

Johnson Controls, Inc. v Katco Elec., Inc.

2007 NY Slip Op 32815(U)

September 5, 2007

Supreme Court, New York County

Docket Number: 0601888/2007

Judge: Lewis Bart Stone

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

HON. LEWIS BART STONE

Index Number : 601888/2007

PART 50

JOHNSON CONTROLS, INC.

vs.

KATCO, ELECTRIC, INC.

SEQUENCE NUMBER : 001

COMPEL OR STAY ARBITRATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 *is denied, in accordance with the annexed Decision and Order*

FILED

SEP 11 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5 Sept 07

Lewis Bart Stone
HON. LEWIS BART STONE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50S

-----X	
JOHNSON CONTROLS, INC.	:
	:
Petitioner,	: DECISION AND ORDER
KATCO ELECTRIC, INC.,	:
	: INDEX NUMBER
Respondent.	: 601888/07
-----X	

Hon. Lewis Bart Stone, J

This proceeding was commenced by Petitioner, Johnson Controls, Inc. (“Johnson”) by Notice of Motion dated June 5, 2007 pursuant to Civil Practice Law and Rules (“CPLR”) Article 75 against Respondent, Katco Electric, Inc., (“Katco”) to say an arbitration proceeding commenced by Katco on February 14, 2007 against Johnson.

Memorial Sloan Kettering Hospital in Manhattan is constructing a two building cancer research center using Turner Construction Corp (“Turner”) as its general contractor. Turner subsequently employed Johnson as a sub-contractor to perform certain work on the buildings. Johnson in turn entered into two written sub-subcontracts with Katco on July 23, 2004 and November 1, 2004 (the “Contracts”) to install Fire Alarm System and Building Management System in the two buildings, and on the completion of the second building to connect these systems between the

Corporation

buildings. The parties agree that the first building and Katco's work to be performed there has been substantially completed. Construction the second building has not yet been started, and accordingly, the commencement of Katco's work on such building cannot yet proceed.

The Contracts each contain an arbitration clause for the resolution of disputes and a dispute has arisen between the parties relating to the amounts to be paid thereunder by Johnson to Katco for work performed on the completed building.

Johnson does not assert that there is no dispute, but asserts that the Contracts provide for arbitration only after the work on both buildings has been completed, and that accordingly, a condition precedent to Katco's right to arbitrate has not been met. As a result, Johnson seeks to stay arbitration pending the fulfilment of such condition precedent. Katco asserts that the Contracts do not bar the arbitration from being commenced at this time as Johnson, by its default, has terminated the Contracts and effectively any requirement that Katco await the completion of the second building before arbitrating.

The threshold issue to be decided by the Court is whether the Court must first determine whether there was a condition precedent to arbitration under the Contracts and whether such condition has been satisfied or whether such issues are to be decided by the arbitrators. If the latter, the Court need not address the merits of the

parties' positions on the issues at this time.¹ Only if the Court is the proper forum in which those threshold issues are to be determined may the Court construe the arbitration agreement with respect to this issue.

CPLR Article 75 does not expressly address this allocation of decision making functions between courts and arbitrators. Decisional law applies.

Johnson cites a single case, Rockland v. Priminano Const. Co., Inc., 51 NY2d 1 (1980) which it asserts controls the instant controversy. In Rockland, the Court of Appeals addressed those limited areas where the Court, rather than the arbitrator, must make an initial decision before it may order arbitration, viz: (1) whether the parties had agreed to arbitrate, (2) whether the dispute was within the scope of their agreement to arbitrate, (3) whether there had been compliance with any condition precedent to access to arbitration, and (4) whether the statute of limitations for a civil action relating to the claim had lapsed. The sole issue in Rockland was whether there had been compliance with a condition precedent. Recognizing that the parties were free to contract with respect to conditions precedent in the arbitration agreement, the Court found that the claims asserted were not covered by the contractually imposed conditions precedent, and therefore required the parties to arbitrate. In reviewing the

¹ After the arbitration, the Court may be called upon to review any arbitral decision, albeit under the limited standards for such review.

concept of conditions precedent, the Court noted that contractual conditions in an arbitration agreement were of two types, those which are true conditions precedent and those which are “conditions in arbitration” which govern how the arbitration is to be carried out, and indicated that the Court was to determine the former, and the arbitrators the latter. Further, the Court noted that the parties were free to agree to place conditions of either category into the other category, thus reserving them either for Court or arbitration. In short, the Court is to carry out the express agreement of the parties as to whether, what and when matters are to be sent to the arbitrator.

Katco cites Futerman Ind. Ltd. v. Impdex Intl. Corp., 146 AD2d 520 (1st Dept. 1989) and Channy Communications, Ltd. v Circulation Mgt., Inc., 156 AD2d 633 (2nd Dept. 1989) for the proposition that because the asserted “condition” is procedural, this Court should relegate it to the arbitrator. These cases do not establish such principle; they each were memorandum decisions which assumed that the “conditions” asserted were procedural. Accordingly, they shed no light on the dichotomy discussed by the Court of Appeals in Rockland. Under the circumstances here, however, this Court need not determine whether the condition is a true condition or is merely a procedural matter to be determined by the arbitrator.

Katco asserts that it has terminated the contract by reason of Johnson's breach. Thus, under the dispute clause, where the parties agreed to defer arbitration, arbitration "until the final completion or termination of the Work," the condition has been met. Under the definition of "work,"

"work" shall mean the actual construction and furnishing of labor, services and materials necessary to complete fully all of the terms and conditions of this Agreement including but not limited to the Scope of Work incorporated by reference as Attachment 1.

As the contract has been terminated by Katco's declaration of default, Katco will perform no further work under the contract. Thus, to the extent the contractual provision is a true "condition precedent," this Court will find it has been met and will require the parties to proceed to arbitration. To the extent it is not a true "condition precedent," the Court must take the same step.

This Court's construction of the language of the contract in this Decision and Order relates solely to the obligation of the parties to arbitrate and does not address whether Johnson had withheld moneys or how much, or whether such withholding of payment constituted appropriate grounds for Katco to terminate the agreement or whether Katco wrongfully terminated the agreement. All such issues are left to the arbitrator for resolution. This analysis of the satisfaction of the "condition" to arbitrate follows the analysis used by the Court of Appeals in Rockland where the

Court looked to the purpose of the contractual condition to determine whether it was to apply. In Rockland, where the dispute was over delayed payment, the Court found that reference of the dispute to an architect as a condition precedent was not applicable as the intended function of the architect was to address operational construction aspects of the contract, rather than payment disputes. Here, too, the function of the agreement to delay in the Contracts was to avoid the need to serially resolve disputes while the parties were still continually engaged in the contractual work; it was not to delay the resolution of final disputes after the parties were no longer proceeding under the Contracts.

The Petition to Stay Arbitration is dismissed.

This is the Decision and Order of the Court.

DATED: SEPTEMBER 5, 2007
NEW YORK, NEW YORK

FILED
SEP 11 2007
NEW YORK
COUNTY CLERK'S OFFICE



Hon. Lewis Bart Stone
Justice of the Supreme Court