Atlantic Specialty Ins. Co. v Blitman Mahopac, LLC
2024 NY Slip Op 35054(U)
December 6, 2024
Supreme Court, Westchester County
Docket Number: Index No. 61449/2024
Judge: Gretchen Walsh
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION
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ATLANTIC SPECIALTY INSURANCE COMPANY,

Plaintiff,

Index No. 61449/2024
Motion Seq. Nos. 1, 2, 3

- against -

BLITMAN MAHOPAC, LLC, ROBIN WINTER as Executor of the Estate of Howard N. Blitman, and GARY S. PERESIPER,

Defendants.
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WALSH, J.

The following e-filed documents, listed in NYSCEF by document numbers 9-27, 49, 69, 70, and 75-80, were read on this motion (Motion Seq. No. 1) by Plaintiff Atlantic Specialty Insurance Company ("Plaintiff", "Atlantic" or "ASIC") for an order granting it summary judgment pursuant to CPLR 3212 against Robin Winter, as executor for the Estate of Howard N. Blitman ("Estate" or "Winter") and Gary Peresiper ("Peresiper," together "Defendants"): (1) ordering the Estate and Peresiper, both jointly and severally, to specifically perform their obligation under the subject General Indemnity Agreement dated October 14, 2015 (the "GIA" or "Indemnity Agreement") to provide funds to Plaintiff in the amount of $650,000.00; (2) granting Plaintiff judgment against Defendants, both jointly and severally, in the amount of $38,541.42, in addition to prejudgment interest and other costs, fees and disbursements incurred in bringing this motion; and (3) continuing the action to recover additional costs and future damages which may be incurred by Plaintiff.

The following e-filed documents, listed in NYSCEF by document numbers 28-46, 67 and 81, were read on this motion (Motion Seq. No. 2) by Plaintiff for an order granting Plaintiff a default judgment against Blitman Mahopac LLC ("Blitman" or "Defaulting Defendant"): (1) ordering Blitman to specifically perform its obligation under the Indemnity Agreement to provide funds to Plaintiff in the amount of $650,000.00; (2) granting Plaintiff judgment against Blitman, in the amount of $38,541.42, in addition to prejudgment interest and other costs, fees and disbursements incurred in bringing this motion; and (3) continuing this action to recover additional costs and future damages which may be incurred by Plaintiff.

The following e-filed documents, listed in NYSCEF by document numbers 54-66, 68, 71, 73 and 74, were read on this cross-motion (Motion Seq. No. 3) by the Estate for an order pursuant to CPLR 602 consolidating this action with the action entitled *Town of Carmel v Atlantic Specialty Insurance Company and Blitman Mahopac, LLC, et al.* (Supreme Court, Putnam County) (Index Number 501654/2023) (the "Town Action").

Upon the forgoing papers and for the reasons stated herein, Plaintiff's motion for summary judgment and motion for a default judgment shall be granted in part and denied in part, and the Estate's cross-motion shall be denied.

RELEVANT PROCEDURAL BACKGROUND

A. The Complaint

This action was initiated with Plaintiff's filing of a Summons and Verified Complaint on April 30, 2024 (NYSCEF Doc. No. 1 [the "Complaint"]). It arises from Blitman's execution of the Indemnity Agreement required in connection with Plaintiff's issuance of a site improvement bond required by the Town of Carmel in connection with Blitman's construction of a residential development. Plaintiff and Blitman have been sued in connection with the site improvement undertake by Blitman in the Town Action. .The Complaint alleges: (1) a First Cause of Action for Specific Performance based upon the terms of a site improvement bond issued by Plaintiff on behalf of Blitman dated October 2, 2022, assigned Bond. No. 800005249 and in the initial amount of $1,967,000 (the "Site Improvement Bond" or "Bond"); and (2) a Second Cause of Action for Breach of Contract based upon Defendants purported breach under the Site Improvement Bond. In terms of the relief requested, Plaintiff seeks: (1) for the First Cause of Action, specific performance against the Defendants, jointly and severally, as to their contractual obligation to deposit with ASIC collateral funds in the amount of $650,000; (2) for the Second Cause of Action, a judgment against Defendants based upon their breach of the Indemnity Agreement, inclusive of pre-judgment interest and costs and expenses, including attorneys' fees, incurred in connection with defending Plaintiff in the Town Action and pursuing this case; and (3) additional relief as this Court deems appropriate (*id.* at 12).

B. Defendant Estate's Answer

Defendant Estate filed a Verified Answer with Cross-Claims on July 2, 2024 (NYSCEF Doc. No. 5 [the "Estate Answer"]). In its Answer, the Estate denies the material allegations of the Complaint (Estate Answer at ¶¶ 1-49), invokes sixteen affirmative defenses (*id.* at ¶¶ 50-65), and asserts two cross-claims against Peresiper. The first cross-claim seeking an order declaring that: (1) "the General Indemnity Agreement . . . provides that Peresiper is liable for the full amount due to Plaintiff"; (2) "Peresiper is obligated pursuant to the terms of the GIA and common law indemnity to pay 50% of any amount due to Plaintiff as his proportionate share;" and (3) "for such other further and different relief that may be just and proper under the circumstances." The second cross-claim seeks a judgment against Peresiper in the event Plaintiff is awarded judgment on the

Complaint "for [Peresiper's] proportionate share of any amounts owed in accordance with the [Bond] and/or any such amounts that Defendant Estate paid or will pay" (*id.* at ¶¶ 66-74).

C. Defendant Peresiper's Answer

Defendant Peresiper filed a Verified Answer with Cross-Claims on July 2, 2024 (NYSCEF Doc. No. 7 [the "Peresiper Answer"]). In his Answer, Peresiper denies the material allegations of the Complaint (Peresiper Answer at ¶¶ 1-49), invokes sixteen affirmative defenses (*id.* at ¶¶ 50-65), and asserts a cross-claim against the Estate for "contribution and indemnification for their proportionate shares of any amounts owed" (*id.* at ¶ 66).

Defendant Estate filed a Reply to Cross-Claim on July 18, 2024 denying the material allegations of the cross-claim asserted in Defendant Peresiper's Answer (NYSCEF Doc. No. 8).

MOTION SEQ. NOS. 1 & 3

A. Plaintiff's Contentions in Support of its Motion

In support of Motion Seq. No. 1, Plaintiff submits: (1) an affirmation of Christopher J. Sheehy, Esq., dated August 5, 2024 (NYSCEF Doc. No 18 [the "Sheehy Aff. 1"]), and attached exhibits (NYSCEF Doc. Nos. 19-23); (2) an affidavit of Brielle M. Tavaglione ("Tavaglione"), Senior Claims Consultant for Plaintiff, sworn to July 31, 2024 (NYSCEF Doc. No. 10 [the "Tavaglione Aff."]), together with its attached exhibits (NYSCEF Doc. Nos. 11-17); (3) a statement of material facts (NYSCEF Doc. No. 24 ["Plf's SOF"]); and (4) a memorandum of law in support (NYSCEF Doc. No. 25 ["Plf's Mem. 1"]).

Tavaglione asserts that she is the Senior Claims Consultant for Plaintiff and submits her affidavit in support of Plaintiff's motion for summary judgment, the contents of which are based upon her personal knowledge, the investigation she conducted as Senior Claims Consultant, and a review of the relevant documents (Tavaglione Aff. at ¶¶ 1-3). Tavaglione claims that Blitman, Peresiper and decedent Howard N. Blitman ("Mr. Blitman") (the "Indemnitors") executed the Indemnity Agreement in Plaintiff's favor which, under Paragraph 2 obligated that the Indemnitors would, both jointly and severally:

> exonerate, hold harmless, indemnify, and keep indemnified the Surety 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 and from and against any such losses and expenses which the Surety may sustain or incur, plus interest thereon, arising out of, directly or indirectly: (1) the Surety being requested by the Indemnitors to execute or procure the execution of any Bonds; or (2) the Surety having executed or procured the execution of any Bonds on behalf of Principal; or (3) the failure of the Indemnitors to perform or comply with any of the terms and conditions of this Agreement and/or (4) the Surety enforcing any of the terms and conditions of this Agreement.

> (*id.* at ¶ 4, *quoting* the Indemnity Agreement [attached to the Tavaglione Aff. at NYSCEF Doc. No. 11] at ¶ 2).

Paragraph 3 of the Indemnity Agreement states that Indemnitors:

> upon demand of the Surety, at any time and for any reason, including but not limited to Surety's receipt of a claim, shall deliver to the Surety collateral in the form and amounts acceptable to the Surety in its sole and absolute discretion. Any acceptable collateral provided to the Surety by the Indemnitors or any third party or the proceeds thereof, in whole or in part, may be held in the name of Surety and applied to any obligations of Indemnitors under this Agreement. The Surety shall not have any obligation to release such collateral until it has received a written release and conclusive evidence of its discharge without loss in the form and substance satisfactory to the Surety with respect to the Bonds and fulfillment by Indemnitors of all obligations owed under this Agreement. Indemnitors agree 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.* at ¶ 5, *quoting* the Indemnity Agreement at ¶ 3).

Tavaglione asserts that Indemnitors agreed to provide to ASIC, on demand, with funds in the amount ASIC deems necessary to protect it from potential loss in connection with any bonds issued on behalf of Blitman, and, further, that ASIC may enforce its right to collateral by order of specific performance (*id.* at ¶ 6).

