

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THE UNITED STATES FOR THE USE AND :
BENEFIT OF LONSDALE CONCRETE :
CONSTRUCTION, INC., :
Plaintiff, :
v. : CA 12-03 L
FRENCH DESIGN BUILDERS INCORPORATED; :
KCORP TECHNOLOGY SERVICES, INC.; and :
HARTFORD FIRE INSURANCE COMPANY, :
Defendants. :

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the Court is the Motion for Default Judgment (Docket ("Dkt.") #13) ("Motion") filed by Defendant KCorp Technology Services, Inc. ("KCorp"). By the Motion, KCorp seeks default judgment on its cross-claim for contractual and equitable indemnification against Defendant French Design Builders Incorporated ("FDB").

The Motion has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B). No objection has been filed to the Motion. The Court concludes that a hearing is not necessary. See Marcus Food Co. v. DiPanfilo, 671 F.3d 1159, 1172 (10th Cir. 2011) ("Rule 55 of the Federal Rules of Civil Procedure, which governs default judgments, does not require that the district court receive evidence on the claimed damages amount before entering a default

judgment; rather, the Rule simply allows the district court to conduct a hearing if it believes that additional investigation is necessary."); HMG Prop. Investors, Inc. v. Parque Indus. Rio Canas, Inc., 847 F.2d 908, 919 (1st Cir. 1988) ("It is settled that, if arriving at the judgment amount involves nothing more than arithmetic—the making of computations which may be figured from the record—a default judgment can be entered without a hearing of any kind."); cf. Torres-Rivera v. O'Neill-Cancel, 524 F.3d 331, 339 n.3 (1st Cir. 2008) ("A hearing may be required ... to set damages [in a default judgment scenario] when the amount is in dispute or is not ascertainable from the pleadings.") (alterations in original). For the reasons stated below, I recommend that the Motion be granted.

I. Background

This is an action brought pursuant to the Miller Act, 40 U.S.C. § 3131 *et seq.*, which requires surety bonds on federal construction projects.¹ See Complaint (Dkt. #1); see also Eastern Seaboard Constr. Co. v. Gray Constr., Inc., 553 F.3d 1, 2 (1st Cir.

¹ The Miller Act requires a general contractor performing a contract valued at over \$100,000 on any public construction project to obtain a performance bond for the protection of persons supplying labor and material in the prosecution of the work on the project. 40 U.S.C. § 3130(b); see also GE Supply v. C & G Enters., Inc., 212 F.3d 14, 17 (1st Cir. 2000) (stating this requirement under earlier version of the Act). "The purpose of the Miller Act is 'to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the construction of nonfederal buildings.'" GE Supply, 212 F.3d at 17 (quoting United States ex rel. Sherman v. Carter, 353 U.S. 210, 216, 77 S.Ct. 793 (1957)).

2008) (noting this requirement). The United States National Guard entered into a written contract with KCorp to act as general contractor/construction manager for a construction project at the Rhode Island National Guard Camp Fogarty Training Site. Complaint ¶¶ 8-9. KCorp entered into a contract with FDB to act as prime contractor for the construction project. Id. ¶ 10. Hartford Fire Insurance Company ("Hartford"), as surety, and KCorp, as principal, executed a labor and material bond for the project in the amount of \$1,420,500. Id. ¶ 11.

FDB entered into a written subcontract with Lonsdale Concrete Construction, Inc. ("LCC"), whereby LCC was to perform certain concrete work for the project. Id. ¶ 12. The subcontract was in the amount of \$17,050, and LCC completed all subcontract work and is owed \$17,050. Id. ¶ 13. However, FDB failed to pay LCC. Id. ¶ 14. LCC has sued FDB for breach of contract (Count I), FDB and KCorp for quantum meruit² (Count II), and Hartford for the payment bond claim (Count III). Complaint ¶¶ 16-22.

II. Facts

On March 28, 2011, KCorp and FDB entered into the KCorp Technology Services Subcontract Agreement (the "Subcontract") with regard to certain labor and materials to be provided by FDB in

² LCC alleges that the labor, materials, and equipment provided by LCC to FDB were furnished and performed at the request of FDB and constitute a benefit to FDB and KCorp for which FDB and KCorp expected to pay and for which LCC expected to be paid. Complaint ¶ 19.

connection with a prime contract with the U.S. Government concerning the Parachute Rigging Facility located at 2841 South County Trail, East Greenwich, Rhode Island, known as the Camp Fogarty Training Site (the "Project"). See Answer and Cross-Claim of Defendants KCorp Technology Services, Inc. and Hartford Fire Insurance (Dkt. #9) ("Answer and Cross-Claim") ¶ 1.³ The Subcontract allowed FDB to assign portions of the contractual work to other subcontractors. Id. KCorp alleges on information and belief that FDB assigned a portion of the work to LCC. Id. ¶ 2.

Pursuant to Paragraph 3.15 of the Subcontract, FDB agreed to defend, indemnify, and hold KCorp harmless from "any and all costs, claims, causes of action, or liability, of whatsoever kind including, but not limited to, any legal fees and costs incurred by [KCorp] in defending against any such claim or cause of action arising out of [FDB's] performance of this Subcontract." Id. ¶ 3 (first alteration in original). In Paragraph 3.16(b) of the Subcontract, FDB further agreed to be liable for the actions of any of its agents relating to matters covered by the Subcontract. Id. ¶ 4.

On May 20, July 14, and August 26, 2011, in connection with the submission of applications for payment, FDB executed identical

³ The paragraph cited is found in the cross claim portion of the Answer and Cross Claim of Defendants KCorp Technology Services, Inc. and Hartford Fire Insurance (Dkt. #9) ("Answer and Cross Claim"). Hereafter, unless otherwise indicated, all citations to the Answer and Cross Claim refer to the cross claim portion ("Cross Claim") of that document.

forms constituting a Waiver and Release of Construction in Progress (the "Waiver Forms"). Id. ¶ 5. In each of those Waiver Forms, FDB "certifie[d] that all persons, firms or corporations who have furnished labor and/or materials and/or equipment to the Project have been paid in full, as of th[is] date." Id. (alterations in original). FDB further agreed in each of the Waiver Forms that "it would indemnify and hold KCorp harmless from any and all claims, causes of action or demands of any nature both related to persons, firms, or corporations who have furnished labor and/or materials and/or equipment to [FDB], or at the direction of [FDB], respecting the Project." Id. Upon the execution of these Waiver Forms on May 20, July 14, and August 26, 2011, KCorp released certain funds to FDB. Id. ¶ 6.

On or about December 27, 2011, upon learning that certain of FDB's suppliers and/or sub-subcontractors who had previously provided labor and materials to the Project were making claims for payment allegedly due, counsel for KCorp made demand upon FDB for indemnity and a defense in connection with any such claims pursuant to the provisions of the Subcontract and the Waiver Forms. Id. ¶ 7. As of February 9, 2012, FDB had failed and/or refused to defend or resolve any such claims, including, but not limited to, claims made by the United States for the Use and Benefit of Lonsdale Concrete Construction, Inc. ("Plaintiff"), in this action. Id. ¶ 8.

As a result of this failure and/or refusal, KCorp made payment to LCC in the amount of \$17,050. See Affidavit of Mark W. Freel, Esq. (Dkt. #14) ("Freel Aff.") ¶ 4; Supplemental Affidavit of Mark W. Freel, Esq. (Dkt. #16) ("Freel Supp. Aff.") ¶ 7. In addition, KCorp has incurred certain legal expenses and costs in connection with the defense of this action. Freel Aff. ¶ 5. Specifically, KCorp has paid reasonable attorneys' fees and costs totaling \$6,750. See id.; see also Freel Supp. Aff. ¶¶ 2-6.

III. Travel

Plaintiff commenced the instant action on January 4, 2012. See Dkt. FDB was served with a summons and a copy of the Complaint on January 5, 2012. See Dkt. #3. KCorp was similarly served on January 6th, see Dkt. #4, as was Hartford on January 9th, see Dkt. #5.

