

FPG CH 94 Amity, LLC v Pizzarotti LLC
2020 NY Slip Op 33458(U)
October 20, 2020
Supreme Court, Kings County
Docket Number: 512149/2019
Judge: Leon Ruchelsman
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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 AND DEPOSIT
COMPANY OF MARYLAND

Defendants, October 20, 2020

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §3024(b) seeking to strike certain provisions from the Second Amended 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.

As recorded in prior orders, 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. The

parties have disputed numerous provisions of that agreement. On July 16, 2020 the plaintiff filed a second amended complaint and alleges a breach of the letter agreement, a claim based upon the defendant's failure to secure a maintenance bond and for specific performance of the letter agreement and breach of contract.

The defendant argues that eight paragraphs of the second amended complaint, specifically, paragraphs 73-80 are scandalous and must be stricken. The plaintiff opposes the motion arguing those paragraphs are necessary since they support the claim of specific performance.

Conclusions of Law

CPLR §3024(b) provides that a party may move to strike any scandalous or prejudicial material that has been unnecessarily inserted in a pleading. If the allegations are relevant to a cause of action then such material will not be stricken (New York City Health and Hospitals Corporation v. Barnabas Community Health Plan, 22 AD3d 391, 802 NYS2d 363 [1st Dept., 2005]). Thus, "relevancy is the measuring rod" whether such material, allegedly scandalous or prejudicial is properly placed in a pleading (Siegel, New York Practice, §230 [5th Ed., 2011]). The specific paragraphs of the second amended complaint which are the subject of the motion state that defendant Pizzarotti was formed by an Italian parent company in 2015 and essentially took on more work than it could handle. This caused under staffing at many different job sites and most of the jobs in New York were terminated and consequently, Pizzarotti is facing numerous

litigations throughout New York State. Further, the second amended complaint states that Pizzarotti "has taken steps to cease its United States Business operation" (§77) is no longer performing any construction in the United States and has "begun transferring its assets out of the United States" (§79). The second amended complaint asserts the maintenance bond is the only way the plaintiff could be assured payment for plaintiff's defective work.

The plaintiff asserts the above paragraphs establish an element of specific performance, namely the absence of an adequate remedy at law. Thus, the paragraphs are necessary and a motion to strike them should be denied.

It is well settled that to successfully plead a cause of action for specific performance the party must demonstrate that he has substantially performed his contractual obligations and is ready willing and able to fulfill any remaining obligations and that the defendant is able to perform its obligations and there is no adequate remedy at all (ADC Orange Inc., v. Coyote Acres, Inc., 7 NY3d 484, 824 NYS2d 192 [2006], E & D Group LLC v. Violet, 134 AD3d 981, 21 NYS3d 691 [2d Dept., 2015]). When a case such as this does not involve the sale of real property or a unique item, the complaint must allege that damages alone are inadequate (Emigrant Bank v. UBS Real Estate Securities Inc., 49 AD3d 382, 854 NYS2d 39 [1st Dept., 2008]). The plaintiff asserts that "there is no adequate remedy at law for the damages sustained. Specifically, Pizzarotti's failure to comply with its

obligations under the Letter Agreement cannot be remedied by money damages" (see, Affirmation in Opposition, ¶17). The plaintiff further argues that "even after FPG establishes that Pizzarotti breached the Letter Agreement, without specific performance, Plaintiff will be without recourse for additional defective work that was performed by Pizzarotti" (id at ¶18). There is well established case law that supports the contention that a bargained for bond contained in a contract may be pursued via specific performance. As the court noted in Marine Midland Trust Company of New York v. Alleghany Corporation, 28 F.Supp. 680 [S.D.N.Y. 1939] "it is apparent that a suit for damages for the breach of the covenant to post or maintain collateral security would be inadequate. If a creditor is to have the security position for which he bargained, the promise to maintain the security must be specifically enforced" (id). While cases generally have adopted this approach protecting sureties pursuing collateral security clauses (see, American Motorists Insurance Company v. Pennsylvania Beads Corporation, 983 F.Supp. 437 [S.D.N.Y. 1997] it should be equally applicable in any case where a party has bargained for a bond. In Safeco Insurance Company of America v. Lake Asphalt Paving and Construction LLC, 807 F.Supp2d [Eastern District of Missouri 2011] the court explained that many courts hold "that although damages might be available to the surety in the future, the surety would be deprived of its

contractual right to be placed in funds to be used to pay claims and expenses incurred on the bonded projects. In such cases, as in this case, the surety bargained for a collateral security clause to protect it from the impending risks of liability once a claim had been made on the bond" (id). Likewise, in this case the plaintiff bargained for a maintenance bond and the plaintiff should be able to pursue that bond despite the ability to obtain a judgement. Thus, the plaintiff maintains the right to pursue the equitable remedy of specific performance to satisfy contractual obligations. In that vein paragraphs 74, 75 and 76 do not support a claim for equitable relief at all and the motion seeking to strike them is granted. The motion seeking to strike the remainder of the contested paragraphs is denied.

The defendant further argues the existence of the contested paragraphs will permit the plaintiff to engage in non relevant discovery. However, that issue, should it arise, can be dealt with in the manner of all allegedly irrelevant discovery demands, either with a court conference or a motion. That alleged abuse is not a basis to strike the paragraphs at this juncture. Therefore, the motion is denied as indicated.

So ordered.

ENTER:



DATED: October 20, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC