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

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GRACIANO CORPORATION,

Plaintiff,

-against-

LANMARK GROUP, INC. and FEDERAL INSURANCE COMPANY,

Defendants.

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LANMARK GROUP, INC.,

Third-Party Plaintiff,

-against-

LIBERTY MUTUAL INSURANCE COMPANY,

Third-Party Defendant.

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Index No. 652750/2014

Motion Seq. No. 001

T.P. Index No. 595017/2015

BRANSTEN, J.

Defendants Lanmark Group, Inc. ("Lanmark") and Federal Insurance Company move to consolidate this case (hereinafter "Graciano Action") with *Lanmark Group, Inc. v. New York City School Construction Authority*, Index No. 650060/2015 (Sup. Ct. N.Y. Cnty.) ("SCA Action 1") and *Lanmark Group, Inc. v. New York City School Construction Authority*, Index No. 653952/2015 (Sup. Ct. N.Y. Cnty.) ("SCA Action 2"). New York City School Construction Authority ("SCA") is not a party to the Graciano Action. Both Plaintiff Graciano Corporation ("Graciano") and non-party SCA oppose the consolidation of the Graciano Action and SCA Actions 1 and 2. For the reasons that follow, Defendants' motion is denied.

I. Background

A. *Factual Background*

All three actions relate to construction work at P.S. 204(K) in Brooklyn, New York. In or about June of 2013, the SCA, as owner of the Project, entered into a contract with Lanmark, as general contractor (the "Prime Contract"), to perform construction work on a project known as "Exterior Masonry, Parapets, Roof, Flood Elimination, Paved Areas at PS 204(K) in Brooklyn, New York" (the "Project"). Affirmation of Joseph J. Cooke ("Cooke Affirm.") ¶ 3. On or about August 26, 2013 Lanmark entered into an agreement with Graciano to perform work at the Project (the "Subcontract"). *Id.* ¶ 4. During the course of work on the Project, on or about August 27, 2014, Lanmark issued an addendum to the Subcontract that deleted a substantial portion of Graciano's masonry work. Affidavit of Glenn Foglio ("Foglio Aff.") ¶ 12. In response, Graciano notified Lanmark by letter dated September 8, 2014 that it was stopping work on the Project. Cooke Affirm. ¶ 6. Lanmark took over the remaining work and notified Graciano that the Subcontract was terminated. *Id.* ¶¶ 7-8.

B. *Graciano Action*

On November 5, 2014, Graciano commenced this action against Lanmark and its surety, Federal Insurance Company, to recover damages. *Id.* ¶ 13. In the Complaint, Graciano alleged Lanmark delayed and interfered with Graciano's work and wrongfully

deleted a substantial portion of the masonry scope work from the Subcontract. Compl. ¶¶ 10-18. Issue was joined by Defendants' service of an Answer and Counterclaim on December 9, 2014. Cooke Affirm. ¶ 14. In the Counterclaim, Lanmark alleged Graciano had breached the Subcontract by failing to perform work in accordance with the Subcontract requirements, performing defective work, delaying completion of its work, and abandoning performance of the Subcontract in September of 2014. Answer and Countercl. ¶ 51. On January 12, 2015, Lanmark filed a Third-Party Complaint against Liberty Mutual Insurance Company ("Liberty") and Liberty served its answer to the Third-Party Complaint on February 17, 2015. The parties are currently engaged in discovery, with an April 31, 2017 deadline for all discovery.

C. *SCA Actions 1 and 2*

On January 8, 2015, Lanmark commenced SCA Action 1 against SCA. By the Complaint, Lanmark alleged that subsequent to the start of Lanmark's work on the Project, SCA requested Lanmark perform "extra work" beyond the scope of the Prime Contract. Lanmark sought compensation for seven items of "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 existing plates and (7) removal of existing loose and hung lintels. SCA filed a pre-answer motion to dismiss all of Lanmark's claims. Cooke Affirm. ¶ *20*.

This action was assigned to Justice Scarpulla and the motion to dismiss was fully submitted on April 6, 2015. Justice Scarpulla granted SCA's motion to dismiss Lanmark's fourth cause of action and denied the motion as to all other claims. *Id.* ¶ 21. Lanmark filed a notice of appeal on February 2, 2016 and SCA cross-appealed on February 29, 2016. As of the return date of this motion, the appeal is currently pending before the First Department.

After SCA Action 1 was filed, Lanmark identified two additional "extra work" claims under the Prime Contract involving back-up brick work and the installation of door jambs, frames, saddles, and hinges. Lanmark commenced SCA Action 2 by serving SCA with a summons with notice on December 1, 2015. SCA filed a demand for the complaint and Lanmark served the complaint on March 14, 2016. *Id.* ¶ 24. SCA then filed a pre-answer motion to dismiss all claims, which was fully submitted on July 5, 2016. SCA Action 2 was assigned to Justice Scarpulla and, as of the return date of this motion, the motion to dismiss is currently *sub judice*.

II. Discussion

Lanmark now seeks to consolidate the Graciano Action with SCA Actions 1 and 2 pursuant to CPLR 602.

A. *Standard of Law for Consolidation*

"When actions involving a common question of law or fact are pending before a court, the court, upon motion, . . . may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." CPLR 602(a). "A motion to consolidate is directed to the sound discretion of the court, and the court is given wide latitude in the exercise thereof." *Inspiration Enters., Inc. v. Inland Credit Corp.*, 54 A.D.2d 839, 840 (1st Dep't 1976).

Consolidation is disfavored where the party opposing the motion demonstrates that consolidation will prejudice a substantial right. *See Raboy v. McCrory Corp.*, 210 A.D.2d 145, 147 (1st Dep't 1994). The party opposing consolidation has the burden of demonstrating prejudice to a substantial right. *Sokolow v. Lacher*, 299 A.D.2d 64, 74 (1st Dep't 2002). When considering the issue of substantial prejudice, courts may consider the totality of the circumstances that consolidation would engender. *Skelly v. Sachem Cent. Sch. Dist.*, 309 A.D.2d 917, 918 (2d Dep't 2003).

B. *Consolidation is Not Warranted*

1. Common Questions of Law and Fact

Here, there are no common questions of law or fact between the Graciano and SCA Actions. The Graciano and SCA Actions arise out of different instruments and involve different parties. *See JM Mech. Corp. v. Washington Fed. Sav. & Loan Assoc.*, 80 A.D.2d

884, 886 (2nd Dep't 1981) (finding no common question of law where suits presented three distinct legal claims, each based on a separate contract). In the Graciano Action, Graciano seeks to recover the costs associated with the work it performed at the Project and Lanmark counterclaims to recover damages arising from the breach of the Subcontract. On the other hand, in SCA Actions 1 and 2, Lanmark seeks to recover costs from SCA for specific items of "extra work" that Lanmark alleges fell outside of the scope of the Prime Contract. The Prime Contract governs Lanmark and SCA's relationship as general contractor and owner. The Subcontract governs Lanmark and Graciano's relationship as general contractor and subcontractor. SCA is not a party to the Subcontract and Lanmark has failed to establish privity between SCA and Graciano.[1] Although the Graciano and SCA Actions involve the same construction project, the actions arise out of different contracts, and involve different parties and different factual issues. *See H. H. Robertson Co. v. N.Y. Convention Ctr. Dev. Corp.*, 160 A.D.2d 524, 524 (1st Dep't 1990) (denying consolidation of actions arising from same construction project). Therefore, there is no common issue of law or fact in the Graciano and SCA Actions.

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[1] Lanmark has argued that it is entitled to pass onto SCA the costs of "extra work" under the Subcontract that Lanmark performed after the Subcontract was terminated. Reply Memo. at 4-5. However, Lanmark has not provided legal support for this contention in its briefing. Lanmark cites to *Kleinberg Electric, Inc. v. E-J Electric Installation Company*, which provides the contractor's right to recover from a subcontractor who abandons the contract. 111 A.D.3d 410, 411 (1st Dep't 2013). However, *Kleinberg* does not establish a contractor's right to pass through costs to the owner of the project.

2. Prejudice of a Substantial Right

Furthermore, the non-moving parties have shown the totality of circumstances resulting from a consolidation would prejudice a substantial right. First, consolidation would prejudice SCA by imposing additional costs and involving SCA in a trial that it has nothing to do with. *See Sokolow*, 299 A.D.2d at 74. The Graciano Action is a dispute between the general contractor and subcontractor at a Project owned by SCA. SCA is not liable for any breaches of the Subcontract because SCA was not a party to the Subcontract and any determination in the Graciano Action would have no bearing on the resolution of the SCA Actions. *See id.* (finding consolidation inappropriate where issues dominating one trial had "little bearing" on defendants in the other case). Thus, consolidating the SCA Actions with the Graciano Action would prejudice SCA.

Second, jury confusion would occur after the realignment of parties because Lanmark would be the plaintiff and defendant in the consolidated case. *See Geneva Temps, Inc. v. N.Y. Communities, Inc.*, 24 A.D.3d 332, 335 (1st Dep't 2005) (holding that an action should not be consolidated if it results in a party being plaintiff and defendant). In addition, as noted above, the Prime Contract and Subcontract are separate instruments. A determination that Graciano performed "extra work" that fell outside of the scope of the Subcontract would not necessarily give Lanmark the right to recover from SCA under the Prime Contract. Therefore, to try these actions together may cause confusion. *See Dean Witter Reynolds, Inc.*, 85 A.D.2d at 552 (finding prejudice would be caused by

consolidating action by an underwriter against a real estate investment trust with an action by the trust against an insurer where a determination in favor of the underwriter against the trust did not necessarily give the trust a right to recover from the insurer).

Finally, the consolidation of the three cases would cause significant delay. *See Inspiration Enters.*, 54 A.D.2d at 840 (finding prejudice of substantial right where issue had recently been joined and pretrial procedures would entail delay of trial). The decision on SCA's motion to dismiss in SCA Action 1 is currently on appeal to the First Department and the motion to dismiss in SCA Action 2 is currently pending before Justice Scarpulla. Consolidation of SCA Action 2 would be inappropriate at this time because issue has not yet been joined. *See Luks v. N.Y. Life Ins. Co.*, 213 A.D. 623, 625 (1st Dep't 1925) (finding that court should not consolidate when issue was not joined). In addition, if the Graciano Action and SCA Actions were consolidated, the trial would be delayed until there was a determination on the SCA motions to dismiss. Therefore, consolidation would result in substantial prejudice to Graciano.

II. Conclusion

Accordingly, it is ORDERED Defendants' motion to consolidate (motion sequence 01) is denied.

Dated: New York, New York
February 17, 2017

ENTER:

Hon. Eileen Bransten, J.S.C.