

**Cox v Nap Constr. Co., Inc.**

2010 NY Slip Op 33346(U)

November 30, 2010

Supreme Court, New York County

Docket Number: 111790/2003

Judge: Shirley Werner Kornreich

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

HON. SHIRLEY W. KORNREICH

PRESENT.

PART 54

Index Number : 111790/2003

COX, ANTHONY

vs

NAP CONSTRUCTION

Sequence Number : 010

SUMMARY JUDGMENT

INDEX NO. 111790/03

MOTION DATE 10/7/10

MOTION SEQ. NO. 010

MOTION CAL. NO. \_\_\_\_\_

*C*

The following papers, numbered 1 to 9 were read on this motion to/for 10/2/10

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-5

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

7-9

*and correspondence 10/6/10 and 10/7/10*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.**

**FILED**

DEC 02 2010

NEW YORK COUNTY CLERK'S OFFICE

JUSTICE SHIRLEY WERNER KORNREICH

Dated: 11/30/10

*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
ANTHONY COX, ROGER FRANCO, JOHN LINARES,  
and SAMUEL MITCHELL, individually and on behalf of  
all other persons similarly situated who were employed by  
NAP CONSTRUCTION COMPANY, INC., with respect  
to certain Public Work Projects awarded by the CITY OF  
NEW YORK and/or THE NEW YORK HOUSING  
AUTHORITY,

Plaintiffs,

-against-

NAP CONSTRUCTION COMPANY, INC., ST. PAUL  
MERCURY INSURANCE COMPANY, GREENWICH  
INSURANCE COMPANY and ANTHONY PANAGIO,

Defendants.

-----X  
GREENWICH INSURANCE COMPANY,

Third-Party Plaintiff,

-against-

NAP CONSTRUCTION COMPANY, INC., ANTHONY  
PANAGIO and SHERYL PANAGIO,

Third-Party Defendants.

-----X  
ST. PAUL MERCURY INSURANCE COMPANY, INC.,

Second Third-Party Plaintiff,

-against-

NAP CONSTRUCTION COMPANY, INC., ANTHONY  
PANAGIO and SHERYL PANAGIO,

Second Third-Party Defendants.

-----X  
**KORNREICH, SHIRLEY WERNER, J.:**

Defendant, third-party plaintiff, St. Paul Mercury Insurance Company (St. Paul) moves

Index No.:111790/2003

**DECISION and ORDER**

**FILED**

DEC 02 2010

NEW YORK  
COUNTY CLERK'S OFFICE

for summary judgment on its claim for indemnity against defendants and third-party defendants Anthony Panagio and Sheryl Panagio (collectively “the Panagios”) , and for a judgment of default on its claim for indemnity against defendant and third-party defendant Nap Construction Company, Inc. (Nap). (Mot. Seq. No. 010.) The Panagios filed a petition for individual bankruptcy under Chapter 13 of the Bankruptcy Code on October 6, 2010. As a result, all proceedings in this case are stayed as to the Panagios. The court will address only the motion for default against Nap, which is unopposed.<sup>1</sup>

### *Background*

The motion is supported by Affidavits (with exhibits) of: Tom Groseclose, a senior claim executive with St. Paul; Diana Minchella, a vice president of Vertex Construction Services, Inc., a consultant to St. Paul; and John F. Hamilton, St. Paul’s counsel. This action arises out of Nap’s alleged failure to pay the prevailing wage rates, supplemental benefits and overtime for labor performed on certain public works projects. As a result, plaintiffs and a putative class brought the initial action against Nap, Anthony Panagio (one of the ten largest shareholders of Nap), and Nap’s sureties, St. Paul and Greenwich Insurance Company. Both companies had issued labor and material payment bonds (surety bonds) on behalf of Nap.<sup>2</sup> St. Paul had issued the surety bonds in reliance on a General Agreement of Indemnity (Indemnity Agreement) executed by the Panagios and NAP (by Anthony Panagio).

After NAP answered the initial complaint, an amended class action complaint was filed,

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<sup>1</sup>The Panagios, before filing for bankruptcy, filed an unsworn opposition to the motion for summary judgment.

<sup>2</sup>The court (Cahn, J., retired) granted certification of the class, on consent, by order dated September 6, 2005.

which NAP also answered. St. Paul filed and served a third-party complaint for indemnity against NAP and the Panagios, all of whom answered.<sup>3</sup> NAP and the Panagios were represented by the same counsel, the law firm of Biaggi & Biaggi, until the court granted the attorneys' motion to be relieved. In that same order dated August 13, 2009, the court directed NAP to retain new counsel within thirty days. To date, NAP has not retained new counsel and has not made any further appearances.

After extensive settlement negotiations, St. Paul settled the Class Action Claim for \$1,190,000. This court approved the settlement after a fairness hearing, and on February 19, 2010, St. Paul paid \$1,190,000 to settle its portion of the Class Action claim. Nap and the Panagios did not object and did not appear at the Fairness Hearing. Plaintiffs then discontinued their action against Nap and Anthony Panagio by order dated February 2, 2010.

St. Paul derived its settlement authority from the Indemnity Agreement, which provides that,

The SURETY may settle or compromise any claim, liability, demand, suit or judgment upon any BOND or BONDS executed or procured by it, and any such settlement or compromise shall be binding upon the UNDERSIGNED.

Groseclose Affid., Exh. 1, ¶ 8. Also under the Indemnity Agreement: Nap and the Panagios agreed, jointly and severally, to indemnify and reimburse St. Paul from and against any and all loss, costs, damages, expenses and attorneys' fees, and any and all liability arising, resulting, sustained or incurred by reason of St. Paul having executed surety bonds, including payment, performance and other bonds, on behalf of Nap (¶ 6); St. Paul is entitled to recover from the

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<sup>3</sup>Greenwich filed and served a similar third-party complaint for indemnity, under a separate indemnity agreement, against NAP and the Panagios. This motion is made solely on behalf of St. Paul. The original complaint was filed in 2003. Motion practice and appellate proceedings ensued, which explains the lengthy delay.

indemnitors the costs, expenses and counsel fees incurred in enforcing the Indemnity Agreement (§ 6); and vouchers or other evidence of payment made by St. Paul are *prima facie* evidence of the fact and amount of the indemnitors' liability to St. Paul (§ 9).

To date, St. Paul has incurred and paid a total of \$1,669,159.37 in losses, damages and expenses, as set forth in the sworn statement of Tom Groseclose of St. Paul. The total is comprised of: the \$1,190,000 settlement amount; \$454,780.73 in counsel fees; and \$24,378.64 in consultant fees.

#### *Discussion*

“When a defendant has failed to appear . . . the plaintiff may seek a default judgment against him.” CPLR 3215(a). To succeed on a motion for a default judgment, the plaintiff must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim. *See* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3215:16, at 557.

As a corporation, Nap must be represented by an attorney. CPLR 321(a). Where a corporate defendant fails to appear by attorney, it is proper for a court to hold that defendant in default. *World on Columbus, Inc. v L.C.K. Rest. Group, Inc.*, 260 AD2d 323 (1st Dept 1999). Nap has had since August 13, 2009 to find new counsel, more than fifteen months. Its failure to do so, and failure to participate in any proceedings or motion practice during that period, establish Nap's default. *See Bilello v Genesis Seafood, Inc.*, 12 AD3d 474 (2d Dept 2006); *Evans v Conley*, 124 AD2d 981 (4th Dept), *app dis*, 69 NY2d 822 (1987) (finding appearance by non-lawyer for corporation a nullity).

However, St. Paul has failed to submit proof of service of the second third-party

complaint on Nap, as required by CPLR 3215(f). Without proof of service, or an affidavit attesting to service, the court cannot determine whether St. Paul also served Nap with an additional summons and complaint at least twenty days before seeking the default judgment. CPLR 3215(g)(4) requires the additional service when a corporation has been served pursuant to BCL 306(b) (service on Secretary of State). The court observes that these procedural prerequisites to granting a default judgment seem unnecessary where a corporate defendant has answered the complaint in question and repeatedly appeared in the litigation, but there is no ambiguity in the statute. Accordingly, it is hereby

ORDERED that the motion of defendant and third-party plaintiff St. Paul Mercury Insurance Company for a default judgment on its claim for indemnity against defendant and third-party defendant Nap Construction Company, Inc., is denied, without prejudice to renewing and re-filing with the proof required by CPLR 3215; and it is further

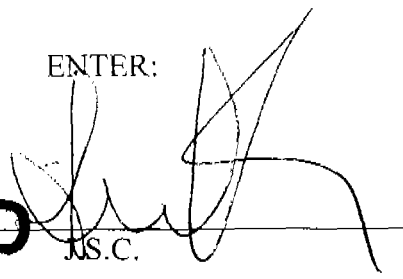
ORDERED that upon renewing and re-filing the motion, St. Paul may rely on and incorporate by reference its Memoranda of Points and Authorities and affidavits submitted in support of the original motion for default; and it is further

ORDERED that the court will dismiss St. Paul's second third-party complaint, with prejudice, unless St. Paul renews and re-files its motion for default within thirty days of entry of this order.

Date: November 30, 2010  
New York, N. Y.

ENTER:

**FILED**



J.S.C.

DEC 02 2010

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