

Nova Cas. Co. v New York City Hous. Auth.
2011 NY Slip Op 31106(U)
April 28, 2011
Supreme Court, New York County
Docket Number: 602527/2008
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, J.S.C.

PART _____

Index Number : 602527/2008

NOVA CASUALTY

vs

NEW YORK CITY HOUSING

Sequence Number : 002

AMEND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for amend

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2, 2A

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted as per
decision/order dated 4-28-11.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

APR 29 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4-28-11

[Signature]
MARGY S. FRIEDMAN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

FILED

PRESENT: Hon. Marcy S. Friedman, JSC

APR 29 2011

NOVA CASUALTY COMPANY, x

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff(s),

Index No.: 602527/2008

- against -

NEW YORK CITY HOUSING AUTHORITY,
Defendant(s).

DECISION/ORDER

x

In this action, plaintiff/surety, Nova Casualty Company (Nova), seeks to recover for payments made under performance bonds issued in connection with two construction projects for defendant New York City Housing Authority (NYCHA). Plaintiff moves to amend its complaint to withdraw factual allegations regarding alleged oral representations made by NYCHA, and to reduce its demand for damages against NYCHA for the Reid Project. Defendant does not oppose this branch of the motion. Plaintiff also seeks to amend the complaint to increase the amount of its damages for the O'Dwyer Gardens Project (O'Dwyer).

Leave to amend should be freely granted in the absence of prejudice. (See CPLR 3025[b]; McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp., 59 NY2d 755 [1983].) While the court "should consider the merit" of the proposed pleading (Norwood v City of New York, 203 AD2d 147, 148 [1st Dept 1994], " '[t]he merit of a proposed amended pleading must be sustained, * * * unless the alleged insufficiency or lack of merit is clear and free from doubt.' " (Detrinca v DeFillippo, 165 AD2d 505, 509 [1st Dept 1991][quoting Daniels v Empire-Orr, Inc., 151 AD2d 370 [1st Dept 1989].) Put another way, the amendment should be denied if, but only if, the amendment is shown to be clearly lacking in merit. (See Crimmins Contr. Co. v

City of New York, 74 NY2d 166 [1989]; Herrick v Second Cuthouse, Ltd., 64 NY2d 692 [1984]; Koss v Board of Trustees, 281 AD2d 200 [1st Dept 2001].)

The complaint alleges that Nova paid out \$308.00 on the O'Dwyer Project. (Compl., ¶ 53.) Nova seeks to amend the complaint to allege \$37,929.61 in payments allegedly made for this Project. (P.'s Aff. In Support, ¶ 45.) NYCHA opposes the amendment on the ground that Nova sought damages for this Project of only \$308.00 in its April 15, 2008 notice of claim (D.'s Ex. F.) NYCHA contends that failure to include the now increased damages in the notice of claim violates both the contract for the Project and Public Housing Law § 157(1).

Section 23 of the contract between NYCHA and the contractor requires the contractor to serve a notice of claim under the following circumstances:

“(a) If the Contractor claims that any instructions of the Authority, by drawings or otherwise, involve Extra Work entailing extra cost, or claims compensation for any damages sustained by reason of any act or omission of the Authority, or of any other persons, or for any other reason whatsoever, the Contractor shall, within twenty (20) days after such claim shall have arisen, file with the Authority written notice of intention to make a claim for such extra cost or damages.”

(D.'s Aff. in Opp., Ex. E.) Section 23 (b) of the contract provides that service of a notice of claim for the claims specified in subsection (a) is a condition precedent to commencement of an action against NYCHA.

Assuming arguendo that this contractual requirement applies not only to the contractor but also to the surety, the causes of action for payment which plaintiff asserts are not ones for which a notice of claim must be served. Plaintiff seeks to recover payments made under the performance bond for performance (i.e., labor and materials) by the contractor's subcontractors and suppliers on the O'Dwyer Project. (Compl., ¶ 16; P.'s Aff. In Support, ¶ 20.) The identical

[* 4]

contract provision has been interpreted as requiring a notice of claim for claims based on “extra cost,” and not for such routine claims as claims for payment, after work has been performed to the satisfaction of NYCHA, of the contract balance. (Nova Cas. Co. v New York City Hous. Auth., Sup Ct, New York County, Nov. 3, 2008, Gammerman, J.H.O., index No. 112974/07 at 7-8.) The cases cited by NYCHA are not to the contrary. These cases hold that a complaint may not be maintained where a contractor fails to comply with contractual notice requirements. They do not hold that the terminology of Section 23 requires a notice of claim not only for extra work but also for work provided for by the contract. (See e.g. A.H.A. Gen. Constr., Inc v New York City Hous. Auth., 92 NY 2d 20 [1998]; S.J. Fuel Co., Inc. v New York City Hous. Auth., 73 AD3d 413 [1st Dept 2010]; 4-A Gen. Contr. Corp. v New York City Hous. Auth., 28 AD3d 261 [1st Dept 2006]; Promo-Pro Ltd. v Lehrer McGovern Bovis, Inc., 306 AD2d 221 [1st Dept 2003] ly denied 100 NY2d 628.)

Moreover, the contractual notice requirements for claims for extra work serve the purpose of “enabl[ing] the Authority to verify whether allegedly extra work is in fact beyond the scope of the contract” (A.H.A. Gen. Constr., 92 NY 2d at 24), or of “avoiding the credibility contests that arise in cases of alleged oral modification and waiver of written contract provisions.” (Promo-Pro Ltd., 306 AD2d at 222.) Such purposes are not implicated where the claim is for work that was undisputedly required by the contract.

For the above reasons, the court concludes that the requirements of Section 23 of the contract do not apply to plaintiff’s claims. The court further concludes that Public Housing Law §157(1) is not a bar to these claims. This statute provides:

“In every action or special proceeding, for any cause whatsoever, prosecuted or maintained against an authority, other than a claim arising out of a condemnation proceeding, the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims upon which such action or special proceeding is founded were presented to the authority for adjustment and that it has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.”

The complaint alleges that demands for payment were presented to NYCHA on or about September 19, 2007 and again on April 15, 2008. (Compl. ¶¶ 40, 41.) These demands were made at least thirty days prior to the commencement of this action, by filing of the summons and complaint on or about August 28, 2008.

In arguing that the demands are insufficient predicates for maintenance of this action because they understate and do not itemize the amount of plaintiff's damages, NYCHA contends that courts have dismissed causes of action in complaints where the underlying claim was not previously set forth in a notice of claim. (D.'s Aff. In Opp., ¶ 23.) NYCHA relies for this proposition on cases decided under Public Housing Law § 157(2). (See e.g. Scott v City of New York, 40 AD3d 408 [1st Dept 2007] [dismissing false arrest and malicious prosecution claims where notice of claim alleged only assaultive conduct]; Figuroa v New York City Hous. Auth., 271 AD2d 238 [1st Dept 2000].) Section 157(2) is inapposite, as it sets forth the requirements for notices of claim for property damage and personal injury actions. In such actions, the notice must contain sufficient information to afford the municipal authorities an opportunity “to investigate the facts” as to the underlying incident. (Rosenbaum v City of New York, 8 NY3d 1, 11 [2006]; Goodwin v New York City Hous. Auth., 42 AD3d 63, 68 [1st Dept 2007].) As noted above, this purpose for the notice is not at issue where the claims are only for payment of work that is provided for in the contract.

NYCHA wholly fails to set forth any appellate authority holding that an understatement in a demand mandates dismissal of a claim for payment of work specified in a contract. In the absence of such authority, or of any showing by NYCHA that the proposed amendment would cause prejudice or surprise, the court declines to hold that the complaint may not be amended to correct the amount of plaintiff's claim.

Accordingly, it is hereby

ORDERED that Nova Casualty Company's motion for leave to amend the complaint is granted to the extent that it is

ORDERED that the proposed amended complaint annexed as Exhibit U to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that defendants shall serve an answer to the amended complaint within 20 days from the date of said service.

This constitutes the decision and order of the court.

Dated: New York, New York
April 28, 2011



MARCY FRIEDMAN, J.S.C.

FILED

APR 29 2011

**NEW YORK
COUNTY CLERK'S OFFICE**