Construction’s] and each of the other Indemnitors’ liability to [Endurance] for such Loss.”

“New York courts have held that pursuant to an indemnity agreement such as that signed by the defendants, the surety is entitled to indemnification upon proof of payment, unless payment was made in bad faith or was unreasonable in amount, and this rule applies regardless of whether the principal was actually in default or liable under its contract with the obligee. Payment is made in good faith if the surety pays the claims in the honest belief that it was liable for such claims” (*Lee v T.F. DeMilo Corp.*, 29 AD3d 867, 868 [2d Dept 2006] [internal quotations and citations omitted]).

Endurance has submitted detailed and unchallenged evidence establishing that it both settled the Claims and incurred substantial legal fees (Wilson Aff. Exs. DD-FF). Endurance’s submissions establish a *prima facie* entitlement to recover the amount it paid on the Claims and Green Island has not tendered any evidence that the Claims were paid in bad faith to warrant an exception to the Indemnification Agreement (*Deutsche Bank Tr. Co. of Americas v Tri-Links Inv. Tr.*, 74 AD3d 32, 39 [1st Dept 2010] [collecting cases] [indemnitee has right to recover settlement paid in good faith]).

With respect to attorney’s fees, the invoices produced by Endurance show that attorneys working on this case billed at rates of approximately \$195-\$250 per hour and that paralegals worked at a rate of \$75 per hour, said rates being discounted for Endurance, and which are

acceptable in the New York market (Brotspies Aff. ¶¶14-15). Endurance's submission for legal fee invoices takes up three NYSCEF docket entries. Rather than specifically objecting to Endurance's actual incursion of those fees, Green Island argues that "Green Island should be afforded the opportunity to fully brief its objections to Endurance's 1,000 pages of legal invoices and have same resolved by a special referee. . ." without specifying any objections to Endurance's counsel's request or legal support for its position or a motion for a reference (Opp. Brief at 14).

An award of attorneys' fees must be reasonable (*RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d 836, 840 [2d Dept 2016] [collecting cases]). An award of attorney's fees is proper here without the need for an evidentiary hearing based on the undisputed evidence in the record (*Bd. of Managers of 411 E. 53rd St. Condominium on Behalf of Unit Owners of 411 E. 53rd St. Condominium v Faracco*, 202 AD3d 431, 432 [1st Dept 2022][belated request for a hearing is not sufficient]). The Court's review of the invoices submitted indicates that the work undertaken was reasonable under the Indemnity Agreement (Green Island's contention that the bankruptcy works did not arise under the Indemnity Agreement is rejected), that the hourly rates sought are reasonable, and that the invoices were submitted as proof in admissible form without objection.

Specific Performance Providing Access To Books and Records Is Warranted

Paragraph 3.6 of the Indemnity Agreement provides that Endurance must be afforded "unrestricted access" to the Indemnitors' "financial statements, books, records, and/or accounts" until the "surety is fully reimbursed for all amounts due. . ." Similar provisions have been enforced in the surety context (*Colonial Sur. Co. v Eastland Const., Inc.*, 2009 N.Y. Slip Op. 31756[U] [Sup Ct, New York County 2009], *affd as mod.*, 2010 N.Y. Slip Op. 07671 [1st Dept 2010]). Green Island has admitted that the provision is enforceable not raised any specific

challenge to this category of relief. Accordingly, the motion is granted, and Indemnitors are directed to make their books and records available to Endurance.

Specific Performance Vis-à-vis The Court Of Claims Case Is Warranted

Paragraph 5.1 of the Indemnity Agreement provides that Green Island would “assign, transfer, pledge, convey, and et over. . .any and all sums that may be due or hereafter become due on account of any and all. . .contracts” relating to the Indemnity Agreement. The Court of Claims Case clearly relates to one of the Bonds and Green Island does not dispute that any recovery should be used to satisfy the judgment. Accordingly, the motion is granted, and Green Island shall assign any recovery in the Court of Claims case to Endurance to the extent necessary to satisfy the judgment.

