

Alliance Masonry Corp. v Corning Hosp.
2018 NY Slip Op 33650(U)
July 17, 2018
Supreme Court, Broome County
Docket Number: EFCA2018000951
Judge: Ferris D. Lebous
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At a submitted Motion Term of the Supreme
Court of the State of New York held in and
for the Sixth Judicial District on July 6, 2018.

PRESENT: HON. FERRIS D. LEBOUS
JUSTICE, SUPREME COURT

STATE OF NEW YORK
SUPREME COURT:: BROOME COUNTY

ALLIANCE MASONRY CORP.,

Petitioner,

vs.

DECISION & ORDER

Index No. EFCA2018000951
RJI No. 2018-0437

CORNING HOSPITAL,

Respondent.

ANDREW R. MANCINI ASSOCIATES, INC.,

Petitioner,

vs.

DECISION & ORDER

Index No. EFCA2018000956
RJI No. 2018-0438

GOULD TURNER GROUP, P.C.,
CORNING HOSPITAL, AND
ALLIANCE MASONRY CORP.,

Respondents.

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FERRIS D. LEBOUS, J.S.C.

This Decision & Order addresses identical petitions filed by subcontractors on the same construction project seeking to stay the demand for arbitration filed by the owner of said project.

The first petition was commenced by petitioner Alliance Masonry Corp. seeking an Order pursuant to CPLR § 7503 permanently staying and/or dismissing the arbitration proceeding commenced by respondent Corning Hospital against petitioner, and also naming Gould Turner Group, P.C. and Andrew Mancini & Associates, Inc. as respondents (Index No. EFCA2018000951).

The second petition was commenced by petitioner Andrew R. Mancini Associates, Inc. by way of Order to Show Cause also seeking an Order pursuant to CPLR § 7503 permanently staying and/or dismissing the arbitration proceeding commenced by respondent Corning Hospital against petitioner, and also naming Gould Turner Group, P.C. and Alliance Masonry Corp. as respondents (Index No. EFCA2018000956).

The court exercised its discretion and declined to sign the Order to Show Cause, but instead held a conference call with all attorneys of record on April 12, 2018 wherein it was agreed that all mediation and arbitration matters would be stayed indefinitely until these petitions were resolved by this court.

BACKGROUND

Corning Hospital, as owner, commenced a project for the design and construction of an Acute Care Hospital and Cancer Treatment Center in Corning, New York ("the Project"). Corning Hospital hired Gould Turner Group, PC. as architect for the Project ("Gould Turner"). As part of the design, the architect specified the facing of the new building would utilize an ornamental stone product called Realstone veneer.

Corning Hospital hired a general contractor for the Project, namely a joint venture known as Gilbane Building Company/Welliver McGuire ("Gilbane"). This "Corning-Gilbane Contract" is the prime contract on the Project and, as relevant here, states:

1.2.1 The "Agreement consists of (i) this Construction Services Agreement (the "Agreement") and all of its Exhibits and Appendices; (ii) *the General Conditions of Construction (the "General Conditions")*; (iii) all Addenda, Schedules, and Exhibits attached to this Agreement and/or the General Conditions; and (iv) all amendments and modifications thereto.

(Hurteau Aff, Ex C, p 3 [emphasis added]).

The General Conditions state, in pertinent part, as follows:

4.4.1 Controversies and Claims Subject to Arbitration.

Any controversy or claim arising out of or related to any agreement between Owner, Contractor, Architect or any Subcontractor, or any of them, or the breach thereof, *shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association....*

(Hurteau Aff, Ex A, p 21 [italics added]).

The Construction Industry Arbitration Rules of the American Arbitration Association in turn state, in pertinent part, as follows:

R-9. Jurisdiction

- (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.

(Hurteau Aff, Ex B, p 18).

Gilbane hired Andrew R. Mancini Associates, Inc. ("Mancini") as a subcontractor for general construction work on the Project (the "Gilbane-Mancini Subcontract") (Hurteau Aff, Ex D). The Gilbane-Mancini Subcontract expressly incorporated the Contract Documents and General Conditions as follows:

4.1 The Contract Documents consist of this Agreement and any documents referred to herein or exhibits attached hereto, the Agreement between the Owner and Construction Manager, the conditions of the Agreement between the Owner and the Construction Manager, *General Conditions*, Supplementary, Special and Other Conditions, the Drawings, Specifications, General Instructions to Bidders, Supplements to Bidder's documents, form of Proposal, all Addenda issued prior to and all modifications issued after execution of the Agreement between the Owner and Construction Manager and agreed upon by the parties.

(Hurteau Aff, Ex D, p 4 [emphasis added]).

With respect to any dispute resolution language, the Gilbane-Mancini Subcontract contains various references throughout the subcontract to remedies "at law or in equity" or "judicial or arbitral authority" (Hurteau Aff, Ex D, §§ 9.4.1 and 9.4.3, p 9). The Gilbane-Mancini Subcontract also contains an entire paragraph wherein Mancini "[w]aives trial by jury in

any action or proceeding to which the trade contractor may be a party arising out of or in any way pertaining to this agreement or the enforcement thereof" (Hurteau Aff, Ex D, § 9.19, p 11).

Subcontractor Mancini then hired Alliance Masonry Corp. as a subcontractor for the installation of Realstone ornamental stone (the "Mancini-Alliance Subcontract"). The Mancini-Alliance Subcontract expressly incorporated the Contract Documents and General Conditions as follows:

1.1 The Contract Documents for the Subcontract consist of this Agreement, Exhibit A "Scope of Work" and any other Exhibits attached hereto, the Prime Contract between the Owner and Contractor, the *General, Supplementary and other Conditions of the Prime Contract*, Drawings, Specifications, all Addenda issued by Owner prior to the execution of this Subcontract, the Project Schedule as may be amended from time to time, any subsequent modifications or revisions, any invitation for bids or information for bidders, if any, to the extent applicable and any other documents listed or referred to by the Prime Contract. A general non-inclusive listing of the Contract Documents is set forth on Exhibit B attached hereto.

(Hurteau Aff, Ex E, p 1 [emphasis added]).

With respect to any dispute resolution language, the Mancini-Alliance Subcontract states under "Claims" as follows: "[a]ny claims or disputes which may arise, including adjustment to compensation or to time of completion, shall be governed and decided in accordance with the Disputes provisions contained in the Contract Documents" (Hurteau Aff, Ex E, § 11.1, p 9).

In 2012, Alliance installed the Realstone product to the exterior of the Project. On or about May 30, 2014, construction on the Project was completed. On July 12, 2014, the Hospital

began operations. In the Fall of 2014, Corning became aware that Realstone panels were falling off.

By all accounts, a settlement agreement regarding the Realstone issue was reached between Gilbane and subcontractors Alliance and Mancini whereby Gilbane agreed to pay Mancini \$503,500 by October 30, 2017 and Mancini would pay Alliance \$180,000 within five days of said payment (Alliance Petition, Ex E).

Additionally, another settlement agreement was entered between Corning and Gilbane regarding the Realstone issue whereby the parties acknowledged an outstanding payment of \$494,086 due to Gilbane which would be settled by Corning agreeing to release \$379,086 to Gilbane and receiving a credit of \$115,000 (Hurteau Aff, Ex F).

In May 2017, Corning sued Realstone Systems, LLC in US District Court, Western District. In March 2018 Corning filed a Notice of Dismissal of said lawsuit.

On March 19, 2018, Corning filed a Demand for Arbitration against Alliance, Gould Turner, and Mancini. The Nature of the Dispute is listed as "design and construction defects with the design and construction in connection with the application of certain ornamental stone (Realstone) on both the interior and exterior of the Hospital" (Petitions, Ex A).

These petitions soon followed with petitioners arguing that there is no contractual privity between the parties and, in any event, Corning has not stated viable causes of action. Corning

opposes the petitions contending that a provision in the prime contract mandating arbitration was incorporated by reference into the subcontracts.

DISCUSSION

On a motion to stay arbitration, the court's inquiry is limited to ascertaining: (1) whether there was a valid agreement to arbitrate; (2) if so, whether the parties complied with the agreement; and (3) whether the underlying claim is timely (CPLR § 7503(b); *Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 6-7 [1980]). Generally, the initial question of arbitrability is an issue for judicial determination unless "the parties clearly and unmistakably provide to" arbitrate arbitrability (*Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 45-46 [1997]).

It is well-settled that incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions *relating to the scope, quality, character and manner of the work to be performed by the subcontractor* (*Navillus Tile, Inc. v Bovis Lend Lease LMB, Inc.*, 74 AD3d 1299, 1302 [2d Dept 2010]). Any provision that goes beyond scope, quality, character and manner of the work - such as dispute resolution - must be specifically incorporated in the subcontract to be effective against the subcontractor (*New York Tel. Co. v Alvord & Swift*, 49 AD2d 726 [1st Dept 1975]). In requiring such specificity, the courts are mindful that a party consenting to arbitration "[w]aives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent [citations omitted]" (*Matter of Marlene*

Indus. Corp. (Carnac Textiles), 45 NY2d 327, 333-334 [1978]). As such, as relevant here, the subcontracts must explicitly incorporate the arbitration provision while a general incorporation of other contracts or documents by reference, without specific mention of the arbitration clause, will not be sufficiently clear to obligate the parties to arbitrate (*SJS Constr. Co., Inc. v Darius Masonry, Inc.*, 156 AD3d 933 [2d Dept 2017]; *Persaud v Bovis Lend Lease, Inc.*, 93 AD3d 831 [2d Dept 2012]).

Upon a careful review of the two subcontracts, the court finds that neither subcontract contains the specific incorporation of the arbitration provisions of the prime Corning-Gilbane Contract.

As noted above, the Gilbane-Mancini Subcontract contains various references throughout the subcontract to remedies "at law or in equity" or "judicial or arbitral authority" and even references Mancini's waiver of a jury trial (Hurteau Aff, Ex D, §§ 9.4.1, 9.4.3, & 9.19, pp 9 & 11). So not only does the Gilbane-Mancini Subcontract not contain a specific incorporation of the arbitration provisions of the prime Corning-Gilbane Contract (namely, General Conditions § 4.4.1 or the Construction Industry Arbitration Rules of the American Arbitration Association), but it contains contrary references to actions at law, judicial actions and jury trials. Based on the foregoing, the court finds there is no clear showing of an intent to arbitrate under the Gilbane-Mancini Subcontract.

With respect to the Mancini-Alliance Subcontract, said subcontract states: "[a]ny claims or disputes which may arise, including adjustment to compensation or to time of completion,

shall be governed and decided in accordance with the Disputes provisions contained in the Contract Documents" (Hurteau Aff, Ex E, § 11.1, p 9). The court also finds that this provision fails to contain a specific reference to the arbitration provisions of the prime Corning-Gilbane Contract (namely, General Conditions § 4.4.1 or the Construction Industry Arbitration Rules of the American Arbitration Association). The court finds the general reference to the dispute provisions in the prime contract do not satisfy the requirement of an explicit incorporation of the arbitration provisions. Based on the foregoing, the court finds there is no clear showing of an intent to arbitrate in the Mancini-Alliance Subcontract.

In view of the foregoing, the court finds that there were no valid agreements to arbitrate between these parties in either petition and, as such, the petitions to stay arbitration must be granted.

To the extent that the parties raised additional arguments including but not limited to the issues of third-party beneficiary status and the impact of prior settlements, the court finds any discussion of these issues would be premature and are best left for resolution if and when future litigation is pursued.

CONCLUSION

In view of the foregoing, both petitions seeking to permanently stay and dismiss the arbitration proceeding are GRANTED. The requests for costs, disbursements, and legal fees are denied.

This constitutes the decision and order of the court.

Dated: July **17**, 2018
Binghamton, New York



Hon. Ferris D. Lebow
Justice, Supreme Court

The court considered all papers and all prior papers and pleadings which were filed via NYSCEF in the Broome County Clerk's Office:

1. Notice of Petition dated April 9, 2018 (EFCA2018000951);
2. Verified Petition sworn to April 9, 2018, with exhibits (EFCA2018000951);
3. Petitioner's Memorandum of Law dated April 9, 2018 (EFCA2018000951);
4. Corning Hospital's Answer to Petition dated June 18, 2018 (EFCA2018000951);
5. Affirmation of Daniel J. Hurteau dated June 18, 2018, with exhibits (EFCA2018000951);
6. Corning Hospital's Memorandum of Law in Opposition to Petition dated June 18, 2018 (EFCA2018000951);
7. Notice of Petition dated April 9, 2018 (EFCA2018000956);
8. Petition dated April 9, 2018, with exhibits (EFCA2018000956);
9. Corning Hospital's Answer to Petition dated June 18, 2018 (EFCA2018000956);
10. Affirmation of Daniel J. Hurteau dated June 18, 2018, with exhibits (EFCA2018000956);
11. Corning Hospital's Memorandum of Law in Opposition to Petition dated June 18, 2018 (EFCA2018000956);
12. Reply Affidavit of Alan J. Pope, Esq. sworn to July 2, 2018 (EFCA2018000951);
13. Petitioner's Reply Memo of Law dated July 2, 2018 (EFCA2018000951); and
14. Letter from Ronald L. Greene, Esq. dated July 5, 2018 (EFCA2018000956).