30 Fifth Ave. Owners Inc. v Lane Engg. Consulting, P.C.

2025 NY Slip Op 32570(U)

July 1, 2025

Supreme Court, New York County

Docket Number: Index No. 652794/2023

Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **37**

Justice

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30 FIFTH AVENUE OWNERS INC.,

Plaintiff,

- v -

LANE ENGINEERING CONSULTING, P.C.,

Defendant.

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INDEX NO. 652794/2023

MOTION DATE 01/24/2025, 03/05/2025

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

LANE ENGINEERING CONSULTING, P.C.,

Plaintiff,

-against-

MKP ELECTRICAL CORP.,

Defendant.

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Third-Party
Index No. 595810/2024

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56,

were read on this motion for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 44

were read on this motion for a DEFAULT JUDGMENT.

Upon the foregoing documents, and for the reasons stated hereinbelow, the motion of defendant/third-party plaintiff Lane Engineering Consulting P.C. ("Lane"), pursuant to CPLR 3212, for partial summary judgment limiting its liability is granted to the extent set forth below; and, pursuant to CPLR 3215, for a default judgment on its claims against third-party defendant, MKP Electrical Corp. ("MKP"), is denied.

Background

This case arises out of a contract between plaintiff, 30 Fifth Avenue Owners Inc., and Lane for Lane to design and provide construction administration services for the installation of an emergency generator in plaintiff's building (the "Lane Contract"). NYSCEF Doc. No. 16. The Lane Contract is a seven-page document with a signature page on page five, followed by two more pages of provisions labelled "CONSULTANT CONTRACT PROVISIONS." Id. Pages six and seven of the contract contain a clause at ¶ 11 limiting Lane's liability for breach of

contract such that it "shall not exceed the total compensation received by [Lane] under this Agreement" (the "Liability Clause"). Id.

Plaintiff additionally entered into a contract with MKP to, inter alia, provide and install the emergency generator in plaintiff's building ("MKP Contract"). NYSCEF Doc. No. 27.

On June 9, 2023, plaintiff sued Lane, alleging that Lane breached the Lane Contract by ordering an inadequate generator that "did not comply with the plans and could not be safely installed or operated in the intended location" in plaintiff's building. NYSCEF Doc. No. 4.

On August 19, 2024, Lane filed a third-party action against MKP, alleging, inter alia, that: MKP falsely represented that an inadequate generator was equivalent to the originally planned model, recommended installing it, and was responsible for the installation; that Lane is a third-party beneficiary to the MKP Contract; and that Lane is entitled to indemnification and contribution from MKP. NYSCEF Doc. Nos. 5, 11.

On September 20, 2024, Lane served process on MKP through its registered agent. NYSCEF Doc. No. 29. On January 9, 2025, Lane again served process on MKP in the same manner. NYSCEF Doc. No. 33. On January 6, 2025 Lane sent MKP's agent a CPLR 3215(g)(4) notice of default. NYSCEF Doc. No. 44.

Lane now moves, pursuant to CPLR 3212 and the Liability Clause for partial summary judgment limiting its liability to a total of $13,500 (Motion Sequence 2). NYSCEF Doc. No. 35.

In opposition, plaintiff argues, inter alia, that the Liability Clause should not be considered part of the Lane Contract because it comes after the signature page and was not explicitly incorporated in a clause above the signature line. NYSCEF Doc. No. 48. Plaintiff further argues that enforcement of the Liability Clause, if part of the Lane Contract, would be precluded because Lane was grossly negligent in that it "was responsible for and controlled all aspects of the generator installation" and "knew, or should have known," that the generator was inadequate. Id.

In reply, Lane notes that the header of each page of the contract had page numbers and indicated that the document was seven pages long (i.e. "[page number] of 7"). NYSCEF Doc. No. 54. Lane additionally argues that plaintiff cannot maintain that pages six and seven are not part of the Lane Contract, as plaintiff previously relied upon the same seven-page document in its prior motion for summary judgment. Id. citing NYSCEF Doc. No. 13 ¶ 2. Finally, Lane argues that its actions did not meet the threshold of gross negligence and therefore the Liability Clause is enforceable.

Lane further moves, pursuant to CPLR 3215, for a default judgment against MKP (Motion Sequence 3). NYSCEF Doc. No. 42. MKP has neither answered the third-party complaint nor opposed the instant motion and its time to do so has expired.

Discussion

Motion Sequence 2, Partial Summary Judgment

In order to obtain summary judgment, the "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests' [M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose." Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (internal citations omitted).

The Limited Liability Clause

"There is no legal requirement that a party's signature appear at the end of a written agreement." Pludeman v Northern Leasing Sys., Inc., 87 AD3d 881, 882 (1st Dept 2011). In Pludeman, the plaintiffs alleged that a contract provision coming after the first page, on which the agreement was signed, was not part of the agreement because the plaintiffs were unaware that the additional pages existed. The Appellate Division First Department found that an issue of fact existed as to whether the plaintiffs received the additional pages of the contract and whether they could have reasonably believed that the first page represented the complete contract, noting that page one of the form lease, which each plaintiff signed, "states that it is 'Page 1 of 4' and contains a reference" to later contract provisions.

"'Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding.'" Nestor v Britt, 270 AD2d 192, 193 (1st Dept 2000), quoting Maas v Cornell Univ., 253 AD2d 1, 5, (3d Dept 1999), aff'd 94 NY2d 87.

