Young v Brim
2019 NY Slip Op 30096(U)
January 11, 2019
Supreme Court, New York County
Docket Number: 651908/2018
Judge: Carmen Victoria St. George
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
NEW YORK COUNTY - - PART 34

SUSAN E. YOUNG,

Plaintiff,

Index No.: 651908/2018
Motion Sequence No.: 001

- against -

DECISION/ORDER

JOHN G. BRIM, Individually and as trustee of THE BRIM FISHERS ISLAND TRUST U/A, MARIA ELENA A. BRIM, Individually and as Trustee of THE BRIM FISHERS ISLAND TRUST U/A,

Defendants.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

Plaintiff, an architect, entered a contract with defendants for design services at their property. Plaintiff's proposal described the work that she would perform, and agreed to a $7000 fee, due upon installments that were specified in the letter. Plaintiff annexed a rider, and she explained that the rider "must be signed by contractor as a condition of his employment to indicate that he understand the context of the project and the need to extend his liability insurance cover me {*sic*} as part to {*sic*} the team" (Plaintiff's Aug. 26, 2016 letter). The rider stated that plaintiff would receive $100 per hour for any additional services. It also included an arbitration agreement, stating that disputes would be mediated before the Construction Industry Mediation Rules of the American Arbitration Association (AAA) in Queens County. Furthermore, the arbitration clause stated that the prevailing party at the arbitration would receive costs including attorney's fees.

Neither party signed the rider. Nonetheless, and despite plaintiff's statement that she would not proceed absent the agreement, the parties proceeded under the contract. According to defendants, they paid plaintiff $5,500 of the $7,000 contract price, but discontinued payments

when a dispute arose between the parties. Subsequently, plaintiff submitted a bill for $39,051 in unpaid fees.

When defendants did not pay the bill, plaintiff commenced this lawsuit for $39,051, under several grounds including breach of contract. In support of the breach of contract claim, the complaint states, in pertinent part, that "[p]ursuant to the terms of the Young Agreement, Plaintiff Young was to be paid, in addition to the . . . fixed sum of $7,000, (a) an hourly rate of $100 per hour for any and all services related to the House other than the preparation of architectural drawings for the renovation . . ." (Complaint, ¶ 20).

Currently, defendants move under CPLR § 3211 for dismissal of this action. Alternatively, they seek an order under CPLR § 7503 which stays the case and compels the parties to proceed to arbitration before the AAA. Finally, defendants seek costs, attorney's fees, and disbursements. Defendants rely on the unambiguous terms of the rider, which provide that all disputes must be mediated before the American Arbitration Association in Queens. Under such circumstances, it is appropriate to grant the prong of defendants' motion which seeks a referral to the AAA (*see Gelwan v Youni Gems Corp.*, 151 AD3d 638, 639 [1st Dept 2017]).

Plaintiff opposes the motion, stressing that the arbitration provision was contained in a rider to the contract which defendants did not sign. As such, plaintiff contends, defendants' position is disingenuous. She states that defendants refused to sign the rider because they did not consent to its terms, and that she proceeded with the project regardless, "Mistakenly" relying on defendants' honesty (Young Aff, ¶ 8). She notes that she has not been paid the full $7,000 agreed to in the contract and that defendants did not pay her any of the additional money she sought in her bill.

In reply, defendants challenge the veracity of plaintiff's statements as well as those of her attorney. They contend that both parties viewed the rider as a part of the contract by which they were bound. They state that plaintiff did not request that they sign the rider, and that they would have had no objection to its terms. They note that the contract incorporated the rider by reference on the first page of the contract, and state that this is sufficient to render it binding. Furthermore, they note that "the disingenuousness of [plaintiff's] claim becomes obvious when juxtaposed against emails that were exchanged between the parties, as well as Verified Complaint in this action" (Maria Elena Brim Aff, ¶ 7). Defendants point out that, among other things, plaintiff sent them bills which reflect the terms of the rider rather than of the main portion of the contract. They annex an email from plaintiff which states that she billed them $7,000 for work in the initial contract, and $100 per hour on the "extended contract." The extended contract, defendants state, is a clear reference to the rider. Moreover, defendants point out, the verified complaint refers to the parties' contract as "the Young Agreement" and describes terms of the rider as part of that agreement in paragraphs 18-22 and paragraph 25.

Discussion

When a court considers a CPLR § 3211 motion, it "accept[s] as true the facts as alleged in the complaint and submissions in opposition to the motion, accord[s] plaintiff[] the benefit of every possible favorable inference and determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Serv., Inc.*, 20 NY3d 59, 63 [2012] [Whitebox] [citation and internal quotation marks omitted]). Based on these principles, the Court grants the motion.

As plaintiff points out, the rider is unsigned. Plaintiff is incorrect that this renders the arbitration agreement unenforceable, however. Defendants counter with evidence, including

emails, which indicate that the parties treated other provisions of the rider – and thus the rider – as binding and enforceable. This sort of acquiescent conduct has been deemed sufficient, on a motion for summary judgment, to establish the enforceability of a contract or provision (*see, e.g., Minelli Construction Co., Inc. v Volmar Construction, Inc.*, 82 AD3d 720 [2nd Dept 2011]). In such circumstances, "there is an issue of fact as to whether the [parties] accepted the terms of the . . . riders through 'acquiescent conduct,' which should not be decided on a motion addressed to the pleadings" (*Nwauwa v Mamos*, 53 AD3d 646, 649 [2nd Dept 2008] [citing *Eldor Contracting Corp. v County of Nassau*, 272 AD2d 509 (2nd Dept 2000)]; *see Preferred Serv. v Country Wide Ins. Co.*, 35 Misc 3d 66, 67 [App T 1st Dept 2012]).

Defendants succeed under CPLR § 3211, however, without the need to move for summary judgment after discovery is complete. This is because, as defendants state, at several points in her complaint plaintiff refers to the rider as part of the "Young Agreement." Most significantly, and as earlier noted, the complaint states that "[p]ursuant to the terms of the Young Agreement, Plaintiff Young was to be paid . . . (a) an hourly rate of $100 per hour for . . . all services related to the House other than the preparation of architectural drawings for the renovation . . ." (Complaint, ¶ 20). The hourly rate of $100 per hour is part of the rider to the signed letter agreement rather than the one-page agreement which precedes it. Thus, through her pleadings plaintiff has conceded that the rider is part of the "Young Agreement" and is enforceable. This Court may review as documentary evidence "prior statements or averments of parties or their agents in the court of litigation that refute an essential element of a plaintiff's present claim" (*Warshaw Burstein Cohen Schlesinger & Kuh, LLP*, 106 AD3d 536, 537 [1st Dept], *lv dismissed*, 21 NY3d 1059 [2013]). This paragraph of the complaint, therefore, is documentary evidence that

the rider is enforceable. The Court directs the parties to proceed to arbitration in New York County, however, in the absence of an available forum in Queens County.

Accordingly, it is

ORDERED that defendant's motion is granted insofar as it seeks to compel arbitration and to stay this action; and it is further

ORDERED that plaintiff shall arbitrate her claims against defendants in accordance with the rider to the Young Agreement; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration.

Dated: January 11, 2019

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.