[* 1]

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

PRESENT: HON. PAUL WOOTEN Justice

PART 7

NEW YORK CITY HOUSING AUTHORITY,

Plaintiff,

- against-

GREENWICH INSURANCE COMPANY and XL REINSURANCE AMERICA INC. (pertaining to an underlying action entitled *Sunil Manroop v New York City Housing Authority*),

Defendants.

INDEX NO. 400445/2007

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

GREENWICH INSURANCE COMPANY and XL REINSURANCE AMERICA, INC.,

Third-Party Plaintiffs,

- against-

FARH CONSTRUCTION CORPORATION and FARHANG NAJMI,

Third-Party Defendants.

The following papers, numbered 1 to 5, were read on this motion by defendants/third-party plaintiffs for partial summary judgment and for leave to file an amended third-party complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2, 3
Replying Affidavits (Reply Memo)	4, 5

Cross-Motion: ☐ Yes ☒ No

This is a declaratory judgment action by plaintiff New York City Housing Authority ("NYCHA" or "plaintiff") against defendants/third-party plaintiffs Greenwich Insurance Company

("Greenwich") and XL Reinsurance America Inc. ("XL") (collectively "the Co-Sureties" or "defendants/third-party plaintiffs"), for defense and indemnification under a Performance Bond. The Co-Sureties issued the Performance Bond on behalf of third-party defendant Farh Construction Corporation ("Farh"), in connection with a contract awarded by NYCHA to Farh for a brick repair project. A construction worker on the project fell off a ladder and brought a personal injury lawsuit against NYCHA and Farh, which NYCHA eventually settled for $200,000 in 2007. NYCHA seeks a declaration that the Performance Bond obligates the Co-Sureties to defend and indemnify it for the claims arising from that lawsuit. The Co-Sureties have brought a third-party action against Farh and Farhang Najmi ("Najmi") (collectively "the Farh defendants" or "third-party defendants") under a General Indemnity Agreement ("Indemnity Agreement"), seeking indemnification for any losses they incur as a result of the underlying action.

The parties have completed discovery and the Note of Issue was filed on November 17, 2010. The Co-Sureties now move for: (1) partial summary judgment, pursuant to CPLR 3212, granting judgment in their favor, as to liability, on their third-party claim against the Farh defendants under the Indemnity Agreement, and awarding attorney's fees and costs incurred through June 30, 2010, in the sum of $52,637.76; and (2) leave to file an amended third-party complaint, pursuant to CPLR 3025(b), to assert causes of action against the Farh defendants for breach of contract and specific performance based on their contractual obligation to deposit collateral security in the amount of $400,000, to cover losses and expenses associated with the present litigation. The Farh defendants have responded in opposition to the motion, and the Co-Sureties have filed a reply.[1]

---

[1]NYCHA has also filed a reply, but takes no position with respect to the Co-Sureties' motion against the Farh defendants. NYCHA's reply responds to certain statements by the Farh defendants that they claim are inaccurate.

BACKGROUND

In support of their summary judgment motion, the Co-Sureties submit, *inter alia*, an affidavit of Donald M. Bieda, a Surety Claims Manager from XL Specialty Insurance Company, the entity that administrators claims on behalf of the Co-Sureties; the Performance Bond; the Indemnity Agreement; a copy of the $200,000 settlement check paid by NYCHA; and the proposed amended third-party complaint. In opposition, the Farh defendants submit, *inter alia*, an affidavit of Najmi. The following facts are undisputed.

A. The Underlying Personal Injury Lawsuit

This action has its genesis in an accident that occurred on August 6, 2004, when a construction worker, Sunil Manroop ("Manroop"), fell off a ladder while working on a project involving repairs to the exterior brick at the Monroe Houses in Bronx, New York. At the time of the incident, Manroop was an employee of GHM Construction Co., a subcontractor of Farh, a general contractor. Najmi, an individual, was the sole owner of Farh. Farh was hired to work on the project pursuant to a contract with NYCHA, a public housing agency, that was awarded on January 29, 2003.

In January 2005, Manroop commenced a lawsuit against NYCHA and Farh in the Supreme Court, Bronx County, asserting causes of action under Labor Law §§ 200, 240(1) and 241(6) (*see Manroop v New York City Housing Auth.*, No. 7285/2005 [Sup Ct Bronx County]). NYCHA eventually settled with Manroop and paid him $200,000 in settlement of the case on October 18, 2007.

