

277 E. 7th St. Condominium v 277 E. 7th St., LLC

2021 NY Slip Op 30825(U)

March 9, 2021

Supreme Court, New York County

Docket Number: 654292/2018

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK

PART IAS MOTION 38EFM

Justice

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INDEX NO. 654292/2018

THE 277 EAST 7TH STREET CONDOMINIUM,

MOTION DATE 04/08/2020

Plaintiff,

MOTION SEQ. NO. 002

- v -

277 EAST 7TH STREET, LLC,

DECISION + ORDER ON MOTION

Defendant.

-----X

277 EAST 7TH STREET, LLC,

Third-Party
Index No. 595058/2019

Plaintiff,

-against-

TRINITY BUILDERS OF NEW YORK, INC.,

Defendant.

-----X

277 EAST 7TH STREET, LLC,

Second Third-Party
Index No. 595761/2019

Plaintiff,

-against-

EISNER DESIGN, LLC,

Defendant.

-----X

277 EAST 7TH STREET, LLC,

Third Third-Party
Index No. 595596/2020

Plaintiff,

-against-

BRILLIANT CONSTRUCTION INC., BRILLIANT 2000 CORP.,
BRILLIANT CONSTRUCTION CORP., PROMONTE
CONSTRUCTION INC., REDIZ CONSTRUCTION INC., and
NETT PROJECT LLC,

Defendants.

-----X

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 69, 70, 71, 72, 73, 74, 75, 76, and 77

were read on this motion to COMPEL ARBITRATION.

Upon the foregoing documents, the motion of second third-party Defendant Eisner Design, LLC (“Eisner”) to compel arbitration is denied, in accord with the following memorandum decision.

Background

Plaintiff 277 East 7th Street Condominium Association Inc. (“Plaintiff”) is a not-for-profit corporation that owns real property located at 277 East 7th Street, New York, New York, on which is situated a building known as the 277 East 7th Street Condominium (the “Condominium”) (complaint ¶¶ 1-2, NYSCEF Doc 1). Defendant 277 East 7th Street, LLC (the “277 East”) acted as sponsor for the development of the Condominium (*id.* ¶¶ 4-5). Pursuant to separate agreements with 277 East, third-party defendant Trinity Builders of New York Inc. (“Trinity”) acted as the general contractor for the Condominium project, and Eisner acted as architect. Third third-party defendants Brilliant Construction Corp., Promonte Construction Inc. (“Promonte”), Rediz Construction Inc. (“Rediz”), and Nett Project LLC (“Nett”) acted as subcontractors on the Condominium project, pursuant to agreements with Trinity. Third third-party defendants Brilliant 2000 Corp. and Brilliant Construction Inc. are purported alter-egos of Brilliant Constriction Corp.

On August 29, 2018, Plaintiff commenced this action to recover for damages to the Condominium caused by water leaks that Plaintiff alleges were caused by 277 East’s failure to construct the building in accordance with all applicable building codes, plans, and specifications

as required by the contract between Plaintiff and 277 East (*id.* ¶¶ 15-20). The complaint alleges that the Condominium has suffered water damage from persistent leaking from several sources, including from gaps in the roof membrane, a missing skirt piece, lack of waterproofing in the roof, aluminum copings on the roof that were improperly fastened with screws driven into wooden boards, lack of waterproofing for the bulkhead door on the roof, improper pitch of the balconies of the apartments, and an improperly installed Exterior Insulated Finishing System (*id.* ¶ 19).

