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

PRESENT: Hon. EMILY JANE GOODMAN PART 17

Justice

Wonderworks Construction Corp

- v -

RC Dolner, LLC

INDEX NO. 114834/06

MOTION DATE

MOTION SEQ. NO. 001

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 Petition

Upon the foregoing papers, it is ordered that this motion is decided

per attached

J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____

Dated: 9/2/08

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

J.S.C.

EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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In the Matter of the Application of

WONDERWORKS CONSTRUCTION CORP.

Petitioner,

For an Order Pursuant to Article 75 of the CPLR Staying the Arbitration Demanded by Respondent

-against-

Index No. 114834/2006

R.C. DOLNER, INC. 217 MULBERRY STREET COMPANY, LLC and MICHAEL D. YOUNG, ARBITRATOR

Respondents.

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EMILY JANE GOODMAN, J.S.C.

In Motion Sequence 001, Petitioner Wonderworks Construction Corp. ("Wonderworks") sought a permanent stay of arbitration demanded by Respondent R.C. Dolner, Inc. ("Dolner") against it, in connection with an arbitration commenced by 271 Mulberry Street Company, LLC ("Mulberry") against Dolner, as general contractor, to recover for defective construction work. Wonderworks also sought a temporary stay of the arbitration commenced by Mulberry and a declaration that any dispute between Wonderworks and Dolner related to their contractor-subcontractor relationship must be resolved only through judicial process. The cross motion to admit two attorneys pro hac vice was previously granted orally without opposition.

After oral argument on the temporary restraining order, the Court temporarily stayed only the claim demanded by Dolner in its Amended Notice of Claim against Wonderworks. A Partial

Award was rendered on May 8, 2007 which concluded that "[a]ll of the damages, except those set forth in Section III.C.5c above, relate to work performed by Wonderworks, but for which Dolner is legally liable." A Final Award was rendered June 11, 2007 which concluded that "[a]ll of the damages, except those set forth in Section III.C.5e of the Partial Award, related to work not performed by the Dolner Respondent, but for which it is legally liable" and awarded Mulberry damages of $2,428,909.47.

In Motion Seq 002, Dolner seeks to amend its pleading by filing a counterclaim in this Article 75 proceeding. Both motions are consolidated for disposition.

The central issue presented is whether there should be a permanent stay of arbitration on the claim demanded by Dolner against Wonderworks, based on Wonderwork's argument that the subcontract between Wonderworks and Dolner, dated March 19, 1998 (the "Subcontract"), did not contain an agreement to arbitrate. Dolner maintains however that, as a result of paragraph 2.2 of the Subcontract, the agreement to arbitrate was incorporated by reference from the contract between Mulberry and Dolner, dated December, 1997 (the "General Contract").

The General Contract

In its moving papers, Dolner does not identify any provision in the General Contract between concerning an agreement to arbitrate, except paragraph 9.1.7 thereof, which indicates that additional documents form part of the General Contract Documents including the "Owner Required Clauses Exhibit E." Exhibit E in turn provides, in relevant part, that

> Owner-Contractor Arbitration: Subcontractor shall be bound by any arbitration award between Owner and Contractor. Contractor, at its sole election, may permit

> Subcontractor and/or its representative to participate in such arbitration . . . Such award shall be final whether Subcontractor participates therein or is notified thereof.

In the additional submissions requested by the Court, however, Dolner submits the affidavit of Roger Chartouni, the person who executed, on behalf of Dolner, the Standard Form of Agreement between Mulberry and Dolner and who initialed the amendments thereto. Dolner then points to, and attaches, **for the first time**, the Amendments to General Condition 4.4 entitled "Resolution of Claims and Disputes-Expedited Arbitration by Single Knowledgeable Arbitrator" which provides for arbitration of "[a]ny controversy, claim or dispute arising out of or related to the Contract or breach thereof." In addition to the fact that this Court should not be required to independently review a complicated contract for the relevant provisions, the Court notes that this provision was contained in a page which was not submitted to the Court by Wonderworks when it attached the General Contract. It appears that Dolner's counsel similarly was unaware of the provision, as it was not brought to the Court's attention until the Court requested additional submissions. Wonderworks submits nothing to dispute Dolner's claim that the Amendments to General Condition 4.4 was part of the General Contract.

The Subcontract

Dolner cites paragraphs 2.1 and 2.2 of the Subcontract, and notes that under paragraph 2.2 "Dolner has each and every right and remedy as against [Wonderworks] as [Mulberry] has against Dolner under the General Contract." Accordingly, Dolner argues because Mulberry and Dolner agreed to arbitrate, an agreement to arbitrate was incorporated by reference from the

General Contract under paragraph 2.2 of the Subcontract.[1]

The Amendments to the General Contract

By Decision and Order, dated May 7, 2007, this Court directed additional submissions because the General Contract included amendments thereto, and one of those amendments appeared to contradict Dolner's argument. Specifically, the amendment provides in paragraph

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[1]The Subcontract provides, in relevant part, that

Article II of the Subcontract

2.1 The Contract Documents for the Project may be examined by the Subcontractor at any reasonable time at R.C. Dolner's offices. The Subcontractor represents and agrees that it has carefully examined and understands the Contract Documents. The Subcontractor represents and agrees that it has investigated the nature and conditions and difficulties under which the Work is to be performed and that it enters into this Agreement based on its own examination, investigation, and evaluation and not upon any opinions or representations of R.C. Dolner, the Owner, or their respective officers, agents, or independent contractors.

2.2 With respect to the work, the Subcontractor agrees to be bound by every term and provisions of the Contract Documents, and to assume toward R.C. Dolner all of the duties that R.C. Dolner has assumed as the Owner and Indemnities with respect to the Subcontractor's Work and, where so specified in the Contract Documents, directly to the Owner and Indemnities referred to therein. The Subcontractor agrees that R.C. Dolner has each and every right and remedy as against the Subcontractor as the Owner has against R.C. Dolner under the General Contract. The terms and provisions of this Agreement with respect to the Work performed by the Subcontractor shall be in addition to and not in substitution for any of the terms and provisions of the Contract Documents and in no event shall any of the terms and conditions of this Subcontract in any way modify or limit the obligation of the Subcontractor to comply with the Contract Documents with respect to the Subcontractor's Work.

4.4.4. that

> [n]o arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner [Mulberry] and Contractor [Dolner]. The Owner, may at its sole option, consent to the joinder of . . . a subcontractor . . . as a person substantially involved in a common question of fact of law whose presence is required in order to afford complete relief (emphasis added).

Thus, this provision appears to contradict The Owner Required Clauses Exhibit E, cited by Dolner, which provides that "Contractor, at its sole election, may permit Subcontractor and/or its representative to participate in such arbitration" (emphasis added).

Additional Submissions

Wonderworks additional submission provided that "it is unable to ascertain the dates of the amendments" and did not address whether the amendment contradicted Dolner's arguments. Dolner's additional submission consists of an affidavit from Roger Chartouni and a memorandum of law, which adequately addresses the Court's query. Chartouni states that he entered into the General Contract on behalf of Dolner and initialed contract pages, and that the amendments were initialed on the same date that the General Contract was signed (December 18, 1997). However, Dolner explains that the amendment does not create an impediment to arbitration. For the first time, Dolner states that it did obtain the Owner's (Mulberry's) consent to join Wonderworks to the arbitration by asking Mulberry to consent and by notifying the arbitrator, by letter dated February 9, 2006. Accordingly, the Court finds the Amendment to 4.4.4 was satisfied and does not present an impediment to compelling arbitration.

Incorporation by Reference

The parties do not dispute the fact where language is sufficiently explicit, an agreement to arbitrate may be incorporated reference, although it is clear that incorporation by reference should be avoided as it severely complicates issues for the parties and Court. The dispute here is whether the language is sufficiently explicit. Wonderworks argues that Saturn Constr. Co. v Landis & Gyr Powers, Inc. (238 AD2d 428 [2d Dept 1997]) is dispositive. In that case, the court found that there was no "express and specific" agreement to arbitrate a dispute between a general contractor and subcontractor where the contract between the general contractor and the owner contained an arbitration clause, and the subcontract provided that the subcontractor

> agrees to be bound to the Contractor . . . by the terms of the . . . Principal Contract . . . and to assume to the [general contractor] all the obligations and responsibilities that the [general contractor] . . . assumes to the [owner]. (id. at. 428).

Dolner distinguishes Saturn and cites cases which permit incorporation by reference in other contexts.

The Court agrees that Saturn is distinguishable, but not for the reasons advanced by Dolner. In that case, the Court correctly found that there was no agreement to arbitrate. The language regarding the subcontractor's agreement to "assume" to the general contractor "all the obligations and responsibilities" that the general contractor "assumes" to the owner, could not have referred to arbitration because arbitration is not an obligation or responsibility which may be "assumed." Moreover, in Saturn, the language regarding subcontractor's agreement to be bound to the contractor by "the terms of the. . . Principal Contract" could not have incorporated

an arbitration agreement by reference, because it reflected only the subcontractor's agreement to be bound to the contractor concerning agreements made between the contractor and the owner. However, in this case, Section 2.2 provides that:

> The Subcontractor agrees that R.C. Dolner has **each and every right and remedy** as against the Subcontractor as the Owner has against R.C. Dolner under the General Contract.

Thus, as Mulberry had the contractual "right" to arbitrate as against Dolner concerning "[a]ny controversy, claim or dispute arising out of or related to the Contract or breach thereof," Dolner would similarly have the "right" to arbitrate disputes "arising out of or related to the Contract" as against Wonderworks. Further, any doubts as to whether an issue is arbitrable will be resolved in favor of arbitration (Matter of Smith Barney Shearson v. Sacharow, 91 N.Y.2d 39, 49-50 [1997]).[2]

Waiver of Arbitration

As a result of the Final Award against it, Dolner sought to amend its pleadings in this Article 75 proceeding to file a counterclaim against Wonderworks seeking (1) a declaration that

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[2]Wonderworks has waived its argument that the arbitration should be stayed because the dispute is time barred, as a result of its failure to move to stay the arbitration within 20 days of service of the notice of intention to arbitrate, as required by CPLR §7503 (c). The Order to Show Cause was filed October 11, 2006. Although Wonderworks states that Dolner "allegedly" served on it a Notice of Claim and an Amended Notice of Claim on or about April 3, 2006, Wonderworks does not deny receiving either notice. Instead, Wonderworks relies on case law which provides that absent an agreement to arbitrate, the failure to move to stay arbitration within the requisite twenty days is not fatal. However, the Court has determined that there is an agreement to arbitrate. Therefore, as Wonderworks failed to move to stay the arbitration in accordance with CPLR §7503 (c), it forfeits the opportunity for a judicial determination as to whether the dispute is time barred.

Wonderworks is "bound by the terms of the Award against Dolner" (2) contractual indemnification, and (3) attorney's fees and costs. Dolner's motion to amend does not result in a waiver of a right to arbitrate. Unlike respondents in Tengtu Int'l Corp. v Cheung, 24 AD3d 170 [1st Dept 2005]), who waived their right to arbitrate because of their unequivocal election to litigate a federal action, Dolner's actions evidence intent to resolve the dispute in arbitration. Although not reflected in its motion to amend, Dolner's supplemental brief explains that its request to amend its pleadings to assert a counterclaim is operative only if the Court determines that Dolner and Wonderworks are not bound to arbitrate their dispute. Further, unlike the respondents in Tengtu who filed a complaint and an amended complaint, opposed a motion, and moved for partial summary judgment, Dolner has only moved to amend its pleadings to assert a counterclaim and has taken no other actions to evidence its intent to litigate (such as moving to compel discovery). As Dolner correctly notes, if the Court determines that Dolner and Wonderworks must arbitrate, there is no further litigation in this Court (see JPMorgan Chase Bank v Tappan Zee Ntl. Bank of Nyack, 34 AD3d 308 [1st Dept 2006] [landlord's mere interposition of a breach of contract claim in opposition to tenant's papers to stay arbitration was not a waiver of the landlord's right to arbitrate the breach of contract claim]).

It is hereby

ORDERED and ADJUDGED that the Petition to stay arbitration is denied and the proceeding is dismissed; and is further

ORDERED that Wonderworks Construction Corp. serve a copy of this Decision, Order

and Judgment on all parties, with Notice of Entry; and it is further

ORDERED that Wonderworks Construction Corp. and R.C. Dolner, Inc. are directed to proceed to arbitration within 45 days after service of a copy of this Decision, Order and Judgment; and it is further

ORDERED that R.C. Dolner, Inc.'s motion to amend its pleadings to assert a counterclaim is denied as moot.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: September 2, 2008

ENTER:

J.S.C.