

Gotham Bldrs. Group L.L.C v Orcher Realty L.L.C

2019 NY Slip Op 33414(U)

October 28, 2019

Supreme Court, Kings County

Docket Number: 511428/19

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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GOTHAM BUILDERS GROUP, L. L. C, ON BEHALF OF
ITSELF AND ON BEHALF OF ALL OTHERS ENTITLED TO
SHARE IN THE FUNDS RECEIVED BY ORCHER REALTY,
L. L. C, AS TRUSTEE, IN CONNECTION WITH THE
IMPROVEMENT OF THE REAL PROPERTY KNOWN AS
378 HUMBOLT STREET a/k/a 1 MASPETH AVENUE,
BROOKLYN, NEW YORK, BLOCK: 2892, LOT: 1,

Plaintiffs, Decision and order

- against -

Index No. 511428/19

ORCHER REALTY, L. L. C, ILYA OCHER,
MILITADIS LEPTOUGOS, P.E., ALMA BANK,
AND "JOHN DOE" AND "JANE DOE" AS THEIR
INTERESTS MAY APPEAR,

ms # 192

Defendants, October 28, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §7503 seeking to compel arbitration. The plaintiff has cross-moved essentially staying any arbitration. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court makes the following determination.

On August 12, 2016 the parties entered into an agreement whereby the plaintiff agreed to perform construction work for the defendants. The plaintiff alleges that due to changes made to the design of the project they expended more work, materials and subcontractors and are owed approximately additional sums. Indeed, the plaintiff filed a Mechanic's Lien in the amount of \$677,948. Further, the plaintiff alleges the defendants diverted the trust fund under the Lien Law. The agreement between the parties contained an arbitration clause and the defendants seek

to compel arbitration. The defendants assert that some of the allegations of the complaint cannot be arbitrated and thus the arbitration should be stayed pending resolution of those matters.

Conclusions of Law

"It is firmly established that the public policy of New York State favors and encourages arbitration and alternative dispute resolutions" (Westinghouse Elec. Corp. v. New York City Tr. Auth., 82 NY2d 47, 603 NYS2d 404 [1993], citing, Nationwide Gen. Ins. Co. v. Investors Ins. Co. of Am., 37 NY2d 91 [1975]). Arbitration has long been shown to be an effective "means of conserving the time and resources of the courts and the contracting parties" (Nationwide Gen. Ins. Co, supra); see, also, Westinghouse Elec. Corp., supra). "Therefore, New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration" (Smith Barney Shearson Inc. v. Sacharow, 91 NY2d 39, 666 NYS2d 990 [1997], quoting, Matter of 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 NY2d 88 [1991]).

It is well settled that a party cannot be subject to arbitration absent a clear and unequivocal agreement to arbitrate (see, Waldron v. Goddess, 61 NY2d 181, 473 NYS2d 136 [1984]). Thus, where an arbitration clause encompasses all disputes

between the parties and is unambiguous such arbitration clause will be enforced (Stoll America Knitting Machinery Inc., v. Creative Knitwear Corp., 5 AD3d 586, 772 NYS2d 863 [2d Dept., 2004]).

The Agreement in this case references another agreement which states that "any Claim subject to, but not resolved by, mediation shall be subject to arbitration..." (see, §15.4.1 of the AIA Document A201-2007).

The plaintiff argues that the claims related to lien foreclosure and diversion of trust funds first did not arise out of the agreement and in any event cannot be arbitrated. Thus, the plaintiff argues that they "did not agree to arbitrate those disputes related to its Lien and could not have anticipated Defendants' trust fund diversion at the time the Agreements were made" (see, Memorandum of Law, Page 5). However, there can be little dispute the Mechanic's Lien and any related claims are directly the result of the agreements between the parties. Indeed, without such agreements no such lien could be possible. Further, the fact the precise allegations were not anticipated is a truism of many lawsuits and where the agreement provides that such unforeseen events that did in fact occur should be resolved by arbitration then the proper forum is arbitration. Thus, the lien foreclosure and trust fund diversion causes of action are surely subject to arbitration.


First, the plaintiff does not dispute that all the claims can be subject to arbitration except for two claims. Turning to the plaintiff's argument that these specific claims cannot be arbitrated, it is true that foreclosure of the mechanic's lien cannot be arbitrated, however, the amount of the lien, if any, can be subject to arbitration (see, 5 Brothers Inc., v. D.C.M. of New York LLC, 39 Misc3d 711, 960 NYS2d 876 [Supreme Court Kings County 2013]). Thus, any arbitration can surely precede the two claims noted (Ferguson Electric Company Inc., v. Kendal At Ithica Inc., 274 AD2d 890, 711 NYS2d 246 [3rd Dept., 2000]).

Therefore, the motion seeking to compel arbitration is granted. The motion of the plaintiff seeking to stay the arbitration is denied except that upon the conclusion of the arbitration the plaintiff may pursue the two claims of lien foreclosure and diversion of the trust to the extent they remain viable.


So ordered.

ENTER:

DATED: October 28, 2019
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC


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