Lanmark Group, Inc. v New York City Sch. Constr. Auth.
2017 NY Slip Op 31244(U)
June 6, 2017
Supreme Court, New York County
Docket Number: 653952/2015
Judge: Saliann Scarpulla

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

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LANMARK GROUP, INC.,

Plaintiff,

-against-

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,

Defendant.

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DECISION and ORDER

Index No.: 653952/2015
Mot. Seq. No. 001

SALIANN SCARPULLA, J.S.C.:

Defendant New York City School Construction Authority (SCA) moves, pursuant to CPLR 3211 (a) (1) and (8), to dismiss plaintiff Lanmark Group, Inc.'s (Lanmark) complaint based on documentary evidence and for lack of personal jurisdiction. Lanmark cross-moves, pursuant to CPLR 305 (c), to amend its summons with notice.

In June 2013, Lanmark entered into a contract with SCA to perform construction work on PS 204(K)'s "[e]xterior [m]asonry, [p]arapets, [r]oof, [f]lood [e]limination, [and] [p]aved [a]reas" for the amount of $14,893,000 (the Project) (complaint, ¶¶ 3-4). After work began, SCA also asked Lanmark to remove "existing back up brick" from the school, as well as to install "door jambs, door frames, door saddles[,] and door hinges" (the door work). Lanmark alleges that both requests were outside the scope of the original contract.

George Manouselakis, Lanmark's Corporate Secretary, alleges that, with respect to the brick removal, the original contract called for the removal of "backup masonry to expose existing steel framing at the 1929 original building" (Manouselakis aff dated 6/13/16, ¶ 10).[1] "During the demolition process," Lanmark discovered additional amounts of brick that had to be removed to expose the steel (*id.*). Manouselakis alleges that the contract drawings provided no information about whether and how to remove this additional masonry. The parties disagreed on how much brick needed to be removed and how much of the brick removal was outside the scope of the Project. After SCA directed Lanmark to continue work on the brick removal, without including what Lanmark believed to be the full amount of brick to be removed (Manouselakis aff, exhibit D, notice of direction dated 9/16/14), Lanmark sent a letter to SCA, on October 27, 2014, requesting clarification of the scope of the extra work and noting Lanmark's disagreement with the project architect's scope of the work (Manouselakis aff, exhibit E, Lanmark letter to SCA dated 10/27/14). On October 28, 2014, SCA responded that it could not specify the quantities of brick to be removed in the notice of direction (Manouselakis aff, ¶ 14).

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[1] I am permitted to consider affidavits submitted by Lanmark to supplement its complaint (*see Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]).

On December 1, 2014, Lanmark sent SCA a cost estimate for the removal of 6,800 square feet of brick that was not included in the original contract (Venning affirmation dated 4/13/16, exhibit C, cost estimate; Manouselakis aff, ¶ 14). After receiving the estimate, SCA sent Lanmark an offer of $120,406 for the "removal of back up masonry"; Manouselakis, however, states that it was unclear "whether the offer was predicated on the square footage in [Lanmark's] proposal (6,800 square feet) or that of the [a]rchitect (3,889.50 square feet)" (Manouselakis aff, ¶ 15; exhibit F, email correspondence between Lanmark and SCA).

The parties continued to discuss the amount and cost of the brick to be removed, until SCA executed a unilateral change order on February 24, 2015, requesting brick removal for $120,406 (complaint, ¶ 9; Manouselakis aff, ¶ 16; exhibit G, change order dated 2/24/15). SCA also made clear that this amount was for removal of the full 6,800 square feet of brick.

Lanmark claims that the reasonable value of the brick removal was $891,231.44. Lanmark also alleges that it performed other additional work beyond the scope of the original contract, which included door work; that it submitted a request for additional compensation related to the door work; and, that SCA did not execute a change order for the door work, which Lanmark values at $36,899.77.

On April 6, 2015, Lanmark filed a notice of claim for the brick removal. Subsequently, Lanmark began the work to remove the bricks, which continued through July 31, 2015. On February 12, 2016, Lanmark filed a notice of claim with SCA for the door work, in the amount of $36,899.77. To date, Lanmark alleges that most of SCA's alleged indebtedness has not been paid.

Lanmark commenced this action on December 1, 2015, by filing a summons with notice. The summons states that Lanmark's action is for breach of contract and seeks $891,231.44 in money damages. SCA demanded a complaint on March 9, 2016, and on March 14, 2016, Lanmark served a complaint on SCA. The complaint alleges two causes of action for breach of contract: the first alleges lack of payment for the brick removal, and the second alleges lack of payment for the door work. Lanmark seeks damages in the amount of $891,231.44 on the first cause of action, and $36,899.77 on the second cause of action. SCA now moves, pursuant to CPLR 3211 (a) (1) and (8), to dismiss the complaint.

Discussion

SCA argues that the first cause of action must be dismissed because Lanmark's notice of claim for the brick removal work was untimely. SCA refers to Lanmark's request for payment for the brick removal that was included in its detailed estimate dated December 1, 2014, and claims that, based on the date of that request, Lanmark's time to

file a notice of claim expired on March 1, 2015. Lanmark responds that the notice of claim was timely filed because the time to file ran from when the project was substantially completed, and not from the time it submitted the estimate.

The version of Public Authorities Law § 1744 (2) that was in effect at the time the parties contracted for the construction work provides that no action may be maintained against SCA "relating to the . . . reconstruction, improvement, rehabilitation, [or] repair . . . of educational facilities" unless the plaintiff alleges that it filed a detailed written notice of claim regarding the basis of the action within three months of that claim accruing.[2]

> It is well settled that a contractor's claim accrues when its damages are ascertainable. Although the determination of the date on which damages are ascertainable may vary based on the facts and circumstances of each particular case, it generally has been recognized that damages are ascertainable once the work is substantially completed or a detailed invoice of the work performed is submitted.

(*C.S.A. Contr. Corp. v New York City School Constr. Auth.*, 5 NY3d 189, 192 [2005] [internal quotation marks and citations omitted]). The court may determine a plaintiff's compliance with the notice of claim requirement on a motion to dismiss (*see Nicholas v City of New York*, 130 AD2d 470, 471 [2d Dept 1987]).

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[2] The statute was amended, effective December 17, 2014, to provide that "[i]n the case of an action or special proceeding for monies due arising out of contract, accrual of such claim shall be deemed to have occurred as of the date payment for the amount claimed was denied" (Public Authorities Law § 1744 [2], as added by L 1988, ch 738, § 14, as amended by L 2014, ch 519, § 1).

In most cases in which a notice of claim was untimely filed, either one or both conditions for ascertaining damages had occurred by the time the plaintiff filed its notice of claim (*e.g. C.S.A. Contr. Corp.*, 5 NY3d at 191 [contractor sent invoice requesting payment for completed extra work more than three months prior to filing notice of claim]; *Kafka Constr., Inc. v New York City Sch. Constr. Auth.*, 125 AD3d 933, 934 [2d Dept 2015] [notice of claim filed more than three months after contractor issued change order following its substantial completion of the work]; *D & L Assoc., Inc. v New York City School Constr. Auth.*, 69 AD3d 435, 435 [1st Dept 2010] [certificates of substantial completion executed more than three months prior to contractor's notice of claim]).

Here, Lanmark alleges that it did not send an invoice based on work already performed, but instead sent a cost estimate for certain extra work to be performed in the future, specifically, the brick removal (Venning affirmation dated 4/13/16, exhibit C, cost estimate; Manouselakis aff, ¶ 14). The fact that Lanmark's estimate was detailed, as argued by SCA, is insufficient to trigger Lanmark's obligation to file a notice of claim, as the work had not yet been performed.

As set forth above, the cases relied on by SCA are distinguishable, as either the relevant work had been substantially completed, or SCA had been invoiced for work that had been performed more than three months prior to the notice of claim being filed (*Kallen & Lemelson*, 290 AD2d at 497; *Bovis Lend Lease LMB, Inc.*, 2012 NY Slip Op

33352[U] at *6; *Whitestone Constr. Corp. v New York City School Constr. Auth.*, Sup Ct, Queens County, June 22, 2011, Flug, J., index No. 14107/10).

Moreover, Lanmark properly alleges that the scope of the extra work was not even fully clarified until SCA issued its unilateral change order on February 24, 2015 (Manouselakis aff, ¶¶ 16-17). Lanmark filed its notice of claim on April 6, 2015. The brick removal work was finished on July 31, 2015, and SCA declared the Project substantially complete on December 11, 2015 (Manouselakis aff, ¶¶ 4, 18-19). The completed brick removal work had not been invoiced, and the Project had not been declared substantially complete, when Lanmark filed its notice of claim (*C.S.A. Contr. Corp.*, 5 NY3d at 192). Accordingly, Lanmark's notice of claim was timely and that branch of SCA's motion to dismiss the first cause of action on the grounds that the notice of claim was untimely is denied.

SCA next claims that the summons with notice was defective and the court has no jurisdiction over SCA with respect to the second cause of action because Lanmark seeks damages beyond the amount specified in the summons with notice. Lanmark responds that any difference in the amount of damages stated in the summons with notice and in the complaint is, at most, a correctable defect. Further, Lanmark claims that by demanding a complaint, SCA has appeared in the action and waived any objection to jurisdiction.

First, SCA has not waived objections to jurisdiction. Contrary to Lanmark's argument, SCA has merely demanded a complaint, which in and of itself is not an appearance for purposes of conferring jurisdiction on the court (CPLR 3012 [b]). (*Ferran v Benkowski*, 260 AD3d 690, 692 [3d Dept 1999]).

As to the sufficiency of the summons with notice, CPLR 305 (b) provides that a summons served without a complaint must include "a notice stating the nature of the action and the relief sought, and . . . the sum of money for which judgment may be taken in case of default." Failure to provide sufficient notice is a jurisdictional defect (*Roth v State Univ. of N.Y.*, 61 AD3d 476, 476 [1st Dept 2009] ["In thus failing to comply with the notice requirements of CPLR 305(b), the summons was jurisdictionally defective"]).

Lanmark's summons with notice provides that "in case of [SCA's] failure to appear or answer, judgment will be taken against [SCA] by default for breach of contract in the sum of $891,231.44." SCA is correct that the notice does not specify that there are two causes of action for breach of contract, and that the stated damages amount does not cover the total dollar amount of both claims: $891,231.44 on the first cause of action and $36,899.77 on the second cause of action.

"However, since the purpose of the notice is simply to provide the defendant with at least basic information concerning the nature of plaintiff's claim and the relief sought, absolute precision is not necessary" (*Viscosi v Merritt*, 125 AD2d 814, 814 [3d Dept

1986] [internal quotation marks and citations omitted]: *see also Bal*, 73 AD2d at 71 ["CPLR 305 (b) was intended as a shield to protect an unwary defendant from default judgment without proper notice, not a sword to trap a tardy or inattentive plaintiff into dismissal"]).

Here, the summons adequately specifies that this action is for breach of Lanmark's contract with SCA, and requests money damages in a specified sum. This information is more than sufficient to apprise SCA of Lanmark's claim. Indeed, "the [complete] absence of a monetary amount in a notice served with a summons is a correctable irregularity" (*Premo v Cornell*, 71 AD2d 223, 224 [3d Dept 1979]).

Further, that the summons refers generally to a breach of contract without specifying each alleged breach is not fatal. The action remains fundamentally an action for breach of contract, as stated in the summons. Such a general description of the nature of the action has been found to be sufficient in other cases (*Grace v Bay Crane Serv. of Long Is., Inc.*, 12 AD3d 566, 566 [2d Dept 2004] [notice stating action was for personal injury and sought $3,000,000 in damages "complied with statutory requirements"]). A general description of the nature of the case has been found sufficient even where multiple theories of liability may arise out of the same fact pattern (*Tello v Mental Health Assn. of Westchester, Inc.*, 52 AD3d 499, 500 [2d Dept 2008] [summons stating that nature of the action was "causes of action in tort/negligence in

connection with injuries sustained by Decedent . . . resulting in his death . . . as a result of Defendant's negligence" was sufficient to provide notice of both claim for conscious pain and suffering and claim for wrongful death]).

The cases cited by SCA are not to the contrary. In *Parker v Mack* (61 NY2d 114, 116 [1984]), the Court of Appeals upheld the dismissal of a case where the summons "gave no notice either of the nature of the action or of the relief sought." In *Frerk v. Mercy Hosp.* (99 AD2d 504, 504 [2d Dept 1984]), the court dismissed the plaintiff's case because the plaintiff failed to satisfy the statutory notice requirements by serving a summons without notice. The other cases cited by defendants suffered from similar defects (*see Ciaschi v Town of Enfield*, 86 AD2d 903, 903 [3d Dept 1982] ["The summons did not indicate the nature of the action, the relief sought or the sum of money for which judgment would be taken in case of default"]; *Bal*, 73 AD2d at 70-71 [summons without notice failed to satisfy the statutory requirements, but motion to dismiss denied where defendant appeared in the action]).

Here, Lanmark's summons sets forth the nature of the action, the relief sought, and a sum to be recovered upon default. Lanmark's summons satisfies the statutory requirements of CPLR 305 (b), and sufficiently apprises SCA of the nature of the action (*Grace v Bay Crane Serv. of Long Is., Inc.*, 12 AD3d 566, 566 [2d Dept 2004]). Therefore, that branch of SCA's motion to dismiss the second cause of action is denied.

Lanmark cross-moves, pursuant to CPLR 305 (c), for leave to amend its summons with notice if I find that the summons is insufficient to obtain jurisdiction over SCA with respect to the second cause of action. In view of the denial of SCA's motion to dismiss that cause of action, Lanmark's cross-motion to amend its summons is denied as moot.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendant New York City School Construction Authority to dismiss the complaint is denied; and it is further

ORDERED that the defendant is directed to serve an answer to the complaint within 20 days of the date of this order; and it is further

ORDERED that plaintiff Lanmark Group, Inc.'s cross motion to amend its summons is denied as moot; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 208, 60 Centre Street, on July 26, 2017, at 2:15 PM.

DATE: 6/6/17

SALIANN SCARPULLA, JSC