FPG CH 94 Amity, LLC v Pizzarotti LLC
2020 NY Slip Op 31917(U)
June 9, 2020
Supreme Court, Kings County
Docket Number: 512149/2019
Judge: Leon Ruchelsman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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
--x
FPG CH 94 AMITY, LLC,
Plaintiff, Decision and order

- against - Index No. 512149/2019

PIZZAROTTI LLC & FIDELITY & DEPOSIT
COMPANY OF MARYLAND,
Defendant, June 9, 2020
--x
PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §603 seeking to sever the fourth cause of action against Fidelity and Deposit Company of Maryland [hereinafter 'Fidelity'] which the court dismissed in an order dated January 2, 2020. Further, the plaintiff has moved seeking summary judgement concerning the second cause of action. The defendants oppose the motions. 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 this lawsuit as filed by the plaintiff, the owner of property located at 88-98 Amity Street in Kings County. The plaintiff entered into a contract with defendant Pizzarotti wherein Pizzarotti agreed to construct residential townhouses at the location. Pursuant to the agreement the plaintiff paid for performance and payment bonds and Pizzarotti furnished the bonds that were secured from Fidelity. The parties modified the agreement with a new Letter Agreement in an attempt to complete all the obligations under the

original agreement. The plaintiff sued for breach of contract of both the original contract and the Letter Agreement and the court denied the defendant's motion seeking to dismiss those causes of action. The court did dismiss the first count of the complaint wherein the plaintiff sought a declaratory judgement they were not required to return the payment and performance bonds. The plaintiff then served an amended complaint adding Fidelity as a party. The plaintiff also moved seeking to reargue the dismissal of the declaratory judgement claim. The court denied the plaintiff's motion to reargue and dismissed all claims against Fidelity. The plaintiff now seeks to sever the claims against Fidelity so that judgement dismissing the action against Fidelity can be entered to that an appeal can properly be filed.

Conclusions of Law

It is well settled that the decision whether to sever a case pursuant to CPLR §603 is one that rests with the sound discretion of the trial court (Rosenbaum v. Dane & Murphy Inc., 189 AD2d 760, 592 NYS2d 391 [2d Dept., 1993]). Indeed, the decision denying severance will generally not be disturbed unless the aggrieved party can demonstrate an abuse of discretion or the prejudice of a substantial right (De Congilio v. Greenman, 125 AD2d 535, 509 NYS2d 776 [2d Dept., 1986]). The purpose of severance is to "further convenience or to avoid prejudice" (CPLR

§603). In this case, the plaintiff presents essentially two arguments why severance should be granted. The first is that severance is routinely granted to permit the entry of judgement and that the plaintiff must enter judgement in order to effectuate an appeal. While that is not a *per se* improper basis seeking severance, the claims which plaintiff seeks to sever have already been dismissed and those claims are no longer viable. Thus, plaintiff seeks to sever already dismissed claims. There is scant authority whether severance can be utilized to separate claims that have already been dismissed regardless of the reason for doing so. The case of Levitt v. Incorporated Village of Sands Point, 3 AD2d 679, 159 NYS2d 5 [2d Dept., 1957] is instructive. In that case a lower court had denied a request to declare certain zoning ordinances unconstitutional and denied a motion to dismiss the first, third and fourth causes of action. The Appellate Division modified that decision in Levitt v. Incorporated Village of Sands Point, 2 AD2d 688, 152 NYS2d 711 [2d Dept., 1956] and reinstated the first cause of action. Later the lower court denied a request to sever the first cause of action from the other dismissed causes of action. The Appellate Division affirmed that denial. The court, in a brief opinion, acknowledged that the movant sought severance claiming it was "necessary in order that a prospective appeal to the Court of Appeals might be taken from that part of our order which

dismissed the third and fourth causes of action" (id). However, the Appellate Division held that since the third and fourth causes of action had been dismissed "there are no causes of action which are severable in the present state" (id, see, also, Rothman v. Holbrook Furniture Company, 38 NYS2d 806 [1st Dept., 1942] which held that "the order of severance nunc pro tunc had no validity since the action had been dismissed. Unless a motion to restore is made, no action exists to which such a motion can apply"). Thus, there is no authority presented permitting the severance of claims that are not viable.

Second, the plaintiff argues that it would be unfair to wait for judgement against Pizzarotti to then pursue an appeal against Fidelity. Plaintiff is correct they cannot be faulted for not seeking an interlocutory appeal of the August decision, nevertheless, they initiated the action against Fidelity and must accept the consequences of that decision. The plaintiff argues they did not purse an interlocutory appeal because there was no reason to do so. However, according to plaintiff that changed because "long after the August decision was rendered, F&D construed that order in support of its motion to dismiss" and that "the appellate court should also properly have that order before it as part of plaintiff's appeal of F&D's motion to dismiss" (Plaintiff's Affirmation in Reply, ¶19). This court cannot dictate the scope of any appellate review. Indeed, no

party can do that, thus it is difficult to imagine the Appellate Division will not consider any relevant information as it considers an appeal. The plaintiff seeks the judgement here just to insure the Appellate Court must consider the August decision. Thus, even if the claims were viable that is an improper basis upon which to sever an action.

Therefore, based on the foregoing the motion seeking a severance is denied.

Turning to the motion seeking summary judgement, the plaintiff seeks summary judgement on the second cause of action, namely that there are no questions of fact Pizzarotti breached the Letter Agreement. The fourth paragraph of the Letter Agreement states that "owner agrees to the substitution of the 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" (see, Letter Agreement dated January 25 2019, ¶4). Thus, paragraph 4 of the Letter Agreement requires the owner to agree to the substitution of the payment and performance bond in exchange for a maintenance bond after substantial completion of the CMA and upon the payment of the fourth and last installment as outlined in the first paragraph of the agreement. The defendant does not dispute this but argues

that prior to providing a maintenance bond the plaintiff was first required to release the payment and performance bonds and since the plaintiff never satisfied his obligations the plaintiff breached the agreement. Indeed, the defendant asserts there are three ways in which the plaintiff breached the Letter Agreement absolving them of delivering the maintenance bond. First, that plaintiff never released the $1.2 in retainage, second that the plaintiff refused to sign the acknowledgment of the letter and third that they never claimed they were entitled to the maintenance bonds.

In a prior decision the court noted that the plaintiff could amend the complaint to assert claims regarding the maintenance bonds. Thus, this motion seeking summary judgement on that very claim at this juncture is curious indeed. First, the Amended Complaint does not even allege a breach concerning the maintenance bond. The Amended Complaint asserts breaches committed by Pizzarotti "by failing to staff the project with PIZZAROTTI personnel who were critical to the completion of the work" (see, Amended Complaint ¶65), by failing "to properly advise the subcontractors of BUSA's role in the project" (see, Amended Complaint ¶66) and by "failing to properly supervise and manage the progress of the work" (see, Amended Complaint ¶73). The Amended Complaint does mention maintenance bonds in paragraph 51, however, that recital merely mirrors the obligations

contained in the Letter Agreement and does not actually allege any breach in that regard. Second, even if the failure to procure maintenance bonds was sufficiently alleged there has ben no evidence that such breach caused any damage. Thus, there are surely questions of fact concerning the amount of damage, if any, suffered by the plaintiff as a result of this breach, even if true.

Therefore, the motion seeking summary judgement is denied.

So ordered.

ENTER:

DATED: June 9, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC