

King C Ironwork, Inc. v Burdg, Dunham & Assoc.

2014 NY Slip Op 31181(U)

May 1, 2014

Supreme Court, New York County

Docket Number: 150710/14

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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KING C IRONWORK, INC.,

Plaintiff,

Index No. 150710/14

-against-

DECISION/ORDER

BURDG, DUNHAM & ASSOCIATES
CONSTRUCTION CORP., URBAN OUTFITTERS,
INC. and 180 BROADWAY LLC,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmation in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff King C Ironwork, Inc. ("King C") now moves by Order to Show Cause for an Order (1) pursuant to CPLR § 7503 staying, dismissing and enjoining a scheduled arbitration in St. Louis, Missouri filed by defendant Burdg, Dunham & Associates Construction Corp. ("BDA") on the ground that the construction contract provision upon which the arbitration is predicated is void and unenforceable pursuant to General Business Law ("GBL") § 757 or, in the alternative, in the event the court finds that the entire arbitration provision is not void, (2) directing that the arbitration be held in the State of New York, New York County and be governed by New York law instead. The Order to Show Cause is resolved to the extent set forth below.

The relevant facts are as follows. King C is a construction contracting company that engages in steel fabrication and installation. On or about July 15, 2013, King C entered into a subcontract (the "Subcontract") with BDA, the general contractor, to perform work on a construction project known as Urban Outfitters located at 180 Broadway, New York, New York (the "Project"). Pursuant to the Subcontract, King C was to perform the fabrication and installation of certain structural steel stairs, landings, guard rails and railings for the Project.

After work commenced on the Project, a dispute arose between King C and BDA regarding BDA's failure to pay for the work King C performed at which point BDA purported to terminate the Subcontract and refused to permit King C to complete the work. On or about January 9, 2014, BDA filed a demand for arbitration with the American Arbitration Association requesting St. Louis, Missouri as the location for the arbitration pursuant to Article 4, Paragraph V of the Subcontract which states,

All claims, disputes, and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules and the American Arbitration Association. The forum for all disputes arising under or in connection with this Contract shall be held in St. Louis, MO.

Additionally, the Subcontract states that it "shall be governed by the laws of the State of Missouri." On or about January 24, 2014, King C filed a mechanic's lien (the "Lien") with the New York County Clerk in the amount of \$184,488. Subsequently, King C commenced the instant action against BDA and defendants Urban Outfitters, Inc. ("Urban") and 180 Broadway LLC ("180 Broadway") alleging causes of action for breach of contract and foreclosure of the Lien.

In the instant action, that portion of King C's Order to Show Cause for an Order staying, dismissing and enjoining the scheduled arbitration in Missouri is granted. Pursuant to GBL § 757,

The following provisions of construction contracts shall be void and unenforceable:

1. A provision, covenant, clause or understanding in, collateral to or affecting a construction contract, with the exception of a contract with a material supplier, that makes the contract subject to the laws of another state or that requires any litigation, arbitration or other dispute resolution proceeding arising from the contract to be conducted in another state.

Pursuant to GBL § 756(5), a “[m]aterial supplier” means any person, firm, partnership, corporation, company, association, or other organization or entity, or any combination thereof, which is party to a contract with an owner, contractor or subcontractor, for the provision of construction materials and/or equipment necessary to the completion of a construction contract.” This is different from a subcontractor, which is “any person, firm, partnership, corporation, company, association, organization or other entity, or any combination thereof, which is a party to a contract with a contractor or another subcontractor to perform a portion of work pursuant to a construction contract.” GBL § 756(4). Courts have held that a contractor is not merely a “material supplier” if it assumes the performance of some part of the work. *See Neo-Ray Products, Inc. v. Boro Electric Installation, Inc.*, 65 A.D.2d 687 (1st Dept 1978)(“[a] subcontractor is defined as one who assumes performance of part of a contract by providing labor or other services and not by merely furnishing materials”); *see also Dorn v. Arthur A. Johnson Corp.*, 16 A.D.2d 1009, 1010 (3d Dept 1962)(“[g]enerally, a subcontractor is regarded as one who assumes performance of some part of the contract, so that labor or other service, and not

merely the furnishing of materials, is involved.”)

Here, this court finds that the portions of the Subcontract which locate the forum for disputes arising from the Subcontract in St. Louis, MO and state that the Subcontract shall be governed by the laws of the State of Missouri are void and unenforceable pursuant to GBL § 757 as King C was a “subcontractor” and not merely a “material supplier” on the Project. As an initial matter, the Subcontract states that King C would perform the fabrication and installation of steel on the Project, specifically providing, in pertinent part,

The Subcontractor shall furnish all labor, materials, and equipment and shall *perform all work in accordance with this Subcontract* as required per plans, specifications, mall criteria and all state and local codes for: Structural Steel.

Provide labor, equipment and materials to complete the steel scope of work per construction plans....

(Emphasis added.) Further, Avi Galapo, the President of King C, has affirmed that King C was a subcontractor and not merely a material supplier based on the terms of the Subcontract and certain correspondence between BDA and King C during the Project. Specifically, such correspondence includes e-mails from BDA to King C in which BDA acknowledges that King C is responsible for the performance of work including the “[i]nsta[ll] [of] the hoist beam so the masons can finish up,” the “[c]omplet[ion] and level[ing] [of the] basement stringers for installation of treads,” “[c]omplet[ion] [of the] stringers up to platform” and the “installation of platform between 2nd and 3rd floor.”

However, this court finds that arbitration of the dispute must go forward in New York State and must be governed by New York law as there exists a valid arbitration agreement. Although this court has found that the forum selection and choice of law provisions in the