Green Island Has Not Established That Further Discovery Is Necessary or Warranted

Green Island argues that discovery remains outstanding with respect to “Endurance’s knowledge concerning its payment of bond-claims beyond the applicable statute of limitations and Endurance’s internal policies and procedures employed to prevent the improper payment of claims” (Opp. Memo at 15-17). However, Green Island Indemnitors do not state that any discovery remains open in this action – only that they may seek discovery in the DiStefano bankruptcy case (*Id.* at 15-17).

CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of that party exist but cannot be stated. Under CPLR 3212(f), where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied. This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. The party invoking the section must provide a proper evidentiary basis supporting its request for further discovery

(*Glob. Minerals and Metals Corp. v Holme*, 35 AD3d 93, 102-03 [1st Dept 2006] [collecting cases, citations omitted] [denying relief under Section 3212[f]). Relief will not be granted pursuant to CPLR 3212(f) where the applicant “fails to offer anything other than conjecture” *Rios v City of New York*, 199 AD3d 478 [1st Dept 2021] [citing *id.*, other citations omitted]).

A Preliminary Conference Stipulation and Order was entered on January 31, 2018 (“PC Order” [NYSCEF 119]). The PC Order provides that discovery would proceed and that a Note of Issue would be filed by October 15, 2018, with dispositive motions being filed thirty (30) days thereafter. Several subsequent conference were held, discovery was completed, and the Note of Issue date was extended through March 8, 2019 (NYSCEF 121, 122, 169).

Plaintiff filed a Note of Issue on March 8, 2019 indicating that discovery was complete (NYSCEF 210) and timely moved for summary judgment (NYSCEF 220). No motion to strike the Note of Issue or for discovery was made by Green Island. Nor were the bankruptcy matters raised as potential impediments to discovery in this case. Accordingly, denial of summary judgment under CPLR 3212(f) is not appropriate on these facts (*Boston Safe Deposit and Tr. Co. v Hoffman*, 177 AD2d 368, 368 [1st Dept 1991]).

* * * *

Accordingly, it is

ORDERED that summary judgment is **GRANTED** on Endurance’s contractual indemnification claim under the Indemnity Agreement in the amount of **\$2,089,696.08** plus interest and costs to be calculated by the Clerk jointly and severally against Indemnitors Green Island Construction Group, LLC, Green Island Contracting, LLC, Christi L. DiStefano and Patrick Reedy; it is further

ORDERED that summary judgment is **GRANTED** on Endurance's claim for Specific Performance concerning Indemnitors' books and records and Indemnitors Green Island Construction Group, LLC, Green Island Contracting, LLC, Christi L. DiStefano and Patrick Reedy shall produce or otherwise make available their financial statements, books and records pursuant to Paragraph 3.6 of the Indemnity Agreement within twenty (20) days (or such other time as may be agreed by the parties) of the service of this Decision and Order with Notice of Entry; it is further

ORDERED that summary judgment is **GRANTED** on Endurance's claim for Specific Performance concerning the Court of Claims Case and Green Island shall assign, including execution of any required documents, its rights to any recovery in the Court of Claims Case to Endurance to the extent necessary to satisfy the judgment;

ORDERED that counsel for Endurance serve a copy of this Decision and Order with Notice of Entry by overnight mail on any unrepresented defendant within ten (10) days; it is further

ORDERED that counsel for Endurance submit a proposed judgment pursuant to 22 NYCRR 202.48;

ORDERED that counsel for Endurance provide a status letter to the Court concerning the status of the bankruptcies and any other pertinent issues on or by **December 2, 2022**.

10/18/2022

DATE

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CASE DISPOSED

GRANTED

DENIED

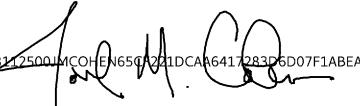
APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

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JOEL M. COHEN, J.S.C.

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NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

REFERENCE

FIDUCIARY APPOINTMENT