

Borough Constr. Group, LLC v Red Hook 160 LLC
2023 NY Slip Op 30275(U)
January 20, 2023
Supreme Court, Kings County
Docket Number: Index No. 500308/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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BOROUGH CONSTRUCTION GROUP, LLC.,
Plaintiff,

Decision and order

- against -

Index No. 500308/19

Motion Sequence # 19

RED HOOK 160 LLC, PHILADELPHIA INDEMNITY
INSURANCE COMPANY, ACREFI MORTGAGE
LENDING, LLC, TRI STATE LUMBER, AF SUPPLY
CORP, UNITED RENTALS (NORTH AMERICA), INC.,
WORLDWIDE PLUMBING SUPPLY, INC., CASTLE
MASONRY, INC., WOODBURY CONSTRUCTION, INC.,
GO GREENER PLUMBING, INC., PREMIUM BUILDING
MATERIALS, INC., UNIVERSAL MARBLE AND GRANITE
OF QUEENS AND TPG CONTRACTING, CORP.,
Defendants,

January 20, 2023

-----X

Red Hook 160 LLC,
Third Party Plaintiff,

- against -

BOROUGH EQUITIES LLC, MICHAEL BAUER &
EMANUEL KANARIS,
Third-Party Defendants,

-----X

UNITED RENTALS (NORTH AMERICA) INC.,
Third Party Plaintiff,

- against -

ATLANTIC SPECIALTY INSURANCE COMPANY,
a/k/a ATLANTIC SPECIALTY INSURANCE INC.,
D/b/a ASIC INSURANCE,
Third-Party Defendants,

-----X

UNIVERSAL MARBLE & GRANITE OF QUEENS INC.,
Third-Party Plaintiff,

-against-

BOROUGH EQUITIES LLC and ATLANTIC
SPECIALTY INSURANCE COMPANY,
Third-Party Defendants,

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

The plaintiff/third party defendant Borough Construction Group LLC and the other third party defendants have moved pursuant to CPLR §2221 seeking to reargue a decision and order dated September 19, 2022 which denied a motion seeking summary judgement and dismissal of the third party complaint. Red Hook 160 LLC 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 decisions Borough Construction Group LLC entered into a contract with Red Hook 160 LLC concerning the construction and renovation of a project located at 160 Imlay Street in Kings County. Borough Construction sued alleging it is owed over two and a half million dollars. Red Hook 160 LLC asserted various counterclaims. Borough Construction moved seeking summary judgement, essentially arguing there are no questions of fact the Borough parties cannot be liable for any of the third party claims and should be awarded judgement for some of its claims. The basis for such a motion was the fact a side letter agreement was entered between the parties on October 25, 2016. As noted, Article 3 of that agreement states that "notwithstanding any provision on the Contract to the contrary, the Owner, and not the Construction Manager, shall be responsible

for the entire cost of performing the Work, without reimbursement by Construction Manager or any deduction in any amounts owed to Construction Manager, including without limitation any costs in excess of the Guaranteed Maximum Price. Without limiting the foregoing, Owner shall be responsible for the cost of all insurance required to be maintained by the Construction Manager in connection with the Project. Further, Construction Manager's liability with respect to any costs of correcting any errors, omissions or other deficiencies in the Work; costs arising out of or relating to any extensions in the Project Schedule; and any costs associated with changes required to be made to the Work because of site conditions at the Project, irrespective of whether the same were or should have been reasonably foreseeable to Construction Manager, shall be expressly limited to the insurance proceeds actually recovered under Construction Manager's insurance policies maintained by Construction Manager pursuant to 11.5.1 of the General Conditions to the Contract pursuant to claim(s) made in connection therewith" (see, Side Letter Agreement [NYSCEF #102]). The Borough parties argued "this provision of the Side Agreement makes clear that whatever damages Defendant is claiming as a result of the alleged breaches of contract are to be borne by Defendant, not BCG" (see, Memorandum of Law, page 6 [NYSCEF #525]). The court rejected that argument finding that provision only required the owner to

be responsible for the "work" and not omissions or conduct that actually frustrated the work. Upon reargument Borough argues the court erred in holding the side letter agreement "cannot be read to confine the liability based upon tortious conduct alleged that is not included within the express provisions of the side agreement at all" (see, Prior Decision Dated September 19, 2022, page 7 [NYSCEF Doc. No. 579]) because the only claims that remain are breach of contract claims. Further, Borough argues that in any event the court erred in failing to interpret the side letter agreement as written which clearly limited Borough's liability.

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]).

The Amended Counterclaim and Third Party Complaint (NYSCEF #196]) alleges that the Borough parties intentionally sabotaged the construction work. Specifically, there are allegations Borough knew the work a subcontractor was performing was not compliant with the project plans and would have to be torn down and begun anew and that Borough informed the subcontractor to "continue with the installation and act as if it was unaware of

the mistake" see, Amended Counterclaim and Third Party Complaint, ¶79 [NYSCEF #196]). Further, it is alleged that Borough "knowingly and intentionally failed to disclose the noncompliant framing issue with the intent to have Red Hook 160 rely on the nondisclosure in making extra contractual payments to Borough" (id at ¶81). Borough seeks to shield itself from any further liability based upon the limitation of liability clause contained in the side agreement. While limitations of liability clauses are generally enforceable (Colnaghi USA Limited v. Jewelers Protection Services Limited, 81 NY2d 821, 595 NYS2d 381 [1993]) public policy prohibits reliance on such clauses for damages caused by gross negligence (Kalisch-Jarcho, Inc., v. City of New York, 58 NY2d 377, 461 NYS2d 746 [1983]). "'Gross negligence' differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (Colnaghi, supra, citing to Sommer v. Federal Signal Corp., 79 NY2d 540, 583 NYS2d 957 [1992]). As noted, the Amended Counterclaim and Third Party Complaint adequately alleges such intentional wrongdoing. Surely, there are questions of fact in this regard which demand the denial of summary judgement. Borough argues Red Hook 160 has failed "to cite to even a single paragraph in its operative pleading (nonetheless actual evidence from this case to prove as much) in which it alleges that BCG

"purposely perform[ed] defective work" or purposely delayed the Project" (see, Reply Memorandum, page 7 {NYSCEF Doc. No. 594}). In addition to the above quoted allegations of such purposeful performance of defective work, Paragraph 87 of the Amended Counterclaim and Third Party Complaint states that "upon information and belief, such information having been provided by a former quality control employee of Borough Construction, Mr Kanaris directed the carpentry subcontractor to hide the fact that the plumbing had not been completed (although it had been invoiced by Borough and paid for by Red Hook 160) because Mr. Kanaris wanted to show Red Hook 160 that the Project was closer to TCO than it actually was, and wanted to ensure the Red Hook 160 would continue funding Borough's payment requisitions" (id). The next paragraph asserts that "Borough invoiced Red Hook 160 for millions of dollars in plumbing work, much of which was never completed (e.g., missing pipes, pipes not connected, no insulation on pipes, no fire-stopping and no fire dampers). That is, behind the newly constructed walls Mr. Kanaris directed the subcontractor to erect, there were open pipes to nowhere without any connections, such that when utilities were turned on, water flooded the Project" (id at ¶88). Further, Sebastian Boivin a safety and quality control manager employed by Borough at the time provided an affidavit wherein he asserts that Borough "directed the carpentry subcontractor to install sheet rock

throughout the Project despite knowing that the plumbing work had not yet been installed by the plumber" (see, Affidavit of Sebastian Boivin, ¶12 [NYSCEF Doc. No. 532]). The affidavit further states that when Mr. Boivin raised this issue with Borough, Mr. Karanis, an owner of Borough told him "that he wanted to show ownership that the Project was closer to obtaining a Temporary Certificate of Occupancy than it actually was in order to ensure that Red Hook 160 would continue funding Borough Equities/Borough Construction's payment requisitions" (id at ¶13).

Thus, specific and pointed evidence exists that Borough purposefully and willfully performed defective work. Such evidence of wilful conduct are not the "sort of errors, omissions or other deficiencies in the Work" that the parties expressly agreed in the Side Agreement would be subject to the limitation of liability provision" (Memorandum of Law in Support, page 11 [NYSCEF Doc. No. 587]). While that evidence will be tested at trial, questions of fact have been raised whether such wilful activities took place denying Borough the ability to rely upon the limitation of liability clause of the side agreement.

The Borough parties insist the court's earlier reference to "tortious conduct" on the part of Borough was clearly erroneous since there are no viable tort claims that remain against Borough. However, that passing reference did not mean to imply

the court was impermissibly converting a contract claim into a tort claim (see, Sommer, supra). Rather, the court was merely pointing out the allegations of improper conduct that can generally be termed 'tortious' (see, Black's Law Dictionary 1717 [10th ed. 2014] defining a tort as a "civil wrong ... for which a remedy may be obtained"). Therefore, the motion seeking to reargue the denial of summary judgement is denied.

Turning to the motion to reargue a decision concerning damages, the Borough parties argue the court erred in failing to consider whether Red Hook 160 adequately presented evidence concerning damages sufficient to satisfy any fraud claim. In the prior motion seeking summary judgement the Borough parties raised three reasons why the fraud claim required dismissal. Those reasons were there was no evidence of any reliance on any misrepresentations, Red Hook 160 could not verify which manpower logs were falsified and lastly that any fraud claim is already contained within a breach of contract claim (see, Memorandum of Law in Support, pages 12-17 [NYSCEF Doc. No. 525]). While the Statement of Material Facts submitted by Borough did assert that "it is impossible to figure out on which days there were not as many workers on the Project site as had been indicated or otherwise quantify any purportedly inflated labor costs charged by BCG to Owner" (see, Statement of Material Facts ¶135 [NYSCEF Doc. No. 526]) to the extent that allegation is different than

the verification argument noted above, no such argument was made in this regard. In any event, on April 5, 2022 this court rendered a decision and specifically noted that any calculation of damages must await expert disclosure (see, Decision and Order, page 9 [NYSCEF Doc. No. 494]). The motion filed prior to the conclusion of such expert disclosure forecloses the dismissal of the fraud claim. Therefore, the motion seeking to reargue the denial of the dismissal of the fraud claim is denied.


Thus, the motion seeking reargument is denied.

To further streamline the continuation of this case all parties must obtain prior court permission before filing any further motions.

So ordered.

ENTER:

DATED: January 20, 2023
Brooklyn, NY



Hon. Leon Ruchelsman
JSC