

**Matter of Philadelphia Indem. Ins. Co. v Interebar
Fabricators, LLC**

2023 NY Slip Op 33889(U)

October 31, 2023

Supreme Court, New York County

Docket Number: Index No. 158995/2023

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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In the Matter of

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Petitioner,

INDEX NO. 158995/2023

MOTION DATE 10/13/2023

MOTION SEQ. NO. 001

- v -

INTEREBAR FABRICATORS, LLC, formerly known as JRC
OPCO, LLC, successor-in-interest to METAL PARTNERS
REBAR, LLC, doing business as FGH REBAR,

Respondent.

**DECISION, ORDER, and
JUDGMENT**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for DISCHARGE/CANCEL MECHANICS LIEN.

The petitioner, Philadelphia Indemnity Insurance Company (Philadelphia), is the surety on a construction bond in the face amount of \$98,499.50, which had been purchased by general contractor Foremost Contracting and Building, LLC (Foremost), to discharge a mechanic's lien in the face amount of \$89,545.00 that had been filed against real property located at 1516 Park Avenue, New York, New York, and owned by 1516 Park Avenue Partners, LLC (the owner). That lien had been filed by the respondent InteRebar Fabricators, LLC (InteRebar), formerly known as JRC OPCO, LLC, as successor-in-interest to Metal Partners Rebar, LLC (Metal Partners), doing business a FGH Rebar, to secure payment for labor and materials that Metal Partners had provided for a construction project at that real property (the project).

Philadelphia now petitions the court to discharge and cancel the bond, and requests the court to find that it owes no obligation to pay out any money on the construction bond.

InteRebar opposes the petition. The petition is denied, albeit without prejudice to Philadelphia's right to seek the discharge of such obligation by means of a counterclaim asserted in a third-

party action entitled *InteRebar Fabricators, LLC v Philadelphia Indem. Ins. Co.*, which is pending before this court in connection with a main lien foreclosure action, entitled *Feldman Lumber-US LBM v Dark Side III, Inc.*, currently being litigated under New York County Index No. 150702/2022 (the 2022 action).

Feldman Lumber-US LBM (Feldman), a sub-subcontractor on the project, initially commenced the 2022 action on January 5, 2022 against, among others, the owner, Foremost, and Dark Side III, Inc., doing business as Defalco Concrete, which was the subcontractor that retained Feldman to provide materials and labor on the project. Feldman alleged that these parties owed it the sum of \$54,908.08, and that it had filed a mechanic's lien in that amount on the subject real property on September 24, 2021. On March 11, 2022, Feldman served a first amended complaint, in which it also named a proposed defendant that it identified as "John Doe '1,'" which allegedly also had filed a lien against the subject real property. In the first amended complaint, Feldman asserted that its lien had priority over any mechanic's lien filed by John Doe "1." On June 2, 2022, InteRebar served and filed an answer with counterclaims and cross claims, asserting that it was indeed the John Doe "1" named in the summons and complaint, inasmuch as it had filed a lien on the subject real property on June 4, 2021 in the face amount of \$89,545.00 to secure payment for rebar that Metal Partners, as its predecessor-in-interest, had provided for the project.

InteRebar simultaneously commenced a third-party action against Philadelphia, and included, in its omnibus pleading, a third-party complaint against Philadelphia, alleging that Philadelphia had posted a construction bond that Foremost had purchased on behalf of the owner to secure payment of the owner's obligation for the rebar that it had been provided. InteRebar further alleged that, although the owner's statutory obligation to pay it under the Lien Law may have been discharged thereby, Philadelphia now was obligated to pay it the proceeds of the bond. In an order dated November 5, 2022, and entered in a related lien foreclosure action referable to the subject real property entitled *Casa Redmix Concrete Corp. v Yaphank*

Bldg. Supply Corp., New York County Index No. 154950/2021 (the 2021 action), this court granted a motion to consolidate the 2022 action into the 2021 action to the extent of joining the two actions for discovery and trial.

Although Foremost served an answer to InteRebar's third-party complaint in the 2022 action, is it not clear as to whether Philadelphia answered the third-party complaint, although the court notes that Philadelphia's attorney in the instant proceeding also represents Foremost in the 2022 action. In any event, Philadelphia's cause of action here, seeking to discharge any obligation it may have under the relevant construction bond on the ground that InteRebar did not itself actually provide the relevant labor and materials, could have been asserted as a counterclaim to InteRebar's third-party cause of action seeking to be paid from the proceeds of that same bond. Although consolidation of this proceeding into the 2022 action may be appropriate, a court may not sua sponte consolidate two proceedings or actions, but may only do so on motion of a party (*see Lazich v Vittoria & Parker*, 196 AD2d 526, 530 [2d Dept 1993]; *see also Caudill v McGreevey*, 299 AD2d 626, 627 [3d Dept 2002]; *Matter of Amy M.*, 234 AD2d 854, 855 [3d Dept 1996]), and no party has requested consolidation. Nonetheless, where, as here, an action is pending in which the validity or enforceability of a lien already is before the court, a separate special proceeding to discharge the same lien is "superfluous," as the lienholder will have to prove the validity of its lien in the pending action in any event and, thus, its right to payment thereunder (*see Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392, 393 [1st Dept 2006]). To the extent that Philadelphia indeed has answered the third-party complaint, the court grants it leave to amend its answer to the third-party complaint to assert a counterclaim for a judgment declaring that it owes InteRebar no obligation in connection with the bond. To the extent that InteRebar properly served Philadelphia with the third-party summons and complaint on July 13, 2022, as set forth in the relevant affidavit of service, but Philadelphia failed to serve an answer to the third-party complaint, the court notes that more than one year has passed since Philadelphia's default and, hence, InteRebar would

not be entitled to obtain a default judgment against Philadelphia (see CPLR 3215[c]). If, in fact, Philadelphia did not serve an answer to the third-party complaint, and the service thereof would otherwise be time-barred by virtue of CPLR 3012, the court extends, until November 21, 2023, Philadelphia's time to serve an answer to the third-party complaint and thereupon assert a counterclaim for the discharge of its obligation to pay on its bond.

Accordingly, it is

ORDERED that the petition is denied, without prejudice to the petitioner's service of an answer or an amended answer asserting a counterclaim for a judgment, inter alia, declaring that it has no obligation to pay out under the subject bond, in the third-party action entitled *InteRebar Fabricators, LLC v Philadelphia Indem. Ins. Co.*, which is pending before this court in connection with the main action entitled *Feldman Lumber-US LBM v Dark Side III, Inc.*, currently being litigated under New York County Index No. 150702/2022; and it is further,

ORDERED that, if the petitioner has yet to serve an answer to the third-party complaint in that third-party action, it shall have until November 21, 2023 to serve and file an answer containing such a counterclaim in that third-party action; and it is further,

ADJUDGED that the proceeding is dismissed, without prejudice, as set forth herein.

This constitutes the Decision, Order, and Judgment of the court.

JOHN J. KELLEY, J.S.C.

10/31/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: