SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

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FLOWCON, INC., d/b/a FLOWER CONSTRUCTION,

Plaintiff,

- v -

ANDIVA LLC, d/b/a Andiva L.L.C., JP MORGAN CHASE, f/k/a CHASE MANHATTAN BANK, MARATHON ENERGY CORP., d/b/a OLYMPIC FLAME FUEL OIL, and JOHN DOE 1 through JOHN DOE 100,

Defendants.

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INDEX NO.	157480/2020
MOTION DATE	
MOTION SEQ. NO.	001 & 002

DECISION + ORDER ON MOTIONS

HON. BARRY R. OSTRAGER

The Court held oral argument on Motions 001 and 002 on January 29, 2021 via Microsoft Teams. Based on the papers submitted and the argument on the record, the motions are resolved as set forth below.

This an action seeking to enforce a notice of mechanic's lien filed against the real property located at 117 East 64th Street, New York, New York 10065, also known as and by Block 1399 and Lot 7, and commonly referred to as the Andiva Townhouse Project (the "Property"). The lien was filed based on the alleged nonpayment of monies due for labor, services and materials that Flower Construction had furnished and supplied to improve the Properrty. Plaintiff initiated this action by Summons and Complaint, alleging a single cause of action for lien foreclosure. Plaintiff also initiated an arbitration proceeding before the American Arbitration Association ("AAA") based on the same facts. Defendant Andiva LLC ("Andiva")

answered the Complaint, alleged ten counterclaims, and filed a third-party Complaint against John Flower, the principal of plaintiff.

Andiva's counterclaims are: (1) Breach of Contract (Return of Deposit); (2) Breach of Covenant of Good Faith and Fair Dealing (Return of Deposit) (3) Unjust Enrichment (Return of Deposit); (4) Conversion (Return of Deposit); (5) Fraud (Return of Deposit); (6) Breach of Contract (Remediation of Defective Work); (7) Breach of Contract (Cost to Complete upon Termination for Cause); (8) Willful Exaggeration of Lien; (9) Slander of Title; (10) Lien Law Trust Fund Violations. The third-party Complaint alleges one count of Lien Law Trust Fund Violation against John Flower.

Before the Court are two motions: Motion 001 is by plaintiff Flowcon, for an order dismissing the counterclaims and third-party complaint asserted by Andiva in its entirety pursuant to CPLR § 7501, or, in the alternative, staying the instant action and compelling Andiva to arbitrate its counterclaims and third-party complaint, pursuant to CPLR § 7503, and awarding Flower Claimants costs and attorneys' fees necessitated by this motion; Motion 002 is by Andiva for an order dismissing or, alternatively, permanently staying the arbitration commenced by Flower in the AAA bearing Case No. 01-20- 0015-3807 (the "Arbitration") pursuant to CPLR 7502(a) and CPLR 7503(b).

Background

On July 19, 2016, Andiva engaged Flower Construction to perform renovations to their townhome pursuant to the AIA Document A134 – 2009 Standard Form of Agreement Between Owner and Construction Manager as Constructor (the "Contract"), the AIA Document A201 – 2007 (the "General Conditions") as modified and entered by and between Andiva and Flower Construction and the Rider thereto entered on November 4, 2019 (the "Rider" and collectively

with the Contract and General Conditions, being the "Agreement"). Pursuant to the Agreement, Flower Construction agreed to perform labor and furnish materials for the renovation of Andiva's townhouse located at 117 East 64 Street, New York, New York (the "Project"), and Andiva was to make periodic, timely payments on a cost plus fee basis.

Between July 19, 2016 and March 17, 2020, Flower Construction performed work and furnished materials to improve the Property. Plaintiff alleges that certain payments were made to Flower Construction by Andiva on account of said work, services and materials, leaving an unpaid balance due to Flower Construction of $691,789.13. On July 15, 2020, pursuant to the New York State Lien Law, Flower Construction filed a lien against the Property with the Clerk of the County of New York, which was entered and docketed against the Property (the "Lien"). In its Counterclaims, Andiva alleges that Flower Construction never earned the final payment under the Agreement insofar as Flower Construction was terminated for cause by virtue of its numerous material breaches of the Agreement. Andiva alleges that Flower Construction breached the Agreement by (1) doing defective and/or deficient work at the Property that requires replacement and/or remediation; (2) damaging existing work-in-place; and (3) otherwise failing to adhere to the requirements of the Agreement.

