

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

2023 NY Slip Op 31308(U)

April 20, 2023

Supreme Court, New York County

Docket Number: Index No. 650912/2022

Judge: Andrew Borrok

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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: COMMERCIAL DIVISION PART 53

-----X

ATLANTIC SPECIALTY INSURANCE COMPANY,

Plaintiff,

- v -

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

Defendant.

INDEX NO. 650912/2022

MOTION DATE 11/21/2022,
12/19/2022,
03/03/2023

MOTION SEQ. NO. 003 004 005

**DECISION + ORDER ON
MOTION**

-----X

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

Plaintiff,

-against-

CHERYL KREMENICK

Defendant.

Third-Party
Index No. 595547/2022

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 150, 151

were read on this motion to/for AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 188, 189

were read on this motion to/for RENEWAL

The following e-filed documents, listed by NYSCEF document number (Motion 005) 198, 199, 200, 201, 204, 205, 206, 207, 208, 209, 211, 212, 213, 214, 215, 216, 217

were read on this motion to/for CONTEMPT

Upon the foregoing documents, (I) Landmark Unlimited, Inc., Landmark Signs & Electrical Maintenance Corp., Landmark Enterprise of NY Inc., Lynn R. Calvano, Katherine L. Lettera and Heather K. Calvano's (collectively, the **Landmark Defendants**) motion (Mtn. Seq. No. 4) to renew the Decision and Order dated June 10, 2022 *affd* 2023 WL 2483600 (1st Dept 2023) (the **Prior Decision**; NYSCEF Doc. No. 78; NYSCEF Doc. No. 210) must be denied (*Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]), (II) NIBONY's (hereinafter defined) (Mtn. Seq. No. 3) to amend their answer and assert certain counterclaims must be granted except to the extent that they seek sanctions as a separate cause of action and (III) the Surety's motion (Mtn. Seq. No. 5) for contempt must be granted.

I. The Landmark Defendants' motion for renewal (Mtn. Seq. No. 4) must be denied

In support of their motion, the Landmark Defendants argue (i) their clients dispute that they signed General Indemnity Agreement (the **GIA**), and (ii) (a) that the affidavit of Drew Muller and (b) the unverified preliminary report of their handwriting expert create issues of fact as to whether the Surety is likelihood to succeed on the merits that the GIA is a duly executed and enforceable agreement. Simply put, they are wrong. Indeed, for the reasons set forth below, the subsequent submissions only serve to confirm that the Prior Decision was correct and suggest that leave should be granted to the Surety to bring a motion for summary judgment by order to show cause.

As an initial matter, the Court notes that although the Landmark Defendants have since this action was initiated taken the position that their signatures on the GIA were unauthorized and forged, previously, both Katherine Lettera and Heather Calvano took a different position.

Previously, they had requested removal from the GIA because they were “no longer affiliated financially with Landmark Unlimited, Inc” (NYSCEF Doc. Nos. 24 and 25). This matters and is fundamentally at odds with their current position. Were their signatures forged as they now allege, one would expect a different communication – *i.e.*, a communication demanding removal from the GIA based on the assertion that their signatures were forged. No such contemporaneous communication was however sent. Inasmuch as their mere denial of signing the papers was previously considered by this Court, this does not in it of itself adduce any new facts warranting a motion to renew. Indeed, to the extent that the Surety looked to impose judgment based on this Court’s finding that the Surety is likely to succeed on the merits, this Court denied the Surety’s request requiring only that the collateral be placed in escrow while the issue is litigated (NYSCEF Doc. No. 152).

Drew Muller, Executive Vice President of National Insurance Brokerage of New York, Inc. (**NIBONY**), in his affidavit (the **Muller Affidavit**; NYSCEF Doc. No. 143) explains in great detail the course of conduct between James Napolitano, the Landmark Defendants’ accountant, the Landmark Defendants and NIBONY. The Muller Affidavit which is corroborated by certain emails maintained as business records firmly establishes that (i) Mr. Napolitano acted as agent for the Landmark Defendants in arranging the bonds and the surety and (ii) due execution and delivery of the GIA occurred:

3. James Napolitano ("Napolitano") is a Certified Public Accountant and the accountant for Landmark.
4. Alysia Eide was an employee of Landmark and the assistant of Lynn R. Calvano ("LRC"). I dealt with her in that capacity.
5. NIBONY is an insurance broker licensed to act as such in the State of New York.

6. I am a licensed insurance broker and an employee of NIBONY.
7. Cheryl A. Kremenick is an employee of NIBONY.
8. Wharton Surety Consultants ("WSC") is a Surety Bond Broker and sometimes underwriting agent for certain sureties.
9. Jeff Longenecker ("Longenecker") is a Bond Broker who works at WSC.
10. NIBONY had a prior relationship with Napolitano who referred business to it in the past.
11. *Napolitano referred Landmark to NIBONY and it assisted in procuring property and casualty insurance prior to the events giving rise to this lawsuit.*
12. *Napolitano always acted for Landmark when it came to matters regarding the procurement of insurance.*
13. *Napolitano, acting for Landmark, approached NIBONY for assistance in getting the bonds for a new signage contract that I learned was for a company called Sansi.*
14. NIBONY reached out to Longenecker at WSC.
15. Longenecker told NIBONY that WSC could issue both Payment and Performance bonds but they would be subject to the execution of a General Indemnity Agreement ("GIA").
16. WSC also required financial statements of Landmark and the individuals.
17. I advised Napolitano and Lynn and they knew that the GIA would have to be executed as a condition to the issuance of any bond.
18. Napolitano and Lynn were advised and knew that one of the reasons the financial statements were needed was to make sure that there was enough personal financial security so that the surety could rely on the individuals who signed the GIA if and when the time came to call upon that security.
19. On behalf of Landmark, LRC and the others Napolitano provided various financial documents to NIBONY and we forwarded them to WSC.
20. Among them were various financial compilations created by Napolitano showing that Lynn had a network of over \$52 Million dollars at the time the bonds were applied *for*. (Exhibit "A," NYSCEF #: 96).
21. On or about April 14, 2020, I sent an email to Napolitano at 10:23 am, (Exhibit "B"), telling him that certain information was needed to finalize the GIA as follows:

From: Drew Muller <DMuller@nibony.com>
 Sent: Tuesday, April 14, 2020 10:23 AM
 To: nappicpa@aol.com
 Subject: Landmark Bond - URGENT
 Importance: High

Hi Jim,

Please see below from the band underwriter that they need to finalize the indemnity agreement. If you can please get for me asap, I will get it over to them ASAP.
 Thanks -
 Drew

Drew:

I am almost done setting up the Indemnity agreement for the Calvanos, in order to get it finished, please provide the following:

- Address, Federal I.D. number, name of person signing and their title for the following:
 - Landmark Signs & Electric
 - Landmark Enterprises
- Address and social security number for the following:
 - Joseph Calvano
 - Katherine Lettera
 - Heather Calvano
 - Anthony Calvano

As soon as I have the above info, I can turn around the indemnity agreement right away.
 Thanks.

Drew Muller - Executive Vice President

22. By email that same day, at 1:39 pm I sent Napolitano another email, (Exhibit "C"), stating the following as to the GIA:

From: Drew Muller <DMuller@nibony.com>
 Sent: Tuesday, April 14, 2020 1:39 PM
 To: nappicpa@aol.com
 Cc: Drew Muller
 Subject: Landmark Bond - indemnification Agreement to be signed
 Attachments: Landmark Unlimited GIA.doc
 Importance: High

Jim,

Please see attached and below. If you have any questions please give me a call I am here.

Drew, I am pleased to forward the indemnity agreement for Landmark along with the terms of approval, below. Please have this printed on standard size paper and have it signed as follows:

- On the second page, Lynn should sign on the line above her printed name and her signature should be acknowledged by a notary
- On the third page, Lynn should sign twice on the lines above her printed name and her signature should be acknowledged by a notary
- On the fourth page Lynn and Joseph should sign on the lines below their printed names and their signatures should be notarized
- On the fifth page Katherine and Heather should sign on the lines below their printed names and their signatures should be notarized
- On the sixth page Anthony should sign on the line below his printed name and his signature should be notarized

When this is complete, please return the original signed document to my office. When I have received the original in my office, I am authorized to release the required bonds.

Any questions, please give me a call.

Thanks again for the submission on behalf of Landmark enterprises. We are pleased to offer support for the \$8,166,064 bond at the following terms.

- 2.5% rate (After 2 years, the project may be subject to a surcharge based on the project's cost-to-complete)
- Corporate Indemnity of Landmark Unlimited, inc; Landmark Signs and Electrical Maintenance Corp; Landmark Enterprises; and any other bonded principal(s)
- Personal Indemnity of Lynn R Calvano, Joseph J Calvano, Katherine L Lettera, Heather K Calvano, and Anthony S Calvano
- Annual corporate financial statements within 120 days of period end
- Annual personal financial statements with 120 days of period end
- Project status updates upon request

Thanks

-Drew

Drew Muller - Executive Vice President
National Insurance Brokerage of New York, Inc.

