

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

**HON. TIMOTHY S. DRISCOLL
Justice Supreme Court**

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NOVA CASUALTY COMPANY,

**TRIAL/IAS PART: 25
NASSAU COUNTY**

Plaintiff,

-against-

Index No: 000294-07

**LMR SERVICES CORP. and
CHRISTOPHER BONSER, A,**

**Motion Seq. No: 1
Submission Date: 5/8/09**

Defendants.

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Papers Read on this Motion:

- Notice of Motion, Affidavit in Support and Exhibits.....x**
- Plaintiff's Memorandum of Law.....x**

This matter is before the court on the motion by Plaintiff Nova Casualty Company ("Plaintiff" or "Nova") for an Order 1) granting Plaintiff summary judgment against Defendants LMR Services Corp. ("LMR") and Christopher Bonsera ("Bonsera") (collectively "Defendants"), pursuant to CPLR § 3212, based on documentary evidence; or, alternatively 2) granting Plaintiff a default judgment against Defendants, pursuant to CPLR § 3215. Defendants have not submitted a response to Plaintiff's motion. For the reasons set forth below, the Court grants Plaintiff's motion for a default judgment against Defendants.

BACKGROUND

A. Relief Sought

Plaintiff move for an Order granting Plaintiff summary judgment against Defendants, pursuant to CPLR § 3212 or, alternatively, a default judgment against Defendants, pursuant to CPLR § 3215, with respect to Plaintiff's causes of action for indemnification, collateral security and exoneration based on the General Agreement of Indemnity ("Agreement") between Nova and LMR, which Defendant Bonsera signed on November 8, 2002 in his capacity as president of LMR.

B. The Parties' History

Plaintiff, Nova Casualty Company, is a licensed New York corporation authorized to act as a surety in New York. In connection with Nova's agreement to obtain surety bonds for Defendants, Defendants executed a General Agreement of Indemnity ("Agreement") that provides that LMR and Bonsera are jointly and severally liable with respect to their obligations under the Agreement.¹ The Agreement refers to Defendants as the "Indemnitors" and Nova as the "Company."

Paragraph 2 of the Agreement provides as follows:

That the Indemnitor will perform all the conditions of each said bond or obligation, and any and all alterations, modifications, renewals, continuations, and extensions thereof, and will at all times indemnify and save the Company harmless from and against every claim, demand, liability, loss, cost, charge, counsel fee, payable on demand of Surety, whether actually incurred or not, (including fees of special counsel whenever by the Company deemed necessary) expense, suit, order judgment and adjudication whatsoever, and any and all liability therefore, sustained or incurred by the Company by reason of having executed or procured the execution of said bonds or obligations, and will place the Company in funds to meet same before it shall be required to make payment, and in case the Indemnitor requests the Company to join in the prosecution or defense of any legal proceeding, the Indemnitor will, on demand of the Company, place it in funds sufficient to defray all expenses and all judgments that may be rendered therein.

¹ There is some confusion about the date that Defendants executed the Agreement. Plaintiff alleges in the verified complaint ("Complaint") that Defendants executed the Agreement on November 8, 2004. Plaintiff affirms in its Affidavit in Support of the instant motion that Defendants executed the Agreement on January 8, 2003. The Court's review of the Agreement leads the Court to conclude that Defendants executed the Agreement on November 8, 2002.

Paragraph 5 of the Agreement provides:

That the Company shall have the right to pay, settle or compromise any expense, claim or charge of the character enumerated in this agreement, and the voucher or other evidence of such payment shall be prima facie evidence of the propriety thereof and of the Indemnitor's liability therefore to the Company.

On or about October 26, 2004, at Defendants' request, Nova issued Surety Bond Number 29157 ("Bond") in the penal sum of \$80,000, for the benefit of the Town of Islip ("Town") as obligee. The Bond assured the payment of fees related to LMR's use of the Town's waste disposal facilities. On or about March 21, 2005, Nova and LMR, by Bonsera, executed a rider to the Bond that amended the Bond amount from \$80,000 to \$100,000 and provided that the other terms of the Bond remained unchanged.

Plaintiff alleges that, beginning on or about January 10, 2006, the Town notified LMR that it was in arrears on its fees for the use of the Town's solid waste disposal facilities in the amount of \$191,832.13, and demanded payment of said amount. Plaintiff provides a copy of a letter dated May 12, 2006, from the Town to Nova, with a copy to LMS. In that letter, the Town notified Nova that 1) the Town's efforts to collect the debt from LMS had been unsuccessful; and 2) in light of LMS' default, the Town was calling upon Nova, as the surety, to satisfy the indebtedness, which was now \$221,124.13.

By letter dated May 27, 2006, Nova advised LMR of the Town's demand for payment. In that letter, Nova advised LMR that, pursuant to the terms of the Agreement, LMR and Bonsera were required to indemnify and hold Nova harmless from loss or expense that Nova incurred as a consequence of issuing bonds on behalf of LMR. Nova demanded that LMR and Bonsera, jointly and severally, deposit \$100,000 in collateral with Nova, to protect it against the Town's claim. Nova advised LMR and Bonsera that they should provide the collateral in the form of a cashier's check payable to NOVA. Nova also advised LMR and Bonsera that, along with the cashier's check, they should provide Nova with instructions regarding whether LMR was disputing the claim, in which case LMR was to provide an explanation of its position. If LMR did not dispute the claim, it should so advise Nova and direct Nova to pay the funds to the Town "so as to discharge its bonded liability." Defendants did not provide the requested collateral.

On January 5, 2007, Plaintiff filed the verified complaint (“Complaint”) in which it seeks damages based on its allegation that Defendants breached the terms of the Agreement by refusing to deposit collateral with Plaintiff. Plaintiff seeks judgment against the Defendants, jointly and severally, in the sum of \$100,000, plus reasonable counsel fees and expenses that Plaintiff incurred in pursuing this action. Plaintiff also seeks an Order directing Defendants, jointly and severally, to exonerate Nova from any claims asserted against the Bond, and requiring Defendants to compensate Plaintiff for costs that Plaintiff incurred in 1) investigating and responding to claims filed against the Bond; and 2) pursuing Plaintiff’s rights pursuant to the Agreement.

Plaintiff affirms that, after completing an investigation of the Town’s claim, Plaintiff issued a check to the Town in the sum of \$100,000 in settlement of the claim. Plaintiff provides a copy of the check, which is check number 104446, dated February 19, 2007 and payable to the Town of Islip in the sum of \$100,000. Plaintiff affirms that it demanded payment from Defendants who “rejected said demand.”

Plaintiff served Defendants with a copy of the Complaint. Plaintiff provides copies of the applicable Affidavits of Service which reflect 1) service upon LMR on January 19, 2007 at 12:00 p.m. by delivery of a copy of the Summons and Complaint to LMR’s Authorized Agent in the Office of the New York Secretary of State, pursuant to Business Corporations Law § 306, and 2) service upon Bonsera on January 5, 2007 by delivering a copy of the Summons and Complaint to a person of suitable age and discretion at Bonsera’s home, located at 1 Forsythia Lane, Jericho, New York 11753, and mailing a copy of the Summons and Complaint to Bonsera at his home on January 8, 2007. The Affidavit of Service for Bonsera reflects that the copy of the Summons and Complaint was mailed to Bonsera’s home in an envelope marked “Personal and Confidential.” In addition, Nova mailed certified letters, dated October 13, 2008, to LMR and Bonsera advising them that 1) pursuant to CPLR §§ 3215(g)(3)(ii) and 3215(g)(4)(ii), Nova is providing them with a copy of the Summons and Complaint previously served on them, to which they have not responded; and 2) Nova intends to move for a default judgment within 20 days after mailing the certified letter. Defendants have not filed a verified answer to the Complaint or otherwise appeared in the action.

C. The Parties' Positions

Plaintiff submits that, pursuant to the Agreement, Defendants are required to indemnify and exonerate Nova for losses and expenses it incurred in securing the Bond. Plaintiff submits, further, that the Agreement requires LMR and Bonsera to provide Nova with collateral security, and reimbursement for counsel fees and expenses that it incurred investigating the Town's claim and pursuing the instant lawsuit, plus interest calculated from the date of payment for each such expense.

Defendants have not responded to Plaintiff's motion.

RULING OF THE COURT

A. Motion for Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

Plaintiff properly served LMR and Bonsera with the Summons and Complaint, and neither Defendant has answered the Complaint or otherwise appeared in this action. Moreover, the Affidavit of Service with respect to Bonsera establishes that Plaintiff has complied with CPLR § 3215(g)(3)(i) which provides, in pertinent part, that "When a default judgment based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at his place of residence in an envelope bearing the legend "personal and confidential" and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt."

A party seeking contractual indemnification must establish the existence of a written agreement between itself and the party from whom it is seeking indemnification. *Moss v. McDonald's Corp.*, 34 A.D.3d 656 (2d Dept. 2006). A party is entitled to contractual indemnity if the agreement specifically so provides, or if the intention to indemnify can be clearly implied from the language and purpose of the entire agreement, and the surrounding facts and

circumstances. *Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 153 (1973); *Watral & Sons, Inc. v. OC Riverhead 58, LLC*, 34 A.D.3d 560 (2d Dept. 2006). The Agreement contains a contractual indemnity indemnification clause. Additionally, the affidavit of Warren B. Seifert, the Vice-President of Claims for Nova, provides factual allegations supporting Nova's claim for contractual indemnification based upon the Agreement.

With respect to Plaintiff's claim for exoneration, a surety is equitably entitled to full indemnity against the consequences of a principal's default. *Lori-Kay Golf, Inc. v. Lassner*, 61 N.Y.2d 722 (1984); *Barr v. Raffé*, 97 A.D.2d 696 (1st Dept. 1983). The right to indemnification in the matter *sub judice* arises out of an express contract. An express contract to indemnify a surety characteristically obligates the principal to indemnify and save harmless the surety against all loss, damage, costs, charges, counsel fees and expenses that the surety incurred by reason of its undertaking and which have caused the surety to suffer actual damages by payment of money or in an equivalent manner. *MacArthur Bros. Co. v. Kerr*, 213 N.Y. 360 (1915); *Maryland Cas. Co. v. Farley*, 11 A.D.2d 756 (1st Dept. 1960).

Nova, as the surety, has established its right to indemnification pursuant to the Agreement and Bond. LMR and Bonsera are obligated to indemnify and hold Nova harmless against all loss and damage it incurred by reason of its undertaking, which includes the \$100,000 that Nova paid to the Town in satisfaction of its claim.

The Court also concludes that Plaintiff has properly served Defendants and complied with the notice requirements set forth in CPLR § 3215(g). In light of the Court's conclusion that Plaintiff has established a *prima facie* cause of action for contractual indemnification and common law exoneration, the Court grants Plaintiff's motion for a default judgment against Defendants.

B. Motion for Summary Judgment

In light of the Court's decision to grant Plaintiff's motion for a default judgment, and in consideration of the fact that neither Defendant has appeared in this action, the Court declines to address Plaintiff's motion for summary judgment pursuant to CPLR § 3212, which authorizes a party to move for summary judgment after issue has been joined.

Accordingly, it is

ORDERED, that Plaintiff have judgment by default against Defendants for the relief demanded in the Complaint; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the determination of damages herein, counsel fees and other costs, if appropriate, pursuant to CPLR § 3215, on August 20, 2009 at 10:00 a.m.; and it is further

ORDERED, that Plaintiff's attorneys shall serve upon the Defendants by certified mail, return receipt requested and regular mail with certificate of mailing a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before August 7, 2009; and it is further

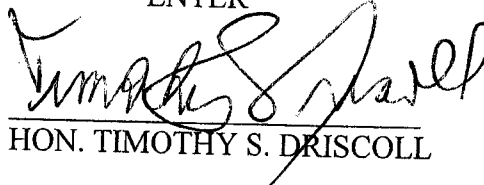
ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against the Defendants in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
July 7, 2009

ENTER


HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

JUL 10 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**