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

PRESENT: JANE S. SOLOMON Justice PART 55

Monarch Construction
in re:
-v-
Stone Truss Systems Inc,

INDEX NO. 114312/10
MOTION DATE 11/22/10
MOTION SEQ. NO. 01
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this ~~motion~~ petition to/for stay arbitration

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5-7
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided in accordance with the annexed memorandum decision, order and judgment.

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: 2/10/11

JANE S. SOLOMON J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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 55

- X

In the Matter of the Arbitration Between

MONARCH CONSTRUCTION CORP.,

Petitioner,

- and -

STONE TRUSS SYSTEMS, INC.,

Respondent.

- X

Index No. 114312/10

DECISION, ORDER and JUDGMENT

JANE S. SOLOMON, J.:

Petitioner Monarch Construction Corp. moves for an order permanently staying respondent Stone Truss Systems, Inc. and the American Arbitration Association from arbitrating the matter under AAA Case No. 13 110 02499 10. For the reasons discussed below, the motion is denied and the proceeding is dismissed.

Petitioner, as contractor, and respondent, as subcontractor, entered into a written agreement, dated November 6, 2003 (Subcontract), in connection with a construction project on property owned by the Con Edison Company of New York, Inc. (Con Ed), and located at 23 West 30th Street, New York, New York (Con Ed Project). The Subcontract has certain provisions that relate to the contract between Con Ed and petitioner (Prime Contract, Exhibit B to Affirmation of Paul G. Ryan Esq. [Ryan Affirmation], *see e.g.* Article 4.1.5, 4.2.1).

On March 13, 2006, respondent filed a mechanic's lien

(Lien) regarding the work performed on the Con Ed Project, to supply and install Indiana Limestone, claiming $388,124 as an amount unpaid out of an agreed-upon amount of $2,750,124. The Lien states that respondent first performed work on the Con Ed Project on April 5, 2004, and respondent last performed work on August 8, 2005 (Exhibit C to Ryan Affirmation). Respondent filed a demand for arbitration with the American Arbitration Association on October 12, 2010 (Arbitration Number 13 110 02499 10), seeking $250,000 (Exhibit D to Ryan Affirmation). By order dated November 22, 2010, this Court stayed the pending arbitration.

Petitioner argues that respondent is foreclosed from arbitrating or litigating this matter because it is time-barred. Petitioner relies upon the statute of limitations provision contained within the "Standard Terms and Conditions" of the Prime Contract, and Article 6.2.3 of the Subcontract which, it contends, specifically incorporates the Prime Contract's statute of limitations period. Article 6.2.3 of the Subcontract provides:

> "A demand for arbitration shall be made within the time limits specified in the conditions of the Prime Contract as applicable, and in other cases within a reasonable time after the claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim would be barred by the applicable statute of limitations."

Section 53 of the Prime Contract provides:

> "Limitation on Time to Sue. No action shall be brought by Contractor based on any controversy or claim arising out of or related to the Contract or any breach thereof, *more than two years after accrual of the cause of action*" (emphasis added).

Thus, the Prime Contract purports to limit the period in which to bring a claim to two years, and the Subcontract has language indicating that it has incorporated that limitation period as a condition. Petitioner contends that because the Lien recites that respondent completed its work on August 9, 2005, and respondent filed a demand for arbitration on October 12, 2010, the arbitration is untimely in that it is more than two years from the date that the cause of action accrued.

Respondent counters that the controlling statute of limitations period is six years for a breach of contract cause of action, pursuant to CPLR 213, and not the shortened two years pursuant to the Prime Contract. It bases its assertion on the following analysis: Article 6.2.3 of the Subcontract provides three time periods in which respondent could make a timely claim for arbitration: (1) "within the time limits specified in the conditions of the Prime Contract as applicable," (2) "in other cases within a reasonable time after the claim has arisen," and (3) "in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim would be barred by the applicable statute of limitations." Respondent contends that the only non-ambiguous time period is the third, thereby making the arbitration demand timely, because it made the

demand within the six-year breach of contract limitations period.

Secondly, respondent argues that its arbitration demand is timely, even if the Prime Contract's limitations period were deemed applicable to the Subcontract, because the Prime Contract refers to "actions," and a demand for arbitration is not an action.

Thirdly, respondent argues that the Subcontract does not incorporate the Prime Contract's limitations provision, because incorporation clauses in a construction contract bind a subcontractor only as to provisions relating to the scope, quality, character, and manner of the work to be performed by the subcontractor (citing *Matter of Wonder Works Constr. Corp. v R.C. Dolner, Inc.*, 73 AD3d 511 [1st Dept 2010]; *Goncalves v 515 Park Ave. Condominium*, 39 AD3d 262 [1st Dept 2007]; and *Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243 [1st Dept 2001]).

In their dispute as to the measure of the period in which respondent could file a demand for arbitration, the parties have neglected to address the issue as to whether timeliness is for the court or the arbitrator to resolve.

A broad arbitration clause is deemed to reserve for the arbitrator all questions regarding compliance with time restrictions for demanding arbitration (*Silverstein Props. v Paine, Webber, Jackson & Curtis*, 65 NY2d 785 [1985]). In contrast, where the arbitration clause is narrow, extending to

one specifically-designated issue for arbitration, then the issue of whether a petitioner satisfied a condition precedent of timely notice is for judicial rather than arbitral resolution (*Matter of Laszlo N. Tauber & Assoc. I, LLC v Alliance Capital Mgt. L.P.*, 25 AD3d 353 [1st Dept 2006]). Moreover, where the parties have set down in their agreement limitations of time within which a party must make a demand for arbitration, then the issue of timeliness is for resolution by the arbitrator (*Matter of County of Rockland* [*Primiano Constr. Co.*], 51 NY2d 1, 8 [1980]).

Here, the parties have not opted for the courts, rather than the arbitrator, to determine the issue of timeliness. This is demonstrated by the fact that the arbitration clause is broad, and the parties agreed to submit "all claims arising out of or related to" the subcontract (with certain limited exceptions) to arbitration (*Matter of May v Anspach*, 24 AD3d 671 [2d Dept 2005]; *Matter of Merritt Eng'g Consultants, P.C. v 55 Liberty Owners' Corp.*, 18 AD3d 210 [1st Dept 2005]). Article 6.2.1 of the Subcontract provides:

> "Any claim arising out of or related to this Subcontract, except claims as otherwise provided in Subparagraph 4.1.5 and except those waived in this Subcontract, shall be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 6.1."[1]

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[1] Article 4.1.5 pertains to the right of the "Contractor and Architect" to reject "Work of the Subcontractor which does not conform to the Prime Contract."

The parties could have carved out an exception to the issues to be arbitrated by providing in the Subcontract that New York law would govern it and its enforcement, but they did not do so. Where the agreement does not expressly incorporate New York law, questions relating to time limits are generally within the province of the arbitrators (*Matter of Kallas v Milberg Weiss LLP*, 61 AD3d 451 452 [1st Dept 2009]).

The Subcontract does not contain language indicating that the parties agreed to leave timeliness issues to the court (*Matter of Edward D. Jones & Co. v American Stock Exch. LLC*, 22 AD3d 319 [1st Dept 2005]). In the context of the Federal Arbitration Act, the Court of Appeals stated:

> "A choice of law provision, which states that New York law shall govern both 'the agreement *and its enforcement*,' adopts as 'binding New York's rule that threshold Statute of Limitations questions are for the courts.' In the absence of more critical language concerning enforcement, however, all controversies, including issues of timeliness, are subjects for arbitration"

Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp., 4 NY3d 247, 253 [2005] [citations omitted] [emphasis in original]).

To be sure, the Prime Contract contains a provision that it "shall be interpreted and the rights and liabilities of the parties hereto determined in accordance with the laws of the State of New York" (Prime Contract, Art. 50). This provision

does not extend to the "enforcement" of the Prime Contract (*see Matter of Diamond Waterproofing Sys. v 55 Liberty Owners Corp.*, 4 NY3d at 253). Significantly, there is no language in the Subcontract incorporating this provision, and neither party to this proceeding argues otherwise.

Accordingly, it is

ORDERED and ADJUDGED that the previously-issued temporary stay is hereby vacated and the petition to stay the subject arbitration is denied in all respects, and the petition is dismissed, with costs and disbursements to respondent; and it further is

ADJUDGED that the parties shall proceed to arbitration forthwith and respondent's counsel shall serve a copy of this judgment upon the arbitral tribunal; and it further is

ADJUDGED that respondent, Stone Truss Systems, Inc., having an address at 23-0 Commerce Street, Fairfield, New Jersey 07004, do recover from petitioner, Monarch Construction Corp., having an address at 10-57 Jackson Avenue, Long Island City, New York 11101, costs and disbursements in the amount of $ _____ as taxed by the Clerk and that respondent have execution therefor.

Dated: February 10, 2011

ENTER:

J.S.C.
JANE S. SOLOMON