23. *On or about April 14, 2020, following the email exchange, I had a telephone call with Napolitano and [Lynn Calvano], in which we discussed the procurement of the bonds and the need for the GIA.* This was in addition to prior communications with them as to the underwriting including the GIA.

24. Napolitano asked if we could notarize the signatures as due to Covid, he could not get the signatures notarized otherwise.

25. *On or about April 16, 2020, Napolitano personally came to the office of NIBONY and presented me with a fully signed GIA.*

26. *He represented that it contained the authorized signatures of those listed on the GIA and that NIBONY was authorized to notarize them under these extraordinary circumstances.*

27. NIBONY submitted the executed GIA toWSC.

28. *Based on the executed GIA and the financial information submitted by Napolitano for the Defendants the surety agreed to issue the bonds.* (Exhibit "E," NYSCEF #:46)

29. Attached to the motion are emails from NIBONY's files.

30. The exhibits are true and accurate copies of those documents.

31. All these documents were kept in the ordinary course of our business.

32. It was our business practice to keep and maintain these documents in our files.

33. These documents were received and maintained contemporaneously with the dates and times indicated on the documents themselves.

(NYSCEF Doc. No. 143 [emphasis added]).

To be clear, although the Muller Affidavit does not describe in detail the process by which the signatures were notarized (and may, at most, raise issues as to whether the acknowledgement complied with the protocols in place and authorized by the Governor during the COVID-19 pandemic), **nothing in the Muller Affidavit raises any issue with respect to the due execution and delivery of the GIA.** The Landmark Defendants' attempt to conflate the two simply fails.

Thus, this too does not warrant renewal of the Court's Prior Decision.

The preliminary expert report (NYSCEF Doc. No. 147) which the Landmark Defendants now adduce also does not warrant renewal. It is unverified and inadmissible (*Ulm I Holding Corp. v Antell*, 155 AD3d 585, 586 [1st Dept 2017]; *Accardo v Metro-N. R.R.*, 103 AD3d 589, 959 [1st Dept 2013]). Even if it were considered, for the reasons set forth below in Section II, it would not affect the outcome.

Equally significant and fatal to the Landmark Defendants' position, as detailed in the original motion and discussed in the Prior Decision, the Landmark Defendants were well aware of the GIA and the bonds and ratified the GIA when they accepted the benefits of them:

To date, Atlantic Specialty has paid Landmark's subcontractors and suppliers a total of \$484,852.23

(NYSCEF Doc. No. 26, n 2). As such, the motion to renew must be denied.

II. NIBONY's motion to amend (Mtn. Seq. No. 3) must be granted except to the extent that it seeks sanctions as a separate cause of action

NIBONY's motion (Mtn. Seq. No. 3) to amend its answer and to assert counterclaims must be granted except to the extent that it seeks sanctions as a separate cause of action. According to NIBONY, based on their due diligence conducted since this case began, they have now learned that:

18. It has been alleged that Landmark won the bid² and entered into a contract with Sansi to do that work for \$8.4 million.

(fn2 We do not concede this point. In fact it is our understanding that Landmark did not win the bid, that a different company owned by Joe Calvano did but because he could not get the required bond he sought out Landmark. There is information, to be adduced during discovery, that it was in fact Joe Calvano's company, unbeknownst to Sansi, that was doing the work and not Landmark supporting another ground for fraud).

19. Sansi required Payment and Performance bonds before Landmark could get/do the work.
20. Simply, Napolitano as agent for Landmark approached Drew Muller at NIBONY for assistance in getting the required bonds.
21. Napolitano, Lynn and NIBONY communicated about what would be needed to get the bonds.
22. NIBONY reached out to Bond Broker Jeff Longenecker at WSC.
23. Longenecker told NIBONY that both Payment and Performance bonds could be issued but subject to the execution of a General Indemnity Agreement, ("GIA").
- ...
27. On behalf of Landmark, LRC and the others Napolitano provided various financial documents to NIBONY who forwarded them to WSC.
28. Among them were various financial compilations created by Napolitano showing that LRC had a net worth of over \$52 Million dollars at the time the bonds were applied for. (Exhibit "A").
29. On April 14, 2020, Drew Muller had a telephone call with Napolitano and LRC in which they discussed the procurement of the bonds and the need for the GIA. This was in addition to prior communications with them as to the underwriting including the GIA
- ...
31. Despite statements to the contrary by LRC, this proves that she/Landmark was well aware, and had been for some time that a GIA was required before the bonds would be issued.
32. By email that same day, at 1:39 pm Drew Muller sent Napolitano another email, stating this as to the GIA, (Exhibit "C"):

From: Drew Muller <DMuller@nibony.com>
Sent: Tuesday, April 14, 2020 1:39 PM
To: nappicpa@aol.com
Cc: Drew Muller
Subject: Landmark Bond - indemnification Agreement to be signed
Attachments: Landmark Unlimited GIA.doc
Importance: High

Jim,

Please see attached and below. If you have any questions please give me a call I am here.

Drew, I am pleased to forward the indemnity agreement for Landmark along with the terms of approval, below. Please have this printed on standard size paper and have it signed as follows:

- On the second page, Lynn should sign on the line above her printed name and her signature should be acknowledged by a notary
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When this is complete, please return the original signed document to my office. When I have received the original in my office, I am authorized to release the required bonds.

Any questions, please give me a call.

Thanks again for the submission on behalf of Landmark enterprises. We are pleased to offer support for the \$8,166,064 bond at the following terms.

- 2.5% rate (After 2 years, the project may be subject to a surcharge based on the project's cost-to-complete)
- Corporate Indemnity of Landmark Unlimited, inc; Landmark Signs and Electrical Maintenance Corp; Landmark Enterprises; and any other bonded principal(s)
- Personal Indemnity of Lynn R Calvano, Joseph J Calvano, Katherine L Lettera, Heather K Calvano, and Anthony S Calvano
- Annual corporate financial statements within 120 days of period end
- Annual personal financial statements with 120 days of period end
- Project status updates upon request

Thanks

-Drew

Drew Muller - Executive Vice President
National Insurance Brokerage of New York, Inc.

33. Thus, Napolitano had the GIA and the instructions of what personal information was required to be added. 34. On or about April 16, 2020, Napolitano personally came to the

office of NIBONY and presented it with a fully signed GIA which he represented were the authorized signatures of those listed on the GIA.

34. On or about April 16, 2020, Napolitano personally came to the office of NIBONY and presented it with a fully signed GIA which he represented were the authorized signatures of those listed on the GIA.

35. More importantly, as per the underwriting requirement of WSC, the GIA contained, printed in by Napolitano, the required Federal Tax ID numbers for each of the Landmark entities listed in the GIA. (**Exhibit “D”**).

36. Napolitano represented that due to Covid he could not get the signatures notarized and asked NIBONY to do so under the circumstances representing and warranting that they were the authorized signatures of all parties named therein.

37. It is our understanding that LRC either signed her name or some of the names and/or specifically directed Napolitano to sign everyone’s name to the GIA because, as she states in the Third-Party Complaint, she was involved with the birth of her grandchild.

38. As a matter of pattern, practice and course of business, LRC often delegated to others and directed others to sign her name on business documents. She used a Rubber Signature Stamp of her signature which was kept by and used by Alysia Edie. We have been advised that the Bonds at issue were signed by Ms. Eide using the LRC Stamp at the specific direction of LRC.

39. NIBONY submitted the executed GIA to WSC.

40. Based on this and the financial information of the other Defendants the surety agreed to have them execute the GIA and issue the bonds. (Exhibit “E”).

41. After working at the job for many months, and getting the financial benefit of that work, (which it would not but for the submission of the GIA and financial statements), Landmark simply stopped work and walked off the job. 42. This eventually triggered claims on the bonds.

42. This eventually triggered claims on the bonds.

43. Those claims on the bonds triggered the surety, Plaintiff hereon, demanding that the signatories abide by the GIA

44. Their refusal led to this lawsuit.

45. NIBONY repeats and realleges all prior allegations as if more fully set forth at length herein and asserts additional allegations all upon Information and Belief.

46. At all times the Third-Party Defendants knew that they had to execute the GIA before the surety would issue any bond that would allow the Landmark entities to bid on and/or get the contract to do the work that is the subject of the First-Party action.

47. Emails between NIBONY, Lynn R. Calvano, (“LRC”), and James Napolitano prove that.

48. At all times the Third-Party Defendants knew that they had to submitted true and accurate financial statements and documents to the surety to justify the surety’s reliance on the GIA which was another predicate before the surety would issue any bond that would allow the Landmark entities to bid on and/or get the contract to do the work that is the subject of the First- Party action.

49. The other Third-Party Plaintiffs authorized LRC to act on their behalf for all things with regard to the procurement and issuance of the Bonds including the execution of the GIA and she acted on their behalf.

50. LRC and thus all other Third-Party Plaintiffs authorized Napolitano to act on their behalf for all things with regard to the procurement and issuance of the Bonds including the execution of the GIA and he acted on their behalf.

51. Napolitano submitted financial statements as to LRC’s net worth on his letterhead, to the surety, stating that LRC was worth approximately \$52 Million Dollars.

52. At the time they were submitted they were not true and overstated her net worth.

53. At the time they were submitted to LRC and her agent knew that the statements were not true.

54. They intended the surety to rely on them to issue the GIA and Bonds.

55. After seeing, what were in actuality fraudulent financials unknown to the surety, the surety transmitted a GIA to the Third-Party Plaintiffs the GIA for execution.

56. LRC specifically directed and authorized Napolitano to handle the GIA including signing her and her children’s names to it, as well as inputting the other information like the Federal Tax ID numbers for the Landmark entities.

57. Napolitano, acting at the direction of LRC, signed the GIA and presented it to NIBONY as a document fully and properly signed by his principals.

58. Since the litigation began, the Third-Party Plaintiffs have falsely claimed that the signatures on the GIA were unauthorized when they knew that the signatures were made by Napolitano at the direction of LRC.

59. The submissions made and efiled in this litigation in which they deny that the signatures were unauthorized and/or forged were untrue and known to be untrue when made.

60. When drafted and efiled the Third-Party Plaintiffs knew that the statements therein that the signatures were unauthorized, as per ¶44 therein, were untrue and yet they intentionally made them anyway.

61. It was intended that NIBONY would rely on the Fraudulent statements about the signatures being unauthorized and/or forged.

62. It was intended that NIBONY would rely on the Fraudulent statements about the signatures being unauthorized and submit the pleading to its E&O Liability insurer.

63. It was intended and planned by the Third-Party Plaintiffs that based on their Fraud NIBONY and its E&O insurer would either have to pay the surety the full amount owed by the Third-Party Plaintiffs or pay some of their liability based on Cost-of-Defense and other theories having nothing to do with the actual truth of the case.

64. It was intended and planned by the Third-Party Plaintiffs that based on their Fraud NIBONY and its E&O insurer would either have to pay the surety the full amount owed by the Third-Party Plaintiffs or pay some of their liability based on the fear of criminal exposure or Administrative/Regulatory punishment having nothing to do with the actual truth of the case.

65. NIBONY justifiable relied on these fraudulent misrepresentations in the pleading.

66. In justifiable reliance on the intentionally false misrepresentations in the pleading, NIBONY submitted the pleadings to their insurer.

67. As a direct and proximate result of the false and fraudulent allegations of intentional acts, NIBONY may be ultimately uninsured for this matter.

68. As a direct and proximate result of the false and fraudulent allegations against NIBONY it will and has suffered damages, like having to defend this false and fraudulent action which have accrued since the beginning of NIBONY's involvement with this lawsuit and are continuing.

69. As a direct and proximate result of the false and fraudulent allegations against NIBONY it will and has suffered damages that are continuing

(NYSCEF Doc. No. 145, at 10-17 [emphasis added]).

Thus, there is no surprise or prejudice in NIBONY amending its answer to reflect the foregoing and to assert that none of the Landmark Defendants appeared before the notary physically in person to have their signatures on the GIA notarized. Neither the fraud (first counter claim) counterclaim nor the prima facie tort counter claim (second counterclaim) are “palpably improper or insufficient as a matter of law” (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]). To be clear, if the above facts are true (which they appear to be), Mr. Napolitano, the Landmark Defendants’ accountant and agent in arranging the surety relationship, represented due execution and delivery of the GIA, and could bind his principals and it does not matter whether a stamp was used for Lynn Calvano’s signature or whether Ms. Calvano signed or caused others to sign on behalf of the other Landmark Defendants (*see YH Lex Ests. LLC v HFZ Cap. Grp. LLC*, 203 AD3d 417, [1st Dept 2022]; *BSDT 2012 LLC v H F Z Capital Group LLC*, 2022 WL 135320, at * 2 [Sup Ct, NY County Jan 2022]).

Fraud requires (i) a misrepresentation or a material omission of fact which was false and known to be false by defendant, (ii) made for the purpose of inducing the other party to rely upon it, (iii) justifiable reliance of the other party on the misrepresentation or material omission, and (iv) injury (*Spector v Wendy*, 63 AD3d 820, 821 [2d Dept 2009], citing *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]). NIBONY alleges that (i) the Landmark Defendants knowingly made the false statement about forged signatures when Mr. Napolitano as their agent clearly represented otherwise, (ii) they intended for NIBONY to rely on their false statement, (iii) NIBONY justifiably relied on it and submitted the pleading to its errors and omissions insurance

carrier and (iv) as a result will suffer damages such as increased insurance premiums. These allegations taken as true state a claim sounding in fraud.

Prima facie tort requires (i) the intentional infliction of harm, (ii) which results in special damages, (iii) without any excuse or justification, (iv) by an act or series of acts which would otherwise be lawful (*Kickertz v New York Univ.*, 110 AD3d 268, 277 [2d Dept 2013]). NIBONY alleges that (i) the Landmark Defendants' position on forged signatures constitutes criminal insurance fraud, (ii) they made the false statement without any excuse or justification, (iii) they intend to cause NIBONY injuries and damages, and (iv) NIBONY suffers special damages in having to defend this third party action. It does not matter that the alleged false statement was "only" made in the Landmark Defendants' third party complaint. The lawsuit is not retaliatory. If it is true that the Landmark Defendants position that their signatures were forged and unauthorized is false and if their lawsuit against NIBONY is fabricated, NIBONY would be entitled to special damages in having to defend this lawsuit. It is very concerning (given their position) that the Landmark Defendants have not sued Mr. Napolitano, their accountant, who is alleged to have represented due execution and delivery of the GIA.

The third counterclaim, however, is impermissible. New York does not recognize a separate cause of action to impose sanctions pursuant to 22 NYCRR 130-1.1 (*Licalzi v Wells Fargo Bank, N.A.*, 125 AD3d 942, 943, [2d Dept 2015]). Although NIBONY may be entitled to attorneys' fees as sanctions as a remedy, this is not a separate cause of action. Therefore, the branch of the motion seeking to add this counterclaim must be denied.

III. The Surety's motion for contempt (Mtn. Seq. No. 5) must be granted

The Surety's motion (Mtn. Seq. No. 5) for contempt must be granted. The Landmark Defendants have willfully and contumaciously failed to comply with this Court's order requiring them to escrow the collateral. It is simply no excuse that they continue to dispute the validity of the signatures, that they filed an appeal or that they were negotiating with the Surety as to an alternative. They have accepted the benefits of the bonds (as discussed above) and made no payments in respect of the Surety. They well could have complied with this Court's order while they sought relief from the Appellate Division and if successful had the collateral released at that time. They did not do that. Nor have they either made payment to the Surety or deposited the required collateral since the Appellate Division's decision (NYSCEF Doc. No. 210) affirming this Court's order requiring them to do so. Thus, the Landmark Defendants shall pay the statutory maximum for civil contempt of \$250 in addition to the reasonable attorneys' fees in connection with the Surety bringing this motion. Although the Court declines at this time to hold the Landmark Defendants in criminal contempt at this time, if the Landmark Defendants fail to fund the collateral by Wednesday April 26, 2023, the Surety may email Part 53 and request that the Court issue a supplemental order and the Court shall hold them in criminal contempt.

The Surety shall submit a bill for its reasonable attorneys' fees to the Landmark Defendants. If the Landmark Defendants object, the attorneys' fee will be referenced to JHO for inquest.

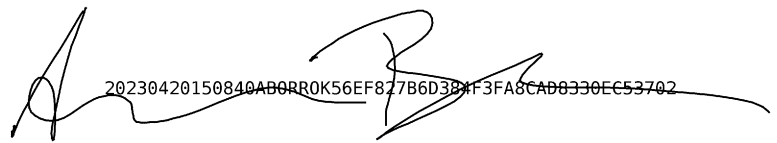
Accordingly, it is

ORDERED that NIBONY's motion (Mtn. Seq. No. 3) to amend its answer must be granted solely as to the first and second counterclaims; and it is further

ORDERED that the Landmark Defendants' motion (Mtn. Seq. No. 4) to renew the Prior Decision must be denied; and it is further

ORDERED that the Surety's motion (Mtn. Seq. No. 5) for contempt must be granted; and it is further

ORDERED that the Surety is granted leave to bring a motion for summary judgment by order to show cause.


20230420150840AB0RR0K56EF877B6D3B4F3FA8CAD0330EC53702

4/20/2023
DATE

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 checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE