

<b>Pizzarotti, LLC v FPG Maiden Lane, LLC</b>
2019 NY Slip Op 32645(U)
September 3, 2019
Supreme Court, New York County
Docket Number: 651697/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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PIZZAROTTI, LLC,

Plaintiff,

- v -

FPG MAIDEN LANE, LLC, FORTIS PROPERTY GROUP,  
LLC, FIDELITY & DEPOSIT COMPANY OF MARYLAND,  
and ZURICH AMERICAN INSURANCE COMPANY,

Defendants.

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INDEX NO. 651697/2019

MOTION DATE 08/29/2019

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

**HON. ANDREA MASLEY:**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 117, 118, 119, 120, 122, 123, 124, 125, 126, 127, 128

were read on this motion to/for

DISQUALIFY COUNSEL

The motion to disqualify Herrick Feinstein, LLP, which represents defendants Fortis Property Group LLC and FPG Maiden Lane LLC (Fortis), is denied.

This action arises from the construction of a 58-story residential condominium building at 161 Maiden Lane. (NYSCEF Doc. No. 73 [NYSCEF], Amended Complaint ¶¶ 4, 5). Pizzarotti, LLC (Pizzarotti) entered into an agreement dated December 2, 2015 with Fortis pursuant to which it would pay Pizzarotti \$77,480,318 to perform construction management services (the Agreement). (NYSCEF 6, AIA Agreement). On March 22, 2019, Pizzarotti initiated this action. (NYSCEF 2, Complaint). In its May 30, 2019 amended complaint, Pizzarotti seeks: (1) a declaratory judgment that pursuant to CPLR 3001, Pizzarotti properly terminated the Agreement without further obligation; (2) to enjoin Fortis from using Pizzarotti's subcontractors or equipment and indemnify Pizzarotti, holding it harmless; (3) damages for breach of contract for payments due under the Agreement; (4) fair compensation for additional and extra work; (5) damages

for breach of contract caused by Fortis' interference with Pizzarotti's performance, relationships, operations and maintaining its planned schedule for completion causing increased costs; (6) judgment of foreclosure on its lien for \$33,837,618.34; and (7) damages for wrongful termination. (NYSCEF 73, Amended Complaint).

Goetz Fitzpatrick, LLP (Goetz) filed a notice of appearance for Fortis on April 9, 2019. (NYSCEF 17). Bedford Soumas, LLP filed a notice of appearance for Fortis on May 2, 2019. (NYSCEF 47). Herrick substituted for Goetz on July 29, 2019 with William R. Fried listed as lead counsel. (NYSCEF 83).

On August 21, 2019, Pizzarotti moved pursuant to 22 NYCRR 1200.0 (Rule 1.18 of the Rules of Professional conduct) to disqualify defendants' counsel because Pizzarotti, as a prospective client, communicated with Herrick in March 2019. Pizzarotti asserts that during those two communications, Pizzarotti provided confidential information and documents, and sought legal advice from Herrick. In an email stamped Friday, March 8, 2019 at 3:22 P.M., Lorenzo Cristanelli, general counsel of Pizzarotti, introduced himself to Herrick partner Mitchell Korbey,<sup>1</sup> and asked to talk that afternoon about one of Pizzarotti's many NYC projects. (NYSCEF 123). At 4:39 P.M., Korbey responded that he was not available until Monday. (NYSCEF 124). At 5:07 P.M., Cristanelli implored Korbey for an earlier opportunity to speak "at least to understand" whether Herrick had a conflict of interest and whether Herrick was amendable to assist "given the broad subject." (*Id.*). All Korbey's emails have the following legend: "[t]his

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<sup>1</sup> Korbey's expertise is in land use and zoning. (NYSCEF 127, Affirmation August 27, 2019, ¶1).

email does not constitute a zoning opinion or guaranty of Herrick, Feinstein LLP and should not be relied upon for investment, tax or real estate transaction purposes.” (*Id.*)

Cristanelli and Korbey had a conversation on Friday sometime between 5:07 and 5:41 P.M. Cristanelli followed up with an email in which he identified the matter about which Pizzarotti sought advice as an “Encroaching - - Opinion.” (NYSCEF 119). He identified the project as One Seaport, 161 Maiden Lane. (*Id.*) He provided Herrick with a list of adverse parties to enable Herrick to perform a conflict check (including defendants) and identified two options for discussion; and enclosed three pages of documents. (NYSCEF 118, Cristanelli Affidavit ¶¶ 3-7).<sup>2</sup> The documents included a letter dated March 5, 2019 from Pizzarotti to Fortis, enclosing surveys of the structure encroaching on a neighboring property line due to the leaning of the structure.

Korbey acknowledges a brief conversation on Friday (NYSCEF 127, ¶2) during which a telephone call was scheduled for the following Monday at 10:30 A.M. (NYSCEF 119). He denies that any confidential information was disclosed during the Friday conversation. (NYSCEF 127, ¶2). Korbey invited Fried, his law partner, a commercial litigator with construction litigation experience, to participate in the call on Monday. (*Id.*, ¶3).

Korbey, Cristanelli and Fried participated in a telephone call on Monday, March 11, 2019 at about 10:38 A.M. (NYSCEF 119). Korbey and Fried describe the conversation as addressing “the misalignment condition and encroachment issue”, not

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<sup>2</sup> At argument, Pizzarotti provided the court with the unredacted document in which the two options are listed and the attachments. Pizzarotti is directed to file a motion by OSC, consistent with this court’s rules, and file the unredacted document as a sealed document available to the parties and court until further order of the court.

lien law, not litigation, not claims against Fortis. (NYSCEF 126 and 127). They deny that any confidential information was discussed. (*Id.*)

Cristanelli states in his August 21, 2019 affidavit that “Pizzarotti also provided confidential information and documents and sought legal advice from Herrick on several critical legal issues that relate to the dispute between Pizzarotti and ... Fortis.” (NYSCEF 118, ¶ 7). He states that the conversation on Monday was approximately one-half hour, during which Herrick provided a legal opinion regarding the two redacted options in his March 8, 2019 email, which “ultimately played an important role in connection with the litigation strategy implemented by Pizzarotti in this action.” (*Id.* at ¶¶ 8, 10).

To be represented by counsel of one’s choosing is “a valued right [and] any restrictions must be carefully scrutinized.” (*Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469 [1st Dept 2013]). Pizzarotti has a heavy burden of showing that disqualification is warranted, but it has failed to offer any evidence that Herrick “received information from the prospective client [Pizzarotti] that could be significantly harmful to that person in the matter.” (*Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 6 [1st Dept 2015]). Rather, Cristanelli’s vague affidavit fails to establish that harmful information was disclosed. (*Graziano v Andzel-Graziano*, 169 AD3d 1195 [3d Dept 2019]). Cristanelli’s assertion that he relied on Herrick’s one-half hour of free advice, contrary to Korbey’s email legend that it does not constitute a zoning opinion, in filing this \$33 million action for breach of contract does not make it so. (NYSCEF 118, ¶ 8).

The time to remedy Pizzarotti’s inadequate motion papers was in a reply, which it failed to submit, not at argument on the motion. Pizzarotti’s repeated invitations to the court to interview Cristanelli off the record at the argument was untimely, unfair and would yield an unappealable record.

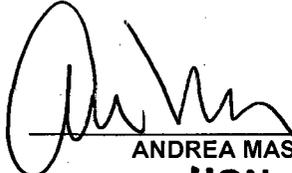
The documentary evidence corroborates this court's conclusion. Documents exchanged with Herrick consist of a letter Pizzarotti sent to Fortis with two survey pages attached and some emails. The emails objectively demonstrate that Pizzarotti contacted Korbey for advice on land use and zoning, his specialty. Pizzarotti cannot seriously assert that the documents it sent to Fortis before it initiated this action against Fortis, and shared with Herrick, contain confidential information (i.e. information that Fortis does not know) or that the information disclosed therein to Herrick would be harmful to Pizzarotti in this action against Fortis.

Finally, while Pizzarotti fails to include a table of authorities, the court notes that all but one of its cited cases precede April 2009 when Rule 1.18 was enacted and are thus not controlling. (*Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 6 [1st Dept 2015]). Rather, *Mayers*, the only contemporary case Pizzarotti cites, is factually similar and controlling here.

Accordingly, it is

ORDERED, that Pizzarotti's motion to disqualify Herrick is denied.

9/3/2019  
DATE



ANDREA MASLEY, J.S.C.

HON. ANDREA MASLEY

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE