

**One Stop Facilities Maintenance Corp. v Aquajak,
Inc.**

2010 NY Slip Op 31223(U)

May 5, 2010

Supreme Court, Nassau County

Docket Number: 003740-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
ONE STOP FACILITIES MAINTENANCE CORP.,

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Petitioner,

**Index No: 003740-10
Motion Seq. No: 1
Submission Date: 3/18/10**

-against-

AQUAJAK, INC.,

Respondent.

-----x

The following papers have been read on this Order to Show Cause:

Order to Show Cause, Verified Petition and Exhibits.....x

This matter is before the Court for decision on the Order to Show Cause filed by Petitioner One Stop Facilities Maintenance Corp. ("One Stop" or "Petitioner") on February 24, 2010 and submitted on March 18, 2010. For the reasons set forth below, the Court refers Petitioner's application to a hearing and directs counsel for the parties to appear before the Court for a conference on May 26, 2010 at 9:30 a.m., at which time that hearing will be scheduled. The Court further directs Respondent Aquajak, Inc. ("Aquajak" or "Respondent") to advise the Court and Petitioner's counsel, on or before May 18, 2010, of the name, address and telephone number of the attorney who will be representing Aquajak in this matter. Pending the Court's decision following the hearing, the Temporary Restraining Order issued by the Court on March 1, 2010 shall remain in effect.

BACKGROUND

A. Relief Sought

Petitioner seeks an Order, pursuant to CPLR Article 3 and § 7502(c), enjoining Respondent Aquajak, Inc. (“Aquajak” or “Respondent”), its shareholders, officers, employees, contractors or agents from contacting any customers of Petitioner or taking any action against Petitioner’s customers to collect payment of any monies allegedly due from Petitioner including, but not limited to, filing any mechanic’s liens, and from utilizing the services of Wilfredo Irizarry until the commencement of an arbitration proceeding and the appointment of an arbitrator. Respondent has not submitted an opposition or other response to Petitioner’s Order to Show Cause.

B. The Parties’ History

The Verified Petition alleges as follows:

One Stop, which has offices in New York County, New York, provides maintenance and repair services to retail stores, restaurants and other businesses (“Customers”). One Stop’s business model is to handle all the needs of its Customers at a particular facility, including arranging necessary personnel. That function entails One Stop’s entering into subcontract relationships with entities that deal in different areas including plumbing, electrical work and cleaning.

Aquajak, which has its place of business in Seaford, New York, entered into a subcontract agreement with One Stop dated July 6, 2009 (“Subcontractor Agreement”) (Ex. A to Order to Show Cause (“OSC”)). Pursuant to the Subcontractor Agreement, Aquajak was to act as One Stop’s subcontractor to provide services to entities including retail stores.

Wilfredo Irizarry (“Irizarry”) is an individual whom One Stop previously hired as a project manager. That employment ended on January 21, 2010 and Irizarry then began working for Aquajak. In connection with his employment with One Stop, Irizarry signed a Confidentiality and Non-Competition Agreement (“Confidentiality Agreement”) dated January 27, 2009 (Ex. B to OSC).

Pursuant to the Subcontractor Agreement, Aquajak was to provide invoices for work it had undertaken and One Stop would pay those invoices after it had been paid in full for the particular job. Relevant provisions of the Subcontractor Agreement include the following:

Section 2, titled “Billing and Payment Procedures, includes the following language:

We are not obligated to pay you until we receive payment from our customer for the Services that you provide. You assume the risk of non payment by our customers for any reason...In no instance may you, your officers, shareholders, employees, contractors, or agents seek to collect payment from our customers.

Section 7, titled “Customer Confidential Information,” provides as follows:

When performing services, you may come into contact with personal information about our clients of our customers. You agree not to remove, divulge, disclose, or communicate any of this personal information. You are not authorized to contact our clients regarding payment and/or stopping service. Failure to comply could result in a penalty of \$5,000, or 50% of monies owed to you, whichever is greater.

The Petition alleges that the purpose of these provisions was to ensure that One Stop’s customers would deal only with One Stop for their facility and maintenance requirements. The Petition further alleges that “One Stop’s customers do not want to be threatened or sued by subcontractors, and only want to interact with One Stop” (Petition at ¶ 9).

Paragraph 6(b) of the Subcontractor Agreement, titled “Non-solicitation,” provides as follows:

You will neither solicit for employment nor hire any of our employees during the terms of this Agreement and for one (1) year following its termination.

Finally, Paragraph 10(A) of the Subcontractor Agreement, titled “Arbitration,” provides, in pertinent part, as follows:

All disputes, controversies and claims of any kind arising out of relating to this Agreement or the rights and obligations of the parties shall be settled through arbitration by the American Arbitration Association at its New York, New York office...This provision shall survive the termination or expiration of this Agreement. Nothing contained herein shall prevent us from applying to and obtaining from any court having jurisdiction, a temporary or preliminary injunction, and/or other emergency relief to enforce our rights and your obligations under this Agreement prior to the filing of any arbitration proceeding or pending the trial, or rendering of a decision or award pursuant to any arbitration proceeding conducted hereunder.

Petitioner alleges that, after Aquajak began to provide services under the Subcontractor Agreement, One Stop began receiving complaints regarding the quality of Aquajak’s work. Despite the decision of One Stop management that Aquajak should no longer be used as a

subcontractor, Irizarry, who was employed by One Stop at the time, directed that Aquajak be hired as a subcontractor for a particular project and One Stop advanced the sum of \$4,000 to Aquajak in connection with this project. Petitioner alleges that Aquajak did not adequately perform the required services and “a dispute erupted between One Stop and Aquajak with regard to Aquajak’s performance and the status of Aquajak’s invoices” (Petition at ¶ 13).

One Stop terminated Irizarry’s employment in 2010, allegedly due to his poor performance. Following this termination (“Termination”), Aquajak began demanding payment from One Stop with respect to invoices for which One Stop had not been fully paid, as well as invoices that One Stop disputed. Thomas Becher (“Becher”), the principal of Aquajak, sent e-mails (“E-mails”) to One Stop (Ex. C to OSC) in which he demanded payment. The Petition alleges that “[Becher] threatened to start contacting One Stop’s customers with regard to the nonpayment of his invoices.” A review of those E-mails, dated February 16, 17 and 19, 2010 reveals that Becher believed that One Stop owed Aquajak money for services that it had rendered. By way of example, the E-mail dated February 17, 2010 includes the following language (capitals in original):

STOP TRYING TO BULLY PEOPLE. IT WILL NOT WORK WITH ME.
 PAY YOUR BILL AND MEET WITH ME.
 YOU ARE ACTING LIKE A COWARD!!!!

The E-mail dated February 19, 2010 includes the following language:

I feel that I have been patient waiting for payment on the \$50,000 in invoices. If you choose to wait to pull the trigger on the check I will recover my \$50,000 in the court room...and with business from your current clients nationally and internationally. I am well respected. People know what they get from me. I am not perfect but I am honorable. If you live up [to] your responsibilities you will have a business ally for life. If you do not I will look to capitalize on your turf wherever possible using every legal means possible.

On February 22, 2010, One Stop sent a letter (“Letter”) to Becher (Ex. C to OSC) in which it, *inter alia*, 1) demanded that Becher immediately cease using Irizarry’s services; and 2) directed Becher to cease contacting One Stop employees and refrain from “disparaging” One Stop. Petitioner alleges that Aquajak ignored the Letter, and violated the Subcontractor Agreement, by contacting One Stop’s customers to demand payment. Petitioner cites as examples incidents on February 22, 2010 when 1) an unidentified representative from Aquajak

visited a customer of One Stop in New York City and dropped off invoices which One Stop had not paid; 2) Anthony Fernandez, a representative of Aquajak visited two New York locations of Reiss Limited (“Reiss”), a customer of One Stop, where he demanded payment of invoices and threatened to file a mechanic’s lien against Reiss due to One Stop’s alleged nonpayment. Petitioner provides an e-mail from Reiss dated February 22, 2010 (Ex. E to OSC) in which Reiss advised One Stop of Mr. Fernandez’ visit and asked One Stop to “advise what I should do as I don’t like being put in this situation.”

C. The Parties’ Positions

Petitioner submits that 1) Aquajak’s conduct violates the provisions in the Subcontractor Agreements prohibiting Aquajak from contacting Petitioner’s customers; 2) the dispute regarding Aquajak’s objectionable conduct will be the subject of an arbitration proceeding that will be commenced; and 3) if the Court does not issue the requested injunctive relief, any arbitration award will be rendered ineffectual because unless Aquajak is enjoined from contacting One Stop’s customers until the arbitration proceeding is commenced, One Stop will lose the benefit of the applicable provisions in the Subcontractor and Confidentiality Agreements and its relationship with its customer base will be irreparably harmed.

Respondent has not submitted an opposition or other response to Petitioner’s application.

RULING OF THE COURT

CPLR § 7502(c) provides as follows:

(c) Provisional remedies. The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose), except that the sole ground for the granting of the remedy shall be as stated above. If an arbitration is not commenced within thirty days of the granting of the provisional relief, the order granting such relief shall expire and be null and void and costs, including reasonable attorney’s fees, awarded to the respondent. The court may reduce or expand this period of time for good cause shown. The form of the application shall be as provided in subdivision (a) of this section.

The E-mails raise issues as to whether the award to which Petitioner may be entitled may be rendered ineffectual without the requested provisional relief. The E-mails suggest that Aquajak's primary concern was being compensated for the work that it performed, and that its decision to approach One Stop's customers was prompted not by its desire to interfere with Petitioner's customer relations, but rather by its frustration at not being paid. In addition, the e-mail from Reiss does not definitively establish that Becher's conduct damaged, or even affected, One Stop's business relationship with Reiss.

In light of the foregoing, the Court concludes that a hearing is needed to determine whether Petitioner can demonstrate that injunctive relief is appropriate. Accordingly, the Court refers Petitioner's application to a hearing and directs counsel for the parties to appear before the Court for a conference on May 26, 2010 at 9:30 a.m., at which time that hearing will be scheduled. The Court further directs Aquajak to advise the Court and Petitioner's counsel, on or before May 18, 2010, of the name, address and telephone number of the attorney who will be representing Aquajak in this matter. The Court further orders that, pending decision after the hearing, the Temporary Restraining Order issued on March 1, 2010 shall remain in effect.

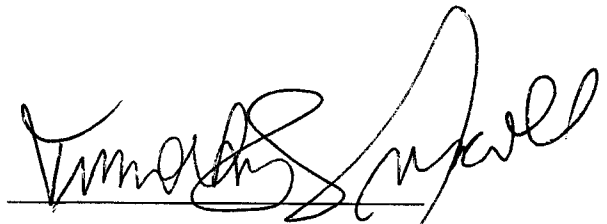
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a conference on May 26, 2010 at 9:30 a.m. as directed herein.

ENTER

DATED: Mineola, NY
May 5, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
MAY 07 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE