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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES **PART 17**
Justice

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TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,
Plaintiff,

Index No.: 7359/08
Motion Date: 9/29/10
Motion Cal. No.:69

-against-

BARRY STRANSKY, MARK STRANSKY, CONAIR CORPORATION, AIRVEL AIR CONDITIONING CORP., CONAIR WEATHER SERVICE, INC., SAFECON SYSTEMS, INC., NADIR UYGAN, GULSER UYGAN and NAGAN CONSTRUCTION, INC.,,
Defendants.

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The following papers numbered 1 to 13 read on this motion by Plaintiff for an order pursuant to CPLR 3212 granting Plaintiff summary judgment in its favor and against defendants.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-3
Notice of Cross-Motion-Affirmation-Exhibits	4-7
Affirmation in Opposition.....	8-9
Reply Affirmation.....	10-11

Upon the foregoing papers it is ordered that this motion by Plaintiff for summary judgment pursuant to CPLR §3212 against defendants Barry Stransky, Mark Stransky, Conair Corporation ("Conair"), Airvel Air Conditioning Corp. ("Airvel Air"), Conair Weather Service, Inc. ("Conair Weather"), Safecon Systems, Inc., ("Safecon"), Nadir Uygan, Gulser Uygan and Nagan Construction, Inc. ("Nagan") for (1) recovery of $2,536,775.70 representing (a) $1,954,544.52 of performance bond losses incurred by the surety Travelers in making arrangements to complete a certain construction contract; (b) $70,032.50 of additional Performance Bond losses incurred by the surety Travelers in performing certain "life/safety" work prior to making such arrangements to complete the contract; (c) $296,183.10 of payment bond losses incurred as a result of making payments to unpaid subcontractors and suppliers of its principal in respect of that contract; (d) $323,837.58 of consultants fees and

expenses, and Travelers expenses (mileage), incurred as a result of issuing performance and payment bonds in respect of that contract; less (e) $107,821.71 of requisition payments received by Travelers in respect of the Contract and (2) a determination that defendants are liable for the attorneys' fees and expenses incurred by Travelers as a result of issuing such Bonds (including fees in prosecuting Travelers' indemnity rights in this action), with the amount to be determined on inquest; and the dismissal of defendants' $800,000 counterclaim, is decided as follows:

According to Plaintiff, the undisputed evidence shows that this action involves a construction contract entered into by a joint venture of defendants Nagan and Conair ("the Joint Venture") with Monsignor McClancy Memorial High School ("School") for certain noise abatement work at the school for $7.2 million (the "Contract"). On or about June 16, 2005, Plaintiff, as surety, and the Joint Venture, as principal, issued Performance and Payment Bonds Nos. 103836517, in favor of Monsignor McClancy, as obligee, for $7.2 million.

The defendants each executed an indemnity agreement dated June 16, 2002 in favor of Travelers (the "2002 Indemnity Agreement") and defendants Barry Stransky, Mark Stransky, Conair, Airvel Air Conditioning, Conair Weather, and Safecon each executed an indemnity agreement dated March 14, 2006 in favor of Travelers (the "2006 Indemnity Agreement,"

The 2002 and 2006 Indemnity Agreements each provide the following: (I) an "indemnification and hold harmless" clause, whereby the defendants agree to indemnify Travelers against all loss, cost and expense, including attorneys fees, incurred as a result of issuing surety bonds on behalf of the defendants; (ii) a "claims settlement" clause, whereby the defendants agree that Travelers has the right, in its sole discretion, to determine if any claim under any surety bond should be settled, and that such determination is binding upon the defendants; and (iii) an "itemized statement" clause, whereby the defendants agree that the Surety's sworn statement of loss shall be prima facie evidence of the defendants' liability.

The 2002 Indemnity Agreement provides that, "[t]he Indemnitor shall exonerate, indemnify and save the Company harmless from and against every claim, loss, damage, demand, liability, cost, charge, suit, judgment, attorney's fee, and expense which the Company incurs in consequence of having executed, or procured the execution of such Bonds. Expense includes the cost of procuring or attempting to procure release from liability, or in bringing suit to enforce this Agreement against any Indemnitor.

The 2006 Indemnity Agreement provides that, "Indemnitors shall exonerate, indemnify and save Company harmless from and against all Loss. An itemized, sworn statement by an employee of Company, or other evidence of payment, shall be prima facie evidence of the propriety, amount and existence of Indemnitors' liability. Amounts due to Company shall be payable upon demand.

Loss is defined as: Loss – All loss and expense of any kind or nature, Including

attorneys' and other professional fees, which Company Incurs in connection with any Bond or this Agreement, Including but not limited to all loss and expense incurred by reason of Company's: (a) making any investigation in connection with any Bond; (b) prosecuting or defending any action In connection with any Bond; (c) obtaining the release of any Bond; (d) recovering or attempting to recover Property in connection with any Bond or this Agreement; (e) enforcing by litigation or otherwise any of the provisions of this Agreement; and (f) all interest accruing thereon at the maximum legal rate.

The 2002 Indemnity Agreement provides that "The Company shall have the right, in its sole discretion, to determine for itself and the Indemnitor whether any claim or suit brought against the Company or the Indemnitor upon any such Bond shall be paid, compromised, settled, defended or appealed, and its decision shall be binding and conclusive upon the Indemnitor. An itemized statement thereof sworn to by an employee of the Company or a copy of the voucher of payment shall be prima facie evidence of the propriety and existence of Indemnitor's liability. The Company shall be entitled to reimbursement for any and all payments made by it under the belief it was necessary or expedient to make such payments.

The 2006 Indemnity Agreement provides that the "Company shall have the right, in its sole discretion, to determine for itself and indemnitors whether any claim, demand or suit brought against Company or any indemnitor in connection with or relating to any Bond shall be paid, compromised, settled, tried, defended or appealed, and its determination shall be final, binding and conclusive upon the indemnitors. Company shall be entitled to immediate reimbursement for any and all Loss incurred under the belief it was necessary or expedient to make such payments.

The 2002 Indemnity Agreement contains the following: "itemized statement shall be prima facie evidence". The 2006 Indemnity Agreement contains the following "itemized statement shall be prima facie evidence" clause as part of the "Indemnification and Hold Harmless" clause quoted above; the relevant sentence is: "An itemized, sworn statement by an employee of Company, or other evidence of payment, shall be prima facie evidence of the propriety, amount and existence of Indemnitors' liability.

Thereafter, by letter dated October 29, 2007, Monsignor McClancy terminated the Joint Venture's right to proceed due to its having defaulted under the terms of the contract, and made demand upon the surety Travelers to complete the contract pursuant to its performance bond obligations. Plaintiff deemed Monsignor McClancy's declaration of default as constituting a "Default" under the two Indemnity Agreements. The 2002 Indemnity Agreement defines "Default" as including "A declaration of Contract default by the obligee [Monsignor McClancy]." Similarly, the 2006 Indemnity Agreement defines "Default" as including "(a) a declaration of Contract default by any Obligee [Monsignor McClancy]."

In response, Plaintiff, with the consent of Monsignor McClancy, initially attempted to

use the Joint Venture to complete the Contract, but those efforts proved unsuccessful.

Subsequently, after Travelers had solicited bids from contractors other than the Joint Venture to complete the work, Monsignor McClancy advised that an engineering firm, Lizardos Engineering Associates, P.C. ("Lizardos Engineering"), had been retained to conduct an evaluation of the quality of work performed by the Joint Venture. Completion efforts were put on hold (with the exception of "life/safety" work) pending receipt of this engineering report.

The Lizardos Engineering report was received in November, 2008, and this report identified substantial deficiencies in the work performed by the Joint Venture, which deficiencies were not previously set forth in the materials received from Monsignor McClancy. Thereafter, Plaintiff engaged in an extensive review, evaluation and investigation of Lizardos Engineering report, and engaged in extensive negotiations with Monsignor McClancy to determine a new scope of work to be performed for Plaintiff to meet its performance bond obligations.

Ultimately, in June, 2009, Plaintiff, Monsignor McClancy and a new contractor, Kenstar Construction Corp. ("Kenstar"), entered into a Tender Agreement whereby Travelers tendered Kenstar as the new completion contractor, with Kenstar furnishing its own surety bonds, and with Travelers funding the $1,954,544.72 shortfall between the remaining contract balance and Kenstar's completion price.

Thereafter, Plaintiff commenced the instant action to recover its itemized losses, which total $2,536,775.70. The itemization of this claim is as follows: 1,954,544.22 representing its payment to Monsignor McClancy pursuant to the Tender Agreement regarding Kenstar's completion of the contract; $70,032.50 representing Travelers cost in performing certain "life/safety" work at the school and the period between Monsignor McClancy's default of the Joint Venture and the June 2009 Takeover Agreement; $296,183.10 representing payments made to unpaid subcontractors and suppliers of the Joint Venture; $323,837.58 representing consultants fees and expenses, and Travelers' expenses (mileage) incurred as a result in issuing the instant Performance and Payment Bond on behalf of the Joint Venture as set forth in the schedule annexed to the Tibbetts Affid. as Exhibit 7; and less the $107,821.70 requisition payment received by Travelers. In addition, Travelers seeks judgment against Defendants for their liability for Travelers' attorneys fees, with the amount to be determined at an inquest. Defendants oppose this motion.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to

determine whether such issues exist. *See*, Barr v. County of Albany, 50 NY2d 247 (1980); Miceli v. Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v March, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in Daliendo v Johnson, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

New York courts have consistently 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'" (Lee v T.F. DeMilo Corp., 29 AD3d 867, 868, 815 N.Y.S.2d 700, *quoting* Frontier Ins. Co. v Renewal Arts Contr. Corp., 12 AD3d 891, 892, 784 N.Y.S.2d 698). Thus, under this analysis, it is irrelevant whether the indemnitor was actually liable on the underlying debt (*see* Frontier Ins. Co. v Renewal Arts Contr. Corp., 12 AD3d at 892; International Fid. Ins. Co. v Spadafina, 192 AD2d 637, 639, 2d Dept 1993.) "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 at 868, *quoting* Maryland Cas. Co. v Grace, 292 NY 194, 200).

Here, the Plaintiff demonstrated entitlement to judgment as a matter of law by submitting the bond contracts and the indemnification agreement with the Defendants, which established that the Plaintiff had a duty to complete the subject construction project, and that the Defendants had a duty to reimburse the Plaintiff for its expenditures in completing those projects. John Deere Ins. Co. v. GBE/Alasia Corp., 57 A.D.3d 620 (2d Dep't 2008) They have also submitted an affidavit by Kimberly Tibbetts, a claim counsel for Plaintiff who worked on this claim against surety bonds executed by the plaintiff, which established the facts as set forth above. She also stated that the Lizardos Engineering Report, which was submitted by Plaintiff, was the product of extensive review and analysis of the work performed by Defendants. The Lizardos Report set out the work needed to complete the project and the Tender Agreement with Kenstar set out the costs of such work and these costs were based on extensive negotiations. She also set out the amount of payments made by the Plaintiff under the bond at issue and the associated expenses. *Id.*

In opposition, Defendants claim that as part of its contractual obligations to the Owner, the Joint Venture furnished a performance bond written by Plaintiff and Plaintiff's obligation under the performance bond arises only "[i]f there is no Owner Default," which the Performance Bond defines as a "[f]ailure of the Owner which has neither been remedied nor waived, to pay the Contractor as required by the Construction Contract or to perform and complete or comply with the other terms thereof." Only after "the Owner has satisfied the conditions of Paragraph 3" (including that there first be "no Owner default"), could Plaintiff

arrange for completion of the Joint Venture's contract under the Performance Bond.

According to Defendant, its evidence, including an affidavit of Nadir Uygan and correspondence and invoices from the School, demonstrates that the School was itself in default as of the October 29, 2007 when it terminated the Joint Venture's contract. First, the Owner had persistently failed to make payments to the Joint Venture as required under the contract. Second, as a matter of law, the Owner wrongfully terminated the contract after the Joint Venture's work was substantially complete. In addition, the fact that the Owner and its Architect agreed to extend the date for completion of the Joint Venture's Contract establishes -- under the express terms of the Contract - - that any delays were through no fault of the Joint Venture. Since the School was in default, Plaintiff had no obligation or right to arrange for the completion of the project. Moreover, since Plaintiff paid when it had no right or obligation to do so, Defendants' claim that Plaintiff's conduct was unreasonable and in bad faith and is not entitled to indemnification or summary judgment.

This Court finds that Defendants' arguments do not comport with controlling New York Law. First, as stated in International Fidelity Insurance Company v. Spadafina, 192 A.D.2d 637 (2d Dep't 1993) "Courts have upheld the validity of such contractual arrangements [indemnity agreements with settlement clauses] and have ruled that payments made by sureties under such provisions are scrutinized only for good faith and reasonableness as to the amount paid". The Court also set forth the general proposition that "[u]nder this analysis, it is irrelevant whether Spadafina was actually liable on the underlying debt to Kelly".Moreover, pending litigation to determine whether a contractor defaulted on its contract is irrelevant to whether the Surety properly complied with its obligations as a surety to the bond's obligee; thus, while a contractor might ultimately be found not to have defaulted on a guaranteed contract, such a finding would not affect the contractor's obligations under an agreement to indemnify the surety against liability. Frontier Ins. Co. v. Renewal Arts Contr. Corp., 12 A.D.3d 891 (3d Dep't 2004.) *See also*, Lee v. T.F. DeMilo Corp., 2006 NY Slip Op 4053 (2d Dep't 2006)

Defendant's reliance upon the case of General Ins. Co. v. K. Capolino Construction Corp., 903 F.Supp. 623, (S.D.N.Y. 1995) is misplaced since that case does not follow established case law and has not been followed by any other Courts and it has been specifically rejected. In Frontier, supra, 784 N.Y.S.2d at 700, the Court rejected the indemnitors' argument, which is the same argument that Defendants have made here, and expressly rejected the application of the "volunteer" rule of Capolino, stating "it is our view that this rule was misapplied in Capolino and is inapplicable here because it is pertinent only in the absence of an indemnification agreement controlling the principal's obligation to the surety. Id. Frontier further stated that "Con Ed's default is irrelevant to liability under the indemnity agreement" and "[u]nder that agreement, plaintiff had the exclusive and binding authority to assess the merits of any claim brought under its bonds." Id. *See also*, Prestige Decorating &

Wallcovering, Inc. v United States Fire Ins. Co., 49 AD3d 406, 407; Utica Mut. Ins. Co. v Magwood Enters., Inc., 15 AD3d 471, 472, International Fid. Ins. Co. v Spadafina, *supra.*

Additionally, Defendants' arguments go against the public policy purpose in enforcing the surety's right to settle claims. Sureties serve an important function in the construction industry, and self interest renders it unlikely to make payments on invalid claims. Sureties provide assurances to the parties involved in construction projects that in an event of a default by any of the other parties involved, such will not cause an economic loss to party protected by a surety agreement. To accept Defendants argument, would limit a surety's ability to settle a performance bond claim because, along with most performance bond claims, there are usually cross-claims by the contractor that the owner was in default and claims by the owner that the contractor was in default. Thus, if this Court were to accept Defendant's claim, that Monsignor was in default and that rendered Plaintiff's payment to the School, pursuant to the Indemnity Agreement, a "voluntary" payment, the ability of Sureties to settle claims would be hindered and the settlements clause of Indemnity Agreements would be rendered meaningless. Accordingly, Defendants' claims that are based upon the School being in default are insufficient to raise an issue of fact in opposition to this motion.

The remaining claims by Defendants, that summary judgment should be denied since Plaintiff did not make its payments in "good faith," or failed to mitigate the costs associated with completing the project and other expenses are rejected for similar reasons. Defendants claim that Plaintiff could not have acted reasonably in settling the instant claim with the school since the owner was in default. This is merely the same argument that has been rejected above. Moreover, these claims of lack of good faith and failure to mitigate are set forth in conclusory affidavits of Mr. Uygan and the affirmation of Defendants' attorney and are insufficient to raise a triable issue of fact. Utica Mut. Ins. Co. v. Magwood Enters., 15 A.D.3d 471 (N.Y. App. Div. 2d Dep't 2005.)

Based on the above, Plaintiff's motion is granted and Summary Judgment in Plaintiff's favor is awarded and against Defendants in the amount of $2,536,777.00. The Court also determines that Defendants' are liable to Plaintiff for its attorneys' fees, as set forth in their agreements, and such amount shall be determined at a proceeding held on December 10, 2010, in Part 17 at 9:30 a.m. Finally, the branch of the motion seeking dismissal of Defendants' counterclaim is dismissed since it relies upon the same arguments that have been rejected by this Court in the above analysis.

Dated: October 1, 2010 .....

ORIN R. KITZES, J.S.C.