

FPG CH 94 Amity, LLC v Pizzarotti LLC

2026 NY Slip Op 30289(U)

January 23, 2026

Supreme Court, Kings County

Docket Number: Index No. 512149/2019

Judge: Reginald A. Boddie

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At an IAS Commercial Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 23rd day of January 2026.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

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FPG CH 94 AMITY, LLC,

Plaintiff,

Index No. 512149/2019

-against-

MS 26

Decision and Order

PIZZAROTTI LLC,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

MS 26

497-515, 525-539

Defendant’s motion for summary judgment is decided as follows:

Background

This action arises out of the construction of eight residential townhomes at 88-98 Amity Street in Brooklyn, New York (the “Project”) and two related agreements between plaintiff FPG CH 94 Amity, LLC (“FPG”) and defendant Pizzarotti, LLC (“Pizzarotti”): a February 15, 2016 Construction Management Agreement (the “CMA”) under which Pizzarotti provided construction management services, and a January 25, 2019 Letter Agreement (the “Letter Agreement”) resolving disputes between the parties and shifting completion responsibilities to a replacement construction manager, Busa Builders, LLC (“Busa”), in exchange for Pizzarotti paying FPG

\$3,859,696.78 in four installments and FPG, among other things, waiving various claims except for limited carve-outs.

Pizzarotti now moves for summary judgment dismissing all claims in the Second Amended Complaint and for summary judgment on its counterclaim for retainage allegedly exceeding \$1.2 million. Pizzarotti argues that FPG cannot establish any breach of the Letter Agreement because Busa was solely responsible for post-agreement construction and the Letter Agreement expressly disclaimed Pizzarotti's liability for Busa's performance. Pizzarotti further contends that FPG lacks admissible proof of causation or damages; that FPG's CMA and maintenance-bond claims are barred by its failure to provide the contractually required notice and opportunity to cure; that the Letter Agreement released nearly all CMA claims except for limited pre-Letter Agreement issues; that consequential damages were waived and are speculative; and that, having paid the full amount due under the Letter Agreement, Pizzarotti is entitled to payment of all retainage held as of the Letter Agreement date.

In opposition, FPG argues that Pizzarotti materially breached both the CMA and the Letter Agreement by performing extensive defective and nonconforming work, failing to timely complete the Project, failing to provide required supervisory personnel, and failing to furnish the \$5 million maintenance bond, resulting in substantial repair, delay, carrying-cost, and lost-profit damages. FPG contends that CMA Section 12.2.2 is not an exclusive remedy and does not bar its damages claims, particularly where Pizzarotti was terminated before substantial completion and had long been on notice of defects. FPG further asserts that the Letter Agreement preserves claims for pre-Letter Agreement work and for breaches of the Letter Agreement, does not clearly waive consequential damages, and that its damages were foreseeable in light of the time-of-the-essence nature of the Project and the parties' expectation that the townhouses would be sold. FPG also

argues that retainages belonged to subcontractors, were assumed and paid by FPG after termination, and in any event are not owed because Pizzarotti failed to comply with the Letter Agreement.

In reply, Pizzarotti maintains that the Letter Agreement unambiguously transferred all post-agreement construction responsibility to Busa and forecloses any claim of breach, causation, or damages against Pizzarotti. Pizzarotti further argues that any remaining CMA or warranty claims are barred by FPG's failure to provide written notice and an opportunity to cure, that the maintenance-bond obligation never arose for the same reason, that the Letter Agreement released nearly all CMA obligations, and that FPG's damages claims are speculative and barred by the consequential-damages waiver. Pizzarotti asserts that FPG is contractually required to pay approximately \$1.2 million in retainage under the CMA and Letter Agreement and that no extrinsic evidence can defeat those unambiguous payment obligations.

Discussion

It is well established that summary judgment is granted when “the proponent makes 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, and the opponent fails to rebut that showing” (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010] [citation omitted]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). Upon a motion for summary judgment, the court's function is one of issue finding rather than issue determination (*Sillman v Twentieth Century-Fox Film*

Corp., 3 NY2d 395, 404 [1957]). “It is not the function of a court . . . to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012] [citation omitted]).

The New York Court of Appeals has “repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [citations omitted]). Although “the facts must be viewed in the light most favorable to the non-moving party . . . bald, conclusory assertions or speculation and [a] shadowy semblance of an issue are insufficient to defeat summary judgment” (*Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016] [citations and internal quotation marks omitted]).

The Letter Agreement

Here, defendant has met its prima facie burden of establishing that plaintiff’s claims premised upon defendant’s alleged failure to supervise or manage construction after execution of the Letter Agreement fail as a matter of law. The Letter Agreement unambiguously provides that Busa “shall act as the construction manager” and “shall direct the performance of the Subcontractors,” and further expressly states that Pizzarotti “shall not be responsible for Busa’s performance or omission to perform.” It is well settled that “it is a basic contract principle that when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms” (*TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 512-13 [2008] [citations and internal quotation marks omitted]). Thus, plaintiff’s reliance on extrinsic evidence

to expand and contradict the unambiguous language of the Letter Agreement is unavailing. Accordingly, to the extent plaintiff's claims are based upon alleged deficiencies in post-Letter Agreement construction management or Busa's performance, summary judgment is granted dismissing those claims.

Defendant is not, however, entitled to summary judgment dismissing plaintiff's claims concerning defective work performed prior to January 25, 2019. Paragraph 5 of the Letter Agreement expressly preserves "the Construction Manager's responsibility under the CMA for the Work performed prior to the date hereof." This language constitutes a clear and unambiguous carve-out from the general release and must be enforced according to its terms. Accordingly, the branch of defendant's motion seeking dismissal of plaintiff's CMA-based claims for defective work performed prior to execution of the Letter Agreement is denied.

As to plaintiff's claims for consequential damages, triable issues of fact exist as to whether there was a meeting of the minds concerning the scope of the consequential damages waiver contained in Paragraph 5 of the Letter Agreement, which provides:

"Other than with respect to the obligations contained in this letter, and the Construction Manager's responsibility under the CMA for the Work performed prior to the date hereof, the parties hereto waive and release all claims against each other arising out of or connected to the performance of the CMA or any other agreement (written, verbal or otherwise) the parties have or may have related to the referenced project, including but not limited to any delay claims, liquidated damages or other special or consequential damages associated therewith."

Paragraph 5 expressly waives "delay claims, liquidated damages or other special or consequential damages." However, the same paragraph contains the carve-out preserving Pizzarotti's "responsibility under the CMA for the Work performed prior to the date hereof," which creates ambiguity as to whether the carve-out preserves only liability for the pre-Letter Agreement work itself, or also preserves consequential damages arising from such work. Plaintiff contends

such waiver “does not bar, much less clearly and unequivocally, recovery of consequential damages for claims relating to Work performed prior to the date of the Letter Agreement or to claims arising under the Letter Agreement,” while defendant asserts that plaintiff waived “all claims for consequential damages under the LA and the CMA.”

It is well settled that “the law disfavors agreements purporting to limit liability by excluding consequential damages and insists that any such limitation be expressed clearly and unequivocally” (*Molina v Games Mgt. Services*, 89 AD2d 69, 71-72 [2d Dept 1982], *affd*, 58 NY2d 523 [1983] [citation omitted]). Accordingly, as the consequential-damages waiver language in Paragraph 5 is not clear and unequivocal, the branch of defendant’s motion seeking dismissal of plaintiff’s consequential-damages claims is denied.

Notice and Opportunity to Cure

Defendant’s contention that it is entitled to summary judgment on plaintiff’s claims for breach of the CMA, breach of the Letter agreement, and claim for a maintenance bond because plaintiff “failed to provide Pizzarotti with the required notice and an opportunity to cure” pursuant to Section 12.2.2 of the CMA is unavailing.

Section 12.2.2 expressly provides that the contractor’s one-year correction obligation is “[i]n addition to” the contractor’s obligations under Section 3.5, pursuant to which Pizzarotti warranted that its work would “conform to the requirements of the Contract Documents and will be free from defects.” Further, Section 12.2.5 of the CMA expressly states that the correction period “relates only to the specific obligation of the Contractor to correct the Work” and does not limit or waive other contractual remedies. Accordingly, the notice and cure provisions of Section 12.2.2 apply solely to Pizzarotti’s obligation to return to the project and correct nonconforming

work, and do not operate as a condition precedent to claims seeking damages for defective or nonconforming performance as Pizzarotti asserts.

Here, the Second Amended Complaint does not seek an order compelling defendant to return to the Project to perform corrective work, as Pizzarotti was terminated as construction manager in 2019 and replaced by Busa. Plaintiff instead seeks monetary damages for defendant's alleged breach of its obligations under the CMA. Moreover, the record reflects that defendant had actual notice of numerous alleged defects and deficiencies prior to its termination, including those identified in plaintiff's termination notice and during subsequent site walk-throughs. Defendant has not established, as a matter of law, which specific alleged defects required written notice under Section 12.2.2 or that plaintiff failed to provide such notice.

Accordingly, the branch of defendant's motion seeking summary judgment dismissing plaintiff's claims based on an alleged failure to provide notice and an opportunity to cure is denied.

Retainage and Maintenance Bond

Section 5.4.1 of the CMA provides that "[e]ach subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner ... provided that assignment is effective only after termination of the Contract by the Owner for cause," and that "[w]hen the Owner accepts the assignment of a subcontract agreement, the Owner assumes the Contractor's rights and obligations under the subcontract." Here, plaintiff assumed the subcontracts upon defendant's termination.

As to the maintenance bond, the Letter Agreement expressly conditions plaintiff's payment obligations on defendant's "compliance with the terms of this letter," and Paragraph 4 specifically requires "the substitution of the payment and performance bond" of a \$5 million maintenance bond upon payment of the final installment. Defendant has not established, as a matter of law, that its obligation to furnish the maintenance bond under the Letter Agreement was independent of

plaintiff's obligation to release the retainage to defendant rather than to the subcontractors pursuant to the CMA, or that plaintiff was required to pay retainage to Pizzarotti regardless of whether Pizzarotti complied with the maintenance bond requirement.

Moreover, the Appellate Division has affirmed this Court's denial of plaintiff's motion for summary judgment, holding that:

"the plaintiff failed to demonstrate its prima facie entitlement to judgment as a matter of law, as its submissions did not eliminate triable issues of fact as to whether the plaintiff's failure to pay retainages to Pizzarotti constituted a breach of the letter agreement, and whether that alleged breach excused Pizzarotti's obligation to provide a maintenance bond." (*FPG CH 94 Amity, LLC v Pizzarotti, LLC*, 218 AD3d 654, 656 [2d Dept 2023]).

Here, defendant has similarly failed to eliminate those factual issues on this motion. Accordingly, defendant has not demonstrated its prima facie entitlement to judgment as a matter of law on its retainage counterclaim or with respect to compliance with the maintenance bond provisions of the Letter Agreement, and that branch of its motion is denied.

Conclusion

Based on the foregoing, defendant's motion for summary judgment is granted to the extent that plaintiff's claims based upon alleged deficiencies in Pizzarotti's post-Letter Agreement for construction management or Busa's performance are hereby dismissed. The remainder of defendant's motion is denied. Any argument not explicitly addressed herein was considered and deemed to be without merit or unnecessary to address given the court's determination.

ENTER:



Honorable Reginald A. Boddie
Justice, Supreme Court