Pizzarotti, LLC v FPG Maiden Lane, LLC
2025 NY Slip Op 33924(U)
October 10, 2025
Supreme Court, New York County
Docket Number: Index No. 651697/2019
Judge: Andrea Masley

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

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PIZZAROTTI, LLC, Plaintiff,	INDEX NO.	651697/2019
- v -	MOTION DATE	
FPG MAIDEN LANE, LLC, FORTIS PROPERTY GROUP, LLC, FIDELITY & DEPOSIT COMPANY OF MARYLAND, and ZURICH AMERICAN INSURANCE COMPANY, Defendants.	MOTION SEQ. NO.	006

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 273, 274, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 322, 331, 333
were read on this motion to/for JUDGMENT - SUMMARY.

In motion sequence 006, plaintiff Pizzarotti, LLC (Pizzarotti) moves, pursuant to CPLR 3212, for partial summary judgment (i) dismissing the first counterclaim of defendants/counterclaim plaintiffs FPG Maiden Lane, LLC (FPG) and Fortis Property Group, LLC (Fortis) and (ii) on Pizzarotti's seventh cause of action for wrongful termination as to liability only.

Background

This action arises from the construction project at 161 Maiden Lane, New York, New York (Site). On December 2, 2015, FPG, as owner of 161 Maiden Lane, and Pizzarotti, as construction manager, entered into the AIA standard form of agreement between owner and construction manager (Agreement). (NYSCEF 245, Agreement.)

The Agreement identifies Fortis as FPG's designated representative. (*Id*. at 2[1].) Pizzarotti was responsible for "the construction of a reinforced concrete mat and 58-story superstructure" at the Site. (NYSCEF 319, FPG and Fortis' Response to Sureties' Rule 19a Statement ¶ 4 [undisputed]; *see generally* NYSCEF 245, Agreement.) On February 4, 2016, the Sureties issued a performance bond for $78,500,000.00, naming Pizzarotti as Principal and FPG, Fortis, and intervenor/third-party plaintiff Bank Leumi, USA (Bank Leumi) as Obligees. (NYSCEF 209, Performance Bond[2].)

On March 25, 2019, FPG sent Pizzarotti a Notice of Default, stating that Pizzarotti was

> "in default due to its material breaches, including, without limitation, as follows: (1) [Pizzarotti's] failure to conform to the Construction Contract Schedule, (2) [Pizzarotti's] refusal and failure to supply enough properly skilled workers or proper materials, (3) [Pizzarotti's] failure to make payments to subcontractors for materials or labor in accordance with [Pizzarotti's] respective agreements, (4) [Pizzarotti's] failure to properly coordinate the work of its subcontractors, (5) [Pizzarotti's] failure to properly oversee, supervise, coordinate, manage and staff the Project, (6) [Pizzarotti's] failure to buy-out the required trades on a timely basis, and (7) [Pizzarotti] disregarding laws, rules and regulations, including numerous site safety violations by [Pizzarotti] and its subcontractors." (NYSCEF 210, Notice of Default Letter at 1-2.)

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.) FPG noted

[1] NYSCEF pagination will be used throughout this decision.
[2] FPG and Fortis challenge the Performance Bond submitted, arguing that the exhibit "is signed only by Zurich" and "not signed by the other parties to the Bond, including either Pizzarotti, Fortis, or Bank Leumi." (NYSCEF 319, FPG and Fortis' Response to Sureties' Rule 19a Statement ¶ 5 [Response].) However, the court notes that FPG's default notice to Pizzarotti refers to this Performance Bond. (NYSCEF 210, Notice of Default Letter.)

that it provided "the seven (7) day notice simply because the Construction Contract requires it, but notes that, under the present circumstances, [FPG] maintains it will be impossible for [Pizzarotti] to fully to cure its myriad material breaches." (*Id*.) FPG stated that, in compliance with Section 3.3 of the Performance Bond, it agreed to pay the Sureties or a new contractor the remaining balance of the contract price. (*Id*.) On April 2, 2029, Fortis, on behalf of FPG, sent a notice to Pizzarotti informing Pizzarotti that FPG was exercising its right to terminate the Agreement and that it was no longer permitted access to the Site. (NYSCEF 211, Notice of Termination.)

On April 2, 2019, Fortis also advised the Sureties that FPG terminated the Agreement and inquired which of the four actions under Section 5 of the Performance Bond the Sureties planned to take.[3] (NYSCEF 212, Performance Bond Demand.) On April 3, 2019, FPG entered into the AIA standard form of

[3] Section 5 of the Performance Bond provides the Sureties with four options when the FPG declares Pizzarotti in default and terminates the Agreement – (1) with FPG's consent, arrange for Pizzarotti to complete its obligations under the Agreement, (2) perform and complete 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 [FP'G'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) the Sureties 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 209, Performance Bond at 2 [Section 5].)

agreement between owner and construction manager with nonparty Ray Builders Inc., replacing Pizzarotti.

In a May 7, 2019 letter to FPG and Fortis, the Sureties refer to an April 5, 2019 letter sent by the Sureties to FPG

> "requesting 'in detail the specific acts or omissions that Fortis claims support its termination of Pizzarotti ... and provide documentation supporting Fortis' position with respect to each claimed breach of the contract by Pizzarotti if there is such documentation that Fortis relies upon beyond that transmitted by Fortis on March 29, 2019.' The Sureties' letter further advised that 'the failure to supply additional documentation will be taken as an admission that you have provided the totality of the documentation supporting Fortis' claims.' In addition, based upon news reports that FPG had already proceeded to retain a replacement contractor, 'Ray's Builders,' Zurich requested information regarding the contractual relationship of Ray Builders to the Project, FPG and subcontractors along with correspondence between FPG and subcontractors regarding the termination of Pizzarotti and/or the role of Ray Builders in the Project." (NYSCEF 213, May 7, 2019 Sureties Letter at 4 [May 7th Letter].)

The May 7th Letter also refers to FPG's April 18, 2019 response, in which FPG asserted that it was not required "to provide further documents because it did not have an obligation under the Bond to 'lay bare its entire case' and that FPG's "PowerPoint presentation at the March 5, 2019 Section 3.1 conference provided information regarding the seven general categories of default." (*Id*.) In the May 7th Letter, the Sureties assert FPG's failure to provide the requested documentation, required the Sureties to rely solely on the documents submitted, and based on those submissions, the Sureties concluded that their obligations under the Performance Bond were discharged. (*Id*. at 5.) Specifically, the Sureties concluded "that there has been a cardinal change to the Construction Contract, as well as one or more material modifications to the Construction Contract, resulting in the release of the Sureties' obligations under the Bond." (*Id.*) The May 7th Letter further provides that

> "[t]he Sureties' investigation reveals that the building under construction has a significant lean, as well as deformity of shape that has created a curvature, which has significantly impacted not only the installation of the curtain wall system (requiring what appears to be a significant re-design), but also will impact all systems in the building that rely upon or are affected by 'verticality.' As discussed below, based on the information available to date, the Sureties conclude that the lean and deformity have developed through no fault, by act or by omission, of Pizzarotti. But even if FPG's arguments placing blame on Pizzarotti for these conditions were correct, they result in responsibility on the part of FPG, not the Sureties." (*Id.*)

The Sureties also concluded that their obligations only arise if there is no "Owner Default" and FPG's failure "to provide plans and specifications," "failure to make payment for contract and extra work," "interference with Pizzarotti's performance of its contract; termination of Pizzarotti without satisfying the contractual requirements for termination," and "wrongful termination of Pizzarotti on substantive grounds" all qualify as "Owner Defaults." (*Id.* at 9.)

On March 22, 2019, Pizzarotti filed this action seeking (1) a declaratory judgment that Pizzarotti properly terminated the Agreement without further obligation; (2) to enjoin FPG and Fortis from continuing work at the Site until a safe re-design provided; (3) damages for payments due under the Agreement; (4) fair compensation for additional and extra work; and (5) damages for breach of contract caused by the interference of FPG and Fortis with Pizzarotti's performance, relationships, operations and maintaining its planned schedule for completion causing increased costs. (NYSCEF 2, Complaint.) On May 10, 2019, FPG and Fortis filed a summons joining the Sureties as "counterclaim defendants." (NYSCEF 70, Counterclaim Summons.) FPG and Fortis also filed an answer in which it asserted counterclaims for breach of the Agreement (against Pizzarotti), breach of the Performance Bond (against the Sureties), and willful exaggeration of a mechanic's lien (against Pizzarotti). (NYSCEF 69, Answer with Counterclaims.)

On May 30, 2019, Pizzarotti filed an amended complaint, adding two additional causes of action for a judgment of foreclosure on its lien for $33,837,618.34 and wrongful termination. (NYSCEF 73, Amended Complaint). It also amended its second cause of action seeking a permanent injunction to add that Pizzarotti be indemnified and held harmless. (*Id.* ¶ 45.) In September 2019, the parties stipulated to permit Bank Leumi to intervene as an intervenor/third-party plaintiff, asserting a claim for breach of the Performance Bond against the Sureties. (NYCSEF 138, Proposed Stipulation and Third-Party Complaint.)

Pizzarotti now moves to dismiss FPG's and Fortis' counterclaim for breach of the Agreement and for judgment on liability only on Pizzarotti's claim for wrongful termination. The Sureties move for summary judgment in their favor, dismissing FPG's, Fortis' and Bank Leumi's claims for breach of the Performance Bond.

Discussion

<u>Legal Standard</u>

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].)

Motion Seq. No. 006 – Pizzarotti's Motion for Partial Summary Judgment

Notice and Opportunity to Cure

Pizzarotti asserts that its termination was wrongful as FPG did not comply with the conditions precedent in Section 14.2.2 of the Agreement. Section 14.2.2 provides,

> "When any of the above reasons exist,[[4]] the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, provided the Contractor does not cure the subject of such notice within such seven (7) days, terminate employment of the Contractor and may, subject to any prior rights of the surety:
>
> 1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
>
> 2 Accept assignment of subcontracts pursuant to Section 5.4; and
>
> 3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to

[4] The reasons are contained in Section 14.2.1, which provides "The Owner may terminate the Contract if the Contractor
1 refuses or fails to supply enough properly skilled workers or proper materials;
2 fails to conform to Contract Schedule;
3 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
4 disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or
5 otherwise is guilty of a material breach of a provision of the Contract Documents." (NYSCEF 245, Agreement at 59.)

> the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work." (NYSCEF 245, Agreement at 59.[5])

First, Pizzarotti asserts that it was not provided with a meaningful opportunity to cure. In support of its argument, Pizzarotti submits evidence that FPG was taking active steps, as far back as February 2019, to replace Pizzarotti with Ray Builders. (*See* NYSCEF 250, Fortis Email to Ray Builders ["Its preferred that you pull the permit under ray builders"]; NYSCEF 267 tr at 418:14-21 [Landau[6] Depo] ["Q. Do you know what GC change was being contemplated, if any, in February of 2019? A. It appears that this is somehow related to potentially putting Ray Builders in place at the Project. Q. And that was being discussed as early as February 14, 2019, sir? A. That's what this reflects"]; NYSCEF 252, FPG Letter to NYC Dept of Buildings [March 8, 2019] [FPG "confirm[s] that …Pizzarotti has been notified and released as the Contractor of Record, and that Ray Builders Inc. … has been hired to complete the work indicated for the given application work type"]; *but see* NYSCEF 268, Agreement between FPG and Ray Builders [dated April 3, 2019].) However, Pizzarotti fails to explain how FPG's engagement with Ray Builders alone deprived Pizzarotti the opportunity to cure. For example, there is no evidence that Pizzarotti was excluded from the Site or prevented by FPG in any way from performing work during the cure period. (*Mike Bldg. & Contr., Inc. v Just Homes, LLC*, 27 Misc 3d 833, 844-845 [Sup Ct, Kings County 2010] [finding that plaintiff was not given "the opportunity to correct any deficiency in performance" where the termination letter "merely states '[p]ursuant to Section 14.2 of the contract dated July 12, 2005 … we hereby give notice of termination of your services effective

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[5] NYSCEF pagination

[6] Jonathan Landau is Fortis' Chief Executive Office. (NYSCEF 218, Landau aff ¶ 1.)

seven (7) days from the receipt of this letter. Per the contract, you are not to return to the subject premises'"].) Nor does Pizzarotti provide case supporting the proposition that hiring another contractor deprives the defaulting contractor the opportunity to cure. Accordingly, Pizzarotti has failed to make a prima facie showing that it was not provided with an opportunity to cure.

Second, Pizzarotti argues that it was not apprised of the conditions it needed to cure. It asserts that the Notice of Default merely regurgitates the language of Section 14.2.1 of the Agreement which lists the causes for which FPG could terminate the Agreement. The Notice of Default provides,

> "[a]ccordingly, pursuant to Article 14.2 of the Construction Contract, Owner hereby gives notice that Contractor is in default due to its material breaches, including, without limitation, as follows: (1) Contractor's failure to conform to the Construction Contract Schedule, (2) Contractor's refusal and failure to supply enough properly skilled workers or proper materials, (3) Contractor's failure to make payments to subcontractors for materials or labor in accordance with Contractor's respective agreements, (4) Contractor's failure to properly coordinate the work of its subcontractors, (5) Contractor's failure to properly oversee, supervise, coordinate, manage and staff the Project, (6) Contractor's failure to buy-out the required trades on a timely basis, and (7) Contractor disregarding laws, rules and regulations, including numerous site safety violations by Contractor and its subcontractors." (NYSCEF 248, Notice of Default at 3.)

A notice to cure is sufficient when it informs the recipient of the condition which the other party wished to have cured. (*Chinatown Apts., Inc. v Chu Cho Lam*, 51 NY2d 786, 788 [1980].) The court agrees that this language essentially mimics the terms of the Agreement, and on its face, does not provide detail as to what exactly needed to be cured. However, FPG raises an issue of fact as to the sufficiency by submitting evidence that the parties had been discussing the conditions giving rise to the Notice of Default for several weeks prior to the issuance of the Notice of Default. (*See* NYSCEF

300, Pizzarotti Letter to Fortis [February 13, 2019]; NYSCEF 301, Fortis Letter to Pizzarotti [February 17, 2019]; NYSCEF 302, Fortis Letter to Pizzarotti [February 20, 2019]; NYSCEF 306, PowerPoint Presentation [March 5, 2019 Meeting] [addressing Pizzarotti's Failure to Perform].)

The purpose of a Notice of Default/to Cure is just that, give notice of the issues that have given rise to a default and allow for them to be cured. However, here, there is evidence that Pizzarotti was already on notice and well aware of the ongoing issues regarding its performance on the Project. "With respect to the adequacy of notice, the appropriate test is one of reasonableness in view of the attendant circumstances." (*Hughes v Lenox Hill Hosp*., 226 AD2d 4, 18 [1st Dept 1996].) Thus, it seems most appropriate for the trier of fact to determine whether the Notice of Default was lacking the requisite detail in light of the circumstances that the parties were engaged in discussions about the issues with Pizzarotti's performance for weeks prior.

FPG also raises an issue of fact as to whether Pizzarotti had abandoned the Project by the time the Notice of Default issued. "There are limited circumstances where despite being contractually required, notice to cure is not necessary, such as where the other party expressly repudiates the contract or abandons performance." (*E. Empire Constr. Inc. v Borough Constr. Group LLC*, 200 AD3d 1, 6 [1st Dept 2021] [citations omitted]; *Point Prods. A.G. v Sony Music Entertainment, Inc*., 2000 US Dist LEXIS 10066, at *12 [SDNY July 19, 2000] ["Providing notice and cure is not required where it would be futile, however," including where the contract has been abandoned. (citation omitted)].)

Third, Pizzarotti asserts that the architect certificate was merely a letter written to FPG which gives no specifics, and thus, is insufficient. Section 14.2.2 requires "certification by the Architect that sufficient cause exists to justify such action." (NYSCEF 245, Agreement at 59.) On March 8, 2019 the architect issued a formal letter to FPG prior to the Notice of Default stating due to Pizzarotti's material defaults, including failure to conform with the Contract Schedule and comply with laws, rules, regulations, ordinances, or orders, there was sufficient cause to terminate the Agreement. (NYSCEF 307, Architect Letter.) Pizzarotti fails to submit law supporting its position that a letter to FPG without specifics was insufficient. The Agreement does not specify who the certification needs to be addressed to and details, if any, that must be included. It simply requires a certification. Pizzarotti has made a prima facie showing that more was required, making the architect's certification insufficient.

Past Breaches

Pizzarotti asserts that FPG surrendered its right to terminate the Agreement when FPG failed to terminate the Agreement when the breaches first occurred.

> "Under the election of remedies doctrine, when one party breaches a bilateral contract, the other party must make an election between declaring a breach and terminating the contract or, alternatively, ignoring the breach and continuing to perform under the contract. On learning of the breach, the other party has a reasonable time to elect its remedy." (*Todd English Enters. LLC v Hudson Home Group, LLC*, 206 AD3d 585, 587 [1st Dept 2022] [internal quotation marks and citation omitted].)

However, Section 13.4.2 of the Agreement is a no-waiver clause stating

> "No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach there under, except as may be specifically agreed in writing." (NYSCEF 245, Agreement at 58.)

"[G]iven the agreement's no waiver clause, there is a question as to whether defendant's acceptance of earlier conduct would preclude termination based on later conduct. Although the no waiver clause may itself be waived, such a waiver will not be lightly presumed and is generally determined by the trier of fact." (*Todd English Enters. LLC*, 206 AD3d at 587 [internal quotation marks and citations omitted].) Thus, it is the trier of fact who shall determine whether FPG's acceptance of Pizzarotti's conduct precluded termination later based on that same conduct. While Pizzarotti relies on *Awards.com v Kinko's, Inc*., 42 AD3d 178, 188 (1st Dept 2007), the parties in that action "agreed that any waiver of past defaults 'shall not constitute a waiver of any future obligation to comply with such provision, condition or requirement.'" The waiver clause in the Agreement at issue in this action is much broader and is not limited to future conduct.

Accordingly, it is

ORDERED that Pizzarotti's motion for partial summary judgment is denied.

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10/10/2025
DATE

ANDREA MASLEY, J.S.C.

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