

Cava Constr. & Dev., Inc. v DAB Group LLC
2010 NY Slip Op 32993(U)
October 25, 2010
Sup Ct, NY County
Docket Number: 109025/2010
Judge: Martin Schoenfeld
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. Schoenfeld Justice PART 28

Cava Construction

INDEX NO. 109025/10

-v-

Dab Group

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for stay foreclosure

FILED

OCT 26 2010

Papers Numbered

Notice of Motion/Order to Show Cause - Affidavits - Exhibits _____

COUNTY CLERK'S OFFICE 1-3
NEW YORK J

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is to vacate a notice to commence action pursuant to lien law § 59 and/or stay the time to commence a foreclosure action is granted as per the accompanying memorandum decision.

Dated: 10/25/10

[Signature], J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER/JUDG.

Form 16: Standard Form Order (Gray Sheet)

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 28

-----X
CAVA CONSTRUCTION & DEVELOPMENT, INC.,

Petitioner,

**MEMORANDUM DECISION
AND ORDER**

-against-

Index No.: 109025/2010

DAB GROUP LLC,

Respondent.

FILED
OCT 26 2010
COUNTY CLERK'S OFFICE
NEW YORK

-----X
DAB GROUP LLC,

Petitioner,

Index No.: 109548/2010

-against-

CAVA CONSTRUCTION & DEVELOPMENT, INC.,

Respondent.

-----X
For CAVA:
Tarshis, Catania, Liberth, Mahon & Milligram, PLLC
One Corwin Court
PO Box 1479
Newburgh, New York 12550

For Respondent DAB:
Leo Salzman
2116 Avenue J
Brooklyn, New York 11210

For Petitioner DAB:
William G. Wallace, Esq.
229 Seventh Street
Garden City, New York 11530

HON. MARTIN SCHOENFELD, J.:

Petitioner CAVA Construction & Development, Inc. ("CAVA") moves pursuant to Lien Law §59 and CPLR 7503 for an order: (1) vacating the Notice to Commence an Action pursuant to Lien Law §59 served by respondent DAB Group, LLC ("DAB") on CAVA, in light of pending arbitration between the parties; and (2) staying the time limitation within which CAVA must

commence a foreclosure action pursuant to Lien Law §59 to complete pending arbitration.

In a related proceeding (Index No. 109548/10) commenced pursuant to CPLR §7503(b) and (c), DAB, as petitioner, moves to stay the arbitration demanded by CAVA. The two motions are consolidated herein, and decided as stated below.

Background

On August 11, 2008, CAVA, as contractor, and DAB, as owner, entered into an AIA contract (the "Contract") for services at 139-141 Orchard Street (the "Property"). The Contract contains, among other things, an arbitration clause that states:

§4.6.Arbitration

§4.6.1 Any claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Sections 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration.

On February 23, 2010, CAVA filed a Notice of Mechanic's Lien in the amount of \$959,229.00 against DAB. On or about June 15, 2010, DAB served CAVA with a Notice to Commence an Action pursuant to Lien Law §59 on or before July 15, 2010 or to show cause why its lien should not be vacated or cancelled.

On June 29, 2010, rather than commence a foreclosure action, CAVA served DAB with a Demand for Arbitration. In its demand, CAVA states that DAB "has indefinitely suspended or terminated the Contract by failing to make payments as required thereunder." An arbitration hearing at the American Arbitration Association ("AAA") is now scheduled for October 26th and 27th.

CAVA, in its motion pursuant to Lien Law §59 and CPLR 7503, argues that DAB's

Notice pursuant to §59 should be vacated in light of the pending arbitration or that the foreclosure action should at least be stayed until completion of the arbitration pursuant to CPLR 7503(a). According to CAVA, as a result of arbitration, DAB may be required to pay the amount owed on the mechanics lien, rendering the foreclosure action unnecessary.

In opposition, DAB argues that CAVA must either discharge the lien and arbitrate, or commence the foreclosure action. DAB urges this Court not to stay the foreclosure proceeding, stating that CAVA is simply seeking a stay because a foreclosure action is “an expensive and time consuming proceeding,” and that “in all probability” CAVA would be unsuccessful with its claims.

In the related proceeding, DAB moves pursuant to CPLR 7503 to stay the arbitration commenced by CAVA alleging that there is “no valid agreement between the parties that allows submission of this dispute directly to arbitration,” and that CAVA “has not complied with conditions precedent to the filing of a demand for arbitration and has failed to timely submit this matter to arbitration.” Further, DAB alleges in its petition that because CAVA commenced the action pursuant to Lien Law §59, it has waived its right to arbitrate. Yet, DAB does not amplify any of these arguments in the body of its petition.

Discussion

Pursuant to Lien Law §59, before a court may vacate or cancel a lien,

“a notice shall be served upon the lienor . . . [which] shall require the lienor to commence an action to enforce the lien within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of a court of record . . . why the notice of lien filed . . . should not be vacated and cancelled. . . .”

According to CPLR 7503(a): “A party aggrieved by the failure of another to arbitrate

may apply for an order compelling arbitration,” and if granted, “the order shall operate to stay a pending or subsequent action.” Further, pursuant to Lien Law §35, “the filing of a notice of lien shall not be a waiver of any right of arbitration of a contractor,” and if the arbitrator[s] “determine the value or price of labor performed or material furnished, their award shall be conclusive as between all parties to the arbitration in any action to foreclose the lien.”

In its petition to stay arbitration, DAB argues “upon information and belief,” that the Contract does not contain an arbitration provision. Yet, Section 4.6 of the Contract clearly contains such a clause. Moreover, DAB’s argument that by filing the mechanics lien, CAVA waived any right to arbitration, that it may have pursuant to “any purported agreement between the parties” is just wrong. As noted above, pursuant to both Lien Law §35 and CPLR 7503, the action would merely be stayed pending the outcome of the arbitration.

DAB also asserts that according to the Contract, a claim by either party must be initiated within 21 days after such claim accrues, and that this was not done here. However, DAB’s general reference to the word claim, without more, is ambiguous. Nor does DAB provide information as to how any such claim is late. In any event, if deemed appropriate, the arbitrator can further explore this allegation.

For the above stated reasons, this Court finds that CAVA has reasonably applied the arbitration provision contained in the parties Contract, and that the foreclosure action should be stayed pending the outcome of the arbitration proceeding.

In accordance with the foregoing, it is


ORDERED that the petition of CAVA Construction & Development Inc. is granted to the extent of staying an action for foreclosure pursuant to Lien Law §59, for a period of thirty (30)

days from the decision of the arbitrator upon completion of the pending arbitration, and it is further

ORDERED that the petition of DAB Group LLC, pursuant to CPLR 7503 to permanently stay arbitration, is denied, except that the arbitration proceeding shall be stayed for three (3) weeks from the date of this order, to allow both sides to prepare their case for arbitration, and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.



J.S.C.

Dated: New York, New York
October 25, 2010

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NEW YORK