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# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
*Justice*

Index Number : 600646/2008

**FERNBACH, LLC**

VS.

**CALLEO CONSTRUCTION**

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. 600646/08

MOTION DATE 7/10/09

MOTION SEQ. NO. 002

MOTION CAL. NO. 43



The following papers, numbered 1 to 12 were read on this motion for summary judgment; cross motion to dismiss

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion— Affidavit—Affidavit— Affirmation — Exhibits A-P | 1-4 |
| Notice of Cross Motion—Affidavit—Exhibits 1–6— Affidavit — Exhibits A-C | 5-8 |
| Affidavit in Reply and in Opposition to Cross Motion | 9 |
| Supplemental Affirmation–Exhibits A, B | 10 |
| Supplemental Affirmation in Opposition | 11 |
| Reply Supplemental Affirmation | 12 |

**Cross-Motion: X Yes ☐ No**

**Upon the foregoing papers, it is hereby ordered that the motion and cross motion are decided in accordance with the annexed memorandum decision and order.**

MICHAEL D. STALLMAN
J.S.C.

Dated: 12/07/09
New York, New York

J.S.C.

**Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION**
**Check if appropriate: ☐ DO NOT POST ☐ REFERENCE**

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

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: IAS PART 7**

----------X

FERNBACH LLC,

Plaintiff,

Index No. 600646/2008

- against -

CALLEO CONSTRUCTION CORP.,

Defendant.

----------X



**Decision and Order**

**HON. MICHAEL D. STALLMAN, J.:**

In this action to recover, among other things, delay damages arising from a terminated construction contract, plaintiff Fernbach LLC moves for summary judgment in its favor against defendant Calleo Construction Corp. Defendant cross-moves to dismiss the action based on failure to join a necessary party and opposes the motion.

BACKGROUND

Plaintiff is the alleged owner of real property located at 26 East 81st Street, New York, New York, which consists of 16 residential units (5 of which are rent regulated) and 6 commercial tenants. In 2005, plaintiff allegedly applied for a construction loan with HSBC for a major renovation of the premises. As a condition of financing, plaintiff was required under the commitment letter to deliver payment and performance bonds prior to closing. HSBC also reserved the right to hire a third party contractor to complete the construction job if the construction on the rooftop had not begun as agreed or within the completion period defined in paragraph 47 (a) and (b) of "Exhibit B Modification to Instrument." Krakowski Affirm., Ex F.

On January 17, 2007, plaintiff allegedly entered into an agreement with defendant for

improvement of the premises. Section 8.1.8 of the agreement states, "Contractor shall furnish payment and performance bonds for the full contract sum from a surety company licensed to do business in New York and acceptable to the Owner, its counsel and Owner's construction lender." Rakowski Affirm., Ex B at 6. Defendant engaged non-party Capital & Guarantee, Inc. (C&G) as its broker for the payment and performance bond. The parties disagreed over who must pay the bond premium. Ultimately, plaintiff allegedly agreed to pay the bond premium without prejudice (Rakowski Affirm., Ex D), and plaintiff allegedly advanced $106,035.87 to C&G for the bond premium. Younes Aff. ¶ 22.

On April 27, 2007, plaintiff allegedly closed on its construction loan with HSBC, and at closing a check was allegedly made, payable directly to C&G, in the amount of $97,497.25. Rakowski Affirm., Ex G. Plaintiff allegedly delivered two additional checks in the sum of $7500 and $1,038.62. According to plaintiff, the bond had still not been obtained even though the closing on financing had passed.

On July 30, 2007, plaintiff allegedly sent a letter notifying defendant that the failure to obtain a bond was an inexcusable delay. Rakowski Affirm., Ex E. By letter dated October 15, 2007, the construction project's architect notified that cause existed to terminate defendant because it failed to obtain the payment and performance bond. It is undisputed that no bond was obtained, and plaintiff purportedly terminated the its agreement defendant by 7-day notice to cure dated October 16, 2007.[1] *See* Rakowski Affirm., Ex I. Plaintiff claims to have hired a replacement contractor on February 19, 2008, to begin work on March 4, 2008. Younes Aff. ¶ 29; Rakowski Affirm., Ex L, at

[1] The 7-day notice is actually dated October 1, 2005, but this appears to be an obvious typographical error, given that defendant was hired in 2007.

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DISCUSSION

As a threshold matter, defendant's cross motion to dismiss the action for lack of a necessary party is denied. Although defendant blames C&G for not obtaining the payment and performance bond, C&G is not a necessary party to this action. The complaint alleges that defendant materially breached its agreement with plaintiff because defendant failed to obtain the necessary bond. Complete relief can be awarded to plaintiff without joining C&G to the action, and C&G would not be inequitably affected by a judgment rendered either in favor of or against defendant.

As to plaintiff's motion for summary judgment, plaintiff has established a prima facie case that defendant materially breached the agreement by failing to obtain the payment and performance bond. Section 8.1.8 of the agreement clearly places the responsibility upon defendant to obtain the bond, and it is undisputed that defendant did not obtain the bond. Such a breach was material because Section 11.2 of the Supplemental General Conditions provides that "General Contractor shall commence the Work upon written notice by Owner or Architect. Time is of the essence." Rakowski Affirm., Ex I. According to plaintiff, work could not commence without the bond in place under the terms of the parties' agreement and the HSBC financing. Younes Aff. ¶ 11.

Defendant asserts that a question of fact exists as to whether plaintiff's actions made procurance of the bond impossible. Defendant claims that plaintiff prevented it from seeking a bond from a different source because plaintiff had already paid the bond premium. In mid-September 2007, Dunewood Truglia, Esq, who communicated to plaintiff on defendant's behalf, allegedly told plaintiff's counsel that he had misgivings about C&G, and that its principal should be fired, that the lender must waive the bond requirement entirely, or provide some other mechanism for

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payment/performance surety. Truglia Aff. ¶ 10. Truglia claims that plaintiff did not nothing to termination the relationship with him until after it had terminated the contract with defendant. *Id.* 11.

This argument is unpersuasive. The parties' agreement places the responsibility of obtaining the bonds squarely on defendant, and plaintiff apparently did not engage C&G as the broker for the surety bond. Younes Aff., Ex C. Thus, defendant bore the risk of a third party being unable to obtain the payment and performance bond that defendant was contractually required to obtain. Plaintiff's alleged refusal to modify the contract requirements does not constitute interference with defendant's performance of the agreement.

Section 11.1 of the Supplemental General Conditions to the agreement provides that,

> "Should the progress of the work and/or Other Work be delayed by any fault, neglect, act, or failure to act of General Contractor, or of any its subcontractors or supplies, so as to cause any additional cost, expense, liability, or damage to Owner, or for which Owner may become liable, General Contractor shall hold Owner harmless from, and indemnify owner against, all such additional cost, expense, liability, or damage in accordance with the provisions of Article 9."

Rakowwski Affirm., Ex B

Article 9 states, in pertinent part:

> "9.1 To the maximum extent permitted by law, General Contractor hereby assumes the entire responsibility and liability for any and all damage (direct or consequential) . . . of any kind or nature whatsoever, to all persons, whether or not employees of General Contractor, and to all property and business or business, caused by, resulting from, arising out of, or occurring in connection with:
>
> 9.1.1 The performance or failure to perform the contract."

*Id.*

Accordingly, plaintiff is entitled to recover, as damages, the difference between the price of

plaintiff's contract with the replacement contractor, and plaintiff's contract with defendant, which is $390,099. Plaintiff is also entitled to recover the bond premium advanced to C&G on defendant's behalf, in the total amount of $106,035.87.

Plaintiff also seeks to recover, as delay damages, certain costs which arose from March 1, 2007 until March 2008, when the replacement contractor was scheduled to start work. Among these costs are the costs of relocating the building superintendent from his apartment on the building's ninth floor (which was to be demolished for a two-story addition) to an apartment in adjacent building, at a monthly rent of $1,800. Although the Court agrees that plaintiff is entitled to recoup these costs, it is not clear why plaintiff chose March 1, 2007 as a date when construction should have originally started. Thus, summary judgment is denied as to the costs of relocating the superintendent.

Plaintiff is not entitled to recover the other expenses which it seeks as delay damages.

> "It is well established that in actions for breach of contract, the nonbreaching party may recover general damages which are the natural and probable consequence of the breach. "[I]n order to impose on the defaulting party a further liability than for damages [which] naturally and directly [flow from the breach], i.e., in the ordinary course of things, arising from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting." In determining the reasonable contemplation of the parties, the nature, purpose and particular circumstances of the contract known by the parties should be considered, as well as "what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made."

*Kenford Co., Inc. v County of Erie*, 73 NY2d 312, 319 (1989)(internal citations omitted). Here, plaintiff seeks to recover lost rental income allegedly resulting from the delay.

Plaintiff contends that, because it was unable to give tenants a start or estimated completion

date for construction, it agreed to freeze the rent for tenants in two residential apartments rather than have a vacancy, and allowed the lease for Apt 2S to expire and remain vacant. Younes Aff. ¶¶ 24-26. Plaintiff also claims that it could not find a commercial tenant for the store # 2 until the construction date commenced. *Id.* ¶ 27. However, these damages do not naturally and directly flow from the construction delay, and the amount of the damages is speculative. The residential apartments at issue are market rate apartments (*see* Rakowski Affirm., Ex J), and thus many factors could have influenced whether those residential tenants decided to remain. Plaintiff measures the lost rental income as the difference between the frozen rent level and what the rent would have been without the freeze, but such an estimation is, for market apartments, based on speculation. Plaintiff has not shown that its own decision to leave an apartment vacant during the period of construction to be a natural and probable consequence of a construction delay, or shown to be known to defendant.

Although the Court might agree that the delay in the start of the construction date might have dissuaded commercial tenants, the lost rental income is not measured from the delay in the start of construction, but rather the delay in the start of the commercial tenant's lease from when the lease would have started had construction finished on schedule. Because the start date of the commercial lease is dependent on what renovations or construction work the commercial tenant itself would have wanted, a delay in the start date of the commercial lease is based on speculation here.

Plaintiff also seeks to recover eleven months of interest that accrued on the construction financing as delay damages. Because plaintiff would have had to pay interest on the loan until such time as it was repaid, the Court fails to see how the interest payments flow naturally and directly from the breach.

Finally, plaintiff has not demonstrated entitlement to attorneys' fees as a matter of law.

> "Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise."

*Hooper Assocs., Ltd. v AGS Computers*, 74 NY2d 487, 492 (1989) Although plaintiff relied upon Articles 9 and 11 of its agreement with defendant, the relevant excerpts quoted above do not include attorneys' fees among the expenses for which plaintiff must indemnify defendant.

Plaintiff raises the failure to mitigate damages in opposition to plaintiff's motion. As discussed above, the only damages which plaintiff is entitled to recover are the increase in the contract price for the replacement contractor, the bond premium advanced, and the rent on the apartment in the adjacent building for the building superintendent. Plaintiff has not raised a triable issue of fact as to whether plaintiff could have mitigated these damages, which are fixed costs. Plaintiff comes forward with no evidence, for instance, of less expensive apartment rentals in adjacent buildings that are comparable to the apartment of the superintendent that was to be demolished along with the ninth floor.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted in part, and is denied in part; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $496, 134.87, together with interest as prayed for at the rate of 9% per annum from the date of October 23, 2007, until the date of entry of judgment, as calculated by the

Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the portion of the complaint that seeks reimbursement of the cost of 11 months of rent for an apartment for the superintendent in an adjacent building is severed; and it is further

ORDERED that defendant's cross motion is denied.

**Dated: December 7, 2009**
**New York, New York**

**ENTER:**

**J.S.C.**

MICHAEL D. STALLMAN
J.S.C.

FILED
DEC 10 2009
NEW YORK
COUNTY CLERK'S OFFICE