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| CPM Bldrs., Inc. v Rachowin |
| 2020 NY Slip Op 33150(U) |
| September 24, 2020 |
| Supreme Court, New York County |
| Docket Number: 651467/2013 |
| Judge: Kathryn E. Freed |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 651467/2013

CPM BUILDERS, INC. d/b/a MG AND COMPANY,

Plaintiff,

MOTION SEQ. NO. 002

- v -

ALEXANDER RACHOWIN and 53RD ST. FOOD, LLC,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57

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

In this action by plaintiff CPM Builders, Inc. d/b/a MG and Company to recover unpaid monies allegedly owed to it by defendants Alexander Rachowin and 53rd Street Food, LLC for certain construction work it performed, plaintiff moves: 1) pursuant to CPLR 2221, to vacate the order of this Court dated November 6, 2019; and/or 2) pursuant to CPLR Article 44, to remand this matter to the trial calendar; or, in the alternative, 3) pursuant to CPLR 7503(a), to compel arbitration of the dispute between the parties. After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff, the general contractor for the construction of a restaurant owned by defendants, commenced this action on April 24, 2013. Doc. 1. In the complaint, plaintiff alleged that defendants breached the terms of the contract between the parties, thereby causing it to incur additional construction costs. Doc. 1. Specifically, plaintiff alleged that, although the value of

its work was \$1,089,122.44, defendants only paid it \$831,115.85, thereby leaving a balance owed of \$257,966.69. Doc. 1.

The captioned action was litigated for several years and eventually a trial was commenced. Doc. 52. After plaintiff opened its case, defendants made a verbal application to dismiss the action on the basis of an arbitration agreement in the construction contract. Doc. 52. Plaintiff agreed to arbitrate the dispute and the parties entered into a so-ordered stipulation, entered November 6, 2019 (“the 11/6/19 stipulation”), which provided as follows:

The parties agree to dismiss this case without prejudice to the plaintiff commencing an arbitration proceeding pursuant to the terms of the contract within six (6) months of the date of this stipulation and to that extent any defense of statute of limitations is waived.

Doc. 53.

On December 4, 2019, plaintiff emailed a demand for arbitration to defendants’ attorney. Doc. 52 at par. 6; Docs. 54-55. Defendants’ counsel acknowledged receipt of the demand but took no further action. Doc. 52 at pars. 6-7; Doc. 55.

On December 16, 2019, plaintiff’s attorney again emailed defendants’ attorney, this time asking the latter “how the arbitration should proceed.” Doc. 52 at par. 7; Doc. 56. Defendants’ counsel did not respond to the email. Doc. 52 at par. 7.

Plaintiff now moves for the relief set forth above. In support of the motion, plaintiff argues that this Court may treat the instant motion as one for renewal pursuant to CPLR 2221 since “[d]efendants continued dilatory conduct has frustrated the reason and purpose of the November 6, 2019 order” and because “[n]either [plaintiff] nor [this Court] could have perceived this course of action by the defendants.” Doc. 52 at par. 10. Alternatively, plaintiff argues that

this Court should remand this case to the trial calendar pursuant to CPLR Article 44 (Doc. 52 at par. 11) or compel defendants to arbitrate. Doc. 52 at par. 14.

As noted previously, the motion is unopposed.

LEGAL CONCLUSIONS:

CPLR 2221(e) provides as follows:

(e) A motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion

Since renewal applies to the submission of new evidence unavailable at the time the original motion was submitted, or to a change in the law that would affect the outcome of the case (CPLR 2221(e)(2); *Vazquez v JRG Realty Corp.*, 81 AD3d 555 [1st Dept 2011]), it is clearly inapplicable herein. Here, defendants moved during trial to dismiss the case based on an arbitration provision in the contract they had with plaintiff. The parties then stipulated to arbitrate and this Court so-ordered the stipulation. However, this Court issued no decision and/or order setting forth any reasoning, based on law or fact, as to why it signed the stipulation. Thus, even assuming, arguendo, that defendants' failure to respond to the demand for arbitration were to constitute a "new fact", plaintiff has failed to establish that it would "change the prior determination."

Nor is plaintiff entitled to any relief pursuant to CPLR Article 44, which is entitled “trial motions” and covers motions made during or after a trial. CPLR 4401 and 4402 address motions made during trial to dismiss the complaint, for a nonsuit, for a directed verdict, for a judgment before the court or a referee, for a judgment based on admissions or opening statements, and for a mistrial. Some of the foregoing motions are made after all evidence has been submitted. Rules 4403 and 4404 address post-trial motions including, inter alia, motions for a new trial, to confirm a referee’s report, or for judgment notwithstanding the verdict or decision. Here, the instant motion was made following the discontinuance of plaintiff’s action during trial and, since it was not made during or after trial, Article 44 is clearly inapplicable.

Finally, this Court denies that branch of plaintiff’s motion seeking to compel arbitration. Initially, this Court notes that, contrary to plaintiff’s contention, it did not commence the arbitration by emailing a demand to arbitrate to defendants’ attorney on December 4, 2019, only to be “ignor[ed]” by the latter. Doc. 52 at pars. 6-8. CPLR 7503(c) provides, in pertinent part, as follows:

(c) Notice of intention to arbitrate. A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. Such notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded.

It is beyond cavil that plaintiff failed to comply with the requirements of CPLR 7503(c). Initially, plaintiff’s purported demand to arbitrate fails to contain language advising defendants

that they had 20 days in which to move to stay arbitration. Additionally, since the demand for arbitration was emailed to defendants' attorney, plaintiff clearly failed to serve defendants "in the same manner as a summons or by registered or certified mail, return receipt requested." CPLR 7503(c). Therefore, plaintiff failed to properly commence an arbitration in accordance with the terms of the 11/6/19 stipulation. Doc. 53.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff CPM Builders, Inc. d/b/a MG and Company is denied in all respects; and it is further

ORDERED that this constitutes the decision and order of the court.

9/24/2020

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

KATHRYN E. FREED, J.S.C.

