

**Siemens Elec. LLC v New York Elec. Power Servs.
LLC**

2019 NY Slip Op 32715(U)

September 11, 2019

Supreme Court, New York County

Docket Number: 653803/2018

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 653803/2018

SIEMENS ELECTRICAL LLC F/K/A SCHLESINGER SIEMENS
ELECTRICAL LLC

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

NEW YORK ELECTRICAL POWER SERVICES LLC,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 33, 34

were read on this motion to/for VACATE -
DECISION/ORDER/JUDGMENT/AWARD

Defendant's motion to (1) vacate the default entered on November 29, 2018 and to (2) and compel arbitration is granted.

Background

This case arises out of alleged overpayments made by plaintiff to defendant. Plaintiff commenced this action on July 31, 2018. On August 13, 2018, plaintiff served defendant with the complaint by service upon the New York Secretary of State.

Defendant did not answer and its time to do so expired. Plaintiff sought a default judgment in the amount of \$336,249.33 with interest and on November 29, 2018, Justice Joel Cohen found defendant in default and ordered an inquest on damages. On February 7, 2019, a few days before the scheduled inquest, plaintiff mailed a copy of the summons and complaint to defendant at its principal place of business. Defendant received the summons and complaint on February 8, 2019. Defendant claims that this was the first time it received a copy of the summons and complaint and learned about the scheduled inquest.

Plaintiff alleges that it was unable to mail the summons and complaint to defendant's principal place of business because defendant failed to update its address with the Secretary of State. Defendant does not dispute that it failed to update its address. Nevertheless, defendant insists that the default judgment should be vacated because plaintiff was aware of defendant's address. Defendant points to the summons and complaint, which sets forth defendant's correct business address in the "parties" section and also alleges that the parties have corresponded for years at this address. Furthermore, defendant alleges that it has a meritorious defense, claiming that the parties entered into a binding arbitration agreement and insists that the parties must arbitrate their claims. Plaintiff opposes the motion, claiming that defendant failed to offer an excuse as to why it failed to keep a current address for service of process with the Secretary of State. Plaintiff also disputes the validity of the arbitration agreement.

Discussion

"CPLR 5015 (a) provides that a party may be relieved from a judgment on the ground of, among others, 'excusable default.' A defendant seeking to vacate a default under this provision must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action" (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138, 141, 492 NE2d 116 [1986]).

While a corporation is required to keep its address updated with the Secretary of State, mistakes happen, and the Court may relieve a defendant of its default for that reason as a reasonable excuse. "It is also well established that service on a corporation through delivery of process to the Secretary of State is not personal delivery to the corporation or to an agent designated under CPLR 318. Thus, corporate defendants served under Business Corporation Law § 306 have frequently obtained relief from default judgments where they had a wrong address on file with the Secretary

of State, and consequently, did not receive actual notice of the action in time to defend” (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138, 141, 42, 501 NYS2d 8 [1986] [citations omitted]). This Court finds defendant’s mistake excusable.

As for the instant defendant’s meritorious defense, the parties’ Agreement indicates an intent to arbitrate.

CPLR 7503(a) states:

“Application to compel arbitration; stay of action. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.”

“It is a well settled principle of law in this state that a party cannot be compelled to submit to arbitration unless the agreement to arbitrate ‘expressly and unequivocally encompasses the subject matter of the particular dispute’” (*Trump v Refco Properties, Inc.*, 194 AD2d 70, 74, 605 NYS2d 248 [1st Dept 1993]).

Plaintiff disputes the validity and binding effect of the arbitration clause of the Agreement. It insists that there is a multi-step, multi-prong process for dispute resolution that must be followed before the dispute eventually proceeds to arbitration. Because several of these steps have not yet been met, plaintiff argues, the parties cannot be compelled to arbitrate. Defendant, on the other hand, maintains that the Agreement is valid and that all of the parties’ claims must be arbitrated.

The Court is not convinced by plaintiff’s argument. The terms of the Agreement clearly indicate that the parties must eventually arbitrate their claims. Although there is a multi-step

process outlined in the Agreement, that does not mean that each step must be taken before arbitration begins. Nor does it mean that one can avoid arbitration by ignoring the anticipated mediation. And it certainly does not mean that the arbitration agreement is rendered meaningless.

Section A of the Dispute Resolution portion of the Agreement states, "...both parties agree to use their best efforts to resolve all such disputes as rapidly as possible on a fair and equitable basis. Toward this end both parties agree to develop and follow a process for presenting, rapidly assessing, and settling claims on a fair and equitable basis" (NYSCEF Doc. No. 25 at pg.19). "If the dispute cannot be resolved under the process set forth in section (A), the parties *may* elect to resolve the dispute through nonbinding mediation" [emphasis added] (*id.*). The agreement further states, "Any dispute not settled by mediation shall be finally settled by arbitration pursuant to the Construction Industry Arbitration Rules then in effect" (*id.* at pg. 20).

The Arbitration Agreement does not mandate that all of the steps mentioned must be taken prior to the commencement of arbitration. It clearly states that the parties *may* elect to mediate before arbitrating claims. But it does say that any case not settled by mediation shall be finally settled by arbitration. The intent to arbitrate claims is expressly stated in the Agreement. The Court cannot overlook this express intent. Because the claims must be arbitrated, defendant has shown a meritorious defense and the November 29, 2018 default is vacated and an inquest will not be scheduled. Moreover, defendant's motion to compel arbitration is granted and the case is dismissed.

Accordingly, it is hereby

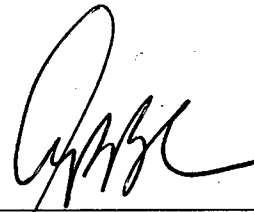
ORDERED that the default entered on November 29, 2018 is vacated; and it is further

ORDERED that defendant's motion to compel arbitration is granted; and it is further

ORDERED that plaintiff SIEMENS ELECTRICAL LLC F/K/A SCHLESINGER SIEMENS ELECTRICAL LLC shall arbitrate its claims against defendant NEW YORK ELECTRICAL POWER SERVICES LLC, in accordance with the Construction Industry Arbitration Rules. Either party may file for the arbitration.

Case dismissed.

9/11/19
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

HON ARLENE P. BLUTH

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE