INDEX NO. 64636/2012

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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JONATHAN STONE and KAREN O'NEIL,

Plaintiffs,

DECISION AND ORDER
Index No.: 64636/12

-against-

NOBLE CONSTRUCTION MANAGEMENT, INC.,

Defendant.

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LOEHR, J.

The following papers numbered 1-3 were read on Plaintiff's motion pursuant to CPLR 7503(b) staying arbitration.

	Papers Numbered
Order To Show Cause - Affidavit - Affirmation - Exhibits	1
Affirmation/Affidavit in Opposition - Exhibits	2
Reply Affirmation - Exhibits	3

Upon the foregoing papers, it appears that on or about June 4, 2010, Plaintiffs engaged Defendant, a contractor, to perform renovations (the "Project") on their property at 20 Rock Hill Way, Bedford, New York. Defendant prepared and emailed a proposed written agreement (the "Agreement") to Plaintiffs. The Plaintiffs did not execute the Agreement but the Defendant commenced the renovations. By October 24, 2011, disputes had arisen between the parties and Defendant apparently ceased work on the Project. In a letter dated October 24, 2011, Defendant wrote to the Plaintiffs that $96,251.24 was outstanding while Plaintiffs were asserting $5,650

worth of repairs as well as drainage work (at an estimated price of $10,000) were in dispute. Defendant suggested that if Plaintiffs paid Defendant $80,601.24 – holding back the $15,650 with respect to the disputed/unfinished work – Defendant would return to the Project. The letter concluded: "Unless we are able to resolve this matter, it is our intention that we will have to arbitrate the dispute." According to Defendant – although disputed by the Plaintiffs – the envelope containing this letter also contained a Notice of Intention to Arbitrate. While the unsigned Agreement did not provide for arbitration, Paragraph 11.11.1 of the Agreement provided that the "Contract Documents consist of [inter alia] Conditions to the Contract (General, Supplementary and other Conditions)." Section 4.9.1 of AIA Document: General Conditions of the Contract for Construction provides for arbitration of all claims and controversies arising out of or related to the Contract. Not having heard from the Plaintiff, on February 8, 2012, Defendant filed a Demand for Arbitration with the American Arbitration Association ("AAA"). On February 24, 2012, the AAA wrote the first of several letters to the parties, advising of the procedures for scheduling the arbitration. It does not appear that the Plaintiffs responded to these letters. Having retained counsel, on June 7, 2012, Plaintiffs' counsel wrote to the AAA that Plaintiffs never agreed to arbitrate nor signed an arbitration agreement. The AAA asked the parties to address this issue and also asked Plaintiffs if they had any objections to the appointment of Vincent Vetrano as the Arbitrator. Plaintiffs' counsel responded that they would have no objection to Vincent Vetrano if they had consented to arbitration but since they had not, the case should be closed and Defendant billed for Mr. Vetrano's time. On August 3, 2012, there was a telephone conference by and between the parties' counsel and Vetrano apparently concerning the issue of arbitrability. Defendant's counsel affirms that the parties agreed to submit the issue of arbitrability to the arbitrator. While conceding that he addressed the issue of arbitrability in writing with the arbitrator as directed by him, Plaintiffs' counsel affirms that he did so "under a continuing objection." On August 27, 2012, the Arbitrator ruled the dispute subject to arbitration based on the parties having performed under a written contract that incorporated an arbitration provision and based on the Plaintiffs' failure to timely move for a stay of arbitration. Plaintiffs' response was to commence this action on September 13, 2012[1] and move for a stay of arbitration.

[1] The Complaint seeks damages for, inter alia, breach of contract with respect to the Project.

An agreement to arbitrate must be clear, explicit and unequivocal and must not depend upon implication or subtlety (*Matter of Waldron (Goddess),* 61 NY2d 181, 183-84 [198]; *Messiah's Covenant Community Church v Weinbaum*, 74 AD3d 916, 918 [2d 2010]). While unsigned contracts may be enforceable (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363 [2005]), where the arbitration provision was in a separate document, only arguably incorporated by reference into an unsigned agreement, there was no clear, explicit unequivocal agreement to arbitrate (*S&T Sportswear Corp. v Drake Fabrics,* 190 AD2d 598 [1st Dept 1993]; *see also Marek Alexander Laufer And Son, Inc.*, 257 AD2d 363, 364 [1st Dept 1999]). Thus, were the issue properly before this Court, it would find there was no valid agreement to arbitrate.

As to the Notice of Intention to Arbitrate and the Plaintiffs' failure to move for a stay within 20 days, pursuant to CPLR 7503(c), where such notice is properly served, the recipient must commence a proceeding to stay arbitration within 20 days or it will be precluded from arguing that no valid agreement to arbitrate was made (*Hartford Insurance Company v Martin,* 16 AD3d 149, 150 [1st Dept 2005]). There are two exceptions to this rule: where there was indisputably no arbitration agreement (*Matter of Mantarasso [Continental Cas. Co.]*, 56 NY2d 264 [1982]) or where the notice to arbitrate was misleading or otherwise defective (*see Crawford v Merrill Lynch, Pierce, Fenner & Smith,* 35 NY2d 291, 296 [1974]; *Sleepy Hollow Dev. & Community Improvement Hous. Dev. Fund Co. v De Angelis,* 51 AD2d 267, 270 [3d Dept 1976]). As to the first exception, as there was a question of fact as to whether the Plaintiffs entered into a valid arbitration agreement, they were not excused from timely commencing a proceeding to stay arbitration to address this issue (*Fiveco, Inc. v Haber,* 11 NY3d 140, 143-44 [2008]). But as to the second exception, were the issue properly before this Court, it would find that, if the Notice of Intention to Arbitrate was sent to the Plaintiffs at all, having "hidden" it in an envelope with another letter that proposed a settlement, the Plaintiffs were misled into thinking no action was required (*see Crawford v Merrill Lynch, Pierce, Fenner & Smith,* 35 NY2d 291, 296 [1974]; *Nationwide Mutual Ins. Co.,* 75 AD2d 765, 766 [1st Dept 1980]) and that, therefore, the Plaintiffs were not bound by the 20 day rule.

However, CPLR 7503(b) provides that only "a party who has not participated in the arbitration" may apply to stay arbitration on the ground that a valid agreement was not made. Here, Plaintiffs participated. They participated in selecting the Arbitrator and participated, if only to the extent of addressing the issue of arbibitrability, albeit under protest and with an asserted preservation of rights. Be that as it may, where, as here, a party participates in an arbitration,

without availing itself of all reasonable judicial remedies, such as seeking a stay, it will not be allowed to upset the remedy emanating from that alternative forum notwithstanding such participation was performed under protest in that alternative forum (*Commerce And Industry Ins. Co. v Nester,* 90 NY2d 255, 262-64 [1997]; *One Beacon Ins. Co. v Bloch,* 298 AD2d 522, 523 [2d Dept 2002]; *Morfopoulos v Linquist,* 191 AD2d 197 [1st Dept 1993]).

Accordingly, the motion to stay arbitration is denied.[2] This constitutes the decision and order of the Court.

Dated: White Plains, New York
May 3, 2013

HON. GERALD E. LOEHR
J.S.C.

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[2] While the parties have not addressed the issue, presumably this action should now be stayed in favor of the arbitration (*see* CPLR 2201).