Pursuant to the contract between Farh and NYCHA, Farh was obligated to procure liability insurance on behalf of itself and NYCHA, and to defend, indemnify and hold harmless NYCHA for bodily injuries arising out of the work on the project. According to Najmi's affidavit, Farh procured insurance through Glenridge Insurance Agency ("Glenridge"), and a Glenridge employee named John Mulero ("Mulero"). When Farh presented the Manroop lawsuit to its

insurer for defense and indemnity, Farh learned, purportedly to its surprise, that although Glenridge and Mulero had issued a certificate of insurance naming Farh as an insured and NYCHA as an additional insured and had accepted premium payments from Farh, no policy had actually been procured by Glenridge and Mulero. Consequently, NYCHA paid its own counsel to defend itself in the Manroop action, as did Farh. In 2006, Farh commenced a separate action against Glenridge and Mulero for breach of contract and negligence in issuing certificates of insurance without actually obtaining insurance policies, which is still pending.

Farh has not defended and indemnified NYCHA for the Manroop lawsuit, despite demands to do so. NYCHA therefore seeks defense and indemnification from the Co-Sureties under the Performance Bond. The Co-Sureties, in turn, seek the same from the Farh defendants under the Indemnity Agreement.

B. The Indemnity Agreement and the Performance Bond

On May 7, 2001, in consideration of the Co-Sureties' issuance of surety bonds on behalf of Farh, the Farh defendants executed the Indemnity Agreement in favor of the Co-Sureties. The Indemnity Agreement contained a provision providing that the Farh defendants would indemnify the Co-Sureties for all losses and expenses, including attorney's fees, that the Co-Sureties incurred as a result of issuing surety bonds on Farh's behalf and/or in enforcing the Co-Sureties' rights under the Indemnity Agreement. Specifically, Paragraph 2 of the Indemnity Agreement provided:

> The Undersigned shall exonerate, indemnify and keep indemnified [the Co-Sureties] from and against any and all liability for losses and/or expenses of whatsoever kind or nature (including, but not limited to, interest, courts costs, and the cost of services rendered by counsel, investigators, accountants, engineers or other consultants, whether consisting of in-house personnel or third-party service providers) and from and against any and all such losses and-or expenses which [the Co-Sureties] may sustain and incur: (1) By reason of having executed or procured the execution of any Bond; (2) By reason of the failure of the Undersigned to perform or comply with the covenants and conditions of this

> Agreement; or (3) In enforcing any of the covenants and conditions of this Agreement. Payment by reason of the aforesaid causes shall be made to [the Co-Sureties] by the Undersigned as soon as liability exists or is asserted against [the Co-Sureties], whether or not [the Co-Sureties] shall have made any payment therefor. In the event of any payment by [the Co-Sureties], the Undersigned further agree that in any accounting between [the Co-Sureties] and the undersigned, [the Co-Sureties] shall be entitled to charge for any and all disbursements made by it in good faith in and about the matters contemplated by this Agreement under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether or not such liability, necessity or expediency existed; and that the vouchers or other evidence of any such payment made by [the Co-Sureties] shall be prima facie evidence of the fact and amount of the liability of the Undersigned to [the Co-Sureties]" (Notice of Mot., Ex. A).

The Indemnity Agreement also allowed the Co-Sureties to demand collateral security from the Farh defendants when a claim was made against them on an issued bond, providing at Paragraph 5 in pertinent part:

> "If a claim is made against [the Co-Sureties], whether disputed or not, or if [the Co-Sureties] deems it necessary to establish a reserve for potential claims, and upon demand from [the Co-Sureties], the Undersigned shall deposit with [the Co-Sureties] cash or other property acceptable to [the Co-Sureties], as collateral security in such amount as [the Co-Sureties] in its sole and absolute discretion deems necessary or appropriate to protect [the Co-Sureties] with respect to such claim or potential claims and any anticipated potential expenses or attorney's fees" (*id.*).

On December 11, 2002, the Co-Sureties issued the Performance Bond (No. SEC1001971) on behalf of Farh, as principal, and in favor of NYCHA, as obligee, in connection with Farh's contract for the work at the Monroe Houses.

C. The Present Action

On February 5, 2007, NYCHA commenced the instant action against the Co-Sureties seeking, *inter alia*, a declaratory judgment that the Performance Bond obligates the Co-Sureties to defend, indemnify and hold harmless NYCHA for Manroop's claims. The Co-Sureties deny

that they are so obligated under the Performance Bond.

On August 20, 2009, the Co-Sureties commenced a third-party action against the Farh defendants under the Indemnity Agreement, seeking judgment in the amount of any loss they suffer as a result of NYCHA prevailing in the present action, plus attorney's fees and costs. The Farh defendants do not dispute that they executed the Indemnity Agreement.

On April 27, 2010, the Co-Sureties made a demand under the Indemnity Agreement that the Farh defendants deposit collateral security in the sum of $400,000, to cover their past and potential future losses as a result of this lawsuit. The Farh defendants have not complied with their demand.

In addition, the Co-Sureties claim that they have incurred attorney's fees in connection with the present case for services provided through June 30, 2010, which total $52,637.76. They submit Beida's affidavit stating that the invoices from the Co-Sureties' counsel, Wolff & Samson PC, have been paid.

DISCUSSION

The Co-Sureties argue that they are entitled to partial summary judgment, as to liability, on their third-party claim against the Farh defendants for indemnification under the Indemnity Agreement. They contend that they are entitled to enforce the Indemnification Agreement because they issued the Performance Bond on behalf of Farh, and liability has been asserted against them as a result. They claim that they have incurred attorney's fees totaling $52,637.76 associated with defending against NYCHA's claims in this action and in prosecuting their third-party claim for indemnification, and that they may incur further losses and costs in the event NYCHA prevails or there is a settlement to which the Co-Sureties contribute. They also seek leave to amend the third-party complaint to assert causes of action for breach of contract and specific performance based on the Farh defendants' failure to deposit collateral security in the amount of $400,000, to cover their past and anticipated losses and expenses associated with

the instant litigation.

The Farh defendants argue that summary judgment should be denied because issues of fact remain in dispute. They claim that the scope of the Performance Bond is limited to "performance of the work" at the construction site, and that NYCHA has made no claims about the performance or completion of the work itself. They also argue that their obligations under the Performance Bond were fulfilled when they obtained liability insurance from Glenridge and Mulero, and that they are not in default under the Indemnity Agreement. They oppose the request to amend the third-party complaint on the grounds that the Co-Sureties have not cited any legal or factual reasons for not including their claims regarding collateral security in the original third-party complaint.

The Co-Sureties, in reply, argue that the Farh defendants' contentions regarding the merits of NYCHA's claims against the Co-Sureties, or their separately litigated claims against Glenridge and Mulero, have no bearing on issue of whether the Co-Securities are entitled to indemnification under the Indemnity Agreement. They further assert that their claims regarding collateral security had not yet arisen at the time of the original third-party complaint because their demand for collateral security was made on April 27, 2010, and the Farh defendants rejected the demand on May 27, 2010.

A. Summary Judgment Under the Indemnity Agreement

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of

the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

It is well established that indemnity agreements, such as the one at issue in this case, are consistently enforced (*see Prestige Decorating & Wallcovering, Inc. v United States Fire Ins. Co.*, 49 AD3d 406, 406 [1st Dept 2008]; *American Home Assur. Co. v Gemma Constr. Co., Inc.*, 275 AD2d 616, 619 [1st Dept 2000]). As stated by the First Department:

> "New York courts have held that pursuant to an indemnity agreement such as that signed by the third-party defendants herein, '*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'" (*Prestige*, 49 AD3d at 406, *quoting Frontier Ins. Co. v Renewal Arts Contr. Corp.*, 12 AD3d 891, 892 [3d Dept 2004] [emphasis supplied]).

Here, although the Indemnity Agreement is enforceable, the Court finds that the Co-Sureties have presented insufficient evidence to establish, prima facie, their entitlement to judgment as a matter of law (*see Republic Western Ins. Co. v RCR Builders, Inc.*, 268 AD2d 574 [2d Dept 2000]). There is no evidence that the Co-Sureties have, to date, made any payments

related to the Manroop settlement under the Performance Bond. Therefore, the requisite proof of payment that must be shown in order to enforce an indemnification agreement has not yet been established (*see Prestige*, 49 AD3d at 406; *Hartford Casualty Ins. Co. v Cal-Tran Assoc., Inc.*, 2008 WL 4165483, at *3 [D.N.J. 2008] [construing New York law and noting that "[c]ourts have upheld the validity of such indemnity agreement provisions and have held that the only relevant inquiry is whether the amount paid by the surety on the contract was reasonable and was done in good faith"]).

Moreover, notwithstanding the Co-Sureties' arguments otherwise, the Court is unaware of any New York authority in which a surety was found to have established a prima facie case as to liability under an indemnity agreement in the absence of detailed documentary proof of payment (*see Prestige*, 49 AD3d at 406-07 [surety made a prima facie showing of entitlement to summary judgment under indemnity agreement by submitting affidavit with itemized statement of loss and expense it incurred by reason of having executed surety bonds]; *John Deere Ins. Co. v GBE/Alasia*, 57 AD3d 620, 621 [2d Dept 2008] [plaintiff made prima facie showing as to liability under indemnity agreement by, *inter alia*, submitting an affidavit "which established the amount of payments made by the plaintiff under the bond at issue"]; *International Fidelity Ins. Co. v Spadafina*, 192 AD2d 637, 639 [2d Dept 1993] [surety stated a prima facie case under indemnity agreement by "submitting proper documentation of payment of the settlement to [subcontractors] as well as the fees and costs incurred in making a settlement"]; *Lee v T.F. DeMilo Corp.*, 29 AD3d 867, 868 [2d Dept 2006] [surety made prima facie showing by submitting an itemized statement of loss and expense incurred by reason of having executed performance bonds, together with copies of various invoices and cancelled checks in support of the amount]; *New York City Hous. Auth. v Olympia Constr., Inc.*, 2004 WL 1870497, *2 [Sup Ct NY County 2004] [surety established prima facie "entitlement to summary judgment by submitting a copy of the contract that the parties executed together with documentation of its settlement payment to

NYCHA"]). Notably, the cases cited by the Co-Sureties in support of their motion fail to establish a contrary interpretation of the Indemnity Agreement (*see, e.g., John Deere*, 57 AD3d at 621; *International Fidelity*, 192 AD2d at 639), and to the extent that the Co-Sureties rely upon language in the Indemnity Agreement requiring payment by the Farh defendants "whether or not the Co-Sureties shall have made any payment," the Court finds such language ambiguous as a matter of law (*see Discovision Assoc. v Fuji Photo Film Co., Ltd.*, 71 AD3d 488, 489 [1st Dept 2010]).

With regard to the request for an award of attorney's fees incurred through June 30, 2010, the Co-Sureties submit Beida's affidavit stating that invoices totaling $52,637.76 have been paid, and they request an immediate award of fees in that amount. Although the Co-Sureties may ultimately be entitled to recover attorney's fees and costs in connection with the claims resulting from the Performance Bond (*see Lori-Kay Golf, Inc. v Lassner*, 61 NY2d 722, 723 [1984]; *Aabco Sheet Metal Co., Inc. v International Fidelity Ins.* Co., 266 AD2d 23, 23-24 [1st Dept 1999]; *Hartford Fire Ins. Co., Inc. v Edgewater Const. Co., Inc.*, 45 AD3d 1304, 1305 [4th Dept 2007]), the Co-Sureties have presented insufficient proof to establish their prima facie entitlement to recover such fees for purposes of the present motion. The Court notes that Beida's conclusory affidavit contains no itemization as to the fees, and the Co-Sureties present no other evidence, such as invoices or canceled checks, to substantiate the payment or reasonableness of the fees (*cf. International Fidelity*, 192 AD2d at 639).

Since the Co-Sureties have failed to meet their initial burden of establishing their prima facie entitlement to judgment as a matter of law, it is unnecessary to consider the adequacy of the opposing papers (*see Winegrad*, 64 NY2d at 853; *Horne v John*, 68 AD3d 722, 722 [2d Dept 2009]). Accordingly, the Co-Sureties' motion for partial summary judgment under the Indemnity Agreement is denied.

B. Amendment Of The Third-Party Complaint

The decision whether to permit amendment of the pleadings is committed to the discretion of the Court, and leave to amend shall be freely granted absent a showing of prejudice or unfair surprise (*see McCaskey, Davies & Assoc., Inc. v New York City Health & Hosp. Corp.*, 59 NY2d 755, 757 [1983]). Here, the claims for breach of contract and specific performance relating to the Farh defendants' obligation to deposit collateral security arises from the same Indemnity Agreement that is the subject of the present lawsuit, and amendment would result in no significant prejudice or undue surprise to the parties (*see Muhlstock v Cole*, 245 AD2d 55, 59 [1st Dept 1997]; *Speroni v Mid-Island Hosp.*, 222 AD2d 497, 498 [2d Dept 1995]). The Court therefore grants the Co-Sureties' request for leave to amend the third-party complaint, and the proposed amended third-party complaint submitted by the Co-Sureties will, accordingly, be deemed served.

For these reasons and upon the foregoing papers, it is,

ORDERED that defendants/third-party plaintiffs' motion for partial summary judgment on the issue of liability under the Indemnity Agreement is denied; and it is further,

ORDERED that defendants/third-party plaintiffs' motion for leave to file an amended third-party complaint is granted; and it is further,

ORDERED that defendants/third-party plaintiffs' shall serve a copy of this Order, with Notice of Entry, upon all parties, and it is further,

ORDERED that, upon service of a copy of this Order with Notice of Entry thereof, the Court will deem served the defendants/third-party plaintiffs' amended third-party complaint.

This constitutes the Decision and Order of the Court.

Dated: June 13, 2011

FILED

JUN 27 2011

COUNTY CLERK'S OFFICE
NEW YORK

Paul Wooten J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST