Moloney v Shamrock Bldg. Sys., Inc.
2005 NY Slip Op 30540(U)
July 8, 2005
Supreme Court, New York County
Docket Number: 103822/05
Judge: Kibbie F. Payne

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK ; IAS PART 4

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Application of
DANIEL MOLONEY, TEMPEST REALTY CORP., LIFFEY VAN LINES, INC. and ROSE REALTY CORP.,
Petitioners,

Index No. 103822/05
Motion Sequence 01 and 02

For an Order Pursuant to Article 75 of the Civil Practice Law and Rules Staying Arbitration of a Certain Controversy at the American Arbitration Association,

- against -

SHAMROCK BUILDING SYSTEMS, INC.,
Respondent.

DECISION/ORDER

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KIBBIE F. PAYNE, J.:

Motions sequence 01 and 02 under New York County Index No. 103822/05 are consolidated for decision and are disposed of in accordance with the accompanying memorandum decision and order.

On May 21, 2005, Daniel Moloney, Tempest Realty Corp., Liffey Van Lines, Inc. and Rose Realty Corp. (hereinafter collectively "petitioners"), by order to show cause and petition, petitioned this court for an order pursuant to CPLR 7503 (b), staying a proceeding in arbitration commenced by respondent Shamrock Building Systems, Inc. (hereinafter "Shamrock") before the American Arbitration Association (hereinafter "AAA"), on the ground that there is no agreement to arbitrate made by any petitioners, except Rose Realty Corp. In response to petitioners' application for temporary relief pending determination of the petition to stay arbitration, this court enjoined the continuation of the underlying arbitration pending determination of the instant petition. Petitioners also seek an award of attorneys' fees, costs and sanctions.

In a separate motion (sequence 02), Allied Van Lines, Inc. (hereinafter "Allied") seeks leave to intervene in this proceeding to stay arbitration. Intervention is sought by permission of the court (CPLR § 1013) and as of right (CPLR § 1012 [a] [2]). Although Allied is not a signatory to the subject arbitration agreement, Allied claims it has been erroneously implicated in the parties' dispute by Shamrock, who has served Allied with a demand for arbitration and a notice of mechanic's lien. Allied alleges further that unless it is allowed to intervene in this proceeding, its interest will not be inadequately represented by the parties and it may ultimately be bound by any future determination in arbitration. It is not contested that, on September 25, 2003, Shamrock, a general contractor, entered into an American Institute of Architects (AIA) *Abbreviated Standard Form of Agreement* with the owner of a certain parcel of land located at 234 East 121st Street, New York (hereinafter "the site"), for Shamrock to erect a building at the site. Article 9.10.4 of the parties' agreement authorizes arbitration and states in pertinent part:

> "Claims, disputes and other matters in question arising out of or relating to the Contract that are not resolved by mediation, except matters relating to aesthetic effect and except those waived as provided for in Paragraph 9.11 and Subparagraph 14.5.3 and 14.5.4 shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen. *** Except by written consent of the person or entity sought to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to the Agreement under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relied is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial, and (4) such person or

> entity is not the Architect or any of the Architect's employees or consultants ***."

A dispute arose when Shamrock, having performed its obligations under the contract by constructing the building, was not paid the full contract price. Shamrock claims it is still owed approximately $600,000 under the parties' agreement. Consequently, Shamrock commenced an arbitration proceeding before the AAA, seeking to recover the unpaid balance from petitioners Daniel Moloney, individually and the corporate entities, Tempest Realty Corp. (hereinafter "Tempest"), Liffey Van Lines, Inc. (hereinafter "Liffey") and Rose Realty Corp. (hereinafter "Rose"). Although it is not a signatory of the construction agreement, Allied has been served by Shamrock with a demand to arbitrate, on the ground that petitioner Liffey is an agent of Allied and further that Liffey made payments called for under the construction contract by issuing checks embossed: "Liffey Van Lines, Inc., Agent for Allied Van Lines." The construction contract which contains the aforesaid arbitration clause, is not signed by, or on behalf of Tempest, Liffey, Rose or Allied. However, Shamrock contends that because Tempest, Liffey and Rose share the same individual as their president – petitioner Daniel Moloney, who controls and conducts these business as an extension of himself, all of these entities should be required to participate in arbitration and held accountable for the debts and obligations owed under the construction contract.

There is no dispute that Daniel Moloney's signature appears on the last page of the construction contract under the heading: "OWNER (*Signature*)." However, the name and address of the owner has not been written in the space provided on the cover page of the contract. As such, it is not clear whether Moloney signed the contract in his individual capacity, or as the

president of one or more of the corporate petitioners. As a result, a factual question is raised "as to the real intent of the parties" (*cf. Metamorphosis Construction Corp. v Glekel,* 247 AD2d 231).

In their verified petition, petitioners claim that Rose is the owner and that Moloney signed the construction contract in his capacity as president of Rose. In support of their claim, petitioners annex a copy of a deed indicating that 234 East 121st Street, New York, New York, Block 1785, Lot 34, the site where the building was to be constructed under the contract's terms, was conveyed by the City to Rose on June 23, 1999. In opposition to petitioners' assertion, respondent Shamrock submits an attorney's affirmation in which it contends that Moloney signed the contract in his individual capacity and on behalf of all the corporate entities which he controls. As additional support for its contention, Shamrock alleges that it was Liffey, the owner under the deed for tax lots 36, 37 and 38 adjoining the site, that provided a survey for the construction project, although no mention of tax lots 36, 37 and 38 appears in the contract as submitted to the court. Shamrock also asserts, because Liffey made substantial payments toward the contract price and was the future tenant of the building to be constructed, Liffey should be deemed an "owner" in accordance with standard industry practice. Shamrock further asserts that petitioners, as a whole, should be required to arbitrate and held liable for the unpaid balance due under the contract.

Whether a valid agreement to arbitrate exists is for the court and not an arbitrator to decide (*see, Matter of Primex International Corp. v Wal-Mart Stores, Inc.,* 89 NY2d 594, 598; *Matter of County of Rockland [Primiano Construction Co., Inc.],* 51 NY2d 1, 6; *In re Pharmacia & Upjohn Co. v Elan Pharmaceuticals, Inc.,* 10 AD3d 331, 333-334). Moreover,

"the language whereby a party agrees to or is under a duty to arbitrate should be clear and unequivocal and the burden lies on the party seeking arbitration" (*Siegel v 141 Bowery Corp.*, 51 AD2d 209, 212; *see, Matter of Allied Van Lines [Hollander Express]*, 35 AD2d 191, 193). In this case, the mere assertions of Shamrock's attorney are insufficient to form a basis for concluding that all of the petitioners are parties to the construction contract and thereby bound to arbitrate. In fact, at this stage of the proceeding, there are several factors that militate against requiring all the petitioners to participate in the arbitration. "It has long been the rule in this State that the parties to a commercial transaction "will not be held to have chosen arbitration as the forum for the resolution of their disputes in the absence of an express, unequivocal agreement to that effect; absent such an explicit commitment neither party may be compelled to arbitrate" (*Matter of Marlene Industries Corp. [Carnac Textiles, Inc.]*, 45 NY2d 327, 333; *see also, Matter of Waldron [Goddess]*, 61 NY2d 181, 183; *Matter of Riverdale Fabrics Corp. [Tillinghast-Stiles Co.]*, 306 NY 288, 289 *reargument denied* 307 NY 689).

The fact that the corporate petitioners share the same person as their president, or their "interrelatedness, standing alone, is not enough to subject a nonsignatory to arbitration" (*TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 340; *Mionis v Bank Julius Baer & Co., Ltd.*, 301 AD2d 104, 111 *quoting TNS Holdings, Inc. MKI Securities Corp.*). Shamrock makes no showing that the corporate petitioners, Tempest, Liffey, or even Rose for that matter, undertook to insure the obligations of "owner" under the construction contract, which includes the obligation to participate in arbitration. The mere fact that payment was made by other so-called Moloney enterprises, does not establish that those entities intended to be bound by the terms of the construction agreement (*see e.g., Matter of O'Donnell v Arrow Electronics, Inc.*, 294

AD2d 581). Nor, does the fact that Liffey furnished Shamrock with a survey for the construction project provide a sufficient basis for compelling arbitration on the part of Liffey.

Additionally, the construction contract itself expressly precludes the joining of any person or entity who is not a party to the agreement in the arbitration without the written consent of such person or entity sought to be joined [Article 9.10.4]. Since all of the petitioners, except Rose, protest their joinder in the arbitration proceeding and deny that they are parties to the agreement with Shamrock, unless it is determined that these corporate petitioners agreed to be bound, it would be "unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent" (*TNS Holdings v MKI Securities Corp.*, 92 NY2d 335, 339).

Finally, petitioners' denial of an agreement is not dispositive of the petition for a stay. The ambiguity created by the omission of the name of the owner from the contract and the conflicting allegations made regarding the capacity in which Moloney signed the agreement, create a triable issues which must be resolved prior to a determination of the petition for a stay of arbitration (CPLR 410). A written agreement to arbitrate need not be signed to be enforceable if there is other proof that the parties actually agreed to arbitrate (CPLR 7501; *see, Crawford v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 35 NY2d 291, 299). In this case, the conclusory assertions of Shamrock's counsel are insufficient to demonstrate a "clear and unequivocal" intention on the part of the corporate petitioners, or the non-party Allied Van Lines, Inc. to be bound by the construction contract. Therefore, a hearing is required to determine in what capacity Moloney executed the construction agreement, including whether he is individually obligated thereunder and "whether the petitioner [Moloney] conducted his business affairs in such a manner as to warrant that the corporate veils of his various corporate enterprises be

pierced" (*Matter of McNulty [Locals 40, 361 & 417 Union Security Funds of the International Assoc. of Bridge, Structural and Ornamental Ironworkers,* 176 AD2d 881; *see, Glasser v Price,* 35 AD2d 98, 101-102).

It is recognized that there may be certain limited circumstances where there is a need to impute the intent to arbitrate to a nonsignatory (*see, e.g., OptiMark Technologies, Inc. v International Exchange Networks, Ltd.*, 288 AD2d 75; *Hendler & Murray v Lambert,* 114 AD2d 1003, mod 67 NY2d 831). Courts have created an "alter ego" theory exception by piercing the corporate veil and compelling the nonsignatories "alter egos" of a signatory to arbitrate (*TNS Holdings v MKI Securities Corp., supra* at 339), by requiring a nonsignatory corporate entity to arbitrate where it is so dominated by another person or entity who is a signatory (*see Van Valkenburgh, Nooger & Neville v Hayden Publishing Co.*, 30 NY2d 34, *mot. for rearg. den.* 30 NY2d 880, *cert. den.* 409 U.S. 875; *Matter of Sbarro Holding [Shiaw Tien Yuan],* 91 AD2d 613). "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance" (*TNS Holdings v MKI Securities Corp.*,335, 339; citing *Matter of Morris v New York State Dept. of Taxation & Finance,* 82 NY2d 135, 141-142). Accordingly, it is

ORDERED that a hearing is directed for a determination of the following issues: (1) whether Moloney executed the construction contract of September 25, 2003 as an individual and/or as an officer of one or more of the corporate petitioners; (2) whether there is a basis for imputing the intent to arbitrate to Tempest, Liffey and Rose, or for piercing the corporate veils of these enterprises and (3) whether Allied Van Lines, Inc. and Shamrock Building Systems, Inc. entered into an agreement to arbitrate; and it is further

ORDERED that the above factual issues are hereby referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, shall hear and determine the referred issues; and it is further

ORDERED that the petition for a permanent stay of arbitration and other relief in the form of attorneys' fees, costs and sanctions, is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403, and it is further

ORDERED that the application of Allied Van Lines, Inc. for leave to intervene in this proceeding is granted to allow Allied Van Lines, Inc. to protect its interest in these proceedings for a stay of arbitration and before the Special Referee (CPLR §§ 1012 [a] [2] and 1013); and it is further

ORDERED that petitioner shall serve a copy of this order with notice of entry upon the attorneys for respondent, intervenor Allied Van Lines, Inc. and the arbitral forum within 20 days of the entry of this order; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the clerk of the Judicial Support Office (room 311) in order to schedule a date for the reference to a Special Referee. The foregoing constitutes the decision and order of the court.

DATED: JUL 8 2005

ENTER:

J. S. C.