

Atlantic Specialty Ins. Co. v Sugar Bay Club & Resort Corp.

2022 NY Slip Op 33603(U)

October 17, 2022

Supreme Court, New York County

Docket Number: Index No. 653684/2020

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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ATLANTIC SPECIALTY INSURANCE COMPANY,

Plaintiff

Index No. 653684/2020

- against -

DECISION AND ORDER

SUGAR BAY CLUB AND RESORT CORP., JOSEPH
MOINIAN, MOIN MOINIAN (a/k/a DAVID
MOINIAN), and MORRIS MOINIAN,

Defendants

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LUCY BILLINGS, J.S.C.:

After a hearing October 13, 2022, and for the reasons more fully explained on the record then, the court grants plaintiff's motion for a preliminary injunction to the following extent and otherwise denies plaintiff's motion. C.P.L.R. §§ 6301, 6312(a). Defendants, jointly and individually, shall deposit with plaintiff cash or other collateral security with a value of at least \$780,805.47 by November 23, 2022, pursuant to the parties' General Indemnity Agreement dated July 15, 2019, which defendants admit they signed. This amount is the reasonable value of losses plaintiff may sustain arising from its execution of bonds on defendant Sugar Bay Club and Resort's behalf. Colonial Sur. Co. v. Eastland Constr., Inc., 77 A.D.3d 581, 582 (1st Dep't 2010); BIB Constr. Co. v. Fireman's Ins. Co. of Newark, N.J., 214 A.D.2d 521, 523 (1st Dep't 1995). These losses comprise nonparty

Carolyn Esperson's claim of \$712,595.37 against the bond, which plaintiff has paid; her further claim against Sugar Bay Club and Resort for attorneys' fees of \$26,540.50; and plaintiff's claimed attorneys' fees of \$41,669.60 incurred in this action payable under the General Indemnity Agreement.

Without the collateral, if plaintiff must await the disposition of this action to recover the above funds, plaintiff will have lost its right to security pending the disposition of this action, and that right will have been rendered meaningless, as relief at the end of the action will not remedy the lack of collateral while plaintiff's claims are pending. Colonial Sur. Co. v. Eastland Constr., Inc., 77 A.D.3d at 582; BIB Constr. Co. v. Fireman's Ins. Co. of Newark, N.J., 214 A.D.2d at 523. In fact the lack of collateral could render any judgment that plaintiff eventually obtains worthless.

In the General Indemnity Agreement itself, defendants acknowledged that their breach of their obligation to deposit collateral "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." Aff. of Jennifer M. Whritenour Ex. A § 3. See Vector Media, LLC v. Go New York Tours Inc., 187 A.D.3d 531, 532 (1st Dep't 2020); BDC Mgt. Servs, LLC v. Singer, 144 A.D.3d 597, 598 (1st Dep't 2016). Recognizing this obligation and the irreparable

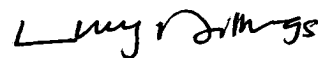
breach of the obligation, defendants challenge only the amount of collateral plaintiff has demanded, which the court has adjusted to a permissible reasonable amount.

Thus the injunction requires only that defendants perform the obligation that they agreed to perform, the breach of which they agreed would cause irreparable harm to plaintiff. Given defendants' undisputed obligation, plaintiff's undisputed irreparable harm, and the requirement that plaintiff must return to defendants any collateral that exceeds the losses plaintiff actually incurs, plaintiff has satisfied the criteria for a preliminary injunction. C.P.L.R. §§ 6301, 6312(a); Asprea v. Whitehall Interiors NYC, LLC, 206 A.D.3d 402, 403 (1st Dep't 2022); Vector Media, LLC v. Go New York Tours Inc., 187 A.D.3d at 531-32; East Fordham DE LLC v. U.S. Bank N.A., 170 A.D.3d 545, 546 (1st Dep't 2019).

When granting a preliminary injunction, the court gauges the amount of the undertaking plaintiff is to provide according to its potential liability if the preliminary injunction granted later proves to have been unwarranted. C.P.L.R. § 6312(b); Graubard Mollen Horowitz Pomerantz & Shapiro v. 600 Third Ave. Assoc., 93 N.Y.2d 508, 515 (1999); 1414 Holdings, LLC v. BMS-PSO, LLC, 167 A.D.3d 425, 426-27 (1st Dep't 2018); London Paint & Wallpaper Co., Inc. v. Kesselman, 138 A.D.3d 632, 633 (1st Dep't 2016); 1414 Holdings, LLC v. BMS-PSO, LLC, 116 A.D.3d 641, 643-44

(1st Dep't 2014). Given that both Espersen's recovery on her claim against Sugar Bay Club and Resort for attorneys' fees of \$26,540.50 and plaintiff's recovery of its claimed attorneys' fees of \$41,669.60 are uncertain, the court sets the required undertaking for the preliminary injunction at approximately half of the total of those claims: \$35,000.00. C.P.L.R. § 6313(b); Colonial Sur. Co. v. Eastland Constr., Inc., 77 A.D.3d at 582. See East Fordham DE LLC v. U.S. Bank N.A., 170 A.D.3d at 546; 1414 Holdings, LLC v. BMS-PSO, LLC, 167 A.D.3d at 426-27; 1414 Holdings, LLC v. BMS-PSO, LLC, 116 A.D.3d at 643-44); Building Serv. Local 32B-J Pension Fund v. 101 L.P., 115 A.D.3d 469, 473 (1st Dep't 2014). Plaintiff does not protest that this undertaking will impose a hardship. Plaintiff shall deposit \$35,000.00 with the Clerk of the Court by November 9, 2022. The parties shall appear for a Preliminary Conference by video November 1, 2022, at 11:00 a.m.

DATED: October 17, 2022



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C