

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

NEW CASTLE COUNTY, a political)
subdivision of the State of Delaware,)
)
Plaintiff,)
)
v.) C.A. No. N19C-01-146 WCC
)
ZURICH AMERICAN INSURANCE)
COMPANY, a foreign corporation,)
FIDELITY AND DEPOSIT)
COMPANY OF MARYLAND, a)
Maryland corporation, and KEVIN)
GARBER, an individual trading as)
Carpentry Unlimited,)
)
Defendants.)

Submitted: August 18, 2020
Decided: November 12, 2020

Plaintiff's Motion for Partial Summary Judgment – GRANTED

Defendant Garber's Motion for Leave to Join Additional Defendants -DENIED

MEMORANDUM OPINION

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CARPENTER, J.

Before the Court is Plaintiff New Castle County's ("Plaintiff" or "NCC") Motion for Partial Summary Judgment against Defendant Fidelity and Deposit Company of Maryland ("Fidelity"). Defendant Kevin Garber ("Garber") has also filed a Motion for Leave to Join Additional Defendants. For the reasons set forth in this Opinion, Plaintiff's Motion is **GRANTED** and Defendant Garber's Motion is **DENIED**.

I. Factual & Procedural Background

In December of 2011, NCC issued Statutory Compliance Bond No. 8181400 ("the Bond") to Garber, under his business name, Carpentry Unlimited, as principal, with Fidelity as surety, in the amount of \$150,000.00.¹ NCC alleges Zurich American Insurance Company ("Zurich Insurance") provided the Bond to Fidelity, its American subsidiary.² The Bond requires the principal and surety to comply with all New Castle County, state, and federal laws and regulations and provides, in relevant part:

1. If Principal fails to correct any code violations after being noticed and having the opportunity to contest such violations pursuant to the applicable violation, enforcement, and penalty provisions enumerated in the New Castle County Building Code, then Surety shall remedy the default within sixty (60) days of notification by New Castle County.

...

3. Any claim under this bond shall be instituted before the expiration of three years from the date the certificate of occupancy or certificate of

¹ Compl. ¶ 9.

² *Id.* ¶ 6.

use is issued subject to tolling and accrual provisions of 10 *Del. C.* § 8106.³

On August 21, 2012, NCC issued Garber a building permit to construct a home located at 510 Bellevue Road, Wilmington, Delaware 19809.⁴ Upon completion of the construction, NCC issued a certificate of occupancy for the home on July 26, 2013.⁵ The homeowners experienced numerous problems with the home and complained to NCC on October 10, 2015.⁶ Following the receipt of an engineering report from the homeowners, NCC inspected the home and found multiple violations of the New Castle County Building Code.⁷

On January 20, 2016, NCC issued a violation notice to Garber and a Rule to Show Cause Hearing affirmed the existence of the violations.⁸ Garber appealed the decision to the New Castle Board of License, Inspection and Review (“LIRB”), which, following a hearing, affirmed the decision of the administrative hearing officer in June 2016.⁹ Garber petitioned for certiorari review in the Superior Court, which granted review and affirmed the decision of the LIRB.¹⁰ Again, Garber

³ *Id.* Ex. A.

⁴ *Id.* ¶¶ 14-15.

⁵ *Id.* ¶ 16.

⁶ *Id.* ¶¶ 17-18.

⁷ *Id.* ¶ 19.

⁸ *Id.* ¶¶ 20-21.

⁹ *Id.* ¶¶ 23-25.

¹⁰ *Id.* ¶ 27. See *Garber v. New Castle Cty. Dep't of Land Use*, 2017 WL 1224510, at *1 (Del. Super. Ct. Mar. 31, 2017), *aff'd*, 173 A.3d 1049 (Del. 2017).

appealed; the Delaware Supreme Court heard oral argument and affirmed the decision of the Superior Court in November 2017.¹¹

During this lengthy appeal process, Garber settled a civil suit with the homeowners.¹² This settlement was executed by Garber, Donegal Insurance Group, as the insurance carrier for Garber’s business, and the homeowners, settling all of the claims asserted between these parties.¹³ The settlement expressly states that “this Agreement is not intended to affect, in anyway, certain proceedings asserted by New Castle County against Kevin Garber in connection with certain alleged code violation[s] affecting the Property.”¹⁴

On July 7, 2016, following the LIRB’s decision, NCC sent a letter to Fidelity, as surety to the Bond, stating the following:

This Notice of Intent serves as New Castle County’s initiation of a claim under Statutory Compliance Bond No. 8181400 to correct New Castle County Building Code Violations . . . at 510 Bellevue Road, Wilmington, DE, 19809. . . . [NCC] records indicate the certificate of occupancy for the Property was issued on July 26, 2013. Thus – initiation of this claim has begun within expiration of three years from the date of the issuance of certificate of occupancy. . . . Since the violations remain the subject of litigation, New Castle County may not make a final demand under the Bond until the completion of the litigation.¹⁵

¹¹ Compl. ¶ 28. See *Garber v. New Castle Cty. Dep’t of Land Use*, 173 A.3d 1049 (Del. 2017).

¹² Garber Aff. ¶ 15.

¹³ Def. Garber’s Answ. Ex. 1.

¹⁴ *Id.*

¹⁵ Compl. Ex. H.

On August 5, 2016, a representative of Zurich’s Commercial Surety Claims Department sent an email to NCC acknowledging NCC’s position that “due to the litigation a final demand on the bond is not being made at this time,” and noting that “as with all correspondence on pending claims,” Zurich reserved all rights and defenses and requested to be kept “apprised of the case as [the litigation] progresses.”¹⁶ Following the Supreme Court’s decision, NCC communicated by telephone with a representative from Zurich and, subsequently, requested payment on the Bond in a July 6, 2018 letter.¹⁷

On September 4, 2018, counsel for Fidelity sent a letter to NCC asserting that NCC “was required to commence suit on the [Fidelity] bond on or before July 26, 2016” and failed to do so, barring their claim.¹⁸ Fidelity argued that the July 7, 2016 letter was insufficient to initiate the claim because NCC did not “actually file a lawsuit on the claim” within three years from the date that the certificate of occupancy was issued.¹⁹ On January 14, 2019, NCC filed its Complaint to recover payment on the Bond.

This is the Court’s decision on NCC’s Motion for Partial Summary Judgment against Fidelity and Garber’s Motion for Leave to Join Additional Defendants.

¹⁶ *Id.* Ex. I.

¹⁷ *Id.* ¶¶ 39-41.

¹⁸ *Id.* Ex L.

¹⁹ *Id.*

II. Plaintiff's Motion for Partial Summary Judgment

A. Standard of Review

In reviewing a motion for summary judgment pursuant to Superior Court Civil Rule 56, the Court must determine whether any genuine issues of material fact exist.²⁰ The moving party bears the burden of showing that there are no genuine issues of material fact, such that he or she is entitled to judgment as a matter of law.²¹ In reviewing a motion for summary judgment, the Court must view all factual inferences in a light most favorable to the non-moving party.²² Where it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate, summary judgment will not be granted.²³

B. Contentions

Plaintiff asserts that its July 7, 2016 letter, which stated that it served as NCC's "initiation of a claim under Statutory Compliance Bond No. 8181400," constituted a claim on the Bond within three years of the certificate of occupancy and, therefore, the suit is not time barred. Furthermore, NCC argues that its claims against Fidelity are timely because "the three-year statute of limitations under 10 Del. C. § 8106(a)

²⁰ Super. Ct. Civ. R. 56(c); *Wilm. Tru. Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).

²¹ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

²² *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).

²³ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. Ct. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).

does not begin to accrue until there is a breach.”²⁴ They contend that the breach did not occur until Fidelity denied NCC’s claim on the Bond on September 4, 2018 and the Complaint was filed January 14, 2019.²⁵ Alternatively, NCC argues that § 8106(a) is “inapplicable because the Bond was signed under seal, therefore, a 20-year statute of limitations applies.”²⁶

In response, Fidelity contends that NCC lacks standing to bring its claims, asserting that NCC brought this suit for the benefit of “politically well connected” private citizens.²⁷ Additionally, they maintain that NCC’s claims are time barred because NCC failed to bring suit within the three-year statute of limitations, which they claim began to run on July 26, 2016 when the certificate of occupancy was issued.²⁸ They further argue that NCC’s letter, although it purports to initiate a claim on the Bond, “neither tolled nor satisfied the statute of limitations” because NCC was required to file a lawsuit in order to satisfy the statute of limitations.²⁹ Finally, Fidelity asserts that the Bond is not an instrument under seal, making the twenty-year statute of limitations inapplicable.³⁰

²⁴ Pl.’s Am. Br. in Support of New Castle County’s Mot. for Partial Summ. J. Against Fidelity and Deposit Company of Maryland at 16.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Defs.’ Br. in Support of the Opp’n of Defs.’ to Pl.’s Mot. for Partial Summ. J. Against Fidelity and Deposit Company of Maryland at 18.

²⁸ *Id.* at 12.

²⁹ *Id.* at 9.

³⁰ *Id.* at 12.

C. Discussion

Before deciding this Motion, it is important for the Court to emphasize that this litigation is about the liability of the Surety under a compliance bond they issued to allow their client, Kevin Garber, doing business as Carpentry Unlimited, to obtain a contractor license to allow him to perform construction in New Castle County. The executed Bond allows the County to look to the Surety to correct building code violations that have not been corrected by the contractor up to the amount of the Bond, which in the present case is \$150,000. Once a building code violation, not corrected by the contractor, has been established by the County through their administrative process, liability under the Bond occurs. While the amount of the liability may remain in dispute, the obligation of the Surety cannot be disputed.

The Court has no intention of getting into the messy dispute over whether the construction was faulty or who was at fault. These issues should have been presented and disputed during the administrative process or in litigation with the homeowner. In this litigation, there is no dispute that a building violation has been determined and if the Court finds no procedural defects like those asserted by Fidelity, the only issue that would remain is the amount of liability. While it is difficult to envision the remedial action together with the administrative cost and fines would not exceed \$150,000, the Court appreciates that the liability figure remains in dispute, so this Opinion will only address the alleged procedural defects.

Fidelity first asserts that the County has failed to institute proceedings within the three year limitation set forth in the Bond and therefore can make no claim thereunder. The Bond states “[a]ny *claim* under this bond shall be instituted before the expiration of three years from the date the certificate of occupancy or certificate of use is issued subject to tolling and accrual provisions of 10 *Del. C.* § 8106.”³¹ There appears to be no dispute that the County issued a certificate of occupancy on July 26, 2013, and thus it is agreed that a claim under the Bond would have had to be initiated before July 26, 2016. On July 7, 2016, nineteen days before the deadline, the County’s law department sent a letter by certified and first class mail to Fidelity. This letter, which the County asserts was sufficient to initiate the claim, stated in relevant part:

Please be advised that Fidelity & Deposit Company of Maryland issued Statutory Compliance Bond No. 8181400 to Carpentry Unlimited on January 1, 2012 for the Penal Sum of One Hundred Fifty Thousand Dollars (\$150,000.00). This Notice of Intent serves as New Castle County’s ***initiation of a claim*** under Statutory Compliance Bond No, 8181400 to correct New Castle County Building Code Violations (“Building Code”) at 510 Bellevue Road, Wilmington, DE, 19809 (“Property”).³²

The letter also gave notice to Fidelity of the date the certificate of occupancy was issued and asserted that the claim was being made within three years of its issuance.³³

The County also advised that it was unable at that time to provide an exact estimate

³¹ Compl. Ex. A. (emphasis added).

³² *Id.* Ex. H. (emphasis added).

³³ *Id.*

of the cost for the remediation repairs due to pending litigation with Garber but that it believed it would exceed the value of the Bond.³⁴ Zurich North America acknowledged the letter in an email of August 5, 2016, created a claim file No. 6380072123 and asserted that it understood that the County's letter was not a "final" demand on the Bond due to pending litigation.³⁵

Fidelity makes several assertions that the above was insufficient to satisfy the conditions of the Bond. First, it claims that the July 7th letter was not a "formal" demand for payment but simply acted as notice of a potential claim. Fidelity goes on to assert that the County would be required to initiate a legal complaint to activate rights under the Bond and since it did not file the present litigation until the three years had run, there is no actionable claim under the Bond. The Court disagrees.

First, the clear language in the Bond requires the initiation of a claim, not the filing of a lawsuit. If the insurance company wanted to require the filing of a lawsuit as a condition for initiation of a claim under the Bond, they clearly had the ability to insist upon that requirement. They did not. The Court has carefully reviewed the Bond document that has been provided by counsel and can find no litigation requirement. It cannot be logically argued that the County's letter failed to clearly assert NCC's legal claim to the proceeds under the Bond. The Court finds that for an

³⁴ *Id.*

³⁵ *Id.* Ex. I.

insurance company to now assert that they must be sued in a legal setting before any obligation under the Bond can arise is simply absurd and is a legal fallacy created by counsel. For centuries, insurance companies have recognized and paid claims without the parties engaging in litigation and there is nothing here to suggest that something more than what the County did was required. The Court finds that NCC initiated its claim in its July 7, 2016 letter, within three years from the date that the certificate of occupancy was issued as required by the Bond.

When Fidelity eventually denied NCC's claim on September 4, 2018, NCC filed suit four months later. The claim limitation prescribed by the Bond is different from the statute of limitation requirement to initiate legal proceedings if Fidelity denies the County's claim. Once the intentions of the parties are known and a denial of the claim is asserted by Fidelity, then the County had three years to file suit to enforce its claim. Here Fidelity denied the claim on September 4, 2018, and NCC timely filed suit four months later. NCC satisfied both the claim limitation required by the Bond and subsequently the three-year statute of limitations to initiate the lawsuit.³⁶

Finally, Fidelity asserts that the County lacks standing to assert a claim in this matter since its real intent was to use its code authority to file what is a private cause

³⁶ As such, the Court need not determine at this time whether the Bond constitutes an instrument under seal for the purposes of applying a twenty-year statute of limitations.

of action for the benefit of a politically connected family. While the Court is not familiar with this allegedly well-connected family, there is nothing in the record to give any credibility to this claim. This appears to be nothing more than a desperate last minute pass to the end zone hoping somehow it will catch the fancy of the Court. Unfortunately, for Fidelity, this Court has not caught that pass.

Based on the above, the Court will grant the County's Motion for Partial Summary Judgment.

III. Defendant Garber's Motion for Leave to Join Additional Defendants

A. Standard of Review

Pursuant to Delaware Superior Court Civil Rule 14(a), a defending party, as a third-party plaintiff, may serve a complaint upon "a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff."³⁷ The third-party plaintiff must obtain leave on motion to make the service if the third-party complaint is filed more than ten days after serving the original answer.³⁸

Delaware Superior Court Civil Rule 19(a) governs the joinder of persons needed for just adjudication and provides that a person who is subject to the Court's

³⁷ Del. Super. Ct. Civ. R. 14(a).

