

Matter of Newman v Cooper, Robertson & Partners

2009 NY Slip Op 31904(U)

August 19, 2009

Supreme Court, New York County

Docket Number: 106403/2009

Judge: Marilyn Shafer

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

PRESENT: SHAFFER
Justice

PART 8

MARTIN NEWMAN

INDEX NO. 106403/09

MOTION DATE _____

MOTION SEQ. NO. 1

COOPER, ROBERTSON & PARTNERS

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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
accord with the annexed memorandum.*

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).

MARILYN SHAFER
J.S.C.

Dated: 8/19/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

----- X
In the matter of the Application of
MARTIN D. NEWMAN and JAMES ANDERSON,

Petitioners, Index No. 106403/2009

- against-

DECISION AND ORDER

COOPER, ROBERTSON & PARTNERS,

Respondent. **UNFILED JUDGMENT**
This judgment has not been entered and notice of entry has not been given.

MARILYN SHAFER, J.S.C.:

By petition dated May 5, 2009, Martin D. Newman (Newman) and

James Anderson seek a judgment, pursuant to Article 75 of the CPLR, staying a demand for arbitration by respondent Cooper, Robertson & Partners (CR&P) pursuant to a March 31, 2008 agreement (the agreement) with petitioners, which is captioned "Owner Work Authorization" (ex. 1 to mov. aff.).

CR&P has filed a counterclaim seeking an order compelling petitioners to proceed to arbitration. CR&P has not moved for any relief with respect to its counterclaim.

Pursuant to the agreement, both petitioners authorized CR&P to perform specified pre-design services in connection with the renovation of a cooperative apartment owned by petitioner Newman at 180 West 58th Street in Manhattan. The agreement states that the project name is "Sofi's Choice Apartment Renovation." It contains hourly rates for the CR&P personnel working on the project, and numerous terms and conditions, including an

arbitration clause.

The agreement states: "[a]uthorization is confirmed for Cooper, Robertson & Partners to perform the following services with the scope and basis as defined below." It then provides for a field survey of existing conditions in the apartment, photographs, and "[v]arious miscellaneous pre-Design Services as requested by Owner." The contract provides that March 24, 2008 is the date services are to begin. The box for "[d]ate services to be completed" is left blank.

Petitioners paid respondent \$5,835, which was the full amount of their April 14, 2008 invoice. That invoice describes the project as "Sofi's Choice -- apartment renovation - phase 1" (ex. 2 to mov. aff.). The record contains no further payment, although respondent presented numerous invoices to petitioners.

Without any additional written agreement, CR&P continued to perform services for petitioners. In an e-mail dated May 27, 2008, Corinne Calessio of CR&P described the work they had completed and were planning, and requested "your written approval for us to proceed with this work while you are away" (ex. A to verified answer). By e-mail dated May 27, 2008, Newman wrote: "[p]lease consider this authorization to proceed with items you have itemized to move this project along" (*id.*, ex. B).

By letter dated April 16, 2009, counsel for CR&P forwarded a demand for arbitration to petitioners, and stated that the demand

is for \$86,585.17.

Section XII of the agreement contains the following arbitration agreement, under the heading, "Disputes," as pertinent:

[t]he owner and CR&P agree to negotiate any claim, dispute or other matter in question arising out of or related to this Agreement in good faith. In the event such claim, dispute or other matter in question is not wholly resolved through negotiation by the parties, the owner and CR&P ... shall resolve the claim, dispute or other matter in question by mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

The mediation ... shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. The request for mediation shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of sixty days from the date of filing ... Claims, disputes, and other matters in question between the parties that are not resolved by mediation shall be decided by arbitration

(ex. 1 to mov. aff.).

CR&P states that the parties have agreed to forego mediation, but counsel for petitioners denies such agreement.

The verified petition alleges that the work for which CR&P is demanding payment does not constitute "pre-design services," and that the agreement to arbitrate does not cover services subsequently provided by CR&P, from which the underlying dispute arose.

Discussion

Petitioners argue that the agreement was for specified services only and that it terminated upon payment in full of the invoice, and that therefore, the arbitration provision had no further force or effect.

CR&P argues that the services rendered subsequent to those covered by that invoice were all part of the same project, under the same project number, and billed at the rates set in the agreement. CR&P also argues that the determination of whether this dispute is arbitrable is for the arbitrators.

The general rule is that, absent "clear and unmistakable evidence from the arbitration agreement ... that the parties intended that the question of arbitrability shall be decided by the arbitrator" [emphasis in original] (*MarketAxess Holdings, Inc. v Ziegelbaum*, 17 Misc 3d 647, 653 (Sup Ct, NY County 2007)), the determination of whether a controversy is properly subject to arbitration is initially one for the courts to determine (*see Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 598 [1997]; *Liberty Mgt. & Constr. v Fifth Ave. & Sixty-Sixth St. Corp.*, 208 AD2d 73, 77 [1st Dept 1995]).

A court's job is to "perform the initial screening process designed to determine in general terms whether the parties have agreed that the subject matter under dispute should be submitted to arbitration. Once it appears that there is, or is not [,] a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract, the court's inquiry is ended" [citation omitted]

(*Tong v S.A.C. Capital Management, LLC*, 16 Misc 3d 401, 407 [Sup Ct, NY County 2007], *mod on other grounds* 52 AD3d 386 [1st Dept 2007]).

Applying the foregoing standard, in light of this State's strong policy favoring liberal enforcement of agreements to arbitrate (see *Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co.*, 37 NY2d 91, 95 [1975]), the issue requires a determination whether the language of the agreement evinces an intention to apply the terms and conditions of the agreement, including the arbitration agreement, to the entire project or just to the initial, pre-design work.

This Court finds that the language of the arbitration agreement, which covers "any claim, dispute or other matter in question arising out of or related to this Agreement," is sufficiently broad to encompass this dispute, regardless of whether the parties intended that an additional agreement be executed for the next phase of the project.

The submissions do not contain any objection by petitioners to the invoices, which charged for services at the rates set in the agreement. The dispute over the invoices sufficiently relates to the agreement to fall within the agreement to arbitrate.

Petitioners' argument that Corinne Calessio performed architectural services without being duly licensed may be

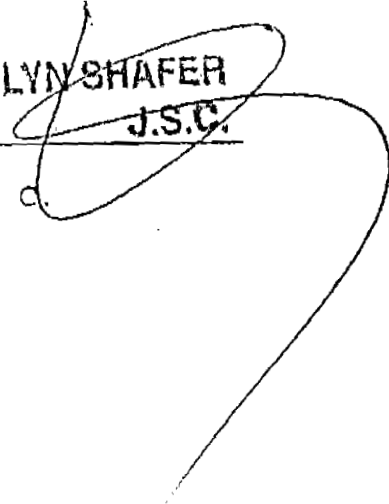
presented to the arbitrator.

Accordingly, it is

ORDERED ADJUDGED AND DECREED that the petition for a judgment staying arbitration is denied and the proceeding is dismissed.

Dated:

E N T E R :



 MARILYN SHAFER

 J.S.C.

 J. S. C.

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