

**Seaboard Solar Holdings, LLC v AMP Solar US
Servs. LP**

2018 NY Slip Op 32724(U)

October 17, 2018

Supreme Court, New York County

Docket Number: 153738/18

Judge: Lynn R. Kotler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8**

-----X
SEABOARD SOLAR HOLDINGS, LLC, SOLAR
MA PROJECT MANAGEMENT, LLC – SERIES I
SOLAR MA PROJECT MANAGEMENT, LLC –
SERIES II, AND SOLAR MA PROJECT
MANAGEMENT, LLC – SERIES IX,

**DECISION, ORDER AND
JUDGMENT**

INDEX No.: 153738/18
MOT SEQ.: 001

Plaintiff(s),

-against-

AMP SOLAR US SERVICES LP,

Present:
Hon. Lynn R. Kotler, J.S.C.

Defendant(s).

-----X

In this special proceeding, petitioners seek a court-ordered subpoena *duces tecum* directing respondent to produce certain documents (CPLR § 3102). Petitioners argue that these materials are necessary to plead and prove its case in a proposed arbitration. Respondent has moved to dismiss the petition and seeks a protective order regarding the subject documents. For the reasons that follow, the petition is denied and the motion to dismiss is granted in part.

According to the petition, petitioners are preparing to commence an arbitration in New York County against C2 MA Adams I, LLC, C2 MA Adams II, LLC, and C2 MA Swansea, LLC (collectively "C2 Energy"). The proposed arbitration arises from three Asset Purchase Agreements ("APAs") which petitioners and C2 Energy entered into whereby petitioners sold assets to C2 Energy for the development and construction of three solar-powered, electrical-generation facilities in Massachusetts. The APAs are governed by New York law and contain an arbitration clause which provides that any disputes arising therefrom shall be submitted to arbitration which shall be held in an

expedited manner.

The dispute which petitioners allegedly seek to submit to arbitration is briefly as follows. Pursuant to the APAs, C2 Energy was to make a Cash on Delivery ("COD") Payment to an expressly designated third-party beneficiary of the APAs, SolarCity Corporation, to whom petitioners owe funds under a settlement agreement. The COD Payment is subject to reduction or elimination depending upon whether three deadlines in the APAs are met. Seaboard requested COD Payments from C2 Energy for the projects. C2 Energy took the position that no COD Payment was owed on any of the projects because the deadlines were missed.

This proceeding arises from petitioners' claim that documents solely within respondent and C2 Energy's possession will establish whether or not the deadlines "were met, and the reasons that any were missed" and is therefore necessary to frame the arbitration complaint. Further, petitioners represent that respondent and C2 Energy refuse to voluntarily provide such documents, and that the expedited arbitration called for the APAs warrants pre-arbitration discovery.

Respondent, in turn, contends that CPLR § 3102 does not permit disclosure from non-parties to the arbitration absent consent and that pre-arbitration disclosure is not available. Further, respondent maintains that extraordinary circumstances are not present so as to warrant the relief requested and that the proposed subpoena is overbroad and unduly burdensome.

Discussion

The court finds that petitioners have not demonstrated extraordinary circumstances warranting the disclosure sought in the subpoena *duces tecum*. A party

seeking court-ordered discovery in aid of arbitration must demonstrate “extraordinary circumstances” (*Hendler & Murray v. Lambert*, 147 AD2d 442 [2d Dept 1989] citing *De Sapio v. Kohlmeyer*, 35 NY2d 402 1974]). “The test is necessity rather than convenience” (*Matter of State Farm Mut. Auto. Ins. Co. v. Wernick*, 90 AD2d 519 [2d Dept 1982]).

Contrary to respondent’s contention, pre-arbitration disclosure can be obtained by court order (*Goldsborough v. New York State Dept. of Correctional Services*, 217 AD2d 546 [2d Dept 1995]). However, such relief is not warranted on this record.

Petitioners argue that absent the court-ordered subpoena, C2 Energy will be the only party in exclusive possession of documents relating to whether the deadlines were missed, why they were missed, and whether C2 Energy bears responsibility for any missed deadlines. By way of the subpoena, petitioners seek contracts between respondent and C2 Energy, correspondence concerning performance under those contracts, documents concerning deadlines for completing the subject work, construction schedules and reports, progress reports, engineering inspection reports, building permit applications and invoices.

There can be no dispute, however, that C2 Energy has the documents which petitioners seek, and as the party to the proposed arbitration, should be the first target of any demand for disclosure. The court disagrees with petitioners that absent court-ordered discovery from respondent, “[t]he resulting arbitration [will] be a mockery of justice.” On this record, it is highly likely that any production from C2 Energy would be duplicative of that from respondent. Therefore, exceptional circumstances do not exist (see i.e. *The Bd. of Managers of Parc Vendome Condominium v. Cambourakis*, 2011

WL 13122229 [Sup Ct, NY Co 2011]).

The court is sympathetic to petitioners' concerns regarding the expedited discovery procedure called for in the APAs. That procedure, however, was expressly agreed to by petitioners, and the court finds no basis for it to step into this dispute and cause it to be any more protracted than the parties expressly agreed to.

The court, however, must deny respondent's request for a protective order. There is no subpoena before the court or any other order directing respondent to produce documents. Therefore, the request for a protective order is premature.

Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that the petition is denied; and it is further

ORDERED that the motion to dismiss is otherwise denied; and it is further

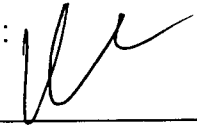
ADJUDGED that the petition is denied and this proceeding is dismissed with costs and disbursements to respondent; and it is further

ADJUDGED that respondent, having an address at

_____, do recover from petitioners, joint and severally, having an address at _____, costs and disbursements in the amount of \$ _____, as taxed by the Clerk, and that respondent have execution therefore.

This constitutes the decision, order and judgment of the court.

Dated: New York, New York
10/17/18

So Ordered: 

Hon. Lynn R. Kotler, J.S.C.