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, and ENERGY XXI GULF COAST, INC.,

Plaintiffs,

- v -

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

Defendants.

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INDEX NO. 657028/2022

MOTION DATE 03/31/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (MS002) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 121, 122, 123, 124, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152
were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Plaintiffs MLCJR, LLC, Cox Oil, LLC, Cox Operating, L.L.C., CEXXI, Inc., Cox Investment Partners LP, and Energy XXI Gulf Coast, Inc. (collectively, plaintiffs) bring this action against defendants PDP Group, Inc. d/b/a Amynta Surety Solutions (Amynta), Aspen American Insurance Company (Aspen), and US Fire Insurance Company (US Fire, and together with Amynta and Aspen, defendants) asserting claims for declaratory relief, breach of contract, breach of the duty of good faith and fair dealing, and a violation of General Business Law § 349 (NYSCEF # 1). US Fire respond by filing counterclaims against plaintiffs for, among other things, breach of contract and specific performance (NYSCEF # 20). Presently before the court is US Fire's motion, pursuant CPLR 3212, for an order granting US Fire partial summary judgment on its counterclaims for specific performance and breach of contract and directing plaintiffs to provide US Fire with an Irrevocable Letter of Credit or cash collateral in the amount of $30,000,000 (NYSCEF # 110). Plaintiffs oppose the motion.

For the following reasons, US Fire's motion is denied without prejudice to renew following the completion of discovery.

Background

Factual Background

The following facts are drawn from the parties' Rule 19-a statements and counterstatements, and any accompanying exhibits and affidavits. They are undisputed unless otherwise noted.

On or about April 15, 2016, plaintiffs, together with non-party Brad E. Cox (each an Indemnitor and together, the Indemnitors), executed a General Agreement of Indemnity (the GAI) in favor of Aspen and Aspen Specialty Insurance Company (NYSCEF # 116 – USFIC 19-a ¶ 1; NYSCEF # 114 – Raino aff ¶ 3; NYSCEF # 137 – Sanders aff ¶ 8; NYSCEF # 2 – GAI at 3-5). Between November 6, 2018, and June 29, 2021, the Indemnitors executed four riders to the GAI (USFIC 19-a ¶ 2; Raino aff ¶ 4). Pursuant to the Rider to the GAI dated October 6, 2020 (GAI Rider # 2), the Indemnitors agreed to modify to the GAI to include US Fire as a "Surety" (USFIC 19-a ¶ 3; Raino aff ¶ 5; Sanders aff ¶ 8; NYSCEF # 32 at GAI Rider # 2).

The GAIs set forth certain indemnity and collateral terms governing the parties' relationship. As is relevant here, pursuant to Paragraph 3 of the GAI (the Collateral Provision),[1] the Indemnitors agreed that

> [u]pon Surety's written demand, Indemnitors shall promptly deposit with Surety a clean, irrevocable letter of credit ('ILOC') on a form and from a bank acceptable to Surety, or shall provide another form of collateral acceptable to Surety (individually and collectively, the 'Collateral') 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.

(GAI ¶ 3). The Indemnitors further agreed 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 Bonds as determined by the Surety in its sole discretion" (*id.*). They, in turn, "waive[d] any and all defenses or challenges to the provision of collateral" and "agree[d] that Surety is entitled to specific performance of the obligation to post collateral" (*id.*).

After the Indemnitors entered into the GAI, Aspen executed a total of 16 bonds (each a Bond and collectively, the Bonds) for one or more of plaintiffs or their affiliates in favor of the obligees named in the Bonds (USFIC 19-a ¶¶ 4, 6; Raino aff ¶ 7; Sanders aff ¶ 7; *see also* NYSCEF #s 33-48). The Bonds were issued in connection with plaintiffs' oil and gas operations in the Gulf of Mexico (USFIC 19-a

[1] US Fire refers to this provision as a "Place-in Funds" or "PIF" right (*see* USFIC 19-a ¶ 15).

¶ 7; Raino aff ¶ 9). These Bonds are generally required as a condition to plaintiffs engaging in oil and gas operations and ensure that proper plugging and abandonment, including environmental remediation, takes places after plaintiffs cease conducting offshore oil and gas exploration and production activities (USFIC 19-a ¶¶ 9-11; Raino aff ¶¶ 9-10). Collectively, the Bonds amount to a total "Penal Sum" of $99,443,460.00 (USFIC 19-a ¶¶ 6-7; Raino aff ¶ 7; Sanders aff ¶¶ 6-7). As of July 15, 2020, US Fire had assumed the surety liability on the Bonds and replaced Aspen as the surety under each Bond pursuant to riders to each Bond (USFIC 19-a ¶ 5; Raino aff ¶ 5).

At issue on the present motion is an Abandonment Bond (Bond No. 612410290) executed by Aspen on May 31, 2015, on behalf of plaintiffs' affiliate EPL Oil & Gas, LLC (EPL) for the benefit of Devon Energy Production Company, LP (the Devon Bond) (USFIC 19-a ¶ 17; Raino aff ¶ 16; NYSCEF # 37). The Devon Bond was executed in connection with a contract known as the "East Bay Lease" and was for a Penal Sum of $30 million (USFIC 19-a ¶¶ 17-18; Raino aff ¶¶ 8, 16; *see also* Sanders aff ¶ 7). US Fire replaced Aspen as "Surety" on the Devon Bond effective March 31, 2022 (USFIC 19-a ¶ 19; Raino aff ¶ 17; NYSCEF # 115 – Killian aff ¶ 3). To date, there have purportedly been no claims by any third party on the Devon Bond (*see* Sanders aff ¶¶ 12, 22).

On June 30, 2015, shortly after Aspen issued the Devon Bond, Whitney Oil & Gas, LLC, and Trimont Energy (NOW), LLC (together, Trimont) entered into a Purchase and Sale Agreement (PSA) with EPL and acquire EPL's interest in the East Bay Lease (USFIC 19-a ¶ 24; NYSCEF # 112 – PSA § 2.01). The PSA required Trimont to obtain a bond from another surety to replace the Devon Bond (USFIC 19-a ¶ 25; PSA § 7.08).[2] But, to date, Trimont has failed to do so (USFIC 19-a ¶ 25; Raino aff ¶ 25; *see also* Sanders aff ¶¶ 18-19). US Fire contends that Trimont's failure to replace the Devon Bond is causing it to extend credit to Trimont while simultaneously relying on plaintiffs' financial ability to answer for any default by Trimont on the Devon Bond (USFIC 19-a ¶ 26). For their part, plaintiffs dispute this point, explaining that they are still the principal on the Devon Bond and thus remain liable to US Fire if a claim is made on the bond (NYSCEF # 146 – Pltfs Counterstatement ¶ 26; Sanders aff ¶ 23). In other words, US Fire's liability under the Devon Bond remained unchanged following EPL's sale of the East Bay Lease (*see* Sanders aff ¶¶ 22-23).

When Aspen issued the Devon Bond, indemnitors CEXXI, Inc. and Energy Gulf Coast, Inc. (i.e., EPL) were under a different ownership (*see* USFIC 19-a ¶ 20; Raino aff ¶ 18). At the time, according to Amynta's Senior Vice President Matthew Raino, the Devon Bond was underwritten under a surety bond program referred to as the "Energy XXI Bond Program" (*see* Raino aff ¶ 18). But in 2018, several of plaintiffs and their affiliates acquired CEXXI, Inc., Energy Gulf Coast Inc., and

[2] Section 7.08 of the PSA was filed at NYSCEF # 84.

EPL, which US Fire contends ended the "Energy XXI Bond Program" and resulted in Aspen transitioning the Devon Bond to the separately underwritten "Cox Bond Program" (USFIC 19-a ¶¶ 27-28; Raino aff ¶¶ 21-22). US Fire claims that the addition of the Devon Bond to the "Cox Bond Program" increased Aspen's risk beyond what was previously contemplated by Aspen (USFIC 19-a ¶ 29; Raino aff ¶ 23).[3] Plaintiffs, conversely, reiterate that they remain liable to US Fire as the principal on the Devon Bond, meaning that neither Aspen nor US Fire's risk has, in any way, increased (Pltfs Counterstatement ¶ 29; *see also* NYSCEF # 141 – Marchive aff ¶¶ 6-10; Sanders aff ¶¶ 23-24).

On January 28, 2021, because Trimont had not yet obtained a substitute bond, and also because of US Fire's apparent belief that it was extending surety credit to Trimont under the Cox Bond Program, US Fire, through its agent Amynta, wrote to plaintiffs' surety bond broker, McGriff Insurance Services, Inc. (McGriff) to express its concern about its exposure on the Devon Bond and its desire that it be replaced (USFIC 19-a ¶¶ 30-31; Raino aff ¶¶ 24, 26-27; NYSCEF # 50). Raino affirms that, through a series of phone calls, he was advised by McGriff that plaintiffs would not provide collateral and were unable to replace any of the Bonds in the Cox Bond Program (USFIC 19-a ¶¶ 32; Raino aff ¶ 28). For his part, Cox Operating, L.L.C.'s Chief Executive Officer, Craig Sanders, affirms that he had communicated to Amynta that US Fire's collateral demand was unreasonable and inappropriate (*see* Sanders aff ¶¶ 13-15, 24).

The next year, on March 1, 2022, US Fire, through Amynta, again contacted McGriff to reiterate its request that plaintiffs either replace the Devon Bond or provide $30 million in collateral (USFIC 19-a ¶ 34; Killian aff ¶¶ 9-10). Discussions regarding US Fire's collateral request then continued over the next several months, although plaintiffs never provided any collateral in connection with the Devon Bond (USFIC 19-a ¶¶ 37-38; Killian aff ¶¶ 13-26). Eventually, US Fire determined that it was no longer willing to extend uncollateralized surety credit to support plaintiffs' long-term operations and obligations (Killian aff ¶ 27). Accordingly, on June 2, 2022, US Fire issued a letter demanding the total amount of the then-undischarged liability under the Bonds, i.e., $99,443,460 (the Collateral Demand) (USFIC 19-a ¶ 39). The Collateral Demand was subsequently reduced to $94,220,000 in September 2022 when the Indemnitors secured the release of two of the Bonds worth a total Penal Sum of $5,223,460 (*id.* ¶ 41).

In justifying the Collateral Demand, including its demand for $30 million related to the Devon Bond, US Fire emphasizes that the risk it faces as Surety in connection with the Bonds has increased over time (*see* USFIC 19-a ¶¶ 12-14; Raino aff ¶¶ 11-13). In support, Raino explains that several of the Bonds, including the

[3] Plaintiffs assert that they lack any information or knowledge as to the truth of the allegations concerning the "Energy XXI Bond Program" or the "Cox Bond Program" because these are details within US Fire's exclusive knowledge and control (Pltfs Counterstatement ¶¶ 20, 27-28).

Devon Bond, have now been in place for several years, which means the remaining useful life of the oil fields that are secured by the Bonds has decreased and Surety's potential obligations are, consequently, "closer to accruing" (*see* Raino aff ¶ 13). US Fire also points to the fact that on May 18, 2022, plaintiffs (acting through their affiliate EPL) filed a Verified Petition in Texas State Court against Trimont in which plaintiffs represented that they believed "Trimont and Whitney's financial situation is precarious for a number of reasons" (*see* USFIC 19-a ¶¶ 42-43).

Plaintiffs dispute US Fire's concerns about its risk under the Bonds, including the Devon Bond. For example, Cox Operating L.L.C. Senior Vice President Benjamin Marchive II claims that, based on the most current information available, the wells covered by the Devon Bond are actively producing in the East Bay in state and federal waters (Marchive aff ¶ 12). Sanders concurs, affirming that these wells will be producing for multiple decades and pose no threat of incurring any near-term plug and abandonment costs (*see* Sanders aff ¶ 28). In fact, as of June 30, 2022, the total oil and gas producing properties held by plaintiffs were projected to produce for more than 30 years on average with a total net discounted value of more than $1 billion (*id.* ¶¶ 35-37). And at any rate, Marchive explains, the PSA provides that if a claim were made against the Devon Bond, plaintiffs' liability would be backstopped by the total value of certain bonds held by Trimont, whose current total value is $68,855,186 (Marchive aff ¶¶ 7-11).

Sanders separately affirms that plaintiffs' overall financial position is stronger now than when they first entered into the GAI, as well as when they entered into the three separate riders to the GAI between November 13, 2018, and June 3, 2021 (*id.* ¶¶ 31-32). He notes that defendants are aware of a recent annual audit of plaintiffs' financial records that concluded that plaintiffs can meet its financial obligations for the next year (*id.* ¶ 34).

Procedural History

On June 28, 2022, shortly after receiving the Collateral Demand, plaintiffs commenced this action (NYSCEF # 1). Soon after, on July 1, 2022, plaintiffs moved, by order to show cause, for preliminary injunction and temporary restraining order (TRO) enjoining defendants from enforcing the Collateral Demand (NYSCEF # 6). On July 5, 2022, defendants opposed the request for temporary relief via letter (NYSCEF # 22), and, that same day, filed their Verified Answer, which asserted counterclaims on behalf of US Fire (NYSCEF # 20).

On July 8, 2022, during a hearing on plaintiffs' request for a TRO, the parties agreed that no party would take any action respect to the Bonds or the GAI pending a decision on plaintiffs' application for a preliminary injunction (NYSCEF # 89). While briefing on plaintiffs' motion was ongoing, plaintiffs made a request for certain expedited discovery in connection with their motion (NYSCEF #s 88-97).

Following a telephone conference with the court, plaintiffs' request was denied for failure to establish a sufficient basis for expedited discovery (NYSCEF # 98).

By Decision and Order, dated December 19, 2022, the court denied plaintiffs' motion for a preliminary injunction based on plaintiffs' failure to adequately demonstrate a likelihood of success on the merits or irreparable harm in the absence of injunctive relief (NYSCEF # 108 – the PI Order at 7-8). In so holding, the court first observed there was no dispute that the Collateral Provision is enforceable under New York law (*id.* at 6). The court then explained that notwithstanding the lack of an explicit "reasonableness requirement" in the plain text of the Collateral Provision, New York law is clear that the "equitable remedy of specific performance of [a] collateral security provision depends on the reasonableness of [the] demand" (*id.*). And "because [this] grant of specific performance is discretionary," the court concluded, "[d]efendants are not automatically entitled to specific performance" notwithstanding any provisions in the GAI indicating that "[p]laintiffs will post collateral in the full amount of the Bond[s]" (*id.*). Despite this conclusion, however, the court nevertheless held that plaintiffs had failed to establish that defendants' demand for collateral was unreasonable or lacked a good faith basis (*id.* at 7).

On January 30, 2023, after the court issued the PI Order, US Fire filed the present motion for partial summary judgment on its claims for breach of contract and specific performance related to the Devon Bond (NYSCEF # 110). Several days later, on February 9, 2023, defendants submitted a letter request seeking to stay disclosure in this action until resolution of US Fire's pending motion, which the court granted on February 27, 2023 (NYSCEF # 121, 125). Accordingly, to date, no discovery has been taken in this action (*see* NYSCEF # 127 ¶ 6). Briefing on US Fire's motion concluded on March 30, 2023. This Decision and Order followed.[4]

Discussion

Under CPLR 3212, "[a]ny party may move for summary judgment in any action, after issue has been joined" (CPLR 3212 [a]). A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a

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[4] On May 14, 2023, after the return date on US Fire's motion had passed, plaintiffs MLCJR, LLC, Cox Operating, L.L.C., Cox Oil Offshore, L.L.C., and Energy XXI Gulf Coast, Inc. (the Debtor Plaintiffs), commenced bankruptcy proceedings before the United States Bankruptcy Court for the Southern District of Texas (the Bankruptcy Court) and filed a Notice of Bankruptcy and Automatic Stay of Proceedings with this court (see NYSCEF # 155). As a result of the Automatic Stay, all proceedings and enforcement of judgments were stayed as against the Debtor Plaintiffs. A dispute, however, arose as to whether the Automatic Stay extended to non-debtors Cox Oil, LLC, CEXXI, Inc., and Cox Investment Partners LP (the Non-Debtor Plaintiffs) (see NYSCEF # 159-163). The court held a conference on November 16, 2023, to discuss this dispute but ultimately deferred this question to the Bankruptcy Court (NYSCEF # 164). By letter, dated January 11, 2024, US Fire submitted that the Bankruptcy Court had ruled that the automatic stay did not extend to Non-Debtor Plaintiffs (see NYSCEF # 165). Hence, this action may proceed against the Non-Debtor Plaintiffs.

matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once that showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact that require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

However, if "facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit . . . disclosure to be had and may make such other order as may be just" (CPLR 3212 [f]). To avail oneself of relief under CPLR 3212 (f), "a party must demonstrate that the needed proof is within the exclusive knowledge of the moving party, that the claims in opposition are supported by something other than mere hope or conjecture, and that the party has at least made some attempt to discover facts at variance with the moving party's proof" (*Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 [1st Dept 2007] [internal citations omitted]).

In its motion for partial summary judgment, US Fire avers that the undisputed record establishes that, as a matter of law, the Collateral Provision of the GAI constitutes an "unqualifiedly obligat[ion]" to deposit collateral security upon US Fire's demand, and that, to do date, plaintiffs have failed to meet that obligation with respect to the Devon Bond (NYSCEF # 117 - MOL at 14-17; NYSCEF # 6 – Reply at 6-8). Plaintiffs offer two responses in opposition. First, plaintiffs contend that US Fire's motion should be denied as premature because plaintiff has not been afforded any opportunity to conduct discovery (NYSCEF # 147 – Opp at 11-13). On this point, plaintiffs note that discovery will allow plaintiffs to ascertain how defendants analyzed plaintiffs' financial records, determined its increased surety risk in connection with the Devon Bond, and arrived at the $30 million collateral demand against these purportedly unspecified risks (*id.* at 11-12). Second, plaintiffs contend that the Collateral Demand, including the demand related to the Devon Bond, is unprecedented and unreasonable, noting that no court has ever enforced a demand for collateral that is not tied to any concrete anticipated losses or an existing claim against the bond (*id.* at 14-17).

To resolve US Fire's motion, the court's analysis starts with the plain terms of the GAI. As noted above, the Collateral Provision of the GAI provides that "[u]pon Surety's written demand, Indemnitors 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" (GAI ¶ 3). US Fire, as Surety, is further permitted "in its sole discretion and for any reason" to require plaintiffs "to provide . . . collateral . . . in the amount representing the total of any undischarged liability under the Bonds as determined by the Surety

in its sole discretion" (*id.*). The plain terms of the GAI are therefore clear that, in essence, US Fire is permitted to "demand collateral whenever it reasonably deem[s] itself to be insecure, regardless of when or whether it had received notice of a claim against it" (*Hartford Fire Ins. Co. v Saunders Concrete Co., Inc.*, 2012 WL 3822097, at *2 [ND NY Sept. 4, 2012, No. 5:11-CV-677 (FJS/DEP)]). Courts applying New York law have routinely held that such collateral security provisions are valid and enforceable (*see BIB Constr. Co. v Fireman's Ins. Co. of Newark, N.J.*, 214 AD2d 521, 523 [1st Dept 1995]; *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 . . . that imposes upon an indemnitor an obligation to provide a surety collateral security . . . prior to any actual bond loss[] is valid and enforceable."]; *U.S. Fidelity and Guar. Co. v J. United Elec. Contr. Corp.*, 62 FSupp2d 915, 922 [ED NY 1999] ["Courts in New York have routinely upheld the validity of collateral security clauses and enforced their terms"]).

That said, even an unqualified contractual obligation to provide collateral upon a surety's demand—like the one set forth in the GAI—is still subject to a reasonableness requirement. In fact, as the First Department has clearly held, "[a] plaintiff 'dealing at arm's length with relative equality of bargaining power' must abide by th[e] [collateral and security] term[s] of [a] contract," but that is only the case "[s]o long as the sum demanded is reasonable" (*see BIB Constr. Co.*, 214 AD2d at 523, quoting *Westinghouse Elec. Corp. v N.Y.C. Tr. Auth.*, 82 NY2d 47, 55 [1993]; *see also RLI Ins. Co. v Pro-Metal Constr. Inc.*, 2019 WL 1368851, at *4 [SD NY Mar. 26, 2019, No. 18-cv-2762(AJN)] ["If, as here, a party has agreed to furnish security in the amount determined by the surety, courts will require the party to comply with the surety's demand '[s]o long as the sum demanded is reasonable'"]).

"[I]n determining what constitutes a reasonable amount of collateral security . . . the function of the court is to determine . . . whether [the surety's] demand is a reasonable estimate of its anticipated losses" (*Safeco Ins. Co. of Am. v M.E.S., Inc.*, 2010 WL 4828103, at *4 [ED NY Nov. 22, 2010, No. 09-CV-3312 (ARR)(ALC)]). Typically, this analysis will entail comparing a surety's collateral demand to some existing third-party claim or concrete risk of future liability (*see e.g., BIB Constr. Co.*, 214 AD2d at 522; *Pro-Metal Constr.*, 2019 WL 1368851, at *4; *Colonial Sur. Co. v Genesee Val. Nurseries, Inc.*, 5 AD3d 1024, 1025 [4th Dept 2004] ["Plaintiff submitted proof in admissible form that it received claims under the bonds it issued on behalf of GVN, and it is thus entitled to specific performance of that part of the Agreement requiring defendants to furnish collateral security"]). And, in that context, courts applying New York law have held that "[a] demand for collateral is reasonable if the sum demanded is commensurate with the claims made against the surety or the amount sought by a third party in litigation" (*see Star Ins. Co. v Champion Constr. Servs. Corp.*, 2014 WL 4065093, at *4 [ED NY July 30, 2014, No. 13 CV 3635(ARR)(RML)], citing *Utica Mut. Ins. Co. v Cardet Constr. Co.*, 114 AD3d 847, 848 [2d Dept 2014] and *Centennial Ins. Co. v 4-A Gen. Contr. Corp.*, 13 Misc3d 1217[A], at *4 [Sup Ct, Kings County, 2006]; *see also Colonial Sur. Co. v A&R*

Capital Assoc., 420 F Supp 3d 38, 46-47 [EDNY 2017] [holding that nothing in the record indicated that amount of collateral demanded was unreasonable where plaintiff demanded collateral in an amount equal to a lien filed by a third party]).

The current litigation, however, presents a different situation for the court's consideration. Specifically, there is no meaningful dispute here that US Fire has not yet received a third-party claim against the Devon Bond or identified a concrete risk of a future liability under the Devon Bond, such as threatened litigation (*see* Reply at 8-9; Sanders aff ¶¶ 12, 22, 28-29). As a result, unlike those situations where there is an existing claim or concrete liability to which the court can refer, the reasonableness analysis in this case will necessarily be tied to, among other things, case-specific, and potentially circumstantial, analyses and assessments bearing on US Fires' contemplated exposure (*see* GAI ¶ 3). For its part, US Fire points to several circumstances that it claims are probative of its perceived risk of liability under the Devon Bond and therefore establish that its demand is reasonable. These include that (1) US Fire is now purportedly extending $30 million in surety credit to Tremont as a result of EPL's sale of its interest in the Easy Bay Lease; (2) US Fire is extending this surety credit despite the fact that EPL no longer has a leasehold interest in the property; (3) US Fire is concerned that plaintiffs do not have the capacity to replace the Devon Bond; and (4) plaintiffs have represented in court filings that Trimont's financial situation is "precarious" (*see* MOL at 17-18; Reply at 8-11; *see also* USFIC 19-a ¶¶ 8-15, 20-29, 31, 42-43; Raino aff ¶¶ 11-14;).

It is certainly possible that, on a full record, these risk considerations advanced by US Fire may rise to the level of a prima facie showing that its demand for collateral was reasonable. But the court need not, and frankly cannot not, make this determination at this juncture. Indeed, many of the facts upon which US Fire relies are premised on certain risk assessments that are exclusively within its possession and control (*see, e.g.,* USFIC 19-a ¶¶ 10-15, 20-29, 31, 33-34; Raino aff ¶¶ 9-14, 18-25). Plaintiffs, by contrast, have had no opportunity to take discovery that would allow it to potentially ascertain if it can challenge whether US Fire reasonably exercised its "sole discretion" under the GAI to require a $30 million collateral deposit in the absence of any actual or threatened claims against the Devon Bond (*cf. J. United Elec. Contr. Corp.*, 62 F Supp 2d at 922 ["The burden of establishing that the costs and expenses were unreasonable or were incurred in bad faith rests with the defendants"]). When also considering that there appears to be some proffered evidence and testimony in the record undercutting US Fire's claimed risk of exposure under the Devon Bond (*see, e.g.*, Marchive aff ¶¶ 7-12; Sanders aff ¶¶ 22-23, 28, 31-37; NYSCEF #s 139-140), plaintiffs have plainly met their burden under CPLR 3212(f) to establish that there may be facts that support its opposition, beyond mere conjecture, which cannot be stated at this time absent some discovery (*see 50 Gramercy Park N. Owners Corp. v GPH Partners LLC (Sponsor)*, 149 AD3d 635, 635 [1st Dept 2017] [concluding that summary judgment was premature "given the early stage of discovery" and even though plaintiff had "relied on affidavits and documentary evidence in support of its motion"]; *Chmelovsky v Country Club*

Homes, Inc., 106 AD3d 684, 684 [2d Dept 2013] [denying summary judgment motion as premature where, at time of motion, no discovery had taken place and plaintiffs raised issues in support of their position that required discovery]). Put differently, it would be premature to resolve US Fire's motion for partial summary judgment at this juncture without a more fulsome record.

To avoid this conclusion, US Fire argues that courts routinely enforce collateral deposit provisions on summary judgment without first requiring discovery (Reply at 12). For example, US Fire relies on the fact that, in *BIB Construction*, the First Department reversed the trial court's holding that "additional evidence [was] necessary to be taken" as to the surety's $3,765,385 collateral demand because, the First Department held, "[t]he deposit demanded by the insurer . . . represent[ed] security, in an amount within the sole discretion of defendant, in anticipation of possible losses" (214 AD2d at 523). US Fire's reliance on *BIB Construction* is unavailing.

In *BIB Construction*, plaintiff, a general contractor, had entered into a contract with the City of Poughkeepsie in an amount of $5,497,000 for the renovation of a building, and that contract was secured by performance and payment bonds issued by defendant (*id.* at 521). After the City terminated its contract with plaintiff for nonperformance, it requested that defendant complete the work and subsequently brought a suit against defendant for a purported breach of its performance bond (*id.*). In response, defendant entered into a contract with a non-party contractor to complete the remaining work on the project in the sum of $4,654,000, which resulted in the City discontinuing its lawsuit (*id.* at 521-522). The next year, however, after defendant terminated the non-party contract for cause, it decided to complete the remaining work on the project itself (*id.* at 522). By that point, defendant maintains that it had expended "$4,000,000 more to complete the project than the payment remaining under the contract with the City because of the need to correct defective work performed by plaintiff" (*id.*). Hence, defendant in *BIB Construction* had identified both threatened litigation and actual incurred liabilities underlying its $3,765,385, the collateral demand (*id.*). On such a record, there was ample context to ascertain defendant's anticipated "possible losses" and thus, the reasonableness of its collateral demand. Here, by contrast, US Fire's demand for collateral is based, at least in part, on its own perceived risk of exposure rather than any particularized current or future liabilities or any actual or threatened claims against the Devon Bond (*see* USFIC 19-a ¶¶ 10-15, 20-29, 31, 33-34, 42-43).

In sum, because plaintiffs have established that "facts essential to justify opposition may exist but cannot then be stated," US Fire's motion for partial summary judgment is plainly premature at this stage of the proceedings. US Fire's motion is accordingly denied, without prejudice to renew upon the completion of discovery.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that US Fire's motion for partial summary judgment is denied, without prejudice to renew after the completion of discovery; and it is further

ORDERED that, given the Bankruptcy Court's determination that the Automatic Stay does not extend to the non-debtor plaintiffs Cox Oil, LLC, CEXXI, Inc., and Cox Investment Partners LP (*see* NYSCEF # 165), the Clerk of the Court is directed to restore this matter to the court's active calendar and mark this matter's "Case Status" on NYSCEF as "Active"; and it is further

ORDERED that a preliminary conference shall be held via Microsoft Teams on June 5, 2024, at 11:30 a.m. or at such other time that the parties shall set with the court's law clerk, provided that the parties shall first meet and confer to stipulate to a preliminary conference order, available at https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/part49-PC-Order-fillable.pdf; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this decision, along with notice of entry, on defendants within ten days of this filing.

05/21/2024
DATE

MARGARET A. CHAN, J.S.C.

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