SHORT FORM ORDER

COPY

INDEX NO.: 0010861/2007
SUBMIT DATE: 11/14/2007
MTN. SEQ.#: 002

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 5/30/2007
MOTION NO.: MG

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LARUCCIA CONSTRUCTION, INC.,

Plaintiff,

-against-

DAVID WINDMILLER, TAMMY WINDMILLER, WINDMILLER PROPERTIES, LLC, JP MORGAN CHASE BANK, N.A., B&B SHEET METAL INC., RICHARD H. MORRELL PLUMBING & HEATING, INC., DREU SIKE CONSTRUCTIONS CORP. and AZS MASONRY, INC.,

Defendants.

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By: Laurel R. Kretzing, Esq.
Attys. for Plaintiffs
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Garden City, NY 11530-3324

ROSSI & CROWLEY, LLP
By: Thomas J. Rossi, Esq.
Attys. for Defendants *David Windmiller, Tammy Windmiller and Windmiller Properties, LLC*
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JP MORGAN CHASE BANK, N.A.
270 Park Avenue, 8th Floor
New York, NY 10017

THE DEIORIO LAW FIRM, LLP
By: Patrick V. Delorio, Esq.
Attys. for Defendant *B&B Sheet Metal, Inc.*
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Long Island City, NY 11101

LAW OFFICES OF RAYMOND A. GIUSTO, PC
By: Brooke Anthony, Esq.
Attys. for Defendant *Richard H. Morrell Plumbing & Heating, Inc.*
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East Islip, NY 11730

AZS MASONRY, INC.
897 Old Medford Avenue
Medford, NY 11763

Upon the following papers numbered 1 to 33 read on this motion for an order compelling arbitration and disqualifying attorney; Notice of Motion/Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 15-21; 22-26; Replying Affidavits and supporting papers 27-31; 32-33; Other _____; it is

ORDERED that this motion by defendants, David Windmiller, Tammy Windmiller and Windmiller Properties, LLC (Windmiller), for an order compelling plaintiff, Laruccia Construction Inc., to submit its claim against defendants to arbitration pursuant to CPLR 7503 (a), and for an order disqualifying the law firm of Jaspan Schlesinger Hoffman from continuing to represent plaintiff in this matter is granted; and it is further

ORDERED that all proceedings in this action are stayed for a period of thirty (30) days from the date of service of a copy of this order with notice of entry upon plaintiff's counsel, and the plaintiff may retain new counsel and notify opposing counsel accordingly within such thirty (30) day period; and it is further

ORDERED that the plaintiff and the defendants Windmiller are directed to proceed to arbitration in accordance with the terms of their agreement, and the stay of this action shall continue, pending the outcome of the arbitration.

Plaintiff and defendant Windmiller Properties, LLC, entered into a written agreement in the abbreviated form provided through the American Institute of Architects dated June 1, 2005 under which plaintiff agreed to demolish an existing residence on property owned by Windmiller and to construct a new residence for the sum of $1,912,500.00. Brian Shore is identified in the agreement as the architect on the project. Plaintiff commenced this action in which the first cause of action seeks foreclosure of its mechanic's lien in the sum of $452,773.60, the second cause of action seeks damages for breach of contract, the third cause of action seeks recovery for labor, services and materials furnished, and the fourth cause of action seeks recovery in unjust enrichment. Defendant JPMorgan Chase Bank, NA is named as a defendant because it holds a mortgage on the premises. Defendants B&B Sheet Metal, Inc., Richard H. Morrell Plumbing & Heating, Inc. (Morrell), Dreu Sike Constructions Corp. and AZS Masonry, Inc. have filed notices of mechanic's lien against the property. Defendants Windmiller now seek an order compelling arbitration of plaintiff's contract dispute on the ground that the written agreement between the parties contains a broad arbitration clause requiring all claims arising out of or relating to the contract to be resolved through arbitration. Movants also seek an order disqualifying the law firm representing plaintiff from continuing such representation on the ground that it represented the Windmillers to obtain a variance allegedly needed as the result of a construction error made by plaintiff. Plaintiff and defendant Morrell have opposed the application.

Paragraph 10.8 of the written contract dated June 1, 2005 between Windmiller Properties, LLC, as owner, and Laruccia Construction Inc., as contractor, provides:

> All claims or disputes between the Contractor and the Owner arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise and subject to an initial presentation of the claim or dispute to the Architect as required under Paragraph 10.5. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen . . . The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

The courts of this state have repeatedly recognized the "long and strong public policy favoring arbitration" (***Matter of Smith Barney Shearson v Sacharow***, 91 NY2d 39, 49, 689 NE2d 884, 666 NYS2d 990 [1997]) and interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration (***Stark v Molod Spitz DeSantis & Stark, P.C.***, 9 NY3d 59, 876 NE2d 903, 845 NYS2d 217 [2007]). Through this action, plaintiff seeks recovery of money claimed to be due and owing for work it performed under the contract. Accordingly, plaintiff's claims arise out of and relate to the contract and are subject to the agreement to arbitrate. The claims of subcontractors are derivative and secondary to the claim of plaintiff, and the arbitrators' determination may dispose of such non-arbitrable issues as well (*see* ***RAD Ventures Corp. v Gotthilf***, 6 AD3d 415, 773 NYS2d 890 [2d Dept 2004]).

An irrebuttable presumption in favor of disqualification of an adversary's lawyer is established when movant demonstrates: (1) the existence of a prior attorney-client relationship between the movant and opposing counsel; (2) that the matters involved in the prior and the present representations are "substantially related"; and (3) that the interests of the present client and former client are materially adverse (***Tekni-Plex, Inc. v Meyner & Landis***, 89 NY2d 123, 131, 674 NE2d 663, 651 NYS2d 954 [1996]), since the Code of Professional Responsibility precludes an attorney from representing any client with interests adverse to a former client on matters substantially related to the prior representation (*see* 22 NYCRR 1200.27[a][1]). Here, there is no dispute that plaintiff's counsel represented defendants Windmiller to obtain a variance needed for the driveway that was part of the construction under the parties' contract. Moreover, the affidavit

of architect Brian Shore demonstrates a nexus between counsel's representation of defendants to obtain a variance and the alleged construction error by plaintiff that necessitated a re-design of the driveway and the construction of a retaining wall. Such affidavit is sufficient to show that the variance application was "substantially related" to the defendants' claim that plaintiff breached its obligations under the contract. Accordingly, disqualification of the law firm of Jaspan Schlesinger Hoffman from continuing to represent plaintiff in this matter is appropriate.

DATED: 31 March 08

HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION