

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

**UNITED STATES OF AMERICA f/b/o)
DOTEN'S CONSTRUCTION, INC.,)**

Plaintiff)

v.)

**JMG EXCAVATING &)
CONSTRUCTION CO., INC., et al.,)**

Defendants)

_____)

Docket No. 03-134-P-S

GREENWICH INSURANCE COMPANY,)

Third-Party Plaintiff)

v.)

**JMG EXCAVATING &)
CONSTRUCTION CO., INC., et al.,)**

Third-Party Defendants)

**RECOMMENDED DECISION ON THIRD-PARTY PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

The third-party plaintiff, Greenwich Insurance Company ("Greenwich"), seeks summary judgment on its claims against the third-party defendants, JMG Excavating & Construction Co., Inc. ("JMG"), Crown Performance Corporation, Judith M. Gro and Brian D. Gro, and on the claims asserted in JMG's cross-claim against it. I recommend that the court grant the motion.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Background

The parties' respective statements of material facts, submitted pursuant to this court's Local Rule 56, include the following undisputed material facts.

JA Jones Management Services, Inc. ("Jones") was the prime contractor on the Hangar One repair project at the Brunswick Naval Air Station which is the subject of this litigation. New Matter ("Defendants' SMF"), included in Third Party Defendants' Opposing Statement of Facts, etc. ("Defendants' Responsive SMF") (Docket No. 62) beginning at [4], ¶ 1.¹ Jones was hired by the Department of the Navy to serve as the prime contractor on the project. *Id.* ¶ 2. Jones hired JMG to act as a subcontractor on the project. *Id.* ¶ 4. Jones required JMG to furnish a performance bond and payment bond, which JMG procured from Greenwich. *Id.* ¶¶ 5-6. JMG hired Doten's Construction, Inc. ("Doten") as a subcontractor. *Id.* ¶ 8.

Greenwich is in the business of issuing performance and payment surety bonds to various contractors to secure performance on construction projects. Greenwich Insurance Company's Statement of Material Facts, etc. ("Plaintiff's SMF") (Docket No. 59) ¶ 1; Defendants' Responsive SMF ¶ 1. On or about September 25, 2001 the third-party defendants executed a general indemnity agreement (the "GIA") to indemnify Greenwich. *Id.* ¶ 2. Greenwich then executed subcontract payment bond number SEC 1000973 ("the bond") at the request and on behalf of JMG, as principal, for the project. *Id.* ¶ 3. Greenwich has received claims on the bond and demands for payment from various sub-subcontractors and suppliers to JMG on the project, including the plaintiff in this action, Doten. *Id.* ¶ 4.

The GIA provides, in part, that the indemnitors

shall exonerate, indemnify, and keep indemnified the Surety from and against any and all liability for losses and/or expenses of whatsoever kind or nature (including, but not limited to, interest, court costs, and the cost of services rendered by

¹ JMG has not filed a response to the defendants' statement of additional material facts. Accordingly, those facts are deemed admitted to the extent supported by the citations given to the summary judgment record. Local Rule 56(f).

counsel, investigators, accountants, engineers or other consultants, whether consisting of in-house personnel or third-party service providers) and from and against any and all such losses and/or expenses which the Surety may sustain and incur: (1) By reason of having executed or procured the execution of any Bond; (2) By reason of the failure of the [Indemnitors] to perform or comply with the covenants and conditions of this Agreement; or (3) In enforcing any of the covenants and conditions of this Agreement.

* * *

Payment by reason of the aforesaid causes shall be made to the Surety by the [Indemnitors] as soon as liability exists or is asserted against the Surety, whether or not the Surety shall have made any payment therefor.

* * *

In the event of any payment by the Surety, the [Indemnitors] further agree that in any accounting between the Surety and the [Indemnitors], the Surety shall be entitled to charge for any and all disbursements made by it in good faith in and about the matters contemplated by this Agreement under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether or not such liability, necessity or expediency existed; and that the vouchers or other evidence of any such payment by the Surety shall be prima facie evidence of the fact and amount of the liability of the [Indemnitors] to the Surety.

* * *

If a claim is made against the Surety, whether disputed or not, or if the Surety seems it necessary to establish a reserve for potential claims, and upon demand from Surety, the [Indemnitors] shall deposit with Surety cash or other property acceptable to Surety, as collateral security in such amount as the Surety in its sole and absolute discretion deems necessary or appropriate to protect Surety with respect to such claim or potential claims and any anticipated potential expenses or attorney's fees.

* * *

Until Surety shall have been furnished with conclusive evidence of its discharge without loss from any Bonds, and until Surety has been otherwise fully indemnified as hereunder provided, Surety shall have right of free access to the books, records and accounts of the [Indemnitors] for the purpose of examining and copying them.

Id. ¶¶ 5-9.²

² The defendants' response to each of these paragraphs is the same: "Any characterization of the content or provisions of the GIA is denied, as the document speaks for itself." Defendants' Responsive SMF ¶¶ 5-9. None of these paragraphs could reasonably be construed to present anything other than the text of the GIA.

On April 23, 2003 Greenwich notified the indemnitors that it expected to be reimbursed for all funds expended by it in the investigation, evaluation, negotiation and defense of claims made on the bond. *Id.* ¶ 10. As of May 24, 2004 Greenwich had sustained losses in the form of attorney fees and expenses in the amount of \$25,013.75 in investigating and defending claims made on the bond, including defending the claim by Doten in this action. *Id.* ¶ 11. On May 24, 2004 Greenwich made demand on the indemnitors for reimbursement of all incurred attorney fees and expenses pursuant to the express terms of the GIA. *Id.* ¶ 12. To date, the indemnitors have failed and/or refused to reimburse Greenwich for its incurred attorney fees and expenses. *Id.* ¶ 13.

On May 24, 2004 Greenwich made demand on the indemnitors that they immediately provide collateral security to Greenwich in the amount of \$183,057.50. *Id.* ¶ 14. Greenwich deems it necessary to require the deposit of this collateral to protect it from exposure for Doten's claim plus exposure of an award of attorney fees, penalties and interest to Doten and anticipated attorney fees and expenses that will be incurred by Greenwich in defending that claim. *Id.* ¶ 15. To date, the indemnitors have failed and/or refused to provide collateral to Greenwich despite its request. *Id.* ¶ 17. On April 23, 2003, May 21, 2003 and April 15, 2004 Greenwich made demands on the indemnitors to inspect and examine their books and records. *Id.* ¶ 18. To date, the indemnitors have failed and/or refused to permit Greenwich to make inspection of their books and records. *Id.* ¶ 19.

III. Discussion

The third-party complaint alleges that all of the third-party defendants are required to indemnify Greenwich and have breached the GIA; it seeks specific performance and equitable reimbursement *quia timet*. Third Party Complaint, etc. (Docket No. 21) at 4-8. JMG's cross-claims against Greenwich in the initial action seek indemnification and contribution for any damages obtained by Doten and damages for

violation of 10 M.R.S.A. § 1111. Amended Answer and Amended Cross-Claims of Defendant JMG Excavating & Construction Co., Inc., etc. (“Cross-Claim”) (Docket No. 24) at 7-9 (Counts I and III). JMG does not respond to Greenwich’s motion for summary judgment on these cross-claims, but the court must nonetheless consider the merits of the motion for summary judgment on those claims. *Vélez v. Awning Windows, Inc.*, ___ F.3d ___, 2004 WL 1554450 (1st Cir. July 9, 2004), slip op. at 13.

Greenwich contends that it is entitled to the indemnification and funding advance it seeks by the terms of the GIA. Greenwich Insurance Company’s Motion for Partial Summary Judgment, etc. (“Motion”) (Docket No. 58) at 3-7. The third-party defendants respond first that a disputed issue of fact material to these claims is raised by the deposition testimony of David G. Bryton, designated by Greenwich as its representative under Fed. R. Civ. P. 30(b)(6), to the effect that “Greenwich does not believe its contractual relationships with the Third Party Defendants create any obligation on Greenwich to perform its duties” and that “the work performed on the Project is not covered by the JMG/[Jones] bond.” Objections of Third Party Defendants to the Motion for Partial Summary Judgment, etc. (“Opposition”) (Docket No. 61) at 4. However, no reference to Bryton’s deposition testimony appears in the third-party defendants’ responsive or additional statements of material facts, and it therefore is not before the court for consideration in connection with the pending motion.

The defendants next contend that Greenwich is not entitled to summary judgment because the bonds at issue are not subject to the Miller Act and recovery of attorney fees is barred by the applicable state law, that of Pennsylvania. *Id.* at 6-10.³ Since neither Greenwich’s motion nor its third-party complaint mentions the Miller Act, this argument appears to miss the point. Whether or not the underlying bond was required by

³ Again, one of the third-party defendants’ arguments — that Greenwich had admitted that the bond is governed by (*continued on next page*)

law, it existed. Even assuming that the defendants are correct and that their ensuing argument that Pennsylvania law applies is also valid, Greenwich is nonetheless entitled to summary judgment on Counts I-III and V of the third-party complaint on the showing made. The third-party defendants' argument on this point is limited to that portion of Greenwich's demand that seeks recovery of attorney fees, penalties and interest. *Id.* By the terms of the only case law cited by the defendants themselves, Pennsylvania law allows recovery of attorney fees when there is "a clear agreement of the parties." *Snyder v. Snyder*, 620 A.2d 1133, 1138 (Pa. 1993). The court in *Fort Washington Res., Inc. v. Tannen*, 901 F. Supp. 932, 943 (E.D. Pa. 1995), merely makes the unremarkable observation that attorney fees are "not generally recoverable in contract or tort action[s];" the existence of a clear agreement of the parties to the contrary was not at issue in that case. The GIA provides a clear agreement between Greenwich and the third-party defendants that attorney fees incurred by Greenwich are covered. The factual assertion in the defendants' memorandum that "[t]here has been no contract between JMG and Doten that would create a contractual right by which Doten could recover its counsel fees from JMG," Opposition at 9, is unavailing for two reasons. First, the third-party defendants have included no such factual assertion in their statements of material facts, nor have they provided a copy of the bond or bonds at issue. Second, the language of the GIA does not require that JMG's payment on the bond be required by the terms of the bond or some other contract between JMG and the bonded party; Greenwich is allowed to charge the indemnitors for any disbursements made under the belief that it was liable or that it was necessary or expedient to make such disbursements "whether or not such liability, necessity or expediency existed." Plaintiff's SMF ¶ 7.

common law — relies on factual assertions not made part of the summary judgment record through their statements of material fact, Opposition at 10, and accordingly may not be considered by the court.

Because the evidence submitted by Greenwich supports its claims for indemnification and deposit of collateral security or funds, it is entitled to summary judgment on Counts I-III and V. Third-Party Complaint ¶¶ 18-26, 31-35. *See Gundle Lining Constr. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 211 (5th Cir. 1996). This outcome renders moot the claim asserted in Count VI. Third-Party Complaint ¶¶ 36-39.

The third-party defendants do not address separately the claim asserted in Count IV of the third-party complaint. The undisputed material facts, Plaintiff's SMF ¶¶ 9, 18-19; Defendants' Responsive SMF ¶¶ 9, 18-19, establish that the plaintiff is entitled to summary judgment on this claim as well.

Finally, with respect to the cross-claims asserted against Greenwich by JMG, Greenwich contends that there is no basis in law or fact for JMG, a principal, to assert claims for contribution and indemnity against its surety, Greenwich. Motion at 9-10. Count I of the cross-claim asserts entitlement to contribution and indemnity. Cross-Claim ¶¶ 1-4. JMG has offered no facts in support of this claim; there is no suggestion that any contract provides the basis for it. JMG has offered no argument that it has any such common-law claim against Greenwich, which may only arise from the nature of the relationship between the parties or where there is a great disparity in the fault of the parties. *Araujo v. Woods Hole, Martha's Vineyard, Nantucket Steamship Auth.*, 693 F.2d 1, 2 (1st Cir. 1982); *see Thibodeau v. Fujisawa USA, Inc.*, 1993 WL 277549 (D. Me. July 8, 1993), at *4 (adopting reasoning of *Araujo*). JMG has submitted no evidence that would allow a reasonable factfinder to conclude that the parties intended that Greenwich would bear the ultimate responsibility for Doten's claims, *Araujo*, 693 F.2d at 2; the only evidence in the summary judgment record, the GIA, is directly to the contrary. Similarly, there is no evidence of a "generally recognized special relationship between" JMG and Greenwich. *Id.* at 2-3. Nor is

there any evidence that Greenwich was “actively at fault” while JMG was “merely passively negligent.” *Id.* at 3. Accordingly, Greenwich is entitled to summary judgment on Count I of the cross-claim.

Count III of the cross-claim, the only other count asserted against Greenwich, alleges a violation of 10 M.R.S.A. § 1111 *et seq.* Cross-Claim ¶¶ 12-13. That section of the Maine statutes deals with construction contracts and specifically imposes payment obligations on owners, contractors and subcontractors. 10 M.R.S.A. §§ 1113-14. Neither the definition of “contractor” nor the definition of “owner” for purposes of these obligations can be stretched to cover Greenwich. 10 M.R.S.A. § 1111(3) & (6). Greenwich might possibly fall within the definition of “subcontractor,” in that it is an entity that has contracted to “provide services” to Doten, 10 M.R.S.A. § 1111(8), but JMG has not provided any evidence that Greenwich had any contractual obligation to pay JMG, the only basis for liability under 10 M.R.S.A. § 1114. Greenwich is accordingly entitled to summary judgment on Count III of JMG’s cross-claim.

IV. Conclusion

For the foregoing reasons, I recommend that the motion of Greenwich Insurance Company for partial summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 16th day of July 2004.

/S/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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