

**Matter of Turner Constr. Co. v Mount Auburn  
Multifamily, LLC**

2020 NY Slip Op 30014(U)

January 2, 2020

Supreme Court, New York County

Docket Number: 651987/2019

Judge: Eileen A. Rakower

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SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 6

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In the Matter of Application of

Index No.  
651987/2019

TURNER CONSTRUCTION COMPANY,

Petitioner,

**DECISION  
and ORDER**

For an Order Pursuant to Article 75 of the CPLR  
Staying Arbitration of a Certain Controversy

Motion Seq. 1

- against -

MOUNT AUBURN MULTIFAMILY, LLC,

Respondent.  
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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Turner Construction Company (“Turner”) submits this Petition pursuant to CPLR §§ 7503(b) and 3211(a)(1), seeking an Order permanently staying the arbitration between Turner and Respondent Mount Auburn Multifamily, LLC (“Mount Auburn”) with the American Arbitration Association (the “AAA”), Case Number 01-19-0000-8060 (the “Arbitration”) that was commenced on March 12, 2019 by Mount Auburn, and to dismiss the claims against Turner. Mount Auburn opposes the Petition and has interposed an Answer. Oral argument was held before the Court and the Petition was deemed fully submitted once a copy of the transcript from oral argument was received by the Court.

Brief Summary of Facts

On November 6, 2003, Turner entered into a contract with Oak Hill Apartments, LLC (“Oak Hill”) (“Construction Contract”) in which Turner “agreed to oversee the construction of 14 separate low-rise buildings containing rental town house units (the ‘Project’).” (Verified Petition at 3). The Construction Contract is an AIA Document A101-1997 form, which incorporates by reference an AIA Document A201-1997. The Project was completed in 2005. Certain buildings of the Project had use of balconies.

Pursuant to the Construction Contract, prior to payment, Turner was obligated to “submit to the Architect an itemized Application for Payment for operations completed in accordance with the schedule of values.” The application was to “be notarized, if required, and supported by such data substantiating the Contractor’s right to payment as the Owner or Architect may have reasonably required, such as copies of requisitions from Subcontractors and material suppliers, and reflecting retainage if provided for in the Contract Documents.” (Article 9, Payments and Completion). The Construction Contract provided that “[t]he Architect [would] within seven days after receipt of the Contractor’s Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due. or notify the Contractor and Owner in writing of the Architect’s reasons for withholding certification in whole or in part as provided in Subparagraph 9.51.” (Article 9.4 Certificates for Payment).

The Construction Contract further provides in relevant part that “[t]he Architect, as a representative of the Owner, will visit the site at intervals appropriate to the stage of the Contractor’s operations (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Document.” (Article 4.2.2 Architect’s Administration of the Contract).

By written agreement dated December 21, 2015 (the “Purchase Agreement”), Mount Auburn purchased the Project from Oak Hill. Mount Auburn asserts that it became “the successor in interest to, and assignee of, Oak Hill of the Construction Contract, and all of the warranties, causes of action and other rights and remedies of Oak Hill, LLC as against Respondent [Turner] under the Construction Agreement and the Project.”

According to Mount Auburn’s Demand for Arbitration, on September 7, 2018, one or more balconies on the units at the Project collapsed. Subsequent inspections allegedly “revealed, among other things, that when Respondent [Turner] constructed the Project, Respondent [Turner] failed to install most or all of the flashing and other waterproofing required by the Contract Documents, good construction practice and applicable building codes, to waterproof the headers to the garage doors - which is where each of the balconies is affixed to and supported by - and other areas.” Turner allegedly “omitted the flashing and other waterproofing materials despite the fact

that the Contract Documents required it ... [and] their absence was wholly concealed and covered by the vinyl siding affixed to the outside of the units in the Project” from the Architect and Oak Hill. Turner allegedly “also installed non-compliant vinyl siding on the units in the Project, which not only deviates from the specifications in the Contract Documents, but also are non-compliant with applicable codes.” Turner further allegedly “utilized 2x8 framing in multiple locations in the units, where the Contract Documents specified 2x10 framing [which] were concealed by the siding and other exterior cover on the units.”

