

<b>New York City Sprinkler Corp. v Sarg, LLC</b>
2009 NY Slip Op 30277(U)
February 2, 2009
Supreme Court, Suffolk County
Docket Number: 8192/2008
Judge: Melvyn Tanenbaum
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SHORT FORM ORDER

INDEX NO. 8192-2008

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

PRESENT:  
HON. MELVYN TANENBAUM  
Justice

MOTION #001 002 003 **Mot D**  
R/D: 07/02/08  
S/D: 11/21/08

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NEW YORK CITY SPRINKLER CORP,  
  
Plaintiff,

-against-

SARG, LLC, TOWN OF BROOKHAVEN INDUSTRIAL  
DEVELOPMENT AGENCY, 35 SAWGRASS, LLC,  
QUALITY KING DISTRIBUTORS, INC.,  
CW CAPITAL LLC, INTERSTATE ROOFING  
SERVICES, INC., GENERAL CONCRETE  
CONSTRUCTION, INC., FIRE END & CROKER CORP.,  
S.A. COMUNALE, CO., J. SCALATO & SON, INC. and  
WESTCHESTER FIRE INSURANCE COMPANY,

Defendants.

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J. SCADUTO & SON, INC.,

Third-Party Plaintiff,

-against-

WEST RAC CONTRACTING CORP.,

Third-Party Defendant.

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Page 2  
New York City Sprinkler v Sarg, LLC  
Index No. 8192-2008

Upon the following papers numbered 1 to 35 read on this motion for an order pursuant to CPLR §§ 7503, 3211(a)(1)&(7) and 2201  
Notice of Motion/Order to Show Cause and supporting papers 1-8; Notice of Cross Motion and supporting papers 9-13, 14-23 Answering Affidavits and supporting papers 24-29 Replying Affidavits and supporting papers 30-31, 32-33, 34-35 Other; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion by defendants SARG, LLC (“SARG”), TOWN OF BROOKHAVEN INDUSTRIAL DEVELOPMENT AGENCY (“IDA”), 35 SAWGRASS, LLC (“SAWGRASS”), QUALITY KING DISTRIBUTORS, INC. (“QUALITY KING”), CW CAPITAL LLC (“CW”), and WESTCHESTER FIRE INSURANCE COMPANY (“WFIC”) for an order pursuant to CPLR Sections 7503(a) & 2201 compelling arbitration of plaintiff “NEW YORK CITY SPRINKLER CORP’s” (“NYC SPRINKLER”) claims and staying this action pending the arbitration determination and the cross motion by plaintiff “NYC SPRINKLER” seeking an order pursuant to CPLR Section 7503(b) staying the arbitration demanded by defendant “SARG” and directing the parties to proceed with the litigation in this action and the motion by third party defendant WEST RAC CONTRACTING CORP. (“WEST RAC”) for an order pursuant to CPLR Section 3211(a)(1)&(7) seeking an order dismissing the third party complaint for failure to state a valid cause of action are determined as follows:

Plaintiff “NYC SPRINKLER” entered into a contract with defendant “SARG” dated September 19, 2005 to install fire sprinklers during construction of defendants (“QUALITY KING/SARG”) 580,000 square foot office and distribution center. A dispute arose among the parties in late 2007 concerning plaintiff’s performance. Defendant “SARG” claims that plaintiff breached the parties agreement by performing unsatisfactory work and in failing to install sprinkler heads in the facility’s aerosol room. On December 11, 2007 plaintiff filed a notice of mechanics lien against the premises. In February, 2008 plaintiff commenced this lien foreclosure/breach of contract action against the defendants.

The September 19, 2005 contract contains an arbitration provision which requires that disputes be initially submitted to the project’s architect and thereafter be resolved at arbitration. Defendant “SARG” claims that the parties claims were submitted to the project’s architect without resolution. Defendant “SARG” has served and filed a Demand for Arbitration dated June 10, 2008. Defendant’s motion seeks an order compelling arbitration of both sides claims in accordance with the parties contract. Plaintiff’s cross motion seeks an order staying arbitration claiming that the underlying disputes among all parties are best resolved in this proceeding since the issue of the lien priority among multiple defendants cannot be determined at an arbitration proceeding between “SARG” and “NYC SPRINKLER”.

Page 3

New York City Sprinkler v Sarg, LLC

Index No. 8192-2008

In support of its motion defendant "SARG" submits an affidavit from defendant "QUALITY KING's" chief operating officer and an attorney's affirmation referring to the contract arbitration clause. Defendants claim that no basis exists to deny them access to arbitration since the claims asserted by each side represent arbitral disputes .

In opposition and in support of its motion, plaintiff "NYC SPRINKLER" submits two affirmations of counsel and claims that defendant's arbitration demand must be denied in the interests of judicial economy since there are multiple claims among competing lienholders who are not signatories to the agreement to arbitrate. It is plaintiff's position that since all claims are inextricably intertwined this litigation is the proper forum for a global determination rather than arbitration which can only result in an award between "SARG" and "NYC SPRINKLER". Plaintiff contends that under these circumstances defendant's arbitration demand must be permanently stayed.

In support of third party defendant "WEST RAC's" motion to dismiss the third party complaint, "WEST RAC" submits two affirmations of counsel and claims that the third party complaint must be dismissed since no viable claim is stated against the third party defendant. "WEST RAC" claims that third party plaintiff J. SCADUTO & SON, INC. ("SCADUTO") entered into two contracts with the project owner defendant "SARG" for installation of caulking and for stucco and plaster work . "WESTRAC" asserts that as the project's construction manager, "WEST RAC" acted solely as the agent for the project owner "SARG" and owed no duty to the contractor "SCADUTO" for acts committed within the scope of its authority and owed no duty of care to "SCADUTO" with respect to the owner "SARG's" failure to make payments under the parties contracts. It is "WEST RAC's" position that as an agent for a disclosed principal ("SARG"), "WEST RAC" is not liable to a third party ("SCADUTO") for acts that occurred within the scope of its authority. "WEST RAC" claims that "SCADUTO's" allegations that "WEST RAC": 1) failed to properly manage and assess its work; 2) failed to certify payment to "SCADUTO"; 3) failed to follow specifically established conditions precedent to termination; and 4) wrongfully terminated "SCADUTO" are not sustainable since there is no allegation of affirmative malfeasance committed by "WEST RAC" as an agent acting beyond the scope of its authority.

In opposition third party plaintiff "SCADUTO" submits an attorney's affirmation and claims that viable claims are set forth against the third party defendant based upon the construction manager's negligence in failing to properly assess, supervise and manage the work performed by the subcontractor "SCADUTO" and it also claims that "WEST RAC" tortiously interfered with the "SARG/SCADUTO" contract acting outside the scope of its authority by inducing its principal "SARG" to breach the contract. It is "SCADUTO's" position that the third party complaint sets forth sufficient facts to state valid claims of negligence and tortious interference against "WEST RAC" and therefore the third party defendant's motion to dismiss the complaint must be denied.

Page 4

New York City Sprinkler v Sarg, LLC

Index No. 8192-2008

CPLR Section 7501 provides:

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award.

New York State's public policy favors arbitration as a means of conserving time and resources of the courts and contracting parties (see Nationwide v. Investors Insurance, 37 NY2d 91, 371 NYS2d 463 (1975)).

Section 49.1 of the "SARG/NYC SPRINKLER" September 19, 2005 Contract provides:

#### Controversies and Claims Subject to Arbitration

Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof, except controversies or Claims relating to aesthetic effect and except those waived as provided for in Section 47.5 (by the making of final payment)....

Section 4.7.1 of the "SARG/NYC SPRINKLER" Contract entitled General Conditions provides:

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.....

There is no dispute that under the terms of the "SARG/NYC SPRINKLER" Contract the claims set forth by both sides are claims "arising out of or related to the Contract, or breach thereof" which are required to be settled through arbitration. Although plaintiff "NYC SPRINKLER" contends that competing party lienholders have asserted other project claims which are inextricably intertwined with the fire sprinkler installation claims and are therefore best determined in this litigation, there is no legal basis to stay the arbitration demanded by defendant "SARG" since under the terms of the parties agreement the claims asserted by "SARG" and "NYC SPRINKLER" clearly arise from the

Page 5

New York City Sprinkler v Sarg, LLC

Index No. 8192-2008

fire sprinkler system contract and therefore must be submitted for resolution by arbitration. Defendant's motion to compel arbitration of these claims must therefore be granted.

The third party defendant "WEST RAC's" motion to dismiss the third party complaint concerns an alleged failure to state a cause of action not whether the cause of action can be proved (STAKULS v. STATE, 42 NY 2d 272, 397 NYS 2d 740 (1977)). A pleading does not state a cause of action when it fails to allege wrongdoing by a defendant upon which relief can be granted (HEX BLDG. CORP. v. LEPECK CONSTRUCTION, 104 AD 2d 231, 482 NYS 2d 510 (2<sup>nd</sup> Dept., 1984)). The Court must accept the facts alleged as true and determine whether they fit any cognizable legal theory (CPLR Sec. 3211(a)(7); MARONE v. MARONE, 50 NY 2d 481, 429 NYS 2d 592 (1980); KLONDIKE GOLD INC. v. RICHMOND ASSOCIATES, 103 AD 2d 821, 478 NYS 2d 55 (2<sup>nd</sup> Dept., 1984)).

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to him by the defendant (PALKA v. EDELMAN, 40 NY2d 781, 390 (NYS2d 393 (1976); PALSGRAF v. LIRR CO., 248 NY 339 (1928); Prosser, "Torts" 4 Edition §30, 41-42 and 53)). It must further demonstrate that defendants' acts or omissions which constituted such breach were a proximate cause of plaintiffs' injuries (SHEEHAN v. CITY OF NEW YORK, 40 NY2d 496, 387 NYS2d 92 (1976)).

A cause of action for intentional tortious interference in contract requires the existence of a valid contact between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third party's breach of that contract without justification and causing damages (LAMA HOLDING CO. v. SMITH, 88 N Y2d 413, 646 NYS2d 76 (1996); BEECHER v. FELDSTEIN, 8 AD3d 597, 780 NYS2d 153.

Accepting the factual allegations asserted by the third party plaintiff as true, the third party complaint sets forth sufficient claims to sustain arguably viable causes of action of negligence and tortious interference with contract sufficient to defeat the third party defendant's motion to dismiss. Accordingly it is

**ORDERED** that plaintiff "NYC SPRINKLER's" cross motion for an order pursuant to CPLR Section 7503(b) staying the arbitration demanded by defendant "SARG" is denied, and it is further

**ORDERED** that defendants motion for an order pursuant to CPLR Section 7503(a) & 2201 compelling plaintiff to arbitrate the claims asserted by the parties under the terms of the September 19, 2005 Contract and staying prosecution of this litigation between those parties pending the outcome of the arbitration proceedings is granted, and it is further

Page 6  
New York City Sprinkler v Sarg, LLC  
Index No. 8192-2008

**ORDERED** that the third party defendant "WEST RAC's" motion for an order pursuant to CPLR Section 3211(a)(1)&(7) is denied.

Dated: February 2, 2009

**MELVYN TANENBAUM**  
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J.S.C.