KCorp filed its Answer and Cross-Claim against FDB on February 9, 2012, see Dkt., and FDB was served on February 15, 2012, see Dkt. #10. FDB did not answer or otherwise respond to the Cross-Claim. See Dkt. On March 12, 2012, KCorp requested that default be entered against FDB based on its failure to respond to the Cross-Claim. See Request to Enter Default (Dkt. #11). Default was entered the same day. See Dkt. #12.

The instant Motion was filed on April 11, 2012. See Dkt. It was supported by the Freel Aff. On May 7, 2012, the Court issued an order requiring KCorp to submit a supplemental affidavit from

Attorney Freel which would include an itemization of the \$6,750 sought for attorneys' fees and costs in connection with the Motion. See Order for Submission of Supplemental Affidavit (Dkt. #15) ("Order of 5/7/12"). The Order of 5/7/12 also sought clarification of one sentence in the Freel Aff. See Order of 5/7/12 at 2. The Freel Supp. Aff., which responded to the Order of 5/7/12, was filed on May 9, 2012. See Dkt.

IV. Law

Rule 55 authorizes the entry of default and default judgment against a party who has "failed to plead or otherwise defend" Fed. R. Civ. P. 55(a).⁴ The rule contemplates a two-step process:

⁴ Fed. R. Civ. P. 55 provides in relevant part:

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) Entering a Default Judgment.

(1) By the Clerk. If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk on the plaintiff's request, with an affidavit showing the amount due must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) By the Court. In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make

first, entry of default, and second, entry of default judgment. See Fed. R. Civ. P. 55(a), (b); see also Halvajian v. Hillman, No. Civ.A. 03-5880(HAA), 2006 WL 827853, at *3 (D.N.J. Mar. 30, 2006) (“By its express terms, the Rule contemplates entry of a default when a defendant ‘has failed to plead or otherwise defend.’ Fed. R. Civ. P. 55(a). After a default has been entered, the clerk of the court may enter default judgment if the plaintiff’s claim is for a sum certain; otherwise, the court may enter default judgment upon application of the non-defaulting party. Fed. R. Civ. P. 55(b).”).

V. Jurisdiction

As an initial matter, when judgment is sought against a party who has failed to plead or otherwise defend, a district court has an affirmative duty to assure itself that it has jurisdiction over both the subject matter and the parties. See Sys. Pipe & Supply, Inc. v. M/V Viktor Kurnatovskiy, 242 F.3d 322, 324 (5th Cir. 2001); In re Tuli, 172 F.3d 707, 712 (9th Cir. 1999); Dennis Garberg &

referrals preserving any federal statutory right to a jury trial when, to enter or effectuate judgment, it needs to:

- (A) conduct an accounting;
- (B) determine the amount of damages;
- (C) establish the truth of any allegation by evidence; or
- (D) investigate any other matter.

.....

Fed. R. Civ. P. 55.

Assocs., Inc. v. Pack-Tech Int'l Corp., 115 F.3d 767, 772 (10th Cir. 1997); see also Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 50 (1st Cir. 2002) ("To hear a case, a court must have personal jurisdiction over the parties, 'that is, the power to require the parties to obey its decision.'") (quoting United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 35 (1st Cir. 1999)); Letelier v. Republic of Chile, 488 F.Supp. 665, 668 (D.D.C. 1980) (holding that issue of subject matter jurisdiction should be fully explored despite previous entry of default); cf. Hugel v. McNeill, 886 F.2d 1, 3 n.3 (1st Cir. 1989) ("[W]here the court rendering the default judgment is shown to lack personal jurisdiction over the defendant, ... the judgment may be vacated and set aside by the rendering court on motion, or by another court on collateral attack.") (quoting 6 Moore's Federal Practice ¶ 55.09 (second alteration in original). Accordingly, this Court examines the existence of both subject matter and personal jurisdiction in this action.

A. Subject Matter Jurisdiction

Although the Complaint recites that jurisdiction is conferred on this Court pursuant to the Miller Act, 40 U.S.C. § 3131 *et seq.*, and 28 U.S.C. § 1367, see Complaint ¶ 2, KCorp's Cross-Claim against FDB is for contractual indemnification (Count I) and equitable indemnification (Count II), see Cross-Claim ¶¶ 9-13. These indemnification claims may not meet the requirements for

federal jurisdiction on their own.

However, many cases that are properly within a federal court's jurisdiction include issues or claims against parties that would otherwise not meet the requirements for federal jurisdiction on their own. Erwin Chemerinsky, Federal Jurisdiction, § 5.4, p. 340 (2007 5th Ed). The Supplemental Jurisdiction statute adopted in 1990 provides a grant of subject matter jurisdiction for federal courts to be able to hear these types of claims:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Prestige Capital Corp. v. Pipeliners of Puerto Rico, Inc., Civ. No. 10-2155 (PG), 2012 WL 1034459, at *6-7 (D.P.R. Mar. 29, 2012) (quoting 28 U.S.C. § 1367(a)); see also Godin v. Schencks, 629 F.3d 79, 83 (1st Cir. 2010) (quoting statute).

The issue, then, is whether KCorp's Cross-Claim, which seeks contractual and equitable indemnification from FDB is "so related" 28 U.S.C. § 1367(a), to Plaintiff's original claims⁵ against Defendants "that both form part of the same case or controversy for

⁵ As previously stated, Plaintiff's original claims are for breach of contract (Count I against FDB), for quantum meruit (Count II against FDB and KCorp), and a payment bond claim (Count III against Hartford). Complaint ¶¶ 16-22.

Article III purposes.” Prestige Capital Corp., 2012 WL 1034459, at *7 (framing issue in this manner).

The Court concludes that KCorp’s claims arising from the alleged breach of the Subcontract are sufficiently related to Plaintiff’s own claims against all Defendants to allow the exercise of supplemental jurisdiction. All of the contracts at issue concern or are related to the same project. The event giving rise to both Plaintiff’s and KCorp’s causes of action is the same, i.e., the failure of FDB to pay LCC for the work LCC performed on the Project. Thus, the Complaint and the Cross-Claim share many of the same allegations. Accordingly, I find that the Court may properly exercise supplemental jurisdiction over the claims pled in the Cross-Claim. See Prestige Capital Corp., 2012 WL 1034459, at *7 (finding crossclaim “sufficiently related” where complaint and crossclaim shared many of the same allegations); United States v. Suffolk Constr. Co., No. 95 CIV. 9363 (SS), 1996 WL 391875, at *4 (S.D.N.Y. July 12, 1996) (concluding that cross-claims against defendants fell “within the same case or controversy” where the federal and state claims derived from “a common nucleus of operative fact,” namely the construction of a building on the West Point campus and the alleged failure of defendant’s subcontractors to pay wages and benefits to plaintiffs).

B. Personal Jurisdiction

The Complaint alleges that FDB is a Rhode Island corporation

with a principal place of business at 37 Thurber Boulevard, Smithfield, Rhode Island.⁶ Complaint ¶ 5. FDB has failed to answer the Complaint, and Rule 8(b) of the Fed. R. Civ. P. states that the effect of a failure to deny facts alleged in the complaint is to admit them. See Citizens Concerned for Separation of Church and State v. City & County of Denver, 628 F.2d 1289, 1293 (10th Cir. 1980) (citing earlier version of Rule 8 and stating “that the effect of a failure to deny facts alleged in the complaint is to admit them ... such is the case with jurisdictional facts as well”). Default against FDB with respect to the Complaint could be entered at any time, and this would provide an additional basis for finding that the allegations of the Complaint are true. See Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 13 (1st Cir. 1985) (“default having been entered, each of [plaintiff]’s allegations of fact must be taken as true”); cf. Ortiz-Gonzalez v. Fonovisa, 277 F.3d 59, 62-63 (1st Cir. 2002) (“A defaulting party is taken to have conceded the truth of the factual allegations in the complaint as establishing the grounds for liability as to which damages will be calculated.”). Accordingly, I find that FDB is a Rhode Island corporation and that the Court has personal jurisdiction over it.

⁶ KCorp and Hartford have admitted this fact “upon information and belief.” Answer and Cross Claim ¶¶ 4 5 (Answer portion).

C. Service of Process

"It is axiomatic that service of process must be effective under the Federal Rules of Civil Procedure before a default or a default judgment may be entered against a defendant." Maryland State Firemen's Ass'n v. Chaves, 166 F.R.D. 353, 354 (D. Md. 1996); see also Griffin v. Foti, No. Civ.A. 03-1274, 2003 WL 22836493, at *1 (E.D. La. Nov. 24, 2003) (holding that entry of default judgment against defendant who has never been served is not appropriate); Perafan-Homen v. Hasty, No. 00 Civ. 3883(RWS), 2000 WL 1425048, at *1-2 (S.D.N.Y. Sept. 26, 2000) (denying motion for default judgment because only proper defendant was never served); cf. Fed. R. Civ. P. 12(a)(1)(A) (requiring defendant to serve answer "within 20 days after being served with the summons and complaint ...") (italics added); Fed. R. Civ. P. 55(a) (providing for entry of default where party "fail[s] to plead or otherwise defend as provided by these rules ..."). "Before a default can be entered, the court must have jurisdiction over the party against whom the judgment is sought, which also means that the party must have been effectively served with process." 10A Charles Alan Wright et al., Federal Practice & Procedure § 2682 (3d ed. 1998) (footnote omitted).

The Cross-Claim and accompanying summons were served upon the registered agent for FDB on or about February 15, 2012. See Motion at 1; see also Summons in a Civil Case (Dkt. #10). Accordingly, I find that on February 15, 2012, service was made upon FDB and that

this service complied with Fed. R. Civ. P. 4(h)(1)(B). Therefore, the Court has personal jurisdiction over FDB in that it has been served with process in accordance with Fed. R. Civ. P. 4(h)(1)(B).

VI. Judgment

For purposes of the instant Motion, FDB's default has established the truth of the allegations made by KCorp in its Cross-Claim. See Key Bank Nat'l Ass'n v. Van Noy, Civil No. 07-1076-HU, 2008 WL 4646045, at *12 (D. Or. Oct. 17, 2008) (accepting as true the well-pleaded facts alleged by defendant in its cross-claims against co-defendants as a result of the default orders entered against them); see also Ortiz-Gonzalez v. Fonovisa, 277 F.3d 59, 62-63 (1st Cir. 2002) ("A defaulting party is taken to have conceded the truth of the factual allegations in the complaint as establishing the grounds for liability as to which damages will be calculated."); Brockton Sav. Bank, 771 F.2d at 13 ("default having been entered, each of [movant]'s allegations of fact must be taken as true"); Reading Co. v. City of Philadelphia, No. CIV. A. 91-2377, 1996 WL 251511, at *1 (E.D. Pa. May 9, 1996) (noting that a crossclaim is "the functional equivalent of a complaint").

Accordingly, I recommend that default judgment be entered against FDB in the total amount of \$23,800. This sum represents the amount due KCorp for its contractual and/or equitable indemnification claims (\$17,050), see Freel Aff. ¶ 4; Freel Supp. Aff. ¶ 7, plus reasonable attorneys' fees and costs (\$6,750), see

Freel Aff. ¶ 5; Freel Supp. Aff. ¶¶ 2-6.

VII. Conclusion

For the reasons stated above, I recommend that the Motion for Default Judgment be granted and that default judgment be entered against FDB in the total amount of \$23,800, reflecting \$17,050 for contractual and equitable indemnification and \$6,750 in reasonable attorneys' fees and costs. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within fourteen (14) days of its receipt. See Fed. R. Civ. P. 72(b); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
May 22, 2012