

**Southgate Owners Corp. v KNS Bldg. Restoration
Inc.**

2013 NY Slip Op 32683(U)

July 24, 2013

Sup Ct, New York County

Docket Number: 651927/2013

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

SOUTHGATE OWNERS CORP.,

Petitioner,

-against-

KNS BUILDING RESTORATION INC.,

Respondent.

INDEX NO. 651927/2013

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion to stay arbitration.

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

Table with 1 column: PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to stay arbitration is decided in accordance with the accompanying decision and order.

Dated: July 24, 2013

Handwritten signature of O. Peter Sherwood, J.S.C.

Check one: [X] 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 49

-----X
 SOUTHGATE OWNERS CORP.,

Petitioner,

-against-

DECISION AND ORDER
 Motion Seq. 001

Index No.: 651927/2013

KNS BUILDING RESTORATION INC.,

Respondent.

-----X
 O. PETER SHERWOOD, J.S.C.:

Petitioner, Southgate Owners Corp. (“Southgate”), which is a housing cooperative that hired respondent, KNS Restoration, Inc. (“KNS”), to make repairs to the premises, seeks to stay arbitration of KNS’s claim for payment of \$78,802.00. KNS asserts that the claim is for an undisputed amount of monies owed for services rendered pursuant to the terms of a construction contract between Southgate and KNS. Thus the claim is arbitrable under the New York Prompt Payment Act, General Business Law § 756-b(3)(c) (the “PPA”) even though the Standard Form American Institute of Architects Agreement (“AIA Contract”) the parties signed was modified to delete the arbitration clause.

KNS asserts that pursuant to the provisions of GBL §756-b, the claim is subject to mandatory arbitration. Southgate maintains that the parties agreed expressly not to arbitrate and that the PPA does not entitle KNS to arbitration of the dispute because the PPA concerns payment of undisputed amounts and the amount demanded in this case is a disputed amount due to multiple defaults by KNS. Southgate states that KNS defaulted on the contract by, *inter alia* (1) failing to provide adequate labor, equipment and materials to complete the work within the time provided for in the contract; (2) misrepresenting its use of subcontractors; (3) failing to obtain prior approval of subcontractors; (4) failing to make payments to subcontractors consistent with the Lien Law and the PPA; (5) failing to provide supervision consistent with contract requirements; and (6) failing to provide documents, including (a) copies of subcontractor agreements, (b) proof of subcontractor’s insurance, (c) warranties, (d) lien waivers from all subcontractors and suppliers, and (e) project closeout documents.

Southgate adds that during the course of the contract it was required to issue five (5) separate notices of contract breach as well as a Final Notice, none of which have been cured.

KNS argues that the issue of arbitrability should be referred to the arbitrator. The court disagrees. Although questions concerning matters such as whether a party's claims fall within the scope of the parties arbitration agreement, whether conditions precedent to arbitration have been waived or whether an arbitration demand was timely filed are for the arbitrator to decide, (*see, e.g. [Matter of Diamond Waterproofing Systems, Inc. v 55 Liberty Owners Corp., 4 NY3d 247, 252 [2005]; 21st Century North Amer. Ins. Co. v Douglas, 105 AD3d 463 [1st Dept 2013]*), the threshold issue of whether the parties have agreed to arbitrate or otherwise are bound to arbitrate, is a matter for the courts to decide (*see CPLR 7503[a]; Nationwide General Ins. Co. v Investors Ins. Co., 37 NY2d 91, 95 [1975]; Cheng v Oxford Health Plans, Inc., 15 AD3d 207, 208 [1st Dept 2005]*).

The PPA is intended to encourage the prompt payment of undisputed amounts owed to construction contractors and subcontractors. GBL §756-a states that its “purpose . . . is to expedite payment of all monies owed to those who perform contracting services pursuant to construction contracts”. The law is not intended to trump the terms of agreements of parties to construction contracts. The law provides that “[e]xcept as otherwise provided in this article, the terms and conditions of a construction contract shall supercede the provisions of this article and govern the conduct of the parties.”. The law requires that invoices be approved or disapproved in a timely fashion and defines the permissible grounds for disapproval (*see GBL §756-a[2][a][i]*).

In this case, KNS submitted payment applications numbers 5 and 6 on November 29, 2012 and December 27, 2012 respectively. Southgate issued timely responses on December 6, 2012 and January 15, 2013 respectively, declining to approve specific items of work. Southgate states that it paid \$155,961 of the contract price and that KNS had asserted an outstanding balance of \$125,800. Apparently, KNS has adjusted its payment request and now seeks only \$78,802. Southgate continues to dispute this amount.

GBL §756-b sets forth a timetable for payment of undisputed invoice amounts and requires payment of interest at the rate of one percent per month for late payment (*see GBL*

§756-b(i)). It also establishes a timetable and procedure for contractors to give notice and to suspend performance for non-payment of undisputed amount without fear of being held in breach of contract (*see* GBL §756-b[2]).

Pursuant to GBL §756-b(3), an aggrieved party may give written notice of a complaint “that the owner has violated the provisions of this article” and requires that “the parties shall attempt to resolve the matter giving rise to such complaint”. If negotiations fail, “the aggrieved party may refer the matter . . . for an expedited arbitration”. GBL §756-b(3)(c).

These provisions do not purport to require parties to construction contracts to forego the traditional right of contracting parties to choose whether to litigate disputed claims or to submit disputed claims to arbitration. The PPA applies to undisputed invoices only. The terms and conditions of the modified AIA Contract continue to govern disputed invoices (*see* GBL §576-a). The contract of the parties in this case expressly excludes arbitration as the vehicle for resolution of disputed matters. Accordingly, the petition must be granted. It is

ORDERED and ADJUDGED that the petition to stay arbitration of the disputed invoices at issue in this case is **GRANTED**; and it is further

ORDERED and ADJUDGED that the demand for arbitration, American Arbitration Association claim number 002-MWX-GDC, is hereby permanently **STAYED**.

DATED: July 24, 2013

ENTER,



**O. PETER SHERWOOD
J.S.C.**