Here, as in Pludeman, every page of the subject contract contains a header indicating seven total pages, suggesting that the contract included seven total pages. Additionally, there is text just below the signature line that states "ATTACHMENT: CONSULTANT CONTRACT PROVISIONS," indicating that the final two pages were part of the agreement. NYSCEF Doc. No. 16 at 5. However, unlike in Pludeman, plaintiff has neither alleged nor submitted any evidence to suggest that it did not receive the last two pages of the Lane Contract, nor that it was unaware of the Liability Clause. Instead, it merely argues that the pages are "not part of" the contract because they are not incorporated by reference before the signature line. NYSCEF Doc. No. 48. In any event, without any allegation that plaintiff was unaware of the contract provisions coming after the signature, this argument is insufficient to raise an issue of fact as to the provision's validity.

Moreover, plaintiff has previously submitted the full seven-page document, at NYSCEF Doc. No. 16, which plaintiff's counsel affirmed at the time was the Lane Contract. NYSCEF Doc. No. 13 ¶ 2. Plaintiff is therefore judicially estopped from now taking the inconsistent position that only the first five pages represent the Lane Contract.

Gross Negligence

"Exculpatory clauses and liquidated damages clauses in contracts are not enforceable against allegations of gross negligence." Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc., 18 NY3d 675,

683 (2012) (internal citations omitted). "Gross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must smack of intentional wrongdoing. It is conduct that evinces a reckless indifference to the rights of others." Id. (internal citations and quotation marks omitted)

In Abacus, the defendant security systems companies' negligence consisted in "much more than mere failure to install a proper working alarm system and inspect it." Id. at 683. They "had knowledge — for weeks, if not months — that the equipment had been malfunctioning" and failed to act. Id. at 683. Similarly, in Fed. Ins. Co. v Automatic Burglar Alarm Corp., 208 AD2d 495, 496 (2d Dept 1994), "defendant's prior notice of the malfunctioning of" an alarm system raised "issues of fact with respect to whether or not the defendant was grossly negligent."

By contrast, in David Gutter Furs v Jewelers Protection Servs., 79 NY2d 1027 (1992), expert testimony that "there should have been two motion detectors, instead of one, on each level; a shock sensor should have been installed; defendant should have ascertained how the inventory would be arranged; and a post-occupancy inspection should have been undertaken" was insufficient to raise an issue of fact with regard to "whether defendant performed its duties with reckless indifference to plaintiff's rights."

Here, unlike in Abacus or Fed. Ins. Co., plaintiff does not allege that Lane ignored a malfunctioning generator for an extended period of time; the generator was in the process of being installed and was not yet operational. While plaintiff alleges that Lane "knew, or should have known," that the unit was not suitable, based on their multiple inspections throughout the installation, there is no evidence to suggest that Lane had "knowledge" or "prior notice" of the problem and chose to ignore it, as in Abacus and Fed. Ins. Co. Instead, the evidence suggests that Lane relied on the representations of MKP when it chose to install the unit that later proved to be inadequate. Like in David Gutter Furs, Lane's unintentional failure to ensure that the unit was adequate, if proven, would at most amount to ordinary negligence, not gross negligence.

Thus, as the Liability Clause is part of the Lane Contract, and as Lane's alleged negligence does not smack of intentional wrongdoing or reckless indifference, this Court should grant Lane's motion for partial summary judgment limiting its liability to the compensation it received for work performed on the project.

Although Lane's liability will be limited, it is unclear what the precise limitation is. The Lane Contract specifies that Lane's liability "shall not exceed the total compensation received by [Lane] under this Agreement." NYSCEF Doc. No. 16 at 6-7. Lane's fee for its services was to be $13,500, plus "inspection of work in progress" that was "to be billed at the prevailing hourly rate, including reasonable expenses, and shall include a limit of 1/2 hour travel time per visit." Id. at 3. However, as it is unclear exactly how much compensation Lane received for its hourly work and fees, the exact limitation, if Lane is ultimately found liable, shall be determined later in this action.

This Court has considered plaintiff's other arguments and finds them to be unavailing and/or non-dispositive.

Motion Sequence 3, Default Judgment Against MKP

To obtain a default judgement, a plaintiff must submit proof of service of the summons and complaint, the facts constituting the claim, the default, and the amount due. CPLR 3215. "Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003).

"Service of process on a registered agent may be made in the manner provided by law for the service of a summons, as if the registered agent was a defendant." BCL § 306.

Here, although service was proper, Lane has not submitted proof of the facts constituting the claim. There is no evidence that MKP intended to benefit Lane by entering into the MKP Contract, thus defeating Lane's third-party beneficiary claim; nor does the MKP Contract state that MKP would indemnify Lane for any of MKP's actions. NYSCEF Doc. No. 27. Thus, Lane is not entitled to a default judgment against MKP.

Conclusion

Thus, the motion of defendant/third-party plaintiff, Lane Engineering Consulting, P.C., for partial summary judgment limiting its liability to plaintiff, 30 Fifth Avenue Owners Inc., to the amount of compensation that Lane received is hereby granted with said amount to be determined later in this action; and the motion of defendant/third-party plaintiff, Lane Engineering Consulting, P.C., for a default judgment against third-party defendant, MKP Electrical Corp., is denied; and the Clerk is directed to enter judgment accordingly.

Finally, the parties are hereby directed to attend an in-person Preliminary Conference on July 17, 2025, at 10:00 a.m. at 60 Centre Street, Courtroom 418, New York, NY.

HON. ARTHUR F. ENGORON

7/1/2025
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE