

Waterscape Resort LLC v Pavarini McGovern, LLC
2019 NY Slip Op 33362(U)
November 8, 2019
Supreme Court, New York County
Docket Number: 651360/2015
Judge: W. 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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WATERSCAPE RESORT LLC

Plaintiff,

- v -

PAVARINI MCGOVERN, LLC,

Defendant.

INDEX NO.

651360/2015

MOTION DATE

08/08/2019

MOTION SEQ. NO.

004

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134

were read on this motion to/for

FRAMED ISSUE HEARING

This action has an extensive litigation history and arises out of a construction project wherein plaintiff Waterscape Resort LLC (hereinafter "Waterscape"), the project owner for the construction of a 45-story hotel and condominium building at 66-70 West 45th Street, New York, New York, (hereinafter the "Project") and defendant Pavarini McGovern, LLC (hereinafter "Pavarini") entered into a contract under which Pavarini agreed to provide construction management services for the Project.

In motion sequence number 004, Pavarini moves pursuant to CPLR §2218, for a framed issue hearing and limited discovery to resolve an ambiguity in the parties' contract. Waterscape opposes the motion contending that CPLR §2218 is unavailable as no motion is currently pending before the court; that the contractual ambiguity issue is but one of the central issues in this action, and as such is inappropriate for disposition by way of a reference; and that engaging in limited discovery to resolve the contractual ambiguity will subject the parties to duplicative discovery and depositions, causing unnecessary delay and waste.

BACKGROUND

On June 28, 2007, Waterscape, as owner, entered into a contract with Pavarini to build a forty-five (45) story, mixed-use hotel and condominium and serve as the construction manager for the project. The Construction Management Agreement (hereinafter "CMA") provided that Pavarini would perform the "Work" including all labor, materials, tools, equipment, supervision, and management for the proper execution and completion of the Project. (NYSCEF Doc. No. 127). Pavarini hired several subcontractors to carry out the construction work.

Amendment No. 1 to the CMA provided the Project Schedule and set forth milestone dates to complete various components of the work which dates ranged from October 2008 to June 2009. Waterscape alleges that Pavarini missed each date for work completion and that Pavarini materially breached and defaulted on its CMA obligations, including but not limited to, failure to follow the Contract documents; failure to follow instructions in construction of the Work; failure to carry out the Work as required by the CMA and utilize good construction practice; construction of Work which was defective and incomplete; failure to pay costs and mitigate delays caused by subcontractors; and failure to construct and complete the Work in accordance with the agreed upon Project Schedule. (NYSCEF Doc. No. 128). According to Waterscape, by September 2010, it had incurred millions of dollars in excess construction costs as a result of Pavarini's material breaches and default, ultimately resulting in Pavarini's termination as the CMA Project Manager on September 27, 2010. (Id).

The CMA established a dispute resolution board (the "DRB") to resolve claims and disputes between the parties. The DRB resolutions were binding for the duration of the Project through completion and final payment from Waterscape to Pavarini, and precluded the parties from suing each other; only after final payment and the expiration of a "60-day cooling off

period” could either party challenge DRB resolutions through *de novo* litigation pursuant to CMA Sections 18.4.3 and 18.7.2. (NYSCEF Doc. No. 127). According to Pavarini, between 2009 and 2013, Pavarini and Waterscape submitted approximately 250 claims to the DRB, resulting in 50 hearings from which the DRB issued resolutions for the claims, including claims Waterscape now seeks to litigate in this action. DRB’s “Final Accounting” resolution, awarded Pavarini over \$8 million as final payment. (NYSCEF Doc. No. 126, ¶12). Waterscape made final payment to Pavarini on April 24, 2014 and this litigation was commenced approximately one year later. (NYSCEF Doc. No. 128). In the complaint, Waterscape disputes the amounts the DRB determined were owed to Pavarini.

As noted, this action has a protracted litigation history including proceedings commenced in the United States Bankruptcy Court.¹ On August 22, 2016, this Court (Justice Braun) denied Defendant’s first motion for summary judgment. On November 22, 2016, Defendant again moved for summary judgment which stayed discovery. Justice Braun granted summary judgment in favor of Defendant and by Judgment dated October 20, 2017 dismissed the action. Plaintiff appealed the October 2, 2017 Order and the October 20, 2017 Judgment. On January 22, 2019, the Appellate Division unanimously affirmed the August 24, 2016 Order of the Court and unanimously reversed the October 2, 2017 Order, thereby resulting in the action being remitted to this Court. (NYSCEF Doc. No. 119).

Waterscape contends that no Court has ever decided the validity of the DBR’s Final Resolution, and argues that re-litigation at trial is its contractual right. Waterscape relies on the

¹ See, *Pavarini McGovern, LLC v Waterscape Resort LLC (In re Waterscape Resort LLC)*, 483 BR 601 (Bankr SDNY Dec. 10, 2012); *Waterscape Resort LLC v McGovern*, 107 AD3d 571 (1st Dept 2013); *In re Waterscape Resort LLC*, 2014 WL 1389762 (Bankr SDNY April 9, 2014); *In re Waterscape Resort LLC*, 520 BR 424 (Bankr SDNY Nov. 24, 2014), *In re Waterscape Resort LLC*, 544 BR 507 (Bankr SDNY Jan. 14, 2016) and *Waterscape Resort LLC v Pavarini McGovern, LLC*, 168 AD3d 561 (1st Dept 2019).

prior court decisions which found that the CMA is hardly a model of clarity, noting that the provisions relating to the binding nature of the DRB resolutions have been found to be ambiguous upon judicial review. Indeed, the Appellate Division ruled that the “dispute resolution provisions in the parties' agreement are ambiguous as a matter of law”. *Waterscape Resort LLC v Pavarini McGovern, LLC*, 168 AD3d 561, 562 (1st Dept 2019). As such, Waterscape maintains that Pavarini’s request for a framed issue hearing to resolve the contractual ambiguity is improper as there is currently no dispositive motion pending where a single fact is in issue that requires a hearing under CPLR §2218. Waterscape argues that the motion must be denied because CPLR §2218 does not entitle a party to a trial preference or an accelerated trial; rather, it is a mechanism used to resolve a motion that has the potential of disposing the action in its entirety, and that none of these factors are present here.

Additionally, Waterscape avers that Justice Braun expected discovery to go forward when he held a preliminary conference after having determined that the provisions of the CMA were ambiguous, and concluded that “there has to be a trial to determine what those ambiguous provisions mean.” (NYSCEF Doc. No. 130). Waterscape contends that while the contractual ambiguity is a central issue in this action, it is but one of many issues to be resolved by the Court. Additionally, Waterscape notes that no discovery has taken place in this action, despite its protracted history, and that as such, the motion should be denied and all issues should be determined at trial without the expense and delay of a framed issue hearing.

Pavarini maintains that unless the contractual ambiguity is resolved as a threshold matter, the parties will be subjected to extensive and wasteful discovery that can be avoided by granting its request for a framed issue hearing. It argues that the central issue in this case is the scope of judicial review of the DRB resolutions and that the Court can resolve this issue by ordering

limited discovery to determine the parties' intentions regarding the degree to which a Court should defer to the DRB resolutions. Pavarini claims that the central issues are unknown because the Court has ruled that the provisions of the CMA are ambiguous as a matter of law, and thus resolving this ambiguity will streamline the issues to be litigated, such as whether the DRB claims are to be re-litigated *de novo*, or litigating whether any DRB resolution was effected by fraud, bad faith or palpable mistake. For the reasons that follow, the motion is denied.

STANDARD OF REVIEW/ANALYSIS

CPLR §2218 provides, in pertinent part that, "[t]he court may order that an issue of fact raised on a motion shall be separately tried by the court or a referee." Professor Connors explains that "the power to order the trial of an issue arising on a motion . . . amounts to a kind of preference for the matter, especially since the power is, as a rule, properly exercised only when the result of the preliminary trial has some reasonable chance of putting an end to the litigation." (Connors, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR §2218). Accordingly, the Court's discretion to grant a framed issue hearing should be exercised only in narrow instances, where clear-cut issues, rather than lengthy, complicated ones which are central to the main issues at the trial, can be resolved (see *Stowell v Berstyn*, 26 AD2d 828 [2d Dept 1966]).

Here, three separate courts have ruled that the DRB provisions in the CMA are ambiguous and not a model of clarity. Moreover, there is currently no motion pending before the court which is contemplated by the plain language of section 2218. Pavarini has simply failed to demonstrate that a framed issue hearing will achieve the laudable goal of significantly advancing the litigation and possibly even ending it, as intended by CPLR §2218. It is a mechanism that should only be used in narrow circumstances to resolve a motion that has the potential of ending

the litigation. Indeed, Justice Braun found the CMA provisions to be ambiguous and held that “there has to be a trial to determine what those ambiguous provisions mean.” (NYSCEF Doc. No. 30).

Contrary to Pavarini’s contention, resolving the contractual ambiguity of the DRB provisions is not a discrete, narrow issue; it is one of the central issues in this action, in addition to several other issues related to the DRB resolutions to be litigated in order to resolve the claims alleged in the complaint. If the Court were to grant the relief requested, and permit the parties to undertake limited discovery now, and the action proceeds in its entirety after a framed hearing, the parties would be subjected to multiple depositions and extensive document discovery, given the protracted history of this action. Indeed, subpoenaed parties may be subjected to multiple requests for documents and depositions.

Limited discovery for purposes of a framed hearing is not likely to result in ending the action in its entirety and may prove expensive and subject the parties to unnecessary and duplicative discovery. Additionally, as Waterscape correctly notes, there is no motion currently pending before the court as the plain language of section 2218 contemplates. The Court finds that the issues raised by the complaint are best resolved upon consideration of a fully developed record after the benefit of pre-trial discovery and depositions. Pavarini has failed to demonstrate that a framed issue hearing is appropriate in this action.

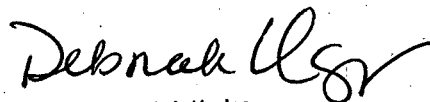
CONCLUSION

Accordingly, it is hereby,

ORDERED that Defendant’s motion sequence number 004 seeking a framed issue hearing is denied; and it is further

ORDERED that counsel shall appear for a preliminary conference in Room 307, 80 Centre Street, on January 28, 2020, at 9:30 a.m.

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



Hon. Deborah A. Kaplan
Administrative Judge
Supreme Court, New York County
Civil Branch

11/8/2019

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

W. FRANC PERRY, J.S.C.