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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 601086/2007

ARC ASSOCIATES GP, LLC

VS

PEI PARTNERSHIP ARCHITECTS LLP

Sequence Number : 001

DISMISS ACTION

INDEX NO. 601086/07

MOTION DATE 8/27/07

MOTION SEQ. NO. 001

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

FILED

SEP 04 2007

COUNTY CLERK'S OFFICE NEW YORK

Upon the foregoing papers, it is ordered that this motion

The within motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the application of defendant Pei Partnership Architects LLP for an order, pursuant to CPLR 3211(a) granting summary judgment dismissing the complaint of Plaintiff Arc Associates GP LLC ("plaintiff") upon the ground that plaintiff failed to comply with a condition precedent, is denied. It is further

ORDERED that counsel for parties shall appear for a Preliminary Conference in Part 35, 60 Centre Street, Room 438 on Tuesday, September 25, 2007 at 3:00 p.m. It is further

ORDERED that counsel for defendant shall serve a copy of this Order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

Dated: 8/30/07

HON. CAROL EDMEAD J.S.C.

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

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: PART 35

ARC ASSOCIATES GP LLC,

Index No.. 601086/07

Plaintiff,

DECISION/ORDER

-against-

PEI PARTNERSHIP ARCHITECTS LLP,

Defendant.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant Pei Partnership Architects LLP ("defendant") moves for an order, pursuant to CPLR 3211(a) granting summary judgment dismissing the complaint of Plaintiff Arc Associates GP LLC ("plaintiff") upon the ground that plaintiff failed to comply with a condition precedent.

Background

The underlying action sounds in professional negligence, breach of contract and unjust enrichment against defendant, a limited liability partnership offering architectural services. This matter arises from an agreement, dated April 11, 2005 between Bernar Venet ("Venet") and defendant (the "Agreement") for the provision of architectural services for the renovation and construction of a property located at 117 West 21st Street, New York, New York (the "project").

On April 2, 2007, plaintiff filed a three count Complaint alleging professional negligence, breach of contract and unjust enrichment related to the Agreement. In the Complaint, plaintiff alleges that it has assumed the rights of Venet under the Agreement.[1]

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[1]For purposes of this application only, defendant assumed that plaintiff is in fact the successor-in-interest to Venet and that it has standing and capacity to assert claims arising under the Agreement.

Defendant's Contentions

The Agreement specifically incorporates the provisions of American Institute of Architects Document B141 - 1997 Standard Form of Agreement Between Owner and Architect with Standard Form of Architects Services ("B141").

B141 specifically requires pursuant to sections 1.3.4 and 1.3.5, that any dispute arising from and under the Agreement must be submitted to mediation and/or arbitration prior to commencement of any legal proceeding. Despite the specific provisions of B141, plaintiff has filed the Complaint without first submitting to mediation and/or arbitration. Since plaintiff has failed to comply with a condition precedent to the Agreement, plaintiff's Complaint must be dismissed.

Plaintiff's Contentions

Dismissal is not warranted on any of the legal theories advanced by defendant because plaintiff did not agree to arbitrate. Defendant claims that the unsigned B141 which is mentioned at page 3 of the Agreement and which contains arbitration and mediation provisions, binds plaintiff to arbitrate. The B141 form is not signed by plaintiff, nor does the Agreement state that it is incorporated therein. The only mention of the B141 form does not mention arbitration and/or mediation.

Even if the Agreement had specifically incorporated the B141 form, which it did not, the failure to incorporate the arbitration clause of the B141specifically is fatal to defendant's contention that the parties to the Agreement agreed to arbitrate.

Defendant's Reply

In Reply, defendant points out that at no time did Venet ever express any objection to the

incorporation and terms of B141 under the Agreement. Plaintiff's opposition is limited to its claim that the mediation and arbitration clause included in B141 was not properly incorporated into the Agreement. Plaintiff admits that the Agreement specifically identifies B141 and does not dispute that it was aware of and possessed a copy of B141.

Analysis

The reference in the Agreement to B141 is as follows:

> For further details of the Architect's Services, please refer to AIA DOCUMENT B141-1997 *Standard Form of Agreement Between Owner and Architect with Standard Form of Architect's Services,* attached.

The is no reference to arbitration and/or mediation in the Agreement. Also, the reference to B141 is not for the purpose of incorporating the arbitration clause into the Agreement. It does not even reference the arbitration clause. The apparent purpose of referencing B141 is for further details of the defendant's services.

Arbitration is a favored means of resolving disputes. *Nationwide Gen. Ins. Co. v Investors Ins. Co.,* 37 N.Y.2d 91, 95, 371 N.Y.S.2d 463, 332 N.E.2d 333 (1975). " '[W]here there is no substantial question whether a valid agreement was made or complied with the court shall direct the parties to arbitrate.' " *Liberty Mgmt. & Constr. v Fifth Ave. & Sixty-Sixth St. Corp.,* 208 A.D.2d 73, 77, 620 N.Y.S.2d 827 (1st Dept.1995) (quoting CPLR § 7503(a).) "Thus, it is for the courts to determine, in the first instance, whether the parties have entered into a binding agreement to arbitrate." *Id.* The "judicial inquiry ends once it is determined that a valid agreement to arbitrate exists and that the matter in controversy falls within the scope of the agreement." *Id.* at 80, 620 N.Y.S.2d 827.

However, at the same time, the "obligation to arbitrate remains a creature of contract"

and thus "a party cannot be required to submit to arbitration any dispute which [it] has not agreed to submit.' " *Louis Dreyfus Negoce S.A. v Blystad Shipping & Trading, Inc.*, 252 F3d 218, 224 (2d Cir.), *cert denied* 534 U.S. 1020(2001) (citation omitted), *quoting, AT & T Technology, Inc. v Communication Workers of America,* 475 U.S. 643, 648 (1986).

An agreement to arbitrate must be clear and unambiguous, and not dependent upon subtleties in the agreement (see, *Crimmins Contr. Co. v City of New York,* 74 N.Y.2d 166, 544 N.Y.S.2d 580, 542 N.E.2d 1097, *Matter of Waldron [Goddess],* 61 N.Y.2d 181, 473 N.Y.S.2d 136, 461 N.E.2d 273). While an agreement to arbitrate can be incorporated by reference, any such reference must clearly show such an intent to arbitrate (see, *Level Export Corp. v Wolz, Aiken & Co,* 305 N.Y. 82, 111 N.E.2d 218; cf., *Matter of Riverdale Fabrics Corp. [Tillinghast-Stiles Co.],* 306 N.Y. 288, 118 N.E.2d 104).

Contract Interpretation

Courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*James v. Jamie Towers Housing Co., Inc.*, 294 A.D.2d 268, 743 N.Y.S.2d 85 [1st Dept. 2002]; *Barrow v. Lawrence United Corp.*, 146 AD2d 15, 18, 538 NYS2d 363 [3rd Dept. 1989]), (*Barrow v Lawrence United Corp.*, 146 AD2d 15, 18), remaining "consistent[ ] with the over-all manifest purpose of the ... agreement." The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v. Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v. Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the

plain meaning of its terms *(see e.g. R/S Assoc. v. New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]).

Furthermore, a contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v. Community Hosp. of W. Suffolk*, 87 NY2d 514, 520, 640 NYS2d 472 [1996]; First Natl. Stores v. Yellowstone Shopping Ctr., 21 NY2d 630, 638, 290 NYS2d 721, rearg denied 22 NY2d 827, 292 NYS2d 1031 [1968]).

Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties' "reasonable expectations" (*see Sutton v. East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460 [1982]).

The Agreement at issue herein fails to incorporate, either explicitly or by reference, the provision of B141 requiring the parties to submit their disputes to arbitration, nor does the provision relied upon evince a clear intent by the parties to do so.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the application of defendant Pei Partnership Architects LLP for an order, pursuant to CPLR 3211(a) granting summary judgment dismissing the complaint of

Plaintiff Arc Associates GP LLC ("plaintiff") upon the ground that plaintiff failed to comply with a condition precedent, is denied. It is further

ORDERED that counsel for parties shall appear for a Preliminary Conference in Part 35, 60 Centre Street, Room 438 on Tuesday, September 25, 2007 at 3:00 p.m. It is further

ORDERED that counsel for defendant shall serve a copy of this Order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

This constitutes the decision and order of this court.

Dated: August 30, 2007

Carol Robinson Edmead, J.S.C.