

**Matter of RCDolner, LLC v 271 Mullberry St. Co.,
LLC**

2010 NY Slip Op 30989(U)

April 21, 2010

Supreme Court, New York County

Docket Number: 603804/09

Judge: Joan B. Lobis

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

PRESENT: Jean B. Lolis
Justice

PART 6

Index Number : 603804/2009
RC DOLNER LLC
VS.
271 MULLBERRY STREET CO., LLC
SEQUENCE NUMBER : 001
COMPEL OR STAY ARBITRATION

INDEX NO. _____
MOTION DATE 2/5/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Petition
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1-32
33-46

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

decided per attached decision/orders. *decided per attached*

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).

Dated: 4/21/10

JBT
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
NEW YORK COUNTY: IAS PART 6**

-----X
In the Matter of the Application of
RCDOLNER, LLC and R.C. DOLNER, INC.,

Petitioners,

Index No. 603804/09

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

Decision, Order and Judgment

- against -

271 MULBERRY STREET COMPANY, LLC and
THE BOARD OF MANAGERS OF THE 285
LAFAYETTE STREET CONDOMINIUM,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1410).

Respondents.

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner RCDolner LLC ("Dolner") brings this special proceeding pursuant to C.P.L.R. § 7503(b), seeking an order staying arbitration and vacating respondents' demand for arbitration. Respondents 271 Mulberry Street Company, LLC ("Mulberry") and the Board of Managers of the 285 Lafayette Street Condominium (the "Board") (collectively "Respondents") oppose the petition.

This proceeding arises out of a construction contract pertaining to the renovation of what was once a factory on Lafayette Street to a luxury condominium building (the "Building"), including the addition of several floors on top of the Building. The contract is between Abej, LLC (managing member of Mulberry) and R.C. Dolner, Inc.¹ The contract contains a broad arbitration clause that 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.

¹ RCDolner, LLC is the successor in interest to R.C. Dolner, Inc.

In December 1997, Mulberry and Dolner entered into the construction contract (the "Dolner Contract"). Mulberry had previously entered into a contract for architectural work in June 1997 with WYS Design Partnership ("WYS"). In or about June 1998, Mulberry sponsored the conversion of the Building to luxury condominiums. Dolner received final payment for its work under the contract on August 1, 2000. The Final Certificate of Occupancy ("FCO") was issued two years later, on August 9, 2002.

In 2002, various unit owners detected leaks in their apartments in the Building. The Board hired engineers to evaluate the Building, who confirmed the existence of water leaks and cracked mortar and bricks. In July 2003, Mulberry and Dolner entered into a tolling agreement that purportedly tolled the statute of limitations with respect to all claims that either party may have against each other with respect to the Dolner Contract. The tolling agreement recites that it "shall continue indefinitely and may be terminated only upon 30 days written notice." In June 2004, Mulberry, the Board, and Dolner entered into a settlement agreement (the "Agreement") in which Dolner agreed to fix the conditions causing the leaks and cracks. The Agreement recites a similar tolling agreement. Respondents allege that Dolner failed to fix a significant portion of the conditions and that Dolner "walked off the job" in or about October 2005. By notice of claim, Mulberry demanded arbitration against Dolner on or about November 10, 2005 (the "First Demand"). By letter dated January 9, 2006, Mulberry notified Dolner that the Dolner Contract, as amended, and as supplemented by the Agreement dated June 23, 2004, was terminated as of February 7, 2006, based on the reasons set forth in the notice of claim served on Dolner on or about November 10, 2005. The subsequent arbitration resulted in the arbitrator awarding over \$2.4 million to Mulberry, which related to work for which Dolner was found liable. Dolner paid the award.

On or about October 5, 2009, Respondents served Dolner, WYS (the architect), and Shael Shapiro (the principal of WYS) with a Notice of Intention to Arbitrate and a Demand for Arbitration (the "Second Demand"). The Second Demand—the subject of the instant proceeding—sets forth that since the award was paid, "new, additional, pervasive and fundamental construction and design defects" have been discovered that far exceed the defects that were causing the leaks. As a result, Mulberry and the Board seek arbitration to enforce their rights under the Dolner Contract and the contract with WYS.

Dolner seeks to permanently stay the arbitration, asserting that the claims in the Second Demand are barred by the six year statute of limitations. Dolner asserts that it substantially completed work in August 2000, when it received final payment and left the site, so that the time to bring a breach of contract claim expired in August 2006. Alternatively, Dolner asserts that the latest possible time to bring a claim could be no more than six years after the FCO was issued, which signified that all work under the Dolner Contract was, by necessity, completed. Accordingly, Dolner maintains that the latest time to bring a breach of contract claim expired in August 2008, or six years after the FCO was issued in August 2002. Dolner also contends that the tolling agreement is unenforceable as a matter of law according to N.Y. General Obligations Law § 17-103(1), because it purported to extend the statute of limitations indefinitely. In opposition, Respondents argue their claims did not begin to accrue until October 2005, when Dolner "walked off the job" after having resumed substantive construction. Thus, Respondents maintain that the Second Demand is timely, having been brought within six years of October 2005. Respondents further argue that the tolling agreement is enforceable because it was entered into by sophisticated entities represented by counsel and because it provided for written notice of termination.

In general, a claim against a contractor for defects in construction accrues when the “actual physical work” is completed, “even if the claimed defect is latent[.]” Rite Aid of New York, Inc. v. R.A. Real Estate, Inc., 40 A.D.3d 474 (1st Dep’t 2007) (citations omitted). Dolner is correct that incidental repair work subsequent to the completion of the work would not serve to reopen the contract and extend the statute of limitations. See Cabrini Med. Ctr. v. Desina, 64 N.Y.2d 1059, 1061 (1985) (minor masonry work was incidental to the construction of the building and could not serve to extend statute of limitations); see also State v. Lundin, 60 N.Y.2d 987, 989 (1983) (issue of payment for construction work already completed is an incident matter that did not extend the statute of limitations beyond the date that construction was complete); Volmar Constr. Corp. v. NYC Sch. Constr. Auth., 25 Misc. 3d 1239(A) (Sup. Ct. Kings Co. 2009) (repair items in the nature of minor repairs or punch list items do not extend completion date). But, the circumstances here are not similar to those cases involving incidental work on which Dolner relies. The scope of the work described in the Agreement indicated that Dolner’s correction of conditions related to “cracks and leaks” could take up to six months to complete, required scaffolding, contemplated bi-weekly construction meetings, and included significant masonry, waterproofing, and roofing work. This was not merely remedial, incidental, or “routine” work (see County of Nassau v. H. Sand & Co., Inc., 144 A.D.2d 619 [2d Dep’t 1988]) to be completed by Dolner, but substantial work that should have been completed under the Dolner Contract. The record indicates that the actual physical work was not substantively completed on August 1, 2000, despite the fact that Dolner was paid on that date. Further, the gap in time between the date of final payment or the issuance of the FCO and Dolner’s recommencement of work does not preclude a finding that Dolner performed substantive work under the contract at least in the summer of 2004. Therefore, the demand for arbitration was served within the six year statute of limitations.

In light of the court's finding that Dolner resumed substantive construction in or about the summer of 2004, thus extending the statute of limitations to at least the summer of 2010, the court need not reach the issue of whether the tolling agreement is enforceable. Furthermore, "[w]hen arbitration is invoked the only questions to be resolved by the courts (unless the dispute is barred by the Statute of Limitations) are whether 'a valid [arbitration] agreement was made' and whether such agreement was 'complied with.'" Prinze v. Jonas, 38 N.Y.2d 570, 574 (1976), quoting C.P.L.R. § 7503. "[T]he court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute." C.P.L.R. § 7501; quoted in Prinze, 38 N.Y.2d at 574. If the arbitration clause is a broad arbitration clause, such that all disputes or claims that arise would be subject to arbitration, a presumption of arbitrability arises and even collateral issues are arbitrable if issues under the contract are implicated. Gerling Global Reins. Corp. v. Home Ins. Co., 302 A.D.2d 118, 126 (1st Dep't 2002), citing Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir. 2001). Having resolved the issue of the statute of limitations, and it not being contested that there is a valid agreement, the court is precluded from reaching the remaining issues raised by Dolner. Collateral issues such as standing and the effect of the prior arbitration are more appropriate for the arbitrator.

The stay of arbitration is denied and this proceeding is dismissed. This constitutes the decision, order, and judgment of the court.

Dated: April 21, 2010

UNFILED JUDGMENT
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 JOAN B. LOBIS, J.S.C.