

<b>Flintlock Constr. Servs., LLC v Global Precast, Inc.</b>
2019 NY Slip Op 31232(U)
April 30, 2019
Supreme Court, New York County
Docket Number: 655260/2018
Judge: William Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

*Justice*

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INDEX NO. 655260/2018

FLINTLOCK CONSTRUCTION SERVICES, LLC

MOTION DATE N/A

Petitioner,

MOTION SEQ. NO. 001

- v -

GLOBAL PRECAST, INC.,

**DECISION AND ORDER**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for STAY PPA ARBITRATION.

In this special proceeding, petitioner Flintlock Construction Services, LLC (“Flintlock”), seeks a preliminary injunction staying a demand for arbitration before the American Arbitration Association (“AAA”) under General Business Law § 756-b (hereinafter, the “Prompt Payment Act” or “PPA”), by respondent Global Precast, Inc. (“Global”). Global opposes the Petition.

**BACKGROUND**

On or about January 15, 2013, Flintlock, as general contractor, and 56th Street Hotel, LLC, as owner, entered into a written agreement in which Flintlock agreed to provide certain labor, equipment, materials and services in connection with the construction of the Whitby Hotel located at 18 West 56th Street, New York, New York (the “Project”). On or about May 29, 2014, Flintlock, as general contractor, and Global, as subcontractor, entered into a written agreement (the “Subcontract”) in which Global agreed to perform certain architectural precast work in connection with the Project.

Ultimately, a dispute arose between Flintlock and Global regarding their performance of their respective obligations under the Subcontract, including Flintlock’s failure to pay

approximately \$450,000.00 in outstanding invoices submitted by Global. The dispute was resolved by a letter agreement executed by Flintlock and Global on May 17, 2017 (the “Settlement Agreement”). Under the Settlement Agreement, Flintlock agreed to make scheduled payments totaling \$360,000.00 in exchange for Global’s completion of certain outstanding punchlist items identified in a report, dated April 19, 2017, produced by a consultant of 56th Street Hotel, LLC, Vidaris, Inc. (“Vidaris”). The Settlement Agreement expressly provided that:

In the event that contractor does not make payments as required by this agreement, then subcontractor may make claim for and take any action to recover all claims it has on this Project, including a total claimed for extra work of \$450,000.00 in place of the settlement sum recited herein of \$360,000.00.

(Dkt. No. 4).

Pursuant to the Settlement Agreement’s interim payments provision, between May 2017 and March 2018, Flintlock made partial payments to Global in the sum of \$330,000.00.

However, a further dispute arose regarding the last open item on the punchlist. When Global refused to accept that it was responsible for completing the remaining punchlist item, Flintlock withheld the remaining \$30,000.00 due under the Settlement Agreement (*see* Dkt. Nos. 5-8 [emails]). Flintlock eventually paid to complete the punchlist item and back charged Global.

On April 12, 2018, Global’s Cathy Carpino, Senior Accounts Receivables, sent an email to Flintlock’s Andrew Weiss and Manuel De La Vega stating that \$30,000.00 remained due and owing under the Settlement Agreement and requesting information regarding when the payment would be issued to Global. When Flintlock failed to respond, on April 24, 2018, Global sent a follow-up email declaring that, as a result of Flintlock’s failure to comply with the payment terms of the Settlement Agreement, the monetary settlement of \$360,000.00 was null and void and that Global would seek collection of the original amount owed of \$450,000.00, less payments received of \$330,000.00 (Dkt. No. 25). Flintlock similarly failed to respond to the April 24, 2018 email.

Based on Flintlock's failure to respond to both the April 12, 2018 and April 24, 2018 emails, on May 29, 2018, Global sent a letter to Flintlock accusing Flintlock of violating multiple provisions of the Prompt Payment Act (Dkt. No. 23). Again, Flintlock failed to respond and, thus, on June 20, 2018, Global filed and mailed a Demand for Arbitration before the AAA of Flintlock's alleged violations of the PPA (Dkt. No. 24).

#### DISCUSSION

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, there is no contractual agreement between the parties to arbitration.

However, Global alleges that its claims against Flintlock are for violations of the PPA, a statutory scheme that governs payment procedures and remedies for private non-residential construction contracts in excess of a specified dollar amount (*see* GBL 756 [1]). If efforts to resolve a dispute arising under the PPA are unsuccessful, the aggrieved party may refer the matter for expedited arbitration before the AAA (GBL 756-b [3]). As the foregoing statute confers upon Global the right to initiate binding arbitration, the absence of a contractual agreement to arbitration is irrelevant. (*see Capital Siding & Const., LLC v Alltek Energy Sys., Inc.*, 2016 N.Y. Slip Op. 31043[U], 2 [Sup Ct Albany County 2016]).

Here, Flintlock argues that a preliminary injunction permanently staying Global's demand for arbitration is warranted because the April 2018 emails are not "undisputed invoices" within the meaning of the PPA and that forced arbitration in the absence of an obligation to arbitrate constitutes irreparable harm as a matter of law. However, Global's right to pursue arbitration under the PPA is not contingent upon Global's ability to establish now that it is certain to succeed at establishing a violation of the PPA at arbitration (*see In re Arbitration between Capital Siding &*

*Const., LLC*, 138 AD3d 1265, 1266 [3d Dept 2016] [holding that mere accusations by a subcontractor that a contractor violated the PPA may be referred to the AAA for expedited arbitration under the PPA). “So long as [a] subcontractor plausibly alleges that the PPA has been violated, the question of whether there has actually been a violation is an issue for the arbitrator to determine.” (*Pike Co., Inc. v Tri-Krete Ltd.*, 349 F Supp 3d 265, 276 [WDNY 2018]).

The only prerequisites that must be satisfied before seeking the benefit of the PPA’s arbitration remedy are outlined in GBL § 756-b(3). “[A] claim alleging a violation of the PPA is subject to arbitration so long as the prerequisites of §756-b(3) have been satisfied” (*Pike Co., Inc. v Tri-Krete Ltd.*, 349 F Supp 3d 265, 276 [WDNY 2018]). The provision requires delivery of “written notice of a complaint” that a contractor or subcontractor “has violated the provisions of this [PPA] article,” followed by informal dispute resolution negotiations between the parties regarding the complaint (GBL 756-b [3] [a]). The PPA further provides that if the parties fail to reach a mutually agreeable resolution through informal avenues, “the aggrieved party may refer the matter, not less than fifteen days of the receipt of third party verification of delivery of the complaint, to the American Arbitration Association for an expedited arbitration pursuant to the Rules of the American Arbitration Association.” (GBL § 756-b [3] [c]). The PPA’s arbitration remedy is to be liberally construed in favor of expedited arbitration.

Flintlock does not dispute receipt of Global’s May 29, 2018 letter, which outlines various alleged PPA violations. Global also notified Flintlock that the parties were obligated to attempt to resolve the referenced violations, and requested that Flintlock contact Global’s attorneys. Global further indicated that it intended to refer the matter to the AAA for expedited arbitration if the parties were unable to resolve the matter within 15 days from the date Flintlock received the letter. (Dkt. No. 22). There is no question of fact that the parties’ disputes were not resolved and Global

referred its alleged PPA violations to the AAA “not less than fifteen days of the receipt of third party verification of delivery of the complaint (GBL § 756-b [3] [c]). Therefore, Global complied with the prerequisites of GBL § 756-b (3) and any PPA violations alleged in the May 29, 2018 letter are properly before the AAA and should proceed to conclusion in the pending arbitration. Accordingly, Flintlock’s petition for a preliminary injunction is denied on the ground that the alleged PPA violations are arbitrable before the AAA panel, and thus, Flintlock has not demonstrated that irreparable harm will result from compelling continued arbitration proceedings.

However, this court’s determination that Global is entitled to pursue its complaint alleging PPA violations at arbitration does not preclude Flintlock from raising affirmative defenses or “present[ing] evidence that the invoiced amount was ‘subject to various deductions for, inter alia, back charges, incorrect invoicing, and improper performance of the work.’” (*Layout, Inc. v. Heavy Metal Corp.*, 2018 WL 2244684, \*3 [EDNY 2018], quoting *Donninger Constr., Inc. v. C.W. Brown, Inc.*, 113 AD3d 724, 725 [2d Dept 2014]). Moreover, the claims referred to arbitration are solely the alleged PPA violations set forth in the May 29, 2018 letter. To the extent either party seeks to assert claims other than for violations of the PPA, the merits of those remaining claims must be resolved through litigation.

As the petition seeks only to stay the arbitration and neither party has asserted any claims other than Flintlock’s application for a preliminary injunction, no stay or continuation of this special proceeding is required.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Flintlock’s petition seeking a preliminary injunction permanently staying the arbitration is denied and the special proceeding is dismissed, without costs and disbursements to either party.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

4/30/19  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE