

Matter of 108 India St., LLC v Millington
2021 NY Slip Op 30765(U)
March 1, 2021
Supreme Court, Kings County
Docket Number: 514173/2020
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of March, 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

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In the Matter of the Application of 108 India Street, LLC,

Index No.: 514173/2020

Petitioner,

- against -

DECISION & ORDER

STEPHEN A. MILLINGTON AND KRISTINA
H. MILLINGTON (A/K/A KRISTINA H. LESKINEN)

Motion Sequence # 1

Respondents.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1-5, 9
Opposing Affidavits (Affirmations).....	12-18,
Reply Affidavits (Affirmations)	25-27,
Memorandum of Law	6, 19, 21

After a review of the papers and oral argument, the Court finds as follows:

Petitioner, 108 India Street, LLC (hereinafter the “Petitioner”) moves by Order to Show Cause for an order pursuant CPLR 7503 staying the arbitration commenced before the American Arbitration Association by Respondents Stephen A. Millington and Kristina H. Millington (a/k/a Kristina Leskinen) (hereinafter the “Respondents”). The Petitioner contends that its application to stay the arbitration should be granted as the parties have not agreed to arbitrate disputes arising under the Housing Merchant Implied Warranty. The Petitioner further contends that without such an agreement to arbitrate, the arbitration

brought by the Respondents is improper. Additionally, the Petitioner represents that after it had made repairs in relation to a number of outstanding issues raised in the initial arbitration demand, the Respondents amended their arbitration demand with new claims relating to HVAC and sound attenuation issues. The Petitioner argues that these additional claims are excluded from arbitration because they relate to the Housing Merchant Implied Warranty. The Respondents oppose this application and contend that they are permitted to address these issues in arbitration in accordance with and pursuant to the agreement between the parties.

The Petitioner apparently sold the Respondents a condominium unit located at 108 India Street, (Unit 2) Brooklyn, New York (the "Unit"). As part of this sale the parties entered into a purchase agreement dated September 20, 2019 (the "Purchase Agreement"). The Purchase Agreement contains an arbitration clause that provides in pertinent part as follows:

"In order to resolve any dispute, controversy, claim or question arising with respect to the Condominium (with the exception of disputes arising under the Housing Merchant Implied Warranty which may be brought by suit in court) or the Purchase Agreement, or to break any deadlock in voting, the parties shall submit such dispute or question to arbitration through the American Arbitration Association ("AAA"), which will give any party the rights he is entitled to under New York law."

The Petitioner contends that a demand for arbitration was filed and served by the Respondents relating to outstanding repairs in the unit. The Petitioner argues that many of these claimed outstanding repairs had been completed as part of a punch list. The Petitioner further represents that what remained were allegations by the Respondent involving water leaks in the Unit. The Petitioner further contends that the Respondents have improperly sought to resolve disputes relating to the Housing Merchant Implied Warranty by means of arbitration and that such a dispute must be made before the Court. The Petitioner also points to the Respondents having amended their arbitration demand. Specifically, the Petitioner contends that the Amended Arbitration Demand "removes the Respondents' claims for the Punch List,

reasserts the claims for the leaks and otherwise alleges new claims not contained in the original Demand, viz., mold, ant infestation, mechanical (HVAC) and sound attenuation issues.” (See Petition Paragraph 27). The Petitioner argues that the Respondents have improperly amended their arbitration demand to include new claims relating to HVAC and sound attenuation defects that necessarily relate to the Housing Merchant Implied Warranty and that these claims are explicitly excluded from arbitration under the Purchase Agreement.

The Respondents oppose the application and argue that it should be denied. The Respondents contend that since purchasing the Unit they have had to address a number of repair issues with the Petitioners. They allege that they have had limited success in this endeavor. While the Respondents do acknowledge that some repairs have been made, they contend that some repairs have not been completed and that the repairs made only occurred after the Respondents persisted in their complaints. The Respondents further argue that there continues to be water related damage and other issues to be repaired in the Unit and that the Purchase Agreement does not prevent them from seeking to have these issues resolved by means of arbitration. The Respondents aver that the Amended Arbitration Demand was made as a result of mold and water testing conducted by the waterproofing engineering firm of LPE Engineering, P.C. (“LPE”). They explain that this testing took place in the Unit after the initial Arbitration Demand was made. The Respondents also provide that the Amended Arbitration Demand was made in an effort to respond to a demand made by the Petitioner to remove certain parties, other than the Petitioner, from the arbitration. Finally, the Respondents argue that the language in the Purchase Agreement gives the them the option to bring the subject claims before the Court but that they have elected to have their claims resolved by arbitration.

“It is well settled that a party cannot be compelled to submit to arbitration unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute.” *Am.*

Centennial Ins. Co. v. Williams, 233 AD2d 320, 320, 649 N.Y.S.2d 190, 190 [2d Dept 1996]. “The construction and interpretation of an unambiguous written contract is an issue of law within the province of the court, as is the inquiry of whether the writing is ambiguous in the first instance.” *Katina v. Famiglietti*, 306 AD2d 440, 441, 761 N.Y.S.2d 327, 329 [2d Dept 2003].

Turning to the merits of the Petitioner’s application made pursuant to CPLR 7503, the Court finds that the application for a stay is denied and that the Respondents may proceed with the arbitration. “Since arbitration is a creature of contract, the courts may inquire into whether the parties have agreed to arbitrate the particular dispute.” *Matter of We’re Assocs. Co.*, 163 AD2d 393, 394, 557 N.Y.S.2d 930, 931 [2d Dept 1990]. The Petitioner contends that by filing an Amended Arbitration Demand the Respondents have “attempted to circumvent the limited arbitration clause by amending their demand to assert different claims outside the scope of the arbitration clause.” (See Reply Memorandum, Page 2). However, the arbitration clause that is contained in the Purchase Agreement provides that a party to the agreement may seek to have a dispute resolved in Court. This language, however, serves to afford an option. “The use of the word ‘may’ in this Section unequivocally provides the parties with the non-mandatory, permissive choice to pursue equitable relief in court or arbitration; it is not, as Respondent incorrectly asserts, a ‘carve-out’ and it does not deprive the AAA of jurisdiction to arbitrate any dispute as mandated in that broad-form arbitration clause.” *Cenni v. Cenni*, No. 652201/2018, 2018 WL 5281815, at 2 (N.Y. Sup. Ct. Oct. 24, 2018); *see also Baldwin Tech. Co., Inc. v. Printers’ Serv., Inc.*, No. 15 CIV. 07152 (GBD), 2016 WL 354914 (S.D.N.Y. Jan. 27, 2016).

It is clear to this court that in the instant matter the Purchase Agreement provides that any dispute, controversy, claim or question arising with respect to the Condominium shall be arbitrated except for disputes arising under the Housing Merchant Implied Warranty which may, but do not have to be addressed in court. As a result, the Respondent is not barred from electing to address disputes related to

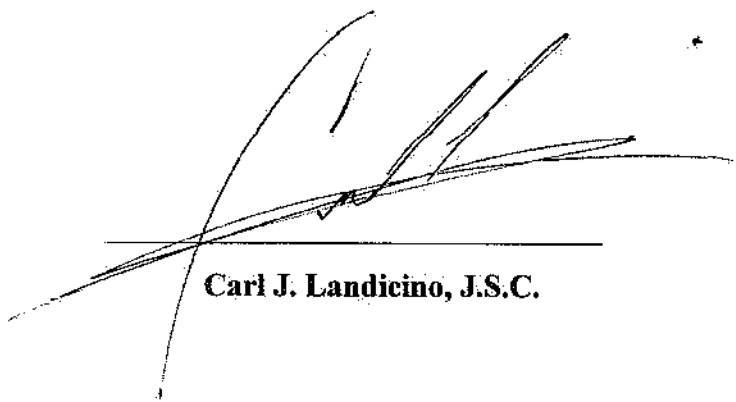
the Housing Merchant Implied Warranty by means of arbitration. The Petitioner's application to stay the subject arbitration is accordingly denied.

It is hereby ORDERED as follows:

Petitioner's application (motion sequence #1) to stay the subject arbitration pursuant to CPLR 7503 is denied and the Petition is dismissed.

This constitutes the Decision and Order of this Court.

ENTER:



Carl J. Landicino, J.S.C.

RECEIVED NYSCEF: 03/10/2021