Emma Lee, Inc. v J. Juhn Assoc., Inc.

2007 NY Slip Op 33692(U)

October 29, 2007

Supreme Court, Queens County

Docket Number: 0017802/2007

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**
Justice

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EMMA LEE, INC.

Plaintiff,

-against-

Index No. 17802/07
Motion Date: 10/24/07
Motion Cal. No. 33

J. JUHN ASSOCIATE, INC., BETHEL GENERAL CONTRACTING, INC., JAEWOO JUHN, individually and as an officer of JAEWOO JUHN ASSOCIATE, INC. And JAEWOOD JUHN, individually and as an officer of BETHEL GENERAL CONTRACTING, INC.,

Defendants.

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The following papers numbered 1 to 12 read on this application by defendants **J. JUHN ASSOCIATE, INC., BETHEL GENERAL CONTRACTING, INC.** for an order pursuant to CPLR 7503(a), staying the action and compelling arbitration.

	PAPERS NUMBERED
Order to Show Cause-Affirmation-Exhibits.....	1- 3
Affidavit of Service.....	4-5
Affirmation in Opposition.....	6-8
Memorandum of Law.....	9
Reply Affirmation.....	10-12

Upon the foregoing papers it is ordered that the application by defendants for an order pursuant to CPLR 7503(a), staying the action and compelling arbitration is granted, for the following reasons:

This action stems from a written agreement, dated, October 18, 2002, wherein plaintiff and defendant J. Juhn Associate, Inc. (hereinafter, "Juhn") agreed to certain terms and conditions for the construction of a three story commercial building in Flushing, New York. Thereafter, on or about June 14, 2007, defendant Bethel General Contracting Inc. (hereinafter, "Bethel") filed a Notice of Mechanic's Lien wherein it alleged that it completed the project however $190,269.00 was to it by plaintiff. Subsequently, plaintiff commenced the instant action against defendants, alleging breach of contract, negligence, breach of implied covenant of good faith and fair dealing, unjust enrichment, misrepresentation and fraud, slander of titel and a demand to foreclose on the mechanic's lien filed by Bethel.

Defendants Bethel and Juhn now apply for an order staying this action and compelling

arbitration based upon the terms of the contract between the parties. According to these defendants, the contract signed by plaintiff and defendant Juhn was the form designated by AIA Document A101-1997 and this incorporated by reference the General Conditions of the Contract for Construction referred to and designated as AIA Document A201-1997. Under paragraph 4.6 of the General Conditions of the Contract for Construction, "[a]ny claim arising out of or related to the Contract, except claims relating to aesthetic effect and except those waived as provided for in subparagraphs 4.3.10, 9.10.5, shall , after decision by the Architect or 30 days after submission of the claim to the Architect, be subject to arbitration." Finally, defendants claim that after the execution of the contract and commencement of work, Juhn assigned its interests and obligations to Bethel with the knowledge and consent of plaintiff.

Plaintiff opposes this application on the following grounds: The agreement with Bethel is fraudulent and therefore not enforceable; The A201-1997 conditions regarding arbitration are not enforceable because they were not attached to the Agreement and these conditions were adopted by mutual mistake; the action was commenced after the work was completed and thus not subject to arbitration; defendants Juhn and Bethel are estopped from seeking the protection of the A201-1997 conditions due to their unclean hands.

The branch of the motion seeking to compel arbitration is granted. It is well settled that on a motion to compel or stay arbitration, the court must determine, whether the parties made a valid agreement to arbitrate, whether the agreement has been complied with, whether the dispute at issue falls within the agreement to arbitrate, and whether the claim is time-barred. Matter of Smith Barney, Harris Upham & Co. v Luckie, 85 NY2d 193, (1995.) *See also*, Levkoff-Sennet Partnership v Levkoff, 154 AD2d 352 (2d Dept 1998.) Once it is determined that the parties have agreed to arbitrate the subject matter in dispute, the court's role has ended and it may not address the merits of the particular claims. *See*, Matter of Praetorian Realty Corp, 40 NY2d 897(1976.) In fact, this Court's concern is limited to whether the parties made a valid agreement to arbitrate and not whether the contract as a whole was unenforceable. Wagner Acquisition Corp. v. Giove, 250 A.D.2d 857 (2d Dept 1998)

Regarding the enforceability of the contract's provision for the arbitration of a dispute, the Court of Appeals wrote in Marlene Industries Corp. v. Carnac Textiles, Inc., 45 N.Y.2d 327 (1978), "It has long been the rule in this State that the parties to a commercial transaction will not be held to have chosen arbitration as the forum for the resolution of their disputes in the absence of an express, unequivocal agreement to that effect; absent such an explicit commitment neither party may be compelled to arbitrate" Here the plain language of the A201-1997, as indicated above, shows the existence of a broad arbitration clause. Contrary to

plaintiff's assertions, these conditions were clearly incorporated into the agreement by way of the reference clause on the first page of the agreement submitted by plaintiff. His allegation that he did not read the reference clause cannot render a contract clause void. Furthermore, it is clear that the instant dispute is covered by the broad arbitration clause.

Plaintiff's allegations that there was a fraud perpetrated by defendants and plaintiff had no reason to believe an arbitration clause was in the contract fails to defeat this application. "Under both federal and New York law, it is settled that unless it can be established that there was a grand scheme to defraud which permeated the entire agreement, including the arbitration provision, a broadly worded arbitration provision will be deemed separate from the substantive contractual provisions and the agreement to arbitrate may be valid despite the underlying allegation of fraud" Riverside Capital Advisors, Inc. v. Winchester Global Trust Co., 21 A.D.3d 887 (2d Dept 2005.) (Quoting Stellmack A. C. & Refrig. Corp. v Contractors Mgt. Sys. of NH, 293 A.D.2d 956, 957.)

Here , the plaintiff did not demonstrate that the arbitration agreement incorporated into the agreement that it has submitted as being the controlling document, was formed with the intent to defraud it. Plaintiff's claim that a fraud took place, alleging that the agreement was altered after it was signed, thus voiding the entire agreement, including the arbitration clause is without merit. As mentioned above, it is clear that the incorporated documents were referred to and indicated as being incorporated into the Agreement. That plaintiff chose not to read them cannot render the inclusion in the Agreement a fraud. Furthermore, the affidavit submitted by plaintiff of Mr. Jun Ho Lee, the signatory of the Agreement, does not show a fraud, since, in paragraph seven he says that he believed the contract was with Bethel and Mr. Juhn, not with a company named J. Juhn Associate Inc. and in paragraph 32 he says that he never signed an agreement with Bethel. Also, plaintiff has submitted the Agreement wherein J. Juhn Associate Inc. was named and as a signatory. From this, it is not clear with whom plaintiff understood the Agreement to be with; perhaps much of this confusion can be explained by the fact that defendants Bethel and Juhn were closely related companies. Consequently, plaintiff's allegations of fraud do not permeate the entire agreement so as to invalidate the arbitration clause as well. Cologne Reinsurance Co. of Am. v. Southern Underwriters, 218 A.D.2d 680 (2d Dept 1995.)

Plaintiff's claim that the failure to have attached a copy of A201-1997 renders the arbitration clause unenforceable is without merit. While plaintiff correctly cites to Lopez v. 14th St. Dev., LLC. 40 A.D.3d 313 91st Dept 2007), as support that AIA Document A201-1997 is not a model of clarity, such does not render the instant contract's arbitration clause

equivocal. A201-1997 clearly indicates the arbitration clause, the lack of clarity arises from the conditions precedent to arbitration that require referral to the architect and mediation of claims arising prior to final payment. These terms are not relevant to the instant case and plaintiff does not claim a lack of understanding of the arbitration clause's terms. Furthermore, contrary to plaintiff's claim, the instant dispute did not arise after the completion of work since there are issues of final payment for the work left to be resolved. Based on the above, there is insufficient evidence of a mutual mistake by the parties resulting in the subject arbitration agreement. Finally, the defendants are not estopped from seeking arbitration since there is insufficient evidence that they have acted in an inappropriate or "unclean" manner. The Court will not order sanctions against either party. Accordingly, this Court finds that the parties entered into a valid agreement to arbitrate any disputes arising out of their agreement. All issues concerning the alleged alteration of the contract after it was signed and the authenticity of the submitted contract, upon which defendants base their claim are referred to the arbitrator to resolve. Riverside Capital Advisors, Inc. v. Winchester Global Trust Co., 21 A.D.3d 887 (2d Dept 2005.)

Based on the above, the application by defendants for an order pursuant to CPLR 7503(a), staying the action and compelling arbitration is granted. The action is stayed and the parties are directed to proceed to arbitration, pursuant to the contract. If this is not possible, they shall proceed in accordance with the rules of the American Arbitration Association, at its offices located at 1633 Broadway, 10th Floor, New York, New York 10019 and in accordance with the CPLR. An arbitrator shall be designated by the American Arbitration Association whom shall act in accordance with this order. CPLR 7504.

A copy of this decision is being sent to the parties via facsimile transmission on October 29, 2007.

Dated: October 29, 2007 .....

ORIN R. KITZES, J.S.C.