IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CDM CONSTRUCTORS INC., **Plaintiff,** **v.** **RANDALL MECHANICAL INC. and HARTFORD FIRE INSURANCE COMPANY,** **Defendants.**	**CIVIL ACTION FILE** **NO. 1:19-CV-1178-MHC**
UNITED STATES, for the Use of RANDALL MECHANICAL, INC. **Counterclaim Plaintiff,** **v.** **CDM CONSTRUCTORS INC., et al.** **Counterclaim Defendants.**	

ORDER GRANTING PENDING MOTIONS TO DISMISS

This matter comes before the Court on Hartford Fire Insurance Company's Motion to Dismiss [Doc. 150] and CDM Constructors, Inc.'s Motion to Dismiss Conditioned Upon Granting of Hartford Fire Insurance Company's Motion to Dismiss [Doc. 151]. For the reasons below, the motions are **GRANTED**.

In its motion, Hartford Fire Insurance Company ("Hartford") moved, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, to voluntarily dismiss the present action including the counterclaims asserted by Randall Mechanical, Inc. with prejudice. [Doc. 150 at 1.] Hartford represents and asserts that it has authority to resolve all claims in the above styled action inclusive of all claims asserted by Randall Mechanical, Inc. against CDM and CDM's surety companies, Fidelity and Deposit Company of Maryland, Zurich American Insurance Company, XL Specialty Insurance Co. and Greenwich Insurance Company (collectively the "CDM Sureties"). Hartford contends that Hartford and CDM are the only parties necessary to agree to the dismissal of the action with prejudice.

For its part, CDM Constructors, Inc. ("CDM") represents that CDM and Hartford have agreed to settle all claims in the above styled action pursuant to a Settlement Agreement attached to Hartford's Motion to Dismiss as Exhibit 17 thereto. [Doc. 150-21.]

Hartford's Motion to Dismiss was filed on April 18, 2023. [Doc. 150.] CDM's Motion to Dismiss was filed on April 19, 2023. [Doc. 151]. On April 20, 2023, Randall Mechanical Inc. ("Randall") requested additional time to hire counsel for the purposes of opposing the pending motions to dismiss. The Court granted Randall's request and directed Randall to file any response in opposition to the pending motions to dismiss no later than June 5, 2023. As of the date of this Order, Randall has

not filed a response in opposition to the pending motions or otherwise requested further extensions.[1] In addition, no response or objection to the proposed consent order granting the motions to dismiss was filed by Randall within fourteen days of the filing of the proposed consent order.

Following a review of the motions to dismiss, including the Declaration of Maribel Luzunaris ("Luzunaris Decl.") [Doc. 150-3], this Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

The facts underlying the motions to dismiss are undisputed.

1. This lawsuit concerns a subcontract dated February 3, 2016, between CDM and Randall (the "Subcontract"), in connection with a project known as the SHEP Dissolved Oxygen Injection System (the "Project").[2] Hartford, as surety, provided payment and performance bonds on behalf of Randall as principal in favor of CDM as obligee in connection with the Subcontract on the Project (the "Bonds").[3]

2. Bonds are credit transactions, that is, Hartford underwrites its willingness to issue bonds as an extension of credit. One of the most critical factors in

[1] Under the Local Rules of this Court, "[f]ailure to file a response [to a motion] shall indicate that there is no opposition to the motion." LR 7.1(B), NDGa.
[2] See Complaint [Doc. 1] and Counterclaim [Doc. 11].
[3] Luzunaris Decl. at ¶ 4 and Ex. 1.

determining whether a bond will be issued is the financial condition and credit worthiness of the principal. Hartford issued these Bonds based upon Randall's financial condition.[4]

3. One of the other factors in issuing a Bond is reliance upon an agreement of indemnity. Randall has several related/affiliated sister companies and Hartford obtained indemnity agreements from Randall and these related companies along with several individuals (collectively the "GIAs").[5]

4. Hartford relied upon the GIAs in issuing the Bonds.[6]

5. The operative terms of the two GIAs are identical and have several provisions relevant to Hartford's motion. First, the GIAs define a default under the GIA, to include, among other events, the following:

> iii) an Indemnitor's failure, refusal or inability to timely satisfy any term or condition of any Bond, any contract for which a Bond has been Underwritten or [the GIA];

and

> v) a declaration of default, a demand for Hartford to pay or perform, or a termination for default asserted by an obligee relating to any contract for which Bond has been Underwritten . . . .

[4] Id. at ¶ 6.
[5] Id. at ¶ 7 and Ex. 2A and 2B.
[6] Id. at ¶ 8.

See GIAs at ¶ 1(b) (also note that "Indemnitor" as used in the GIAs includes the Bonds' principal, Randall).

6. Under paragraph 5 of the GIAs, Randall and the other indemnitors agreed to "indemnify, exonerate and old Harford harmless from and against all Loss, claims, demands, liabilities, suits and causes of action which are in any way related to any Underwriting activities, Bonds or [the GIAs]." GIAs at ¶ 5.

7. In paragraph 6, the Indemnitors agree to deposit collateral, as follows:

> Upon Hartford's demand, the Indemnitors shall immediately deposit with Hartford funds, as collateral, in an amount Hartford deems necessary at the time of said demand to protect itself from actual or anticipated Loss. Demand may be made as soon as a) Hartford determines that liability exists; or b) Hartford has a reasonable basis to believe that it may incur liability or Loss; or c) in the event any Indemnitor diverts contract funds relating to any Bond in violation of Paragraph 11 of this Agreement or applicable law; or d) in the event Hartford deems itself insecure, whether or not Hartford has made any payment or established any reserve and whether or not it has received notice of, accepted or denied any claim in whole or in part. The Indemnitors acknowledge and agree that their failure to immediately deposit with Hartford any sums demanded under this section shall cause irreparable harm to Hartford for which it has no adequate remedy at law….

GIAs at ¶ 6.

8. In paragraph 7, Randall agreed that Hartford had the right to settle any claims related to the Bonds:

> Hartford shall have the absolute right to adjust, settle, dispute, litigate, appeal, finance, or compromise any claim, demand, suit, judgment or exposure relating to any Underwriting activities or Bonds without affecting the Indemnitors' liability under this Agreement and Hartford's determination shall be binding upon the Indemnitors….

GIAs at ¶ 7.

9. In paragraph 8, Randall agreed that:

> Hartford shall have the absolute right to review and copy all Books and Records of the Indemnitors. Hartford's access to said Books and Records shall continue until Hartford's liability under all Bonds has been terminated with no Loss and Indemnitors have satisfied all of their obligations under this Agreement. Any person or entity having any manner of relationship with an Indemnitor, including, without limitation, financial institutions, Bond obligees, contracting parties, governmental entities, providers of legal, accounting or engineering services and all other persons or entities is/are expressly authorized by this Agreement to discuss and furnish to Hartford any Books and Records, information or documentation requested including work papers and document drafts.

GIAs at ¶ 8.

10. Finally, in paragraph 9, Randall assigned certain rights to Hartford, including its claims asserted in this action as Counterclaims:

> Effective on the earlier of the date of this Agreement or the date on which Hartford first Underwrites a Bond to, at the request of or on behalf of any Indemnitor, all Indemnitors irrevocably assign, transfer and convey the following to Hartford;

> (a) All rights of the Indemnitors in, arising from, or related to Bonds or any bonded or unbonded contracts, subcontracts and subcontract bonds and any extensions, modifications, alterations or additions thereto; and
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> ***
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> (d) Any and all accounts receivable, accounts, chattel paper, documents of title, intangibles, claims, judgments, choses in action, purchase orders, bills of lading, federal or state tax refunds, tort claims, premiums, deferred payments, refunds, retainage or retainage account in which the Indemnitors have an interest.

GIAs at ¶ 9.

11. Randall was declared in default on January 23, 2019, but Hartford still felt comfortable with Randall's financial condition, capability, and Randall's ability to return this project and complete work, and Hartford supported Randall's return to the project.[7]

12. Three years after the declared default and the commencement of this litigation, in the Spring of 2022, Hartford became concerned about Randall's financial condition. Hartford was not receiving current financial records but wanted them and was entitled to this information. Under the terms of the GAIs, Hartford has the right to have access to Randall's financial documents.

[7] Luzunaris Decl. at ¶ 9.

13. Starting in the Spring of 2022 and continuing for months, Hartford requested up-to-date financial data from Randall, all to no avail. In an email dated April 5, 2022, Hartford's attorney requested Randall's audited accounting for the year ending December 31, 2021, and further said if the audit was not yet available, asked when this would be provided, as well as internal financial data.[8]

14. A month later, May 4, 2022, Hartford repeated the request and Randall said the information would be coming.[9]

15. Randall said it had suffered a ransomware attack so the financial documents would not be provided for another week.[10]

16. Shortly afterwards on May 12, 2022, Randall said the documents would not be ready until the following Monday.[11]

17. On June 15, 2022, Hartford pointed out that a failure to provide financial documents as requested was a breach of the GIA, and there was no valid reason to deny the request. The next day, June 16, 2022, Hartford received a message from Jeff Condello, president of Randall, that the year-end audit for 2021 would not be completed until the end of July 2022. [12]

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[8] Id. at ¶ 10 and Ex. 3.
[9] Id. at ¶ 11 and Ex. 4.
[10] Id. at ¶ 11 and Ex. 5.
[11] Id. at ¶ 12 and Ex. 6.
[12] Id. at ¶ 13 at Ex. 7 and Ex. 8.

18. Hartford received a small amount of information, but it never got the year end audit for 2021.[13]

19. The GIAs require the indemnitors to collateral with Hartford in an amount deemed necessary to protect itself from either actual or anticipated loss. See GIAs at ¶ 6.[14]

20. On July 15, 2022, Hartford made a collateral demand upon all indemnitors in the sum of $2,892,672, the amount of damages sought by the Plaintiff in the pending litigation.[15] Condello, Randall's president, responded to the demand for collateral security with an email stating "Good luck with that! Not happening."[16]

21. Hartford continued to no avail to ask for financial data. On September 13, 2022, Hartford's attorney requested that Randall give it access to books, records, corporate tax returns, and financial documents per the GIAs and provided Randall with a list of financial documents requested.[17]

22. On September 13, 2022, Condello directed Randall personnel to advise Hartford when it would receive the requested financial documents.[18]

[13] Id. at ¶ 14.
[14] Attached to the Luzunaris Decl. as Ex. 2A and 2B.
[15] Luzunaris Decl. at ¶ 16 and Ex. 9.
[16] Id. at ¶ 17 and Ex. 10.
[17] Id. at ¶ 18 and Ex. 11.
[18] Id. at ¶ 19 and Ex. 12.

23. Hartford followed up on September 23, 2022, and asked Condello and his employee when the requested financials would be ready. That day Jeff Gottfried (Randall) emailed that the financial documents requested would be available by the middle of the week. Again, nothing happened, and no financials were given.[19]

24. The requests for information continued. On October 5, 2022, Hartford made a formal request for a CPA to have access to the books and records.[20]

25. On October 5, 2022, Condello responded that Randall would work on Hartford's request for documents in late November 2022.[21]

26. Hartford never received the financial documents requested, and its accountant was never given access to Randall's records.[22]

27. On January 25, 2023, Hartford's attorney renewed Hartford's demand for collateral with a second letter demanding that the sum of $2,892,672.00 be provided as collateral to Hartford.[23]

28. Hartford never received collateral as demanded.[24]

[19] Id. at ¶ 20 and Ex. 13.
[20] Id. at ¶ 21 and Ex. 14.
[21] Id. at ¶ 22 and Ex. 15.
[22] Id. at ¶ 23.
[23] Id. at ¶ 24 and Ex. 16.
[24] Id. at ¶ 25.

29. Following the failed mediation of all parties in this case, Hartford made the determination that it would exercise its rights under GIAs to settle all claims in this matter, including the claim asserted by CDM's and Randall's counterclaim.[25]

30. A settlement agreement was executed by CDM and Hartford.[26]

31. Hartford states that its decision to settle was based upon numerous factors. Among these were the failure of the indemnitors to provide collateral as twice demanded, and Randall's failure to provide financial reports. Another grave concern Hartford has is awareness that Randall had defaulted on paying subcontractors on construction projects bonded by another surety. Another surety for Randall paid at least $4,000,000.00 on payment bond claims because of Randall's default on other projects. Hartford is aware that Randall had significant secured creditor bank debt, including a recent loan obtained, but no information whatsoever with regard to the use of proceeds of that loan or the total amount of bank and other surety debt Randall owed. Based upon these factors and others, Hartford made the decision to settle all claims and counterclaims.[27]

[25] Id. at ¶ 26.
[26] Id. at ¶ 27 and Ex. 17.
[27] Id. at ¶ 26-27 and Ex. 17.

26 CONCLUSIONS OF LAW

A. The Indemnity Agreements are valid and enforceable.

The GIAs that Randall provided to Hartford are valid and enforceable. In Anderson v. U.S. Fid. & Guar. Co., 267 Ga. App. 624, 600 S.E.2d 712 (2004), the Georgia Court of Appeals recognized that it has "consistently upheld the validity and enforceability of indemnification agreements executed in connection with the issuance of surety bonds." Id. at 627. The court further held that the ordinary rules of contract construction apply to indemnity agreements including the enforcement of clear and ambiguous terms. "No construction is required or even permissible when the language employed by the parties in the contract is plan, unambiguous and capable of only one reasonable interpretation." Id. at 627 (citation and internal punctuation omitted; see also Liberty Mut. Ins. Co. v. Ra-Lin & Assocs., No. 3:08-CV-105-JTC, 2010 U.S. Dist. LEXIS 150446, at *8-9 (N.D. Ga. Feb. 5, 2010) (holding that "[t]he terms of the General Agreement of Indemnity are clear and unambiguous and do not violate any rules of law"); Reliance Ins. Co. v. Romine, 707 F. Supp. 550 (S.D. Ga. 1989), aff'd, 888 F.2d 1344 (11th Cir. 1989) (holding that an indemnity agreement provided in conjunction with the issuance of surety bonds was valid and enforceable).

B. Hartford has authority as assignee to settle Randall's claims.

Georgia law generally permits parties to assign contractual rights. O.C.G.A. § 44-12-22. A cause of action for personal torts or for injuries arising from fraud to the assignor may not be assigned, but claims involving injuries to property, directly or indirectly are assignable. O.C.G.A. § 44-12-24. For a transfer of a chose in action to be effective, there must be a writing that evidences the definite intention of the assignor to transfer to the assignee the title and interest in the chose in action. See Ponder v. CACV of Colo., LLC, 289 Ga. App. 858, 658 S.E.2d 469 (2008); Jones v. Universal C.I.T. Credit Corp., 88 Ga. App. 24, 75 S.E.2d 822 (1940); Myers v. Adams, 14 Ga. App. 520, 81 S.E. 595 (1914).

"The form of an assignment of a chose in action is immaterial. It is sufficient if it is in writing and manifests the intention of the owner to transfer to the assignee his title to the chose in action." Lumpkin v. American Surety Co., 61 Ga. App. 777, 779, 7 S.E. 2d 687 (1940) (citing Southern Mutual Life Ins. Co. v. Durden, 132 Ga. 495, 64 S.E. 264 (1909)).

Here, Randall assigned its cause of action against CDM to Hartford within the GIA. That document provides the following:

> Effective on the earlier of the date of this Agreement or the date on which Hartford first Underwrites a Bond to, at the request of or on behalf of any Indemnitor, all

> Indemnitors irrevocably assign, transfer and convey the following to Hartford;
>
> (b) All rights of the Indemnitors in, arising from, or related to Bonds or any bonded or unbonded contracts, subcontracts and subcontract bonds and any extensions, modifications, alterations or additions thereto; and
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> ***
>
> (e) Any and all accounts receivable, accounts, chattel paper, documents of title, intangibles, claims, judgments, choses in action, purchase orders, bills of lading, federal or state tax refunds, tort claims, premiums, deferred payments, refunds, retainage or retainage account in which the Indemnitors have an interest.

GIA at ¶ 9.

In addition, the GIA gave Hartford the right to settle claims:

> Hartford shall have the absolute right to adjust, settle, dispute, litigate, appeal, finance, or compromise any claim, demand, suit, judgment or exposure relating to any Underwriting activities or Bonds without affecting the Indemnitors' liability under this Agreement and Hartford's determination shall be binding upon the Indemnitors….

GIA at ¶ 7.

These rights, contained in an indemnity agreement obtained by a surety, have been enforced by other courts permitting the surety to resolve affirmative claims

brought by its principal. See Hutton Constr. Co. v. County of Rockland, 52 F.3d 1191 (2nd Cir. 1995).[28]

Hartford has both the right to settle claims against the bond and an assignment of Randall's affirmative claims against CDM. These two rights give the authority to Hartford to resolve this entire case which it decided to do when it entered into the settlement agreement. Moreover, Randall failed to post collateral security which could have been provided to secure Hartford. This justifies Hartford's settlement of the claims under the powers granted to it in the GIA.

C. All Claims shall be dismissed pursuant to Rule 41(a)(2).

Hartford has entered into a Settlement Agreement with CDM.[29] There Hartford agreed, pursuant to the rights it was granted in the GIAs, that all of Randall's

[28] See also Great Am. Ins. Co. v. E.L. Bailey & Co., 841 F.3d 439 (6th Cir. 2016) (affirming summary judgment for a surety that settled its principal's claims against an owner without notice); Liberty Mut. Ins. Co. v. Aventura Eng'g & Constr. Corp., 534 F. Supp. 2d 1290 (S.D. Fla. 2008) (enforcing a surety's release of its principal's claim after the principal defaulted in the indemnity agreement by failing to post collateral security); Gen. Accident Ins. Co. of Am. v. Merritt-Meridian Constr. Corp., 975 F. Supp. 511, 516 (S.D.N.Y. 1997) ("Sureties enjoy such discretion to settle claims because of the important function they serve in the construction industry, and because the economic incentives motivating them are a sufficient safeguard against payment of invalid claims."); Bell BCI Co. v. Old Dominion Demolition Corp., 294 F. Supp. 2d 807, 812 (E.D. Va. 2003) (finding that the Indemnity Agreement's unambiguous assignment provision conferred on the surety the authority to settle and resolve the principal's claims against the owner).

[29] Luzunaris Decl. at Ex. 17.

claims against CDM were "completely settled, released, and discharged" subject to the approval by this court of the dismissal of this action. CDM likewise released Hartford and Randall of all claims, again with the condition subsequent that this Court dismiss the case with prejudice.

Rule 41(a)(2) provides for the voluntary dismissal of an action by court order "on terms that the court considers proper." In this case, both CDM (by separate motion) and Hartford request the dismissal of the action, including all claims and counterclaims, with prejudice.

Given Hartford's rights to Randall's claims through the assignment, along with Hartford's right to settle claims on the bond, Hartford and CDM are the only parties necessary to agree to the dismissal of the action with prejudice. These parties have agreed to the settlement of all claims and to their dismissal with prejudice.

III. FINAL ORDER

Therefore, having reviewed the pending motions to dismiss, and in light of the lack of opposition to same, it is hereby **ORDERED** that Hartford Fire Insurance Company's Motion to Dismiss [Doc. 150] and CDM Constructors, Inc.'s Motion to Dismiss [Doc. 151] are **GRANTED**. In light of the above, all claims in the above styled action, including the counterclaim asserted by Randall, are **DISMISSED WITH PREJUDICE**.

Since there are no remaining issues in this litigation, the trial in this matter previously scheduled for December 4, 2023 [Doc. 149] is **CANCELLED**.

The Clerk's Office is **DIRECTED** to close the case.

IT IS SO ORDERED this 27th day of June, 2023.

Mark H. Cohen

MARK H. COHEN
United States District Judge