Tavaglione provides, as factual background, that Blitman undertook to construct a residential development known as the Random Ridge Subdivision (the "Development"), located at Kennicut Hill Road, Mahopac in the Town of Carmel (the "Town") and that in order for Defendant Blitman to move forward with the Development, it was required by the Town to "perform certain site improvement work, including, but not necessarily limited to, constructing roadways, drainage systems, curbing, sewers, lighting and other items for the Development," and, in assurance of those improvements, Blitman was required by the Town to "provide a site improvement bond" (the "Bond") (*id.* at ¶¶ 7-8). Tavaglione claims that Plaintiff issued the Bond to Blitman on October 28, 2015 with an initial penal sum of $1,967,000 (*id.* at ¶ 9). Tavaglione asserts that, pursuant to that Bond, the Indemnitors were jointly and severally liable for any failure of Blitman to perform the requisite improvements (*id.*). Tavaglione states that Defendant Blitman began construction on the Development, performing the majority of the requisite work on site, before requesting a reduction of the penal sum to reflect the cost of the remaining site work and an assessment was performed by Putnam Engineering, PLLC ("Putnam") who estimated the work that remained to be done has a value of $334,350 and she attaches a copy of this assessment as Exhibit 3 (NYSCEF Doc. No. 13) (*id.* at ¶ 10). She avers that "[d]espite this assessment, the Town

only agreed to reduce the penal sum to $650,000" by resolution dated December 19, 2018 and she attaches a copy of the Town's resolution as Exhibit 4 (NYSCEF Doc. No. 14) (*id.*).

Tavaglione states: (1) that Mr. Blitman passed away on January 3, 2021; (2) that Defendant Winter was made executor of his Estate; and (3) that the Estate assumed Mr. Blitman's obligations as an indemnitor under the Indemnity Agreement (*id.* at ¶ 11). She contends that thereafter, on or about May 26, 2023, the Town provided Plaintiff with written notice that Defendant Blitman had not completed the requisite site work for the development secured by the Bond (*id.* at ¶ 12). Tavaglione asserts that on October 10, 2023, Plaintiff demanded collateral in the amount of $650,000 from Defendants and that the Indemnitors failed and/or refused to provide the demanded collateral thereby breaching the Indemnity Agreement (*id.* at ¶ 13). Tavaglione explains that Plaintiff repeated this demand on April 16, 2024, in response to which Defendants once again "failed to provide the demanded collateral" (*id.* at ¶ 14).

Tavaglione explains that as a result of Defendants' breach, Plaintiff retained counsel and a consultant to respond to the claim in the Town Action and commence this action (*id.* at ¶¶ 15-16). Tavaglione claims the facts material to Plaintiff's motion for summary judgment are not in dispute (*id.* at ¶¶ 17-18). She asserts that Plaintiff has made six payments to WSSG,[1] in addition to six payments to its consultant, Beacon Consulting ("Beacon")[2] (*id.* at ¶¶ 19-20). Tavaglione ends her affidavit reiterating Plaintiff's request for: (1) "an order of specific performance compelling the Estate and Peresiper to meet their express contractual obligations to provide ASIC with collateral funds in the amount of $650,000 to protect ASIC from loss under the Bond"; and (2) "judgment awarding ASIC damages incurred as a result of the Indemnitors' breach of the Indemnity Agreement, including legal and consulting fees and expenses incurred in this matter" (*id.* at ¶ 21).

In his affirmation, Sheehy argues that Plaintiff moves for summary judgment "because there are no questions of material fact or valid legal defenses to the causes of action asserted in the Verified Complaint" (Sheehy Aff. 1 at ¶ 7). Sheehy explains that Plaintiff was required to: (1) retain WSSG to respond to the Bond claim in the Town Action; (2) commence this action; and (3) retain Beacon as a consultant (*id.* at ¶¶ 9-10). Sheehy dedicates the remainder of his affirmation to describe his qualifications, legal experience, and the work performed by WSSG to substantiate its current billings amounting to $12,710.00 in costs and fees incurred in connection with this action and the Town Action (*id.* at ¶¶ 11-21).

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[1] Specifically, six individual payments, in the amount of: (1) $5,244.35 on January 16, 2024; (2) $4,712.75 on February 20, 2024; (3) $1,085.45 on March 18, 2024; (4) $820.00 on April 15, 2024; (5) $4,693.23 on May 13, 2024; and (6) $1,516.31 on July 15, 2024 (Tavaglione Aff. at ¶ 19).

[2] Specifically, six individual payments, in the amount of: (1) $649.00 on January 24, 2024; (2) $862.50 on February 28, 2024; (3) $4,360.00 on April 8, 2024; (4) $7,745.33 on April 30, 2024; (5) $4,342.50 on July 16, 2024; and (6) $2,510.00 on July 16, 2024 (*id.* at ¶ 21).

In its memorandum of law, Plaintiff first provides a brief summary of the background facts (Plf's Mem. 1 at 1-8). In support of this Court's grant of summary judgment to Plaintiff on its claim for specific performance under the Indemnity Agreement, Plaintiff asserts that there is no dispute as to its contractual entitlement to the collateral funds given the express terms of the Indemnity Agreement (*id.* at 9). Plaintiff further asserts that it has demanded collateral funds equal to its exposure under the Bond and, therefore is seeking only "the minimal protection needed for its potential loss" – an amount it asserts is a matter of its discretion under the Indemnity Agreement and is, nevertheless, entirely reasonable (*id.*). Plaintiff explains that the validity of collateral security provisions in indemnity agreements, such as that at issue here, have been upheld consistently by both New York state courts and federal courts "even when the surety has not yet incurred a loss" (*id.* at 10). Plaintiff further asserts that New York courts have found that the breach of such a collateral provision leaves the surety without an adequate legal remedy, due to the unascertainable nature of the damage which results from a failure to give security (*id.* at 11). Plaintiff contends that there is no question that Plaintiff's demand for funds equal to the amount of the Town's claim under the Bond in the Town Action is reasonable (*id.*).

In support of its request for summary judgment on its breach of contract cause of action, Plaintiff argues that, pursuant to Paragraph 2 of the Indemnity Agreement, the Indemnitors "agreed . . . to 'exonerate, hold harmless, indemnify, and keep indemnified [ASIC] 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 and from and against any such losses and expenses which [ASIC] may sustain or incur, plus interest thereon, arising out of, directly or indirectly . . . the failure of the Indemnitors to perform or comply with any of the terms and conditions of this Agreement and/or . . . enforcing any of the terms and conditions of this Agreement'" (*id.* at 11-12 [citations omitted]). Plaintiff asserts that the Indemnity Agreement explicitly includes attorneys' fees billed in conjunction with Plaintiff's claims against Indemnitors – thus "the award of attorneys' fees incurred in enforcing the Indemnity Agreement is also appropriate" (*id.* at 12). Plaintiff claims that in cases such as this "the surety's payments are scrutinized only for good faith and reasonableness as to the amount paid" (*id.*). Plaintiff asserts that vouchers and other statements indicate the incurrence of reasonable expenditures "establish [its] *prima facie* right to reimbursement" (*id.*). Plaintiff further asserts that the Tavaglione Affidavit "establishes [Plaintiff's] *prima facie* entitlement to recovery;" that the Plaintiff's "right to reimbursement . . . of its costs and counsel fees . . . is clear," and that the Sheehy Affirmation supports Plaintiff's "right to receive the costs and counsel fees incurred" (*id.* at 13-14).

B. The Estate's Contentions in Opposition Plaintiff's Motion and in Support of its Cross-Motion

In opposition to Plaintiff's motion for summary judgment and in support of its cross-motion, the Estate submits: (1) an affirmation of Harry J. Nicolay, Jr. Esq. dated September 20, 2024 (NYSCEF Doc. No 55 [the "Nicolay Aff."]) together with its attached exhibits (NYSCEF

Doc. Nos. 56-63)[3]; (2) an affidavit of Defendant Robin Winter (NYSCEF Doc. No. 64 [the "Winter Aff."])[4]; (3) a memorandum of law (NYSCEF Doc. No. 65 ["Estate Mem."]); and (4) a Response to Statement of Material Facts (NSYCEF Doc. No. 66 ["Estate SOF"]).

In his affirmation, Nicolay summarizes the procedural history of this case (Nicolay Aff. at ¶¶ 2-4). Nicolay asserts that the Court should deny Plaintiff's motion for summary judgment because: (1) "numerous issues of fact exist"; (2) "the amount requested for collateral is 'unreasonable' as a matter of law"; and (3) "the legal position of [Plaintiff] in the Town action[] is legally inconsistent with its legal position in this case" (*id.* at ¶ 5). Nicolay also summarizes the Estate's legal argument, which is replicated in the accompanying memorandum of law.

In its memorandum of law, the Estate asserts that Plaintiff's motion should be denied due to Plaintiff's inconsistent legal positions in the Town Action and this action (Estate Mem. at 1). The Estate further argues that "material issues of fact exist [as to Plaintiff's request for $650,000 in capital] and the 'unreasonableness' of the amount demanded," specifically given the "credible evidence" establishes that: (1) "80% of the work required by the Bond is complete"; (2) "the Town Planning Board voted to recommend that the Bond be reduced to $393,400"; (3) "the Town's refusal to accept a dedication of the roadways reduces the Bond to potentially $0"; (4) "ASIC has not disclosed the report of [Beacon Consulting]"; and (5) "ASIC has not paid the Town any money under the Bond" (*id.*). The Estate asserts that the branch of Plaintiff's motion which requests an award of attorneys' fees and expenses "should fail for two separate and distinct reasons": (1) "[Plaintiff] does not make any showing that the terms and conditions of paragraph 2 of the General Indemnity Agreement concerning indemnification have been triggered. ASIC has not prevailed in this action; nor has it incurred any damages to the Town that require indemnification"; and (2)

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[3] The Court will consider the exhibits attached to the Nicolay Affirmation that were submitted in admissible form by Plaintiff or are otherwise in admissible form -- *i.e.*: the pleadings in the Town Action (NYSCEF Doc. Nos. 56, 57, 62 & 63); the Putnam Engineering Letter (NYSCEF Doc. No. 58, previously submitted by Plaintiff as NYSCEF Doc Nos. 13 & 32); and the Bond (NYSCEF Doc. No. 61, previously submitted by Plaintiff as NYSCEF Doc. Nos. 12 & 31). The Court has also considered the exhibit consisting of the Town of Carmel Planning Board Minutes dated November 14, 2018 and December 19, 2018 (NYSCEF Doc. No. 59), but has not considered the January 4, 2017 letter from Richard J. Franzetti, P.E. addressed to Blitman Mahopac LLC (NYSCEF Doc. No. 60) as it is not submitted in admissible form. The Court has also not considered Mr. Nicolay's assertions of facts for which he has no personal knowledge (e.g., that the Town was somehow at fault for not accepting the dedication of the roads).

[4] In her Affidavit, Winter states that she has "reviewed the Affidavit in Opposition of Harry J. Nicolay, Jr. submitted herewith and [agrees] with its contents" (Winter Aff. at ¶ 2). This is wholly insufficient to establish the admissibility of the statements made by the Estate's counsel and, in addition, the admissibility of the documents annexed to counsel's affirmation.

"[Plaintiff] has not set forth a shred of proof on this motion to remotely demonstrate that the fees and consulting expenses are 'reasonable and necessary'" (*id.* at 1-2).

The Estate argues that Plaintiff has failed to make its requisite showing as to the absence of any issue of material fact (*id.* at 2-3). The Estate also argues that, under either a cause of action for specific performance or a cause of action for breach of contract, the amount of collateral security requested, as well as the amount of attorneys' fees and expenses, "must be 'reasonable'" where "the amount of the collateral is in the sole discretion of the surety" (*id.* at 3).

In support of its argument that Plaintiff should be estopped from seeking delivery of collateral and indemnification because of its "inconsistent legal positions" pled in this action and in the Town Action, the Estate explains that the estoppel doctrine prevents parties "who asserted a factual position in a prior action from taking an inconsistent position in subsequent litigation" (*id.* at 4). According to the Estate, a fair reading of the Amended Answer in the Town Action, signed by Plaintiff's counsel demonstrates that "ASIC has completely denied all liability to the Town under the Bond and . . . [asserts] that the claim is time barred" (*id.* at 4-5). In sum, the Estate argues that Plaintiff ought to be "legally estopped from seeking collateral and indemnification from the Estate, when [Plaintiff] has denied all liability to the Town under the Bond" (*id.* at 5).

The Estate further argues that Plaintiff's motion should be denied because it "has submitted credible proof . . . [demonstrating] that the amount of collateral requested by [Plaintiff] is unreasonable" (*id.*). The Estate asserts that the Planning Board voted on and approved a recommendation reducing the Bond to a balance of $393,400 on November 14, 2018, and that the minutes for that meeting demonstrate that the purpose of such reduction was to configure the bond amount closer to the amount of remaining work – $334,350 – up to the 20% bond reduction minimum threshold (*id.* at 6). The Estate claims that the reduction "appears to be in conjunction with a letter/report to the planning board from Putnam Engineering, PLLC dated April 17, 2018, which advised the Board that 'Over 80% of the site improvements have been completed,' . . . that the 'Balance to Complete' is '334,350.00' and that the 'bond be reduced from $1,967,000.00 to the minimum of twenty (20) percent or $393,400.00'" (*id.*). The Estate asserts that the letter from the engineer and the Town Board Minutes create issues of material fact as to the reasonableness of the requested amount of $650,000 (*id.*).

The Estate summarizes the Town's purported refusal to accept dedication of subdivision roads, as represented by a letter dated January 4, 2017 (the "January 4 Letter") (*id.*). The Estate claims that the line items for the subject bond, specifically on the "Performance Bond Amount" schedule under the headings: "Pavement"; "Curbing"; and "Drainage" reveal over $550,000 in "bonded items related to the roadways" and the Town's refusal to accept this dedication "raises substantial material issues of fact that warrant the denial of the motion" (*id.*). The Estate further claims that this reduces the amounts due under the Bond potentially to $0, raising yet more issues of fact as to the reasonableness of the collateral requested (*id.*).

The Estate next turns to Plaintiff's failure to disclose the alleged consultant report, arguing that Plaintiff recently engaged Beacon in order to conduct a survey of the subject subdivision and that, moreover, Plaintiff seeks payment for the cost of that inspection from the Defendants in this action (*id.*). The Estate asserts that Plaintiff's counsel has failed to respond to the "multiple requests" to attach the report to its motion papers or otherwise provide a copy of the report, and that the absence of the report raises yet another issue of fact regarding the reasonableness of the requested collateral (*id.*).

According to the Estate, the amount of requested collateral is speculative, arbitrary, capricious and unreasonable, given that "ASIC has denied liability in the Town Action and . . . has not paid the Town [any amount]" (*id.*). The Estate argues that ASIC's claim as to the reasonable, commensurate nature of the requested collateral is unfounded (*id.* at 7-8).

Next, the Estate claims that the Plaintiff's request for legal fees and expenses, pursuant to the Indemnity Agreement, should be denied given that "the terms and conditions of paragraph 2 of the General Indemnity Agreement . . . concerning indemnification have not been triggered[] . . . [nor is there any] proof presented by [Plaintiff] to demonstrate the 'reasonableness' of these purported legal and consulting fees" (*id.* at 8). Accordingly, the Estate asserts that the branch of Plaintiff's motion seeking legal fees and expenses should be denied (*id.* at 8-9).

Finally, the Estate asserts that summary judgment is premature given that facts essential to its opposition "may exist but cannot be stated without discovery and disclosure" (*id.* at 9). Relying on CPLR 3212(f), the Estate argues that Courts have found that where, as here, parties have not completed discovery in an action, "[s]ummary judgment is frequently denied as 'premature'" (*id.*). The Estate asserts that it requires: (1) "discovery concerning ASIC's consultant's report on the amount of work purportedly remaining under the Bond"; (2) "ASIC's underwriting records concerning the risk it has assessed on this matter"; and (3) "the amount of damages to which ASIC is potentially exposed" (*id.* at 10).

In support of its cross-motion to consolidate this case with the Town Action, the Estate relies on CPLR 602, which states, in pertinent part, that a court may consolidate "'actions involving a common question of law or fact [] pending before a court . . . as may tend to avoid unnecessary costs or delay'" (*id.*, *quoting* CPLR 602). According to the Estate, "New York courts are inclined to consolidate separate actions where there are common issues of law and fact; one or more parties are identical; consolidation will avoid unnecessary duplication, cost, and expense and will prevent the possibility of inconsistent decisions and judgments; and where no substantial prejudice will result from consolidation" (*id.*). The Estate asserts that this action should be consolidated with the Town Action because: (1) "both actions involve the same parties (with the exception of the Town, who is the Plaintiff in the Town Action)"; (2) "both action[s] contain similar facts and causes of action regarding alleged liability on the Bond and the amount due thereunder"; (3) "consolidation will avoid further duplication, cost and expense in having to litigate both actions in separate courts where the issues are substantially similar"; (4) "consolidation will avoid the possibility of

inconsistent decisions or judgments"; and (5) "the Plaintiff cannot and will not be able to show any prejudice whatsoever resulting from consolidation at this early juncture of the cases, where no discovery has taken place in either action" (*id.* at 11). Further, the Estate asserts that consolidation is appropriate given that the purportedly unreasonable amount of the requested collateral "will likely exceed the amounts, if any, determined to be owed to the Town of Carmel in the Town Action" (*id.*).

C. Peresiper's Contentions in Opposition to Plaintiff's Motion and in Support of the Estate's Cross-Motion

In support of the Estate's cross-motion and in opposition to the Plaintiff's motion, Defendant Peresiper submits: (1) an Affirmation of Ira Levine, Esq. dated September 20, 2024 (NYSCEF Doc. Nos 69 & 71 [the "Levine Aff."]); and (2) a Response to Statement of Material Facts (NYSCEF Doc. No. 70 ["Peresiper SOF"]). The purpose of the Levine Affirmation is to oppose Plaintiff's motion and to offer Peresiper's support for the Estate's cross-motion (Levine Aff. at ¶¶ 1-4). Specifically, Levine asserts that Plaintiff's motion "should be denied for the reasons set forth by [the Nicolay Affirmation and the Estate's Memorandum of Law]" (*id.* at ¶ 2), and Peresiper further joins "the Estate's cross-motion for consolidation for all purposes or joint trial pursuant to CPLR 602(a)" (*id.* at ¶ 3).

D. Plaintiff's Contentions in Further Support of Its Motion and in Opposition to Defendants' Cross-Motion

In opposition to the Estate's cross-motion to consolidate and in further support its motion, Plaintiff submits: (1) the Opposition Affirmation of Seth D. Rosmarin, Esq. dated October 3, 2024 (NYSCEF Doc. No. 74 [the "Rosmarin Opp. Aff."]); (2) the Reply Affirmation of Seth D. Rosmarin, Esq. dated October 3, 2024 (NYSCEF Doc. No. 76 [the "Rosmarin Reply Aff."]), along with a copy of the redacted invoices for WSSG's legal services in this action as an attached exhibit (NYSCEF Doc. No. 77 [the "Invoices"]); (3) an affidavit of Andrew Lem sworn to October 3, 2024 (NYSCEF Doc. No. 78 [the "Lem Aff."]); (4) a Memorandum of Law in Opposition to Motion Seq. No. 3 (NYSCEF Doc. No. 74 ["Plf's Opp. Mem."] and (5) a Memorandum of Law in Reply (NYSCEF Doc. No. 75 ["Plf's Reply Mem."]).

Rosmarin submits his affirmation "in opposition to the cross-motion by [the Estate], seeking to consolidate this action with [the Town Action]" (Rosmarin Opp. Aff. at ¶ 1). After providing the factual background of the case (*id.* at ¶¶ 2-6), Rosmarin explains that Plaintiff opposes the Estate's cross-motion as "[e]ach action involves separate and distinct facts and applicable law" (*id.* at ¶ 7). Rosmarin explains that while the Indemnity Agreement is at the center of this case, it is not involved in the Town Action whatsoever (*id.*). Rosmarin asserts that such a consolidation order would irreparably prejudice the Estate given the pending motion before this Court and the conferences held before this Court, etc. (*id.*).

In his affidavit, Lem states that he is a Project Manager/Surety Consultant for Beacon – a position he has held for over 7 years (Lem Aff at ¶ 1), and that the basis for the representations in his affidavit are his own personal knowledge, his inspection of the Development and his review of the relevant records maintained by Plaintiff, Blitman, and the Town and Beacon (*id.* at ¶ 4). Lem explains that Beacon was retained by Plaintiff to review the claim asserted against Plaintiff in the Town Action (*id.*). Lem describes his understanding that the claim under the Bond resulted in Plaintiff's demand for collateral funds upon the Indemnitors, and that the Indemnitors thereafter failed to provide the demanded collateral (*id.* at ¶ 2). Lem claims that the purpose of his affidavit is "to correct the inaccurate statements contained in the [Nicolay Opp. Aff.] . . . as well as to summarize Beacon's analysis of the remaining site work at the Development in connection with the Bond Claim" (*id.* at ¶ 3). Lem provides factual background before explaining that Beacon was retained as a consultant and that "[a]s a result, on or about March 12, 2024, [Lem] conducted an on-site review of the Development with the Town Engineer to ascertain the extent to which the site work remained incomplete," in addition to "[reviewing] documents, including, but not limited to, the scope of the bonded work, drawings, contract documents, as well as correspondence relating to the remaining site improvements under the Bond and/or in connection with the Development and a prior breakdown of the open site work by Putnam Engineering PLLC, (Putnam) performed in April 2018" (*id.* at ¶¶ 5-7).

Lem states that, contrary to the Estate's claim, Beacon did not prepare a report in connection of its review of the Development and instead conducted "an analysis of, among other things, the items of bonded site work remaining to be completed . . . as well as an estimate of the cost to complete that work" (*id.* at ¶ 8). Lem asserts that, based on Beacon's analysis, the cost of completing the remaining work at the Development could cost somewhere between a range of $377,855 - $880,535, and that Putnam's evaluation of $393,400 to complete the site was conducted in April 2018, and may not be accurate given factors such as the rise in inflation from 2018 and the failure to include certain items of site work in the Putnam analysis (e.g., infiltration systems for certain roads at the Development in connection with compliance with the SWPPP) (*id.* at ¶¶ 11-13). Lem states Beacon has concluded that "to the extent the Town's position is upheld [with regard to the inclusion of items such as infiltration systems], the cost of completion will be significantly increased" and that the additional costs, "together with inflation of costs from 2018, amount to a claim exceeding the Bond's current penal sum" (*id.* at ¶ 14). Lem disagrees with the Estate's categorization of the correspondence with the Town as showing the Town's claim as unenforceable or inflated, and notes that the "argument does not remove the exposure ASIC faces under the Bond" (*id.* at ¶ 15).

In conclusion, Lem provides an explanation for the consulting expenses paid by ASIC to Beacon, amounting to $20,469.33 at the time of the summary judgment motion. Lem states that Beacon's investigation "included the review of voluminous documents,"[5] preparation for and

[5] Lem makes specific mention of "(a) the estimates and drawings submitted by the Town Engineer at the time the Bond was executed, (b) subsequent revisions and drawings submitted by the Town

attendance of "an on-site review of the Development along with the Town Engineer and representatives of ASIC," and "an analysis of its review of the physical documents, and of the site" (*id.* at ¶¶ 16-18). Lem states that the work by Beacon "was extensive" and that its hourly rates in the range of $185 - $215 "are entirely reasonable for these type[s] of consulting services in New York" and, as such, "the fees paid to Beacon, [in the amount of] $20,469.33, to investigate, analyze and defend the Bond claim, are reasonable" (*id.* at ¶¶ 18-19).

In its memorandum in opposition, Plaintiff argues that "the central facts [in this action] concern only the Indemnity Agreement, the Indemnitors' and the Estate's breach of the Indemnity Agreement and ASIC's right to specific performance of the collateral security provision in the Indemnity Agreement," while "the Town Action concerns the remaining site work at the Development purportedly not completed by Blitman, resulting in the Town's Bond claim and resulting lawsuit" (Plf's Opp. Mem at 5-6). Plaintiff argues that the enforcement of the Indemnity Agreement is irrelevant to the Town Action, just as the Town's claim is irrelevant to this action "except as the catalyst for the demand of collateral" (*id.* at 6). Given the different claims, parties and transactions at issue, Plaintiff claims that "the two actions . . . are so dissimilar they defy any efficient . . . consolidation" (*id.*). Plaintiff argues that a consolidation would be prejudicial given the pending motion for summary judgment and the "historic knowledge the Court has gained of [the] issues" in this case (*id.* at 6-7). Accordingly, Plaintiff requests that should this Court order the actions consolidated, that the consolidated action be heard before this Court in Westchester County (*id.* at 7). Plaintiff alternatively requests that, should the Court permit consolidation before Putnam Supreme Court, such relief should not be granted until after the resolution of Plaintiff's motion for summary judgment (*id.*). Plaintiff states that "the mere fact that certain limited common questions of fact may exist . . . does not mandate that a motion for consolidation must be granted" given that "the two cases involve completely different transactions . . . and completely different legal theories of recovery" (*id.* at 7-8).

Rosmarin explains the purpose of his Reply Affirmation is "to refute the factual assertions made in the [Nicolay Aff.]" (Rosmarin Reply Aff. at ¶ 2). Rosmarin explains that both the Estate and Peresiper fail to "refute the indisputable facts giving rise to [Plaintiff's] right to summary judgment" (*id.* at ¶ 3). Specifically, Rosmarin asserts that: (1) "the Estate does not dispute that [Howard N. Blitman, Blitman Mahopac LLC and Peresiper] each executed [the Indemnity Agreement] . . . under which, each of the Indemnitors agreed, jointly and severally, not only to indemnify ASIC from and against any and all damages, losses and expenses incurred as a result of ASIC's issuance of surety bonds on behalf of Blitman and/or in enforcing the Indemnity Agreement but also, on demand, to provide ASIC with collateral funds" (2) "the Estate [does not] dispute that, upon Mr. Blitman's passing . . . the Estate assumed Mr. Blitman's obligations to ASIC

Engineer, (c) minutes of Town Planning Board Meetings, (d) resolutions, (e) Putnam's correspondences and attachments relating to the remaining site work for the Development, (f) the Bond, and (g) documents relating to the Development's required compliance with state and local authorities" (Lem Aff. at ¶ 17).

under the Indemnity Agreement"; (3) "the Estate . . . admits that, upon Blitman's request, and in reliance upon the Indemnity Agreement, ASIC issued . . . [the Bond] . . . and that, following a claim under the Bond, ASIC demanded that the Indemnitors . . . provide collateral funds to ASIC in the amount of the Bond claim"; and (4) "the Estate admits that the Indemnitors/Estate refused to provide this collateral" (*id.*). Rosmarin categorizes the Estate's arguments as an irrelevant attempt to confuse these undisputed facts (*id.* at ¶ 4). Rosmarin claims that the Estate's arguments as to the reduction of the penal sum are "completely refuted by the Town's Resolution of December 19, 2018, which reduced the Bond from $1,967,000 (the initial penal sum) to its current amount of $650,000" (*id.*). Rosmarin asserts that the Plaintiff "has established its entitlement to summary judgment and an order requiring the Estate and Peresiper, jointly and severally, to specifically perform their obligation under the Indemnity Agreement to provide ASIC with collateral funds in the amount of $650,000" and, further, given the Court the "requisite proof warranting a judgment against the Estate and Peresiper, jointly and severally, in the amount of $38,541.42" for attorneys' fees and other costs (*id.* at ¶ 5).

Rosmarin explains that, contrary to the Estate's representations, the Town Planning Board never reduced the Bond to $393,400 and that the Estate ignores the minutes of a meeting subsequent to the one which occurred on November 14, 2018 – specifically on December 19, 2018 – "where the Town Planning Board unanimously resolved to lower the penal sum of the bond only to $650,000," and this figure "is conclusively established by the Town's Resolution dated December 20, 2018" and by a letter from the Town, dated May 16, 2023 (*id.* at ¶¶ 7-8). Rosmarin next states that the Estate's arguments regarding the need for discovery is baseless, and that "discovery is not needed," as "all of the facts material to this motion are fully disclosed and even acknowledged by the Estate" (*id.* at ¶¶ 9-11). Further, Rosmarin argues that the issues raised by the Estate do not concern the Plaintiff's motion, but instead the amount to which the Town may be entitled in the Town Action (*id.* at ¶¶ 9-11). Rosmarin further notes that: (1) "the Estate did not serve discovery until September 16, 2024, nearly five months after ASIC filed its Summons and Complaint and only after ASIC made its motion, and when the Estate's response to that motion was upcoming;" (2) "Peresiper has yet to serve discovery in this action;" and (3) "even with regard to the Town Action . . . , the Estate has not . . . served any discovery demands" – facts which Rosmarin asserts indicate that "[a]ll material facts in this action are disclosed" (*id.* at ¶¶ 12-13).

Rosmarin next states that Plaintiff retained his firm to respond to the Town Action and enforce its rights under the Indemnity Agreement, and that the Plaintiff's moving papers and submissions in reply, including the Invoices, "establish[] ASIC's prima facie entitlement to reimbursement under the Indemnity Agreement," "the extent of [Beacon's] required investigative and consulting services . . . and the reasonableness of Beacon's fees," "the required legal services performed by WSSG," and the reasonable "legal fees and expenses, incurred through July 15, 2024" (*id.* at ¶¶ 14-19).

In its Reply Memorandum, Plaintiff asserts that the undisputed facts – admitted-to or uncontested by Defendants – establish: (1) "[Defendants'] express obligation to provide the

demanded collateral under the Indemnity Agreement"; (2) "that the Town asserted a claim under the Bond in the amount of $650,000"; and (3) "that, despite demand, they failed to provide ASIC with collateral funds" (Plf's Reply Mem. at 1-2). Plaintiff points out that in their opposition, Defendants argue: (1) that "ASIC is judicially estopped from seeking collateral to protect against potential loss in connection with the Bond claim because this demand is, somehow, inconsistent with denying liability for that claim in the Town's action"; (2) "that the collateral demanded, $650,000, the exact amount of the Town's claim under the Bond, is unreasonable"; (3) "that the motion is premature because discovery is needed"; and (4) "that ASIC is not entitled, in this motion, to recover its counsel fees and consulting fees incurred to date" (*id.* at 2-4).

Plaintiff asserts that the Defendants' estoppel argument "reflects a fundamental lack of understanding of both the doctrine of judicial estoppel and the purpose of collateral" (*id.* at 5). Plaintiff asserts that the doctrine precludes a party from taking a position contrary to a prior position in a separate case, yet does not prevent parties taking on a subsequent position that can be reconciled with the earlier one (*id.*). Plaintiff contends that "judicial estoppel is only effective if a party secures a prior judgment inconsistent with its subsequent position," unlike the circumstance here where "no judgment has been issued in [the Town Action]" (*id.* at 5-6). Plaintiff asserts that "there is nothing inconsistent" between its position in the Town Action and what it seeks in this action, which is to obtain "collateral to protect itself in the event the Town's claim is ultimately upheld" (*id.* at 6). It further asserts that its entitlement to the subject collateral is unrelated to any acknowledgement of underlying liability and that "[t]o the contrary, had ASIC acknowledged liability for the Town's claim under the Bond, it would be obligated to make payment of that claim immediately" (*id.*).

Plaintiff states that the amount of requested collateral is reasonable and the Defendants' position ignores that the collateral demanded is equal to the amount of the Town's claim - in fact, Plaintiff asserts it would have been within its rights to demand greater collateral, but chose not to so as to keep its demand as reasonable as possible (*id.* at 7). Plaintiff claims that Putnam's analysis does not change the Town's determination to reduce the penal sum to $650,000, as opposed to a lower figure (*id.*). Plaintiff explains that while the Putnam analysis can be used to contest the amount sought in the Town Action, it cannot be used to legally establish "that the Town's claim should be reduced to the amount of the assessment" (*id.* at 7-8). Plaintiff states that the Putnam analysis is not a basis for reducing the collateral or denying the motion in light of the fact that the issue of reducing the Town's claim has not yet been adjudicated (*id.* at 8). Plaintiff also states that "the Town's purported refusal to accept the dedication of a road . . . is . . . merely evidence to be weighed in determining the ultimate amount to which the Town is entitled, assuming [liability]" (*id.*). Plaintiff asserts Defendant's implication of a hidden report by Beacon is unfounded (*id.*). According to Plaintiff, Beacon performed an analysis estimating the cost of the remaining site work, which Beacon concluded could exceed $650,000 (*id.*). Plaintiff reiterates that, regardless, the reasonableness of the Town's claim under the Bond "cannot be unilaterally decided . . . but

must rather await determination by the Court [and] [t]hus, the full collateral in the amount of the Town's claim, $650,000, is necessary" (*id.* at 8-9).

Plaintiff categorizes the Estate's discovery arguments as "specious" because "all facts material to this motion are known," specifically: (1) "that the Indemnitors executed the Indemnity Agreement, which speaks for itself, including with regard to the Indemnitors' obligation to provide the demanded collateral"; (2) "that ASIC issued the Bond and that the reduced penal sum of the Bond, based on the Town's resolution, is in the amount of $650,000"; (3) "that the Town made a claim under the Bond for the full penal sum of $650,000"; and (4) "that ASIC demanded collateral in that amount from the Indemnitors but the Indemnitors failed and refused to provide it, thus breaching the Indemnity Agreement" (*id.* at 9). Plaintiff states that the questions of fact raised by Defendants "are not material to ASIC's entitlement to collateral but, rather, to the Town's ultimate entitlement to payment under the Bond" – "questions [which] do not affect. . . the Indemnitors' obligation to provide ASIC with collateral funds" (*id.* at 10). Plaintiff asserts that the Estate would have served discovery demands well in advance of filing of the motions at issue here if discovery was actually needed in this action (*id.*).

Plaintiff asserts that it is entitled to recover both "counsel and consulting fees in connection with this matter" and that the Indemnitors' argument in opposition to this point is both unexplained and without basis (*id.* at 10). Plaintiff asserts that the Indemnity Agreement expressly obligates the Indemnitors to protect Plaintiff "immediately for any and all damages, costs, losses and expenses, including counsel and consulting fees, incurred in connection with any bond issued by ASIC or in enforcing the Indemnity Agreement," which applies to "[a]ll counsel fees and consulting fees . . . sought to be recovered in this motion" (*id.* at 10-11). Plaintiff claims it "may establish both the liability of the Indemnitors and the amount of its loss, including for counsel and consulting fees, by submitting a sworn statement of payments made by ASIC, which sworn statement constitutes prima facie proof" (*id.* at 11). Specifically, Plaintiff asserts that it has submitted the Tavaglione Affidavit establishing that payments were made to Beacon and to WSSG in connection with the investigation for its claims and defenses, demonstrating "both the liability of the Estate and Peresiper, as well as Blitman, and the amount of the damages incurred up to that time" (*id.* at 11-12). Plaintiff asserts that it is Defendants' obligation to rebut the claimed damages and/or their related liability, and "they have utterly failed to meet [this burden] . . . hav[ing] submitted absolutely no evidence on this issue" (*id.* at 12). Plaintiff claims that the simple reason for this failure to submit relevant evidence on this point is that "[t]he amount of counsel and consulting fees . . . are entirely reasonable and justified both by the Town's claim and the need to enforce the Indemnity Agreement" (*id.*). Plaintiff asserts that, "even to the extent the Estate and Peresiper were able to rebut ASIC's prima facie entitlement, as established by the sworn statement of Ms. Tavaglione . . . this additional information certainly establishes the reasonableness of counsel and consulting fees incurred and the Indemnitors' liability for these payments" (*id.*).

MOTION SEQ. NO. 2

A. Plaintiff's Contentions in Support of its Motion For A Default Judgment Against Blitman

In support of its motion for a default judgment, Plaintiff submits: (1) an affirmation of Christopher J. Sheehy, Esq. dated August 5, 2024 (NYSCEF Doc No 37 ["Sheehy Aff. 2"]), together with its attached exhibits (NYSCEF Doc. Nos. 38-44); (2) an affidavit of Brielle M. Tavaglione, Plaintiff's Senior Claims Consultant sworn to August 5, 2024 (NYSCEF Doc. No. 29)[6], and attached exhibits (NYSCEF Doc. Nos. 30-36); and (3) a memorandum of law (NYSCEF Doc. No. 45 ["Plf's Mem. 2"]).

In his affirmation, Sheehy first summarizes the factual and procedural background of the case (Sheehy Aff. 2 at ¶¶ 1-8). Sheehy explains that, unlike Defendants, Blitman has "failed to appear in this action," despite service of the Summons and Verified Complaint, through the New York Secretary of State on May 7, 2024, and an additional copy of the Summons and Verified Complaint mailed pursuant to CPLR 3215(g) on May 7, 2024 (*id.* at ¶ 9).

In its memorandum of law, Plaintiff describes the service made on Blitman through the Secretary of State and regular mail, and claims that the time to appear expired June 6, 2024 (Plf's Mem. 2 at 7).[7] Plaintiff argues Blitman has failed to appear in this action, given the expiration of the requisite time to answer or move in connection with the Complaint (*id.* at 8). Plaintiff claims that it has established its right to recovery against Blitman given the submission of the Tavaglione Affidavit and the Sheehy Affirmation in support of default (*id.*). Specifically, Plaintiff asserts it "has established Blitman's breach of the Indemnity Agreement both by failing to provide indemnification as required and by failing to provide the required collateral security" as well as "the extent of the collateral security . . . that should have been provided and ASIC's losses to date," thus "establish[ing] valid causes of action for breach of the Indemnity Agreement and [entitlement] to both an order of specific performance under the first cause of action and a judgment for damages for breach under the second" (*id.* at 8-11).

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[6] The Tavaglione Affidavit submitted in support of Motion Seq. No. 2 is identical to the Tavaglione Affidavit submitted in support of Motion Seq. No. 1. As such, the assertions will not be repeated herein.

[7] Plaintiff asserts that a "failure of a defendant corporation to receive the additional service of summons and notice . . . shall not preclude the entry of default judgment" (Plf's Mem. 2 at 7-8, *citing* CPLR 3215[g][4][ii]).

B. Estate's Contentions in Limited Opposition of Plaintiff's Motion for a Default Judgment Against Blitman

In opposition to Plaintiff's motion for default judgment, the Estate submits an affidavit in limited opposition by Eric J. Mandell, Esq., sworn to on September 20, 2024 (NYSCEF Doc. No. 67 [the "Mandell Aff."]). Mandell refers the Court to the Nicolay Affirmation for a recitation of the facts, and explains that he submits this affidavit of limited opposition "to ensure that the issuance of default judgment against Blitman Mahopac LLC does not have a collateral estoppel effect as to the Estate" (Mandell Aff. at ¶¶ 1-3). Mandell asserts that, pursuant to CPLR 3215(a), a default judgment taken against fewer than all defendants severs the action as against the remaining defendants, and that "[a] default judgment obtained by a plaintiff as against [a] defaulting defendant is not entitled to collateral estoppel effect against the nondefaulting defendants who would otherwise be denied a full and fair opportunity to litigate issues of liability" (*id.* at ¶ 4). Mandell claims that granting the motion for default judgment would greatly prejudice the Estate by effectively granting the relief sought in the summary judgment motion. Mandell asserts the Estate's submission in opposition to the Plaintiff's motion for summary judgment (Motion Seq. No. 1) "sets forth numerous issues of fact challenging Plaintiff's entitlement to the relief sought" (*id.* at ¶¶ 5-6). In the alternative, Mandell requests that, should this Court grant Plaintiff's motion for default judgment, that the action be severed against Defendants, or that the issuance of the default judgment against Blitman be held in abeyance until the full adjudication of the claims against Defendants (*id.* at ¶ 7).

C. Plaintiff's Contentions in Further Support of Its Motion

In further support of its motion for a default judgment against Blitman, Plaintiff submits a reply memorandum of law ("Plf's Reply Mem. 2"). In its reply memorandum, Plaintiff reasserts that it established that: (1) "ASIC served the Summons and Verified Complaint on Blitman on May 7, 2024 by service through the New York Secretary of State"; (2) "ASIC also provided an additional copy of the Summons and Verified Complaint to Blitman by mail, pursuant to the requirements of CPLR § 3215(g)"; and (3) "despite due and proper service, Blitman has failed to answer, appear or otherwise move in connection with this action, or even to request an extension of time to do so" (Plf's Reply Mem. 2 at 13). Plaintiff states that these facts, in conjunction with the merits of the action established by the Tavaglione Affidavit, sets forth its right for: "(1) an order for specific performance requiring Blitman to provide ASIC with funds as collateral in the amount of $650,000[;] and (2) judgment in the amount of $38,541.42" (*id.* at 13).

Plaintiff claims that the Estate's arguments contained in its limited opposition are "incorrect" as "[t]here is no collateral effect upon the Estate should the Court grant [Motion Seq. No. 2], which requests the identical relief as [Motion Seq. No. 1] against the Estate and Peresiper" (*id.* at 13-14). Plaintiff states that Defendants have had full and fair opportunity to litigate the liability issues across the two motions, and that, further, the Estate could have appointed counsel on behalf of the non-appearing Defendant Blitman (*id.* at 14). Plaintiff states that it would be

severely prejudiced by a grant of the Estate's request for severance or abeyance of its motion for a default judgment and, "[a]ccordingly, the motion for a default judgment against Blitman should be granted" (*id*).

DISCUSSION

A. Plaintiff's Motion for Summary Judgment

The legal standards to be applied on a motion for summary judgment are well settled. The proponent of a motion for summary judgment "bears the initial burden of demonstrating its prima facie entitlement to the requested relief" (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47 [2d Dept 2011]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]).

Once the moving party has made a prima facie showing of entitlement to summary judgment, the burden of production shifts to the opponent, who must go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Reyes,* 83 AD3d at 50; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). A party opposing summary judgment may not rest on mere conclusions or unsupported assertions; rather the party must "affirmatively demonstrate the merit of its claim or defense" (*Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2015]; *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 [1st Dept 1984], *affd* 62 NY2d 938 [1984]).

"It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega,* 18 NY3d at 504). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Pizzo-Juliano v Southside Hosp.*, 129 AD3d 695 [2d Dept 2015]; *William J. Jenack Estate Appraisers & Auctioneers, Inc.,* 22 NY2d 470). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]; *Collado,* 126 AD2d 926). In reviewing a motion for summary judgment, the Court must accept as true the evidence presented by the nonmoving party and must deny the motion "if there is any doubt as to the existence of a triable issue" (*Herrin v Airborne Freight Corp.*, 301 AD2d 500, 501 [2d Dept 2003]; *see also Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

Here, there is no dispute that the Plaintiff and the Indemnitors executed the Indemnity Agreement and that its terms govern this dispute. The language of the Indemnity Agreement is clear and unambiguous, and therefore the Indemnity Agreement will be enforced according to its terms (*see Continental Ins. Co. v. 115-123 West 29th St. Owners Corp.*, 275 AD2d 604, 605 [1st

Dept 2000] ["It is well settled that when the terms of an agreement are clear and unambiguous, the court will not look beyond the four corners of the agreement and will enforce the writing according to its terms"]).

Based upon the papers submitted, the Court finds that there is no material issue of fact as to ASIC's entitlement to a deposit of collateral security in the amount of $650,000.00 from the Answering Defendants. Paragraph 3 of the Indemnity Agreement specifically provides that:

> The Indemnitors upon demand of the Surety, at any time and for any reason, including but not limited to Surety's receipt of a claim, shall deliver to the Surety collateral in the form and amounts acceptable to the Surety in its sole and absolute discretion. Any acceptable collateral provided to the Surety by the Indemnitors or any third party or the proceeds thereof, in whole or in part, maybe held in the name of Surety and applied to any obligations of Indemnitors under this Agreement. The Surety shall not have any obligation to release such collateral until it has received a written release and conclusive evidence of its discharge without loss in the form and substance satisfactory to the Surety with respect to the Bonds and fulfillment by Indemnitors of all obligations owed under this Agreement. Indemnitors agree 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 (NYSCEF Doc. No. 11 at ¶ 3).

The right of a surety to compel specific performance of the collateral security provisions of an indemnity agreement that requires indemnitors to deposit collateral security with the surety upon the surety's demand is well settled (*see, e.g., Utica Mut. Ins. Co. v. Cardet Const. Co., Inc.*, 114 AD3d 847, 849 [2d Dept 2014] [holding surety entitled to specific performance of collateral security provision of indemnity agreement]; *Prestige Decorating and Wallcovering, Inc. v U.S. Fire Ins. Co.*, 2007 NY Slip Op 31181[U] [Sup Ct, New York County 2007] [holding surety entitled to summary judgment for specific performance of collateral security provision in indemnity agreement], *affd* 49 AD3d 406 [1st Dept 2008]; *Colonial Sur. Co. v. Genesee Valley Nurseries, Inc.*, 5 AD3d 1024, 1025 [4th Dept 2004] [affirming trial court's order granting surety's summary judgment motion and ruling that surety entitled to specific performance of collateral security provision of indemnity agreement]; *BIB Constr. Co., Inc. v. Fireman's Ins. Co. of Newark, NJ*, 214 AD2d 521, 522-24 [1st Dept 1995] [holding that surety was entitled to specific performance of collateral security provision under terms of indemnity agreement]; *National Sur. Corp. v. Titan Constr. Corp.*, 26 NYS2d 227, 230 [Sup Ct, New York County 1940] [specifically enforcing collateral security provision of indemnity agreement and ruling that surety does not have an adequate remedy at law where indemnitors fail to post collateral security], *affd*, 260 AD 911 [1st Dept 1940]; *see also Safeco Ins. Co. of Am. v. Hirani/MES, JV*, 480 Fed Appx 606, 608-09 [2d Cir 2012] [affirming trial court's order granting surety's summary judgment motion for, among other things, specific enforcement of indemnity agreement's collateral security provision and stating that indemnity agreement's collateral security provision is "'subject to enforcement by

specific performance [because t]he damage resulting from the failure to give security is not ascertainable, and the legal remedy is therefore inadequate'"]). An agreement which provides the amount of collateral at the surety's "sole discretion" is enforceable "[s]o long as the sum demanded is reasonable" (*BIB Const. Co., Inc. v. Fireman's Ins. Co. of Newark, NJ*, 214 AD2d at 523).

The parties do not dispute that the Town has submitted a claim against the Bond and do not dispute that the Town has filed a lawsuit against Plaintiff on the Bond. There is also no dispute that Plaintiff has demanded that Defendants deposit collateral security and Defendants have failed to comply with Plaintiff's demand and deposit the amount demanded (*see* Tavaglione Aff., NYSCEF Doc Nos 16, 17). In addition, Plaintiff has not received satisfactory evidence of its complete discharge from all claims and has not been fully reimbursed for all losses, expenses and fees as required by the Indemnity Agreement. As such, Plaintiff is entitled to collateral security in such an amount as Plaintiff, in its sole discretion, deems appropriate, so long as the requested amount is reasonable.

Here, Plaintiff demonstrated its prima facie entitlement to judgment as a matter of law on its First Cause of Action for specific performance by submitting the Indemnification Agreement, the Bond, and proof of the $650,000 claim asserted against Plaintiff in the Town Action (*Utica Mut. Ins. Co. v Cardet Const. Co., Inc.*, 114 AD3d 847). In opposition, Defendants have failed to submit evidence raising a triable issue of fact. "'[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' . . . . Typically, this analysis will entail comparing a surety's collateral demand to some existing third-party claim or concrete risk of future liability" (*MLCJR, LLC v PDP Group, Inc.*, 2024 NY Slip Op 31900[U] at * 8 [Sup Ct, New York County 2024], *quoting Safeco Ins. Co. of Am. v MES Inc.*, 2010 WL 4828103 at *4 [EDNY 2010], *affd* 480 Fed Appx 606 [2d Cir 2012]). "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'" (*Liberty Mut. Ins. Co. v Biltmore Gen. Contractors, Inc.*, 2023 WL 5350813, at *5 [EDNY 2023], *quoting Stars Ins. Co. v Champion Constr. Servs. Corp.*, 2014 WL 4065093 at *4 [EDNY 2014]; *see also Colonial Sur. Co. v A&R Capital Assoc*, 420 F Supp 3d 38 [EDNY 2017] [requested security collateral was reasonable where plaintiff demanded such collateral in an amount equal to a lien filed by a third party]). In light of the amount sought in the Town Action, the $650,000 collateral security deposit demanded by Plaintiff is reasonable (*id.*). "New York courts routinely award specific performance at the summary judgment stage when the surety requests collateral in an amount less than the face value of the underlying claims . . . [which] holds as a general matter even where the amount requested approaches or even equals the face value of those claims" (*Liberty Mut. Ins. Co.*, 2023 WL 5350813, at *5). While "[t]here may be cases in which the recovery of the amount demanded is, on the face of the record, virtually impossible . . . [t]his is not one of those cases" as "the amount demanded by the [Town] is certainly disputed, [but] it is not unsupportable" and, even drawing every inference in Defendants' favor, "they have not pointed to any facts that would permit an inference that recovery in the amount demanded is definitively barred" (*RLI Ins. Co. v Pro-Metal Constr. Inc.*, 2019 WL 1368851 at *5 [SDNY 2019]). Defendants' argument that the amount of

secured collateral should be reduced based upon the evaluation of the work to be completed by the Estate's consultant Putnam Engineering, which was then used by the Town Board to reduce the penal sum to $393,400 at the Town Board's meeting on November 14, 2018 is unsupported since while the Town Board may have discussed and even recommended reducing the penal sum to $393,400 at their November 14, 2018 meeting (NYSCEF Doc. No. 59), the Town Board ultimately voted by resolution at their meeting on December 19, 2018 to reduce the penal sum only to $650,000 (NYSCEF Doc. No. 14). Furthermore, the requested amount of collateral security is not "speculative" given the $650,000 in damages sought in the Town Action.

In addition, the Court does not credit the Estate's arguments that Plaintiff cannot seek collateral security in this action as it has denied the claims brought by the Town in the Town Action (i.e., Plaintiff's denial of liability in the Town action somehow judicially estops it from enforcing its rights to the collateral security in this action). "[I]n evaluating whether to apply the doctrine of judicial estoppel, courts generally look for the existence of three factors: (1) that a party's new position is 'clearly inconsistent' with its earlier position, (2) that the party seeking to assert this new position previously persuaded a court to accept its earlier position, and (3) that the party 'would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped'" (*Intellivision v Microsoft Corp.*, 484 Fed Appx 616, 619 [2d Cir 2012] [citations omitted]). "[B]ecause judicial estoppel is designed 'to prevent improper use of judicial machinery,' it is 'an equitable doctrine invoked by a court at its discretion'" (*id.* [citations omitted]). Judicial estoppel is inappropriate here as Plaintiff has not "persuaded a court to accept" an earlier position which it contradicts before this Court (*Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436 [2d Dept 1995] ["Judicial estoppel . . . precludes a party who assumed a certain position in a prior legal proceeding *and who secured a judgment in his or her favor* from assuming a contrary position in another action simply because his or her interests have changed"] [emphasis added]). Moreover, Plaintiff's current position – seeking collateral as protection for potential exposure in the Town Action – is not inconsistent with Plaintiff's position that it is not liable for the Town's claim in the Town Action (*Simon v Safelite Glass Corp.*, 128 F3d 68, 72-73 [2d Cir 1997] ["Because judicial estoppel is invoked to protect the integrity of the judicial process from the threat of inconsistent results, there must be a true inconsistency between the statements in the two proceedings. If the statements can be reconciled there is no occasion to apply an estoppel"]). Plaintiff's entitlement to collateral security under the Indemnity Agreement is not tied to any acknowledgement of liability in the Town Action.

The Estate's argument the motion should be denied as premature because it has not had the opportunity to conduct discovery is unavailing because it has not made the requisite showing "that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion [are] exclusively within the knowledge and control of the movant" (*Morales v Amar*, 145 AD3d 1000, 1003 [2d Dept 2016]; *see* CPLR 3212[f]). Here, the material facts at issue are undisputed: (1) the existence of the underlying Bond and Indemnity Agreements; (2) the Indemnitors' obligations thereunder; and (3) the claim underlying the Town Action. Plaintiff need not prove that it will necessarily be held liable in the Town Action to prove its entitlement to

collateral security in this action and indemnification for its reasonable expenses expended to date. It is well settled that "mere speculation that [further discovery] will uncover a question of fact is . . . insufficient" (*Rogan v Giannotto*, 151 AD2d 655, 656 [2d Dept 1989]; *see also Dalrymple v Morocho*, 208 AD3d 751 [2d Dept 2022]).

Accordingly, the branch of Plaintiff's motion for summary judgment seeking an order requiring Defendants to deposit $650,000.00 as collateral security shall be granted.

Turning to the branch of Plaintiff's motion seeking reimbursement of the consultant fees and attorneys' fees expended to date, ASIC submits evidence concerning the parties' entry into the Indemnity Agreement, which by its plain terms requires the Indemnitors to "exonerate, hold harmless, indemnify, and keep indemnified the Surety 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 and from and against any such losses and expenses which the Surety may sustain or incur, plus interest thereon, arising out of, directly or indirectly: . . . the failure of the Indemnitors to perform or comply with any of the terms and conditions of this Agreement and/or . . . the Surety enforcing any of the terms and conditions of this Agreement" (NYSCEF Doc. No. 11 at ¶ 2). "Under New York law, the meaning of an attorneys' fees provision must be 'unmistakably clear from the language of the contract'" (*Colonial Sur. Co. v William G. Prophy LLC*, 2023 WL 7338784, at *8 [EDNY 2023], *quoting Mid-Hudson Catskill Rural Migrant Ministry, Inc. v Fine Host Corp.*, 418 F3d 168, 177 [2d Cir. 2005]). Here, the language is unmistakably clear that Defendants agreed to indemnify ASIC for its "losses, fees, costs and expenses . . . including . . . attorney's fees . . . and any other outside consulting fees" (NYSCEF Doc. No. 11 at ¶ 2). "The Indemnity Agreement, therefore, entitles [Plaintiff] to recover attorneys' fees [and consulting fees]" (*Westchester Fire Ins. Co. v Annex Gen. Contr., Inc.*, 2016 WL 11481197, at *19 [EDNY 2016]).

Regarding Plaintiff's request for reimbursement for its expenses associated with its consultant Beacon and its attorneys' fees, the Court shall grant Plaintiff summary judgment as to its request for reimbursement of the $20,469.33 it paid to Beacon[8] but not its request for $18,072.09

[8] Tavaglione's affidavit setting for the amount of payments made to Beacon satisfies Plaintiff's prima facie burden as to the damages it has sustained in consulting fees given that the Indemnity Agreement specifically provides "In 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 *prima facie* evidence of the fact and the amount of such payment and of the extent of the liability of the Indemnitors to the Surety, and, in the absence of actual fraud or bad faith amounting to dishonesty or malicious conduct, shall be final, conclusive and binding upon the Indemnitors" (NYSCEF Doc. No. 11 at ¶ 4; *see Prestige Decorating and Wallcovering, Inc. v U.S. Fire Ins. Co.*, 49 AD3d 406 [1st Dept 2008]). In opposition, Defendants have failed to raise a triable issue of fact as to either the bona fides of the payment or the reasonableness of the amount (*Prestige Decorating and Wallcovering, Inc.*, 49 AD3d 406; *International Fid. Ins. Co. v Spadafina,* 192 AD2d 637 [2d Dept 1993]).

in attorneys' fees because Plaintiff failed to submit in its moving papers an affirmation of legal services and the billing records associated with those services (*Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487 [1989]), the reasonableness of such fees is always a matter to be determined by the Court (*Friend v Regina*, 189 AD2d 853 [2d Dept 1993]; *Manufacturers Hanover Trust Co. v Green*, 95 AD2d 737 [1st Dept 1983], *lv dismissed* 61 NY2d 760 [1984]). Although in its reply, Plaintiff has provided invoices and the Lem Affidavit, seemingly to rectify the deficiency in its moving papers, Court will not consider the inclusion of "the invoice[s] submitted for the first time on reply because Defendants did not have the opportunity to review and challenge the invoices for reasonableness" (*Star Ins. Co. v A&J Constr. of N.Y. Inc.*, 2018 WL 6177857 at *4 [SDNY 2018]; *see also Bravia Capital Partners Inc v Fike*, 296 FRD 136, 144 [SDNY 2013] [Plaintiff "was obligated in her initial moving papers, not in her reply, to provide evidence supporting . . . the hours expended by her counsel"]).

Based on the foregoing, while the Court will grant Plaintiff's motion to the extent it seeks reimbursement of the $20,469.33 paid to Beacon, but shall hold the branch of Plaintiff's motion seeking an award of $18,072.09 in attorneys' fees in abeyance to give Defendants the opportunity to dispute the reasonableness of the fees based on the affirmation of legal services and billing records Plaintiff provided in its reply.

B. The Estate's Cross-Motion for Consolidation

CPLR 602(a) provides that "when actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Consolidation or a joint trial is within the discretion of the trial court and "should be ordered when the actions involve common questions of law and fact so as to avoid unnecessary duplication of trials, save unnecessary costs and to avoid the possibility of inconsistent decisions based upon the same facts" (*Ferrandino & Son, Inc. v Wheaton Builders, Inc., LLC*, 2009 WL 8559381 [Sup Ct, Nassau County 2009], *citing Viafax Corp. v Citicorp Leasing, Inc.*, 54 AD3d 846 [2d Dept 2008] & *Gutman v Klein*, 26 AD3d 464 [2d Dept 2006]). Consolidation is warranted where, across the separate actions, there are common issues of law and fact; identical parties; an avoidance of unnecessary duplication; a prevention of inconsistent decisions; and no resultant, substantial prejudice (*see, inter alia, Best Price Jewelers.com Inc. v Internet Data Stor. & Sys., Inc.* 51 AD3d 839, 840 [2d Dept 2008])

A party seeking a consolidation order must establish the existence of common questions of fact and/or law (*Beerman v Morhaim,* 17 AD3d 302 [2d Dept 2005]). "The test to determine whether the actions have a common question of law or fact is usually met if evidence that would be admissible in one action would also be admissible in the other" (*Leeco Constr. Co. v United States Liab. Ins. Co.*, 22 Misc 3d 611, 612 [Sup Ct New York County 2008]). Once the movant establishes the common questions, if a party opposes consolidation, they must demonstrate that they will suffer prejudice to a substantial right if consolidation is granted (*Mattia v Food*

Emporium, Inc., 259 AD2d 527 [2d Dept 1999]; *Maigur v Saratogian, Inc.*, 47 AD2d 982 [3d Dept 1975]).

