

**DiConza v Love**

2007 NY Slip Op 33178(U)

September 28, 2007

Supreme Court, Nassau County

Docket Number: 9473-06/

Judge: Leonard B. Austin

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

INDEX  
No. 19473-06 -#1  
20864-06 -#2

**SUPREME COURT - STATE OF NEW YORK**  
**IAS TERM PART 14 NASSAU COUNTY**

**PRESENT:**

**HONORABLE LEONARD B. AUSTIN**

Justice

**Action # 1 - 19473-06**  
**Motion R/D: 12-22-06**  
**Submission Date: 7-18-07**  
**Motion Sequence No.: 001/MOT D**

\_\_\_\_\_ x

*Action #1*

**CAROL DICONZA and PETER DICONZA,**

**Plaintiffs,**

**Action # 2 - 20864-06**  
**Motion R/D: 1-3-07**  
**Submission Date: 7-18-07**  
**Motion Sequence No.: 001/MOT D**

**- against -**

**LISA LOVE and LISA LOVE DESIGNS, LLC.**

**Defendants,**

**COUNSEL FOR PLAINTIFFS**  
**Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Esqs.**  
**333 Earle Ovington Blvd., Suite 502**  
**Uniondale, New York 11553-3625**

-----x

*Action # 2*

**In the Matter of the Application of PETER DiCONZA and CAROL DiCONZA,**

**Petitioners,**

**COUNSEL FOR DEFENDANTS**  
**Hanley, Conroy, Bierstein, Sheridan, Fisher & Hayes, LLP**  
**112 Madison Avenue - 7<sup>th</sup> Floor**  
**New York, New York 10016**

**- against -**

**LISA LOVE DESIGNS, LLC.,**

**Respondents.**

\_\_\_\_\_ x

DiCONZA v. LOVE, et ano,  
 Index No. 19473-06  
 DiCONZA v. LISA LOVE DESIGNS, LLC.  
 Index No. 20864-06

### ORDER

The following papers were read on Special Proceeding: Index No. 19473-06 and Index No. 20864-06:

Index No. 19473-06 -  
 Order to Show Cause dated December 11, 2006;  
 Petition of Peter DiConza and Carol DiConza dated December 11, 2006;  
 Affirmation of Steven M. Hayes, Esq. dated December 29, 2006;  
 Affirmation of Francis X. Schroeder, Esq. dated January 5, 2007;

Index No. 20864-06 -  
 Notice of Motion  
 Affirmation of Steven M. Hayes, Esq. dated December 4, 2006;  
 Defendants' Memorandum of Law;  
 Affirmation of Francis V. Schroeder, Esq. dated December 15, 2006;  
 Affirmation of Steven M. Hayes, Esq. dated December 21, 2006.

Petitioners/Plaintiffs Carol DiConza ("Carol") and Peter DiConza ("Peter") (collectively "DiConza") move to stay arbitration. Defendant/Respondent Lisa Love ("Lisa") and Lisa Love Designs, LLC ("Designs") move to stay the action brought by DiConza and to compel arbitration.

### BACKGROUND

#### A. Procedural

On or about November 17, 2006, Designs served a Demand for Arbitration seeking to recover the amount due for services rendered to DiConza.

On or about November 22, 2006, DiConza commenced Action No. 1 against Lisa and Designs seeking to recover damages from Lisa and Designs for fraud, negligence and breach of contract. Action No. 1 is captioned *Carol DiConza and Peter DiConza,*

DiCONZA v. LOVE, et ano,  
Index No. 19473-06  
DiCONZA v. LISA LOVE DESIGNS, LLC.  
Index No. 20864-06

*Plaintiffs against Lisa Love and Lisa Love Designs, LLC, Defendants* and bears Nassau County Index No. 19473/2006.

Within 20 days of Design's service of the Demand to Arbitrate, DiConza commenced a special proceeding seeking to stay the arbitration demanded by Designs. This special proceeding Action No. 2 is captioned In the *Matter of the Application of Peter DiConza and Carol DiConza, Petitioners against Lisa Love Designs, LLC, Respondent*. The special proceeding bears Nassau County Index No. 20086/06.

The application to stay this action and compel arbitration and the application to stay arbitration have been consolidated for disposition.

B. Factual

Both Designs' Demand for Arbitration and the DiConza's action arise from the same transaction.

In or about June 2004, DiConza purchased a home in Port Washington. Designs is a limited liability company organized and existing pursuant to the laws of the State of Connecticut. Lisa is a resident of Connecticut.

Designs alleges it was consulted to perform design services regarding the interior design and furnishing of DiConza's Port Washington house. Designs further alleges that it entered into a "Letter of Agreement" which reflects the parties agreement. The Letter of Agreement was executed by Lisa on behalf of Designs and Carol.

DiCONZA v. LOVE, et ano,  
Index No. 19473-06  
DiCONZA v. LISA LOVE DESIGNS, LLC.  
Index No. 20864-06

The Letter of Agreement indicates that Designs was to “to coordinate...the general design of selected rooms, decorative surfaces, lighting, moldings, painting and faux finishes, fabric and window coverings and floor coverings, etc.” Designs was to receive an hourly fee for its design services and a percentage of the net costs for faux finishes, paper hangers, tradesmen, floor and wall tiles, fabrics, wall coverings, floor coverings drapery and upholstery.

In the Demand for Arbitration, Designs seeks to recover the amount due for services rendered in connection with the Letter of Agreement.

DiConza allege that they were advised by Lisa and Designs that Lisa was a qualified licensed interior designer, design architect, general contractor and licensed electrical design engineer. They further allege that Lisa and Designs represented that they were qualified and capable of performing the work involved in the construction and renovation of their home. DiConza deny having a written contract with Lisa or Designs. They allege they had an oral agreement with Lisa and Designs. DiConza allege that Lisa and Design misrepresented their background and ability and improperly performed the work. The further allege that Lisa and Designs never finished the job. DiConza’s complaint alleges causes of action for breach of contract, fraud and negligence.

Carol asserts she was provided with a Letter of Agreement prior to the commencement of the work. She alleges that she signed the Letter of Agreement but never received a signed copy back from Lisa or Designs until November 29, 2006,

DiCONZA v. LOVE, et ano,  
Index No. 19473-06  
DiCONZA v. LISA LOVE DESIGNS, LLC.  
Index No. 20864-06

which is after the DiConza had commenced their action and after Designs had filed its demand for arbitration. However, the parties submitted a copy of the Letter of Agreement that had been signed by Carol and Lisa.

The Paragraph III(C) of the Letter of Agreements states:

“c. Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration. Arbitration and mediation shall be in accordance with the Arbitration and Mediation Rules of American Arbitration Association. If such matter relates to or is the subject of the lien, the Designer may proceed in accordance to applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or arbitration. The parties shall share in the mediator’s fee and any filing fees equally. The award rendered by the arbitrator(s) shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.”

DiConza commenced a special proceeding seeking to stay the arbitration demanded by Designs. Lisa and Design move in the action commenced by DiConza to stay the action and compel arbitration.

#### DISCUSSION

The court must determine whether this application is subject to CPLR Article 75 or the Federal Arbitration Act, 9 U.S.C. §1. *et. seq.* (“FAA”).

The FAA applies expansively to any transaction affecting interstate commerce. Allied-Bruce Terminex Cos., Inc. v. Dobson, 513 U.S. 265 (1995). See also, Diamond Waterproofing Systems, Inc. v. 55 Liberty Owners Corp., 4 N.Y. 3d 247 (2005). The

DiCONZA v. LOVE, et ano,  
Index No. 19473-06  
DiCONZA v. LISA LOVE DESIGNS, LLC.  
Index No. 20864-06

FAA expresses intent of Congress to exercise its Commerce Clause powers to their full extent. *Id.*; and Perry v. Thomas, 482 U.S. 483 (1987).

A transaction which involves a New York resident and a Connecticut limited liability company involves interstate commerce. Matter of Diamond Waterproofing Systems, Inc. v. 55 Liberty Owners Corp., *supra*; and Carlton Hobbs Real Estate, LLC v. Sweeney & Conroy, Inc., 41 A.D. 3d 214 (1<sup>st</sup> Dept. 2007); and ImClone Systems, Inc. v. Waksal, 22 A.D.3d 387 (1<sup>st</sup> Dept. 2005).

“The Federal Arbitration Act creates a ‘body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the act (citation omitted).” State of New York v. Oneida Indian Nation of New York, 90 F.3d 58, 61 (2<sup>nd</sup> Cir.1996).

There is a strong federal policy favoring arbitration. *Id.*, and Chelsea Square Textiles, Inc. v. Bombay Dying & Mfg. Co., Ltd., 189 F.3d 289 (2<sup>nd</sup> Cir. 1999). Likewise, New York favors arbitration as well. An arbitration clause in an agreement will be interpreted as requiring the parties to submit any covered dispute to arbitration. State of New York v. Oneida Indian Nation of New York, *supra*. See, Bank Julius Baer & Co., Ltd. v. Waxfield Ltd., 424 F.3d 278 (2<sup>nd</sup> Cir. 2005).

Under the FAA, the court must determine whether the parties agreed to arbitrate and whether the arbitration provision encompasses the claims at issue. Campaniello Imports, Ltd. v. Saporiti Italia, S.p.A., 117 F.3d 655 (2<sup>nd</sup> Cir. 1997). See also, First

DiCONZA v. LOVE, et ano,  
Index No. 19473-06  
DiCONZA v. LISA LOVE DESIGNS, LLC.  
Index No. 20864-06

Options v. Kaplan, 514 U.S. 938 (1995); and Matter of Smith Barney Shearson, Inc. v. Sacharow, 91 N.Y. 2d 39 (1997). The Letter of Agreement clearly establishes that it was the intent of the parties to submit all disputes arising out of the work relating to the Letter of Agreement to mediation, and, if the matter is not resolved through mediation, to submit the disputes to arbitration. The only disputes that exist between Designs, Lisa and Carol arise out of the work Designs was doing pursuant to the Letter of Agreement.

Peter did not sign the Letter of Agreement. He assert that since he is not a signatory to the agreement which provides for arbitration he cannot be compelled to arbitrate.

A non-party can be compelled to arbitrate if the agreement to arbitrate is incorporated by reference into another agreement, the party assumes the obligation, agency, veil piercing or alter ego or estoppel. American Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349 (2<sup>nd</sup> Cir. 1999).

“A party is estopped from denying its obligation to arbitrate when it receives a “direct benefit” from a contract containing an arbitration clause. See, Thomson-CSF, 64 F.3d at 778-79.” *Id.* at 353. See, MAG Portfolio Consult, GMBH v. Merlin Biomed Group, LLC, 268 F.3d 58 (2<sup>nd</sup> Cir. 2001).

Peter is a co-owner and resides in the premises in which Designs performed the work. In Action No. 1, he seeks damages resulting from Lisa and Design's failure to perform or properly perform their work. As an owner, he received a direct benefit from

DiCONZA v. LOVE, et ano,  
Index No. 19473-06  
DiCONZA v. LISA LOVE DESIGNS, LLC.  
Index No. 20864-06

the work being performed. His involvement in Action No. 1 must be viewed as an admission by Peter that he was a direct beneficiary of the work Lisa and Design were performing. Since Peter is a direct beneficiary of the work, he can be compelled to submit to arbitration even though he was not a party to the Letter of Agreement. See, Thomson-CSF, S.A. v. American Arbitration Assn., 64 F. 3d 773, 777 (2<sup>nd</sup> Cir. 1995).

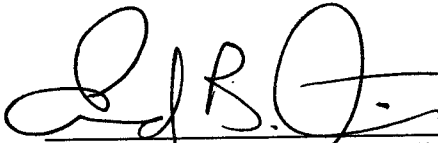
Accordingly, it is,

**ORDERED**, that the application of Peter DiConza and Carol DiConza to stay arbitration is **denied**; and it is further,

**ORDERED**, that the motion of Lisa Love and Lisa Love Designs, LLC to stay the prosecution of Action No. 1 to compel arbitration is **granted**. The parties are directed to proceed with arbitration in accordance with the Letter of Agreement forthwith.

This constitutes the decision and order of this Court.

Dated: Mineola, NY  
September 28, 2007

  
Hon. LEONARD B. AUSTIN, J.S.C.

**ENTERED**  
OCT 04 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE