SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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MLCJR, LLC,COX OIL, LLC,COX OPERATING, L.L.C., COX OIL OFFSHORE, L.L.C., CEXXI, INC.,COX INVESTMENT PARTNERS LP, ENERGY XXI GULF COAST, INC.

Plaintiffs,

- v -

PDP GROUP, INC. D/B/A AMYNTA SURETY SOLUTIONS, ASPEN AMERICA INSURANCE COMPANY, US FIRE INSURANCE COMPANY,

Defendants.

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INDEX NO. 657028/2022

MOTION DATE 07/01/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. MARGARET CHAN:

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

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Plaintiffs move, by order to show cause, pursuant to CPLR 6301, 6311, and 6313, for an order enjoining defendants PDP Group, Inc. d/b/a Amynta Surety Solutions (Amynta), Aspen America Insurance Company (Aspen) and US Fire Insurance Company (US Fire) (together, Defendants) from enforcing their demand letter dated June 2, 2022, which seeks to require plaintiffs to provide Amynta approximately $100 million in collateral through an irrevocable letter of credit (Demand Letter). Defendants oppose the motion.

Background

Plaintiffs are a group of affiliated companies whose business involves the extraction of offshore oil and gas in the Gulf of Mexico (NYSCEF #1- Verified Complaint, ¶ 3). Defendants Aspen and US Fire are sureties, and Amynta acts as their agent (NYSCEF # 30-Raino Aff., ¶ 1, n. 2).

The parties' relationship is governed by a General Agreement of Indemnity (GAI) dated April 15, 2016, which Plaintiffs executed as Indemnitors in favor of Aspen (NYSCEF # 13- Sanders Aff., ¶ 8; NYSCEF # 30, ¶¶ 5-7), Plaintiffs thereafter executed four riders to the GAI, including an October 6, 2020 Rider,

under which US Fire was added to the definition of a surety; US Fire subsequently replaced Aspen as the surety on the Bonds (NYSCEF # 14-the GAI and Rider; NYSCEF # 30, ¶ 9).

Aspen issued sixteen bonds to one or more of the Plaintiffs in support of their oil and gas operations totaling $99,443,460 (the Bonds) (NYSCEF # 13- Sanders Aff. ¶¶ 6-7; NYSCEF #30, ¶ 9). The majority of the Bonds were executed to ensure the proper plugging and abandonment takes place after oil and gas exploration and production activity cease (NYSCEF # 30, ¶ 12). The Bonds are required by state and federal law and/or private owners as a condition to the activities which allow Plaintiffs' exploration and drilling activities (*id.*, ¶ 13; NYSCEF # 7-Plaintiffs' Aff. in Support, at 1). In addition to Defendants, nine other surety companies have issued existing bonds on the Plaintiffs' behalf (NYSCEF #7 at 2).

The instant dispute has its genesis in an Oil & Gas Bond executed by Aspen on May 31, 2015, on behalf of Plaintiffs' affiliate EPL Oil & Gas, LLC (EPL) in the sum of $30,000,000 (the Devon Bond), which is one of the sixteen bonds subject to the GIA (NYSCEF # 13, ¶ 9; NYSCEF # 30, ¶ 21). On June 30, 2105, third parties Whitney Oil & Gas, LLC (Whitney) and Trimont Energy (NOW) LLC (Trimont) entered into a purchase and sale agreement (PSA) with EPL under which Whitney and Trimont were required to obtain a replacement bond for the Devon Bond by June 30, 2018 (*id*, ¶¶ 10-11; NYSCEF # 84-PSA, § 7.08). However, the replacement bond was not obtained (NYSCEF #13, ¶ 11; NYSCEF # 30, ¶ 30).

Defendants maintain that they became concerned about the risk posed by the Devon Bond because they were extending credit to Whitney and Tremont, which entities they never agreed to bond, and because of the acquisitions made by Plaintiffs and their affiliates in 2018, which led to a concern about their exposure on the $48 million Chevron Bond (NYSCEF # 59-Killian Aff. ¶¶ 9-11; NYSCEF #30, ¶¶25-31). Defendants submit proof that in 2021, Defendants expressed their concerns to Plaintiffs' surety bond broker regarding the Devon Bond and sought to have it replaced (NYSCEF # 30, ¶¶ 31-38, 41-43; NYSCEF #'s 50-52, 55; NYSCEF # 59, ¶¶ 15-20).

In March 2022, discussions between the parties continued regarding Defendants' request that Plaintiffs replace the Devon Bond or provide $30 million in collateral over five years (NYSCEF # 59, ¶¶ 23-25; NYSCEF # 13, ¶ 9). On May 18, 2022, EPL filed an action against Whitney and Trimont in the United States Court for the Eastern District of Texas for breach of the PSA which seeks damages and a direction ordering that Whitney and Trimont to replace the Devon Bond (NYSCEF #13, ¶ 13; NYSCEF # 83-Complaint-EPL Action). By email dated May 23, 2022, Amynta notified Plaintiffs that they were to execute a revised collateral agreement for the Devon Bond by May 26, 2022, or Amynta would send a formal indemnity demand for Plaintiffs' entire exposure, i.e., $100 million (NYSCEF # 15).

Plaintiffs failed to meet the May 26, 2022 deadline, and on June 2, 2022, Defendants issued the Demand Letter requiring Plaintiffs to provide "an irrevocable letter of credit in the amount of .... $99,443,460, the total amount of all undischarged liability under the [sixteen bonds] within ten (10) days of receipt of this letter" (NYSCEF # 16 at 2).

Plaintiffs filed this action on June 28, 2022, asserting claims for (i) a declaration that Defendants not be permitted to enforce the Demand Letter or demand additional collateral support of payment absent a reasonable basis for the demand, (ii) breach of contract based on allegations that Aspen and US Fire breached their obligations under the GAI by improperly and unreasonably demanding collateral in the full amount under the Bonds, (iii) breach of the covenant of good faith and fair dealing, and (iii) violation of General Business Law § 349 arising out of Defendants' bad faith demand for the full amount of the collateral under the Bonds (NYSCEF # 1, ¶¶ 50-74). The complaint also seeks a temporary restraining order and a preliminary and permanent injunction enjoining Defendants from enforcing the Demand Letter (*id.*, ¶¶ 75-87).

On July 1, 2022, Plaintiffs filed a proposed order to show cause seeking to enjoin Defendants from enforcing that Demand Letter and requesting that pending a hearing on the motion, that Defendants be temporarily restrained and enjoined from enforcing the Demand Letter (NYSCEF # 6). Defendants opposed the request for temporary relief via letter arguing, *inter alia*, that emergency relief was not required since Defendants could not enforce any right to collateral without seeking judicial intervention, and that, in this regard, Defendants filed a counterclaim to enforce their rights to specific performance under the GAI (NYSCEF # 22). Defendants filed a letter response to which Plaintiffs responded (NYSCEF #'s 24-25).

On July 5, 2022, Defendants filed their Verified Answer and asserted a Counterclaim on behalf of US Fire which alleges that Plaintiffs breached the GAI by refusing to deposit the demanded collateral security and seeks damages in the amount of $99,443,460, specific performance, and costs, expenses and attorney's fees resulting from the breach (NYSCEF #20-Counterclaim, ¶¶ 9-39).

On July 8, 2022, the parties agreed on the record that pending a decision on the Plaintiffs' motion for a preliminary injunction that:

> No party will take any action with respect to any of the bonds identified in the complaint filed in this action or the general agreement of indemnity and any riders thereto which are exhibits to the complaint filed in this action or any rights or obligations that any party has under the bonds or the general agreement of indemnity or the riders pending a decision from this Court on plaintiffs' application

> for a preliminary injunction unless there's an intervening agreement between the parties[1]

(NYSCEF # 89-Tr. dated 7-8-22 at 3).

On July 8, 2022, the court issued Plaintiffs' order to show cause and granted the interim relief as agreed to by the parties and set a briefing schedule which included an opportunity for Plaintiffs to reply[2] (NYSCEF # 26).

Preliminary Injunction Motion

"A preliminary injunctive is drastic remedy, and thus should not be granted unless the movant demonstrates "a clear right" to such relief (*City of New York v 330 Continental LLC*, 60 AD3d 226, 234 [1st Dept 2009]). Entitlement to a preliminary injunction requires a showing of (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor (CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.,* 4 NY3d 839 [2005]). If one of the three requirements is not satisfied, the motion must be denied (*Faberge Intern., Inc. v Di Pin,* 109 AD2d 235 [1st Dept 1985]). "While the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action...[a] party seeking the drastic relief of a preliminary injunction must nevertheless... establish a clear right to that relief under the law and the undisputed facts upon the moving papers" (*1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011] [internal citations and quotations omitted]).

Plaintiffs argue that they are likely to succeed on the merits of their claims because New York law prohibits the relief sought in the Demand Letter which, under the circumstances here, unreasonably requires Plaintiffs to cover collateral for the full amount of the Bonds even though only the Devon Bond is at issue.

Defendants counter that Plaintiffs' claims are without merit since under the GAI, Plaintiffs "waive[d] any and all defenses or challenges to the provision of

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[1] The parties further stated that the agreement applied to any litigation pending between U.S. Fire and Brad Cox (the sole indemnitor not named as a plaintiff who was released from his obligation under the GAI), including a then pending action in the United States District Court for the Northern District of Texas (NYSCEF # 89 at 3)

[2] After Defendants submitted their opposition, Plaintiffs sought an adjournment of the time to reply so that they could obtain expediated discovery, which request was opposed by Defendants (NYSCEF #'s 88-97). By interim order dated August 16, 2022, the court denied Plaintiffs' request, finding that they failed to demonstrate a sufficient basis for the discovery and, on consent of Defendants, extended the time for Plaintiffs to reply (NYSCEF # 98)

collateral" and agreed that Defendants have the right to seek specific performance of a demand for the provision of collateral in their "sole discretion and for any reason by written demand [for]... collateral... in the amount representing the total of any undischarged liability under the Bond" (hereinafter, the Collateral Provision) (NYSCEF # 14, ¶ 3). Moreover, Defendants point to evidence which they assert reflects that the collateral demand was motivated by concerns not only regarding the Devon Bond but to Plaintiffs' financial condition generally (NYSCEF #'s 59-81).

In reply, Plaintiffs argue that notwithstanding the language of the Collateral Provision, since Defendants are seeking specific performance which requires that the court invoke its equitable powers, Defendants' right to demand collateral is constrained by principles of equity requiring the court to assess the reasonableness of the demand so as not to impose hardship or disproportionate burden. Moreover, Plaintiffs argue that even if the waiver language in the Collateral Provision bars a challenge to the demand itself, the amount of the demand must still be reasonable. In addition, Plaintiffs submit a reply affidavit stating contrary to Defendants' allegations, their financial condition is strong (NYSCEF # 100-Sanders Reply Aff.,¶¶ 29, 30 [stating that as of June 30, 2022, Plaintiffs' oil and gas operations are "projected to produce more than 30 years on average, with a total revenue of $1 billion"]).

The starting point for analyzing the likelihood of Plaintiffs' success on the merits, is paragraph 3 of the GAI, which provides that:

> Upon Surety's [i.e. Defendants'] written demand, Indemnitors [i.e. Plaintiffs] shall promptly deposit with Surety a clean, irrevocable letter of credit on a form and from a bank acceptable to Surety, or shall provide another form of collateral acceptable to Surety... in the amount of any reserve Surety establishes for any existing liability or claim, and or any expenses associated therewith, whether or not any assertion or payment of such liability, claim, or expense has been made at the time of the Surety's demand. **Further, Indemnitors expressly and specifically agree that Surety in its sole discretion and for any reason may, by written demand, require Indemnitors to provide the Surety within ten (10) days collateral, as defined herein, in the amount representing the total of any undischarged liability under the Bond as determined by the Surety in its sole discretion.** In the event of any increases in Surety's undischarged liability, Indemnitors shall supplement the Collateral to match the increase. * * * * **To the fullest extent allowed by law, Indemnitors waive any and all defenses or challenges to the provision of collateral pursuant to this Agreement. Indemnitors further expressly stipulate and agree that Surety will have no adequate remedy at law should Indemnitors fail to post any**

collateral required herein, and agree that Surety is entitled to specific performance of the obligation to post collateral.

(NYSCEF # 14, ¶ 3 [emphasis supplied]).

There is no dispute that collateral security provisions are enforceable under applicable New York law (*BIB Contr. Co. v Fireman's Ins. Co.,* 214 AD2d 521, 523 [1st Dept 1995]; *Colonial Sur. Co. v Genesee Valley Nurseries, Inc.*, 5 AD3d 1024, 1025 [4th Dept 2004]; *Travelers Cas. And Sur. Co. v Dale*, 542 F Supp 2d 260, 263-64 [SD NY 2008] ["A collateral security provision in an indemnity agreement, which is clear and unambiguous ... is valid and enforceable."]). At issue is whether the amount demanded for collateral security must be reasonable notwithstanding the language of the GAI requiring that Plaintiffs post collateral in the Surety's "sole discretion and for any reason" [and] "in the amount representing the total of any undischarged liability under the Bond as determined by the Surety in its sole discretion."

Defendants argue that based on the plain language of the Collateral Provision no reasonableness requirement can be inferred and that cases relied on by Plaintiffs are not the contrary as they involved different factual circumstances — specifically involving when the demand for collateral was made pursuant to provision related to the surety's potential liability for claims in pending or anticipated litigation (citing e.g. *BIB Contr. Co. v Fireman's Ins. Co.,* 214 AD2d at 522 [provision stated that "in the case of pending litigation, plaintiff will furnish defendant with a cash reserve ...[and] promises 'to deposit with [defendant], immediately upon demand a sum equal to any loss reserve...that [defendant], in its sole discretion establishes in connection with any bond"']; *RLI Ins. Co. v Pro-Metal Constr.*, 2019 WL 1368851, *3 [SD NY 2019] [where the agreement provided for payment by the insured to the plaintiff surety "'equal to the amount of the reserve set by [surety] or equal to such amounts as [surety], and its sole judgement, deems sufficient to protect it from loss or potential loss...as soon as liability exists or is asserted against the [surety]'").

Contrary to Defendants' argument, under New York law, the principles underlying the reasonableness requirement are not limited to circumstances where a surety seeks collateral for claims related to pending or potential litigation. Instead, the precedent broadly holds that equitable remedy of specific performance of collateral security provision depends on the reasonableness of a demand (*see e.g., BIB Contr. Co. v Fireman's Ins. Co.,* 214 AD2d at 523 [noting that courts will require the party to comply with the surety's demand "[s]o long as the sum demanded is reasonable..."); *U.S. Fid. And Guar. Co. v J. United Elec. Contracting Corp.*, 62 F Supp 2d 915, 922 [SD NY 1999][same]; *Safeco Ins. Co. of Am. v M.E.S., Inc.*, 2010 WL 3928606 [ED NY Oct 4, 2010] [imposing reasonableness requirement where indemnity agreement provided that the indemnitor "on request of Surety, [to]

procure discharge of Surety from any Bond" and, "[i]f such discharge is unattainable," to "deposit collateral with Surety, acceptable to Surety, sufficient to cover all exposure under such bond or bonds"]). In this regard, because a grant of specific performance is discretionary, despite the language of the GAI stating that Plaintiffs will post collateral in the full amount of the Bond, Defendants are not automatically entitled to specific performance of this obligation (*Concert Radio, Inc. v GAF Corp.*, 108 AD2d 273, 278 [1st Dept 1985], *aff'd* 73 NY2d 766 ["[i]t has long been settled that specific performance will not be granted where it would cause unreasonable hardship or injustice to the party, even if it was the one who breached the contract"][internal citations omitted]).

As for the claim for breach of the implied duty of good faith and fair dealing, under New York law, every contract implies a covenant of good faith and fair dealing in the course of performance (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [internal citations omitted]). "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract' " (*id.*, quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 387 [1995]). Moreover, as noted by Plaintiffs, when, as here, "the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercise of discretion" (*Dalton*, 87 NY2d at 389 [internal quotation and citation omitted]).

Although the reasonable standard applies to Defendants' demand for collateral under the GAI and the amount of the demand cannot be "arbitrary and irrational," Plaintiffs have not established that they will succeed on the merits of their claims for breach of contract and breach of the implied duty of good faith and fair dealing. Specifically, it cannot be said on this record that Defendants' demand for amount of the entire exposure under the Bonds was unreasonable or lacked a good faith basis. Thus, to the extent Plaintiffs could show that the waiver provision does not apply to a challenge to the amount of collateral sought, they have not demonstrated likelihood of success on the merits.

In any event, even if, for the sake of argument, Plaintiffs could adequately demonstrate a likelihood of success on the merits, including after a hearing, they would not be entitled to injunctive relief as they cannot show that they will suffer imminent and irreparable harm in the absence of such relief. In this regard, Plaintiffs urge that they have demonstrated irreparable harm because the enforcement of the Demand Letter will destroy their business and result in the need for bankruptcy protection by causing other sureties to take similar actions which would result in a demand for all their liquid capital for the entirety of their bond obligations (citing e.g. *Advent Software, Inc. v SEI Global Services, Inc.*, 195 AD3d 498, 499 [1st Dept 2021] ["[t]he loss of the goodwill of a viable, ongoing business may constitute irreparable harm warranting the grant of preliminary injunctive

relief']). However, as Defendants point out, they cannot enforce their rights under the Demand Letter and require that Plaintiffs provide collateral in the amount of the Bonds absent a court order and that they have asserted a counterclaim for such relief. And, to the extent Plaintiffs alternatively seek to prevent Defendants from impairing their contractual rights under the GAI by seeking to cancel the Bonds or otherwise avoid their contractual obligations, they have failed to show that there is an imminent threat of such harm exists and that it is not remote or speculative (*Golden v Steam Heat Inc.*, 216 AD2d 440, 442 [2d Dept 1995] [reversing injunction because "record merely indicates that plaintiffs are concerned" that action to be enjoined "will have an adverse effect"])

Considering the foregoing, Plaintiffs' motion for a preliminary injunction must be denied, and the court need not reach whether the equities weigh in favor of Plaintiffs.

Conclusion

In view of the above, it is

ORDERED that Plaintiffs' motion for a preliminary injunction is denied; and it is further

ORDERED that a preliminary conference shall be held on January 18, 2023 at 2:30 pm via Microsoft Teams, with a link to be sent to the parties by the court.

12/19/2022
DATE

MARGARET CHAN, J.S.C.

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