

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

2005 NY Slip Op 30195(U)

March 30, 2005

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: HON. RICHARD B. LOWE, III
Justice

PART SL

1199 Hewing Corp.

- v -

Kelley Tank Company, Inc

INDEX NO.

600525/02

MOTION DATE

1/1/05

MOTION SEQ. NO.

006

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 _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

APR - 7 2005

NEW YORK
COUNTY CLERK'S OFFICE

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

HON. RICHARD B. LOWE, III

Dated: 3/30/05

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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
DECISION AND ORDER

KELLY TANK COMPANY, INC.,
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
KELLY TANK COMPANY, INC., and
INTERNATIONAL FIDELITY INSURANCE
COMPANY,

Second Third-Party Plaintiffs,

-against-

CASCADE WATER SERVICES, INC., and
XYAMICA AIR CONDITIONING & PIPING CORP.,

Second Third-Party Defendants.

-----X

RICHARD B. LOWE, III, J:

Defendant International Fidelity Insurance Company (Fidelity) moves, pursuant to CPLR 3025 (b), for leave to serve and file an amended verified answer in the form annexed to the moving papers. Plaintiff cross-moves for leave to take additional discovery, and to make a motion for summary judgment should this court grant Fidelity’s motion. Plaintiff also seeks all costs, including attorney’s fees, incurred in opposing Fidelity’s motion to dismiss and prosecuting its prior motion to strike Fidelity’s affirmative defenses.

Background

Plaintiff 1199 Housing Corporation (1199) is a Limited-Profit Housing Company that owns and operates a housing development in East Harlem. The development has 1,594 residential apartments in three high-rise towers. In June 1997, 1199 entered into a contract with Kelly Tank Company (Kelly Tank) to renovate the development’s heating system (the Contract). Fidelity issued a Performance Bond, dated June 17, 1997 (the Performance Bond) to secure the performance of the Contract by Kelly Tank.

1199 alleges, inter alia, that Kelly Tank missed two “time of the essence” deadlines to have new boilers ready for the 1997 and 1998 heating seasons; that it never got three new boilers running properly; that it submitted fraudulent invoices claiming renovation of apartment radiators that was never performed; and that, in a number of instances, it performed faulty work.

On September 9, 1999, 1199's attorneys sent a letter to Kelly Tank that outlined Kelly

Tank's failure to complete the terms of the Contract, and demanded completion of the Contract within 30 days, or 1199 would seek to declare Kelly Tank in default. A copy of the letter was sent to Fidelity.

1199 alleges that Kelly Tank took some steps to correct and complete the work, but that its efforts were inadequate. On March 23, 2000, 1199's attorneys sent another letter to Kelly Tank that detailed the incorrect or incomplete work that remained to be completed or corrected by Kelly Tank. The March 23rd letter also enclosed an architect's specifications of the incomplete work. The letter notified Kelly Tank that if it failed to perform the work, "then the owner will terminate the contract." A copy of the letter and enclosure was sent to Fidelity.

Fidelity acknowledged receipt of the March 23rd letter. Fidelity's Claims Manager, Frank Whelan, sent a letter dated March 29, 2000 to plaintiff's counsel. The letter stated, in part, as follows:

Please be advised that we have referred this matter to our Principal. We anticipate that you and our Principal will work together to resolve any outstanding issues. Unless the Surety hears otherwise, it will assume that all outstanding issues will be resolved between you and our Principal.

Approximately two weeks later, on April 17, 2000, 1199 sent a termination notice to Kelly Tank. Simultaneously, 1199 sent Fidelity a letter informing it of this action, and enclosing a copy of the termination notice and attachments, including a copy of the Performance Bond issued by Fidelity. 1199 also enclosed the architect's list of unperformed work, and his recommendation that the Contract be terminated.

Fidelity contends that its obligations under the Performance Bond only arise upon 1199's satisfaction of a notice-and-conference provision set forth in paragraph 3 of the Performance

Bond. That paragraph provides, in part, as follows:

3. If there is no Owner Default, *the Surety's obligations under this Bond shall arise after:*

- 3.1 The Owner has notified the Contractor and Surety * * * that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract. If the Owner, the Contractor and Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract * * * ;
- 3.2 The Owner has declared a Contractor Default * * * [which] shall not be declared earlier than twenty days after the Contractor and the Surety have received notice as provided in Subparagraph 3.1; and
- 3.3 The Owner has agreed to pay the Balance of the Contract Price to the Surety * * *

(Friedman Aff., Ex B).

1199 commenced this action in April 2002, seeking damages of \$3 million for breach of contract, as well as additional damages for Kelly Tank's fraud in misrepresenting that certain work had been completed, when, in fact, it had not. 1199's tenth cause of action is against Fidelity, and seeks recovery on the ground that Fidelity defaulted on its obligations under its Performance Bond. In June 2002, 1199 filed a verified first amended complaint, and on November 17, 2003, 1199 filed a verified second amended complaint. Fidelity joined issue on September 20, 2002 by serving and filing a verified answer to the Complaint, jointly with Kelly Tank. Subsequently, on December 4, 2003, Fidelity and Kelly jointly served a verified answer to the second amended complaint.

In its answer to the second amended complaint, Fidelity alleged as its fourteenth affirmative defense that “Plaintiff failed to comply with the required procedures of the subject performance bond as to notice, default and/or termination, thereby discharging defendant/second third-party plaintiff International Fidelity Insurance Company from any liability on the bond” (Friedman Aff., Ex. D, ¶ 318).

Fidelity further alleged in its eighteenth affirmative defense that

“The Plaintiff, by its own improper actions, denied defendant/second third-party plaintiff International Fidelity Insurance Company the opportunity to exercise its rights under the bond and prevented defendant/second third-party plaintiff International Fidelity Insurance Company from mitigating its potential damages, thereby causing prejudice to said defendant/second third-party plaintiff and thereby discharging its liability under its bond”

(Friedman Aff., Ex. D, ¶ 322).

By motion returnable April 18, 2003, Fidelity moved, pursuant to CPLR 3211 (a) (5) and (a) (7), to dismiss the complaint against it, on the ground that 1199 failed to satisfy the conditions precedent to a claim under the Performance Bond. In response, 1199 cross-moved, pursuant to CPLR 3015 (a), to strike Fidelity’s fourteenth and eighteenth affirmative defenses, and to preclude Fidelity from asserting any defense based upon the non-occurrence of a condition precedent.

By decision dated October 16, 2003, this Court granted the motion to dismiss 1199’s claims against Fidelity, except those for delay damages, based upon 1199’s failure to follow the conference procedures set forth in the Performance Bond. The decision also denied the cross motion to dismiss Fidelity’s fourteenth and eighteenth affirmative defenses.

By decision dated January 13, 2005, the Appellate Division, First Department, reversed

this court's decision, finding that, at the pleading stage of the proceedings, the plaintiff did not have to allege performance of a condition precedent. The Appellate Division also dismissed Fidelity's fourteenth and eighteenth affirmative defenses, finding that Fidelity had not complied with the pleading requirements of CPLR 3015 (a), in that it had failed to identify the specific procedure required by the Performance Bond with which 1199 had failed to comply (1199 Housing Corp. v International Fidelity Ins. Co., 14 AD3d 383 [1st Dept 2005]).

Two weeks later, on January 27, 2005, Fidelity brought the within motion, by order to show cause, to amend its answer, so that its affirmative defenses comply with the requirements of CPLR 3015 (a).

Discussion

In its proposed fourteenth affirmative defense, Fidelity quotes paragraph 3.1 of the Performance Bond, which provides that Fidelity shall not have any obligation under the bond until plaintiff "has notified [Kelly Tank] and [Fidelity] . . . that [plaintiff] is considering declaring a Contractor Default and has requested and attempted to arrange a conference with [Kelly Tank] and [Fidelity] to be held not later than fifteen days after receipt of such notice" (Friedman Aff., Ex. A, ¶ 318). Fidelity alleges that 1199 never attempted to arrange such a conference.

In its proposed fifteenth affirmative defense, Fidelity quotes paragraph 3.2 of the Performance Bond, which provides that Fidelity shall not have any obligation under the Performance Bond until Plaintiff "has declared a Contractor Default and formally terminated the Contractor's right to complete the contract" (id., ¶ 322). Fidelity contends that 1199 never declared Kelly Tank to be in default.

Similarly, in its proposed sixteenth affirmative defense, Fidelity states that paragraph 3.3 of the Performance Bond provides that Fidelity shall not have any obligation thereunder until plaintiff “has agreed to pay the Balance of the Contract Price to [Fidelity] in accordance with the terms of the Construction Contract or to a contractor selected to perform the Construction Contract in accordance with the terms of the contract with [plaintiff]” (*id.*, ¶ 326). Fidelity alleges that 1199 never agreed to pay the remaining contract balance to Fidelity. Finally, in its seventeenth affirmative defense, Fidelity asserts that:

The subject performance bond provides at paragraph 4 that where plaintiff has satisfied the conditions precedent to [Fidelity’s] liability thereunder set forth in paragraph 3 of the performance bond, [Fidelity] shall either (a) arrange for [Kelly Tank] to complete the Project, with [1199’s] consent; (b) complete the Project itself, through agents or independent contractors; (c) arrange for a completion contractor to enter into a contract with [1199] to complete the Project, with [Fidelity] paying [1199] any excess in the cost to complete above the remaining contract balance; or (d) waive its right to complete or arrange for completion of the Project and either tender payment to [1199] in the amount required by the bond or denies liability under the bond

(*id.*, ¶ 329). Fidelity asserts that, by failing to satisfy the conditions precedent set forth in paragraph 3 of the Performance Bond, 1199 denied Fidelity the rights and remedies expressly provided to it by the Performance Bond, and the ability to mitigate its damages. Therefore, Fidelity contends that it does not have any liability under the Performance Bond.

1199 opposes Fidelity’s motion for leave to serve the amended answer on the grounds that the motion is precluded by the determination of the Appellate Division which granted 1199’s cross motion to strike two of Fidelity’s affirmative defenses, but did not give Fidelity leave to re-plead; that Fidelity waited until the eve of trial to amend its answer, and has not presented an

affidavit of excusable delay; and that the new affirmative defenses do not have merit. 1199 also points out that the parties have not had discovery on the issue of Fidelity's affirmative defenses.

Failure to request leave to re-plead in opposition to a prior motion to dismiss, as required by statute, does not necessarily preclude that relief; non compliance may be excused as a matter of discretion (Imprimis Investors LLC v Insight Venture Mgmt., Inc., 300 AD2d 109 [1st Dept 2002]; Elliman v Elliman, 259 AD2d 341 [1st Dept 1999]). Here, the proposed affirmative defenses clearly have merit; the affirmative defenses set forth a condition precedent to recovery which is contained in the Performance Bond upon which 1199 seeks recovery (see United States Fidelity and Guaranty Co. v Braspetro Oil Services Co., 369 F 3d 34 [2d Cir 2004]). Moreover, Fidelity's delay in requesting leave to re-plead these defenses was occasioned by the issue having been seemingly resolved by this court's dismissal of 1199's claims against Fidelity. Fidelity moved to amend these affirmative defenses two weeks after the Appellate Division rendered its decision.

As to the cross motion, trial of the action has already been continued, and the parties are directed to proceed with discovery. That part of 1199's motion to recover attorney's fees is denied. Absent an agreement, statute, or court rule, none of which are present here, each party bears responsibility for its own attorney's fees (Hooper Assoc., Ltd. v AGS Computers, 74 NY2d 487 [1989]).

Conclusion

Accordingly, based upon the foregoing, it is

ORDERED that defendant International Fidelity Insurance Company's motion for leave to amend its answer is granted, and service of such answer, in the form annexed to moving

papers shall be deemed served upon service of a copy of this Order with notice of entry; and it is further

ORDERED that plaintiff 1199 Housing Corporation's cross motion is granted only to the extent that the parties are directed to proceed with discovery, and 1199 is granted leave to move for summary judgment. The cross motion is otherwise denied.

Dated: March 30 , 2005

ENTER:



HON. RICHARD B. LOWE, III

FILED

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