³⁸ *Id.*

jurisdiction and service of process shall be joined as a party if:

- (1) in the person's absence complete relief cannot be accorded among those already parties, or
- (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.³⁹

B. Discussion

Defendant Garber has filed a Motion for Leave to Join Additional Defendants J. Russell Johnson, Amy Podolsky, and Deborah Wartel.⁴⁰ Garber alleges that Johnson “is the architect who designed the property and also served as the construction manager” and that his design defects caused “the majority of the problems” with the home.⁴¹ Garber contends that Johnson “is liable to Garber, Zurich, and/or Fidelity for any claims for money damages for which Garber, Zurich or Fidelity may be liable to NCC” because Johnson’s design defects caused the problems.⁴²

Podolsky and Wartel are the homeowners and Garber claims that they are “liable to Garber and/or Zurich and Fidelity for any claims for damages for which

³⁹ Del. Super. Ct. Civ. R. 19(a).

⁴⁰ Def. Garber’s Mot. for Leave to Join Additional Defs. at 1.

⁴¹ *Id.* ¶ 5.

⁴² *Id.* ¶ 19.

Garber, Zurich, or Fidelity may be liable to NCC” because the homeowners are “ultimately responsible for the cost” of remediation, since they “already reached an accord and satisfaction with Garber for the value of such costs.”⁴³ Alternatively, Garber claims that the homeowners are liable to him “for the return of all consideration tendered to them” in exchange for the settlement.⁴⁴

In response, NCC asserts that neither Johnson nor the Homeowners could have been sued by NCC for the failure of Fidelity to pay NCC on the Bond; therefore, they should not be added as parties.⁴⁵ NCC argues that this is a “straight-forward case seeking payment under a statutory compliance bond,” and Garber’s liability to NCC for violating the NCC Building Code is distinct from his civil liability to the homeowners.⁴⁶ As such, Plaintiff maintains that no one is liable for the Bond other than the currently named Defendants.⁴⁷

Pursuant to Rule 14(a), Defendant Garber, acting as third-party plaintiff, may add a party to the action who is or may be liable to him for all or part of NCC’s claim.⁴⁸ However, the parties that Garber seeks to add are not liable to him for NCC’s claim, which is premised solely on the Bond. Only Garber, with Fidelity as surety, executed the Bond to benefit NCC in consideration for Garber’s endorsement as a

⁴³ *Id.* ¶ 18.

⁴⁴ *Id.*

⁴⁵ Pl.’s Obj. to Def. Garber’s Mot. for Leave to Join Additional Defs. ¶ 8.

⁴⁶ *Id.* ¶ 1.

⁴⁷ *Id.* ¶ 8.

⁴⁸ Del. Super. Ct. Civ. R. 14(a).

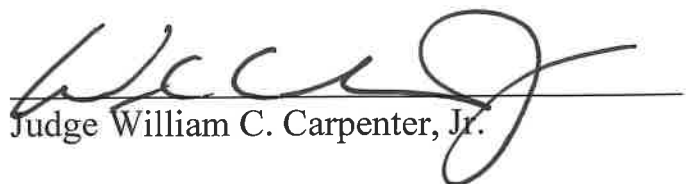
licensed permit contractor under the Building Code.⁴⁹ As such, neither Johnson nor the homeowners are liable to Garber for NCC's claims on the Bond.

Additionally, pursuant to Rule 19(a), a person may be joined if, in the person's absence, complete relief cannot be accorded among those already parties or if the nonparty claims an interest in the action.⁵⁰ In the instant matter, complete relief can be accorded among the current parties because, as discussed above, only the current Defendants may be liable on the Bond. Accordingly, as neither Johnson nor the homeowners have asserted an interest that would be adversely affected by this litigation, they cannot be joined under Rule 19.

IV. Conclusion

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment is **GRANTED** and Defendant Garber's Motion for Leave to Join Additional Defendants is **DENIED**.

IT IS SO ORDERED.



Judge William C. Carpenter, Jr.

⁴⁹ Pl.'s Obj. to Def. Garber's Mot. for Leave to Join Additional Defs. ¶ 2.

⁵⁰ Del. Super. Ct. Civ. R. 19(a).