SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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PIZZAROTTI, LLC,

Plaintiff,

- v -

FPG MAIDEN LANE, LLC, FORTIS PROPERTY GROUP, LLC, FIDELITY & DEPOSIT COMPANY OF MARYLAND, and ZURICH AMERICAN INSURANCE COMPANY,

Defendants.

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INDEX NO. 651697/2019

MOTION DATE

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 272, 275, 321, 323, 324, 325, 326, 327, 328, 329, 330, 332

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

In motion sequence 007, counterclaim and third-party defendants Fidelity and Deposit Company of Maryland (Fidelity) and Zurich American Insurance Company (Zurich) (together, Sureties) move, pursuant to CPLR 3212, for summary judgment dismissing the counterclaim of FPG Maiden Lane, LLC (FPG) and Fortis Property Group, LLC (Fortis Group) (together, Fortis) for breach of a performance bond as well as the third-party claim of Bank Leumi USA (Bank Leumi) for breach of a performance bond.

A detailed background is set forth in this court's decision and order on plaintiff Pizzarotti, LLC's (Pizzarotti) motion for summary judgment (NYSCEF 334, Decision and Order [mot. seq. no. 006]) and will only be repeated here where necessary.

Discussion

Legal Standard

Under CPLR 3212, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted].) Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted. (*See Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) "[S]ummary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just." (CPLR 3212 [e].)

Hiring Ray Builders Inc.

The Sureties argue that Fortis materially breached the Performance Bond[1] by hiring nonparty Ray Builders Inc. (Ray Builders) to replace Pizzarotti prior to the Sureties exercising their rights under Section 5 of the Performance Bond.

Section 5 of the Performance Bond provides the Sureties with four options upon a declaration of default and termination of the AIA standard form of agreement between owner and construction manager (Agreement)[2] – (1) with FPG's consent, arrange for Pizzarotti to complete its obligations under the Agreement, (2) perform and complete

[1] On February 4, 2016, the Sureties issued a performance bond for $78,500,000, naming plaintiff Pizzarotti as Principal and FPG, Fortis, and intervenor/third-party plaintiff Bank Leumi as Obligees. (NYSCEF 325, Performance Bond [fully executed].)

[2] On December 2, 2015, FPG, as owner of 161 Maiden Lane, and Pizzarotti, as construction manager, entered into the Agreement. (NYSCEF 245, Agreement.)

the Agreement themselves, (3) "obtain bids or negotiated proposals from qualified contractors acceptable to [FPG]" for completion of the Agreement and "arrange for a contract to be prepared for execution by [FPG] and a contractor selected with the [FPG's] concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the [Agreement], and pay to [FPG] the amount of damages as described in Section 7 in excess of the Balance of the Contract Price incurred by [FPG] as a result of the Contractor Default;" or (4) waive their "right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances: [i] After investigation, determine the amount for which it may be liable to [FPG] and, as soon as practicable after the amount is determined, make payment to [FPG]; or [ii] Deny liability in whole or in part and notify [FPG], citing the reasons for denial." (NYSCEF 325, Performance Bond at 2 [Section 5].) If the Sureties do not proceed in accordance with Section 5 with "reasonable promptness," then they are deemed in default "seven days seven days after receipt of an additional written notice from the Owner to the Surety demanding that the Surety perform its obligations under this Bond, and the Owner shall be entitled to enforce any remedy available to the Owner." (*Id*. [Section 6].)

On March 25, 2019, FPG sent Pizzarotti a Notice of Default. (NYSCEF 210, Notice of Default Letter.) Pizzarotti was given seven days to cure its alleged breaches; otherwise, FPG would terminate the Agreement for cause on April 2, 2019. (*Id*. at 2.) The Notice of Default states that "[b]y copy of this notice to the Surety, pursuant to Section 3.3 of the Bond, Owner agrees to pay the Balance of the Contract Price to the Surety or to a contractor selected to perform the Construction Contract." (*Id*.)

On April 2, 2019, Fortis Group, on behalf of FPG, sent a notice of termination to Pizzarotti. (NYSCEF 211, Notice of Termination.) On that same day, Fortis Group also advised the Sureties that FPG terminated the Agreement and inquired which of the four options under Section 5 of the Performance Bond the Sureties planned to exercise. (NYSCEF 212, Performance Bond Demand.) On April 3, 2019, FPG entered into an AIA standard form of agreement between owner and construction manager with Ray Builders.

"Surety bonds--like all contracts--are to be construed in accordance with their terms." (*Walter Concrete Constr. Corp. v Lederle Labs*., 99 NY2d 603, 605 [2003].) "A party who actively interferes with the performance of a contract may not then recover damages or benefit by its own actions." (*Socy. of Survivors of Riga Ghetto, Inc. v Huttenbach*, 141 Misc 2d 921, 927-928 [Sup Ct, NY County 1988] [citations omitted].)

"[W]here an obligee … deprives a surety of its ability to protect itself with options contained in a performance bond, there is a material breach of the bond that renders it null and void." (*Bovis Lend Lease (LMB) Inc. v Lower Manhattan Dev. Corp.*, 2015 NY Slip Op 30631[U], *9 [Sup Ct, NY County 2015] [citation omitted], *aff by, in part, mod by, in part, Bovis Lend Lease (LMB) Inc. v Lower Manhattan Dev. Corp*., 143 AD3d 597, 598 [1st Dept 2016] [modifying lower court's dismissal of obligee's claim against the surety because the prime contract, which was incorporated into the bond, required prior written approval of the obligee and the Lower Manhattan Development Corporation for any replacement subcontractor, which the surety failed to secure]; *see also Tishman Westwide Constr. LLC v ASF Glass, Inc*., 33 AD3d 539, 540 [1st Dept 2006] [discharging surety "from its liability on its surety bond because plaintiff materially

breached its contractual duties to [the surety] by failing to provide [the surety] with the opportunity to exercise its options under paragraph 4 of the bond"].)

The Performance Bond clearly provides that, once Fortis satisfies the conditions of Section 3,[3] the Sureties shall promptly act on one of the four options listed in Section 5. (NYSCEF 325, Performance Bond at 2 [Section 5 – "When the Owner has satisfied the conditions of Section 3, the Surety shall promptly and at the Surety's expense take one of the following actions… ."].) However, only one day after terminating Pizzarotti, and inquiring which of the four options the Sureties planned to exercise, Fortis entered into an agreement with Ray Builders to replace Pizzarotti, effectively stripping the Sureties of their rights under the Performance Bond and altering the terms of such. Specifically, Fortis' action of hiring a new contractor deprived the Sureties of their right to exercise one of the performance options as provided for in Section; thus, rendering the Performance Bond null and void. (*120 Greenwich Dev. Assoc., LLC v Reliance Ins. Co*., 2004 US Dist LEXIS 10514, at *26 [SDNY June 7, 2004] [internal quotation marks and citation omitted] [stating that "courts have consistently held that an obligee's action that deprives a surety of its ability to protect itself pursuant to performance options granted under a performance bond constitutes a material breach, which renders the bond null and void"].)

Fortis asserts that hiring Ray Builders prior to the Sureties exercising their options under Section 5 did not absolve the Sureties of their obligations under the Performance Bond. Fortis also argues that their action was not a per se violation of the

[3] The court assumes Fortis satisfied the conditions of Section 3 and makes no findings as such need not be addressed for the purposes of this decision.

Performance Bond. The court disagrees. Hiring a replacement contractor, whether before or after Pizzarotti's termination,[4] ultimately stripped the Sureties of their rights, especially where the replacement was hired just one day after Pizzarotti's termination. By hiring Ray Builders, Fortis essentially stepped into the Sureties' shoes and made the decision for them as to how to proceed with completion of the project. This was not the proper course of action pursuant to the terms of the Performance Bond. As previously stated, pursuant to Section 5, the Sureties were obligated to promptly select one of the options; however, they did not even have 24 hours to make such a decision before that decision was essentially made for them by Fortis. (NYSCEF 325, Performance Bond at 2 [Section 5 – "When the Owner has satisfied the conditions of Section 3, the Surety shall promptly and at the Surety's expense take one of the following actions… ."].)

Further, *In re Liquidation of Union Indem. Ins. Co.*, 234 AD2d 120 (1st Dept 1996), relied on by Fortis, is distinguishable. In *Liquidation*, obligee, pursuant to the subcontract, which was incorporated into the bond, could "'employ any other person or persons to finish the work.'" (*Id*. at 121.) The bond in *Liquidation* also did not provide the surety with a right to exercise options when there was a default like Section 5 in the Performance Bond. (NYSCEF 328, *Liquidation* Bond.)

Mitigating Damages

[4] Fortis advances the argument that the timing of Ray Builders' hiring distinguishes this case from the case law relied on by the Sureties. The court rejects this argument as entering into the agreement with Ray Builders one day after Pizzarotti's termination did not provide the Sureties with a reasonable time to act pursuant to Section 5. If such hiring happened weeks after the termination of Pizzarotti, without the Sureties taking any steps pursuant to Section 5, that would present a significantly different situation. The Performance Bond requires the Sureties to promptly act; Fortis giving the Sureties 24 hours or less before hiring a replacement themselves is unreasonable.

Fortis argues that, by hiring Ray Builders, they were mitigating potential damages and did not deprive the Sureties of their rights under the Performance Bond.

> "However, there is no such thing as 'pre-breach' mitigation. Only after a contract has been breached does a duty to mitigate damages arise. Once a party has reason to know that performance by the other party will not be forthcoming, he is ordinarily expected to stop his own performance to avoid further expenditure. The injured party is expected to arrange a substitute transaction within a reasonable time after he learns of the breach. Under New York law, the party that is injured by a breach of contract has the duty of making reasonable exertions to minimize the injury. As this Court has previously emphasized, this duty only arises after the purported breach has occurred." (*Bank of NY Mellon Trust Co. v Morgan Stanley Mtge. Capital, Inc.*, 2017 US Dist LEXIS 20788, at *2-3 [SDNY Feb. 10, 2017] [internal quotation marks and citations omitted].)

When Fortis entered into the agreement with Ray Builders, the Sureties were not in breach of the Performance Bond. "[M]itigation touches on damages rather than liability." (*City of NY v R.A.M Used Auto Parts, Inc*., 43 Misc 3d 1205[A], 1205A, 2014 NY Slip Op 50503[U], *9 [Sup Ct, NY County 2014].) Here, Fortis is trying to use mitigation to excuse their compliance with the terms of the Performance Bond. This is misplaced. Mitigation imposes a duty on an injured party to make a reasonable effort to minimize damages from breach. (*Prudential Ins. Co. v Dewey Ballantine*, 170 AD2d 108, 115 [1st Dept 1991].) It does relieve a party from its contractual obligations especially when the other party has not breached.

In support of their position, Fortis relies on *United States Fid. & Guar. Co. v Braspetro Oil Servs. Co*., 369 F3d 34, 58 (2d Cir 2004), where the Second Circuit held that there was no error in the District Court's finding "that the Obligees had a duty to mitigate their damages … given the exorbitant expense that moving the platforms would have represented." The Second Circuit reasoned that "this case is plainly distinguishable from those in which a court released a surety on the grounds that the

obligee-owner simply 'allowed' the defaulting contractor to remain on the job to finish the contract." (*Id.*)

Braspetro is distinguishable as there was a delay of several months before declaring a default due to the parties' attempts to reach a resolution and the sureties. The District Court determined that if, the contractor did not continue to perform, any contractual damages would be increased; thus, the contractor's continued performance under the contract would mitigate damages. (*United States Fid. & Guar. Co. v Braspetro Oil Servs. Co*., 219 F Supp 2d 403, 451 [SDNY 2002].) The District Court noted, that "in the circumstances of this case, there continued to be an obligation to perform to mitigate damages." (*Id*.) This is not the case here. There was no significant delay requiring the immediate hiring of Ray Builders without giving the Sureties a reasonable time frame to exercise their option pursuant to Section 5. The court also notes that, in *Braspetro,* the sureties "elected to conduct an investigation of the P-19 Bond, thereby waiving, in accordance with P 4.4 of the Bond, their rights to perform and complete, arrange for completion or obtain a new contractor." (*Id.* at 450.)

Finally, Fortis argues that, while Ray Builders started working on April 3, 2019, Fortis and Ray Builders did not finalize or execute their agreement until May 1, 2019, giving the Sureties an opportunity to exercise their options while mitigating damages. The agreement clearly states that it was "made" on April 3, 2019, work commenced the date of the agreement, April 3, 2019, and the Contract Time was measured from April 3, 2019, with substantial completion by December 31, 2019. (NYSCEF 238, Ray Builders Agreement.) The only document dated May 1, 2019 is a separate indemnity agreement annexed as Exhibit B to the AIA agreement. (*Id.* at 62.)

All remaining arguments have been considered and do not alter the court's determination.

Accordingly, it is

ORDERED that the motion of Fidelity and Deposit Company of Maryland and Zurich American Insurance Company for summary judgment dismissing the counterclaim of FPG Maiden Lane, LLC and Fortis Property Group, LLC for breach of a performance bond as well as the third-party claim of Bank Leumi USA for breach of a performance bond is granted and those claims are dismissed in their entirety as against said defendant, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendants; and it is further

ORDERED that the action is severed and continued against the remaining parties; and it is further

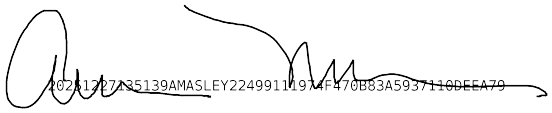
ORDERED that the caption be amended to reflect the dismissal of Fidelity and Deposit Company of Maryland and Zurich American Insurance Company and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the

Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases

(accessible at the “E-Filing” page on the court’s website)].



12/27/2025
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**		X	**NON-FINAL DISPOSITION**		
	X	**GRANTED**	**DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**