

**Atlantic Specialty Ins. Co. v Landmark Unlimited,  
Inc.**

2022 NY Slip Op 32248(U)

June 10, 2022

Supreme Court, New York County

Docket Number: Index No. 650912/2022

Judge: Andrew Borrok

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

-----X

ATLANTIC SPECIALTY INSURANCE COMPANY,

INDEX NO. 650912/2022

Plaintiff,

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 001

LANDMARK UNLIMITED, INC., LANDMARK SIGNS &  
ELECTRICAL MAINTENANCE CORP., LANDMARK  
ENTERPRISES OF NY INC., LYNN CALVANO, JOSEPH  
CALVANO, KATHERINE LETTERA, HEATHER  
CALVANO, ANTHONY CALVANO

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 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

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Upon the foregoing documents, Atlantic Specialty Insurance Company’s (the **Surety**) motion for a mandatory preliminary injunction pursuant to CPLR 6301, *et seq.*, is granted because the Surety has demonstrated a likelihood of success on the merits, the threat of irreparable harm in the absence of the injunction, and a balance of equities in its favor (*Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY2d 839, 840 [2005]). The Defendants<sup>1</sup> must deposit with the Insurance Company collateral security in the amount of \$8,466,064.00 pursuant to paragraph 3 of the General Indemnity Agreement (hereinafter defined). Lynn Calvano, Heather Calvano, Katherine Lettera, and Joseph Calvano (hereinafter, collectively, the **Individual Defendants**) have not

<sup>1</sup> For purposes of this motion, the Defendants shall refer to all named defendants in this action except for Anthony Calvano, who has not been properly served with the summons and complaint. For the avoidance of doubt, it is Mr. Calvano, grandson, and not Mr. Calvano the grandfather (deceased in 2014) that the Surety alleges signed the document.

rebutted the presumption that they did, in fact, sign the General Indemnity Agreement, and therefore the motion cannot be not denied as against them.

### The Relevant Facts and Circumstances

Reference is made herein to (i) a Performance Bond (the **Performance Bond**; NYSCEF Doc. No. 11) and a Payment Bond (the **Payment Bond**; NYSCEF Doc. No. 11, and the Payment Bond, together with the Performance Bond, hereinafter collectively, the **Bonds**) dated April 17, 2020, between Landmark Unlimited, Inc. (**Landmark Unlimited**) as Contractor, the Surety as Surety, and Sansi North America, LLC (**the Owner**) as Owner, each in the amount of \$8,166,064.00, in connection with a certain **Bonded Contract**, and (ii) a General Indemnity Agreement (the **General Indemnity Agreement**; NYSCEF Doc. No. 10) dated April 14, 2020 and signed on April 16, 2020, by the Defendants as indemnitors on behalf of the Surety, in consideration of the Surety executing the Bonds.

Pursuant to the General Indemnity Agreement:

The Indemnitors upon demand of the Surety, at any time and for any reason, including but not limited to Surety's receipt of a claim, shall deliver to the Surety collateral in the form and amounts acceptable to the Surety in its sole and absolute discretion. Any acceptable collateral provided to the Surety by the Indemnitors or any third party or the proceeds thereof, in whole or in part, may be held in the name of Surety and applied to any obligations of Indemnitors under this Agreement. The Surety shall not have any obligation to release such collateral until it has received a written release and conclusive evidence of its discharge without loss in the form and substance satisfactory to the Surety with respect to the Bonds and fulfillment by indemnitors of all obligations owed under this Agreement. Indemnitors agree that their failure to immediately deposit with Surety any sums demanded under this section shall cause irreparable harm to Surety for which it has no adequate remedy at law, and Surety shall be entitled to injunctive relief for specific performance of such obligation

(NYSCEF Doc. No. 10, ¶ 3).

The Surety alleges that, in the early spring of 2020, Landmark Unlimited, through its chairperson, Lynn Calvano, and its president, Joseph Calvano, requested that the Surety execute the Bonds on behalf of Landmark Unlimited. In connection with that request and the related underwriting process, the Surety requested certain financial information from Landmark Unlimited, its affiliates, Landmark Signs & Electrical Maintenance Corp. (**Landmark Signs**) and Landmark Enterprises of NY Inc. (**Landmark Enterprises**, and, together with Landmark Unlimited and Landmark Signs, **Landmark**), and Lynn Calvano. Lynn Calvano's financial information for 2019 and 2020 was provided (NYSCEF Doc. No. 9), but she denies ever having given permission for her financial information to be turned over. When the Surety determined that the financial information was satisfactory, it requested that Landmark, Lynn Calvano, and her family members execute the General Indemnity Agreement in favor of the Surety. The Surety asserts that Lynn Calvano's family members were included in order to avoid a potential transfer of assets from Lynn Calvano to her family. Each of the Individual Defendants signed for themselves, Lynn Calvano signed for Landmark Unlimited, Landmark Signs, and Landmark Enterprises, and each of the signatures was notarized.

The Bonds were issued on April 17, 2020. The Surety's agent issued an invoice to Landmark Unlimited for the premium for the Bonds in the amount of \$202,901.60 (NYSCEF Doc. No. 12) and Landmark Unlimited paid the premium by check bearing the signatures of both Lynn Calvano and Joseph Calvano (NYSCEF Doc. No. 13).

On January 4, 2022, the Owner advised the Surety that Landmark Unlimited was in default under the Bonded Contract and that the Owner was considering making a demand on the Performance Bond. As a result of that notice, the Surety sent letters to the Defendants dated January 12, 2022, and January 26, 2022 (NYSCEF Doc. Nos. 15-16), demanding that they deposit collateral with the Surety in the amount of \$8,466,064.00. This amount reflects the penal sum of the Performance Bond and an estimated \$300,000 in costs and expenses. In response to these letters, Joseph Calvano alleged that his notarized signature on the General Indemnity Agreement was not authentic. The Owner terminated the Bonded Contract with Landmark Unlimited by letter dated March 23, 2022 (NYSCEF Doc. No. 18). The Owner advised the Surety that it was making a formal claim against the Performance Bond (NYSCEF Doc. No. 19) and Landmark Unlimited's subcontractors and suppliers began making claims against the Bonds.

The Surety sued the Defendants by summons and complaint dated February 26, 2022, seeking (i) specific performance of the obligation to deposit collateral with the surety and (ii) indemnification for costs and expenses. Joseph Calvano, Katherine Lettera, and Heather Calvano responded by letters dated March 4, 2022, requesting to be removed from the General Indemnity Agreement because they are no longer affiliated with Landmark Unlimited (NYSCEF Doc. Nos. 22-24). The Surety now moves for a mandatory preliminary injunction compelling the Defendants to deposit collateral in the sum of \$8,466,064.00 with the Surety. The Defendants argue that the signatures on the General Indemnity Agreement are fraudulent and were not authorized.

### Discussion

On a motion for a preliminary injunction, the movant must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in its favor (*Nobu Next Door, LLC*, 4 NY3d at 840). A mandatory preliminary injunction is granted in situations where the granting of relief is essential to maintain the status quo pending trial of the action (*Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 264-265 [1st Dept 2009]). The demand for collateral by the Surety is a security in anticipation of possible losses, and the obligation to make a deposit is subject to enforcement by specific performance (*BIB Constr. Co. v Fireman's Ins. Co. of Newark, N.J.*, 214 AD2d 521, 523 [1st Dept 1995]). Notarization carries a presumption of due execution (*Genger v Arie Genger 1995 Life Ins. Trust*, 84 AD3d 471, 471 [1st Dept 2011]). This presumption cannot be rebutted by evidence of a doubtful character, including the unsupported testimony of interested witnesses or a bare preponderance of the evidence (*Paciello v Graffeo*, 32 AD3d 461, 462 [2d Dept 2006], *lv denied* 8 NY3d 802 [2007]).

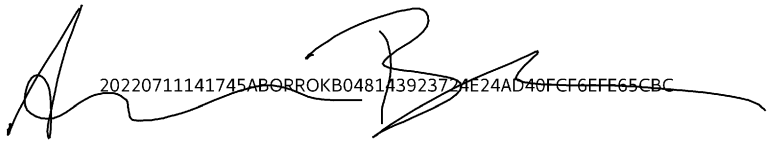
The Defendants fail to rebut the presumption of due execution of the notarized signatures on the General Indemnity Agreement. The actions of the Individual Defendants seems to demonstrate that they were aware of the General Indemnity Agreement and did not timely assert that their signatures were allegedly forged. The Individual Defendants each received a copy of the letters from the Surety demanding payment of the collateral, but only Joseph Calvano objected at that time on the basis that his signature was allegedly forged. Katherine Lettera and Heather Calvano both responded to those letters, but asked to be removed from the General Indemnity Agreement without objecting to the veracity of their signatures. Lynn Calvano did not raise the argument that her signature was allegedly forged until this motion. Lynn Calvano and Joseph Calvano

both signed the check to pay for the premium for the Bonds, which demonstrates that they both were or should have been aware from the beginning that the Bonds and the General Indemnity Agreement had been executed.

The Individual Defendants each submit an affidavit stating that their signatures were forged, but they provide no actual evidence to support that assertion. Lynn Calvano, Katherine Lettera, and Heather Calvano each submit a photocopy of their driver’s license, but those signatures are not sufficient to raise an issue as to the presumption of due execution of the General Indemnity Agreement. Other than the driver’s licenses, no evidence is submitted. This is insufficient (*John Deere Ins. Co. v GBE/Alasia Corp.*, 57 AD3d 620, 622 [2d Dept 2008]). The self-serving affidavits of each of the Individual Defendants cannot raise issues as to the veracity of the notarized signatures.

It is hereby ORDERED that the Surety’s motion for a mandatory preliminary injunction is granted; and it is further

ORDERED that, within 30 days of the date of this order, the Defendants shall deposit \$8,466,064.00 with the Surety as collateral.

  
20220711141745ABORROKB0481A392372FE24AD40FCF6EFE65CBC

6/10/2022  
DATE

ANDREW BORROK, JSC

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