Matter of Albee Dev. LLC v Casino Dev. Group, Inc.
2014 NY Slip Op 31959(U)
July 25, 2014
Sup Ct, Kings County
Docket Number: 502342/14
Judge: David I. Schmidt
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At an IAS Term, Part Com-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of July, 2014.

PRESENT:

HON. DAVID I. SCHMIDT,

Justice.

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In the Matter of the Application of
ALBEE DEVELOPMENT LLC and ZDG, LLC,

Petitioners,

For a Judgment Pursuant to Article 75 of the CPLR Staying Arbitration of a Certain Controversy

Index No. 502342/14

- against -

CASINO DEVELOPMENT GROUP, INC.,

Respondent

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The following papers numbered 1 to 6 read on these motions:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 4-5
Opposing Affidavits (Affirmations)	3, 6
Reply Affidavits (Affirmations)	
____ Affidavits (Affirmations)	
Other Papers	

Upon the foregoing papers, petitioners Albee Development LLC (Albee) and ZDG, LLC (ZDG) move, by order to show cause,[1] for a judgment permanently staying arbitration

[1] The order to show cause dated March 19, 2014, also contained this court's stay, pending resolution of the motions, of all arbitration proceedings commenced by Casino. Since this court hereby determines the issues raised by the instant orders to show cause, the parties' arguments concerning temporary restraining orders are thus moot.

[* 2]

proceedings commenced against them by respondent Casino Development Group, Inc. (Casino). Casino also moves, by order to show cause, for an order pursuant to CPLR 404 (a), dismissing the petitions with prejudice.

Background

Petitioners commenced this special proceeding by filing the verified petitions on March 18, 2014. The petitions assert that Albee is the owner of the plot of land in Brooklyn bordered by Willoughby Street, Flatbush Avenue Extension, Fleet Street, Dekalb Avenue, Gold Street and Albee Square West. Albee, intending to construct mixed-use buildings on the subject property, hired Casino as the concrete and excavation contractor. Consequently, Albee and Casino entered into two form construction agreements[2] dated September 18, 2012 and March 19, 2013.

According to Albee, on November 8, 2013, "as a result of multiple and material breaches of contract on the part of Casino, both of the Casino contracts were terminated for cause by Albee." Casino responded to Albee by commencing a plenary action in this court against Albee and ZDG; Casino filed its summons with notice on December 20, 2013. Casino served Albee and ZDG with process on February 20, 2014 and subsequently served and filed a verified complaint. Albee and ZDG then interposed answers.

Thereafter, on or about March 4, 2013, Casino filed a demand for arbitration with the American Arbitration Association. The instant petitions and petitioners' order to show cause

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[2] Referred to by petitioner as the "support of excavation" agreement and the "concrete" agreement.

ensued, and Casino's order to show cause soon followed. The main disagreement in the present matter is whether the subject agreements provide for compulsory arbitration of disputes; petitioner asserts that the agreements do not (although they have provisions for "binding mediation" of certain claims).

Petitioners' Arguments in Support of Judgment Permanently Staying Arbitration

Petitioners[3] first assert that Casino waived any right it had to have any claims stemming from this dispute submitted to arbitration when Casino commenced a plenary action involving the same issues. Specifically, petitioners identify Casino's claims as listed in the arbitration demand as follows: seeking compensation for change orders, seeking damages attributable to construction delays, and seeking damages for ZDG's alleged failure to turn over a bonus payment. Petitioners argue that Casino's allegations in the plenary action are identical to those made in the arbitration demand, and also "embrace the same issues." Petitioners reason that Casino, by first filing a plenary action concerning this dispute and then filing an arbitration demand that concerns the same issues raised in plenary action, has thus waived its right to arbitrate claims in this larger dispute.

Petitioners then identify various reasons why this court should invoke the waiver doctrine. First, petitioners reason that, since respondent has both commenced a plenary action and demanded arbitration, this court should therefore "prevent dual process and an

[3] Although each petitioner is represented by different counsel, they are united in interest against the demand for arbitration; petitioners (and their counsel) submitted a joint memorandum of law.

[* 4]

abuse of both the arbitration process and the courts." Also, petitioners point out that this court should prevent inconsistent determinations of certain issues (e.g. which party was responsible for construction project delays), which may arise if this court permits both the plenary action and arbitration of claims to proceed concurrently. Petitioners conclude that these considerations should weigh in favor of finding that respondent has waived any right to arbitration by commencing the underlying plenary action.

Alternatively, petitioners claim that respondent has no right to demand arbitration of the dispute. Specifically, petitioners allege both that the two subject agreements do not contain arbitration provisions, and that this court should not infer a desire to arbitrate this dispute absent "a clear, explicit and unequivocal agreement to resolve the dispute through arbitration" without "depend[ing] on implication or subtlety." Petitioners note that the subject agreements provide that applicable claims are subject to "binding mediation" and not arbitration. Petitioners contend that the two methods of dispute resolution are distinguishable: "[m]ediation is a fluid process which can take many forms pursuant to the agreement of the parties as opposed to an arbitration which is much more akin to a judicial hearing involving the formal presentation of witnesses and documentary evidence." Additionally, petitioners contend that respondent's demand for arbitration is misleading. Petitioners note that the demand states that there is no procedure for binding mediation; petitioners reject this contention and assert, to the contrary, the applicable rules of the American Arbitration Association allow parties to decide the process of alternative dispute

[* 5]

resolution. Petitioners claim that, here, in contrast, respondent "unilaterally substitute[d] arbitration for mediation of those claims" in an attempt to foreclose petitioners exercising their right to determine the process and course of non-judicial dispute resolution.

Petitioners further argue that, assuming that this court finds the two agreements unequivocal with respect to the parties' intent to submit certain claims to an arbitration, the agreements provide for non-judicial dispute resolution of claims only valued less than $250,000. However, contend petitioners, in this matter, respondent purports to demand arbitration of disputes concerning change orders worth more than $480,000 and delay claims worth approximately $300,000. Petitioners reason that, therefore, even assuming that the right to arbitrate claims exists and is manifest in the subject agreements, such right is unambiguously limited to claims worth $250,000 or less. Petitioners conclude that this court should stay the demanded arbitration of claims on the ground that the value of the claims exceeds the threshold for arbitration.

Additionally, petitioners assert that there is no agreement between ZDG and respondent. Petitioners note that the applicable agreements are between respondent and Albee; petitioners point out that ZDG is not a party to these agreements. Petitioners further state that "there is no written agreement of any kind" between ZDG and respondent. Reasoning that since ZDG has not expressed a "clear, explicit and unequivocal agreement" to submit the subject claims to arbitration, ZDG should thus not be compelled to arbitrate the subject claims. Moreover, petitioners contend that, assuming that such an agreement to

[* 6]

arbitrate claims existed, respondent has nevertheless waived any such right to arbitrate by seeking damages in the underlying plenary action against ZDG.[4]

Petitioners reiterate that respondent has, by asserting this and similar claims that are "intertwined" with the construction project, thus waived the right to have the claims submitted to arbitration. Petitioners maintain that once waived, the right to arbitrate the subject claims cannot be regained. In any event, argue petitioners, there "was no basis whatsoever" for respondent's demand for arbitration against ZDG.[5] In sum, and for the foregoing reasons, petitioners conclude that they are entitled to a judgment permanently staying the arbitration demanded by respondent.

Respondent's Arguments in Support of Judgment Dismissing Petition

In opposition to the instant petitions, and in support of its own order to show cause seeking an order dismissing the petitions, respondent[6] first asserts that the issue of whether arbitration is the proper forum for these claims is itself reserved for arbitration. Specifically, respondent asserts that the applicable agreements (and in unambiguous language) indicates that it and Albee agreed to alternative resolution of disputes such as those involving the claims made in the demand for arbitration. Respondent further claims that this court "must

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[4] Specifically, petitioners note that respondent has alleged that ZDG failed to pay respondent the sum of $40,000 as a bonus payment.

[5] Petitioners also assert that they are entitled to an award of costs and sanctions against respondent representing the attorneys' fees expended.

[6] Which refers to itself as "plaintiff" in papers submitted.

[* 7]

find the provisions [of the subject agreements] enforceable[.]" Accordingly, reasons respondent, the issue of whether the subject disputes—and "any other issues related" to the subject agreements—must be determined by the appropriate forum for alternative dispute resolution.

Next, respondent rejects petitioners' suggestion that it waived its right to submit the subject claims to arbitration by commencing a plenary action. To the contrary, asserts respondent, the binding case law holds that a party that chooses to seek judicial review of some claims does not necessarily waive the right to arbitrate related but distinct claims. Additionally, respondent points out that the subject agreements (made with form contracts provided by Albee) expressly contemplate arbitration of claims up to a certain value[7] without restricting judicial review of claims over the applicable value threshold.

Moreover, respondent notes that the summons that was filed in the plenary action expressly disclaims any attempt to seek judicial review of claims below the subject threshold. Also, respondent points out that the summons includes a statement whereby respondent reserves all rights to arbitration of below-threshold claims despite commencing the plenary action. Respondent maintains that courts should find no waiver of the right to arbitrate absent both unreasonable delay and actions inconsistent with a desire to submit claims to arbitration. Respondent alleges that its actions in the instant dispute are entirely consistent

[7] According to respondent, the "support of excavation" agreement provides for non-judicial resolution of claims valued at up to ten percent of the contract sum; the "concrete" agreement provides the same for claims valued up to $250,000.

with the desire to both submit claims worth less than the applicable monetary limits to arbitration and prosecute claims over that threshold in the plenary action. Furthermore, respondent states the claims submitted to arbitration were different types of claims than the ones asserted in the plenary action.[8] Lastly, respondent asserts that there was no unreasonable delay in this matter; respondent claims that it served petitioners with process in the plenary action less than two weeks before it filed a demand for arbitration.

Also, respondent claims that there is no merit to the distinction, relied upon by petitioners, between arbitration and binding mediation. Respondent asserts that, irrespective of the label used, the subject agreements demonstrate that Albee and respondent unequivocally agreed to submit certain claims to a nonjudicial dispute resolution forum. Respondent further contends that the courts of this State have repeatedly acknowledged the policy against interfering with alternative dispute resolution where parties have agreed to such a forum. Respondent also maintains that the courts of this State interpret "binding mediation" and "arbitration" interchangeably; respondent points out that this court has already held as much during oral argument of the first motion. Respondent concludes that, given that there is no dispute that the parties have agreed to binding non-judicial dispute resolution, this court should reject petitioners' arguments to the contrary.

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[8] Respondent submits the affidavit of its president averring in substance to this assertion. Specifically, respondent contends that the arbitration claims are limited to "disputes regarding change orders and requests for time extensions" but the plenary action seeks damages for "breaches of the subject contract [*sic*] that resulted in various damages exceeding $250,000."

[* 9]

Additionally, respondent asserts that the Federal Arbitration Act (the Act) requires this court to enforce the subject arbitration provisions. Specifically, respondent claims that the Act applies to arbitration provisions in contracts that involve interstate commerce. Respondent further points out that the Act requires state courts to generously construe and enforce the intent to arbitrate disputes. Respondent alleges that, in this matter, the agreements between it and Albe involve "goods, suppliers, and materialmen" from several states. Thus, reasons respondent, federal law requires the courts of the State of New York to vigorously enforce the arbitration provisions at issue.

Lastly, respondent provides several miscellaneous reasons for this court to dismiss the petitions. First, respondent states that, after conferring with counsel for ZDG, the demand for arbitration has been amended to remove ZDG as a party. Next, respondent notes that it has recently amended the substance of both the verified complaint in the underlying action and the notice of arbitration to delineate the respective claims; respondent asserts that, consequently, there should be no serious question whether the claims made in the demand for arbitration overlap with the breach-of-contract claims asserted in the plenary action. Respondent contends that, therefore, this court cannot find that respondent waived its right to submit certain claims to arbitration. Finally, respondent points out that the CPLR allows it to move to dismiss a petition in a special proceeding such as the instant one. For these reasons, respondent concludes that this court should grant its motion, dismiss the instant

[* 10]

petitions, and deny petitioners' request to permanently stay the previously-demanded arbitration.

Discussion

This court denies petitioners' motion, grants respondent's motion, and dismisses the petitions for failure to state causes of action pursuant to CPLR 3211 (a) (7).[9] As a threshold matter, and as respondent correctly points out, CPLR 404 (a) ("Objections in point of law") permits the respondent in a special proceeding to assert "a defense that can produce a summary dismissal of the proceeding as under CPLR 3211(a) (failure to state a cause of action, res judicata, lack of capacity, statute of limitations, lack of jurisdiction, etc.). See N.Y.Adv.Comm. on Prac. & Proc., Fourth Prelim.Rep., Legis.Doc.No.20, p.181 (1960)" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 404). Pursuant to this principle, this court addresses the arguments contained in respondent's motion to dismiss the petitions for failure to state a cause of action.

Next, this court considers the text of the subject agreements. The support of excavation agreement provides, in relevant part, that: "[a]ny Claim arising out of or relating to the Agreement with a value not exceeding ten percent (10%) of the Contract Sum[10] as set forth in this Agreement shall be subject to binding mediation between the parties." Moreover, the concrete agreement provides, in relevant part, that: "[a]ny Claim arising out

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[9] This court dismisses Albee's petition on its merits. In contrast, the petition of ZDG is dismissed as moot, as there is presently no arbitration demand against ZDG.

[10] The defined Contract Sum is $9,125,000.00.

of or relating to the Agreement with a value not exceeding Two Hundred Fifty Thousand dollars ($250,000.00) shall be subject to binding mediation between the parties." There is no dispute as to whether these agreements are applicable or were in effect at relevant times, and, therefore, this court now considers petitioners' arguments.

First, the court rejects as meritless petitioners' assertion that Albee did not expressly agree to arbitration (*cf. God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006] ["A party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties' 'clear, explicit and unequivocal' agreement to arbitrate"], citing *Matter of Waldron [Goddess]*, 61 NY2d 181, 183 [1984]). Specifically, the contention that the subject agreements do not require Albee to submit to arbitration of disputes because the provisions specify "binding mediation" as the dispute resolution procedure instead of the word "arbitration" lacks merit. This distinction is not relevant for the purposes of CPLR Article 75; as respondent correctly observed, a trial court of this state has applied Article 75 to a "binding mediation" in confirming a mediation award (*see e.g. Seneca Ins. Co. v Ruday Realty Corp.*, 2010 NY Slip Op 50105[U], Sup Ct, Queens County, Jan. 26, 2010).[11] Moreover, even if this court were to find a meaningful

[11] Petitioners' point that arbitration is not the same process as mediation is well-taken. "Mediation is much less structured than an arbitration, and '[e]ach side can speak freely to the mediator out of the hearing of the other party, a meeting generally referred to as a caucus' (4 NY Prac, Com. Litig. in New York State Courts § 46:5). In fact, during the mediation, both parties agreed and had an opportunity to speak 'behind closed doors' with the mediator to assess legal fees (*see Matter of Jelenevsky v Leonakis*, 234 AD2d 548 [1996] [ex parte discussions must be authorized by the parties])" (*Seneca Ins. Co.* at *3). Nevertheless, the subject agreements indicate Albee's consent to compulsory, binding non-judicial resolution of the instant claims, whether structured as

[* 12]

distinction between the two expressions, in either situation, Albee has agreed to be bound by the decisions of a neutral third-party that resolve disputed claims up to the applicable threshold—each contract provides that, unless a contrary agreement is made, "mediation shall be in accordance with Construction Industry Mediation Rules of the American Arbitration Association[.]"[12] Given that the demands served by respondent appear to comply with the applicable rules of the subject organization, this court shall not interfere with the bargained-for alternative dispute resolution process based on the distinction between "binding mediation" and arbitration.[13]

This court also rejects petitioners' contention that respondent waived any right to submit the subject claims to arbitration. To be sure, petitioners correctly point out that a party to an agreement that contains an arbitration provision may waive the right to submit claims to the arbitral forum (*see e.g. Sherrill v Grayco Bldrs.*, 64 NY2d 261, 272 [1985]). Petitioners further correctly note that "[o]nce waived, the right to arbitration cannot be regained" (*Ryan v Kellogg Partners Inst. Servs.*, 58 AD3d 481, 481-482 [1st Dept 2009], citing *Tengtu Intl. Corp. v Pak Kwan Cheung*, 24 AD3d 170, 172 [1st Dept 2005]). However, petitioners misstate the standard used to determine whether a party has waived its right to

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arbitration or not.

[12] This provision, requiring that mediation "shall be in accordance" with the rules of the non-judicial dispute resolution forum, undercuts petitioners' suggestion that they are permitted to chart their procedural course in this dispute.

[13] Moreover, as respondent contends without rebuttal, the subject agreements were Albee's form contracts.

arbitration by also using the judicial forum; the correct statement of the principle is that "a litigant may not compel arbitration when its use of the courts is 'clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration'" (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2005], quoting *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 372 [2005]).

Applying this principle to the facts of this matter, respondent has not waived its right to submit the subject claims to arbitration. First, this court notes that the subject agreements expressly provide for both binding nonjudicial resolution of claims below certain thresholds *and* judicial resolution of claims above the thresholds. Thus, Albee and respondent knew (or should have known) the possibility of a party submitting some claims to binding mediation while submitting others to court. The fact that respondent chose to do both is not a waiver of the right of arbitration; to the contrary, respondent used the process that it and Albee agreed to in the subject contracts.

Moreover, petitioners ignore the rule that "[i]n the absence of unreasonable delay, so long as the [proponent of arbitration] defendant's actions are consistent with an assertion of the right to arbitrate, there is no waiver" (*De Sapio v Kohlmeyer*, 35 NY2d 402, 405 [1974]). In this matter, and according to the petitions, respondent: (1) commenced the underlying plenary action on December 20, 2013; (2) served petitioners with process in the plenary action on or about February 20, 2014; and (3) filed the first demand for arbitration on or about March 4, 2014. Thus, in the space of thirteen days, respondent both commenced the

plenary action and demanded arbitration. Petitioners have provided no authority suggesting that less than two weeks is an "unreasonable delay" to assert both the right to arbitrate claims below the applicable threshold and the right to seek judicial resolution of the higher-value claims; absent such authority, this court will not find an "unreasonable delay" of two weeks.

Moreover, respondent herein has acted consistently with an acknowledgment of its right to arbitrate. The notice that accompanied the summons explicitly states that "[s]ince the contract provides for the remedy of arbitration of certain claims under the sum of $250,000.00, the instant action is not intended to include those items which shall be determined between the parties in the agreed upon forum of arbitration. Casino reserves its right to submit such claims to arbitration and the instant action shall not be deemed to be a waiver of such contract provisions or an election of remedies to seek a determination of such issues in court, rather than in the proper forum of arbitration." Furthermore, the first demand for arbitration explicitly acknowledges the applicable claim value thresholds and outlines the individual claims[14] (and asserts that the value of each claim—individual change order, time extension and delay claims—is below the applicable threshold). Coupled with the absence of unreasonable delay, the contents of both the summons with notice and the demand for

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[14] Petitioners argue that the claims, in the aggregate, exceed the applicable thresholds. However, nothing in the subject agreements suggests that a party is not permitted to submit claims that are individually below the thresholds but collectively above them to arbitration. Indeed, the term "Claim" is defined in the agreements; the definitions do not contain provisions about aggregating claim value.

arbitration demonstrate that respondent's actions were "consistent with an assertion of the right to arbitrate," and thus "there is no waiver" (*De Sapio*, 35 NY2d at 405).[15]

Lastly, this court considers petitioners' argument that this court should permanently stay arbitration of the subject claims because "all of the disputes arising out of the [construction] Project are inextricably intertwined[.]" Petitioners correctly point out that waiver of arbitration often "is invoked to prevent dual process and an abuse of both the arbitration process and the courts . . . [where] claims sought to be redressed in the judicial proceedings embrace the same issues for which arbitration is sought" (*Matter of Board of Educ., Brentwood Union Free School Dist., Town of Islip (Brentwood Teachers Assn.)*, 79 Misc. 2d 758, 763 [Sup Ct, Suffolk County 1974], citing *Denihan v Denihan*, 34 N Y 2d 307, 311 [1974]; *Matter of Redmond v Redmond*, 39 AD2d 527 [1st Dept 1972]). However, it is also correct that "this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties [and] [t]herefore, New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration" (*Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 49 [1997]).49-50 [citations and internal quotation marks omitted]). In this matter, Albee expressly agreed to allow for arbitration of claims below a certain value threshold; petitioners point to no

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[15] Petitioners contend that, recently, respondent has both improperly amended the demand for arbitration and served a complaint that attempts to amend the claims listed in the summons with notice. More specifically, petitioners state that these actions "cannot revive" respondent's right to arbitrate claims. This court rejects these contentions as academic; the *original* summons with notice and demand for arbitration indicate that respondent did waive its rights to arbitration. Therefore, any *subsequent* demand, complaint or other amended process served or filed by respondent is immaterial.

provision of the subject agreement that precludes a party from both asserting the below-threshold claims in arbitration and commencing a plenary action to recover higher-value damages. Therefore, Albee expressly consented to the risk of the instant situation in its dispute with respondent, and this court will accordingly not interfere with the agreed-upon provisions of the subject written agreements (*id.*).[16]

Conclusion

In sum, the motion of petitioners Albee Development LLC and ZDG, LLC is denied. The motion of respondent Casino Development Group, Inc. is granted and the instant petitions are thus dismissed. Any temporary restraining orders issued in this matter are hereby vacated, and any prior stays are hereby lifted.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT

[16] Since the public policy of this State favors arbitration, this court need not address respondent's argument concerning the Federal Arbitration Act.