

from Mountbatten. As an inducement to Mountbatten to issue the bonds, Bat-Jac and Eric and Steve R. Menzer (the "Menzers"), executed an indemnity agreement jointly and severally covenanting to exonerate and save harmless Mountbatten as the surety on the bonds.

Bat-Jac contends that from April 30, 1999 to April 6, 2000, it performed all the work, labor and services and furnished all of the materials pursuant to the terms of the contract. Bat-Jac alleges that there is a balance due for the work, labor, services and materials furnished which has been duly demanded, but the School has refused to pay. Bat-Jac commenced this action against the School for breach of contract, account stated and to foreclose upon a mechanic's lien.

In its amended answer the School generally denies the allegations contained in the complaint, interposes several affirmative defenses and a counterclaim alleging that Bat-Jac breached the contract. In its counterclaim, the School contends that Bat-Jac wrongfully walked off the job, performed in an unworkmanlike manner, failed to correct defects or to complete the project, and failed to pay its subcontractors. The School posits that Bat-Jac is, and has been declared in default under the contract and also has interposed a counterclaim for damages against Mountbatten as the surety company.

In support of its cross motion and in opposition to

Bat-Jac's motion, Mountbatten has submitted, inter alia, the affidavit of Nicholas Kokinakis, a Claims Attorney for Zurich North America, the parent company of Mountbatten. Kokinakis asserts that unpaid subcontractors and suppliers of Bat-Jac on the School project have made claims against Mountbatten, \$228,808.87 of which have been paid. Kokinakis also asserts that Mountbatten has worked with the School and Bat-Jac's subcontractors to complete the project. In fact, Kokinakis states that on March 25, 2002, a meeting was held with all the relevant parties to discuss the completion of the project. However, Bat-Jac refused to cooperate and did not attend the meeting. Rather, via a letter from its attorney Stuart Zisholtz, Bat-Jac states that the contract with the School was terminated for failure to remit payment, at which time the bond issued by Mountbatten was also terminated. Stuart Zisholtz states that any costs incurred for the completion of the project would not be the responsibility of Bat-Jac or the Menzers (hereinafter the "Indemnitors" when referred to collectively), and that Mountbatten's voluntary appearance on the project, would result in Mountbatten incurring the costs of completion.

Kokinakis states that the Indemnitors have not reimbursed Mountbatten for the monies it has expended on their behalf. Kokinakis also states that Mountbatten has established a reserve fund in the amount of \$450,000 to cover the various claims and lawsuits brought against it in connection with the School project.

Although duly demanded, neither Bat-Jac nor the Menzers have provided collateral security to Mountbatten to cover the reserve fund. As a result, Mountbatten maintains that Bat-Jac and the Menzers are in default under the GIA.

Additionally, Kokinakis asserts that Mountbatten has informed Stuart Zisholtz that it was exercising its right to assume control over the matter as the attorney-in-fact for Bat-Jac pursuant to the Assignment and Attorney-In-Fact clauses contained in the indemnity agreement. Zisholtz and Zisholtz has declined to execute the Consent to Change Attorneys and has refused to recognize Mountbatten as Bat-Jac's attorney-in-fact. Based on the default of the Indemnitors, and the refusal of Zisholtz and Zisholtz to execute the Consent to Change Attorney form, Mountbatten argues that it is entitled to the relief requested in its cross motion, thereby necessitating the denial of Bat-Jac's motion.

Bat-Jac advances several arguments for denial of the cross motion. Bat-Jac argues that the performance bond permits an owner to complete a project by utilizing the services of the surety if and when the principal defaults under the terms of the contract. If the principal does not default, Bat-Jac argues, then the surety has no obligation to complete the project.

Bat-Jac maintains that in the case at bar, the School breached the contract by failing to remit payment. Therefore, Bat-Jac argues that it had grounds to terminate the contract with

the School, and that upon such termination, the performance bond was vitiated and Mountbatten had no obligation to complete the project.

Bat-Jac points out that based on the evidence submitted, Mountbatten has not received any funds from the owners of the projects. Bat-Jac contends that it did not receive final payment on a number of projects, which payments, Bat-Jac surmises would have been sufficient to reimburse Mountbatten for the funds it has expended on the projects. Therefore, it is Bat-Jac's position that if Mountbatten had mitigated its damages, the alleged default would not have occurred and Mountbatten would have been made whole.

Finally, Zisholtz contends that a substitution of attorneys is not proper because the positions taken by Bat-Jac and Mountbatten are contradictory. Zisholtz argues that Bat-Jac is pursuing a claim against the School for breach of contract while Mountbatten is attempting to complete the project based on the pretext that Bat-Jac is in breach of the contract.

Paragraph 6 of the indemnity agreement specifically provides that, if Mountbatten establishes a reserve to cover any liability, claim asserted or lawsuit in connection with the bonds, the Indemnitors, "immediately upon demand...shall provide the Surety funds and/or other collateral security which the Surety in its sole discretion deems adequate...as security on such Bond." Consequently, Bat-Jac's failure to furnish the demanded collateral funds constitutes a breach of its obligations.

The deposit demanded by Mountbatten is not based upon the maturity or liquidation of any claims, but represents security in an amount within the sole discretion of Mountbatten in anticipation of possible losses (see, Bib Constr. Co., Inc. v Fireman's Ins. Co. Of Newark, N.J., supra). Therefore, Bat-Jac's mitigation argument is without merit. Moreover, other than Bat-Jac's speculation, no evidence has been submitted to establish that Mountbatten did not attempt to mitigate damages (see, American Home Assur. Co. v Gemma Constr. Co., Inc., 275 AD2d 616; Acstar Ins. Co. v Teton Enter., Inc., 248 AD2d 654). Upon the breach of the indemnity agreement, i.e., failing to make the demanded collateral payments, all of Bat-Jac's rights "growing in any manner out of" the contract were assigned to Mountbatten, thereby triggering Mountbatten's authority to settle, compromise all claims, or complete the contracted work, on behalf of Bat-Jac. This authority not only included the right to settle or compromise claims against Mountbatten upon the bonds, but also Bat-Jac's claims against the School for breach of contract (see, e.g., Hutton Constr. Co., Inc. v County of Rockland, 52 F.3d 1191 [2nd Cir]).

Moreover, once the School declared Bat-Jac in default and sued Mountbatten, as the surety on the performance bonds to fulfill Bat-Jac's obligations, Mountbatten was required to comply, regardless of its own belief in the correctness of the School's action (see, Bib Constr. Co., Inc. v Fireman's Ins. Co. of Newark,

N.J., 214 AD2d 521). Accordingly, Bat-Jac's argument that Mountbatten completed the project voluntarily is baseless.

Furthermore, the Indemnitors irrevocably designated Mountbatten as their attorney-in-fact with the authority to exercise all of the rights of the Indemnitors under the indemnity agreement. Consequently, Mountbatten has the right to substitute Zisholtz and Zisholtz with the attorney of its choice.

Accordingly, Mountbatten is entitled to the relief sought in the cross motion.

As to the motion to restore, according to the court's computer records, on May 1, 2001 this case was marked "OTHER FINAL DISP. (PRE-NOTE)." It has been made clear that such a practice is not permitted (Johnson v Brooklyn Hosp. Center, 295 AD2d 567; Lopez v Imperial Delivery Serv., 282 AD2d 567, lv dismissed 96 NY2d 937). There is no indication that an order was issued dismissing the action upon the parties' default in appearing at the scheduled pre-note of issue conference as is contemplated by 22 NYCRR 202.27(c). Consequently, there is no need for a motion to restore as the case is "still alive" (see, McCarthy v Jorgensen, 290 AD2d 116, 118; Lopez v Imperial Delivery Serv., Inc., 282 AD2d 190, 200, lv dismissed 96 NY2d 937). Accordingly, the motion is denied as moot.

Settle order.

Dated: October 17, 2002

Justice John A. Milano