

**WBTL Architects, LLP v Dewhurst Macfarlane &
Partners, P.C.**

2009 NY Slip Op 31775(U)

August 4, 2009

Supreme Court, New York County

Docket Number: 600658/08

Judge: Joan A. Madden

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to
for

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

PRESENT: Hon Joan A. Midder

PART 11

Index Number : 600658/2008 *Justice*

WBTL ARCHITECTS

vs

DEWHURST MACFARLANE

Sequence Number : 002

STAY PROCEEDINGS

INDEX NO. _____

MOTION DATE 4-9-09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, _____ this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
AUG 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: August 4, 2009

[Signature] J.S.C.

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Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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WBTL ARCHITECTS, LLP,

Plaintiff,

-against-

DEWHURST MACFARLANE AND PARTNERS, P.C.,

Defendant

Index No. 600658/08

FILED

AUG 06 2009

COUNTY CLERK'S OFFICE
NEW YORK

JOAN MADDEN, J.:

Defendant Dewhurst Macfarlane and Partners, P.C. ("DM") moves for a stay of this action pursuant to CPLR 2201, pending a determination of an arbitration proceeding (the "Arbitration") between plaintiff WBTL Architects, LLP ("WBTL") and non-party Needham's Point Holding Company ("NPHL"). Plaintiff WBTL opposes the motion, arguing that certain issues in this case are distinct from those that arose in the Arbitration. For the reasons below, the motion is denied.

Background

This dispute arises out of a project for the construction of a four-story 358-room Hilton hotel (the "Hotel") in Barbados (the "Project"). Non-party NPHL contracted with WBTL to perform design and certain construction administration duties for the Project. WBTL then entered into an agreement with DMP for the provision of certain civil and structural engineering consultation services for the project. During the Project, problems arose regarding, inter alia, the specifications for the Hotel's external envelope, including the windows, frames, partitions and balconies, including whether the specifications met certain structural criteria including wind load criteria. As a result of these disputes and other issues, including delays in completing the Project, NPHL commenced the

Arbitration against WBTL seeking over \$5 million in damages based on WBTL's alleged breach of contract, negligence and professional malpractice.

In this action, WBTL alleges causes of action against DMP for negligence, breach of contract, unjust enrichment, contribution and indemnification for DMP's alleged role in providing allegedly incorrect and deficient calculations and specifications as to the Hotel's external envelope, including but not limited to, erroneous wind load calculations. DMP now seeks to stay this action pending the resolution of the Arbitration, asserting that the Arbitration involves common questions of fact as the action here and that "a stay of one of these proceedings is necessary to avoid inconsistent determinations and prevent a waste of resources" (Affirmation in Support of DMP, ¶ 8).

DMP also claims that this action is premature since WBTL has not set forth the total amount of damages it seeks from DMP because a ruling has not been rendered in the Arbitration, and if WBTL is successful in the Arbitration, "its claim against DMP will be rendered moot" (Affirmation in Support of DMP, ¶ 9). DMP further argues that WBTL's claims against DMP, specifically for contribution and indemnification, are derivative of the claims asserted by NPHL against WBTL in the Arbitration and, therefore, this case should be stayed until the Arbitration is resolved.

WBTL counters that its causes of action against DMP for negligence, breach of contract and unjust enrichment relate solely to DMP's failure to provide specified civil and structural engineering services "consistent with good and accepted engineering standards and practices and in breach of its contract with WBTL" and are not derivative of the claims in the Arbitration (WBTL's Affirmation in Opposition, ¶ 3). WBTL further argues that a resolution of the Arbitration in its favor would not render this

litigation moot as its damages are not dependent upon the outcome of Arbitration and that this case will be prosecuted regardless of the result of the Arbitration since it “continues to sustain damages resulting from DMP’s errors, which are completely independent from NPHL’s claims in the arbitration” (WBTL’s Affirmation in Opposition, ¶ 7). WBTL next asserts that at this stage of the litigation, it is not necessary to set forth the total amount of its damage claim “since damages in many instances continue to accrue” (WBTL’s Affirmation in Opposition, ¶ 10).

In reply, DMP contends that the causes of action against it for negligence, breach of contract and unjust enrichment, all involve the Hotel’s external envelope, and while they are labeled by WBTL as claims independent of the arbitration, they “are effectively for common law indemnification and/or contribution” of the claims being brought in the Arbitration (DMP Reply Affirmation, ¶ 8). DMP also argues, for the first time, that there is no legal or contractual basis for WBTL’s seeking attorney fees from DMP and that the unjust enrichment claim lacks legal merit because there is an existing contract in place between the parties.

Discussion

The standard for granting a stay under CPLR 2201, based on the pendency of another action or proceeding has been limited by case precedent. Thus, in *Hope's Windows v. Albro Metal Products Corp.*, 93 A.D.2d 711 (1st Dept. 1983), *appeal dismissed*, 93 A.D.2d 711 (1983), the Appellate Division of the First Department wrote that:

“CPLR 2201 authorizes the granting of a stay “in a proper case, upon such terms as may be just”. However, the broad language of the statute has been limited by decision. Thus ‘it is only where the decision in one action will determine

all the questions in the other action, and the judgment on one trial will dispose of the controversy in both actions that a case for a stay is presented. * * * What is required is *complete identity of parties, causes of action and judgment sought*' (emphasis supplied; (*Pierre Associates, Inc. v. Citizens Casualty Co. of N.Y.*, 32 A.D.2d 495, 497, 304 N.Y.S.2d 158; *Medical Malpractice Ass'n v. Methodist Hospital of Brooklyn*, 64 A.D.2d 558, 559, 407 N.Y.S.2d 488).