On the other hand, "[w]here lawsuits arise out of the same transactions, but the proof with respect to each lawsuit does not overlap, the identity of facts is not sufficient to merit consolidation or a joint trial of the lawsuits ... [since it] would not serve the stated purpose of [CPLR 602] to wit, to avoid unnecessary costs and delay" (*Aluminum Mill Supply Corp. v Skyview Metals, Inc.*, 117 AD2d 765, 767-768 [2d Dept 1986]). And even if there are some common issues, where the actions arise out of different transactions and involve different claims, consolidation or a joint trial is not warranted (*Village of Mamaroneck v Mamaroneck Affordable Condominium Corp.*, 12 AD3d 361 [2d Dept 2004]). Additionally, where cases are at different procedural stages and consolidation would result in a delay of a trial consolidation is properly denied (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 94 AD3d 455 [1st Dept 2012]; *Barnes v Cathers & Dembrosky*, 5 AD3d 122 [1st Dept 2004]; *Abrams v Port Auth. Trans-Hudson Corp.* 1 AD3d 118 [1st Dept 2003]; *F & K Supply, Inc. v Johnson*, 197 AD2d 814 [3d Dept 1993]; *Stephens v Allstate Ins. Co.*, 185 AD2d 338 [2d Dept 1992]; *Steuerman v Broughton*, 123 AD2d 681 [2d Dept 1986]).

Here, despite the fact that these actions arise out of Blitman's construction of the site work for the Development, the claims and defenses in this action and the Town Action involve different questions of law and fact. Here, Plaintiff is entitled to enforce its Indemnity Agreement by requiring the Answering Defendants' specific performance concerning the provision of the collateral security. It appears that the only overlapping issue between this action and the Town Action is the total amount the Answering Defendants may be required to pay Plaintiff in terms of indemnification after a final determination is rendered in the Town Action. It would be prejudicial to require Plaintiff to have to await the resolution of the Town Action before it could enforce its rights under the Indemnity Agreement. The transactions and occurrences at issue in the Town Action are only tangentially related (i.e., the total amount of indemnity to which Plaintiff would be entitled based on final amount of damages, if any, awarded in the Town Action) and there is an additional party in the Town Action who is not present in this action (i.e., the Town). As such, consolidation is not warranted (*see Hershfeld v JM Woodworth Risk Retention Grp., Inc.*, 85 NYS3d 81 [2d Dept 2018]; *Gristede's Foods, Inc. v Poospatuck (Unkechauge) Nation*, 2009 WL 3644159 [EDNY 2009]).

C. Plaintiff's Motion for Default Judgment

Pursuant to CPLR 3215(f), "'[a]n applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear'" (*Lancer Ins. Co. v Fishkin*, 211 AD3d 719, 720 [2d Dept 2022], *quoting Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 806 [2d Dept 2020]; *see also Atlantic Cas. Ins. Co. v RJNJ Serv. Inc.*, 89 AD3d 649 [2d Dept 2011]). "To demonstrate the facts constituting the claim, the movant need only submit sufficient proof to enable a court to determine if the claim is viable" (*Lancer Ins. Co.*, 211 AD3d at 721). A party may establish its entitlement to recovery in the event of default by

submitting a verified complaint, or an affidavit, that establishes a valid cause of action (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62 [2003]; *see also MS Berkoff Co, Inc. v J.R.D. Mgmt. Corp.*, 36 Misc 3d 139[A] [Sup Ct, App Term 2d, 11th and 13th Judicial Districts 2012]; *Anderson v Vasquez*, 98 AD3d 638 [2d Dept 2012]; *see also Triangle Props. 2, LLC v Narang*, 73 AD3d 1030, 1032 [2d Dept 2010] ["A verified complaint may be used as [an] affidavit of the facts constituting the claim, but it must allege 'enough facts to enable a court to determine that a viable cause of action exists'"]).

However, default judgments are not to be rubber-stamped once jurisdiction and failure to appear are shown. Proof must still be submitted to satisfy the Court, at least prima facie, as to the viability of the uncontested cause of action (*Joosten v Gale*, 129 AD2d 531 [1st Dept 1987]; *see* CPLR 3215[b], [f]). Even if there appears to be no opposition, the Court should not exercise its power, whether statutory or inherent, in a manner or under such circumstances where that power could work an injustice to litigants or to non-parties (*Rivera v Laporte*, 120 Misc 2d 733, 735 [Sup Ct, New York County 1983]).

To avoid the entry of a default judgment, the defaulting party is required to demonstrate a reasonable excuse for the default and a meritorious defense to the action (*Grinage v City of N.Y.*, 45 AD3d 729 [2d Dept 2007]; *Zino v Joab Taxi, Inc.*, 20 AD3d 521 [2d Dept 2005]; *Pampalone v Giant Bldg. Maintenance, Inc.*, 17 AD3d 556 [2d Dept 2005]; *Ennis v Lema*, 305 AD2d 632 [2d Dept 2003]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court (*Grinage*, 45 AD3d 729; *Ennis*, 305 AD2d 632).

As discussed supra, the Court finds there is no material issue of fact as to Plaintiff's entitlement to a deposit of collateral security in the amount of $650,000.00 by Blitman as a surety may compel specific performance of collateral security based upon an indemnity agreement (*see, e.g., Utica Mut. Ins. Co, v Cardet Const. Co., Inc.*, 114 AD3d 847; *Colonial Sur. Co. v. Eastland Const., Inc.*, 2009 NY Slip Op 31756[U]; *Prestige Decorating and Wallcovering, Inc.*, 2007 NY Slip Op 31181[U]; *Colonial Sur. Co. v. Genesee Valley Nurseries, Inc.*, 5 AD3d 1024; *BIB Constr. Co., Inc. v. Fireman's Ins. Co. of Newark, NJ*, 214 A.2d 52; *National Sur. Corp. v. Titan Constr. Corp.*, 26 NYS2d 227), including upon an application for default judgment (*Star Ins. Co.*, 2014 WL 4065093).

A contractual demand to furnish collateral security may be enforced through an order of specific performance where the amount of requested collateral is reasonable. Such requested 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" (*MLCJR, LLC v PDP Group, Inc.*, 2024 NY Slip Op. 31900[U] at * 8, *quoting Star Ins. Co.*, 2014 WL 4065093 [EDNY 2014];*see also Utica Mut. Ins. Co. v Cardet Const. Co., Inc.*, 114 AD3d 847). Plaintiff has submitted proof of the Town Action – including the underlying claim for $650,000 – as well as the subject Indemnity Agreement and Bond. Accordingly, based on the demonstration of proper service upon Blitman, Blitman's failure to respond, and the demonstrated merits of Plaintiff's claim, Plaintiff has

established its entitlement to summary judgment for specific performance of the collateral security in the amount of $650,000 (*Stars Ins. Co.*, 2014 WL 4065093).

The branches of Plaintiff's motion seeking an award of consultant and attorneys' fees shall be granted to same extent as this Court is granting the identical branches of Plaintiff's motion for summary judgment against the Answering Defendants.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion by Atlantic Specialty Insurance Company seeking summary judgment against Robin Winter as Executor of the Estate of Howard N. Blitman, and Gary S. Peresiper is granted in part and denied in part; and it is further

ORDERED that the motion by Atlantic Specialty Insurance Company for summary judgment as to its First Cause of Action seeking specific performance requiring the delivery of collateral in the amount of $650,000.00 is granted, and it is further

ORDERED that Defendants Robin Winter as Executor of the Estate of Howard N. Blitman and Gary S. Peresiper, jointly and severally, shall deposit with Plaintiff collateral security in the amount of $650,000.00 within 30 days of the date of this Decision and Order; and it is further

ORDERED that if Defendants do not deposit collateral security in an amount of $650,000.00 within 30 days of the date of this Decision and Order, this Decision and Order shall operate as a lien, mortgage or other encumbrance on the assets of each Defendant in the amount of $650,000.00 and Plaintiff is permitted to file this Decision and Order with the secretary of state(s), counties, municipalities, townships, parishes, cities, and/or wherever else Defendants' property may be located; and it further

ORDERED that the branch of the motion for summary judgment seeking an award against Defendants Robin Winter as Executor of the Estate of Howard N. Blitman and Gary S. Peresiper for consulting fees in the amount of $20,469.33 is granted, and it is further

ORDERED that the branch of the motion for summary judgment seeking an award of attorneys' fees in the amount of $18,072.09 is adjourned to December 20, 2024 **(on submission, no appearances required)**, and Answering Defendants are granted leave to serve and file papers in response to Plaintiff's Affirmation of Legal Services and billing records submitted in Plaintiff's reply no later than 4 p.m. on December 19, 2024; and it is further

ORDERED that Plaintiff's motion for a default judgment against Blitman Mahopac, LLC is granted to the same extent Plaintiff's motion for summary judgment against Robin Winter as Executor of the Estate of Howard N. Blitman, and Gary S. Peresiper, and it is further

ORDERED that the cross-motion by Robin Winter as Executor of the Estate of Howard N. Blitman seeking consolidation is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
December 6, 2024

ENTER:

HON. GRETCHEN WALSH, J.S.C.

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