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

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NORTH AMERICAN SPECIALTY INSURANCE COMPANY,

Plaintiff,

- v -

APS CONTRACTORS, INC.,APS CONTRACTORS GROUP, INC.,AAA WINDOWS & DOORS CORPORATION, MAC MULTI GROUP, LLC,GOCE BLAZESKI, ZANETA BLAZESKI, BOBI NIKOLSKI

Defendant.

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INDEX NO. 651872/2021

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. ANDREW S. BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, AAA Windows & Doors Corporation ("AAA"), Zaneta Blazeski, and Bobi Nikolski's (collectively, the **Defendants**) motion pursuant to CPLR § 2221(d) for leave to renew or reargue the Decision and Order of this Court dated April 27, 2022 (NYSCEF Doc. No. 109; the **Prior Decision**) must be denied. The facts are set forth in the Prior Decision. Familiarity is presumed.

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters not offered on the prior motion" (CPLR § 2221[d][2]; *Tadesee v Degnich,* 81 AD3d 570 [1st Dept 2011]). A motion to reargue is not intended to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented (*Setters v AI Prop. and Dev. (USA) Corp.*, 139 AD3d 492, [1st Dept 2016], *Foley v Roche*, 68 AD2d 558 [1st Dept

1979]). Nor can a motion to reargue serve as a basis "to advance arguments different from those tendered on the original application" (*Foley*, 68 AD2d at 568-69).

To prevail on a motion for leave to renew, the movant must put forth "new facts not offered on the prior motion that would change the prior determination," along with a "reasonable justification to present such facts on the prior motion" (*Assevero v Rihan*, 144 AD3d 1061, 1062 [2d Dept 2016] [citation and quotation omitted].

The Defendants argue that renewal and reargument is warranted because (i) this Court did not make a determination that the demand for the collateral was reasonable (ii) the Surety presented insufficient evidence to support its claim and (iii) a triable issue of fact remains whether the 2014 Indemnity Agreement was terminated as to Nikolski. In support of these arguments, the Defendant rehashes arguments previously made and rejected by this court and otherwise improperly offers new facts not previously made. CPLR 2221(d). The arguments all fail.

As an initial matter, Zaneta Blazeski's affidavits allege new facts not submitted in opposition to the prior summary judgment motion and to this extent are improper. CPLR 221(d)(2). In addition, the Defendants again argue that the evidence was insufficient and that an issue of fact exists as to whether the Indemnity Agreement was terminated. The court rejected both of these arguments. In any event, even if this Court were to consider the Blazeski affidavits, the Indemnity Agreements expressly contradict her assertions. The 2014 Indemnity Agreement was not terminated and superseded by the 2017 Indemnity Agreement. As this Court previously explained, the 2017 Indemnity Agreement is clear and not ambiguous and it provides that the execution of a subsequent

General Indemnity Agreement does not release, reduce or limit the rights and obligations under a prior General Indemnity Agreement and that the 2017 Indemnity Agreement was in addition to and not in lieu of any other agreement of indemnity whether then existing or entered into thereafter. Any modifications of the Indemnity Agreement were required to be in writing and there was no evidence of any waiver.

Finally, in support of the motion for summary judgment, the plaintiff adduced the affidavit of Bryan Seifert who is the Vice President for the Plaintiff. His duties included supervision of the bond claim file and he testified as to his personal knowledge as to the investigation and settlement of the bond claims itemized in the claims file which included the facts and documents and books and records maintained in the regular course of business of the Plaintiff. In support of the motion, the Plaintiff adduced the itemized statements of payments, the general ledger, the check register showing payment and performance bond losses and the claim and release documents:

> The bonds issued to APS and AAA for which the Surety has received claims are itemized in the Seifert Affidavit and have a total penal sum of $97,851,916.00. *See Seifert Aff.* ¶5 (NYSCEF Doc. 18), and Ex. 1 (Bonds) (NYSCEF Doc. 19). Thus, the maximum exposure for the Surety on these bonds is $97,851,916.00. As of the SJ Motion the Surety had paid $51,904,700.53 in performance bond claims (*Seifert Aff.* ¶26, Ex. 5 (NYSCEF Doc. 23), and $543,249.91 in payment bond claims (*Seifert Aff.*, Ex. 24 (NYSCEF Docs. 18 & 24)). The Surety had credited against Defendants' indemnity obligation the $24,825,246.08 received in cash payments and/or contract funds on the projects, reducing the payment bond losses demanded in the SJ Motion to $27,079,454.45. *See Seifert Aff.*, Ex. 5, p. 118-119 (NYSCEF Doc. 23). Leaving almost $46 million of possible exposure under the Bonds. At the time of the SJ Motion, the Surety anticipated additional net performance bond losses of $32,933,102.90, without consideration of loss adjustment expenses, assuming collection of the remaining contract balances and demanded the net amount accordingly in the SJ Motion. *See Seifert Aff.* (NYSCEF Doc. 18)

(*NYSCEF Doc. No.* 142, 23)

As the Court previously discussed:

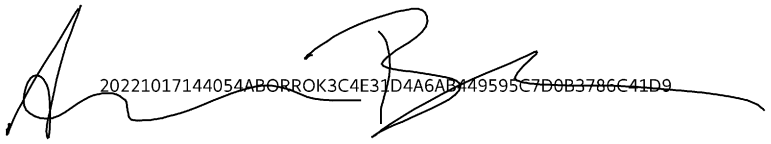
> It is undisputed that the Surety loaned monies to APS and that APS defaulted (NYSCEF Docs. No. 21, 92) and that the Surety incurred $27,079,454.45 in performance bond losses for completion of work (NYSCEF Doc. No. 23), $543,249.91 in payment bond losses for labor and materials (NYSCEF Doc. No. 24), and $3,670,039.74 in consulting and legal fees, costs and expenses (NYSCEF Doc. No. 74). Additionally, the Surety anticipates additional projected performance bond losses totaling $32,933,102.90 (id.). As such the Surety has met its burden of coming forward with sufficient evidence entitling them to judgment. (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v New York, 49 NY2d 557, 562 [1980]).

(NYSCEF Doc. No. 109, 2)

Given the foregoing, the Court held that the demand on the collateral was reasonable and that the plaintiff had met its prima facie burden of entitlement to judgment. Because the defendant failed to raise a material issue of fact, the Court entered judgment. Thus, the Court did not misapprehend the law or facts and summary judgment was properly granted and this motion must be denied.

The Court has considered the defendant's remaining arguments and finds them unavailing.

Accordingly, it is hereby ORDERED that the Defendants' motion to renew or reargue the prior motion is denied.



10/14/2022
DATE

ANDREW S. BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE