

Spinner v Structural Preserv. Sys., Inc.

2007 NY Slip Op 30575(U)

March 30, 2007

Supreme Court, New York County

Docket Number: 0603004/2006

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 52

Index Number : 603004/2006 *Justice*

SPINNER, JAY

INDEX NO. 603004/2006

vs

STRUCTURAL PRESERVATION

FILED DATE 1-10-07

Sequence Number : 001

FILED SEQ. NO. 001

STAY PROCEEDINGS

FILED CAL. NO. 14

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Article 75

The following papers, numbered _____, to/for _____ PAPERS NUMBERED _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

24
5

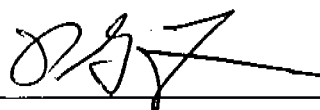
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ *petition* is granted in

part and denied in part and the cross-motion to compel arbitration is granted in part and denied in part.

See Annexed Decision, Order & Judgment.

Dated: 3/30/07



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

[* 1]

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM PART 52

-----X
JAY SPINNER,

Petitioner,

against

STRUCTURAL PRESERVATION SYSTEMS, INC.,
Respondent.
-----X

Index Number 603004/2006
Submission Date Jan. 10, 2007
Mot. Seq. No. 001
Mot. Cal. No. 14

**DECISION, ORDER AND
JUDGMENT**

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Papers considered in review of this petition to stay arbitration and cross-motion to compel arbitration:

Papers
Notice of Petition.....
Verified Answer to Petition.....
Notice of Cross-Motion.....
Affirmation in Opposition.....
Affirmation in Opposition to Cross-Motion.....

Numbered _____
UNFILED JUDGMENT
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PAUL GEORGE FEINMAN, J.:

In this Article 75 proceeding, petitioner seeks to stay arbitration pursuant to CPLR 7503(b). Respondent cross-moves to compel arbitration pursuant to CPLR 7503(a). For the reasons which follow, the petition is granted only to the extent that the arbitration actually commenced before the American Arbitration Association is permanently stayed unless petitioner consents to proceed in that forum. The cross-motion is granted to the extent that respondent is compelled to participate in an arbitration as required by the contract, however, the arbitral forum shall be one mutually agreed to by the parties within 30 days of entry of this judgment. In the event the parties cannot agree, they may file another motion seeking to have the court designate

the arbitral forum.

Facts

On about January 26, 2005, respondent entered into a written agreement with petitioner to install a waterproofing system in petitioner's residence which was then under construction (Pet. ¶ 4; Ex. A). Petitioner's home suffered "substantial damage" and petitioner contends that respondent's work was negligently done or with an inferior product (Pet. ¶ 5). Petitioner terminated the contract. On October 19, 2005, respondent commenced an arbitration proceeding before the American Arbitration Association (AAA) by filing a demand for arbitration, a copy which was served on petitioner on October 20, 2005 (Pet. Ex. B). The demand indicates that the January 26, 2005 contract at issue includes an arbitration clause and asserts that respondent seeks \$26,931 in fees due under the contract, along with attorney's fees, interest, and costs.

Petitioner, through his attorney, contacted the AAA on December 13, 2005, to indicate that he did not consent to arbitration or to arbitration before the AAA, and that it was his belief that without both parties' consent, arbitration could not proceed (Cross-Mot. Ex. A). The AAA informed both parties by letter dated December 27, 2005 and transmitted by facsimile that it would proceed with administration of the arbitration (Cross-Mot. Ex. C).

Petitioner seeks to stay the arbitration. Alternatively, he seeks arbitration or mediation in another forum. Respondent cross-moves seeking to enforce what it argues is the clear language of the contract's arbitration provision.

The Contract

The seven-page contract, drafted by respondent, consists of two pages specific to the work project, and a five-page Attachment "A" of "general conditions." Among the pertinent

general conditions are the following:

- 2.1. If an alternative form of contract or subcontract is to be used, then such form shall be the unmodified AIA Standard Form Contract Document A101 or unmodified Subcontract Document A401;
 - ...
 - 14.1 All claims, disputes, and other matters and questions arising out of, or relating to this Contract or any breach thereof, which cannot be resolved through negotiation, shall be submitted to either mediation or arbitration before and as a condition precedent to any other remedy.
 - 14.2 This contract shall be governed by the law of the place where the project is located.
-

(Pet. Ex. A).

Parties' Contentions

In essence, petitioner argues that although the contract clearly requires that the parties *seek* arbitration or mediation as a condition precedent to other remedies such as recourse in the courts, the contract does not require that mediation or arbitration be *consented to and conducted* (Pet. ¶ 10). He contends that were the paragraph to be read to require that either arbitration or mediation be conducted, there would then be no real possibility of pursuing other remedies, thus rendering ineffective the clause “as a condition precedent to any other remedy” (Pet. ¶ 11).

Respondent argues that “submitting” a dispute to arbitration necessarily includes pursuing the claim through resolution and that there is no provision that allows a party to reject arbitration. It maintains that the clause clearly provides for arbitration and “does not depend upon implication or subtlety.” (Cross-Mot. ¶ 6).

Legal Analysis

The courts favor the enforcement of arbitration clauses as an expeditious and economical alternative to the judicial forum for dispute resolution (*Matter of Smith Barney Shearson Inc. v*

Sacharow, 91 NY2d 39, 49 [1997]). However, a threshold issue to be decided is whether the parties agreed to arbitrate. The agreement must be “explicit and unequivocal,” otherwise a party may not be compelled to proceed to arbitration (*Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 171 [1989]).

Plaintiff argues that paragraph 14.1 of the contract is ambiguous and does not state, as respondent asserts, that the parties must arbitrate, only that any issue must first be submitted to arbitration (or mediation) prior to some other forum. He notes that many contracts contain provision that state that arbitration is the “sole and exclusive” remedy of the parties and that because the instant contract is drafted otherwise, it must be understood as providing for other forms of dispute resolution (Pet. Aff. in Opp. ¶ 4, citing *Matter of Teschner v Livingston*, 285 AD 435, 439 [1st Dept. 1955], *aff'd* 309 NY 972 [1956]). He further argues that because respondent drafted the contract, its terms must be construed against it, citing *Bell Atlantic Corp. v CTC Communications Corp.*, 159 F.3d 1345 [2d Cir. 1998] [holding that the term “upon mutual agreement, any controversy or claim arising out of or relating to this Agreement . . . shall be settled by arbitration,” did not compel arbitration]). Finally, he argues that nowhere in the contract does it designate AAA as the arbitrator, or give respondent the unilateral right to select an arbitrator.

It is basic horn book law that a contract’s terms are interpreted against the drafter (Calamari, Perillo Contracts 3d ed, § 3-13, citing Restatement Second, Contracts § 206; *Jacobson v Sassower*, 66 NY2d 991 [1985]). Although the parties may proffer differing interpretations of a clause, the threshold question of whether ambiguity exists is for the court to determine (*Amusement Business Underwriters v American Int’l Group, Inc.*, 66 NY2d 878, 881

[1985]). In the absence of ambiguity, which obscures the intentions of the parties to a contract, the interpretation of a contract and the obligations of the parties thereto, are questions of law not fact (*Briarwood Towers 85th Co. v Guterma*n, 136 AD2d 456, 458 [1st Dept 1988]).

When resolving an alleged conflict between sections of a contract, courts should adopt an interpretation that gives meaning to every provision of a contract (*In the Matter of the Arbitration between Donald J. Trump and Refco*, 194 AD2d 70 [1st Dept 1993]). Petitioner argues that the Paragraph 14.1 is ambiguous because where a dispute is first submitted to mediation or arbitration, any subsequent remedies are likely to be limited under the law. Petitioner argues that to give force to the paragraph's intent to allow subsequent remedies after mediation or arbitration, it must be understood that the mere demand for arbitration fulfills the condition precedent, and a refusal to arbitrate opens the door to employing other methods of dispute resolution.

Paragraph 14.1 of the contract is not ambiguous or discretionary. It states that as a condition precedent to any other potential remedy, any dispute which cannot be negotiated "shall be submitted to either mediation or arbitration." (Pet. Ex. A at para. 14.1). Contrary to petitioner's suggestion that the contract merely requires him to withhold his consent to which forum is chosen, and that he then may choose his own forum including a judicial proceeding, the paragraph requires him to undertake the arbitration or mediation process. Notably, the definitions of "submit," as set forth in the online AMERICAN HERITAGE DICTIONARY, are, as a transitive verb: "1. To yield or surrender (oneself) to the will or authority of another. 2. To subject to a condition or process. 3. To commit (something) to the consideration or judgment of another. 4. To offer as a proposition or contention. . . ," and as an intransitive verb, "1. To give

in to the authority, power, or desires of another. 2. To allow oneself to be subjected to something.” None of these definitions suggests that an objection to arbitration qualifies as “submission” as set forth in the contract.

As a general rule, “a party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it.” (*Arnav Indus. Inc. Retirement Trust v Brown, Raysman, Millstein*, 96 NY2d 300, 304 [2001]). A signatory to a contract who is competent to execute the agreement, and does not allege fraud, is responsible for his or her signature and is presumed to read and know what he or she signed (*Beattie v Brown & Wood*, 243 AD2d 395 [1st Dept. 1997]). By signing the agreement on in late January 2005, petitioner bound himself to the terms of paragraph 14.1 as well as the other terms of the agreement. Accordingly, the petition to stay the arbitration is denied, and the cross-motion to compel arbitration is granted.

As concerns the identity of the arbitrator, it is clear that the contract does not indicate that the AAA is the body designated to conduct the arbitration. The contract’s references to “alternative forms of contract,” in Paragraph 2.1, which respondent contends refers obliquely to the AAA, have little meaning given that no alternative form of contract appears to have been used. Respondent cites no case law or contract provision permitting it to unilaterally choose the arbitral forum. Accordingly, although the petitioner can be compelled to arbitrate, the parties are to mutually agree upon a forum within 30 days of entry of this decision. In the event that the petitioner and respondent cannot agree to mutually designate an arbitral forum, the parties may move before the court to have a forum designated. It is

ADJUDGED and ORDERED that the petition is granted only to the extent that the arbitration actually commenced before the American Arbitration Association is permanently

stayed unless petitioner consents to proceed in that forum and the cross-motion is granted to the extent that respondent is compelled to submit the dispute to arbitration as required by the contract; and it is further

ORDERED that the parties shall, within 30 days of entry of this judgment, mutually designate an arbitral forum and in the event the parties cannot agree, either party may file a motion seeking to have the court designate the arbitral forum.

-----This constitutes the decision, order and judgment of this court.----- Courtesy copies of this decision are being mailed to counsel.

Dated: March 30, 2007
New York, New York

ENTER



J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).