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

PRESENT: Cahn Justice

PART 49m

Durst Front Street LLC

INDEX NO. 602328/06

MOTION DATE 3/5/07

- v -

MOTION SEQ. NO. 002

F. J. Sciame Construction Co.,

MOTION CAL. NO. _____

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

	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

APR 27 2007

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

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

Dated: 4/19/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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DURST FRONT STREET LLC,

Plaintiff,

Index No. 602325/06

-against-

F.J. SCIAME CONSTRUCTION CO., INC.,
SCIAME DEVELOPMENT INC., and
ZUBERRY DEVELOPMENT CORPORATION,

Defendants.

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ZUBERRY DEVELOPMENT CORPORATION and
ZUBERRY COMPANY,

Plaintiffs,

Index No. 603835/06

-against-

SCIAME DEVELOPMENT INC., THE SCIAME
FAMILY PARTNERSHIP, L.P., and JOHN M.
EVANS,

Defendants.

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HERMAN CAHN, J.:

Zuberry Development Corporation and Zuberry Company (together, Zuberry) move to enforce a settlement agreement that was agreed to in open court and placed on the record on November 20, 2006. Defendants Sciame Development Inc., The Sciame Family Partnership, L.P., F.J. Sciame Construction Co., Inc. (collectively, Sciame), and John M. Evans oppose the motion, and cross-move to compel arbitration.

BACKGROUND

Zuberry and Sciame each have a 45% ownership in EZS, an LLC. EZS was formed in 2003 to manage interest in Yarrow, which in turn manages the Front Street Project, a commercial/residential project in the South Street Seaport neighborhood of Manhattan. EZS holds 60% ownership in Yarrow, with the remaining 40% being owned by plaintiff Durst Front Street LLC. The 10% interest in EZS not owned by either Zuberry or Sciame is owned by John M. Evans, a defendant.

Sciame Construction acted as the general contractor for the Front Street Project. Sciame Construction is affiliated with Sciame; it billed charges to Yarrow for costs to the Front Street Project, allegedly in excess of the expenses permitted in its contract. Yarrow sought to enforce Sciame Construction's obligations under its construction contract, by filing an arbitration against Sciame Construction with the American Arbitration Association (AAA), alleging breach of contract. Sciame Construction also filed arbitration claims with the AAA, seeking payment for its work on the Front Street Project. The parties agreed that if the "settlement" which is the subject of these motions, was entered into, the arbitration proceeding would continue.

Durst filed the instant lawsuit against Sciame, Sciame Construction and Zuberry. Durst claimed that by defendants allowing more expenses than were permitted under the construction contract, Durst was caused to incur additional debt in violation of its LLC agreement.

As a result of these disputes, Zuberry elected to invoke the Buy/Sell Provision in the EZS Agreement. Zuberry sent Sciame notice offering to be bought out, or to buy out Sciame, for the member's share of the capital contribution to the Front Street Project. For Zuberry to purchase the interests of both Sciame and Evans, totaling 55% of EZS, it would have cost Zuberry $6,250,000.

Sciame disputed the validity of the Buy/Sell Notice.

Thereafter, on November 3, 2006, Zuberry filed this action to compel Sciame to comply with its obligations under the Buy/Sell Notice.

Five mechanics' liens were filed on July 18, 2006 by the electrical contractor on the job, D.J. Electrical Contractors, Inc. The total amount of these liens was $1,380,000. On October 30, 2006, Heritage Mechanical Services, Inc. filed additional liens for $507,234. In December 2006, Navillus Tile Inc. placed a lien on the project in the amount of $1,780,000.

Sciame argued that Zuberry's contention, that Sciame Construction's construction agreement obligates it to bond the liens, is an arbitral matter and at issue in the AAA arbitration.

On November 20, 2006, the parties in these two consolidated actions appeared before the Court, and a "settlement" was arrived at and placed on the record. The terms were that Sciame would sell its interest in the underlying project to Zuberry for $6,700,000 and there would be an exchange of general releases.

The claims that were then being arbitrated, regarding construction matters, would continue in arbitration.

Transfer taxes would be paid by Zuberry.

All parties agreed to cooperate to obtain necessary approvals.

The parties all agreed to the terms, and the motions on those matters were marked withdrawn. Order to Show Cause, Younger Aff., Ex. A.

The parties again appeared before the Court on November 27, 2006. However, it then became clear that all the outstanding issues were not yet resolved and that there were some serious disputes among the parties regarding their obligations.

Bonding the Liens

One of the major disputes was with respect to the liens on the property. Zuberry argued that Sciame was required to bond any liens, because Sciame Construction was the general contractor on the project. Sciame disagreed, saying that its obligation no longer existed because the owner defaulted in paying it. Zuberry pointed to Sciame's agreement, in September 2006, to bond the liens as evidence that Sciame was responsible for bonding those liens. Sciame noted that its agreement at that time was, as then stated, "a pragmatic step taken in the spirit of cooperation" and without prejudice to its claim that it was not so obligated. Order to Show Cause, Berry Aff., Ex. H.

Zuberry maintained that Sciame's failure to bond the liens is a breach of the settlement agreement because Sciame was failing to deliver clean title to its interest.

The differing views with respect to the liens became evident very shortly after the November 20, 2006 Court appearance when the settlement was entered on the record. On November 21, 2006, the very next day, Zuberry's counsel e-mailed Sciame's counsel, writing "what is frank [Sciame] doing re bonding outstanding mechanic's liens as we will get nowhere with bank et al without knowing that these are being bonded." Sciame's Appendix, Ex. J. While Zuberry contended that this demonstrated an expectation that Sciame would be taking care of the bonding, Sciame argued that there was no such agreement and that Zuberry recognized that it was an open issue. Sciame answered the e-mail saying "[i]t is the position of Sciame Construction that the Owner has defaulted under the construction contract and therefore Sciame Construction has no obligation or intent to bond the liens." *Id.*

Other Settlement Issues

Other issues that, according to Sciame, were not addressed include the deadline for obtaining necessary consents, timing for when payment was to be made, whether Sciame would continue to assume burdens of ownership and management during the interim period between the signing of the agreement and the closing, and the cancellation of any personal guarantees by Mr. Sciame.

Sciame further pointed out that circumstances have changed since November 20, 2006. In particular, Sciame emphasized that it was required to make a further capital contribution to the project of approximately $480,000 and an additional $135,000 in interest payments.

DISCUSSION

Zuberry maintained that the settlement placed on the record in open court should be enforced. It argued that settlement agreements in open court are binding, especially where, as here, the parties expressed their intent to be bound. Zuberry contended that, going into the November 20, 2006 settlement conference, Sciame had promised to bond the liens. Therefore, the parties had understood that Sciame was bonding the liens, which understanding was confirmed by many pieces of correspondence prior to that date. Zuberry denied that there was any default in paying Sciame, and noted that Sciame was paid over $15,400,000 more than the guaranteed maximum price of $28,900,000 that was provided for in the parties' contract.

Zuberry contended that a binding preliminary agreement can exist despite the failure to agree on all points that require negotiation. It maintained that such a binding agreement exists here, and it was Sciame's failure to negotiate in good faith that resulted in the parties' inability to resolve the outstanding issues.

Zuberry further maintained that there was partial performance of the agreement, in that

the agreement provided for the parties to exchange drafts of the settlement documentation, which was in fact done promptly.

Finally, Zuberry argued that there were no open material terms. It contended that many of the issues that Sciame raised were not raised during the settlement negotiations, and are post-hoc constructs. With respect to the liens, Zuberry contended that all parties understood that approvals were required from the State Housing Finance Agency, the Bank of New York and the New York City Economic Development Corporation. The impediment to obtaining these approvals was effectively controlled by Sciame and, therefore, Sciame was required to exercise said control to remove the impediments, i.e. to bond the liens. Zuberry also relied on Sciame's subsequent agreement to bond the liens, in one of the later counter proposals, as evidence of its obligation.

There is no question that when parties profess to have reached a settlement and place that settlement on the record, they are generally bound by its terms. Where, however, the terms of the settlement are such that the Court cannot enforce them, due to the failure to reach an agreement on necessary and material terms, the agreement is not binding. *Matter of Express Indus. and Terminal Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 590 (1999), quoting *Joseph Martin, Jr., Delicatessen v Schumacher,* 52 NY2d 105, 109 (1981) ("'Impenetrable vagueness and uncertainty will not do'"). Here, the question of who would bond the liens is material, and could have been a deal-breaker. *Id.* Indeed, both parties argued vociferously that the other should be required to accept the risk and expense involved in the bonding of the liens.

However, the Court has now been advised by both parties that the issue of the liens has been resolved by them. The parties advise that Sciame has agreed to remove the liens which it placed on the project and have those liens which others placed, removed, or have them bonded.

Thus, after much dispute, the question of who was to bond the liens is no longer an issue.

Despite this, Sciame now argues that its willingness to settle this issue should not "redound to its prejudice in connection with the pending motion." DiBenedetto Letter, 4/18/07. Sciame continues to contend that "there was no meeting of the minds on the lien issue" and that the change in circumstances does not mean that "the parties' earlier failure to agree has somehow been 'mooted.'" *Id.* This is simply unpersuasive.

The Court assumes that the parties were acting in good faith when they entered the settlement on the record on November 20, 2006, and each intended to be bound by it. In such a situation, if a material issue which was not resolved by them is discovered when memorializing the settlement, the *materiality* of that issue may prevent the settlement from being enforceable. If, however, the material issue is thereafter "mooted" by further agreement between the parties, that issue is no longer a hindrance to the enforcement of the settlement. There is, therefore, no reason not to enforce the settlement. It is clear to all, the Court and the parties, what is required of the parties in the settlement.

The Court notes that the question regarding the liens was the only material outstanding issue. The remaining issues do not rise to the level of hindering the enforcement of the settlement.

The remaining open issues that Sciame raises are not material and do not prevent an otherwise enforceable agreement from being enforced. Zuberry is correct in asserting that even if there were outstanding issues to the settlement, Sciame was obligated to negotiate in good faith. *Teachers Ins. and Annuity Assn. of Am. v Tribune Co.*, 670 F Supp 491, 498 (SDNY 1987). Additionally, certain routine mechanical issues can be resolved by the Court, if necessary. For example, the issues regarding the deadline for obtaining consents and the timing of payments

could be resolved by the Court imposing a reasonable period of time within which to close the deal.

Although entering into a settlement was certainly a decision only the parties could make, once they opted to do so, and entered said settlement on the record in open court, the Court itself has a role in enforcing the settlement. Indeed, it is "important that courts enforce and preserve agreements that were intended as binding." *Id.*

Sciame's cross-motion is held in abeyance. The parties have not resubmitted all of the papers regarding the prior motions that were withdrawn at the time of the purported settlement.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion to enforce the purported settlement of November 20, 2006, is granted; and it is further

ORDERED that each of the parties expeditiously perform its obligations under the November 20, 2006 settlement; and it is further

ORDERED that the cross-motion to compel arbitration is held in abeyance pending receipt of all the papers on the cross-motion.

Dated: April 19, 2000

ENTER:

J.S.C.