

**Lanmark Group, Inc. v New York City School
Construction Auth.**

2016 NY Slip Op 30139(U)

January 25, 2016

Supreme Court, New York County

Docket Number: 650060/15

Judge: Anthony A. Scarpino

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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LANMARK GROUP, INC.,

Plaintiff,

Index No. 650060/15

-against-

NEW YORK CITY SCHOOL CONSTRUCTION
AUTHORITY,

DECISION AND ORDER

Defendant.

-----X
HON. SALIANN SCARPULLA, J.:

In this action to recover damages for breach of contract based on extra work arising from a construction agreement between plaintiff Lanmark Group, Inc. (“Lanmark”) and defendant New York City School Construction Authority (“SCA”), SCA moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint.

In June 2013, Lanmark entered into a contract (“Contract”) with SCA to perform exterior masonry, parapets, roof, flood elimination, and paved area work at P.S. 204 in Brooklyn for \$14,893,000 (“Project”). According to Lanmark, work on the Project began in June 2013 and is approximately 73% complete.

During the course of the Project, Lanmark requested, and had approved, 11 change orders pursuant to the terms of the Contract. A change order is requested when Lanmark identifies a condition which requires work beyond the original scope of the Contract. In

such cases, Lanmark submits a Request for Information (“RFI”) to the project architect, identifying the possibility that work beyond the scope of the Contract could be required. The RFI requests guidance from the project architect as to whether that work should be done and, if so, the details of how SCA wants the work performed.

Ultimately, if SCA agrees that additional work is required, a formal change order is issued, the price for which is negotiated at a later time. In the event that SCA determines that the work at issue is not beyond the scope of the Contract, it notifies Lanmark as such, which is then able to file a Notice of Claim as a predicate to a potential legal action.

Lanmark commenced this action in January 2015, alleging seven causes of action for breach of contract, based on extra work involving: (1) installation of waterproofing membrane; (2) ductwork and plaster removal; (3) removal of lead paint; (4) installation of custom-made brick; (5) removal of steel framing from a decorative cornice; (6) removal of bent metal plates; and (7) removal of window lintels.

SCA now moves to dismiss the complaint on the ground that the work at issue does not constitute extra work because it falls within the parameters of the Contract.

Discussion

"A motion to dismiss under CPLR 3211 (a) (7) assumes the truth of the material allegations and whatever can be reasonably inferred therefrom and should be denied if, from the pleading's four corners, factual allegations are discerned which when taken together manifest any cause of action cognizable at law." *Le Bar Bat, Inc. v. Shallo*, 198

A.D.2d 49, 50 (1st Dept. 1993) (citation omitted). Dismissal pursuant to CPLR 3211(a)(1) is appropriate where the defense is founded upon documentary evidence which resolves all factual issues and conclusively refutes and disposes of the plaintiff's claim. *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002).

First Cause of Action

Lanmark's first cause of action arises from extra work it allegedly performed in connection with its application of a spray-applied waterproofing membrane on a portion of the building. It is undisputed that the product that Lanmark had intended to use was rejected by the Project's architect after the Project began, forcing Lanmark to use a different product. It is also undisputed that the original specifications for the Project did not identify specific products which were approved for use in applying the waterproofing membrane.

SCA argues that this cause of action must be dismissed based upon section 1 of the portion of the Contract titled "Information for Bidders," which states that prospective bidders were required to examine the Contract documents and make a written request to SCA for clarification of any ambiguities. SCA contends that the first cause of action should be dismissed because Lanmark failed to request a clarification as to which product it could use for the waterproofing membrane. Lanmark argues that the product it sought to use was one that is standard in the industry for use in this context.

The motion to dismiss the first cause of action is denied. The original Contract specifications did not identify acceptable products for use in applying the waterproofing membrane and SCA did not provide guidance in that context until after Lanmark had begun work on the Project. At best, factual questions exist as to whether Lanmark was required to seek clarification as to whether it could use the product it intended to use in the first instance. Such factual questions are not appropriately decided on a motion to dismiss pursuant to CPLR 3211.

Second Cause of Action

In its second cause of action, Lanmark alleges that it performed extra work in connection with removing plaster and enclosing ductwork in the gymnasium. Specifically, Lanmark alleges that the Contract did not accurately detail all the ductwork that needed new gypsum board enclosures. It also contends that the Contract underestimated the number of existing conduits that needed to be removed and relocated. Lanmark further alleges that it performed extra work in connection with removing plaster from the gymnasium's ceiling in order to install the new gypsum board enclosures.

SCA argues that this cause of action should be dismissed because, as set forth above, Lanmark was required to examine the Contract documents and make a written request to SCA for clarification of any ambiguities.

The motion to dismiss this cause of action is denied. Factual disputes exist as to whether the Contract was ambiguous with respect to the work in question. A factual

dispute also exists as to whether the Contract specifications were sufficient to put Lanmark on notice that it might be required to do the work at issue or whether it should have requested a clarification from SCA. However, at this point, assuming the truth of the allegations in the complaint, SCA has not demonstrated that this cause of action should be dismissed.

Third Cause of Action

Lanmark's third cause of action alleges that SCA requested that Lanmark perform work outside of the scope of the Contract involving the removal of lead paint on spandrel beams and columns. Lanmark requested additional compensation, but was informed by SCA that such work fell within the parameters of the Contract.

The Contract required Lanmark to scrape, clean, prime and paint existing spandrel beams. However, the parties sharply dispute whether Lanmark was required to remove lead paint, and, if so, the manner in which such paint was to be removed. Factual questions exist on this issue which are not appropriately decided on a motion to dismiss pursuant to CPLR 3211 and therefore, the motion to dismiss is denied as to the third cause of action.

Fourth Cause of Action

The fourth cause of action involves alleged additional work consisting of the fabrication and installation of custom-made bricks of various shapes and sizes. Lanmark claims that this constituted work beyond the original scope of the Project.

I find that Lanmark has failed to adequately allege a cause of action with respect to the brick work at issue. The allegation that the brick work at issue constituted extra work is contradicted by the plain terms of the Contract and the drawings appended to the Contract. SCA asserts, and Lanmark does not dispute, that the Contract required that "existing brick be replicated in size, shape, coursing, bond pattern, and detailing." It is also undisputed that the drawings appended to the Contract indicate that the building contained multiple types of brick masonry and that Lanmark was required to match them in color, size, shape and texture. Thus, the plain language of the Contract demonstrates that Lanmark was required to fabricate and install custom-made bricks of various shapes and sizes. As such, such work does not constitute work outside of the scope of the original Contract.

The complaint does not set forth any additional facts to demonstrate that the brick work at issue in the fourth cause of action constituted work beyond the scope of the parties' original agreement. Therefore, the fourth cause of action is dismissed.

Fifth Cause of Action

Lanmark alleges in its fifth cause of action that it was required to perform extra work in connection with the removal of a cornice from the building. The Contract plainly required Lanmark to remove the cornice. However, Lanmark alleges that the cornice contained a structural steel frame which was not indicated in the Contract or in any of the drawings associated with this portion of the Project. As such, Lanmark asserts that, by

having to remove the steel frame, it was required to perform work outside of the terms of the Contract.

SCA seeks dismissal of this cause of action on the grounds that the removal of the cornice was work that was within the original scope of the Contract. However, factual issues exist as to whether removal of the steel frame constituted work within the scope of the Contract and whether the Contract put Lanmark on notice that such work was required under the Contract. Such factual issues are not properly resolved within the context of this motion. Therefore, the motion to dismiss is denied as to the fifth cause of action.

Sixth Cause of Action

Lanmark's sixth cause of action arises from the removal of one or more bent plates on existing spandrel beams. The RFI submitted by Lanmark states that one or more of the spandrel beams contained a bent metal plate which had to be removed, constituting work outside the scope of the Contract. According to Lanmark, it was unaware of this condition until the brick facade was removed.

SCA argues that this cause of action should be dismissed because the Contract specifically instructs Lanmark to remove bent plates and limits such removal to new steel installations. As such, it argues that such work cannot constitute work outside of the scope of the Contract.

Lanmark does not dispute that the Contract called for the removal of plates on certain spandrel beams. However, it states that the Contract specifications relied on by

SCA applied only to spandrel beams related to wind posts. It also states that, absent extensive pre-bid demolition, the existence of the plate in additional locations could not be determined and could not have been factored into its bid amount on the contract.

At this point, it is unclear whether the Contract required Lanmark to remove the plate only at locations related to wind posts, as asserted by Lanmark, or at additional locations, as asserted by SCA. However, assuming the truth of the allegations in the complaint, SCA has not demonstrated that this cause of action should be dismissed.

Seventh Cause of Action

LANMARK'S SEVENTH CAUSE OF ACTION

Lanmark's seventh cause of action alleges that it performed extra work in connection with the removal of existing loose and hung lintels at various elevations. Lanmark alleges that the number and locations of such lintels were not shown on the contract drawings.

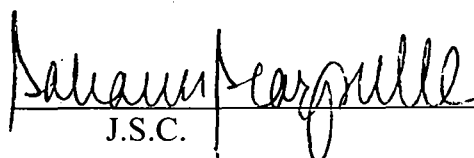
As above, SCA argues that Lanmark had an obligation to request clarification of any ambiguities in connection with the removal of the lintels. However, it is unclear at this point whether the Contract contained sufficient details to put Lanmark on notice that it should request such clarification. Therefore, the motion to dismiss this cause of action is denied.

In accordance with the foregoing, it is hereby

ORDERED that the motion by defendant New York City School Construction Authority to dismiss the complaint is granted only to the extent that the fourth cause of action is dismissed and the remaining causes of action are severed and shall continue.

This constitutes the decision and order of the court.

Dated: January 25, 2016
New York, NY



J.S.C.

HON. SALIANN SCARPULLA