

Dakota, Inc. v Nicholson & Galloway, Inc.
2019 NY Slip Op 30270(U)
January 30, 2019
Supreme Court, New York County
Docket Number: 656280/2018
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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THE DAKOTA, INC.

Petitioner,

- V -

NICHOLSON & GALLOWAY, INC.

Respondent.

INDEX NO. 656280/2018

MOTION DATE 01/24/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for

Stay Arbitration

HON. BARRY R. OSTRAGER:

Petitioner, The Dakota, Inc. (“the Dakota”), is a residential cooperative apartment corporation. Respondent, Nicholson & Galloway, Inc. (“N&G”), is a general contractor. On March 13, 2015, the Dakota hired N&G as general contractor to undertake a roughly \$28 million roof replacement and façade renovation of the historic building. On November 28, 2018, N&G demanded expedited arbitration, pursuant to the Prompt Payment Act (the “PPA”), of its claim for final payment of the \$637,500 retainage purportedly remaining under the construction contract.

Petitioner commenced this special proceeding, pursuant to CPLR § 7503(b), to stay the arbitration. For the reasons discussed herein, the petition to stay is denied and the special proceeding is dismissed.

Background

In March 2015, the parties entered a construction contract (the “Agreement”) for major roof and façade renovations. The Agreement provides for retainage payments of 10% of progress payments, capped at \$1,250,000. (Wilson Aff. Ex. 1 [NYSCEF Doc. 19]). The vast majority—if not all—of the construction work was purportedly completed in April 2018. Shortly thereafter, the Dakota released 50% of the retainage to N&G. The Dakota has since withheld the balance of the retainage after alleging N&G caused damage to the building during renovations. Thus, the Dakota claims offsets against the balance of the retainage due to N&G.

On November 28, 2018, N&G noticed a Demand for Arbitration on the Dakota. (Wilson Aff. Ex. 13 [NYSCEF Doc. 31]). The Demand for Arbitration alleges violations of the New York Prompt Payment Act. The Demand was also made pursuant to an expedited arbitration procedure within the New York Prompt Payment Act. *See* N.Y. Gen. Bus. Law § 756-b(3)(c). The Dakota seeks to stay arbitration pursuant to CPLR § 7505(b).

Discussion

“[A] party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made[.]” CPLR § 7503(b).

Petitioner argues a stay of arbitration is necessary because the parties specifically agreed to litigate disputes, rather than arbitrate, in their Agreement. Article 5 of the Agreement provides that “the method of binding dispute resolution shall be ... [l]itigation in a court of competent jurisdiction” and *not* arbitration “pursuant to Section 21.4” of the Agreement, which contains a mechanism for arbitration before the American Arbitration Association (“AAA”). (Wilson Aff. Ex. 1 [NYSCEF Doc. 19]).

Thus, Petitioner argues that a stay is warranted because there is no arbitration agreement and the parties specifically agreed to litigate all disputes arising out of the Agreement.

Respondent, in opposition, argues the stay should be denied and the parties must resolve their retainage dispute in accordance with the PPA's expedited arbitration remedy. Further, Respondent asserts that Article 5 of the Agreement—purporting to preclude arbitration—is void and unenforceable under the PPA.

Thus, Respondent argues the stay must be denied and the parties allowed to arbitrate their dispute on an expedited basis pursuant to the PPA.

The first issue the Court must resolve is whether the PPA's expedited arbitration procedure is precluded by parties' contractual agreement to litigate disputes.

Here, the plain language of the PPA makes void and unenforceable the parties' purported agreement to litigate disputes arising out of the Agreement to the extent the Agreement precludes the PPA's expedited arbitration procedure. *See* N.Y. Gen. Bus. Law § 757. The PPA provides that “[a] provision, covenant, clause or understanding in, collateral to or affecting a construction contract stating that expedited arbitration as expressly provided for in the manner established by section [756-b] of this article is unavailable to one or both parties” is “void and unenforceable.” *Id.*

The Third Department's decision in *Matter of Capital Siding & Constr., LLC* is particularly instructive. There, a construction contract dispute arose when a contractor withheld certain payments from a subcontractor. 138 A.D.3d 1265, 1265 (3d Dep't 2016). The subcontractor sought expedited arbitration pursuant to the PPA and the contractor commenced a CPLR § 7503 proceeding to stay the arbitration. *Id.* Petitioner contractor argued that the

agreement at issue “expressly states that litigation, not arbitration, is the parties’ chosen method of dispute resolution.” *Id.*

The Third Department held that petitioner’s reading of the PPA “ignores the existence of General Business Law § 757(3), which ... unambiguously voids and renders unenforceable any contractual provision that makes expedited arbitration unavailable to one or both parties.” *Id.* at 1266; *see also Pike Company, Inc. v. Tri-Krete Limited*, 2018 WL 6060927, at *7 (W.D.N.Y. Nov. 20, 2018) (“However, § 757 prohibits any contractual provision that causes the PPA’s expedited arbitration remedy to become unavailable to one or both parties.”)

Likewise, here, the parties’ agreement to litigate, and not arbitrate, disputes is void and unenforceable to the extent it precludes N&G from properly invoking the PPA’s expedited arbitration procedure.

The second issue the Court must resolve is the scope of the expedited arbitration in relation to N&G’s allegations in its arbitration demand.

“The plain language of the PPA reveals its arbitration provision was broadly drafted in favor of arbitrability.” *Pike Company, Inc.*, 2018 WL 6060927, at *7. “While there is little caselaw specifically interpreting this arbitration provision, the available decisional law supports the conclusion that a claim alleging a violation of the PPA is subject to arbitration so long as the prerequisites of § 756-b(3) have been satisfied.” *Id.* at *8. “In other words, if a subcontractor alleges that the PPA was violated and satisfies the prerequisites of § 756-b(3), then the claim may proceed to arbitration where the contractor may raise any applicable defense to support its non-payment.” *Id.* at *8. The prerequisites include: (1) third-party verification of delivery of written notice of the PPA violations; and (2) third-party verification of delivery of the demand, to AAA, for an expedited arbitration. *See* N.Y. Gen. Bus. Law § 756-b(3).

Here, N&G alleges a PPA violation in its Demand for Arbitration and the prerequisites of § 756-b(3) have been satisfied.

First, N&G's Demand for Arbitration plainly alleges that the nature of the dispute is a "[v]iolation of New York Prompt Payment Act." (Wilson Aff. Ex. 13 [NYSCEF Doc. 31]). N&G alleges a violation of the PPA and the Dakota cannot, at this procedural stage, invoke substantive, merits-based challenges to the alleged violation. *See Pike Company, Inc.*, 2018 WL 6060927, at *9. The Court will not engage in an extensive analysis of whether the PPA has been violated which would necessarily render the PPA's expedited arbitration remedy useless as a tool to avoid protracted and expensive litigation. *See id.*

However, it is unclear whether some, none, or all of N&G's allegations constitute arbitrable violations of the PPA. N&G's arbitration demand alleges PPA violations *and* breach of contract. Yet, "the AAA's authority to issue an arbitral award is limited to the alleged violation of the PPA." *Id.* at *10. Thus, AAA will arbitrate any alleged PPA violations but is without jurisdiction to determine whether N&G has asserted a meritorious common law cause of action for breach of contract. *See id.* AAA's jurisdiction is limited to PPA violations. Any allegations of common law breach of contract must necessarily be litigated in a court of competent jurisdiction pursuant to the Agreement's dispute resolution provisions in Article 5. (Wilson Aff. Ex. 1 [NYSCEF Doc. 19]).

Second, N&G has satisfied the prerequisites of § 756-b(3). On October 26, 2018, N&G provided written notice to the Dakota of PPA violations. (Wilson Aff. Ex. 11 [NYSCEF Doc. 29]). This notice was sent to the Dakota pursuant to the notice provisions of Section 22.1 of the Agreement. General counsel for the Dakota confirmed receipt of the written notice by letter dated November 7, 2018. (Wilson Aff. Ex. 12 [NYSCEF Doc. 30]). Therefore, there was third-

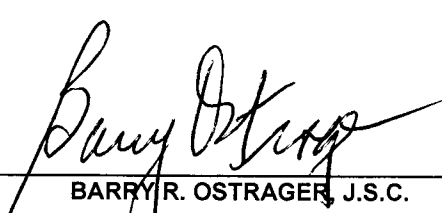
party verification of delivery of written notice of the Dakota's purported PPA violations.¹

Additionally, not less than fifteen days after the Dakota's general counsel confirmed receipt of the notice, and after the parties failed to informally resolve the dispute, N&G filed a demand for expedited arbitration with AAA. (Wilson Aff. Ex. 13 [NYSCEF Doc. 31]). Thus, N&G "complied with the prerequisites of § 756-b(3) and any PPA violation alleged" in the October 26, 2018 notice "is properly before the AAA and should proceed to conclusion in the pending arbitration." *Pike Company, Inc.*, 2018 WL 6060927, at *9.

Accordingly, it is hereby

ORDERED that Petitioner's motion to permanently enjoin the arbitration proceedings demanded by Respondent is denied; and it is further

ORDERED that Petitioner's petition seeking a stay of Respondent's November 28, 2018 Demand to Arbitrate is dismissed and this special proceeding discontinued.

<u>1/30/2019</u>					
DATE				BARRY R. OSTRAGER, J.S.C.	
CHECK ONE:	☒	CASE DISPOSED	☐	NON-FINAL DISPOSITION	
	☐	GRANTED	☒ DENIED	☐	GRANTED IN PART ☐ OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☐	☐	FIDUCIARY APPOINTMENT ☐ REFERENCE

¹ The Court sees no reason to narrowly interpret § 756-b(3)'s "third-party verification of delivery" requirement to mandate formal service. The intent of the provision is to provide an accused party with notice of alleged PPA violations such that the party may participate in an anticipated, expedited arbitration. Here, the Dakota's general counsel—a third party to the dispute—confirmed receipt of the notice. At a minimum, N&G has substantially complied with the "third-party verification of delivery" requirement in § 756-b(3).