

**Liberty Mut. Ins. Co. v 1040 Sherman Ave  
Supermarket, Inc.**

2012 NY Slip Op 31293(U)

May 9, 2012

Supreme Court, New York County

Docket Number: 600587/2010

Judge: Judith J. Gische

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY  
HON. JUDITH J. GISCHE  
J.S.C.**

**PRESENT:** \_\_\_\_\_  
*Justice*

**PART** 10

Index Number : 600587/2010  
LIBERTY MUTUAL INS. COMPANY  
vs.  
1040 SHERMAN AVE. SUPERMARKET  
SEQUENCE NUMBER : 003  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ [No(s)] \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ [No(s)] \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ [No(s)] \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is:

**FILED**

MAY 16 2012

NEW YORK  
COUNTY CLERK'S OFFICE

*motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date,*

*and a preliminary conference is  
scheduled for July 12, 2012 at  
9:30 am in Part 10, 60 Centre St.  
Room 232.*

Dated: 5/29/12

\_\_\_\_\_  
HON. JUDITH J. GISCHE  
J.S.C.

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

- 1. CHECK ONE: \_\_\_\_\_  CASE DISPOSED
- 2. CHECK AS APPROPRIATE: \_\_\_\_\_ MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: \_\_\_\_\_  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK IAS PART 10**

\_\_\_\_\_  
Liberty Mutual Insurance Company,

Plaintiff (s),

**-against-**

1040 Sherman Ave Supermarket, Inc.  
d/b/a C Town et al.,

Defendant (s).  
\_\_\_\_\_x

**DECISION/ ORDER**

Index No.: 600587-10  
Seq. No.: 003, 004

**PRESENT:**

Hon. Judith J. Gische  
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
<b>Motion Seq No. 3</b>	
Key Food n/m (CPLR 1003, 3211) w/AIK affirm, exhs .....	1
Liberty Mutual opp w/KB affirm, exhs .....	2
Key Food reply w/AIK affirm .....	3
	<b>FILED</b>
	<b>MAY 16 2012</b>
<b>Motion Seq No. 4</b>	
Coskun Bros n/m (CPLR 1003, 3211) w/CM affirm, exhs .....	4
Liberty Mutual opp w/KB affirm, exhs .....	5
Coskun reply w/CM affirm .....	6
<b>Other:</b>	
Various stips to adj .....	7

*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This case involves dozens of defendants. There are presently two motions before the court. Motion sequence number 3 is by the "Key Food" defendants, consisting of 200 Malcolm X Meat Corp., 319 Meat Market Corp., 77 Meat Corp., Alld

Food Corp., DJY Corp., DHY Sonamoo, LLC, Five Star Food & Grocery, LLC, Forbell Meat Corp., Marlam Food Corp., MK Food Corp., Rock Beach Food Corp., and Teams Market, Inc. Motion. Motion sequence number 4 is by Coskun Brothers Specialty Food, Inc. d/b/a Garden of Eden Farmers Market ("Coskun"). Key Food and Coskun (collectively "moving defendants") seek the dismissal of the complaint based upon Liberty Mutual Insurance Company's ("Liberty Mutual") alleged failure to join a necessary party (CPLR §§ 1001, 1003). The moving defendants also claim they have a complete defense founded upon documentary evidence, the court does not have subject matter jurisdiction over the matter, there is another action pending between the same parties for the same cause of action, the pleading fails to state a cause of action and/or the court should not proceed in the absence of a person who should be a party (respectively, CPLR § 3211 [a][1], [2], [4], [5], [7] and [10]). The motion is opposed.

The Key Food defendants have not answered the complaint but issue has been joined by Coskun. Although moving separately, the moving defendants adopt each other's arguments. Therefore, the motions are consolidated for decision in this decision/order.

### **Facts and Arguments**

The following facts are asserted in the complaint. For purposes of this motion only, these facts are accepted as true (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]).

Key Food and Coskun are members of the Wholesale and Retail Workers' Compensation Trust of New York ("Trust"), formerly known as the "Grocery Industry

Trust of New York." There is a Trust Agreement dated September 27, 1999 ("Trust Agreement"). The Trust was formed to satisfy the participating members' workers' compensation obligations. Workers' Compensation Law section 50 [3-a] ("WCL § 50 [3-a]") permits an employer to participate in a group self-insurance program, provided certain financial requirements are met. Pursuant to the Trust Agreement, the Trust remained liable to pay and administer all costs of a participating member "necessitated by the incurrence of liability resulting [from] injuries or disease, including death..." of an employee "while in the course of their employment..." with a participating member (Trust Agreement, Section I). Upon being approved as a participating member of the Trust, the participant satisfied its statutory obligation of providing Workers' Compensation Insurance. Section VIII of the Trust Agreement requires that a member "may terminate [participation in the Trust] by providing 60 days notice to the trust by notifying the Administrator in writing." Furthermore, upon being so notified, the Administrator of the Trust was required to notify the Chairman of the Workers' Compensation Board ("WCB"). Section V of the Trust Agreement provides that it is the "intention of the parties to this Agreement that the Trust Fund shall be used specially for the purpose of paying the Workers' Compensation and Employer's Liability Claims of Employees of the Participating Employers ....

Section VI of the Trust Agreement provides that:

The Trust shall not be personally liable for the payment of any Workers' Compensation claim or expense of the Trust .... All participating Employers and the Trust shall indemnify, defend and hold harmless each Member of the Board of the Trustees in his or her capacity as a Trustee...the Financial Institution, Administrator and Surety Company from and against all damages, losses, injuries, claims, actions... including but not limited to

attorneys' fees, arising out of or relating to the performance or obligations and responsibilities hereunder provided however that the Trustee, members of the Board of Trustees, Financial Institution...actions are consistent with and in discharge of such obligations and responsibilities herein.

Pursuant to Section II of the Trust Agreement, each participating member was required to execute a Joinder and Indemnification Agreement. The moving defendants are signatories to the Joinder and Indemnification Agreement dated April 30, 2002 ("Joinder Agreement"). In relevant part, the Joinder Agreement provides that the applicant seeking approval as a self-insurer "expressly agrees that it will be jointly and severally liable for the expenses and obligations of the Fund<sup>1</sup> and for the workers' compensation liability of all Participating Employers incurred while the Applicant is a Participating Employer. . . ." (Joinder Agreement ¶ 2).

Liberty Mutual issued a Surety bond [Bond No. 019-017-504] on April 8, 2004, effective July 21, 2002. The Bond states that Liberty Mutual is "held and bound to the Chair of Workers' Compensation Board of the State of New York and to the entitled employees...of [the Trust], a self-insured employer, as Principal, in the aggregate sum of Seven Hundred Fifty Thousand Dollars (\$750,000) for the payment of which the Surety binds itself. . ." The bond states that it was being filed by Trust in accordance with WCL § 50 [3] to secure "its liability as an employer." A rider to the Surety Bond dated October 29, 2007 modified the bond to \$780,000.

Thereafter, on July 25 2007, Ronald Phillips, Chairman of the Trust's Board of Trustees entered into a General Agreement of Indemnity, Commercial Surety ("Surety

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<sup>1</sup>Reference to the "Fund" in the Joinder Agreement is, by definition, reference to the "Trust."

Agreement") with Liberty Mutual. Pursuant to paragraph 5 of the Surety Agreement, the various individuals, entities, business, etc. who were participating members of the Trust agreed that they would:

exonerate, indemnify and save harmless the Surety from and against any and all losses, costs and damages of whatsoever kind or nature... which Surety may at any time sustain or incur by reason of: the request to execute, procure, or deliver any Bonds...

The Trust was later declared insolvent and on or about April 30, 2008, the WCB assumed the administration and final distribution of the Trust and upon doing, so WCB demanded payment on the bond. Liberty Mutual complied with that demand by tendering payment to the WCB on August 4, 2008. In a Memorandum of Understanding "August \_\_ 2010" ("MOU"), between WCB and other members of the Trust (not the moving defendants) it was agreed that "the Board shall provide the expert or experts selected by the former [Trust] Members with access to all information reasonably required by a set of duly accredited and licensed actuaries, claims reviewers and forensic accountants ..."

Liberty Mutual commenced a prior action against the Trust (Liberty Mutual Insurance Company v. Wholesale Retail Workers' Compensation Trust of New York, Sup Ct., N.Y. Co., Index No. 114950-08) ("2008 action"). The Trust defaulted in that action and the Hon. Barbara R. Kapnick enter judgment in favor of Liberty Mutual in the sum of \$405,000 with interest thereon from August 4, 2008. In this action, however, Liberty Mutual seeks to recover the money it paid under the bond directly from the participating members. Liberty Mutual's 1<sup>st</sup> cause of action is based upon principles of subrogation. Liberty Mutual contends that by satisfying the Trust's obligations, it is

surrogated to the rights of the WCB against the members of the Trust. The 2<sup>nd</sup> cause of action is to enforce the Surety Agreement. Liberty Mutual also seeks an accounting.

#### **Discussion**

The moving defendants contend that Liberty Mutual does not have standing to bring this action and that WCB is a necessary party, not only because it administered the Trusts' assets and liabilities, but also because the WCB has sole physical possession of all the Trust's books and records. CPLR § 1001 [a] mandates that a necessary party who is subject to the court's jurisdiction must be joined and failure to join the necessary party is grounds for the dismissal of the action (CPLR §§ 1003; 3211 [a][10]; Solid Waste Services, Inc. v. NYC Dept Env Protection, 29 AD3d 318 [1<sup>st</sup> Dept 2006]). A "necessary party" is someone who must be brought into the case if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action.

The WCB is not a necessary party to this action. Liberty Mutual has already issued payment to the WCB under the bond, thereby satisfying the Trust's (its principal's) debt to the WCB. Even if the WCB has the Trust's books and records, discovery is not a reason to dismiss this case or require that the WCB be joined as a named defendant. The MOU that the WCB entered into with a different participating member shows WCB's willingness to work with the participants to provide access to such records. In any event, the parties can engage in non-party discovery to obtain them. Therefore, the moving defendants' motion to dismiss based upon CPLR §§ 1001, 1003 and 3211 [10] is denied.

In its first cause of action, Liberty Mutual states that it is "subrogated to the

contractual, statutory and other rights of...the Trust, the Workers' Compensation Board...and/or the State of New York against the Member defendants." The moving defendants argue that it is impossible for Liberty Mutual to become subrogated to the rights of the WCB and or State of New York because plaintiff cannot step into the shoes of a state agency or the state itself.

Subrogation is akin to the secondary obligor's purchase of the obligee's claim against the principal obligor. When the underlying obligation is totally satisfied, then the secondary obligor may succeed to the rights of the obligee against the principal (Restatement (Third) of Suretyship & Guaranty § 27 [1996]).

Applying those principles of law to the facts of the complaint, Liberty Mutual issued a surety bond guaranteeing the Trust's obligation to the WCB (obligee) of financial soundness. When the Trust defaulted, Liberty Mutual paid the Trust's debt to the WCB thereby extinguishing it. Thus, Liberty Mutual (the secondary obligor) succeeded to WCB's right against the Trust. Although WCL § 50 [7][a] provides that when the status of a group self-insurance program is terminated, the bond, by operation of law, remains in the custody of the chair of the WCB "for such time as the chair may deem proper and warranted," the statute is otherwise silent about what rights, if any, the surety may assert. There being no statutory limitation expressed and moving defendants having cited no legal precedent to support their argument, this is not a reason to dismiss the complaint.

Liberty Mutual is a surety. By issuing a bond to the trust, it bound itself to be primarily liable for the Trust's obligations to WCB. The subrogation doctrine affords someone who has paid the debt owed primarily by another "every opportunity to be

reimbursed in full.” (Chemical Bank v. Meltzer, 93 N.Y.2d 296, 304 [1999]). A surety is, however, an insurer (see Insurance Law § 1113 [a][16]). An insurer is barred from asserting its right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered (North Star Reinsurance Corp. v. Continental Insurance Company et al., 82 NY2d 281 [1993]). Thus, the moving defendants are correct in their assertion that Liberty Mutual could not assert its right of subrogation against the Trust. Although Liberty Mutual obtained a money judgment in the 2008 action, the bona fides of that case are not before the court and the decision was, in any event, made on default. Thus, moving defendants further argument, that this action and the 2008 action are identical is incorrect and, therefore, not a basis upon which to dismiss the complaint.

Here, Liberty Mutual is proceeding against the participating members of the Trust, not the Trust, its direct insured. The moving defendants argue that Liberty Mutual is not allowed to this because, by suing the Trust’s individual participating members, Liberty Mutual is trying to disregard or circumvent the “corporate form” of the Trust. The moving defendants deny they agreed to indemnify Liberty Mutual and state that the lack of their signatures on the Surety Agreement is documentary evidence that they are not liable to the plaintiff.

Where employers elect to self insure through group self insurance, as provided under WCL § 50 [3-a], the group assumes the liability of all the employers with the group and pays all compensation for which the individual employers would be otherwise be liable. If the group fund falls to pay benefits, the individual employers are still liable for such payments. The moving defendants were participating members of the Trust.

By participating in this Trust, the approved individual members satisfied their statutory obligation to provide their workers with workers compensation insurance. As a condition to membership in the Trust, and pursuant to the Trust Agreement, each participating member agreed to "Indemnify, defend and hold harmless each Member of the Board of the Trustees in his or her capacity as a Trustee...the Financial institution, Administrator and Surety Company..."

To qualify for membership in the Trust, an applicant had to satisfy certain prerequisites, including execution of an indemnification agreement in the form set forth as an exhibit to the Trust Agreement. Under the Joinder Agreement, a Trust participant expressly agreed that it would be jointly and severally liable for the expenses and obligations of the Trust. Finally, pursuant to the Surety Agreement, the participating members – identified as "Indemnitors" – agreed to "exonerate, indemnify and hold harmless Liberty Mutual..." As defined in the Surety Agreement, Indemnitors encompasses: "the various individuals, corporations and/or other business entities Wholesale Retail Workers Compensation Trust of New York (individually and collectively hereinafter called "Indemnitors")..."

As members of the Trust when the surety bond was purchased, the individual members of the Trust are liable to indemnify and exonerate the Surety for claims covered by those bonds (see Levitt v. Fireman's Fund Insurance Companies, 54 AD2d 923 [2<sup>nd</sup> Dept 1976]). Although the moving defendants deny they were members of the Trust when the Surety Agreement was signed and, therefore, since neither of them were privy to the agreement, they cannot be held individually liable to Surety, neither of them provide documentary evidence that would definitively dispose of plaintiff's claims

(Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1<sup>st</sup> Dept. 2006]; Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 [1<sup>st</sup> Dept. 1995]). The documents they have provided, which include invoices, do not satisfy the moving defendants' burden. Therefore, the motion to dismiss on that basis (CPLR 3211 [a] [1]) is denied as well.

Among the relief sought by Liberty Mutual in the complaint is an accounting. The moving defendants argue that this claim is without any basis because none of the necessary elements for an accounting, including a fiduciary relationship, are present. Generally, a judicial accounting is available to a surety where collateral was pledged to secure the bond because it is the only way to ascertain the amount of the principal's liability (Sternbach v. Friedman, 34 A.D. 534 [1<sup>st</sup> Dept. 1898]). Here, however, no collateral was pledged and, therefore, there is no right to an accounting. Furthermore, Liberty Mutual does not address this point in its opposition. Therefore, the accounting cause of action is hereby severed and dismissed.

Affording the pleadings a liberal construction, taking the allegations of the complaint as true, and providing Liberty Mutual with the benefit of every possible inference, it has the causes of action pleaded. Although Coskun already answered the complaint, the Key Food defendants have not. Their time to answer is extended in the manner provided under CPLR 3211 [f].

No preliminary conference has yet been held in this case. A preliminary conference is hereby scheduled for July 12, 2012 at 9:30 a.m. in Part 10, 60 Centre Street, Room 232.

#### Conclusion

In accordance with the foregoing,

It is hereby

**ORDERED** that the motion by the "Key Food" defendants, consisting of 200 Malcolm X Meat Corp., 319 Meat Market Corp., 77 Meat Corp., Al-Hid Food Corp., DJY Corp., DHY Sonamoo, LLC, Five Star Food & Grocery, LLC, Forbell Meat Corp., Marlam Food Corp., MK Food Corp., Rock Beach Food Corp., and Teams Market, Inc. and the motion by Coskun Brothers Specialty Food, Inc. d/b/a Garden of Eden Farmers Market ("Coskun") is granted, only to the extent that the claim for an accounting is severed and dismissed; otherwise the motions are denied for the reasons state; and it is further

**ORDERED** that Coskun Brothers Specialty Food, Inc. d/b/a Garden of Eden Farmers Market shall answer the complaint in the manner provided under CPLR 3211 [f]; and it is further

**ORDERED** that a preliminary conference is hereby scheduled for **July 12, 2012 at 9:30 a.m. in Part 10, 60 Centre Street, Room 232**; and it is further

**ORDERED** that any relief requested but not specifically addressed is hereby denied; and it is further

**ORDERED** that this constitutes the decision and order of the court.

**Dated:** New York, New York  
May 9, 2012

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**

**MAY 16 2012**