Kermanshahchi v Naderi

2007 NY Slip Op 33267(U)

October 5, 2007

Supreme Court, New York County

Docket Number: 0100472/2007

Judge: Marilyn Shafer

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SCANNED ON 10/12/2007

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

PRESENT: HON. MARILYN SHAFER, *Justice* PART 8

PHILIP KERMANSHAHCHI,

Plaintiff,

-against-

KAZEM NADERI, ABBAS SHAH and EMPIRETECH CONSULTING ASSOCIATES, INC.,

Defendants.

INDEX NO. 100472/07

MOTION SEQ. NO. 001

The following papers, numbered 1 to 7 were read on this motion:

	PAPERS NUMBERED
Notice of Motion — Affidavit — Exhibits	1
Memorandum of Law in Support	2
Affirmation In Opposition	3
Memorandum of Law in Opposition	4
Affirmation in Limited Opposition	5
Replying Affidavit	6
Memorandum of Law in Reply	7

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Cross-Motion: ☐ Yes √√ No

Upon the foregoing papers, it is ordered that the motion by defendant Kazem Naderi for an order pursuant to CPLR 3211 (a)(2) and (a)(5) dismissing the complaint is granted.

Introduction

Philip Kermanshahchi entered into a contract with Kazem Naderi, a trained but unlicensed architect, in July, 2003, to design a house to be built on land owned by Kermanshachi. The instant motion represents the sixth time that Kermanshachi has tried to invalidate that contract on the ground that he would not have entered into it had he been aware that Naderi not a licensed architect.

Background

The record reveals that a dispute arose between the parties before construction began and Kermanshachi terminated the project. In November 2005, Naderi initiated arbitration proceedings for breach of contract and unpaid fees. In response, Kermanshachi filed a petition in Supreme Court to stay the arbitration, making the argument, for the first time, that he would not have entered the contract had he known Naderi was unlicensed.

Kermanshachi made the argument a second time by simultaneously filing a complaint with the New York State Department of Education for violation of Education Law §7302:

> [o]nly a person licensed or otherwise authorized to practice under this article shall practice architecture or use the title "architect".

In April, 2006, Judge Marcy Friedman rejected Kermanshachi's claim and ordered the parties to arbitration.

The Department of Education also rejected Kermanshachi's argument. Judge Friedman referenced their holding in her decision:

> [My] conclusion is reinforced by a settlement of a complaint against respondent filed by petitioner with the New York State Education Department ("DOE") in which it was agreed that 'Mr. Naderi's contracts and contract documents will reflect that signed and sealed architectural plans are provided by a registered architect.' ... There is no indication that the DOE required any other changes to the terms of the contract providing for services in connection with design and

construction. (Davis Aff., Ex. D, p.3):

Kermanshachi moved to re-argue Judge Friedman's decision, and the argument was rejected a third time.

Kermanshachi moved to interpose the argument as a counter-claim in the arbitration. It was rejected for the fourth time:

> Having reviewed the arguments by the parties regarding the counterclaim and considering the decisions by the courts and the Department of Education, I hereby decide that the counterclaim is denied, although I will allow respondent to make all such arguments as they see fit as offsets to the claim during their time during the day of hearing. (Davis Aff., Ex. G)

The arbitration, held in January 2007, found that neither party had breached the contract and neither was entitled to recovery, rejecting the argument for the fifth time:

> There is no affirmative counterclaim. My previous decision denying the counterclaim by Respondent is hereby reasserted."(Davis Aff., Ex. H)

Four months later, Kermanshachi initiated this action, asserting the argument for the sixth time.[1](Davis Aff., Ex. I).

Discussion

A fundamental aim of our legal system is to prevent disgruntled litigants from taking a "second bite of the apple". It is in the interest of the community that the same cause of action ought not to be brought twice. (*Ryan v New York Tel Co*, 62 NY2d 494 [1984]) Collateral estoppal, or issue preclusion, prevents a party from re-litigating issues which have been previously decided against him. (*Juan C v Cortines*, 89 NY2d 659 [1997]; Siegel, *New York*

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[1] The engineering firm retained to assist in the project, Empiretech Consulting Associates, Inc., and its principal, Abbas Shah, are also named as defendants in this action but take no part in this motion. (Davis Aff., Ex. F, p.2)

Civil Practice 4th, § 457; *Color By Pergament, Inc v O'Henry's Film Works, Inc*, 278 AD2d 92 [1st Dept 2000]).

The doctrines of *res judicata* and collateral estoppal apply to arbitration awards with the same force and effect as they apply to judgments of courts. (*Hibbert v Avwontom*, 35 AD3d 813 [2nd Dept 2006]). While judicial confirmation of arbitration awards may be the recommended practice, the doctrines are applicable to issues resolved by arbitration notwithstanding a lack of confirmation. (CPLR 7510, Siegel, *New York Civil Practice*, § 601, *Acevedo, supra; Motor Vehicle Accident Indemnification Corp v Travelers Ins Co*, 246 AD2d 420 [1st Dept 1998]). [2]

Plaintiff's Fourth and Fifth Causes of Action, resting upon an argument already rejected five times, are dismissed.

However, the First, Second and Third Causes of Action are predicated on damages arising from the demolition of an existing house on the property in preparation for the construction of the house which was never built. Although the demolition may have been discussed in the arbitration, claims for damages have never been affirmatively raised. Kermanshachi has not waived the claims for damages arising from the demolition by choosing not to assert them in the arbitration :

> Unlike the courts, which derive their powers from the Constitution and jurisdiction over the parties and the subject matter, the authority of an arbitrator to decide a controversy is derived entirely from the consent of the parties. As a general rule, therefore, the arbitrator is limited to deciding only those questions submitted by the parties. (*Cine-Source, Inc et al v Burrows*, 180 Ad2d [1st Dept 1992]).

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[2] Plaintiff's reliance upon the dicta of *Allcity Ins Co v Vitucci*, 151 AD2d 430 [1st Dept 1989] is misplaced. (*Protocom Devices v Figueroa*, 173 AD2d 177 [1st Dept 1991]); *Jacobson v Fireman's Fund Ins Co*, 111 F3d 261 [2d Cir NY 1997]

Under CPLR article 75 the role of the courts is limited to that of a "gatekeeper". Whether a claim is barred by the doctrine of *res judicata* is a question properly before the court. (*Cine-Source, supra.*) However, the merits of a controversy are reserved for the arbitrator. (*Merrill Lynch, Pierce, Fenner & Smith v Benjamin*, 1 AD3d 39 [1st Dept 2003]); (*Nationwide General Ins Co v Investors Ins Co of America*, 37 NY2d 91 [1975][A claim need not be tenable to be arbitrable.]).

The merits of these claims are beyond the scope of judicial consideration. They are dismissed without prejudice to be raised in further arbitration proceedings.

We have considered the other arguments raised by the parties and find them without merit.

Accordingly, it is hereby

ORDERED that Naderi's motion to dismiss the complaint is granted.

This reflects the decision and order of this Court.

Dated: 10/5/07

MARILYN SHAFER
J.S.C.

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