Once Mount Auburn, the new owner of the Project, learned of the alleged collapse of balconies, Mount Auburn reported the claim to Turner and the Architect pursuant to the Construction Contract. In the Demand, Mount Auburn, stepping into the shoes of Oak Hill, seeks to arbitrate its claim for “fraudulent construction.”

Turner, in turn, contends that the Arbitration should be permanently stayed because there is no valid arbitration agreement between Turner and Mount Auburn. Turner contends that the parties have not “expressly agreed to arbitrate any disputes between them.” (Turner’s Memo. of Law at 3).

### Discussion

#### A. Agreement to Arbitrate

Turner argues that Mount Auburn does not have a valid arbitration agreement with Turner and the Court should therefore permanently stay the Arbitration.

“The courts’ gatekeeping role is delineated in CPLR 7503, which sets forth three specific issues a court must decide, if called upon to do so, before compelling or staying arbitration.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin*, 1 A.D.3d 39, 43 [1st Dept 2003]. “These threshold issues are whether a valid agreement was made, whether the agreement was complied with.” *Id.* “The party seeking a stay of arbitration has the burden of showing sufficient facts to establish justification for the stay.” *AIU Ins. Co. v. Cabreja*, 301 A.D.2d 448, 449 [1st Dept 2003]. The “one opposing a [petition to stay arbitration] must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 509 [1980]. “In determining whether parties have entered into a valid arbitration agreement, courts should apply ordinary state-law principals that govern the

formation of contract.”. *Rizer v. Breen*, 12 Misc. 3d 1183(A) [Sup. Ct. New York County 2005] (citation omitted). “Under New York law, it is for the court, not the arbitrator, to decide whether both parties have made a valid agreement to arbitrate.” *Id.*

Here, the parties do not dispute that Oak Hill and Turner entered into the Construction Contract which contained a provision requiring arbitration and therefore they had a valid agreement to arbitrate. Rather, the issue is whether Mount Auburn, as successor in interest to Oak Hill, can enforce that agreement to arbitrate.

The Court finds that Mount Auburn, as Oak Hill’s successor, can enforce the arbitration provision of the Construction Agreement. The Court further finds that Turner’s argument that there is no valid arbitration agreement between Turner and Mount Auburn because there was no valid assignment of the Construction Contract “as a whole” to be unavailing. The Purchase Agreement between Oak Hill and Mount Auburn did not assign the Contract “as a whole.” At the time of the Purchase Agreement in 2015, the Project had been completed since 2005. After the Project was completed, all that could be assigned to Mount Auburn from Oak Hill were the parties’ respective rights and remedies that survived the completion of the construction, including the assigned claims. Therefore, Turner did not need to provide written consent of Oak Hill’s assignment to Mount Auburn. As Turner and Mount Auburn had a valid agreement to arbitrate, the instant petition seeking a permanent stay of the arbitration on that ground should be denied.

#### B. Claims in Arbitration

Turner further argues that Mount Auburn’s claims asserted in its Demand for Arbitration are barred by the applicable statute of limitations, and as such, the Arbitration should be stayed and Mount Auburn’s claims should be dismissed.

The Court must determine “whether the claim sought to be arbitrated is barred by a statute of limitations.” *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1 A.D.3d at 43.

“A cause of action against a contractor for defects in construction generally accrues upon completion of the actual physical work.” *Cabrini Med. Ctr. v Desina*, 64 NY2d 1059, 1061 [1985]. Breach of contract claims are “barred by the applicable six-year Statute of Limitations.” *Id.* “By itself instructing its architect to release all funds payable to defendants, plaintiff here signaled the completion of work under

the terms of the contract.” *Id.* Where a party asserts fraud and negligence claims within its breach of contract claim, the statute of limitations will not be extended. *Id.* “Even if a separate cause of action had been stated, plaintiff could not by allegations of fraud that are incidental to its complaint for breach of contract extend the life of its claim.” *Id.* at 1061-62.

“A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract.” *First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291 [1st Dept 1999]. “By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract.” *Id.* “The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.” *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009].

“A cause of action based upon fraud must be commenced within six years of the commission of the fraud, or two years from the date on which the fraud could have been discovered, the expiration of whichever is later (CPLR 213 [8]).” *Gonik v Israel Discount Bank of New York* [N.Y. Sup Ct, New York County 2010], *affd.*, 2011 N.Y. Slip Op. 00025 [1st Dept. 2011]. “The burden of establishing that the fraud could not have been discovered prior to the two-year period before the commencement of the action rests on the plaintiff who seeks the benefit of the exception.” *Id.* (citing *Von Blomberg v Garis*, 44 AD3d 1033, 1034 [2d Dept 2007]).

The doctrine of equitable tolling applies “where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action.” *Kotlyarsky v. New York Post*, 195 Misc.2d 150, 153 [Sup. Ct. New York County 2003].

In the Demand for Arbitration, Mount Auburn asserts a claim for “fraudulent construction of the Project” based on Turner’s use of “less expense, inferior ... materials” in violation to the requirements of the Construction Contract. Although Mount Auburn couches its claim as one for fraud, the claim “merely restates a breach of contract claim” and is not separate from a claim for breach of contract. *First Bank of Americas*, 257 AD2d at 291. Any claim for breach of contract against Turner would be barred by the applicable six year statute of limitations from completion of the Project. Both parties agree that the Project was completed at the end of 2005.

Mount Auburn commenced arbitration in 2019, which is 14 years after the Project was completed and beyond the statute of limitations for a breach of contract claim.

However, even if Mount Auburn is found to have asserted a fraud claim and Mount Auburn has the benefit of the extended statute of limitations, the statute of limitations would have run on the fraud claim as well.

Here, the Arbitration was commenced more than six years after the alleged fraud, and Mount Auburn has failed to satisfy its burden of establishing that the fraud could not have been discovered prior to the two-year period before the commencement of the Arbitration. Furthermore, the doctrine of equitable tolling is unavailable.

Mount Auburn claims that it did not know of the construction defects at issue with respect to the balconies when it purchased the Project and could only discovered them through destructive testing. Mount Auburn claims that it first learned of the issues in 2018 when one or more of the balconies on the units at the Project collapsed.

However, Turner submits the Affidavit of Carl E. Stewart III ("Stewart"), a Vice President and General Manager of the Albany Business Unit of Turner and formerly Turner's Project Executive on the Project, which provides additional and relevant facts. Turner states that in May 2013, he received a call from Dean DeVito, one of the owners of Oak Hill. DeVito informed him "that cross-support beams on a balcony at the Project showed evidence of water damage, were rotting and possibly required repair and replacement." DeVito informed him "that one of the balconies had begun to pull away from the building's structure and required temporary support to avoid its collapse, and ultimately, required rebuilding." (Paragraph 6). Stewart states that on May 17, 2012, he met with DeVito at the Project site to look at the balcony issues and took photographs of the issues. (Paragraph 7). Stewart states that he and DeVito "discussed not only the one balcony of then immediate concern reflected in the attached pictures, but we also discussed that all of the balconies were similarly constructed. (Paragraph 8). Stewart states that in June 2012, DeVito informed him that "Oak Hill was considering hiring an engineer to re-design the balcony supports and intended to proceed with repairing the balconies." (Paragraph 9).

If issues with respect to the balconies were available for Stewart's visual inspection in 2012, the same issues would have been evident to Mount Auburn when it performed its inspection in 2015 unless Oak Hill had done an intervening repair. Mount Auburn relies on the concept that it could only have discovered the

construction defects at issue with the balconies through “destructive testing” and therefore the statute of limitations should be equitably tolled. However, Oak Hill knew of the issues with the balconies, and Mount Auburn stands in its shoes regarding notice of the alleged defect.

Conclusion

The Court finds that there is a valid agreement to arbitrate between the parties; however, the claims asserted in the arbitration are time barred. Therefore, the application to stay the arbitration and dismiss the claims against Turner is granted.

Wherefore it is hereby

ORDERED that the application to permanently stay the arbitration is granted.

This constitutes the Decision and Order of the Court. All other requested relief is denied.

DATED: JANUARY 2, 2020



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EILEEN A. RAKOWER, J.S.C.