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Order

(Title of Document)

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CODE: 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

TRUSTEES OF THE NORTHERN NEVADA
LABORERS HEALTH & WELFARE TRUST
FUND et al.,

Plaintiff,

Case No. CV09-02715

vs.

Dept. No. 1

TRAVELERS CASUALTY AND SURETY CO.
OF AMERICA, a Connecticut corporation;
FINANCIAL PACIFIC INSURANCE COMPANY,
a California corporation; JOHN W. ZERWECK;
JAIME ZERWECK; STEVEN CRUZ; VASSILIKI
CRUZ; SCOTT FREIDUS; NAOMI FREIDUS; and
DOES 1-100,

Defendants.

ORDER

Plaintiffs Trustees of the Northern Nevada Laborers Health & Welfare Trust Fund et al. (collectively, "Trust Funds"), by and through counsel, Nathan Jenkins, Esq., and Jerry Carter, Esq., filed a *Motion for Summary Judgment* on December 8, 2010. Plaintiffs filed a *Reply* on December 23, 2010 and submitted the matter to the Court. No opposition was filed.

Summary judgment is appropriate when the record demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). The pleadings and the record are construed in the light most favorable to the nonmoving party. *Id.* However, the nonmoving party

1 must do more than simply show that there is some metaphysical doubt as to the operative facts. *Id.*
2 at 732. To avoid having summary judgment entered against him, the nonmoving party must, by
3 affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial.
4 *Id.* A genuine issue exists where the evidence is such that a rational trier of fact could return a
5 verdict for the nonmoving party. *Id.* at 731. The nonmoving party's documentation must be
6 admissible evidence and cannot build a case on the gossamer threads of whimsy, speculation and
7 conjecture. *Collins v. Union Federal Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610,
8 621 (1983).

9 "[I]f the nonmoving party will bear the burden of persuasion at trial, the party moving
10 for summary judgment may satisfy the burden of production by either (1) submitting
11 evidence that negates an essential element of the nonmoving party's claim, or (2)
12 "pointing out . . . that there is an absence of evidence to support the nonmoving
13 party's case." In such instances, in order to defeat summary judgment, the
14 nonmoving party must transcend the pleadings and, by affidavit or other admissible
15 evidence, introduce specific facts that show a genuine issue of material fact.

14 *Cuzze v. University and Community College System of Nevada*, 123 Nev. 598, 602-03, 172
15 P.3d 131, 134 (2007) (citations omitted).

16 "[J]udges need not paw over the files without assistance from the parties." *Huey v. United*
17 *Parcel Service, Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999). "Rule 56(e) therefore requires the
18 nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions,
19 answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a
20 genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986)
21 (emphasis added).

22 Washoe County District Court Rule 13(3) provides in relevant part: "Within 10 days after the
23 service of the motion, the opposing party shall serve and file his written opposition thereto, together
24 with a memorandum of points and authorities and supporting affidavits, if any, stating facts showing
25 why the motion should be denied. Failure of the opposing party to serve and file his written
26 opposition may be construed as an admission that the motion is meritorious and a consent to granting
27 the same."
28

1 This case arises from a collective bargaining agreement Cruz Excavating, Inc. agreed to be
2 bound by when it hired laborers represented by unions that maintain the Plaintiff Trust Funds. The
3 collective bargaining agreement required Cruz Excavating to make regular contributions and fringe
4 benefit payments to the Trust Funds. Plaintiffs originally sued Cruz Excavating, Zephyr Companies,
5 Inc., and Scott Freidus in the District Court for the District of Nevada. The federal court entered
6 default against these Defendants on August 19, 2009 and subsequently entered final judgment in
7 favor of Plaintiffs in an order dated April 5, 2010. The federal court's judgment awarded Plaintiffs
8 \$482,488.09 but gave Defendants credit for \$81,882.11 Plaintiffs received in March 2010 from a
9 former Defendant, Financial Pacific Insurance Company. The total amount of the judgment granted
10 to Plaintiffs was \$400,605.98.

11 In the present case, Plaintiffs claim Defendants John W. and Jamie Zerweck, Steven and
12 Vassiliki Cruz, and Scott and Naomi Freidus (collectively "individual Defendants") are personally
13 liable to Plaintiffs pursuant to personal indemnification agreements those individual Defendants
14 signed to guarantee Cruz Excavating's promised contributions to the Trust Funds. In support of their
15 *Motion for Summary Judgment*, Plaintiffs submitted a copy of the default judgment entered in
16 federal court and copies of the personal indemnification agreements signed by individual Defendants
17 named above. These agreements appear to be executed on forms approved or created by the Nevada
18 State Contractors Board. The personal indemnification agreements state that individual Defendants
19 "do hereby indemnify the creditors of Cruz Excavating, Inc. . . . as guarantors and as sureties,
20 against any loss or damage the said creditors may suffer as a result of licensees failure to promptly
21 pay obligations incurred by it in the ordinary course of construction business within the State of
22 Nevada."

23 In addition to the \$400,605.98 default judgment award from federal court, Plaintiffs allege
24 Cruz Excavating, and the individual Defendants in the present case who signed personal
25 indemnification agreements, separately owes Plaintiff Northern Nevada Operating Engineers Trust
26 Funds a balance of \$416,572.43 for delinquent fringe benefit contributions, liquidated damages,
27 interest, accounting fees, and attorney's fees and costs. This amount is comprised of actual damages
28 of \$471,805.19 and includes a credit for settlement funds received from a former Defendant in the

1 amount of \$55,232.76, for a total of \$416,572.43. Plaintiffs included the *Affidavit of Wayne*
2 *McBride*, the Collection Manager for the Trust Funds, the *Affidavit of Kristen Burgess, CPA*, an
3 independent accountant's report on Cruz and Zephyr's contributions to the trust funds performed by
4 Kafoury, Armstrong & Co., Certified Public Accountants, and the *Affidavit of Jerry C. Carter, Esq.*
5 These documents, as well as the copies of the personal indemnification agreements signed by the
6 individual Defendants, support Plaintiffs' claims for contributions and damages from the individual
7 Defendants in this action.

8 Finally, Plaintiffs seek to enforce a contractor license bond issued by Defendant Travelers
9 Casualty and Surety Company of America ("Travelers"). In support, Plaintiffs included a surety
10 bond form executed by Travelers for \$30,000 on behalf of Cruz Excavating.

11 The Court has considered the pleadings of the parties and the record in its entirety. The
12 Court finds Plaintiffs' *Motion for Summary Judgment* is supported by the evidence. Additionally,
13 the Court construes Defendants' failure to oppose the Motion as consent that the Motion has merit.
14 Accordingly, and good cause appearing, Plaintiffs' *Motion for Summary Judgment* is GRANTED.

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16 DATED: This 30th day of December, 2010.

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20 DISTRICT JUDGE
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 3rd day of January, 2010, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Nathan M. Jenkins, Esq.
Jerry C. Carter, Esq.
Attorneys for Plaintiffs

CERTIFICATE OF MAILING

Pursuant to NRCPC 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 3rd day of January, 2010, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Jason D. Guinasso, Esq.
10425 Double R Boulevard
Reno, NV 89521
Attorney for Defendants

K. Matrasov for
Christy Kuhl



COPY

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: 3/2/11

HOWARD W. CONYERS, Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada.

By: [Signature] Deputy