Oceana Home Owners Assoc., Inc. v Statewide Disaster Restoration, Inc.
2015 NY Slip Op 30073(U)
January 23, 2015
Supreme Court, Kings County
Docket Number: 501859/2014
Judge: David I. Schmidt

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 Civic Center, Brooklyn, New York, on the 22nd day of January, 2015.

P R E S E N T:

HON. DAVID I. SCHMIDT,
Justice.

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OCEANA HOME OWNERS ASSOCIATION, INC., BRIGHTON ONE LLC, BRIGHTON TWO LLC, BRIGHTON FOUR LLC, BRIGHTON SIX LLC, BRIGHTON SEVEN LLC, BRIGHTON EIGHT LLC, BRIGHTON NINE LLC, BRIGHTON TWELVE,

Plaintiffs,

- against -

Index No. 501859/14

STATEWIDE DISASTER RESTORATION, INC.,

Defendant.

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The following papers numbered 1 to 22 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-6, 8-9
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	12-13, 14-21, 22
Affidavit (Affirmation)	
Other Papers	7,10,11

Upon the foregoing papers, plaintiffs Oceana Home Owners Association, Inc., Brighton One LLC, Brighton Two LLC, Brighton Four LLC, Brighton Six LLC, Brighton Seven LLC, Brighton Eight LLC, Brighton Nine LLC, and Brighton Twelve LLC, (plaintiffs)

move, by way of an order to show cause, seeking an order granting them *inter alia* injunctive relief staying the arbitration of any claims between the parties pursuant to CPLR 7503 (b), along with a declaratory judgment declaring that the subject arbitration provision in dispute is unenforceable under General Business Law (GBL) §399-c .

Defendant Statewide Disaster Restoration, Inc. (Statewide), cross moves for an order compelling plaintiffs to arbitrate the dispute between the parties with respect to the Emergency Work Authorization and Agreement (the agreement), dated October 29, 2012, before the American Arbitration Association and denying plaintiffs' motion for a stay of arbitration.

Background

Plaintiffs Brighton One, Two, Four, Six, Seven, Eight, Nine and Twelve (the condominium plaintiffs) are part of a residential development known as "Oceana" that consists of fifteen separate condominium units located at 40, 60, 70, 100, 120, 130 and 150 Ocean Drive West and 45, 55, 65, 75, 105, 125,135 and 155 Ocean Drive East in Brooklyn. Oceana is situated on a 15 acre lot. The Oceana Home Owners Association (HOA) is a separate and distinct legal entity from the condominium plaintiffs.

Defendant Statewide Disaster Restoration Inc., is a Michigan based company engaged in the business of commercial and residential water, wind, and fire damage cleanup, repair and restoration. Non-party First Service Residential New York, Inc., (FSR) f/k/a Cooper Square Realty, Inc. (CSR) is the managing agent for HOA. Non-party Muss Development,

LLC is the sponsor of the premises and owns the central garages which are located at the premises.

This litigation relates to events surrounding the super storm that struck the New York region on October 29, 2012, known as "Hurricane Sandy." On that date, David Kuperberg, who was the CEO of CSR, the managing agent for the HOA, contacted Statewide to retain it to provide various services needed to preserve the safety of the condominium unit owners and the property and to preserve necessary services. Mr. Kuperberg signed an Emergency Work Authorization and Agreement that CSR entered into on behalf of the HOA with Statewide. Pursuant to this agreement Statewide mobilized its resources to prepare for this task. On October 30, 2012, Raymond Eddy (Eddy) , Statewide's Vice President, drove to the site to assess the damages to Oceana and determine what work would need to be done at the site and a team began working the next morning.

On November 2, 2012, Adam Becker, the President of Statewide sent an email to Kuperberg informing him that Statewide would " . . . need a separate work authorization signed for each different complex or building if they are separately insured." Kuperberg responded to this email as follows informing Statewide that there would need to "be separate ones [emergency work authorizations and agreements] for each entity." On November 5, 2012, Becker followed up with Kuperberg because he had still not received a signed contract from Oceana. On November 12th, Michael Mintz from CSR emailed Becker the signed agreement for Oceana. CSR filled out the agreement and Kuperberg signed it on behalf of

the Oceana Homeowners Association. The agreement was comprised of Statewide's printed form Emergency Work Authorization and Agreement, an Addendum to Emergency Work Authorization and Agreement, a certificate of insurance and a copy of Statewide's labor and equipment rates. Paragraph 10 to the Agreement addresses how disputes under the contract would be handled and provided that "Statewide may at its sole discretion elect to submit all disputes related to the Agreement to binding arbitration, administered by the New York City [office] of the American Arbitration Association under its Commercial Arbitration Rules . . ."

CSR filled out the form contract and made certain handwritten changes including changing the location of the arbitration proceedings from Michigan to New York City, as well as changing the venue and governing law to New York from Michigan. In addition, the addendum states that CSR is the managing agent of the "Property Owner/Insured" and not the principal of the contract. Muss entered into a separate contract with Statewide in relation to providing cleanup to the central garages.

Plaintiffs contend that following discussions between Statewide and FSR general manger Anthony Bolbolian, Statewide decided to split the fees for its services 50/50 between plaintiffs and Muss and later changed the allocation to 60 percent for Muss and 40 percent for plaintiff. Subsequently, the plaintiffs hired an engineer who reviewed the work that was performed to determine plaintiffs' share of the costs. The engineer determined that plaintiffs' share of Statewide's cleanup services versus Muss' share computed to be

approximately 10 percent based upon gallons of flood water removed and approximately 20 percent based upon total cleanable surface areas. Thus, plaintiffs believed that they were over billed and, on June 27, 2013, HOA sent written correspondence to Statewide requesting a detailed explanation of the billing and an explanation of the allocation of the billings between Muss and the condominium plaintiffs, as well as each of the individual condominium plaintiffs share of the costs. Plaintiffs contend that, despite their repeated requests, they received only limited information and were told by an FSR representative that Statewide had provided all the available information and that no detailed records supporting the billings were maintained.

Defendants served an arbitration demand on plaintiffs that was dated December 6, 2013, which was defective and was subsequently withdrawn. A second arbitration demand dated January 9, 2014 was similarly defective and was withdrawn. A third arbitration demand dated January 28, 2014, is the subject of this action.

Plaintiffs' Motion and Statewide's Cross Motion

Plaintiffs move, by way of an order to show cause, seeking an order granting them *inter alia* injunctive relief staying the arbitration of any claims between the parties pursuant to CPLR 7503 (b), along with a declaratory judgment declaring that the subject arbitration provision in dispute is unenforceable under GBL§ 399-c. Statewide cross-moves for an order compelling the arbitration. Plaintiffs argue that the subject arbitration clause is unenforceable under GBL §399-c which prohibits mandatory arbitration clauses in certain

consumer contracts and that, even if the court were to find it applicable, that the condominium plaintiffs are non-signatories to the agreement containing the arbitration clause and are thus not bound by it.

Section 399-c of the GBL provides as follows:

> Mandatory arbitration clauses in certain consumer contracts prohibited
> 1. Definitions. a. The term "consumer" shall mean a natural person residing in this state.
> b. The term "consumer goods" shall mean goods, wares, paid merchandise or services purchased or paid for by a consumer, the intended use or benefit of which is intended for the personal, family or household purposes of such consumer.
>
> c. The term "mandatory arbitration clause" shall mean a term or provision contained in a written contract for the sale or purchase of consumer goods which requires the parties to such contract to submit any controversy thereafter arising under such contract to arbitration prior to the commencement of any legal action to enforce the provisions of such contract and which also further provides language to the effect that the decision of the arbitrator or panel of arbitrators in its application to the consumer party shall be final and not subject to court review.
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> d. The term "arbitration" shall mean the use of a decision making forum conducted by an arbitrator or panel of arbitrators within the meaning and subject to the provisions of article seventy-five of the civil practice law and rules.
> 2. a. Prohibition. No written contract for the sale or purchase of consumer goods, entered into on or after the effective date of this section, to which a consumer is a party, shall contain a mandatory arbitration clause. Nothing contained herein shall be construed to prohibit a non-consumer party from incorporating a provision within such contract that such non-consumer party agrees that the decision of the arbitrator or panel of arbitrators shall be final in its application to such non-consumer party and not subject to court review.

> b. Mandatory arbitration clause null and void. The provisions of a mandatory arbitration clause shall be null and void. The inclusion of such clause in a written contract for the sale or purchase of consumer goods shall not serve to impair the enforceability of any other provision of such contract.

Plaintiffs maintain that the subject arbitration clause is unenforceable under GBL §399-c arguing that the agreement provided for emergency services for the rehabilitation of the subject homes and thus can be considered a contract for the sale or purchase of "consumer goods" as that term is defined under the statute.

In opposition, and in support of their cross motion, defendants argue that the arbitration provision contained in the agreement is not preempted by GBL §399-c as that statute is not applicable to this transaction. First, defendants points out that plaintiffs are corporate entities and not "natural persons" falling within the definition of "consumer" under GBL §399-c. Next they maintain that despite plaintiffs' mischaracterization of the services provided, the actual services provided by Statewide consisted of remediation work in the common areas of the condominiums and did not involve work on behalf of any individual unit owners and did not occur in any individual condominium units, thus taking the work out of the definition of "consumer goods" under GBL §399-c (1) (b). Statewide further points out that here the plaintiffs are not the individual condominium owners but rather corporate entities represented by CSR in the agreement. Moreover, Statewide points out that there was no unequal bargaining power in the negotiation of the agreement as evidenced by the fact that CSR, when negotiating the agreement on plaintiffs' behalf, insisted on changing the locale

and governing law contained in the arbitration provision to New York from Michigan. Finally, Statewide argues that even if GBL §399-c applied to the agreement between plaintiffs and Statewide, the arbitration provision would still be enforceable under the Federal Arbitration Act because the agreement affected interstate commerce.

At the outset, the court notes that it finds that GBL §399-c does not apply to the instant agreement as plaintiffs are not consumers as defined under the statute and that the services provided pursuant to the agreement do not constitute "consumer goods" as contemplated under the statute inasmuch as they were not provided for "personal, family or household purposes," but, rather, were performed in common areas of the condominium buildings and not in individual units for individual owners. However, even if the court had found that GBL §399-c applied it would have been preempted by the FAA.

"The Federal Arbitration Act (9 USC § 1 et seq. [FAA]) applies to any arbitration provision in a contract that affects interstate commerce" (*N.J.R. Assoc. v Tausend*, 19 NY3d 597, 601 [2012]; *see Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 [2005]). "The Supreme Court has interpreted the words "involving commerce" as the functional equivalent of the phrase "affecting commerce," which ordinarily signals Congress' intent to exercise its Commerce Clause powers to the fullest extent (*Diamond Waterproofing Sys.*, 4 NY3d at 252;*see Allied-Bruce Terminix Cos., Inc. v Dobson*, 513 US 265, 273-274 [1995]; *Highland HC, LLC v Scott*, 113 AD3d 590, 592-593 [2014]).

Here the court finds that the facts of the instant case reveal that the services provided pursuant to the agreement "affected interstate commerce" inasmuch as: Statewide is a Michigan corporation whose services were retained by CSR from New York via telephone and electronic communications, a large number of Statewide employees traveled from Michigan to perform the work, equipment used to perform the work was brought in from Ohio and Indiana and supplies were shipped to the site from various states. Thus, even if GBL §399- c was applicable it would be preempted by the FAA.

Plaintiffs further argue that the arbitration should be stayed because Statewide cannot compel them to arbitrate because no agreement to arbitrate was ever made between the parties since there was no privity between the condominium plaintiffs and Statewide and Statewide is not seeking any reimbursement from plaintiff HOA. They maintain that since only HOA is a party to the agreement that the condominium plaintiffs are not bound by the arbitration provision. Plaintiffs claim that pursuant to the agreement HOA is designated as the customer and that the agreement provides that the services were limited to 40 Oceana Drive West. The court disagrees and finds that this argument is utterly lacking in merit. Here CSR acted as the agent for both HOA and the condominium plaintiffs when it entered into the agreement with Statewide to provide the remediation services to benefit the entire Oceana property and not merely the property located at 40 Ocean Drive West. The myriad of correspondence both written and electronic between the condominium plaintiffs and CSR and Statewide clearly establishes that CSR was acting as the agent for HOA and the plaintiff

condominiums when it entered into the agreement. Moreover, the record reveals that the Management Agreement entered into between HOA and CSR explicitly authorized CSR to enter into such an agreement under the circumstances presented from Hurricane Sandy. Subdivision fourth (b) of the Management Agreement that existed between HOA and CSR provides

> "emergency repairs , i.e., those immediately necessary for the preservation of the Common Areas or for the safety of the Unit Owners, the occupants of the Common Areas, or other persons, or required to avoid the suspension of any necessary service in the Common Area, may be made by the Agent irrespective of the cost thereof, without the prior approval of the Association, after consultation, to the extent feasible considering the nature of the emergency, with the president, vice president, or treasurer of the Association (in the order given) . . . .

Under traditional principles of agency law, "[o]ne who has not personally signed a contract will nonetheless be bound by it if he or she has signed it through an authorized agent." (*Brooks v BDO Siedman, LLP*, 25 Misc 3d 445 (Sup. Ct. [2009]). "In order to bind a principal to an agreement signed by its purported agent, that agent must have actual or apparent authority to act on behalf of the principal"(*Nat'l Union Fire Ins. Co. v Personnel Plus, Ins.*, 954 F Supp 2d 239, 244-245 [2013]; *Hidden Brook Air, Inc. v Thabet Aviation Int'l, Inc.*, 241 F Supp 2d 246, 260 (S.D.N.Y. 2002). Here, CSR had the actual authority to enter into this agreement on behalf of all of the plaintiffs pursuant to the management agreement provision. CSR, as agent for plaintiffs, entered into this agreement which included an arbitration provision and plaintiffs are bound by it. Moreover, Statewide

correctly points out that plaintiffs, who received a direct benefit from the agreement, are estopped from challenging its obligation to arbitrate a dispute arising from the agreement. "Under the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory "knowingly exploits" the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement" (*Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626, 631 [2013]; *see MAG Portfolio Consultant, GMBH v Merlin Biomed Group LLC*, 268 F3d 58, 61 [2d Cir 2001]).

Based upon the foregoing, plaintiffs' motion is denied in its entirety. Statewide's cross-motion to compel arbitration is granted and the parties are directed to arbitrate the dispute arising under the Emergency Work Authorization and Agreement, dated October 29, 2012, before the American Arbitration Association.

This constitutes the decision and order of the court.

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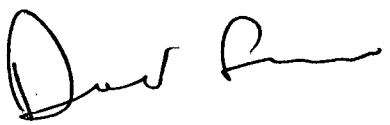

J. S. C.

HON. DAVID I. SCHMIDT