

**FPG Ch 94 Amity, LLC v Pizzarotti LLC**

2019 NY Slip Op 32639(U)

August 22, 2019

Supreme Court, Kings County

Docket Number: 512149/2019

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

-----X  
FPG CH 94 AMITY, LLC,

Plaintiff,

Decision and order

- against -

Index No. 512149/2019

PIZZAROTTI LLC,

Defendant,

*MS # 1*

August 22, 2019

-----X  
PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On February 15, 2016 the plaintiff and defendant entered into a construction agreement wherein the defendant agreed to construct residential townhouses located at 88-98 Amity Street in Kings County. The agreement provided the defendant would be substantially complete with the project by September 30, 2017 and that time was of the essence. On January 25, 2019 after significant delays prevented the completion of the construction project the parties entered into a Letter Agreement. That agreement noted the completion of the work exceeded the guaranteed maximum price by over six million dollars and the defendant had already paid a portion of that amount and would pay the remainder of that amount provided the plaintiff would relieve

the defendant of any overrun excess. Thus, the Letter Agreement provided the plaintiff would release the defendant from the overrun excess if eight conditions were satisfied. The first condition required the defendant to pay the complete amount over the guaranteed maximum price. The second condition stated that upon compliance with the eight conditions the defendant would be relieved of its responsibility for the guaranteed maximum price, the plaintiff would pay to finish the project and the plaintiff would pay defendant for any retainages up to the date of the letter agreement. The third condition noted the defendant was required to retain another entity as a sub-contractor manager to perform construction management services. The fourth condition concerned the substitution of the payment and performance bond submitted by the defendant. The remaining conditions are not relevant except for the fifth condition which is at the crux of this lawsuit. That condition stated that "other than with respect to the obligations contained in this letter, and the Construction Manager's responsibility under the CMA for the Work performed prior to the date hereof, the parties hereto waive and release all claims against each other arising out of or connected to the performance of the CMA or any other agreement...the parties have or may have related to the referenced project, including but not limited to any delay claims, liquidated damages or other special or consequential damages associated therewith" (see,

Letter Agreement, ¶ 5).

The defendant asserts they have fulfilled all the requirements of the letter agreement and consequently the complaint must be dismissed. The plaintiff argues there are provisions of the agreement that have not yet been satisfied rendering the breach of contract claims viable.

#### Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Dauids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

It is further well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1<sup>st</sup> Dept., 2010]).

The defendant argues the Letter Agreement "waived and released all breaches of the CMA and can only sue for an alleged breach of the LA" (see, Memorandum of Law in Support, page 3). Further, any

cause of action based upon alleged breaches of the Letter Agreement are improper since "those claims are barred by the waiver and release language in the LA" (id). Thus, the defendant presents two arguments. First, that no breach based upon the original agreement may be pursued since the original agreement has been replaced by the Letter Agreement. Second, no breaches can be based upon the Letter Agreement since the Letter Agreement expressly releases all such claims.

The fifth condition of the Letter Agreement states that the Letter Agreement constitutes a waiver of all claims arising out of the original agreement subject to two exceptions. The first exception consists of obligations contained in the Letter Agreement. The second exception consists of any of the defendant's "responsibility under the CMA for the Work performed prior to the date" of the Letter Agreement (id). Thus, clearly, the Letter Agreement did not replace the CMA regarding 'responsibility' for issues that arose before the Letter Agreement. In Reply, the defendant argues the Letter Agreement did not contemplate excepting any claims that existed prior to the Letter Agreement but rather an ambiguous "responsibility" that does not alter the "unmistakable intent of the parties to expressly release all claims by and between Pizzarotti and plaintiff related to the project, and that only responsibilities [not claims] with respect to work already performed are to be preserved" (see, Memorandum of Law in Reply,

