SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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ATLANTIC SPECIALTY INSURANCE COMPANY,

Plaintiff,

- v -

AERO SNOW REMOVAL LLC, AERO SNOW REMOVAL (CO) LLC, AERO SNOW REMOVAL (ILL) LLC, AERO SNOW REMOVAL (MASS) LLC, AERO SNOW REMOVAL TEMP PERSONNEL, LLC, AMERICAN SWEEPING COMPANY LLC, AMERICAN SWEEPING PROPERTIES, LLC, DEJANA ENTERPRISES LLC, DEJANA INDUSTRIES LLC, DEJANA SERVICES LLC, EAST COAST SWEEPING LLC, LYNNFIELD LEASING LLC, TECH LEASING LLC, AERO SNOW HOLDINGS (DE), LLC, AERO GROUNDTEK LLC, and TOVAR SNOW PROFESSIONALS LLC,

Defendants.

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INDEX NO. 655053/2023

MOTION DATE 02/26/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.S.C.

This action arises out of an indemnity agreement, pursuant to which plaintiff acted as surety for certain bonds issued to defendants. Before the court is plaintiff's unopposed motion for summary judgment on its claims for specific performance and damages causes by defendants' asserted breaches of the agreement. Defendants have not submitted opposition to the motion. Upon the foregoing documents, plaintiff's motion is granted.

Background

The indemnity agreement provides, among other things, that defendants, upon plaintiff's demand, are required to provide plaintiff with collateral to be "applied to any obligations of [defendants] under this Agreement" (indemnity agreement, NYSCEF Doc. No. 22, ¶ 3).

Defendants agreed 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" (*id.*). In addition, "[i]n the event of any payment by the Surety, an itemized statement of the amount of any such payment sworn to by any officer or authorized representative of the Surety . . . shall be final, conclusive and binding upon the [defendants]" (*id.*, ¶ 4). Defendants shall "exonerate, hold harmless, indemnify, and keep indemnified [plaintiff] from and against any and all liability for losses, fees, costs and expenses of any kind or nature, including but not limited to, court costs, attorney's fees, accounting, and any other outside consulting fees" (*id.*, ¶ 2).

On July 10, 2023, plaintiff demanded collateral from defendants in the amount of $32,770,070.82, in order to cover the cost of certain bonds issued to defendants (July 10, 2023 letter, NYSCEF Doc. No. 24). When defendants failed to supply collateral as requested, plaintiff reduced its demand to $6,000,000.00 (September 27, 2023 letter, NYSCEF Doc. No. 25). To date, defendants have not supplied the demanded collateral, and plaintiff has incurred attorneys' fees bringing this action to enforce its rights under the agreement (Passolt aff., NYSCEF Doc. No. 21, ¶¶ 16-17).

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]

[internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

As an initial matter, the motion is denied as to defendants Aero Snow Holdings (DE), LLC, Aero Groundtek LLC, and Tovar Snow Professional LLC (the "nonsignatory defendants"). The nonsignatory defendants are not listed as parties on the indemnity agreement (*Highland Crusader Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd.*, 184 AD3d 116, 121 [1st Dept 2020] ["It is a general principle that only the parties to a contract are bound by its terms"]). Nor does plaintiff establish that the nonsignatory defendants are third-party beneficiaries of the indemnity agreement. For these reasons, the court searches the record (CPLR 3212 [b]) and grants the nonsignatory defendants summary judgment dismissing the complaint against them.

As to the remaining defendants, plaintiff has established prima facie entitlement to summary judgment on its claims by submission of the indemnity agreement, the bonds issued to defendants, the affidavit of its Senior Vice President Brian W. Passolt, and copies of plaintiff's

counsel's billing records, which together establish "the existence of a contract, the plaintiff's performance thereunder, the defendants' breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Moreover, the failure of an indemnitor to provide collateral security when demanded, as established here, is enforceable by specific performance where the security demanded is reasonable (*BIB Const. Co., Inc. v Fireman's Ins. Co. of Newark, New Jersey*, 214 AD2d 521, 523 [1st Dept 1995] ["The damage resulting from the failure to give security is not ascertainable, and the legal remedy is therefore inadequate"]). Given that the outstanding amount of the bonds is in excess of $37,000,000.00, $6,000,000.00 in collateral security is reasonable. With respect to the billing records submitted as proof of plaintiff's damages incurred in enforcing the agreement, the court determines that based on the applicable standards (*see In re Freeman's Estate*, 34 NY2d 1 [1974]), the amount of $10,516.38 constitutes reasonably incurred legal fees in this matter. Defendants, by not opposing the motion, have failed to satisfy their burden to raise a material issue of fact requiring trial (*Kershaw*, 114 AD3d at 82).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted as to defendants Aero Snow Removal LLC, Aero Snow Removal (CO) LLC, Aero Snow Removal (ILL) LLC, Aero Snow Removal (MASS) LLC, Aero Snow Removal Temp Personnel, LLC, American Sweeping Company LLC, American Sweeping Properties, LLC, Dejana Enterprises LLC, Dejana Industries LLC, Dejana Services LLC, East Coast Sweeping LLC, Lynnfield Leasing LLC, and Tech Leasing LLC; and it is further

ORDERED that said defendants are jointly and severally required to specifically perform their obligations under the indemnity agreement and provide plaintiff with $6,000,000.00 in collateral security within 30 days of the date of filing hereof; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants Aero Snow Removal LLC, Aero Snow Removal (CO) LLC, Aero Snow Removal (ILL) LLC, Aero Snow Removal (MASS) LLC, Aero Snow Removal Temp Personnel, LLC, American Sweeping Company LLC, American Sweeping Properties, LLC, Dejana Enterprises LLC, Dejana Industries LLC, Dejana Services LLC, East Coast Sweeping LLC, Lynnfield Leasing LLC, and Tech Leasing LLC, jointly and severally, in the amount of $10,516.38, with interest thereon at the statutory rate from December 24, 2023,[1] through entry of judgment, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the nonsignatory defendants Aero Snow Holdings (DE), LLC, Aero Groundtek LLC, and Tovar Snow Professional LLC dismissing the complaint against them, with costs and disbursements to said defendants jointly upon submission of an appropriate bill of costs.

[1] "Where [a party's] damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date" (CPLR 5001[b]; *Kachkovskiy v Khlebopros*, 164 AD3d 568, 572 [2d Dept 2018]).

This constitutes the decision and order of the court.

ENTER:

5/20/2024
DATE

LOUIS L. NOCK, J.S.C.

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