Both Flower Construction and Andiva purport to have cancelled the Agreement, and an issue exists as to which termination was operative.

Discussion

There is no dispute that plaintiff's lien foreclosure claim must be heard by this Court. Thus, the issues before the Court are (1) whether the Court or an arbitrator must determine the amount of the Lien and (2) which, if any, of Andiva's counterclaims must be heard by the Court and which, if any, may only be heard by an arbitrator pursuant to the parties' Agreement.

Although plaintiff commenced this action, which was necessary to extend the Lien, it is plaintiff's position that an arbitrator must determine the amount of the Lien and must hear all of Andiva's counterclaims and the third-party Complaint. Plaintiff relies on Article 9.2 of the Agreement, which provides that any claim not resolved by mediation shall be resolved by arbitration. The Agreement broadly defines a "claim" as "a demand or assertion by any of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term 'Claim' also includes other disputes and matters in question between [Andiva] and [Flower Construction] arising out of or relating to the Contract." *See* Section 15.1.1.

Plaintiff also argues that under the Agreement, questions of arbitrability are reserved for the arbitrator based on the express inclusion of AAA rules in the Agreement. *See* Section 15.4.1. While questions of arbitrability are typically for the Court to determine, the Appellate Division has held that where the parties expressly include the AAA rules in the contract – which say that the arbitrator determines arbitrability– the arbitrator may determine the proper scope of the arbitration. *See e.g. Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's,* 66 A.D.3d 495, 495-496 (1st Dept. 2009), *aff'd,* 14 N.Y.3d 850 (2010).

In support of its argument to stay this action in favor arbitration, plaintiff cites three cases in which an action to foreclose a mechanic's lien was stayed in favor of arbitration. *See Mancini v. Stern*, 28 Misc.2d 77 (Sup. Ct., Queens County, Nov. 3, 1960) (granting motion to stay action and compel arbitration because, *inter alia*, "the arbitrators' decision as to the value of the labor and materials is conclusive as to the validity of the mechanic's lien"); *Gotham Bldrs. Group LLC v. Orcher Realty LLC*, 2019 N.Y. Misc. LEXIS 6141 (Kings Cnty. 2019) (holding that while the foreclosure of a mechanic's lien cannot be arbitrated, the *amount* of the lien can be

arbitrated); *Burgart, Inc. v. Foster-Litkins Cor*p., 63 Misc. 2d 930 (Sup. Ct., Monroe Co, 1970), *aff'd* 38 A.D.2d 779 (4th Dept.), *aff'd* 30 N.Y.2d 901 (1972) (denying motion to stay arbitration, directing parties to proceed to arbitration, and staying the lien foreclosure action in its entirety).

In contrast, Andiva's position is that because the lien foreclosure cause of action must be heard by the Court, any claims that are inextricably intertwined with the lien foreclosure claim must also be heard by this Court. Andiva argues that all of its Counterclaims are inextricably intertwined with the lien foreclosure claim, including Andiva's alleged exaggeration of its lien counterclaim, because they relate to the proper amount of the Lien, and therefore must be heard by the Court. Andiva also argues that the third-party Complaint must be heard by the Court because John Flower is not a signatory to any arbitration agreement.

In support of its argument that the arbitration should be dismissed in favor of this action, Andiva cites First Department and New York Court of Appeals precedent holding that arbitration agreements are unenforceable where substantive rights, embodied by statute, express a strong public policy which must be judicially enforced. *See Harris v. Iannaccone*, 107 A.D.2d 429 (1st Dep't 1985). *See also Larrison v. Scarola Reavis & Parent LLP*, 11 Misc.3d 572, 577 (Sup Ct, NY Cty. 2005) *quoting Maross Construction v. Central New York Regional Transportation Authority*, 66 N.Y.2d 341, 345–46 (1985):

> Hence, where jurisdiction over a particular type of dispute is statutorily bestowed exclusively upon the courts, where judicial, as opposed to arbitral, enforcement of particular rights and prohibitions is mandated by public policy, an agreement to arbitrate will not be given effect by the courts. Otherwise, where no such conflict with law or public policy exists, the courts will enforce the parties' contractual decision to submit their disputes to arbitration. Moreover, while a specifically enumerated restriction upon arbitral authority will be upheld by the courts ..., no such limitation upon either factual or legal dispute resolution will be inferred from a broadly worded contractual provision expressly calling for the arbitration of all disputes arising out of the parties' contract.

Andiva argues that here, the legislature has directed that claims for willful exaggeration of mechanics' liens must be resolved by a court of law in connection with a trial of a mechanics' lien enforcement action. *See Degraw Construction Group, Inc. v. McGowan Builders, Inc.*, 178 A.D.3d 770 (2d Dep't 2019), ("[t]he Legislature intended the remedy in Lien Law § 39–a to be available only where the lien was valid in all other respects and was declared void by reason of willful exaggeration after a trial of the foreclosure action.") Thus, Andiva's eighth counterclaim for willful exaggeration of the Lien must be heard in Court. Andiva further argues that all of the counterclaims seeking recovery of the deposit (Counts 1 – 5), as well as the ninth counterclaim for slander of title and the tenth counterclaim for Lien Law Trust Fund Violations, directly relate to whether or not the Lien is exaggerated (leaving only counterclaims six and seven for breach of contract as arguably arbitrable).

Andiva argues that deposit counterclaims (1- 5) are related to the amount of lien because Flower Construction claimed that Andiva owed it $113,329.78 on June 22, 2020 and then filed a lien for $691,789.33 less than a month later. The difference between these two amounts is the deposit. Thus, the resolution of the issues concerning the deposit (as well as the propriety of the claim for retainage) will necessarily impact the final determination of the proper value of the Lien, if any, which is a determination that must be made by this Court, by law.

Andiva also argues that any resolution of those issues in the Arbitration would usurp this Court's sole statutory authority to determine the willful exaggeration claim and that this would prejudice Andiva because any such finding by an arbitrator may have preclusive *res judicata* and/or collateral estoppel effect on this Court with respect to the willful exaggeration claim.

Under the unusual circumstances in this action, the Court must balance the parties' freedom to agree to arbitrate against the parties' statutory right to have a lien foreclosure action

and, in turn, a willful exaggeration of lien counterclaim adjudicated by this Court. While plaintiff cited instances where an arbitrator was permitted to determine the amount of the lien (but not the foreclosure action), the Court notes that none of those cases are binding on this Court. The Court is persuaded – based on the present record – that defendant's counterclaims all relate to the value of the Lien and therefore must be heard in this Court, rather than arbitrated. However, the Court notes that it is difficult at this early to stage to discern whether Andiva's counterclaims all truly relate to the willful exaggeration of the lien counterclaim.

Accordingly, it is hereby

ORDERED that plaintiff's motion 001 to dismiss the counterclaims or compel arbitration is denied without prejudice to renewal after further developments and some discovery, and plaintiff's request for attorney's fees is denied; and it is further

ORDERED that Andiva's motion 002 to dismiss the arbitration is granted to the extent indicated by this Opinion and Order; and it is further

ORDERED that a preliminary conference is scheduled for April 6, 2021 at 10:00 am. The parties should meet and confer prior to the conference to set a discovery schedule using the Court's preliminary conference order form which can be found at https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/Part-61-Preliminary-Conference-Order.pdf/.

Dated: February 1, 2021

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	☐	**CASE DISPOSED**		☒	**NON-FINAL DISPOSITION**		
	☐	**GRANTED**	☐ **DENIED**	☒	**GRANTED IN PART**	☐	**OTHER**
APPLICATION:	☐	**SETTLE ORDER**		☐	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**		☐	**FIDUCIARY APPOINTMENT**	☐	**REFERENCE**