

**Pacific Bldg. Care, Inc. v National Union Fire Ins. Co.
of Pittsburgh, Pa.**

2010 NY Slip Op 33097(U)

October 28, 2010

Supreme Court, New York County

Docket Number: 109058/10

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C.

PART 52

Index Number : 109058/2010

PACIFIC BUILDING CARE, INC.

INDEX NO. 109058/10

vs

NATIONAL UNION FIRE INSURANCE

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 01

COMPEL OR STAY ARBITRATION

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached decision.*

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

FILED

NOV 01 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/28/10

CK

CYNTHIA S. KERN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
PACIFIC BUILDING CARE, INC.,

Petitioner,

Index No. 109058/10

-against-

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA,

Respondent.

-----X

HON. CYNTHIA KERN, J.S.C.

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Pacific Building Care, Inc. ("Pacific") brought the instant petition seeking a stay of arbitration pursuant to CPLR 7503(b) on the grounds that respondent National Union Fire Insurance Company of Pittsburgh, PA ("National Union") failed to comply with a condition precedent to arbitration. Respondent National Union moves to compel arbitration and to name an arbitrator. For the reasons set forth more fully below, Pacific's petition to stay arbitration is denied and National Union's motion to compel arbitration is granted but its motion to name the arbitrator is denied.

The relevant facts are as follows. Pursuant to a contract, the American Home Assurance Company ("AHAC") provided Pacific with workers' compensation and employers' liability

insurance policies for the periods of August 28, 2005 to January 24, 2006 and for January 24, 2006 to August 28, 2006 (together, the "Policies"). In or about January 2006, Pacific entered into an agreement, retroactively effective as of August 28, 2005, with respondent National Union, acting on behalf of AHAC, which detailed the parties' invoicing and payment obligations for the August 2005 to January 2006 period (the "2005 Payment Agreement"). A similar agreement was entered into for the period of January 2006 to August 2006 (the "2006 Payment Agreement" and together with the 2005 Payment Agreement, the "Payment Agreements"). On or about May 20, 2008, Commercial Insurance Collection wrote to Pacific demanding payment of \$272,662.44 in unpaid premiums. In response, Pacific requested an audit of National Union's claims files. The audit was not performed as National Union did not submit all the documents necessary for an audit. On or about April 27, 2010, counsel for National Union sent a letter to Pacific demanding arbitration of the dispute arising from the failure to pay balances allegedly due under the Payment Agreements, the amount of which was cited in the letter as \$749,814. When negotiations to resolve the dispute failed, Pacific filed the petition to stay arbitration.

The issue now before the court is who should decide whether a claims audit is a condition precedent to arbitration - the court or the arbitrators. This court finds that the question should be decided by the arbitrators rather than the court. As a result, Pacific's petition to stay the arbitration on the ground that the audit has not yet taken place is denied. The Payment Agreements specifically provide that any issue arising out of the Payment Agreements, including the issue of arbitrability, is for the arbitrators. "Although the general presumption is that the courts should determine whether a dispute is arbitrable, the parties to an agreement may provide that arbitrators will decide questions of arbitrability." *National Union Fire Ins. Co. of*

Pittsburgh, PA v Las Vegas Professional Football Limited Partnership, 2009 WL 4059174 (S.D.N.Y. 2009) (citation omitted). “Clear and unmistakable evidence” that arbitrability is for the arbitrators to decide is required. *Id.* In *Las Vegas Professional Football*, the court interpreted a payment agreement which had a broad arbitration clause, providing that all disputes “arising out of” the payment agreement were to go to arbitration. The agreement also stated that, “They [the arbitrators] will have exclusive jurisdiction over the entire matter in dispute, including any question as to its arbitrability.” *Id.*; see also *Raytheon Company v National Union Fire Ins. Co. of Pittsburgh, PA*, 306 F.Supp.2d 346 (S.D.N.Y. 2004) (also interpreting the same clause). The court found that that language provided the “clear and unmistakable evidence” of the parties’ intent to have the arbitrators decide questions of arbitrability. *Las Vegas Professional Football*, 2009 WL 4059174; see also *Raytheon*, 206 F.Supp.2d 346.

In the instant case, the arbitration agreement provides clear and unmistakable evidence that the arbitrators are to decide issues of arbitrability. The relevant provision is identical to that in the two cases cited above and provides that “They [the arbitrators] will have exclusive jurisdiction over the entire matter in dispute, including any question as to its arbitrability.” This clause is unambiguous and requires issues of arbitrability to be decided by the arbitrators. Because the question of whether National Union complied with a condition precedent to arbitration is a question of arbitrability, that question is for the arbitrators and this court will not stay the arbitration.

Pacific’s argument that the clause stating that “any action or proceeding concerning arbitrability, including motions to compel or to stay arbitration, may be brought only in a court of competent jurisdiction in the City, County, and State of New York” means that issues of

arbitrability are for the court is without merit. That provision is merely a venue provision and simply provides that any motions brought in court must be brought in New York court. It does not mean that all issues of arbitrability are to be decided by a court but rather that if an action is brought in a court, that court must be in New York.

Because arbitrability is a question for the arbitrators, National Union's motion to compel arbitration is granted. However, National Union's motion to name an arbitrator is denied. Pursuant to the Payment Agreements, Pacific had thirty days from the date of the demand for arbitration, dated April 27, 2010, to name an arbitrator. It failed to do so during this time. However, during the parties' negotiations, the parties agreed to forego collection efforts and extended Pacific's time to move to stay arbitration. Although the parties did not explicitly agree to extend Pacific's time to name an arbitrator, the court finds that since they did not explicitly state that Pacific's time to name an arbitrator was not tolled, Pacific retains this right. Pacific must name an arbitrator within 30 days of the date of this order.

Accordingly, Pacific's petition to stay arbitration is denied and National Union's motion to compel arbitration is granted. However, National Union's motion asking the court to appoint an arbitrator is denied. Pacific retains its right to name an arbitrator and is directed to do so within 30 days of this order. This constitutes the decision and order of the court.

Dated: 10/28/10

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.

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