

Parker v Clear Skies Solar, Inc.
2012 NY Slip Op 33353(U)
July 17, 2012
Supreme Court, New York County
Docket Number: 602579/2008
Judge: Shirley Werner Kornreich
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 602579/2008
PARKER, ROBERT F.
vs.
CLEAR SKIES SOLAR
SEQUENCE NUMBER : 004
COMPEL OR STAY ARBITRATION

INDEX NO. _____
MOTION DATE 5/18/12
MOTION SEQ. NO. _____

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

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

No(s). 35-37

Answering Affidavits — Exhibits _____

No(s). 38

Replying Affidavits _____

No(s). 39

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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

Dated: 7/17/12

SHIRLEY WERNER KORNREICH

J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
ROBERT F. PARKER,

Plaintiff,

-against-

Index No.: 602579/2008

CLEAR SKIES SOLAR, INC., and its wholly owned
subsidiary, CLEAR SKIES GROUP, INC.,
EZRA GREEN, PAMELA NEWMAN,
GELVIN STEVENSON, and RICHARD KLEIN,

DECISION and ORDER

Defendants.

-----X

SHIRLEY WERNER KORNREICH, J.:

Plaintiff Robert F. Parker filed a motion (1) to compel defendant Clear Skies Solar, Inc., and its wholly owned subsidiary, Clear Skies Group, Inc. (Clear Skies), to proceed to arbitration, as agreed by the parties, within sixty days; and (2) in the event Clear Skies fails to proceed to arbitration, granting plaintiff a default judgment, pursuant to CPLR 3215(a). Plaintiff's motion is denied for the reasons that follow.

Plaintiff commenced this action in 2008. Justice Lowe dismissed the individually named officers and directors of defendant corporations from the action, as well as all causes of action save the breach of contract. On July 11, 2011, the day that a bench trial was scheduled to commence, the parties agreed that the case would proceed to binding arbitration in lieu of a bench trial. The parties agreed to spilt the costs of arbitration equally. Thus, a proceeding was commenced before the American Arbitration Association (AAA), an arbitrator was agreed upon by the parties, and the arbitration was scheduled to begin on November 28, 2011. In a

conference call on November 11, 2011, Clear Skies' attorney notified plaintiff and the arbitration case manager that Clear Skies would be unable to pay for its share of the arbitration costs due to lack of funds. Pursuant to AAA policy, the AAA will not commence an arbitration proceeding until the entire fee is paid.

In opposition to the instant motion, Clear Skies reaffirmed its inability to pay for its share of the arbitration costs. Moreover, at oral argument on April 24, 2012, Clear Skies' attorney made it clear that it would default either at arbitration or at trial. However, Clear Skies seeks to force the default to occur at arbitration. Clear Skies proposes that plaintiff pay the full cost of arbitration so that the arbitration can commence, pursuant to the parties' agreement. Plaintiff refuses to do so.

Given Clear Skies' alleged inability and clear refusal to pay the arbitration fee, Clear Skies has breached its agreement to arbitrate this action. Arbitration can only take place if plaintiff pays the full costs, something plaintiff refuses to do. The court, therefore, cannot grant plaintiff's motion to compel arbitration. Instead, the court will schedule a date for a bench trial. Accordingly, it is hereby

ORDERED that Plaintiff Robert F. Parker's motion to compel arbitration is denied; and it is further

ORDERED that a bench trial will commence in this matter in Part 54, on August 9, 2012, at 2:15 p.m.; and it is further

ORDERED that the caption is amended, in accordance with Justice Lowe's August 19, 2009 dismissal order, to read:

-----X
ROBERT F. PARKER,

Plaintiff,

-against-

CLEAR SKIES SOLAR, INC., and its wholly owned
subsidiary, CLEAR SKIES GROUP, INC.,

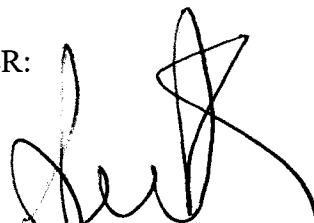
Defendants.
-----X

and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to mark the court records to reflect the present defendants.

Dated: July 17, 2012

ENTER:



J.S.C.