ADS Constr. Corp. v 220 Saint Nicholas Partners, LLC
2011 NY Slip Op 33839(U)
June 6, 2011
Sup Ct, New York County
Docket Number: 651278/2010
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE PART 61

Index Number : 651278/2010

ADS CONSTRUCTION CORP.,

VS.

220 SAINT NICHOLAS PARTNERS,

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 6/6/11

HON. ANIL C. ~~SINGH~~ J.S.C.
SUPREME COURT JUSTICE

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 61

----------X

ADS CONSTRUCTION CORP.,
D/B/A AUTUN CONTRACTORS,

Plaintiff,

-against-

220 SAINT NICHOLAS PARTNERS, LLC,
220 SAINT NICHOLAS MANAGEMENT, LLC,
KYLE RAWLINS,
THE PARK AVENUE BANK now known as
VALLEY NATIONAL BANK,
PEOPLE OF THE STATE OF NEW YORK,
THE CITY OF NEW YORK,
and JANE and JOHN DOE 1-100, and
ABC COMPANY 1-100,

Defendants.

----------X

DECISION AND ORDER

Index No. 651278/2010

HON. ANIL C. SINGH, J.:

This is an action for breach of a construction agreement. Defendants move to dismiss plaintiff's complaint with prejudice pursuant to CPLR 3211 and to refer this matter to arbitration, contending that the plaintiff and one of the defendants entered into a written agreement containing an alternative dispute resolution ("ADR") clause. Plaintiff opposes the motion and cross-moves to dismiss all of the moving defendants' affirmative defenses and counterclaims. Defendants

oppose the cross-motion.

Defendant 220 Saint Nicholas Partners, LLC ("220 Partners") is the owner of the premises at 220 Saint Nicholas Avenue in Manhattan. In January 2008, plaintiff ADS Construction Corp. d/b/a Autun Contractors and defendant 220 Partners entered into a written agreement incorporating the general conditions for construction contracts of the American Institute of Architects (AIA Document A201). Under the terms of the agreement, plaintiff was to manage the construction a ten-story building, and the construction manager's guaranteed maximum price for the work was the sum of $6,978,985.00.

The agreement was signed by defendant Kyle Rawlins in his capacity as Manager of co-defendant 220 Saint Nicholas Management, LLC ("220 Management").

Plaintiff commenced this action in the Supreme Court by filing a summons and complaint on August 16, 2010. The complaint alleges that plaintiff furnished labor, services, materials and equipment pursuant to the contract from January 2008 through February 2010. Plaintiff contends that by letter agreement dated June 15, 2009, defendants acknowledged "their on-going default under the Contract." The complaint asserts six causes of action. The first cause of action alleges breach of contract. The second alleges an account stated. The third cause

of action alleges unjust enrichment. The fourth cause of action seeks to foreclose on a Mechanic's Lien. The fifth cause of action is for legal fees. The sixth cause of action seeks to enjoin the City of New York from issuing any future violations or fines. Plaintiff seeks damages against defendants 220 Partners, 220 Management and Kyle Rawlins in the sum of $263,874.00.

Defendant The Park Avenue Bank now known as Valley National Bank filed an answer asserting two affirmative defenses. The first affirmative defense alleges that the mortgage held by the bank is superior in priority over the lien plaintiff seeks to foreclose. The second affirmative defense alleges that the bank is not a proper party under Lien Law section 44 and CPLR 1002, as foreclosure of plaintiff's Mechanic's Lien is subject to the bank's lien.

Defendants 220 Partners, 220 Management and Kyle Rawlins filed an amended answer, asserting five affirmative defenses and one counterclaim. The first affirmative defense alleges that plaintiff is in breach of contract. The second alleges that plaintiff made misrepresentations to defendants. The third alleges that plaintiff has no right to bring an action in the Supreme Court for the resolution of any alleged contractual dispute with defendant 220 Saint Nicholas Partners, LLC, because the agreement contains an ADR clause. The fourth affirmative defense is that defendants 220 Management and Kyle Rawlins did not enter into any contract

with plaintiff, have no contractual liability, and are not proper parties to a lawsuit with plaintiff. The fifth affirmative defense/first counterclaim alleges that plaintiff is in breach of contract for, among other things, failing to complete the construction project on time and within budget. The sixth affirmative defense/second counterclaim alleges that plaintiff made misrepresentations to defendants. The counterclaims seek damages in the amount of $10,000,000.

Discussion

Although brought as a motion to dismiss the complaint (CPLR 3211), the Court will treat the instant application as a motion to compel arbitration of plaintiff's breach of contract claim (CPLR 7503(a)).

The written agreement in issue is a standard AIA contract: construction management contract AIA Document A121 CMc – 2003, with its riders and Amendment No. 1, and AIA Document A201– 1997, with its riders. As we noted above, defendant Kyle Rawlins signed the agreement in his capacity as Manager on behalf of co-defendant 220 Management. The agreement was also signed by the President of the plaintiff corporation. None of the other defendants in this matter were parties to the agreement.

The agreement has a provision for alternative dispute resolution at Section 9.1. It states:

> During both the Preconstruction and Construction Phases, Claims, disputes or other matters in question between the parties to this Agreement shall be resolved as provided in Sections 4.3 through 4.6 of A201 – 1997 except that, during the Preconstruction Phase, no decision by the Architect shall be a condition precedent to mediation or arbitration.

(Motion to Dismiss, exhibit 1).

> The term "claim" is defined at Section 4.3 as:
>
> a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

(Notice of Motion, exhibit 1, A201 – 1997, pp. 18-19)

> Sections 4.5 and 4.6 state in pertinent part:
>
> **4.5.1** Any Claim arising out of or relating 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 initial decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.
>
> **4.5.2** The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to the Contract

and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

...

SECTION 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. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Section 4.5.

4.6.2 Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect.

...

4.6.4 Limitation on Consolidation or Joinder. No arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor, or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or

> responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a claim not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.
>
> ...
>
> **4.6.6 Judgment on Final Award.** The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

(Affirmation in Support of Robert G. Leino, Esq., dated Nov. 21, 2010, exhibit 1).

"On motions to stay or compel arbitration there are three threshold questions to be resolved by the courts: whether the parties made a valid agreement to arbitrate, whether if such an agreement was made it has been complied with, and whether the claim sought to be arbitrated would be barred by limitation of time had it been asserted in a court of the State" (In the Matter of Arbitration between the County of Rockland and Primiano Construction Co., Inc., 51 N.Y.2d 1, 6-7 [1980]).

It is undisputed that the parties entered into a valid agreement containing an ADR clause. It is noteworthy that neither party to the agreement contends that the ADR provision has been waived.

The claims in this matter fall squarely within the definition of "claim," as defined by the agreement. Furthermore, it is undisputed that the claims would not be barred by limitation of time. Accordingly, the Court finds that defendants have stated sufficient grounds for the application.

Plaintiff raises four arguments in opposition to defendants' motion: 1) the motion is not supported by the affidavit of a person with knowledge; 2) "the alternative dispute resolution clause does not apply to this matter;" 3) assuming that the court finds that the clause is applicable, the ADR clause does not apply to all of the defendants; and 4) the intertwined claims and controversies that are not covered by the ADR clause bar dismissal.

Plaintiff's first contention is meritless because defendants exhibit the sworn affidavit of Kyle Rawlins, a defendant with personal knowledge, in support of the motion.

Plaintiff's second contention that the ADR clause is inapplicable to this dispute is equally lacking in merit. As we stated above, the ADR clause clearly applies because the claims fall within its scope.

Plaintiff's third contention that the ADR clause does not apply to all of the defendants has merit. Accordingly, the Court will stay this action pursuant to CPLR 7503(a) while the parties to the agreement engage in alternative dispute

resolution pursuant to the agreement.

Plaintiff's final contention is that the intertwined claims and controversies that are not covered by the ADR clause "bar" dismissal.

The action is not being dismissed, so it is unnecessary to address plaintiff's contention.

In light of our decision to stay the action pending the outcome of the alternative dispute resolution, we decline to address at this juncture the merits of the cross-motion to dismiss the counter-claims and affirmative defenses.

For the above reasons, it is hereby

ORDERED that defendant's motion is granted only to the extent that the parties to the agreement are directed to engage in alternative dispute resolution as provided for in their agreement; and it is further

ORDERED that this action is stayed pursuant to CPLR 7503(a).

The foregoing constitutes the decision and order of the court.

Date: June 6, 2011
New York, New York

Anil C. Singh

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER