SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD PART 49
Justice

W&W STEEL, individually and on behalf of all other trust beneficiaries,

Plaintiff,

-against-

NATIONAL SEPTEMBER 11 MEMORIAL AND MUSEUM AT THE WORLD TRADE CENTER FOUNDATION, INC., F/K/A THE WORLD TRADE CENTER MEMORIAL FOUNDATION, INC., THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, BOVIS LEND LEASE LMB, INC., and JOHN DOES 1-10,

Defendants.

INDEX NO. 651025/2012
MOTION DATE Aug. 13, 2013
MOTION SEQ. NO. 003
MOTION CAL. NO. ____

The following papers, numbered __ to __were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion to dismiss is decided in accordance with the accompanying memorandum decision and order.

Dated: August 27, 2013

O. PETER SHERWOOD, *J.S.C.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE
☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION PART 49

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W&W STEEL, LLC, individually and on behalf of all other trust beneficiaries,

Plaintiff,

-against-

NATIONAL SEPTEMBER 11 MEMORIAL AND MUSEUM at the WORLD TRADE CENTER FOUNDATION, INC., F/K/A THE WORLD TRADE CENTER MEMORIAL FOUNDATION, INC., THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, BOVIS LEND LEASE LMB, INC. AND JOHN DOES 1-10.

Defendants.

---x

NATIONAL SEPTEMBER 11 MEMORIAL AND MUSEUM AT THE WORLD TRADE CENTER FOUNDATION, INC.,

Third-Party Plaintiff,

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Third-Party Defendant.

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DECISION AND ORDER

Index No.: 651025/2012
Mot. Seq. 003

O. PETER SHERWOOD, J.:

Non-Party/Defendant Port Authority of New York and New Jersey (the "Port Authority"), moves to dismiss the cross-claims of defendant National September 11 Memorial and Museum at the World Trade Center Foundation, Inc., f/k/a the World Trade Center Memorial Foundation, Inc. (the "Foundation"), pursuant to CPLR 3211 (a) for lack of proper service of process and failure to serve the Port Authority with a notice of claim prior to commencement of suit.[1]

[1]The Port Authority contends that it is a non-party, but the Foundation avers that the Port Authority is a cross-claim defendant

I. FACTUAL BACKGROUND

The Foundation is a not-for-profit corporation responsible for designing, operating, funding and maintaining the National September 11 Memorial and Museum at the World Trade Center (the "Project"). The Foundation hired Lend Lease (US) Construction LMB, Inc., f/k/a Bovis Lend Lease LMB, Inc. ("Lend Lease") to act as construction manager for the Project. On October 30, 2009, the Foundation, through Lend Lease as its agent, entered into a $7,289,240 contract (the "Contract") with plaintiff W&W Steel, Inc. ("W&W"), whereby W&W agreed to furnish and install the structural steel for the pavilion at the Project. The Foundation subsequently assigned all of its rights, title, interest and obligations under the Contract to the Port Authority (the "Assignment").

W&W was to commence its work on the Project on September 1, 2009, begin construction on or about March 16, 2010, and complete construction within 80 working days. W&W alleges that throughout the course of the Project, it was directed to make a number of changes to the scope of the work, and that the Foundation and/or the Port Authority had approved change orders totaling $5,014,744.00, for a revised Contract price of $12,303,984.00. W&W alleges that the Foundation and/or the Port Authority failed to pay $2,613,475.00 of these approved change orders, and failed to approve $1,151,227.00 in pending change orders. W&W also alleges that the Foundation and/or the Port Authority delayed work on the Project, creating additional costs and expenses. On January 11, 2012, W&W submitted a claim and a request for an equitable adjustment change order of $4,791,146.00. W&W asserts that the Foundation and/or the Port Authority has not responded to its request for an equitable adjustment change order.

In this action W&W alleges causes of action for breach of contract, unjust enrichment and *quantum meruit*. W&W seeks damages in the amount of $8,555,848.00.

The Foundation answered the complaint and insofar as is relevant on the motion, asserts three cross-claims against the Port Authority: (1) indemnification under a certain Access Agreement and Supplement Agreement; (2) a declaratory judgment that the Port Authority is obligated to defend the Foundation for any action relating to the Project, under the same agreements; and (3) reimbursement for judgment and defense of this action due to the Port Authority's alleged breach of the Assignment.

II. PROCEDURAL HISTORY

W&W commenced this action on April 1, 2012 by the filing of a summons and verified complaint, and on June 21, 2012, filed an amended verified complaint. On July 19, 2012, before the Port Authority appeared in this action, the Foundation filed an answer with cross-claims against the Port Authority. An affidavit of service filed by the Foundation states that the answer with cross-claims was served on the Port Authority by regular mail.

On August 3, 2012, the Port Authority moved by to dismiss the amended complaint, pursuant to CPLR 3211 (a) (2), for lack of subject matter jurisdiction, arguing that W&W failed to serve it with a notice of claim prior to commencing the action, as required by McKinney's Uncons Laws of NY § 7107. In a decision rendered on the record on November 27, 2012, memorialized in a grey sheet short-form order on December 21, 2012, and entered by the Office of the County Clerk on January 3, 2013, the Court granted the Port Authority's motion and dismissed the amended complaint as asserted against the Port Authority.

Subsequently, W&W served the Port Authority with a notice of claim, waited sixty days and on February 19, 2013, moved for leave to further amend its complaint to reassert its claims against the Port Authority. The notice of motion was directed to the Foundation and the Port Authority.

At a conference before the Court held on March 13, 2013, the Port Authority stated that it did not believe that it should respond to the motion for leave to amend, arguing that it was no longer a party to the case. The Foundation contended that the Port Authority was still a party to the action by virtue of the Foundation's cross-claims against the Port Authority. The Port Authority responded that it had never been properly served with the cross-claims, contending that service on July 19, 2012, by NYSCEF and by mail was invalid because the Port Authority had not yet appeared in the action. The Court directed the Foundation to serve the Port Authority pursuant to the applicable provisions of the CPLR and gave the Port Authority the opportunity to move to dismiss the cross-claims. The Court also invited, but did not require, the Port Authority to submit an opposition to the motion for leave to amend the complaint. The Port Authority then filed an opposition to the motion on April 3, 2013. On April 10, 2013, W&W, the Port Authority and the Foundation filed a stipulation withdrawing the motion for leave to amend the complaint.

On March 15, 2013, the Foundation filed an affidavit of service which states that on March 14, 2013, it served the Port Authority with its answer with cross-claims by depositing a copy in the mail, addressed to the Port Authority's counsel at DLA Piper LLP. The Port Authority filed the instant motion on April 3, 2013. On April 15, 2013, the Foundation filed a third party summons and complaint against the Port Authority, asserting three causes of action that are identical to the three cross-claims. The Port Authority has not yet answered or moved against the third party complaint. On April 25, 2013, the Foundation filed an affidavit of service, which states that on April 19, 2013, the Foundation served the Port Authority with its answer with cross-claims and the third party summons and complaint, by personal delivery to a person authorized to accept service on behalf of the Port Authority.

III. DISCUSSION

In moving to dismiss the cross-claims, the Port Authority asserts two primary arguments: (1) the cross-claims were never properly served on the Port Authority; and (2) even if the cross-claims were properly served, the Court lacks subject matter jurisdiction over the cross-claims because the Foundation did not serve the Port Authority with a notice of claim. For the reasons that follow, the Court finds that the cross-claims were properly served on March 14, 2013, but that the cross-claims must be dismissed because the Foundation failed to serve the Port Authority with a notice of claim.

A. Service of the Cross-Claims

The Port Authority argues that it has never been properly served with the Foundation's answer with cross-claims. As noted above, the Foundation filed its answer to the amended complaint with cross-claims against the Port Authority on July 19, 2012, prior to the time the Port Authority appeared in this action. An affidavit of service filed by the Foundation states that it served the Port Authority with the answer and cross-claims by mailing a copy to the Port Authority by regular mail. CPLR 3012 (a) states that "[a] subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons" (CPLR 3012 [a]). Since the CPLR does not provide for service of a summons by regular mail or e-filing upon a party who has not yet appeared, the attempted service of process on July 19, 2012 was ineffective.

The Port Authority appeared in this action on August 3, 2012, pursuant to CPLR 320 (a), by filing its motion to dismiss the complaint for lack of subject matter jurisdiction (CPLR 320 [a] ["[t]he defendant appears by . . . making a motion which has the effect of extending the time to answer"]). Between July 19, 2012 and the time the Court dismissed the complaint as against the Port Authority for lack of subject matter jurisdiction, the Foundation did not attempt service of the cross-claims upon the Port Authority, apparently believing that the Port Authority had already been properly served. Accordingly, as of January 3, 2013, when the Office of the County Clerk entered the order dismissing the complaint as against the Port Authority, there were no claims properly asserted against the Port Authority.

After the Court directed the Foundation to serve the Port Authority, the Foundation attempted service by depositing a copy of its answer to the amended complaint with cross-claims in the mail, addressed to the Port Authority's counsel at DLA Piper LLP. The Port Authority contends that this attempted service was improper for two reasons: (1) cross-claims may not be brought against a non-party; and (2) since the Port Authority was not a party to the action as of March 14, 2013, service upon its attorneys was improper. Both of these arguments are without merit.

The CPLR explicitly allows cross-claims to be brought against non-parties (CPLR 3019 [b], [d]; Siegel, NY Prac § 227 at 389 [5th ed 2011] ["As with a counterclaim, [a cross-claim] is also interposable against a nonparty as well as the co-defendant. The non-party is joined by filing a copy of the answer containing the cross-claim along with a summons, paying a filing fee, and then serving the answer and summons on the nonparty being joined."]).

In any event, the Port Authority was not a non-party to the action as of March 14, 2013, but rather remained a party to the action, because no judgment has ever been entered dismissing the Port Authority from this action. The Port Authority has not cited any authority, and Court's research has found none, that stands for the proposition that upon entry of an order dismissing the complaint against a party but prior to entry of a judgment dismissing that party, its appearance in the action and status as a party is negated. The Port Authority was still a party on March 14, 2013. CPLR 2103 (b) (2) provides that "papers to be served upon a party in a pending action shall be served upon the party's attorney. . . . Such service upon an attorney shall be made . . . by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at the attorney's last known address; service by mail shall be complete upon mailing" (CPLR 2103 [b] [2]).

The Foundation complied with CPLR 2103 (b) (2) by serving the answer with cross-claims by mail upon the Port Authority's attorneys. Accordingly, service of the cross-claims upon the Port Authority was completed on March 14, 2013. The Foundation's additional service of the cross-claims upon the Port Authority on April 19, 2013 by personal delivery to a person authorized to accept service was thus unnecessary.

B. Subject Matter Jurisdiction

The Port Authority argues that even if the cross-claims were properly served, they must be dismissed pursuant to CPLR 3211 (a) (2) for lack of subject matter jurisdiction, because the Foundation failed to comply with the notice of claim statute applicable to the Port Authority (*see* Uncons Laws § 7107). The Port Authority, as a New York State government agency, enjoyed sovereign immunity at common law (*see Yonkers Constr. Co. v Port Auth. Trans-Hudson Corp.*, 93 NY2d 375, 378-379 [1999]). The state legislature has consented to suits against the Port Authority (*see* Uncons Laws § 7101), but requires claimants to serve the Port Authority with a notice of claim at least sixty days prior to commencing suit (*see id.*) Compliance with the notice of claim provision "is mandatory and jurisdictional. The failure to satisfy this condition will result in withdrawal of defendant's consent to suit and compels the dismissal of the action for lack of subject matter jurisdiction" (*see Lyons v Port Auth. of N.Y. & N.J.*, 228 AD2d 250, 251 [1st Dept 1996]; *see also Belpasso v Port Auth. Of N.Y. & N.J.*, 103 AD3d 562, 562 [1st Dept 2013]; *City of New York v Port Auth. of N.Y. & N.J.*, 284 AD2d 195, 195 [1st Dept 2001]). Indeed, "[t]he fact that the Port Authority may not have been prejudiced by [a] plaintiff's failure to comply with the statute is immaterial, since the requirement is jurisdictional and must be strictly construed" (*Lyons*, 228 AD2d at 251). "Substantial compliance" with the statute is insufficient to confer subject matter jurisdiction (*see Matter of New York City Asbestos Litig.*, 106 AD3d 617, 618 [1st Dept 2013]).

The Foundation admits that it did not serve the Port Authority with a notice of claim prior to asserting its cross-claims, but contends that such a notice of claim is unnecessary.[2] First, it contends that since its claims have not accrued, it did not need to serve a notice of claim. Next,

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[2]This notice of claim issue may soon be academic because, at oral argument on this motion, counsel for the Foundation represented that a notice of claim was served on the Port Authority on May 13, 2013.

relying on the instructions in the notice of claim statute that waiver of sovereign immunity as to the Port Authority is granted on the "condition that in the case of any suit, action or proceeding for the recovery or payment of money, . . . a notice of claim shall have been served upon the port authority by or on behalf of the plaintiff or plaintiffs at least sixty days before such suit, action or proceeding is commenced" (Uncons Laws § 7107), the Foundation argues that the cross-claims are not seeking "the recovery or payment of money." Accordingly, there is no need for the Foundation to serve the Port Authority with a notice of claim.

The Foundation emphasizes that its claims have not accrued, and the Port Authority concedes this point (*see Tedesco v A.P. Green Indus., Inc.*, 8 NY3d 243, 247 [2007] [claim for indemnity "accrues only when the person seeking indemnity . . . has paid the underlying claim"]). This emphasis, however, is misplaced. The notice of claim statute requires that a notice of claim be served at least sixty days prior to bringing suit, regardless of whether the cause of action has accrued (*see* Uncons Laws § 7107). As a separate condition to the waiver of sovereign immunity, the Legislature has required "that any suit, action or proceeding prosecuted or maintained" against the Port Authority "shall be commenced within one year after the cause of action therefor shall have accrued" (*id*). Accordingly, even though the Foundation's claims have not accrued (and assuming that the Foundation's claims are "for the recovery or payment of money"), the Foundation is still required to serve a notice of claim upon the Port Authority at least sixty days prior to asserting its cross-claims.

In support of its position, the Foundation relies on *Hartl-O'Leary v Green Bus Lines Corp.* (13 Misc 3d 1215(A), 2006 WL 2785729, 17672/2003 [Sup Ct, Queens County Sept. 20, 2006]). There, the court held that "[a] cause of action for common law indemnification . . . , such as that set forth by [third party plaintiff] in the third party action against the Port Authority, does not accrue until the third party plaintiff makes payment of an amount which exceeds its pro rata share of the judgment. . . . It is well settled that because of this fact, the notice requirements for the commencement of an action, relied upon by the Port Authority . . ., are inapplicable to the maintenance of a third party action . . . . Therefore, the motion by the Port Authority to dismiss the third party complaint, based on a failure to comply with the notice requirements of [Uncons Laws § 7107], is without merit and must be denied" (*id.* at *2-3 [citations omitted]). In making this determination, the *Hartl-O'Leary* court relied on decisions interpreting General Municipal Law §

50-e, and not on the law applicable Port Authority, *(see* Uncons Laws § 7107). There is a critical distinction between these two statutes and that distinction leads this Court to a different result in this case. Whereas General Municipal Law § 50-e requires that a notice of claim be served "within ninety days after the claim arises" (General Municipal Law § 50-e [1] [a]), Uncons Laws § 7107 states that a notice of claim must "have been served . . . at least sixty days before [a] suit, action or proceeding is commenced" (Uncons Laws § 7107). Stated differently, under General Municipal Law § 50-e, there is no requirement to serve a notice of claim until after the claim accrues; under the Port Authority statute, the notice of claim must be served before a suit is commenced, regardless of whether the cause of action has accrued. Accordingly, this court declines to follow the precedent outlined in the *Hartl-O'Leary* decision.

The Foundation next argues that since its cross-claims do not seek "the recovery or payment of money," it was not required to serve a notice of claim upon the Port Authority. The Foundation states, generally, that "where the relief sought is declaratory in nature and the claims are not for monetary damages, a notice of claim requirement applicable only to demands for payment of money does not apply" (Mem. in Opp. 11). As support for this proposition, the Foundation cites *Ruocco v Doyle* (38 AD2d 132, 133-135 [2d Dept 1972]) and *Montgomery-Costa v City of New York* (26 Misc 3d 755, 773-774 [Sup Ct, NY County 2009, Edmead, J.]). These cases are inapposite because they specifically construe the notice of claim provision of Education Law § 3813 (1) and not Uncons Laws § 7107. In any event, the Second Department decision in *Ruocco* involved a true declaration of rights. The plaintiff there was not seeking money damages. Instead, the plaintiff, who was a former school principal, sought a declaration that his resignation was invalid (*see Ruocco*, 38 AD2d at 132-133). In the present action, although framed as cross-claims for declaratory relief, this is an action for the recovery or payment of money, because the Port Authority will be required to pay monetary damages if the Foundation is successful.

Given that the Port Authority notice of claim statute "must be strictly construed" (*Lyons*, 228 AD2d at 251), and that the Court of Appeals' has instructed that "a statute in derogation of the sovereignty of a State must be strictly construed, waiver of immunity by inference being disfavored" (*Sharapata v Town of Islip*, 56 NY2d 332, 336 [1982]; *see also Matter of Bello v Roswell Park Cancer Inst.*, 5 NY3d 170, 173 [2005]), the Court finds that the cross-claims are for the recovery or payment of money, and accordingly, that the Foundation failed to comply with the notice of claim

statute. The "recovery or payment of money" language appears to have been intended to complement Uncons Laws §§ 7105 and 7109, which provide that no action or proceeding for an injunction may be brought against the Port Authority and its commissioners, officers or employees in their official or personal capacities, except upon the complaint of the Attorney General (Uncons Laws §§ 7105, 7109; *see* Bill Jacket, L 1950, ch 301, 1950 NY Legis Ann at 203-204).

Accordingly, the Court finds that the Foundation properly served the Port Authority with its cross-claims on March 14, 2013. However, it failed to comply with the notice of claim statute. The motion to dismiss the cross-claims for lack of subject matter jurisdiction is granted. Nothing in this decision and order shall be construed to bar the Foundation from commencing an action against the Port Authority more than sixty days after service of a proper notice of claim.

This constitutes the decision and order of the court.

DATED: August 27, 2013

ENTER,

O. PETER SHERWOOD

J.S.C.