Wenger Constr. Co., Inc. v New York City Sch. Constr. Auth.
2017 NY Slip Op 32245(U)
October 23, 2017
Supreme Court, New York County
Docket Number: 652445/2015
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA PART 39
Justice

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WENGER CONSTRUCTION CO., INC.

Plaintiff,

- v -

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,

Defendant.

INDEX NO. 652445/2015

MOTION DATE 12/3/2015

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this application to/for DISMISSAL

Upon the foregoing documents, it is

In this breach of contract action, defendant New York City School Construction Authority ("SCA") moves to dismiss the complaint of Wenger Construction Co., Inc. ("Wenger") pursuant to CPLR § 3211(a) (1), (a) (2), (a) (5), and (a) (7).

Wenger entered into a construction project contract with SCA, dated April 18, 2011, (the "Contract") to perform "Exterior Masonry & Flood Elimination" in Public School 86 in Brooklyn (the "Project"). Under the Contract, Wenger was to receive $4,269,000 for the Project.

After the Project commenced, SCA requested that Wenger perform certain "work beyond the scope of the original contract," which it did. Wenger alleges that the "additional work, labor, services and materials [were] requested and approved by the SCA," and that the parties agreed that the value of this additional work was $745,218.78, bringing the total contract price to $5,014,218.78. Wenger claims that although it completed all the work, SCA paid it only $4,374,336.10, leaving a balance of $639,882.68 still due and owing.

Wenger also asserts that SCA "actively interfered with [its] anticipated method of performance," which resulted in "Wenger finishing work, labor, services and materials for the Project far beyond the scope of the original contract." Specifically, Wenger claims that it submitted a change order request to SCA reflecting the value of the additional costs resulting from "notices of direction, bulletins, redesigned contract drawings, unforeseen work and work stoppages," but that SCA failed to execute it. Wenger claims the additional value of this work, which has not been paid, was $1,124,036. Wenger also seeks delay damages in the same amount.

Wenger's complaint, filed on July 10, 2015, alleges three causes of action: (1) breach of contract, based on the alleged underpayment; (2) breach of contract, based on additional work performed; and (3) breach of contract, based on delay damages. With respect to the first cause of action, the complaint does not assert that a notice of claim was ever filed by Wenger.[1] With respect to the second cause of action - and by

[1] However, post-complaint, Wenger did file a second notice of claim on or about February 23, 2016 in the amount of $450,643.61, the contract balance. In an affidavit,

extension, the third - the complaint alleges that Wenger filed a notice of claim with SCA on July 21, 2014 in the amount of $1,124,036.78 (the "notice of claim").

SCA now moves to dismiss Wenger's claims on the grounds that Wenger: (1) failed timely to file a notice of claim as required by New York Public Authorities Law ("PAL") § 1744 (2) for its first cause of action; (2) failed timely to give written notice of the conditions giving rise to its delay claims as required by the Contract for the second and third causes of action; and, (3) failed timely to commence the action with respect to at least some of the claims asserted.

Wenger cross-moves for an order enforcing the parties' settlement agreement, dated February 24, 2016 and titled "Final Settlement of All Delays," (the "Settlement Agreement") purportedly reached while the motion to dismiss was pending, or, in the alternative, for leave to amend its complaint. In opposition to SCA's dismissal motion and in support of its cross-motion, Wenger makes additional allegations, explaining that, "[t]he Project was still ongoing at the time the Complaint was filed," and the last change order was not negotiated until November 24, 2015. Thus, Wenger contends that its second claim notice was timely when filed in February 2016.

Wenger also alleges that after the complaint was filed, and while this motion was being briefed, the parties reached a settlement that "would obviate the need for opposition papers, or[,] at a minimum, result in a further delay of the motion until the post-substantial completion delay claim was negotiated by the parties."

Wenger claims that the February 23, 2016 notice of claim was filed within three months of negotiation of the last open change order.

In its opposition to Wenger's cross-motion, SCA adds another ground for dismissal, *i.e.*, the Settlement Agreement and general release of claims by Wenger precludes the latter from making any pre-substantial completion claims. SCA further argues that because Wenger is impeding the Settlement Agreement's enforcement by "refusing to execute a document required to effectuate payment under the Settlement Agreement" its cross-motion should be dismissed.

The Settlement Agreement

The Settlement Agreement provides that, "the scheduling unit recommends a settlement extending substantial completion a total of 386 consecutive calendar days (ccds) with no consideration for general condition costs," shifting "the previously extended Contract Substantial Completion from 23Dec2012 to 12JAN2014 and eliminat[ing] the assessment of liquidated damages." The Settlement Agreement then lists "ccds" applicable to various damages, including for "G/C $," which contains an asterisk with a notation that, "[a]ll costs will be negotiated with the Change Order Unit based on this recommendation."

Wenger also executed a "general release" on May 9, 2016 (the "Release"), which included a release of all claims for the project. The Release provides that Wenger:

> for and in consideration of the sum stated above [$4,604,564.32] ... which said amount represents the remaining consideration for the Work, not including amounts withheld for punchlists, claims and liens, if any, the receipt whereof is hereby acknowledged, [Wenger] has remised, released, and forever discharged the [SCA] ... from all manner of action or actions... in law or equity, except for the items, if any specifically listed and described in a Schedule ... which is prepared by the Contractor and countersigned by the Chief Project Officer of [SCA] and attached hereto and made a part hereof, which

> said Contractor ever had, now has, or which it ... can, shall, or may, have, for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these presents arising out of and in connection with the CONTRACT identified [herein].

No schedule is attached. In an affidavit, Wenger's principal, David Wenger, states that he signed the Settlement Agreement "on reliance that *all* terms of the agreement would be honored," including ones discussed but not set down in the Settlement Agreement document. Wenger executed the Settlement Agreement as drafted and sent it to SCA "along with an April 27, 2016 letter [the "Cover Letter"] again setting forth the terms of the settlement." As relevant, the Cover Letter states:

> ... as per our agreement, we will now be submitting our final payment requisition and our general condition costs from substantial completion to demobilization of our forces from the site, for consideration and negotiation with the [Change Order Unit].

Wenger attests that, "SCA did not object to the contents of the letter and executed the 'FINAL SETTLEMENT' document."

Discussion

Because the cross-motion to amend the complaint alters the analysis of, and moots much of, the motion to dismiss the original complaint, the Court will address the cross-motion first. Leave to amend is "freely granted in the absence of prejudice or surprise, upon showing that the proposed amendment has merit." *Centrifugal Assoc., Inc. v. Highland Metal Indus., Inc.*, 193 A.D.2d 385, 385 (1st Dept. 1993) (citation omitted); CPLR §3025(b). The decision to grant such leave is soundly within the discretion of the

trial court. *Gjeka v. Iron Horse Transport, Inc.*, 151 A.D.3d 463, 464-465 (1st Dept. 2017).

Here, Wenger's proposed amended complaint alleges the same three causes of action for breach of contract, however, as to the first cause of action, it alleges that the parties agreed that the reasonable value of the additional work it performed was $555,979.71.[2] As to the second and third causes of action, Wenger's proposed amended complaint alleges that based on the settlement reached by the parties, the cost of the additional work and delay damages agreed to by the parties amounted to $321,356.73, which is the amount Wenger now seeks to collect for those claims. As concerns the notice of claim, the proposed amended complaint alleges that Wenger filed a notice of claim on or about February 23, 2016 setting forth damages of $450,643.61 with respect to the first cause of action. The notice of claim date for the second and third causes of action is maintained as July 21, 2014.

The proposed amended complaint does not allege any facts that would come as a surprise to SCA because SCA participated in the settlement discussions with Wenger. Moreover, SCA does not oppose this aspect of Wenger's cross-motion. I find that, at this pre-answer stage of the litigation, there is no prejudice to SCA from the proposed amendment. Accordingly, leave to amend the complaint is granted.

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[2] This paragraph is accompanied by a notation stating that the $555,979 figure "[n]eeds to be checked."

Turning to SCA's motion to dismiss, on reply and in opposition to Wenger's cross-motion, SCA argues that the entire complaint must be dismissed because Wenger executed a Release of all its claims for the Project. Wenger submits that it never received consideration for the Release, because SCA never paid the Contract balance of the post-substantial completion costs. The Release plainly states that it is being executed "for and in consideration of" $4,604,564. If that sum has not been paid to Wenger, the Release cannot be the basis for dismissing any of Wenger's claims.

SCA also argues that by signing the Settlement Agreement, Wenger waived all its pre-substantial completion claims, and, thus, any claims arising out of work from the beginning of the project to the substantial completion date of January 13, 2014 must be dismissed.

Even though the one-page Settlement Agreement contains no merger clause, Wenger posits that this document was executed as part of the overall settlement and was only intended to memorialize that Wenger was agreeing to forego its pre-substantial completion delay claims in exchange for SCA waiving its liquidated damages. As set forth above, the Cover Letter accompanying Wenger's signature on the Settlement Agreement states:

> ... as per our agreement, we will now be submitting our final payment requisition and our general condition costs from substantial completion to demobilization of our forces from the site, for consideration and negotiation with the COU.

SCA contends that consideration of the Cover Letter, as well as of other emails relied upon by Wenger, is barred by the parol evidence rule, which provides

that, "[w]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *Vision Dev. Group of Broward County, LLC v. Chelsey Funding, LLC*, 43 A.D.3d 373, 374 (1st Dept. 2007) (internal citation and quotation marks omitted). "Evidence outside the four corners of the document as to what was really intended is generally inadmissible to add to or vary the writing." *Id.*

SCA's argument is not persuasive. As an initial matter, the Settlement Agreement on its face applies only to delay claims through January 13, 2014 and therefore does not affect Wenger's claims post-dating that substantial completion date. Additionally, the Settlement Agreement is hardly a "clear, complete document." *Id.* For instance, it refers to the settlement as a recommendation and, as noted above, contains an asterisk stating that, "[a]ll costs *will be negotiated* with the Change Order Unit" (emphasis added). Further, as with the Release, the parties have not complied with the terms of the Settlement Agreement. SCA cannot avoid its obligation to pay on the Contract by pointing to a Settlement Agreement on which it has not made payment.[3]

Finally, SCA argues that post-substantial completion claims must also be dismissed because Wenger's notice of claim is defective.

[3] Also because of the Settlement Agreement's lack of clarity and completeness, I decline to grant Wenger's cross-motion for an order enforcing the parties' Settlement Agreement.

PAL § 1744 (2) states that, to maintain an action against SCA "relating to the design, construction, reconstruction, improvement, rehabilitation, repair, furnishing or equipping of educational facilities," a claimant must present a notice of claim "within three months of the accrual of such claim," and any action based thereon must be commenced within one year. PAL § 1744 (3) further provides that the notice of claim "must set forth in detail with respect to such claim: (i) the amount of the claim; (ii) a specific and detailed description of the grounds for the claim, relating the dollar amount claims to the event purportedly giving rise to the claim and indicating how the dollar amount is arrived at; and (iii) the date of the event allegedly underlying the claim."

In urging dismissal, SCA contends that Wenger failed specifically to detail the grounds for each of its claims, but instead stated that, "[c]laimant relies on the plans, specifications, contract documents, change orders, requisitions and project documents reflecting communications on and resolution of change orders." SCA further contends that Wenger failed to "relate the dollar amount for each claim but instead asserted that '[t]he amount of the claim is $450,643.61 which represents the contract balance currently claimed due on the Project, including retainage.'"

The cases cited by SCA in support of its argument are largely inapplicable because, in many of those cases, no notice of claim was filed at all or, if the notice of claim was filed, it was not served upon the appropriate body.[4] In addition,

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[4] *e.g.*, *Zoll v. Suffolk Regional Off-Track Betting Corp.*, 259 A.D.2d 696 (2d Dept. 1999) (no notice of claim filed; did not concern NY PAL § 1744 (2)); *Salesian*

SCA's argument that the verified notice of claim should be disregarded because it did not contain "the information necessary for SCA to properly evaluate Wenger's claims" is also unpersuasive. The verified notice of claim explained that:

> The amount claimed represents the contract work plus approved change order work performed during the course of the project. The claim amount of $450,643.61 is calculated by adding the base contract price of $4,269,000 and approved change orders totaling $555,979.71 and subtracting the amount paid to date on the contract of $4,374,336.10.

The notice of claim further explains that, "[t]here was no single event which resulted in the underlying claim since contract work and change order work was performed over several years...."

It is well-settled that "[t]he purpose of the statutory notice of claim requirement is to afford the public corporation an adequate opportunity to investigate the circumstances surrounding the [claim] and to explore the merits of the claim while information is still readily available." *Vallejo-Bayas v. New York City Tr. Auth.*, 103 A.D.3d 881, 882 (2d Dept. 2013). Here, the verified notice of claim served such a purpose. Under these circumstances, Wenger's claims against SCA as outlined in its February 26, 2013 verified notice of claim may proceed.

Socy v. Village of Ellenville, 41 N.Y.2d 521 (1977) (same); *P.J. Panzeca, Inc. v Board of Educ., Union Free School. Dist. No. 6, Towns of Islip & Smithtown*, 29 N.Y.2d 508 (1971) [same]); *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 N.Y.2d 539, 548 (1983) (plaintiff's "failure to present its notice of claim to defendant Board of Education, 'the governing body of [the] district or school', as required by subdivision 1 of section 3813 of the Education Law, is a fatal defect mandating dismissal of the action").

In accordance with the foregoing, it is

ORDERED that defendant New York City School Construction Authority's motion to dismiss is denied, and it is further

ORDERED that plaintiff Wenger Construction Co., Inc.'s cross-motion for an order enforcing the parties' settlement agreement is denied; and it is further

ORDERED that plaintiff Wenger Construction Co., Inc.'s cross-motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed to be served as of the date of this decision and order; and it is further

ORDERED that defendant New York City School Construction Authority shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of this decision and order; and it is further

ORDERED that counsel are directed to appear for a status conference at 60 Centre Street, in Room 208, on November 29, 2017 at 2:15pm.

This constitutes the decision and order of the Court.

10/23/2017
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED	[X]	NON-FINAL DISPOSITION			
	[ ]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	DO NOT POST				FIDUCIARY APPOINTMENT	[ ] REFERENCE