See also Somoza v. Pechnik, 3 A.D.3d 394 (1st Dept 2004) (“[a] stay of one action pending the outcome of another is appropriate only where the decision in one will determine all the questions in the other, and where the judgment in one trial will dispose of the controversy in both actions”); *Fewer v. GFI Group Inc.*, 59 A.D.3d 271 (1st Dept), *aff'd*, 61 AD3d 586 (2009)(refusing to grant a stay holding that “[e]ven with the rendering of an award in the Employer Arbitration that would resolve the issues raised therein, the material issues raised in the *Fewer* Action would still remain unresolved. .”).

Applying this standard to the instant case, the court finds that while there are similarities between the claims asserted in the Arbitration and those in the instant case, a stay is not appropriately granted. First, the parties are not identical since NPHL is not a party to this action and DMP is not a party to the Arbitration. Next, in the present case, while resolution of the Arbitration in favor of WBTL would resolve the issues addressed by the causes of action for contribution and indemnification, the same is not true with respect to the other claims asserted by WBTL. In particular, while the Arbitration and this action focus on similar issues concerning the external envelope of the Hotel, DMP’s responsibility for, and liability to WBTL for its alleged negligence, breach of contract, and unjust enrichment, will not be resolved in the Arbitration.

Moreover, the cases relied on by DMP do not warrant a different conclusion. For example, in *Bank of Tokyo-Mitsubishi, Ltd., New York Branch v. Kvaerner a.s.*, 243 A.D.2d 1 (1st Dept. 1998), the First Department upheld a stay of proceedings pending a previously commenced arbitration taking place in North Carolina. However, there, the court stayed the proceeding after finding that “the issue sought to be litigated in this action is exactly the issue subject to arbitration in North Carolina between the owner and the joint venture.” *Id.* at 8. Moreover, the court noted that while the parties in the two matters “are nominally different the rights they seek to litigate are indistinguishable from those of the parties in the ongoing arbitration.” *Id.* at 9.

In *El Greco Inc. v. Cohn*, 139 A.D.2d 615, 616-617 (1st Dept 1988), on which DMP also relies, the First Department stayed a state court proceeding pending the resolution of a prior federal action, noting that “[t]he parties in the two actions are virtually identical, the issues to be resolved overlap, and, moreover, the record discloses that a more complete disposition of the parties' respective contentions can be obtained in the earlier-commenced Federal action.”

In contrast to the circumstances involved in the cases relied on by DMP, in this case, the parties in the two matters are different as are the issues sought to be litigated. In particular, while both the Arbitration and this action concern the construction of the Hotel, and in particular the specifications for the Hotel's external envelope, the Arbitration relates to WBTL's alleged liability in connection with its contractual and other duties owed NPHL, whereas this action concerns DMP's potential liability to WBTL arising out of DMP's contractual and other duties owed to WBTL. Thus, the resolution of WBTL's alleged liability to NPHL in the Arbitration will not resolve

whether DMP can be held liable to WBTL for breach of contract, negligence or unjust enrichment in this action.

DMP also cites *Goodridge v. Fernandez*, 121 A.D.2d 942 (1st Dept.1986) in which the First Department, in upholding a stay of a State action where there was a previously pending Federal action, explained that “all necessary parties are joined in both the State and Federal actions and the pleading can be amended in the latter to include the issues related to the guarantee.” *Goodridge*, at 944. However, in this case, DMP is not a party to the Arbitration and “will not be bound thereby; nor can [it] be certain that the issues to be litigated, though similar, are identical...” *Hope's Windows*, at 711. Accordingly, a stay of this action is not appropriately granted.

Next, insofar as DMP argues for the first time in reply that the unjust enrichment claim must be dismissed as there is a written contract between the parties and that WBTL’s claim for attorneys’ fees is without merit, the court need not consider such arguments since WBTL has not had the opportunity to respond. *See McNair v. Lee*, 24 A.D.3d 159, 160 (1st Dept. 2005); *Zolondek v. Morgan*, 141 A.D.2d 632 (2nd Dept. 1988). In any event, with respect to the unjust enrichment claim at this early stage of the litigation, before the contract between the parties has been presented, “plaintiff generally ‘will not be required to elect his or her remedies’” *Wilmoth v. Sandor*, 259 A.D.2d 252, 254 (1st Dept. 1999) *citing Joseph Sternberg, Inc. v. Walber 36th St. Assocs.*, 187 AD2d 225, 228 (1st Dept. 1993). Likewise, it cannot be said at this juncture that there is no basis for WBTL’s claim for attorney’s fees.


Finally, DMP’s assertion that this action is premature since the total amount of WBTL’s alleged damages cannot yet be ascertained is without any legal basis.

In view of the above, it is

ORDERED that defendant's motion for a stay under CPLR 2201 is denied; and it is further

ORDERED that a compliance conference shall be held on August 20, 2009 at 9:30 am, in Part 11, room 351, 60 Centre Street.

DATED: August 4, 2009


J.S.C.

FILED
AUG 06 2009
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NEW YORK