

**R.P. Brennan Gen. Contr. & Bldrs., Inc. v CPS 1
Realty LP**

2010 NY Slip Op 30503(U)

March 10, 2010

Supreme Court, New York County

Docket Number: 603088/08

Judge: Barbara R. Kapnick

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

PRESENT: Kapnick
Justice

PART 8am

R.P. Brennan General Contractors
INDEX NO.

603022 of

- v -

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

CPS Realty, Inc.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED
MAR 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/9/10


BARBARA R. KAPNICK S.C.
J.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
R.P. BRENNAN GENERAL CONTRACTORS &
BUILDERS, INC.,

Plaintiff,

DECISION/ORDER
Index No. 603088/08
Mot. Seq. No. 004

-against-

CPS 1 REALTY LP,

Defendant.

-----X
BARBARA R. KAPNICK, J.:

Plaintiff R.P. Brennan General Contractors & Builders, Inc. ("RPB") moves by Order to Show Cause for an order: (i) pursuant to CPLR § 7503(b) permanently staying the arbitration of a counterclaim (the "arbitration counterclaim") asserted by defendant CPS 1 Realty LP ("CPS") against RPB in the arbitration proceeding, R.P. Brennan General Contractors & Builders, Inc. v. CPS 1 Realty LP, Case No. 13-110-Y-02369-08 02, pending before the American Arbitration Association since October 16, 2008, on the ground that CPS has waived its right to arbitration; and (ii) awarding RPB reasonable attorneys' fees, costs and disbursements.

FILED

MAR 12 2010

NEW YORK
COUNTY CLERK'S OFFICE

The arbitration counterclaim seeks to recover damages in excess of \$12 million allegedly caused by RPB's delay in completing the work and other contractual breaches. RPB contends that CPS has committed to litigate the arbitration counterclaim in court by,

inter alia, moving to assert a counterclaim against RPB in this action for breach of the construction agreements.¹

The motion was granted by Decision/Order of this Court dated December 16, 2009 "to the extent of granting defendant leave to serve and file a repleaded Amended Answer with Counterclaim within 30 days which shall omit any scandalous and prejudicial matter."

CPS denies that it waived its right to arbitrate the counterclaim, since (i) it moved for leave to assert a counterclaim in this action at a time when the arbitration proceeding was stayed pending CPS' appeal of the prior Decision/Order of this Court denying CPS' petition to stay the arbitration of RPB's claims (CPS 1 Realty LP v R.P. Brennan General Contractors & Builders, Inc., Index No. 114766/08, Decision dated March 9, 2009, *aff'd*, 66 AD3d 418 [October 6, 2009], *lv to app denied*, 13 NY3d 713 [December 15, 2009]); and (ii) CPS did not ultimately file a repleaded Amended Answer with Counterclaim in this action.

¹ RPB also contends that CPS has committed to litigate the arbitration counterclaim in court by commencing two actions against its principal, Michael Brennan, personally. However, the claims asserted against Michael Brennan were based on his personal guarantee, which did not include an arbitration provision.

The Court of Appeals has

repeatedly recognized New York's "long and strong public policy favoring arbitration" (citations omitted). Indeed, "this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties. Therefore, New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration" (citation omitted). Nonetheless, "[l]ike contract rights generally, a right to arbitration may be modified, waived or abandoned" (citation omitted). Accordingly, a litigant may not compel arbitration when its use of the courts is "clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration" (citation omitted). As we have further explained, "[t]he crucial question ... is what degree of participation by the defendant in the action will create a waiver of a right to stay the action. In the absence of unreasonable delay, so long as the defendant's actions are consistent with an assertion of the right to arbitrate, there is no waiver. However, where the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer in the particular case, his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory" (citations omitted).

Stark v Molod Spitz DeSantis & Stark, P.C., 9 NY3d 59, 66-67 (2007).

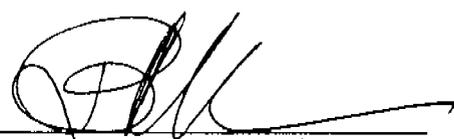
Based on the papers submitted and the oral argument held on the record on March 5, 2010, this Court finds that CPS' seeking and obtaining permission from this Court to assert a counterclaim herein constituted an election between the forums available for resolving the dispute. See, *DeSapio v Kohlmeyer*, 35 NY2d 402, 406 (1974) which held that "[t]he courtroom may not be used as a

convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration. (citation omitted)."

Accordingly, RPB's motion to permanently stay the arbitration of CPS' counterclaim is granted. That portion of the motion seeking attorneys' fees, costs and disbursements is denied at this time.

This constitutes the decision and order of this Court.

Date: March 9, 2010


Barbara R. Kapnick
J.S.C.

**BARBARA R. KAPNICK
J.S.C.**

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