

**Prestige Decorating & Wallcovering, Inc. v United
States Fire Ins. Co.**

2007 NY Slip Op 31181(U)

May 10, 2007

Supreme Court, New York County

Docket Number: 0601804/2004

Judge: Bernard J. Fried

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INTERIM ORDER

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

PRESENT: BERNARD J. FRIED
Justice

FBIEN PART 60

Prestige Decorating
Plaintiff,

INDEX NO. #601804-2004

MOTION DATE _____

-v-
United States Friends

MOTION SEQ. NO. #003

Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED
MAY 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/10/07

[Signature]
J.S.C. **BERNARD J. FRIED**
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 60

-----X
PRESTIGE DECORATING AND WALLCOVERING,
INC.,

Plaintiff,

-against-

UNITED STATES FIRE INSURANCE COMPANY,
ORDER

Defendant.

-----X
UNITED STATES FIRE INSURANCE COMPANY,

Third-Party Plaintiff,

-against-

IDI CONSTRUCTION COMPANY, INC., JAMES
STUMPF, TREVOR PRINCE, TED KOHL and
KENT M. SWIG,

Third-Party Defendants.

-----X
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 60

-----X
PACE PLUMBING CORP.,

Plaintiff,

-against-

UNITED STATES FIRE INSURANCE COMPANY,

Defendant.

-----X
UNITED STATES FIRE INSURANCE COMPANY,

Third-Party Plaintiff,

-against-

FBEM

Action No. 1
Index No. 601804/04

DECISION AND

FILED

MAY 10 2007

COUNTY CLERK'S OFFICE
NEW YORK

Action No. 2
Index No. 603879/04

IDI CONSTRUCTION COMPANY, INC., JAMES STUMPF, TREVOR PRINCE, TED KOHL and KENT M. SWIG,

Third-Party Defendants.

-----X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S PART 60

-----X

P & H SUPPLY CO., INC.,

Plaintiff,

-against-

Action No. 3
Index No. 604228/04

UNITED STATES FIRE INSURANCE COMPANY,

Defendant.

-----X

UNITED STATES FIRE INSURANCE COMPANY,

Third-Party Plaintiff,

-against-

JAMES STUMPF, TREVOR PRINCE, TED KOHL
and KENT M. SWIG,

FILED

MAY 10 2007

**NEW YORK
COUNTY CLERK'S OFFICE**

Third-Party Defendants.

-----X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 60

-----X

A.D. WINSTON CORP.,

Plaintiff,

-against-

Action No. 4
Index No. 604227/04

UNITED STATES FIRE INSURANCE COMPANY,

Defendant.

-----X
UNITED STATES FIRE INSURANCE COMPANY,

Third-Party Plaintiff,

-against-

JAMES STUMPF, TREVOR PRINCE, TED KOHL
and KENT M. SWIG,

Third-Party Defendants.

-----X

FRIED, J;

In Action No. 1, defendant/third-party plaintiff United States Fire Insurance Company (USFIC) moves, pursuant to CPLR 3212, for summary judgment against third-party defendant Kent M. Swig. Swig cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the sixth, seventh and eighth causes of action in the third-party complaint in Action No. 1, and to dismiss the third, fourth and fifth causes of action in the third-party complaints in Action Nos. 2, 3 and 4. Swig also seeks summary judgment for contribution against third-party defendants James Stumpf, Ted Kohl and Trevor Prince to the extent that he is directed to pay any monies to USFIC.

The above-captioned actions are related and arise out of the construction of a residential building known as the Beekman Regent Condominium, located at 351 East 51st Street in Manhattan. IDI Construction Company, Inc. (IDI) was the general contractor and hired each of the above-named plaintiffs to perform various trade work. USFIC as surety, and IDI, as principal, issued a Labor and Materials Payment bond on the project, known as Bond No. 6102278631 (the Bond). The Bond provides that contractors, materialmen and/or

laborers that are not paid for their work on the project may bring a claim for payment against USFIC.

In the above-captioned actions, each plaintiff made a claim against USFIC on the Bond, alleging that IDI failed to pay monies due to that plaintiff on the project. Plaintiffs in Action Nos. 1, 2 and 3 have settled their claims against USFIC. Action No. 4 remains unresolved.

The third-party actions are brought by USFIC to recover sums from the third-party defendants pursuant to a General Agreement of Indemnity, dated June 17, 2002, and executed in connection with the Bond issued by USFIC as surety (the Indemnity Agreement). As consideration for the issuance of the Bond, the third-party defendants agreed to indemnify USFIC for any losses sustained by it thereunder and to post collateral upon demand as set forth in the Bond.

In each of the third-party actions, USFIC seeks to recover the monies it has paid to each of the primary plaintiffs, as well as to other subcontractors who also made claims against the Bond. It further seeks to require the third-party defendants to post collateral for additional claims, as required by the Indemnity Agreement. USFIC alleges that to date, it has made the following payments to claimants on the Bond:

<u>CLAIMANT</u>	<u>AMOUNT PAID</u>
Coordinated Metals	\$ 22,200.00
Budco Enterprises, Inc.	\$ 15,000.00
New Town	\$ 90,000.00
P&H Supply	\$ 53,094.00
Pace Plumbing	\$ 47,031.00
Prestige Decorating	\$195,000.00
Sage Electrical Contracting	\$ 71,406.00

Gilbert Contracting	\$ 9,917.34
Skyline Restoration	<u>\$ 10,500.00</u>
TOTAL	\$514,418.64

(Rochotte Aff., ¶ 11).

USFIC also alleges that, inasmuch as it has received significant claims against the Bond, in accordance with the terms of the Indemnity Agreement, it has set up reserves in the amount of \$2 million to cover the pending claims. USFIC asserts that it has demanded that Swig post the collateral in the amount of \$2 million, but that Swig has ignored these demands. USFIC therefore also seeks summary judgment compelling Swig to deposit collateral with USFIC in the amount of \$2 million.

In opposition to the within motion, and in support of his cross motion to dismiss, Swig first asserts that USFIC has overstepped the bounds of third-party practice, as set forth in CPLR 1007, in that USFIC's claims may only arise from, or be conditioned upon, the liability asserted against USFIC in the main action. Thus, Swig argues, that USFIC may bring third-party actions against him only for the amounts that USFIC paid to each of the plaintiffs in the primary actions. Swig argues that the fact that USFIC could, in some other action, not brought under CPLR 1007, seek indemnification with respect to the other payees, or could seek to require the posting of collateral in a declaratory judgment action, does not change the limitations of these third-party actions.

CPLR 1007 provides the statutory basis for when third-party practice is allowed:

§ 1007. When third-party practice allowed.

After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or

part of the plaintiff's claim against that defendant

The Court of Appeals has stated that “[t]he language of CPLR 1007 serves only to identify the persons against whom a third-party claim may be brought. It places no limit upon the amount which may be recovered or upon the legal theories which may be asserted as a basis for the claim” (George Cohen Agency v Donald S. Perlman Agency, Inc., 51 NY2d 358, 365 [1980]). Moreover, in the above case, the Court made it clear that a third-party plaintiff could plead and prove his entitlement to excess recovery over and above his liability to plaintiff, subject to the trial court's discretionary power to sever any claim which might be unduly burdensome (id. at 365).

Nonetheless, Swig argues that the First Department has held that “the liability sought to be imposed upon a third-party defendant must arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action” (BBIG Realty Corp. v Ginsberg, 111 AD2d 91, 993 [1st Dept 1985]). However, the decision in BBIG Realty was based on the fact that liability against the defendant in the primary action was highly questionable, and the liability of the third-party defendant, which was just as tenuous, could not withstand a motion for summary judgment. Here, the third-party liability asserted against Swig does indeed arise from the liability asserted against USFIC in the main actions.

Moreover, in keeping with the purpose of third-party practice, which is, in part, to avoid the multiplicity of actions, USFIC may appropriately assert additional claims against Swig on the Indemnity Agreement.

Swig next argues that USFIC has failed to offer any evidence of payments to justify the relief sought by it. In its moving papers, USFIC submitted the affidavit of James

Rochette, a Bond Claims Consultant, which attested to the amounts paid to the listed claimants. In reply papers, USFIC has submitted copies of checks issued to each of the above-listed claimants, except Prestige Decorating and Wallcovering. As to Prestige, USFIC has submitted the signed settlement letter, dated April 12, 2005, indicating that USFIC is to pay Prestige Decorating \$195,00.00.

Paragraph 10 of the Indemnity Agreement provides, in part, that:

The Surety shall have the exclusive right for itself and for the Indemnitors to decide and determine whether any claim, demand, suit or judgment upon said Bond or Bonds shall, on the basis of liability, expediency or otherwise, be paid, settled, defended or appealed, and its determination shall be final, conclusive and binding upon the Indemnitors In the event of any payment, settlement, compromise or investigation, an itemized statement of the payment, loss costs, damages, expenses or attorneys' fees, sworn to by an officer of the Surety . . . shall be prima facie evidence of the fact and extent of the liability of the Indemnitors to the Surety in any claim or suit hereunder.

(Rochette Aff., Ex. B).

Pursuant to the terms of the Indemnity Agreement, USFIC's submission of a sworn itemized statement of loss and expense, was prima facie evidence of the fact and extent of Swig's liability. By additionally submitting copies of payment drafts, USFIC has clearly demonstrated its prima facie entitlement to recovery thereupon (American Home Assur. Co. v Gemma Constr. Co., Inc., 275 AD2d 616 [1st Dept], lv dismissed, 95 NY2d 959 [2000]). Moreover, where, as here, an indemnification agreement provides that the surety has the right to pay, settle or compromise any expense, claim or charge, the evidence of payment in satisfaction of such expense, claim or charge is prima facie evidence of the propriety thereof and the liability of the indemnitor (BIB Constr. Co., Inc. v Fireman's Ins. Co. of Newark,

N.J., 214 AD2d 521, 523 [1st Dept 1995]). Therefore, the burden is on Swig to demonstrate that any payments made by USFIC were excessive or improper. Although Swig presents an engineer's affidavit, originally submitted by USFIC in the Pace Plumbing action, which states that some of the payments sought by Pace Plumbing were not in the original contract and thus not bonded work, the papers indicate that Pace Plumbing originally sued USFIC for \$145,940.57 and settled for \$47,031.30. Swig has not shown that this settlement was unreasonable. Nor has Swig presented any evidence that the settlement with Prestige Decorating and Wallcovering, Inc. was unreasonable.

As to USFIC's demand for the posting of \$2 million in collateral, paragraph 7 of the Indemnity Agreement provides that if USFIC is required, or shall deem it necessary to set up a reserve in any amount to cover any claim, demand or liability, the indemnitors shall upon demand deposit an amount of money sufficient to cover such reserve any increase thereof. "The posting of an adequate reserve does not represent a claim for damages or an award in indemnification. It is merely collateral security held in trust by the insurer that must be repaid to the extent that damages are reduced or not awarded" (BIB Constr. Co., Inc., v Fireman's Ins. Co. of Newark, N.J., 214 AD2d at 523, citing American Motorists Ins. Co. v United Furnace Co., 876 F2d 293, 300 [2d Cir 1989]).

USFIC has presented sufficient evidence to indicate that it has established its reserve based on unresolved claims made against the Bond. In Action No. 4, A.D. Winston, the plaintiff, seeks to recover \$293,277.00. Another subcontractor, Precision Mechanical, Inc. has brought an action seeking \$707,614.00 in damages, and Beekman International Center has also brought an action seeking \$1,039,576.50 in damages. USFIC is therefore entitled

to judgment on that part of the Indemnity Agreement requiring Swig to furnish collateral security (Colonial Sur. Co. v Genesee Valley Nurseries, Inc., 5 AD3d 1024, 1025 [4th Dept 2004]).

As to Swig's cross motion to dismiss, the sixth, seventh, and eighth causes of action in the third-party complaint in Action No. 1, and the third, fourth and fifth causes of action in the third-party complaint in Action Nos. 2, 3, and 4 allege trust fund violations in connection with the bonded contract. Each such cause of action is premised on the allegation that the third-party defendants "received money or proceeds under the Bonded Contract and failed to use such money or other proceeds for the purposes of performing the Bonded Contract and discharging the obligations of those performing under the Bonded Contract" (Third-Party Complaint, ¶ 38). USFIC has not disputed Swig's claim that he is not now, and has never been an officer, director, shareholder or employee of IDI, and further, that at no time did he receive any money or other proceeds under the contract. These claims are therefore properly dismissed.

As to that part of Swig's cross motion for summary judgment granting contribution against third-party defendants James Stumpf, Trevor Prince and Ted Kohl, the motion is denied with leave to renew upon proper papers. In his answer to the third-party complaint, Swig cross-claims for contribution against IDI (first cross claim) and for indemnification against Kohl and the other third-party defendants (second and third cross claims). Swig has not asserted a claim for contribution upon which he may seek summary judgment.

Accordingly, based on the foregoing, it is

ORDERED that third-party plaintiff United States Fire Insurance Company's motion

for summary judgment against third-party defendant Kent M. Swig is granted; and it is

ORDERED that United States Fire Insurance Company shall have judgment against Swig in the amount of \$514,418.64 plus interest, costs and fees; and it is further

ORDERED that third-party defendant Swig is directed to post collateral with United States Fire Insurance Company in the amount of \$2 million; and it is further

ORDERED that the cross motion by third-party defendant Swig is granted to the extent that it is

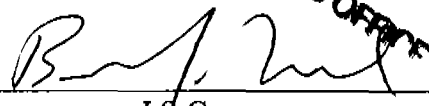
ORDERED that the sixth, seventh, and eighth causes of action in the third-party complaint in Action No. 1 are dismissed as to third-party defendant Swig; and it is further

ORDERED that the third, fourth, and fifth causes of action in the third-party complaint in Action Nos. 2, 3 and 4 are dismissed as to third-party defendant Swig; and it is further

ORDERED that the portion of the cross motion for summary judgment for contribution is denied without prejudice.

DATED: May 10, 2007

FILED
MAY 10 2007
NEW YORK
COUNTY CLERK'S OFFICE
ENTERED



J.S.C.
BERNARD J. FRIED
J.A.C.