

Berkley Regional Ins. Co. v 40-15 27th St. LLC

2020 NY Slip Op 30255(U)

January 23, 2020

Supreme Court, New York County

Docket Number: 651799/2019

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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BERKLEY REGIONAL INSURANCE COMPANY,
BERKLEY INSURANCE COMPANY,

INDEX NO. 651799/2019

Plaintiff,

MOTION DATE 01/08/2020

- v -

MOTION SEQ. NO. 001

40-15 27TH STREET LLC,COSTAS KATSIFAS,
CHRISTOPHER VARDAROS, 38-30 28TH STREET,
LLC,CHRISTINA KATSIFAS, DESPINA VLACHOS

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents and for the reasons set forth on the record, Berkley Regional Insurance Company (**BRIC**) and Berkley Insurance Company's (**BIC**) (collectively, **Berkley**) motion for partial summary judgment pursuant to CPLR § 3212 is granted.

THE RELEVANT FACTS

Berkley issued certain payment bonds and performance bonds (the **Bonds**) between 2004 and 2015 totaling \$70,229,000 on behalf of its principal, non-party Kafka Construction, Inc. (**Kafka**), for various multimillion-dollar public school construction projects for the New York City School Construction Authority (**SCA**). The purpose of the Bonds was to guarantee the performance of Kafka's work on each project and to guarantee the payment of the numerous subcontractors and

suppliers involved. In consideration for issuing the Bonds, Berkley required Kafka and the defendants in this action to enter into a series of indemnification agreements.

The parties first executed a certain General Indemnity Agreement (the **2004 Agreement**), dated February 18, 2004, by and among Berkley, Kafka, Costas Katsifas, Christopher Vardaros, Christina Katsifas, and Despina Vlachos, as amended by the Addendum to General Agreement of Indemnity (the **2008 Addendum**), dated May 7, 2008, by and between Berkley and 38-30 28th Street, LLC (**38-30 LLC**) (Costas Katsifas, Christopher Vardaros, Christina Katsifas, Despina Vlachos, and 38-30 LLC, collectively, the **2004 Indemnitors**). The parties subsequently executed an additional General Agreement of Indemnity (the **2014 Agreement**, and together with the 2004 Agreement, the **Agreements**), dated May 12, 2014, by and among Berkley, Kafka, 40-15 27th Street LLC (**40-15 LLC**), Costas Katsifas, and Christopher Vardaros (40-15 LLC, Costas Katsifas, and Christopher Vardaros, collectively, the **2014 Indemnitors**, and together with the 2004 Indemnitors, the **Indemnitors**).

Pursuant to the Agreements, the Indemnitors agreed to indemnify Berkley and hold Berkley harmless for all losses incurred, to pay interest on any payments made by Berkley from the date of payment, to deposit collateral with Berkley upon notice from Berkley to do so, and that an itemized statement of payments or copies of checks or drafts for such payments shall constitute *prima facie* proof of Berkley's bond losses (NYSCEF Doc. No. 3 ¶¶ 2, 3, 6, 8; NYSCEF Doc. No. 4 ¶¶ 1.01, 1.02, 2.01). The 2008 Addendum added companies that had been acquired by Berkley Surety Group, LLC (**Berkley Surety**), the d/b/a of BRIC and BIC, as additional obligors

to the 2004 Agreement, as contemplated under paragraph 11 of the 2004 Agreement, and to add 38-30 LLC as an additional indemnitor (NYSCEF Doc. No. 3 at 1-3).

Kafka's subcontractors, laborers, materialmen, and fringe benefit funds have filed claims against Berkley resulting in bond losses of \$2,056,930.50 to BRIC and \$472,586.47 to BIC, and unresolved claims of \$540,057.29 to BRIC and \$505,394.60 to BIC relating to the PK 391 and PK 597 projects for which Berkley seeks collateral.

Berkley commenced this action against 40-15 LLC, Costas Katsifas, Christopher Vardaros, 38-30 LLC, Christina Katsifas, and Despina Vlachos seeking indemnification for its payment bond losses and collateral for the unresolved claims. Berkley now moves for partial summary judgment on its first, second, third, and fourth causes of action pursuant to CPLR § 3212.

DISCUSSION

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

In an action for indemnification, a surety may establish entitlement to summary judgment upon proof of payment, unless the payment was made in bad faith or was unreasonable in amount (*Prestige Decorating and Wallcovering, Inc. v U.S. Fire Ins. Co.*, 49 AD3d 406, 406 [1st Dept 2008]). A surety may make a *prima facie* showing of entitlement to summary judgment by submitting, in addition to the indemnity agreement and the bonds, an affidavit by an officer of the surety in accordance with the terms of the operative indemnity agreement that provides an itemized statement of loss and expense incurred as a result of the execution of the bonds at issue (*id.* at 406).

Here, Berkley has submitted the Agreements (NYSCEF Doc. Nos. 3, 4), the Bonds (NYSCEF Doc. Nos. 17, 18), the notarized affidavits of Berkley's Assistant Vice President, Nancy Manno, itemizing the payments, and copies of the settlement checks for the bond loss payments (NYSCEF Doc. Nos. 21, 36). According to the express terms of the Agreements, a sworn affidavit by an officer of Berkley setting forth an itemized statement of payments *or* copies of the checks or drafts for such payments shall be *prima facie* evidence of the Indemnitors' liability (NYSCEF Doc. No. 3 ¶ 8; NYSCEF Doc. No. 4 ¶ 2.01). For the avoidance of doubt, Berkley has submitted both. And it is undisputed that the Agreements give Berkley the right to hold collateral from the Indemnitors for outstanding claims and lawsuits that are unresolved or are contingent on payments from the SCA (NYSCEF Doc. No. 3 ¶ 3; NYSCEF Doc. No. 4 ¶ 1.02). Simply put, this is a straightforward indemnification case in which Berkley has met its burden in establishing its entitlement to summary judgment as a matter of law. Indeed, as the First Department has observed, "Indemnity agreements such as the ones at issue in this case are

consistently enforced” (*American Home Assur. Co. v Gemma Const. Co., Inc.*, 275 AD2d 616, 619-20 [1st Dept 2000] [citing cases]).

In opposition, the defendants fail to offer any evidence to suggest that Berkley made any payments of bond claims in bad faith or that any payments were unreasonable in amount, and their affidavits do not allege fraud or collusion by Berkley in its acceptance of liabilities or payment of claims (*Colonial Surety Company v Eastland Construction, Inc.*, 160 AD3d 437, 438 [1st Dept 2018]). Instead, the Defendants argue that (i) this action is barred by the bankruptcy stay imposed pursuant to 11 U.S.C. § 362 as a result of non-party Kafka’s voluntary petition for bankruptcy, (ii) the affidavits of Nancy Manno are procedurally deficient and inadmissible, (iii) the 2008 Addendum is invalid, and (iv) Ms. Katsifas and Ms. Vardaros served a Notice of Termination on Berkley in 2008.

First, the defendants’ argument that the automatic stay imposed pursuant to 11 U.S.C. § 362 as a result of non-party Kafka’s voluntary petition for bankruptcy applies to this action fails. New York courts have consistently held that “the automatic stay provisions of the Federal Bankruptcy laws ‘do not extend to nonbankrupt codefendants’” (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Oxford Venture Partners, LLC*, 13 AD3d 89, 89 [1st Dept 2004], quoting *Maynard v Fuller Co.*, 236 AD2d 300, 300 [1st Dept 1997]; *Teachers Ins. And Annuity Assoc. of Am. v. Butler*, 803 F2d 61, 65 [2d Cir. 1986] [“It is well-established that stays pursuant to § 362 [a] are limited to debtors and do not encompass non-bankrupt co-defendants”]). The “unusual circumstances” under which courts may extend a bankruptcy stay to non-bankrupt defendants are not present in this case (*see A.H. Robins Co., Inc. v Piccinin*, 788 F2d 994, 999 [4th Cir 1986]). To wit, there

is not sufficient identity between Kafka and the Defendants that Kafka may be said to be the real party defendant and that a judgment against the Defendants would, in effect, be a judgment against Kafka, and the Defendants are not entitled to absolute indemnity by Kafka for any judgment that might result against them in this case (*id.*, citing *In re Metal Center, Inc.*, 31 B.R. 458, 462 [D. Conn 1983]).

In addition, the Defendants argue that the Affidavit of Nancy Manno in Support of Berkley's Motion for Summary Judgment (NYSCEF Doc. No. 16) is procedurally deficient because it lacks a certificate of conformity pursuant to CPLR § 2309 (c). The argument is unavailing. Berkley has submitted an Amended Affidavit (NYSCEF Doc. No 102) with a certificate of conformity, which is annexed to the Reply Affidavit (NYSCEF Doc. No. 105; the Amended Affidavit and the Reply Affidavit, collectively, the **Manno Affidavits**), which the court deems to be properly filed *nunc pro tunc* (CPLR § 2001; *Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]).

Next, the Defendants argue that the Manno Affidavits are inadmissible and of no probative value. To wit, they argue that Ms. Manno contradicts herself because she describes herself as the Assistant Vice President of Berkley Surety, which is the dba for BRIC and BIC, but then states that Berkley Surety is inactive, even though it is registered and in good standing with the New York State Department of State, and that because Ms. Manno claims that she works for Berkley Surety the dba of BRIC and BIC, the Manno Affidavits and the documents submitted therewith do not meet the requirements of the business records exception to the hearsay rule and are therefore inadmissible. The argument, however, fails. As an initial matter, it is of no moment

that Ms. Manno indicates that she is the Assistant Vice President of the dba of BIC and BRIC – and not the Assistant Vice President of BIC and BRIC in her affidavit. This is a distinction without meaning.

As the Court of Appeals has explained, affidavits submitted in support of a motion for summary judgment may be admissible so long as they meet the requirements of the business records exception to the rule against hearsay (*Viviane Etienne Medical Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 508 [2015]). In this case, there is a sufficient foundation for the Manno Affidavits and the documents submitted therewith to qualify business records as the Manno Affidavits are based on Ms. Manno’s personal knowledge as the officer in charge of the bonds at issue for BRIC and BIC and she personally created, received, and administered the records herself (Amended Manno Aff. ¶ 1; Manno Reply Aff. ¶¶ 3, 5). Ms. Manno’s personal knowledge in this case is a sufficient evidentiary foundation for her testimony (CPLR § 4518 [a]).

And, importantly, it is of no consequence that Berkley Surety exists. It certainly does not undermine Ms. Manno’s testimony (Manno Reply Aff. ¶¶ 1, 5). Further even if not actively engaged in business, Berkley Surety could also maintain its registration in good standing without creating an issue of fact as it relates to Ms. Manno’s testimony.

Nor does the Affidavit of Costas Katsifas raise a material issue of fact (NYSCEF Doc. No. 97). In his affidavit, Mr. Katsifas denies that he executed the 2008 Addendum on behalf of 28 LLC and denies that the 2008 Addendum modified or was in any way related to the 2004 Agreement

(*id.* ¶¶ 5, 6). He asserts that he “is uncertain as to which General Agreement of Indemnity the Addendum refers, as there may have been other documents which were presented to Christopher Vardaros and me for our signature,” and that “[i]t obviously, by its own terms, applies to another document (*id.* ¶¶ 6, 7). The defendants argue that these statements raise an issue of fact regarding the validity and enforceability of the 2008 Addendum. The problem with this argument, however, is that Mr. Katsifas makes only general, conclusory denials but does not give any hint as to what other agreement the 2008 Addendum could have possibly referred. To be clear, Mr. Katsifas states that “during the approximate ten-year period between 2004 and 2015, Christopher and I were presented with numerous documents relative to Kafka and other entities” (*id.* ¶ 6). The time period at issue, however, is between 2004 and 2008, not 2004 and 2015, and the only other paper in the record is the 2014 Agreement (NYSCEF Doc. No. 4). At oral argument, counsel for the Defendants confirmed that he was not aware of any other agreement which existed in 2008 to which the 2008 addendum could have referred.

As the Court of Appeals has observed, “bald, conclusory assertions or speculation and ‘[a] shadowy semblance of an issue’ are insufficient to defeat summary judgment” (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016], quoting *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

And, incredibly, Mr. Katsifas also states that he believes that the 2008 Addendum is fraudulent and claims that he did not sign it, even though his signature is on the page. Specifically, he states:

Based upon the suspicious formatting and inconsistent lines contained therein, I also believe that the document identified as Addendum and annexed as part of

Exhibit 1 to the Manno Affidavit not [sic] a true, complete and accurate copy of the original but rather, has been fraudulently altered or deleted. Although the document appears to contain a copy of my signature on the bottom, I dispute that this document is a true and accurate copy of the document that I signed (Katsifas Aff. ¶ 8).

This statement is not only self-serving, but it is also vague and conclusory at best and fails to raise an issue of fact. Mr. Katsifas does not offer any foundation for his qualifications to weigh in on the authenticity of a document based on allegedly “suspicious formatting and inconsistent lines,” which, it should be noted, are not apparent on the face of the document. **And although he denies that he signed the 2008 Addendum, his signature is notarized.**

The Defendants’ also argue that there is a material issue of fact relating to whether Ms. Katsifas and Ms. Vlachos terminated the 2004 Agreement by sending Berkley a Notice of Termination in 2008. The 2004 Agreement states that a termination notice is effective 30 days after receipt of a written notice of termination sent by registered mail (NYSCEF Doc. No. 3 ¶ 19). Berkley states that it searched its records and no such Notice of Termination was received in May 2008. And Berkley argues that because the Defendants fail to submit a return receipt, they are not entitled to a presumption of mailing.

In opposition, the Defendants submit a signed and notarized copy of a Notice of Termination, dated May 7, 2008 (NYSCEF Doc. No. 84). In his Supplemental Affidavit, John Zapas testifies that it is his standard office practice “as the owner of construction companies for over thirty years” to personally deliver all mail to the post office to be delivered (Supp. Zappa Aff. ¶ 3). After sending certified or registered mail, he states that he enters the mailing information in his records and maintains the records, including return receipts, for approximately five years (*id.*).

He further states that he discards all such records after five years unless he believes that there is a particular reason not to do so (*id.*). Mr. Zapa testifies that he prepared the Notice of Termination on behalf of Ms. Katsifas and Ms. Vardaros and mailed it by registered mail at the United States Post Office located on Main Street in Flushing, New York on May 8, 2008 (*id.* ¶ 4).

Significantly, the Notice of Termination is dated one day after the date of the 2008 Addendum (NYSCEF Doc. No. 3).

By establishing an office practice of personally delivering mail to the Post Office and maintaining records of mailings, the Defendants have established their entitlement to a rebuttable presumption that the Notice of Termination was properly mailed to Berkley (*Badio v Liberty Mut. Fire Ins. Co.*, 12 AD3d 229, 230 [1st Dept 2004]). Accordingly, because there is an issue of fact as to whether the Notice of Termination was properly served on Berkley, the motion for summary judgment is denied as it relates to Ms. Katsifas and Ms. Vlachos.

For the foregoing reasons, Berkley's motion for summary judgment on its first, second, third, and fourth causes of action is granted as against defendants 40-15 LLC, 38-30 LLC, Costas Katsifas, and Christopher Vardaros, and is denied as against defendants Christina Katsifas and Despina Vlachos.

Accordingly, it is

ORDERED that the plaintiffs' motion for summary judgment on its first, second, third, and fourth causes of action is granted as against defendants 40-15 27th Street LLC, 38-30 28th Street

LLC, Costas Katsifas, and Christopher Vardaros, and is denied as against defendants Christina Katsifas and Despina Vlachos; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiffs and against defendants 40-15 27th Street LLC, 38-30 28th Street LLC, Costas Katsifas, and Christopher Vardaros, jointly and severally, for contractual indemnification in the amount of \$1,245,711.27, together with interest at the rate of 9% per annum from the date of each payment bond loss payment until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk; and it is further

ORDERED that defendants 40-15 27th Street LLC, 38-30 28th Street LLC, Costas Katsifas, and Christopher Vardaros, jointly and severally, are directed to deposit collateral in the amount of \$1,314,251.43 with Berkley Regional Insurance Company within thirty (30) days of the date of the decision on this motion; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiffs against defendants 40-15 27th Street LLC, Costas Katsifas, and Christopher Vardaros, jointly and severally, for contractual indemnification in the amount of \$472,586.47, together with interest at the rate of 9% per annum from the date of each payment bond loss payment until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk; and it is further

ORDERED that defendants 40-15 27th Street LLC, Costas Katsifas, and Christopher Vardaros, jointly and severally, are directed to deposit collateral in the amount of \$505,394.60 with

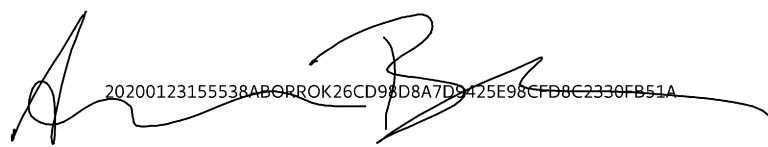
Berkley Insurance Company within thirty (30) days of the date of the decision on this motion;
and it is further

ORDERED that, upon the filing by the plaintiff with the General Clerk’s Office (60 Centre Street, Room 119) of a copy of this Order with notice of entry and a note of issue, the Clerk shall place this matter upon the inquest calendar for an assessment of attorneys’ fees; and it is further

ORDERED that the balance of the claims are severed and continued; and it is further

ORDERED that the parties are directed to appear for a status conference on March 24, 2020 at 11:30 AM (60 Centre Street, Room 238).

1/23/2020
DATE



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ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE