

**1199 Housing Corporation v Kelly Tank Company,
Inc.**

2004 NY Slip Op 30196(U)

March 23, 2004

Supreme Court, New York County

Docket Number: 0600525/2002

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: JUSTICE RICHARD B. LOWE, III
Justice

PART 56

1199 Housing Corporation,

Kelly Tank Company, Inc.
et al

INDEX NO. 600525/02
MOTION DATE 2/5/04
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	_____
Answering Affidavits – Exhibits _____	_____
Replying Affidavits _____	_____

FILED

Cross-Motion: Yes No

APR - 1 2004

Upon the foregoing papers, It is ordered that this motion

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S)

Dated: MAR 23 2004

JUSTICE RICHARD B. LOWE, III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DONOTPOST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 56

-----X
1199 HOUSING CORPORATION,

Plaintiff,

-against-

Index No. 600525/02

KELLY TANK COMPANY, INC., and
INTERNATIONAL FIDELITY INSURANCE
COMPANY, ANTONUCCI & LAWLESS
ARCHITECTS & ENGINEERS, LLP, LAWLESS &
MANGIONE ARCHITECTS & ENGINEERS, LLP,
individually and as successors in interest to Antonucci &
Lawless Architects & Engineers, LLP, ROBERT T.
LAWLESS, ROBERT ANTONUCCI, RONALD P.
MANGIONE, and JOSEPH S. LEA,

Defendants.

-----X
ANTONUCCI & LAWLESS ARCHITECTS &
ENGINEERS, LLP, LAWLESS & MANGIONE
ARCHITECTS & ENGINEERS, LLP, individually and as
successors in interest to Antonucci & Lawless Architects
& Engineers, LLP, ROBERT T. LAWLESS, ROBERT
ANTONUCCI, RONALD P. MANGIONE, and JOSEPH
S. LEA,

Third-party Plaintiffs,

-against-

MARION SCOTT REAL ESTATE, INC.,

Third-Party Defendant.

-----X

RICHARD B. LOWE, III, J:

Plaintiff 1199 Housing Corporation (1199) moves, pursuant to CPLR 2221, to reargue that part of this Court's decision, dated October 16, 2003, which granted, in part, a motion by International Fidelity Insurance Company (Fidelity) to dismiss the action as to Fidelity.

The motion to reargue is denied. A motion for reargument "may be granted only upon a

showing that the court overlooked or misapprehended the facts or the law * * * ” (William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 27 [1st Dept 1992]). 1199 has not made the requisite showing.

In its motion to dismiss, Fidelity asserted that 1199’s breach of contract claims against Fidelity under a Fidelity Performance Bond must be dismissed, because 1199 had not met a condition precedent to recovery, in that it had failed to comply with a notice and conference provision in the Performance Bond. In responding papers, 1199 did not allege that it had, in fact, met the notice and conference provisions of the Performance Bond. Rather, it argued that, as a matter of law, Fidelity could not raise this theory by means of a motion to dismiss for failure to state a cause of action. 1199 asserted that CPLR 3211 (a) (7) may be addressed only to the pleadings, and that CPLR 3015 (a) expressly provides that the satisfaction of a condition precedent need not be pleaded (See Allis-Chalmers Mfg. Co. v Malan Constr. Corp., 30 NY2d 225 [1972]). Therefore, 1199 reasoned, its alleged failure to comply with a condition precedent could not be addressed at the pleading stage.

In support of the within motion to reargue, 1199 asserts that Allis-Chalmers, *supra*, creates an “irrebuttable presumption” at the pleading stage of a case, that a party suing for breach of contract has satisfied any condition precedent in the contract (Plf’s Memorandum, at 6).

1199 is incorrect in its interpretation of Allis-Chalmers. That case holds only that a plaintiff need not specifically allege compliance with a condition precedent, and that pursuant to CPLR 3015, there is a presumption that the allegation is made (30 NY2d at 231). There is no irrefutable presumption of compliance with a condition precedent, at the pleading stage or otherwise. Moreover, even though a plaintiff’s claim as alleged in the complaint may be perfectly valid on its face, it may still be the subject of attack under CPLR 3211 (a) (7) (see,

[* 4]

Siegel, Practice Commentaries, McKinney's Cons. Laws of **NY**, Book 7B, CPLR C3211:25 at 31; Stowell v Huntley, 154 AD2d 810 [3d Dept 1989]). On a motion to dismiss on the ground that the pleading fails to state a cause of action, a movant is not compelled to assume the truth of the pleader's allegations, and in deciding such a motion, the court is not limited to the face of the pleading (Riffat v Continental Insurance Co., 104 AD2d 301 [1st Dept 1984]). When a movant submits affidavits which discredit facts on which the complaint relies, the complaint may be subject to a motion to dismiss for failure to state a cause of action (Orlin v Torf, 126 AD2d 252 [3d Dept 1987]). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Guggenheimer v Ginzberg, 43 NY2d 268,275 [1977]; Doria v Masucci, 230 AD2d 764 [2d Dept 1996]).

Here, the complaint inherently relied on the fact that there was a valid performance bond, and that 1199 had met its obligations thereunder for recovery. Once Fidelity had submitted evidence that 1199 had not complied with a condition precedent, it was incumbent upon 1199 to submit evidence sufficient to raise an issue of fact that there had, in fact, been compliance with the condition precedent. It did not do so.

Accordingly, based upon the foregoing, it is

ORDERED that the motion is denied,

Dated: March 23, 2004

ENTER



J.S.C.

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