page 2). Thus, according to the defendant the Letter Agreement only meant to bind the defendant to past responsibilities but not past claims. While the defendant provides definitional differences between the terms 'claims' and 'responsibility' the practical distinction is difficult to discern. Indeed, other clauses of the Letter Agreement highlight the synonymy between the two words. First, the second paragraph of the Letter Agreement discusses that upon the defendant's payment of certain sums the defendant will not be responsible for any overrun excess. The Letter Agreement states the plaintiff is willing to relieve the defendant "of this responsibility and is willing to pay the Overrun Excess" (see, Letter Agreement) if the enumerated eight conditions are satisfied. It logically follows that the failure to satisfy the conditions would result in the defendant being responsible or liable for the overrun excess. Consequently, the term 'responsible' is legally indistinguishable, in the Letter Agreement, between any 'claim' that can be pursued. Further, Section 2 of the Letter Agreement states that upon the defendant's compliance with the terms of the Letter Agreement, the defendant "shall be deemed relieved of its responsibility for the Guaranteed Maximum Price" (id). Surely, if the defendant were to fail to comply with the terms of the Letter Agreement a claim for the guaranteed maximum price would follow.

In addition, structurally, the fifth condition clearly carved

out two exceptions to the release otherwise granted in the Letter Agreement. The second exception, as noted, concerned the defendant's "responsibility under the CMA for the Work performed" prior to the date of the Letter Agreement. The definitive phrase 'the Work' can only refer to the construction work the defendant was required to perform. Thus, carving out from the release any responsibility for the work without also permitting any claims to be filed for the failure to perform such work would render the exception hollow, something clearly not contemplated by the parties.

Lastly, although the fifth condition does use the term 'claims' the defendant has not presented any argument how the term 'claims' and the term 'responsibility' are distinct as contained in the Letter Agreement. The defendant has failed to provide any reasonable, legal distinction between an exception concerning 'responsibility' under the original agreement and 'claims' which are excluded as an exception under the Letter Agreement. The defendant concedes the Letter Agreement excepts responsibility for any work performed under the original agreement and yet argues that any breach of any responsibility under that agreement does not give rise to a claim for breach of contract. These arguments are semantics and at the pleading stage do not warrant dismissal of any breach of contract claims based upon the original agreement.

Further, the Letter Agreement did not constitute a novation

since there cannot be a novation if there are questions whether conditions effectuating the new agreement were ever satisfied (Wasserstrom v. Interstate Lito Corp., 114 AD2d 952, 495 NYS2d 217 [2d Dept., 1985]). Therefore, the motion seeking to dismiss the third cause of action is denied.

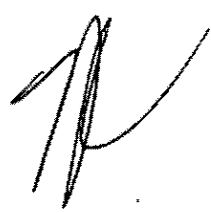
The motion seeking to dismiss the second cause of action is denied. The complaint alleges the defendant breached the Letter Agreement by failing to provide personnel to assist the construction manager and by failing to advise the subcontractors of the new construction manager's involvement. Those allegations, which must be presumed true, demonstrate a violation of the third condition of the Letter Agreement. There is no merit to the argument those breaches, if true, flow from the original agreement.

The first cause of action seeks a declaratory judgement the plaintiff may keep the payment and performance bonds the defendant provided because the Letter Agreement was allegedly breached as noted. The defendant seeks to dismiss that cause of action since there is no dispute all the payments outlined in the first condition of the Letter Agreement have been satisfied. Thus, the Letter Agreement provides that upon satisfactory payment of all sums contained in the first condition then the fourth condition is likewise satisfied and the plaintiff "agrees to the substitution of the payment and performance bond submitted" by the defendant. Since all these conditions have been satisfied and performance has

been completed, notwithstanding any claims regarding the above mentioned issues, there are no questions of fact concerning the release of the bonds. Consequently, the motion seeking to dismiss the first cause of action is granted.

So ordered..

ENTER:



DATED: August 22, 2019  
Brooklyn N.Y.

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Hon. Leon Ruchelsman  
JSC

KINGS COUNTY CLERK  
FILED  
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