

O'Rourke & Sons, Inc. v Gans

2007 NY Slip Op 31092(U)

May 2, 2007

Supreme Court, Suffolk County

Docket Number: 0002004/2007

Judge: Martin J. Kerins

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SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 12 - SUFFOLK COUNTY

MOTION DATE: 04-06-07
ADJ. DATE: 04-12-07
MOT. SEQ: 001-Mot D

PRESENT:

Hon. MARTIN J. KERINS
J.S.C.

-----X
O'ROURKE & SONS, INC. d/b/a :
O'ROURKE CONSTRUCTION, :
 :
 :
 Plaintiff(s), :
 :
 :
 - against - :
 :
 JIL GANS and "JOHN DOE ONE through :
 JOHN DOE TEN" they being tenants, :
 occupants or parties, having a mortgage, :
 judgment lien, warrant or other encumbrance :
 affecting the premises, all which are subordinate :
 to plaintiff's, :
 :
 Defendant(s). :
-----X

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Upon the following papers numbered 1 to 15 read on this motion to compel arbitration; Notice of Motion/ Order to Show Cause and supporting papers 1-8; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 9-13; Replying Affidavits and supporting papers 14-15; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (seq 001) by defendant, Jil Ganz, for an order compelling arbitration and for a stay of the proceedings is granted and in all other respects, the motion is denied; and it is further

ORDERED that defendants' motion is granted and this action is hereby stayed pending the completion of arbitration in accordance with the Arbitration Rules of the American Arbitration Association; and it is further

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ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon final determination of the arbitration; and it is further

ORDERED that the portion of defendant's motion for an order dismissing the complaint, dismissing/vacating the notice of pendency and the mechanic's lien is denied; and it is further

ORDERED that within twenty (20) days of the entry of this order, counsel for defendant shall serve a copy of the order with notice of entry upon counsel for plaintiff and shall thereafter file a copy of the affidavit of service with the clerk of the Court.

The parties entered into a written contract in July 2004, for plaintiff, O'Rourke & Sons, Inc. d/b/a O'Rourke Construction, to oversee the renovation and construction of the residence of the defendant, Jil Gans, located in Remsenberg, NY. Paragraph 7B of the agreement provided, in essence, that any disputes arising from the contract were to be resolved by arbitration conducted by the American Arbitration Association. A dispute arose and plaintiff filed a mechanic's lien in the amount of \$23,400.00 in March 2006. In July 2006, defendant sent a notice pursuant to Lien Law §59. Thereafter, in January 2007, plaintiff commenced this action and filed a Notice of Pendency. On February 23, 2007, defendant filed a Notice of Intention to Arbitrate pursuant to CPLR 7503[c].

It is well settled that upon a motion to compel or stay arbitration, "[i]f the court concludes that the parties made a valid agreement to arbitrate, that the dispute sought to be arbitrated falls within its scope, and that there has been compliance with any agreed on conditions precedent to arbitration, judicial inquiry is at an end (absent any issue as to bar by limitation of time) and the parties should be directed to proceed to arbitration" *Matter of County of Rockland* [Primiano Constr. Co.]51 NY2d1). Thus, all matters relating to interpretation of a broad arbitration clause without preconditions are to be determined by the arbitrator not the Court (*Sisters of Saint John the Baptist v. Geraghty Constructor, Inc.* 67 NY2d 997; cf *Matter of Evan Louis Realty Corp. v. Flagg Properties, LLC*, 306 AD2d 409).

A party will be deemed to have waived a contractual right to arbitrate when the party's litigation activity manifested a preference clearly inconsistent with its later claim that the parties were obligated to settle their differences by arbitration. 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 (*De Sapio v Kohlmeyer*, 35 N.Y.2d 402, 405; see *Allied Bldg. Inspectors v Office of Labor Relations*, 45 N.Y.2d 735). However, "[n]ot every foray into the courthouse effects a waiver of the right to arbitrate" (*Sherrill v Grayco Bldrs.*, 64 N.Y.2d 261, 272), and actions undertaken by the party against whom the waiver would operate that are merely defensive will be considered consistent with an assertion of the right to arbitrate (see *Matter of Haupt v Rose*, 265 NY 108).

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Clearly, defendant here has not taken any action that could be considered inconsistent with the right to arbitrate. To the contrary, the defendant's actions were consistent with the assertion of the right to arbitrate. At the most, by serving a notice pursuant to Lien Law §59, defendant was merely preserving his rights as to the mechanic's lien. Further, shortly after the action was commenced by plaintiff, defendant served a notice of its intent to arbitrate.

There is no claim by plaintiff that arbitration is barred by limitation under CPLR §7502[b]. Further, it is the well established that the public policy in New York favors arbitration.

Insofar as defendant's motion is to dismiss the complaint, such motion is considered pursuant to CPLR 3211 and is denied. The rules governing the court's review of a motion to dismiss pursuant to CPLR 3211(a)(7) are both simple and straightforward. The court must afford the complaint a liberal construction, accept as true the allegations contained therein, afford the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory (see. *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46). Here, plaintiff has sufficiently stated a complaint to foreclose the mechanic's lien to withstand moving defendant's motion to dismiss. Accordingly, that portion of the motion which seeks to dismiss the complaint is denied.

That portion of the motion which seeks to discharge the notice of pendency and vacate the mechanic's lien is denied. Pursuant to Lien Law §59, a notice pursuant to that section is defective if not properly served. Defendant here has wholly failed to provide either the notice itself or an affidavit of service of the notice. In plaintiff's opposition, it provides the §59 notice. It appears that the notice is directed to counsel for the lienor, rather than the lienor itself as required by Lien Law §59. CPLR §2103(b) permits service of papers in a pending action to be served by mailing to a party's attorney "[e]xcept where otherwise prescribed by law. Here, there was no pending action. Further, as set out above, Lien Law §59 prescribes a specific manner in which the notice must be served. In any event, defendant has wholly failed to demonstrate how the notice was served. Accordingly, that portion of defendant's motion seeking to vacate the mechanic's lien is denied.

Dated: May 2, 2007
RIVERHEAD, NY



Martin J. Kerins, J. S. C.

FINAL DISPOSITION _____

NON-FINAL DISPOSITION ✓