

**Capital Siding & Constr., LLC v Alltek Energy Sys.,
Inc.**

2016 NY Slip Op 31043(U)

June 9, 2016

Supreme Court, Albany County

Docket Number: 11796497

Judge: Richard M. Platkin

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STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COPY
COUNTY OF ALBANY

CAPITAL SIDING & CONSTRUCTION, LLC
d/b/a ABAR CONSTRUCTION

Petitioner,

For Judgment Pursuant to Article 75
of the CPLR

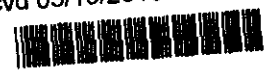
DECISION & ORDER

-against-

ALLTEK ENERGY SYSTEM, INC.,

Respondent.

Albany County Clerk
Document Number 11796497
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Index No. 5644-14
RJI No.: 01-14-115464

(Judge Richard M. Platkin, Presiding)

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RP

Hon. Richard M. Platkin, A.J.S.C.

In this proceeding brought pursuant to CPLR article 75, petitioner Capital Siding & Construction, LLC d/b/a Abar Construction (“Abar Construction”) seeks an order and judgment permanently staying the arbitration demanded by respondent Alltek Energy System, Inc. (“Alltek”) on the ground that there is a valid agreement to litigate all disputes between the parties and no agreement to arbitrate.

BACKGROUND

On or about March 13, 2013, petitioner entered into a contract (“Contract”) with the owner of 581 Livingston Avenue, LLC to demolish an existing structure and construct new senior housing apartments. On or about June 4, 2013, the parties entered into a subcontract (“Subcontract”) whereby respondent would perform the mechanical and HVAC work. Petitioner alleges that after respondent failed to fully perform the subcontracted work, it permissibly withheld certain funds from respondent.

On or about October 17, 2014, petitioner received a Statement of Intention to Arbitrate (“Statement”) pursuant to CPLR 7503 and General Business Law (“GBL”) article 35-E. Petitioner now seeks to permanently stay this arbitration on the ground that Section 6.2 of the Subcontract provides for litigation of any disputes arising under the agreement.

ANALYSIS

CPLR 7503 (b) provides that a party served with a demand for arbitration may apply for a permanent stay of the arbitration on the ground that a valid agreement to arbitrate has not been made. Here, the Subcontract provides that any claim not resolved by mediation shall be subject to binding resolution through litigation in a court of competent jurisdiction. Thus, there is no

contractual agreement between the parties to arbitrate.

However, respondent's claims against petitioner arise under General Business Law article 35-E, also known as the "Prompt Payment Act" ("PPA"), a statutory scheme that governs payment procedures and remedies for private non-residential construction contracts in excess of a specified dollar threshold (*see* GBL § 756 [1]). If efforts to resolve a dispute arising under the PPA are unsuccessful, the aggrieved party may refer the matter to expedited arbitration before the American Arbitration Association (*id.* § 756-b [3]). As the foregoing statute confers upon respondent the right to initiate binding arbitration, the absence of a contractual agreement to arbitrate is of no moment.

In seeking to deny respondent the arbitral rights granted by GBL § 756-b (3), petitioner relies upon GBL § 756-a, which, in pertinent part, reads as follows:

It is the policy and purpose of this article to expedite payment of all monies owed to those who perform contracting services pursuant to construction contracts. Except as otherwise provided in this article, the terms and conditions of a construction contract shall supersede the provisions of this article and govern the conduct of the parties thereto.

Thus, petitioner argues that the mutually agreed-upon dispute resolution procedures of the Subcontract – mediation followed by litigation in a court of competent jurisdiction – are controlling.

While GBL § 756-a establishes a general policy of giving primacy to the terms of the parties' negotiated agreement, the "[e]xcept as otherwise provided" language used by the Legislature necessarily contemplates certain exceptions to that rule. As observed by respondent, one such exception is GBL § 757 (3). Added by the Legislature to the PPA in 2009, GBL § 757 (3) renders void and unenforceable any contractual provision that denies an aggrieved party the

right to expedited arbitration under GBL § 756-b (*see* L 2009, ch 417, § 5). Thus, insofar as petitioner maintains that Section 6.2 of the Subcontract operates to deny respondent the right to pursue arbitration of its PPA claims, the clear and unambiguous language of GBL § 757 (3) renders the Subcontract void and unenforceable to that limited extent.¹

Based on the foregoing, the Court concludes that petitioner has failed to demonstrate its entitlement to the requested permanent stay of arbitration.

Accordingly, it is

ORDERED that petitioner's application for a permanent stay of arbitration is denied.

This constitutes the Decision & Order of the Court. The original of this Decision & Order is being returned to respondent's counsel; all other papers are being transmitted to the Albany County Clerk. The signing of this Decision & Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: March 13, 2015
Albany, New York


RICHARD M. PLATKIN, A.J.S.C.

¹ To the extent that Supreme Court, New York County may have held otherwise in *Turner Constr. Co. v J & A Concrete Corp.* (44 Misc 3d 217 [2014]) – a decision relied upon by petitioner that does not even cite or refer to GBL § 757 (3) – this Court respectfully disagrees.