

FPG Ch 94 Amity, LLC v Pizzarotti LLC

2020 NY Slip Op 30684(U)

March 2, 2020

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

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FPG CH 94 AMITY, LLC,

Plaintiff,

Decision and order

- against -

Index No. 512149/2019

PIZZAROTTI LLC & FIDELITY & DEPOSIT
COMPANY OF MARYLAND,

MS # 6

Defendant,

March 2, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §2221 seeking to reargue a portion of the decision dated January 2, 2020 which dismissed the first cause of action and any claims against Fidelity and Deposit Company of Maryland [hereinafter 'Fidelity'] on the grounds the performance bonds were paid. The plaintiff argues the performance bonds should not have been released without the posting of maintenance bonds which have not occurred. Fidelity has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

The Complaint in this case included a cause of action for declaratory judgement. Specifically, the complaint asserted that "FPG is entitled to a declaration that it is not required to release the Bonds since PIZZAROTTI is in breach of the CMA and LA and since the project remains under construction" (see, Complaint, ¶67). The following paragraph concluded that "a justiciable controversy exists concerning release of the Bonds and FPG has no remedy at law" (id at ¶68). In a decision dated

August 22, 2019 the court granted the defendant's motion seeking to dismiss this cause of action on the grounds the payments outlined in the first paragraph of the Letter Agreement were made which simultaneously satisfied the fourth condition of the Letter Agreement.

Shortly thereafter the plaintiff served an amended complaint and asserted a cause of action against Fidelity for breach of contract alleging Fidelity issued the payment and performance bonds on behalf of the defendant naming the plaintiff as obligee. The Amended Complaint alleged Fidelity failed to complete the work and failed to respond to notice filed by FPG. Fidelity sought to dismiss the Amended Complaint and the plaintiff moved seeking to reargue the bond portion of the August decision. The court denied the motion to reargue and granted Fidelity's motion to dismiss.

The plaintiff has now moved seeking to reargue, once again, the court's dismissal of any claims based upon the performance bonds.

The plaintiff's sole argument is that the court erred by holding the bonds should be released when another condition should have prevented that, namely the failure of the defendant Pizzarotti to secure maintenance bonds. Whether this seeks to reargue the January 2020 decision or the August 2019 is of no moment since an important legal issue has been raised which must

be addressed.

The plaintiff argues the fourth condition of the Letter Agreement was not fully satisfied therefore the performance bonds should not have been released. Indeed, in its opposition to Fidelity's motion to dismiss, plaintiff argued that "neither of the defendants have ever tried to explain the significance of the language in the Letter Agreement which states that the 'Owner agrees to the substitution of the payment and performance bond submitted by Construction Manager for the referenced project for a new maintenance bond covering remedial work after substantial completion under the CMA in the sum of \$5,000,000 upon payment of the fourth and last installment per paragraph 1'" (see, Plaintiff's Motion in Support of Motion for Default and Opposition to Motion to Dismiss, ¶25). The plaintiff argues that pursuant to that condition the surety cannot be discharged until substitution occurs and substitution occurs when Pizzarotti provides a maintenance bond. Since Pizzarotti has not yet filed a maintenance bond the surety cannot be discharged and the court's dismissal of Fidelity was erroneous.

However, the plaintiff has not explained why the surety's obligations pursuant to the Letter Agreement are intertwined with the obligations of Pizzarotti. If true that Pizzarotti must still secure maintenance bonds, there is nothing in the language of paragraph 4 that prevents the surety from satisfying its

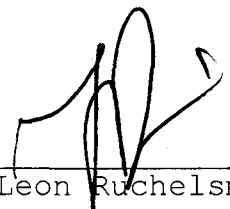
obligations releasing the bonds. To be sure the plaintiff may have an action against Pizzarotti for failing to secure maintenance bonds, however, that failure cannot inure to Fidelity and prevent the lawful release of the performance bonds. The language of paragraph 4 supports this contention. A careful parsing of the paragraph reveals that the owner agreed to the substitution for a new maintenance bond "after substantial completion under the CMA" (id). Thus, the release of the performance bonds and the securing of any maintenance bonds did not, as argued, require simultaneity. It is true that the last phrase "upon payment of the fourth and last installment" is out of order and should have preceded the words "after substantial" however, the incongruous placement does not alter the clear conclusion that the performance bonds and the maintenance bonds are not dependent on each other. Therefore, if Pizzarotti has not secured any maintenance bonds when it is required to do so, as noted, the plaintiff may commence an action in that regard. However, that action has no bearing upon Fidelity's obligations which the court has already concluded have been satisfied.

Therefore, based on the foregoing, the plaintiff's motion is denied.

So ordered.

DATED: March 2, 2020
Brooklyn N.Y.

ENTER:



Hon. Leon Ruchelsman
JSC

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