IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SURETY ADMINISTRATORS, INC., et al.,	:	CIVIL ACTION
	:	
Plaintiffs,	:	NO. 04-5177
	:	
v.	:	
	:	
MOHAMMED H. SAMARA, et al.,	:	
	:	
Defendants.	:	

Stengel, J. April 6, 2006

MEMORANDUM AND ORDER

This case involves claims that a subagent bondsman failed to remit certain premiums and other payments to his principal. Defendants Mohammed H. Samara and Mohammed Samara Bail Bonds, Inc. ("Defendants") have moved for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Defendants have also moved to amend their counterclaim. To succeed on the motion for summary judgment, Defendants must demonstrate that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). I find that Defendants have failed to meet this burden, and I will deny the motion for summary judgment for the reasons that follow. I will, however, grant Defendants' motion to amend the counterclaim because there is no evidence that allowing the amendment would be futile or cause undue prejudice.

I. BACKGROUND

Defendant Mohammed H. Samara[1] is a licensed bondsman in New Jersey. On September 9, 1998, Samara entered into a Bail Bond Subagency Agreement with plaintiff CBC, a Pennsylvania corporation, via CBC's chief executive officer Vincent Smith (the "Subagency Agreement"). The Subagency Agreement appointed Samara as a nonexclusive subagent of CBC and granted Samara the authority to solicit and write bail bonds on behalf of CBC in civil and criminal actions. On January 1, 2003, Harco National Insurance Company, an Illinois casualty insurance corporation whose business includes issuing bail bonds, entered into a Program Administrator Agreement with CBC (the "PAA"). The PAA appointed CBC as Harco's general agent for issuing bail bonds in New Jersey. As a result of the Subagency Agreement and the PAA, Samara had authority to solicit and write Harco bonds as a subagent of CBC. Both CBC and Samara, however, continued to issue bonds on behalf of insurers other than Harco.

By signing the Subagency Agreement, Samara agreed to solicit business and to collect and transfer bail bond premiums on behalf of CBC. Samara also agreed to assure that bonded persons would appear in court when required. Paragraph 5 of the Subagency Agreement specifically requires Samara to maintain and transmit to CBC certain records and reports on all bond business written by or through Samara. The parties agreed at oral

[1]Mohammed H. Samara apparently solicits and writes bail bonds as Mohammed Samara Bail Bonds, Inc. The term "Samara" will therefore refer to both Mohammed H. Samara individually and to Mohammed Samara Bail Bonds, Inc. throughout this memorandum.

argument that Samara was to produce two types of records pursuant to paragraph 5. First, Samara agreed to submit a weekly report providing basic information on the issued bonds (the "Weekly Production Sheets"). Second, Samara agreed to submit a monthly file for all bonds issued including, *inter alia*, the following information: (1) a picture of the defendant; (2) identification information; and (3) each bond's power of attorney serial number (collectively a "Bond Case File").[2]

Paragraph 7 of the Subagency Agreement requires Samara to remit certain fees to CBC. In particular, Samara agreed to pay CBC: (1) three percent of the face amount of the penal liability of the bonds written; and (2) 50 percent of the net revenues from bond premiums after payment (collectively "Bond Premium Fees"). Fay Kirsch, CBC's comptroller, and Sandy Shull, CBC's coordinator of recovery and agency services, handled the majority of the accounting details for the payments between CBC and Samara. There is evidence in the record that Samara wrote bonds to fictional persons ("John Doe Bonds") on several occasions in order to generate cash premiums for CBC.

CBC also supplied Samara with a number of form documents referred to by the Subagency Agreement as Powers of Attorney ("POA"). These POAs evidenced Samara's authority to execute bonds on behalf of Harco. Blanks on the POAs were provided for the insertion of the name of the executing party. Moreover, the POAs were not effective unless they were attached to bonds with sums equal to or less than the face amount of the

[2]The parties noted at oral argument that Samara did not always submit the Weekly Production Sheets and Bond Case Files to CBC on a strict weekly/monthly basis.

POA. The Subagency Agreement provides that Samara must immediately report any unaccounted-for, lost, or mislaid POAs ("unaccounted-for POAs") to CBC and Harco. The Subagency Agreement further provides that Samara shall pay the full premium and reserve due on any unaccounted-for POAs, less the applicable commission, which would have been due if the POA had been issued for its maximum amount ("POA Fees").

On September 8, 2004, Harco advised Samara that Surety Administrators, Inc. ("SAI"), a Pennsylvania corporation, had obtained the rights to Samara's obligations to CBC. SAI holds the rights to collect various debts owed to CBC by its sub-agents,[3] and demanded that Samara remit all current and future payments owed by Samara to CBC. As part of its collection efforts, SAI engaged Compliance Field Services, LLC ("Compliance") to collect the "runoff" liabilities assigned to SAI.[4]

Angelo DeLorenzo, a former CBC vice president and the current principal of Compliance, prepared a financial document for this litigation listing the Bond Premium Fees allegedly owed by Samara to CBC (the "DeLorenzo Document"). There are several versions of the DeLorenzo Document in the record before the Court. Each version appears to have been compiled on a different date, and each version contains a different

[3]CBC had originally assigned these rights to Harco. Harco thereafter entered into an agreement with SAI to collect the debts owed to CBC on Harco's behalf.

[4]The phrase "runoff liabilities" includes activities such as discharging bonds, collecting monies owed by indemnitors, and handling the accounts receivable collections of CBC.

amount due. Plaintiffs allege that Samara failed to remit payment for Bond Premium Fees due as well for POA Fees due. Plaintiffs also allege that they reduced the amount Samara owes to CBC after reviewing documents produced during discovery.

Plaintiffs originally commenced this action on November 5, 2004 and filed a First Amended Complaint on June 23, 2005.[5] The First Amended Complaint alleges three counts of breach of contract, breach of fiduciary duty, conversion of trust funds, unjust enrichment, and equitable relief. Plaintiffs' First Amended Complaint seeks $909,548.72 in unpaid bond premiums as well as $1,410,200.00 in unaccounted-for POAs.[6] Defendants filed the instant motion for summary judgment on November 30, 2006, and the Court heard oral arguments on March 24, 2006.

II. LEGAL STANDARDS

A. Standard for Summary Judgment

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party initially bears the burden of showing the absence of a

[5]I note that Plaintiffs have demanded a jury trial in this case despite language in paragraph 26 of the Subagency Agreement providing that "[a]ny suit, action, or proceeding . . . brought . . . by any party hereto . . . arising out of or relating to this Agreement . . . *shall be tried only by a court and not by a jury*." Subagency Agreement ¶ 26 (emphasis added).

[6]The First Amended Complaint states that Defendants owe Bond Premium Fees of $909,548.72. DeLorenzo testified that an analysis of documents produced during discovery prompted Plaintiffs to credit Defendants' account by $83,573.00, leaving a balance of $826,975.00. DeLorenzo Aff. ¶ 23. Plaintiffs' brief, however, does not cite to an updated auditing statement reflecting this credit. Nor does this credit appear to be reflected in any versions of the DeLorenzo Document currently before the Court. Accordingly, I will use the figure listed in the First Amended Complaint throughout this memorandum.

genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is "material" only when it could affect the result of the lawsuit under the applicable law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non[-]moving party." Id. The moving party must establish that there is no triable issue of fact as to all of the elements of any issue on which the moving party bears the burden of proof at trial. See In re Bessman, 327 F.3d 229, 237-38 (3d Cir. 2003) (citations omitted). The moving party, however, need not offer evidence to negate matters on which the non-moving party bears the burden of proof at trial if the evidence offered in support of the moving party's motion establishes each essential element of that party's claim or defense. Celotex, 477 U.S. at 323.

Once the moving party has carried its burden, the non-moving party must come forward with specific facts demonstrating that there is a genuine issue for trial. Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989). A motion for summary judgment looks beyond the pleadings, and factual specificity is required of the party opposing the motion. Celotex, 477 U.S. at 322-23. In other words, the non-moving party may not merely restate allegations made in its pleadings or rely upon "self-serving conclusions, unsupported by specific facts in the record." Celotex, 477 U.S. at 322-23. Rather, the non-moving party must support each essential element of its claim with specific evidence from the record. See id. This specificity requirement upholds the underlying purpose of

summary judgment, which is "to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense." Fries v. Metro. Mgmt. Corp., 293 F. Supp. 2d 498, 500 (E.D. Pa. 2004) (citing Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1975), cert. denied, 429 U.S. 1038 (1977)).

When analyzing a motion for summary judgment, a district court "must view the facts in the light most favorable to the non-moving party" and make every reasonable inference in favor of that party. Hugh v. Butler County Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005) (citations omitted). Summary judgment is therefore appropriate when the court determines that there is no genuine issue of material fact after viewing all reasonable inferences in favor of the non-moving party. See Celotex, 477 U.S. at 322.

B. Standard for Counterclaim Amendment

Rule 13(f) of the Federal Rules of Civil Procedure governs the addition or amendment of counterclaims. Rule 13(f) provides that "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment." FED. R. CIV. P. 13(f). Courts in this district have held that the standard for amending a counterclaim pursuant to Rule 13(f) is essentially the same as the standard of Rule 15(a), which governs whether a party can amend its pleadings. Fort Wash. Res. v. Tannen, 153 F.R.D. 565, 566 (E.D. Pa. 1994); Fidelity Fed. Sav. & Loan Ass'n v. Felicetti, 149 F.R.D. 83, 85 (E.D. Pa. 1993). The Third Circuit has noted that courts interpret Rule 15(a)

liberally. See Heyl & Patterson Int'l, Inc. v. F.D. Rich Hous. of the V.I., 663 F.2d 419, 425 (3d Cir. 1981). Thus, only where there is "[u]ndue delay, bad faith, or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment" should leave to amend be denied. Foman v. Davis, 371 U.S. 178, 182 (1962); In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997).

III. DISCUSSION

The Court has diversity jurisdiction over this case, and the Supreme Court has stated that "federal courts sitting in diversity apply state substantive law and federal procedural law." Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996); Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 613 (3d Cir. 1992). Paragraph 24 of the Subagency Agreement provides that Pennsylvania law will govern its construction and enforcement. Therefore, while the Court will follow the standards for summary judgment and counterclaim amendment provided in the Federal Rules of Civil Procedure and federal case law, Pennsylvania substantive law controls the breach of contract analysis.

A. The Motion for Summary Judgment

A breach of contract claim in Pennsylvania must be established by demonstrating the following three elements: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." Corestates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999).

Defendants do not dispute the first element of Plaintiffs' breach of contract claim. The undisputed record in this case demonstrates that the Subagency Agreement requires Samara to remit Bond Premium Fees and POA Fees to Plaintiffs.[7] Instead, Defendants level the main thrust of their argument at the sufficiency of the damages evidence and argue that they should be indemnified with regard to certain bond forfeitures.

1. There is a sufficient quantity of information in the record to fairly estimate Plaintiffs' damages.

The Subagency Agreement provides that Samara is responsible for paying Bond Premium Fees to Plaintiffs on a weekly basis. Subagency Agreement ¶ 7. Defendants contend that Plaintiffs' Bond Premium Fees damages evidence is "untrustworthy" and must be excluded pursuant to Rule 806(3) of the Federal Rules of Evidence ("FRE")[8] because (1) CBC's evidence does not accurately reflect several cash payments made by Samara; (2) Defendants' damages expert opined that CBC's accounting records suffer from several "severe internal control flaws"; and (3) the invoices generated by Sandy Shull and used to create the DeLorenzo Document were not based on Shull's personal knowledge of Samara's actual payments.

[7]Defendants also contend that they have fulfilled all of their obligations under the Subagency Agreement.

[8]FRE 803(6) is the "business records" exception to the hearsay rule.

Pennsylvania law provides that the damages element in a breach of contract claim is generally determined by the trier of fact and that the plaintiff bears the burden of proof. Omicron Sys., Inc. v. Weiner, 860 A.2d 554, 564 (Pa. Super. Ct. 2004). A plaintiff need only demonstrate "a reasonable quantity of information from which the fact-finder may fairly estimate the amount of damages." Delahanty v. First Pa. Bank, N.A., 464 A.2d 1243, 1257 (Pa. Super. Ct. 1983) (citations omitted). While the fact-finder may not render a verdict based on pure conjecture or guesswork, it may estimate damages by using some measure of speculation. Weiner, 860 A.2d at 565. In other words, the fact-finder may make a reasonable damages estimate based on relevant data by acting on "probable, inferential, as well as upon direct and positive proof." Judge Tech. Servs., Inc. v. Clancy, 813 A.2d 879, 885 (Pa. Super. Ct. 2002).

In this case, the First Amended Complaint alleges that Defendants owe Plaintiffs $909,548.72 in Bond Premium Fees. Plaintiffs have presented evidence of these damages in the form of several financial documents as well as by testimony relating to the analyses behind the documents. The DeLorenzo Document purports to demonstrate Defendants' unpaid Bond Premium Fees as of September 3, 2004. In creating the DeLorenzo Document, DeLorenzo and the CBC accounting department (1) performed an audit of all invoices issued from CBC to Samara; (2) investigated and verified the invoices entered in CBC's General Ledger; (3) tracked John Doe Bond payments; and (4) reviewed Samara's objections to specific charges. DeLorenzo Aff. ¶¶ 15-23.

In addition, Plaintiffs' expert Eric Setzer submitted a report analyzing Defendants' expert report as well as Plaintiffs' calculation of damages. Expert Report of Eric E. Setzer at 1. Setzer's report concludes that "the procedures performed by [Defendants' expert] Mr. Bonavito [were] insufficient to gain a true understanding of the financial relationship between CBC and Samara, and I therefore question the validity of his report." Id. at 8. Setzer also opined that Plaintiffs' damages calculations relating to the Bond Premium Fees were "supported by detailed and credible documentation." Id. at 8.

Finally, there is significant testimony describing Plaintiffs' generation of the damages figures contained in the DeLorenzo Document. See DeLorenzo Dep. at 74-84 (noting that DeLorenzo and his staff reviewed all relevant documents in creating the DeLorenzo Document); DeLorenzo Dep. at 85-91 (describing the process used to reconcile the John Doe Bond premiums owed); Schull Dep. at 20, 29-30 (demonstrating that Plaintiffs used Samara's records and payments to verify the CBC accounting records); Kirsch Dep. at 31 (stating that Plaintiffs kept a "running account" as a check and balance on CBC's records of Samara's payments).

I find that the evidence produced by Plaintiffs demonstrates a genuine issue of material fact as to whether Plaintiffs' Bond Premium Fees damages evidence meets the Pennsylvania standard. The reliability of damages is generally an issue of fact. See Weiner, 860 A.2d at 564. This issue is material here because, as discussed above, Plaintiffs must adequately prove damages to succeed on their breach of contract claim at

trial. Cutillo, 723 A.2d at 1058. Based on the relatively low damages standard, as well as the financial documents and testimony produced by Plaintiffs, a reasonable jury could conclude that there is a sufficient quantity of information from which to "fairly estimate the amount of damages."

The statutes and cases cited by Defendants in support of their motion are inapplicable on these facts. First, FRE 803(6) is not a standard for the admissibility of evidence, but is instead an exception to the hearsay rule. See FED. R. EVID. 803 ("The following [paragraphs] are not excluded by the hearsay rule . . . ."). The requirement of trustworthiness contained within FRE 803(6) is not a requirement designed to keep untrustworthy evidence out of the record. Rather, it is a requirement for admiting evidence notwithstanding the hearsay rule and is therefore inapplicable as Defendants seek to use it here. The cases cited by Defendants that interpret and apply FRE 803(6) to documents prepared in anticipation of litigation are equally inapplicable here. Second, the state and federal cases cited by Defendants neither consider nor apply the Pennsylvania damages standard and are inapplicable to this case. Accordingly, I find that summary judgment is not appropriate on the issue of Bond Premium Fees damages.[9]

[9]While their arguments are not appropriate at summary judgment, Defendants are free to present evidence at trial attacking the credibility of Plaintiffs' damages evidence.

2. Genuine issues of material fact exist as to whether Defendants owe POA Fees.

The Subagency Agreement provides that "[s]hould any power of attorney be unaccounted-for, lost or mislaid," then Samara must pay Plaintiffs the full premium and reserve, less any applicable commission, which would be due if that POA had been issued for its maximum amount. Subagency Agreement ¶ 6(c). Defendants argue that Plaintiffs have not demonstrated any proof of damages relating to the unaccounted-for POAs. In support of this argument, Defendants rely on statements made by their expert Soren Laursen, as well as statements made by Vincent Smith, suggesting that all of the unaccounted-for POAs have expired. Thus, Defendants argue, Plaintiffs cannot demonstrate any evidence of damages because the issued POA's were unusable.[10]

As described above, a plaintiff need only demonstrate "a reasonable quantity of information from which the fact-finder may fairly estimate the amount of damages" to meet the damages standard in Pennsylvania. Delahanty, 464 A.2d at 1257. Here, Plaintiffs claim that Defendants owe $1,410,200.62 in POA Fees, and have produced a financial document entitled the "Mohammed Samara Open Inventory" as evidence. This document purports to list all of the unaccounted-for POAs issued to Samara as well as the POA Fees owed to CBC. See Mohammed Samara Open Inventory. DeLorenzo

[10]Defendants also contend that Plaintiffs have accounted for all issued POAs by accepting affidavits in lieu of damages. The only evidence Defendants have presented demonstrating that Plaintiffs accepted such affidavits is the deposition testimony of Angelo DeLorenzo, which merely acknowledges the industry practice of receiving affidavits. I find that Defendants have not carried their burden under Federal Rule of Civil Procedure 56(c) with regard to this argument, and I will therefore disregard it.

testified in his affidavit that he and his staff created the Mohammed Samara Open Inventory by searching CBC's master subagency file, and then listing the "open powers of attorney that had not been returned to CBC and still showed open on the inventory list." DeLorenzo Aff. ¶ 20. Moreover, Plaintiffs have produced a sample POA form which states that it "is null and void unless used before 12/31/2006." See Sample Power of Attorney, Harco National Insurance Company. The sample POA tends to refute Defendants' argument that Plaintiffs have suffered no damages because all of the unaccounted-for POAs had expired.

In light of the evidence described above, a reasonable jury could fairly estimate Plaintiffs' damages from the unaccounted-for POAs. At the very least, Plaintiffs' evidence demonstrates a genuine issue of material fact as to whether some POA Fees are outstanding. The calculation of damages in Pennsylvania need not be a precise calculation, and I will deny Defendants' motion for summary judgment with respect to the issue of POA Fees damages.

3. There is a triable issue of fact as to whether Plaintiffs seek to recover the assets of liquidated insurers.

Defendants contend that Plaintiffs are prohibited from recovering any premiums or forfeitures on bonds issued by liquidated insurers. Title to an insolvent insurer's property and other assets ordinarily vests in a receiver or liquidator. See, e.g., 40 PA. CONS. STAT. § 221.20(c) ("The liquidator [of a domestic insurer] shall be vested by

operation of law with the title to all of the [insurer's] property"). In this case, Samara issued bail bonds for a number of insurance companies other than Harco, several of whom were liquidated by court order during the term of the Subagency Agreement (the "liquidated insurers"). Consequently, Defendants argue, Plaintiffs cannot recover premiums or forfeitures due on these bonds because they are the assets of the liquidated insurers and are vested in a liquidator.

Defendants' argument is correct insofar as Plaintiffs may not recover any premiums or forfeitures due on bonds issued by liquidated insurers. However, this argument does not entitle Defendants to summary judgment. Rather, it is an issue for trial that, if sufficiently demonstrated, would reduce Plaintiffs' recovery. At this juncture of the litigation, however, I find that a genuine issue of material fact exists as to whether the liquidation orders preclude Plaintiffs' recovery. Evidence in the record suggests that at least some of the damages sought by Plaintiffs are actually premiums and forfeitures owed by Samara to CBC pursuant to the Subagency Agreement, rather than the assets of the liquidated insurers. As an initial matter, the scope of the Subagency Agreement's language is broad and may create an obligation owed by Samara to CBC on more than just Harco-issued bonds. Paragraph 6 of the Subagency Agreement suggests that premiums collected by Samara on behalf of CBC were the assets of CBC. See Subagency Agreement ¶ 6(a) (providing that Samara shall collect the "premiums to be

charged and collected on behalf of [CBC]"); Subagency Agreement ¶ 6(d) ("All premiums collected by [Samara] shall be deemed trust funds . . . and shall be turned over immediately to [CBC]").

Moreover, DeLorenzo testified in his deposition that the premiums owed and calculated in the DeLorenzo Document are "owed to [CBC]." DeLorenzo Dep. at 191. The broad language of the Subagency Agreement and the testimony of DeLorenzo could lead a reasonable jury to conclude that some portion of the premiums Plaintiffs seek are the assets of CBC. Whether the premiums and forfeitures claimed by Plaintiffs are actually the assets of liquidated insurers is therefore an issue for trial. Accordingly, while I note that Defendants' argument is an appropriate one for limiting Plaintiffs' recovery at trial, I will deny the motion for summary judgment as to this argument.

4. A reasonable jury could find that Defendants are not entitled to indemnification because Samara failed to fulfill his obligations under the Subagency Agreement.

Paragraph 8 of the Subagency Agreement provides that CBC will indemnify Samara for any penal liability exposure, as well as for any legal expenses arising from bonds written by him, so long as he complies with all of his obligations to CBC. Subagency Agreement ¶ 8(a). Defendants argue that they are entitled to indemnification on a number of the damages items listed in the DeLorenzo Document pursuant to

paragraph 8.[11] In particular, Defendants contend that these items were included as damages in the DeLorenzo Document only because of Samara's alleged failure to provide Bond Case Files as required by the Subagency Agreement. Defendants state that there is no specific language in the Subagency Agreement requiring the submission of Bond Case Files. Plaintiffs counter that Samara's failure to submit Bond Case Files violated paragraph 5 of the Subagency Agreement and precludes Defendants' indemnification claim.

These arguments initially require the Court to interpret paragraph 5 of the Subagency Agreement to determine whether it requires Samara to submit Bond Case Files to CBC. When interpreting a contract, I must first determine as a matter of law whether the contractual language is ambiguous or clear. Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159, 164 (3d Cir. 2001). If the language is ambiguous, the interpretation of the contract is a question of fact for the jury. See Sanford Inv. Co., Inc. v. Ahlstrom Mach. Holdings, Inc., 198 F.3d 415, 421 (3d Cir. 1999). If the language is clear, then I may determine its meaning as a matter of law. See id. A contract is ambiguous "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (1999) (citations omitted).

[11]Defendants seek a total of $466,348.07 in indemnification for the following damages items listed in the DeLorenzo Document: (1) a "forfeiture judgment" in the amount of $313,467.00; (2) "risk" in the amount of $22,500.00; (3) attorneys' fees in the amount of $7,877.48; (4) "surrogate fees" in the amount of $23,814.21; (5) court costs of $94,991.41; (6) postage of $25.97; and (7) miscellaneous costs of $3,672.00.

Here, paragraph 5 of the Subagency Agreement, entitled "Reports," provides in pertinent part that:

> Each week, [Samara] shall transmit to [CBC] . . . reports on all bond business written by or through [Samara] showing . . . the principals' names and addresses, the same information regarding guarantors and sureties, the risks assumed, premiums collected, collateral received, perfected and returned, forfeitures incurred, claims paid, bonds discharged and any and all other information that [CBC] may from time to time request.

Subagency Agreement ¶ 5. The plain language of paragraph 5 explicitly requires Samara to provide certain information to CBC each week. This language is not capable of being understood to mean anything other than that Samara must submit weekly reports to Plaintiffs.[12] Accordingly, I hold that this provision is not ambiguous as a matter of law.

While the interpretation of paragraph 5 of the Subagency Agreement is not a question of fact for the jury, Defendants are not entitled to summary judgment on the indemnification issue. Paragraph 8 provides that Samara is entitled to indemnification only if he meets "each and every obligation owed to [CBC] hereunder and otherwise." Subagency Agreement ¶ 8. A party seeking indemnification bears the burden of proving

[12]I note that the parties agreed at oral argument that Samara actually produced two types of reports to CBC: the Weekly Production Reports and the Bond Case Files. I find that these two reports together would fulfill the obligations of paragraph 5 of the Subagency Agreement.

that it is entitled to indemnification at trial. See Valhal Corp. v. Sullivan Assocs., Inc., 44 F.3d 195, 202 (3d Cir. 1995) (citing Topp Copy Prods., Inc. v. Singletary, 626 A.2d 98, 99 (Pa. 1993). Accordingly, Defendants must demonstrate with affirmative evidence that Samara met each of his obligations under the Subagency Agreement. See In re Bessman, 327 F.3d at 238 ("When the moving party has the burden of proof at trial, that party must show affirmatively the absence of a genuine issue of material fact . . . on all the essential elements of its case on which it bears the burden of proof at trial") (emphasis added) (citations omitted).

Here, Defendants have failed to present any affirmative evidence demonstrating that they produced a Weekly Production Report and a Bond Case File for each of the bond premiums at issue. As a result, Defendants have failed to carry their burden for summary judgment, and I will therefore deny Defendants' motion for summary judgment with respect to the indemnification issue.[13]

[13]Plaintiffs also stated at oral argument that so-called "exception reports" demonstrate Samara's failure to submit Bond Case Files on a number of occasions. These exception reports were purportedly created by CBC after comparing a list of the outstanding bonds held by Samara with the Bond Case Files Samara submitted to CBC. Plaintiffs allege that CBC generated an exception report for each outstanding bond without a corresponding Bond Case File and dispatched a copy of each report to Samara. These exception reports, however, are not in the record before the Court and therefore cannot be used in support of denying Defendants' motion for summary judgment.

B. The Motion to Amend the Counterclaim

1. Plaintiffs have not demonstrated that the amended counterclaim would be futile or cause prejudice.

Defendants also seek to amend their counterclaim against Plaintiffs in light of the report by Defendants' accounting expert Robert Bonavito. Bonavito concludes in his report that "a minimum of $588,100 in prepaid and missing cash is owed from [Harco], [CBC] and [SAI] to Samara and Samara Bonds." Expert Report of Robert A. Bonavito at 1. Defendants seek to amend their counterclaim to include a claim for the $588,100.00 Plaintiffs allegedly owed to Samara.

Plaintiffs oppose Defendants' motion to amend by arguing that the amended counterclaim would be futile. An added claim is futile when it would be subject to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the Third Circuit has stated that in such cases the motion to amend should be denied. Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000). "In making this determination, a court is to apply the standards applicable to a motion under Rule 12(b)(6)." Air. Prods. and Chems., Inc. v. Eaton Metal Prods. Co., 256 F. Supp. 2d 329, 332 (E.D. Pa. 2003) (citing Massarsky v. Gen. Motors Corp., 706 F.2d 111, 125 (3d Cir. 1983)). Thus, a party opposing a claim amendment bears a heavy burden in proving futility. Air Prods., 256 F. Supp. 2d at 332-33 (citation omitted).

I find that Defendants could prove some set of facts entitling them to relief under their proposed counterclaim in this case. While Bonavito's expert report may be based on an incomplete inspection of the record as Plaintiffs argue, Defendants could still demonstrate that they are entitled to some recovery from Plaintiffs. Furthermore, determinations of expert credibility are typically issues for the jury to decide. See Barber v. CSX Distrib. Servs., 68 F.3d 694, 700 (3d Cir. 1995) (citations omitted). Finally, Plaintiffs will be free to cross-examine Defendants' expert at trial and to introduce their own evidence casting doubt on Bonavito's analysis. Accordingly, I find that Defendants' amended counterclaim is not futile, and I will grant the requested leave to amend.

Plaintiffs also allege that granting Defendants' motion to amend would cause undue delay and prejudice. The Third Circuit has held that delay alone is insufficient for denying a party leave to amend. Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3d Cir. 1984). "Unless the opposing party will be prejudiced, leave to amend should generally be allowed." Charpentier v. Godsil, 937 F.2d 859, 864 (3d Cir. 1991).

In the instant case, discovery closed on September 26, 2005 and expert reports were due by November 10, 2005. Defendants did not request leave to amend their counterclaim until they filed this motion for summary judgment on November 22, 2005. While Defendants have undoubtably delayed in seeking to amend their counterclaim, I find that Plaintiffs have not demonstrated that this delay will prejudice them in any appreciable way. First, Plaintiffs have not cited to any evidence of prejudice in their

opposition. Instead, they argue only that Defendants unduly delayed in requesting to amend their counterclaim, which is insufficient to deny leave to amend. Second, no additional discovery is necessary to defend this claim. Plaintiffs have already analyzed the financial evidence in the record and have argued that Bonavito's examination and analyses are incomplete. Allowing Defendants to amend their counterclaim will not appreciably increase Plaintiffs' costs of litigating this case. Finally, as noted above, Plaintiffs are free to cross-examine Bonavito at trial and to admit their own evidence refuting his analysis of the financial data in the record. As a result, Plaintiffs have not sufficiently demonstrated that they will be prejudiced by Defendants' proposed amendment. I will grant Defendants' motion for leave to amend.

IV. CONCLUSION

For the reasons described above, I will deny Defendants' motion for summary judgment, but I will grant Defendants' motion to amend their counterclaim. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SURETY ADMINISTRATORS, INC., et al.,	:	CIVIL ACTION
	:	
Plaintiffs,	:	NO. 04-5177
	:	
v.	:	
	:	
MOHAMMED H. SAMARA, et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 6th day of April, 2006, upon consideration of the Defendants' motion for summary judgment (Docket No. 33) and Plaintiffs' response thereto, it is hereby **ORDERED** that the motion is **DENIED**.

It is further **ORDERED** that Defendants' motion to amend their counterclaim is **GRANTED**.

BY THE COURT:

/s Lawrence F. Stengel
LAWRENCE F. STENGEL, J.