

**Tkaczyk v 337 E. 62nd LLC**

2015 NY Slip Op 31522(U)

August 11, 2015

Supreme Court, New York County

Docket Number: 160264/2013

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

-----X  
STANISLAW TKACZYK,

Plaintiff,

-against-

Index No. 160264/2013

**DECISION/ORDER**

337 EAST 62<sup>ND</sup> LLC,

Defendant.

-----X

337 EAST 62<sup>ND</sup> LLC,

Third-Party Plaintiff,

-against-

GATEWAY DEMOLITION CORP.,

Third-Party Defendant.

-----X

**HON. CYNTHIA 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>
Affidavits in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action to recover damages for injuries allegedly sustained during the performance of demolition work. Third-party defendant Gateway Demolition Corp. ("Gateway"), plaintiff's employer, now moves for an order: (1) pursuant to CPLR § 7503(a) compelling arbitration of the third-party action; and (2) pursuant to CPLR § 7503(a) staying the third-party action pending arbitration; or (3) pursuant to CPLR § 603 severing the third-party action. For the reasons set forth below, Gateway's motion is denied.

The relevant facts are as follows. Defendant/third-party plaintiff 337 East 62<sup>nd</sup> LLC (“337 East”) is the owner of the premises located at 337 East 62<sup>nd</sup> Street, New York, New York (the “Premises”). On or about November 27, 2012, plaintiff, an employee of third-party defendant Gateway, was performing demolition work at the Premises on behalf of Gateway when he was allegedly injured. Specifically, plaintiff alleges that he sustained serious injuries when he was caused to slip and fall on steps with a foreign substance.

Based on his alleged injuries, plaintiff commenced the instant action asserting, *inter alia*, a claim for negligence against the Premises owner 337 East. Thereafter, on or about March 28, 2014, 337 East commenced a third-party action against Gateway alleging claims for contractual indemnification, common law indemnification and breach of contract. 337 East’s contractual indemnification and breach of contract claims are based on an agreement between 337 East and Gateway entered into on or about February 23, 2012 (the “Agreement”). Gateway now moves for an order compelling arbitration of the third-party action pursuant to the Agreement’s arbitration provision. 337 East opposes the motion on the ground that Gateway waived its right to arbitration by actively participating in the present action. Thus, the dispositive issue for the court on this motion is whether or not Gateway waived its right to arbitration.

New York has a “long and strong public policy favoring arbitration.” *Stark v. Molod Sptiz DeSantis & Stark, P.C.*, 9 N.Y.3d 59, 66 (2007). Indeed, on a motion to compel arbitration, “[i]f the court concludes that the parties made a valid agreement to arbitrate, that the dispute sought to be arbitrated falls within its scope, and that there has been compliance with any agreed on conditions precedent to arbitration, judicial inquiry is at an end (absent any issue as to bar by limitation of time) and the parties should be directed to proceed to arbitration.” *Matter of*

*County of Rockland*, 51 N.Y.2d 1, 8 (1980). Nonetheless, “like contract rights generally, a right to arbitration may be modified, waived or abandoned.” *Stark*, 9 N.Y.3d at 66 (quoting *Sherrill v. Grayco Bldrs.*, 64 N.Y.2d 261, 273 (1985)). Accordingly, “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.” *Id.* (citations and internal quotation marks omitted). As the Court of Appeals has stated:

The crucial question . . . is what degree of participating by the defendant in the action will create a waiver of a right to stay the action. In the absence of unreasonable delay, so long as the defendant’s actions are consistent with an assertion of the right to arbitrate, there is no waiver. However, where the defendant’s participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer in the particular case, his actions are then inconsistent with the later claim that only the arbitral forum is satisfactory.

*Id.* (citations and internal quotation marks omitted). \

In the present case, Gateway’s motion to compel arbitration is denied as Gateway has waived its right to arbitrate based on its participation in the present lawsuit, which manifests an affirmative acceptance of the judicial forum. When the third-party action was commenced, approximately a year ago, Gateway did not move to compel arbitration pursuant to the Agreement. Rather, Gateway: (1) filed an answer without asserting any affirmative defenses raising the issue of arbitration; (2) entered into no less than five discovery conference orders; and (2) actively participated in discovery, including the deposition of the plaintiff and defendant. These actions clearly constitute a manifestation of an acceptance of the judicial forum. Thus, Gateway cannot now seek to compel arbitration.

To the extent Gateway contends that it did not waive its right to compel arbitration as its motion to compel did not become ripe until the June 2, 2015 deposition of 337 East’s managing

