

FPG CH 94 Amity, LLC v Pizzarotti LLC

2020 NY Slip Op 35476(U)

January 2, 2020

Supreme Court, Kings County

Docket Number: Index No. 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

MS # 2, 3, 4 & 5

PIZZAROTTI LLC & FIDELITY & DEPOSIT
COMPANY OF MARYLAND,

Defendant,

January 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 August 22, 2019 which dismissed the first cause of action. Further, the defendants have moved seeking to dismiss the amended complaint. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

As recorded in the prior order this lawsuit concerns allegations the defendants failed to satisfy provisions of a Letter Agreement and construction agreement entered between the parties. The court granted the defendant's motion seeking to dismiss the first cause of action which sought a declaratory judgement the plaintiff could keep the payment and performance bonds. The court held there was no dispute all the conditions for the release of the bonds was satisfied and that consequently the cause of action had no merit. Upon reargument the plaintiff argues that since the defendants breached the contract, the plaintiff was under no obligation to further perform and the

court erred in dismissing the cause of action.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

It is generally true that a material breach by one party to a contract discharges the non-breaching party from performing under the contract (Barbagallo v. Marcum LLP, 925 F.Supp2d 275 [E.D.N.Y. 2013]). However, where the contract provisions are severable or divisible the non-breaching party must perform those duties associated with the divisible portions of the contract. The Restatement (Second) of Contracts §240 (1981) establishes two criteria to determine whether the provisions of a contract are severable. The first is whether performance can be apportioned into "corresponding pairs of part performances" (id). The second is whether "the parts of each pair of performances are agreed equivalents" (id). The most important element in determining severability is the nature of the work required and the contract's overarching purpose (Aptus Co., v. U.S. 62 Fed.Cl., 808 [2004]).

In this case the Letter Agreement required the defendants to

pay the owner \$3,859,696.73 so he could complete the work (see, Letter Agreement, ¶ 1). Paragraph 4 of the Letter Agreement provided that "Owner agrees to the substitution of payment and performance bond submitted by the 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" (id). Thus, notwithstanding other breaches that are alleged, the funds due have all been paid demanding a release of the bonds. There is no basis to claim the other breaches are connected to the release of any performance bonds such that a breach of other portions of the agreement render the non-breaching party free from complying with the release of bonds provision. The release of the bonds is severable from any other obligation contained in the Letter Agreement and the compliance with that provision necessarily allowed the release of the bonds. Therefore, the motion seeking to reargue that portion of the decision is denied.

For similar reasons the motion seeking to dismiss the first cause of action of the amended complaint is granted. It may be true there is still work that is outstanding, however, the Letter Agreement provided that new performance bonds be substituted covering remedial work and that the original performance bonds are released upon payment pursuant to paragraph 1 of the


Agreement. Thus, the amended claim is not materially different from the dismissed claim. Therefore, the first claim of the amended complaint is dismissed. Likewise, the fourth cause of action of the amended complaint seeking breach of contract claims against Fidelity is dismissed.

Any motion seeking sanctions is denied.

So ordered.

ENTER:

DATED: January 2, 2020
Brooklyn N.Y.



Hon. Leon Buchelsman
JSC



KINGS COUNTY CLERK
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