Defendant 277 East appeared in the action by filing an answer on October 31, 2018 (NYSCEF Doc 4). On January 22, 2019, 277 East commenced a third-party action against Trinity, asserting causes of action for common law indemnification, contractual indemnification, negligence, breach of contract for failure to procure insurance coverage naming 277 East as an additional insured, and contribution (NYSCEF Doc 5). On September 5, 2019, 277 East commenced a second third-party action against Eisner asserting causes of action for common law indemnification, contractual indemnification, negligence, breach of contract for failure to procure insurance coverage naming 277 East as an additional insured, and contribution (NYSCEF Doc 30). Finally, on March 2, 2020, 277 East commenced a third third-party action against the Brilliant entities, Promonte, Rediz, and Nett, asserting causes of action for common law indemnification, contractual indemnification, negligence, breach of contract for failure to procure insurance coverage naming 277 East as an additional insured, and contribution (NYSCEF Doc 49).

On May 17, 2019, Trinity appeared in the first third-party action by filing a motion to compel arbitration of the claims alleged in the action, under the terms of the agreement between the 277 East and Trinity. Pursuant to an order and decision of this court, the motion was denied

chiefly because, “pursuant to the AIA contract between 277 East and Trinity, dated August 1, 2013 (NYSCEF Doc. No. 19), the entity identified as the ‘Initial Decision Maker’ – an integral part of the arbitration scheme fixed in that agreement – would be none other than Eisner Design, LLC (‘Eisner’), a party defendant in this action” (NYSCEF Doc 65 at 2). Additionally, this court added that, to sever the action for arbitration “would be to create an unworkable fracture between the various parties to this lawsuit, all involving a single set of underlying factual circumstances” (*id.*). Citing to *McGorman v Motor Vehicle Accident Indem. Corp.* (29 AD2d 528, 528 [1st Dept 1967]), this court further noted that if the motion to compel arbitration was granted, 277 East and other parties “would have to juggle . . . different, and possibly inconsistent, forums (one judicial and one arbitral), involving, quite probably, shared issues of fact and law” (*id.*).

Eisner now moves to compel arbitration in the second third-party action, pursuant to the terms of the agreement between it and 277 East (the “Agreement”). An arbitration clause in the Agreement provides the following:

any claim, dispute or other matter in question arising out of or related to this Agreement subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of this Agreement.

(NYSCEF Doc 59 § 8.3.1.) Eisner moves to compel arbitration of the claims asserted against it on the grounds that the agreement to arbitrate is “clear, explicit and unequivocal, and the evidence shows that the parties intended to be bound by it” (NYSCEF Doc 62 at 2). Defendant 277 East concedes that the Agreement contains an arbitration clause, but opposes on the grounds that its claims against Trinity and the subcontractors are inextricably intertwined with its claims against Eisner because “they both arise out of alleged negligence in design and construction of

the Condominium building” (NYSCEF Doc 69 ¶ 21). In reply, Eisner argues, *inter alia*, that 277 East will not be prejudiced by being compelled to arbitrate because issue has not been joined in the second third-party action and that arbitration does not present a risk of inconsistent verdicts because Eisner is only a party to this second third-party action and not the case-in-chief or other third-party actions. Additionally, Eisner contends that, because it is only in privity with 277 East, neither Plaintiff nor any other party in this action may allege a direct claim against it and must instead “seek recovery against Third-Party Plaintiff [i.e., 277 East], who in turn may seek contractual indemnity or breach of contract against EISNER DESIGN LLC at arbitration after the underlying direct claim has been resolved” (NYSCEF Doc 72 at 15 ¶ 15).

Discussion

This court’s “long-standing rule” is that “an arbitration clause in a written agreement is enforceable . . . when it is evident that the parties intended to be bound by the contract” (*God’s Battalion of Prayer Pentecostal Church, Inc. v Miele Assocs., LLP*, 6 NY3d 371, 373 [2006]). However, claims that are “inextricably intertwined” should be resolved in the same action in the same forum (*Young v Jaffe*, 282 AD2d 450, 450-451 [2d Dept 2001]; *Brennan v A.G. Becker, Inc.*, 127 AD2d 951 [3d Dept 1987]). As this court noted in its prior decision denying Trinity’s motion to compel arbitration, shared issues of fact and law exist across the case-in-chief and the three third-party actions. In particular, questions of fact exist regarding whether the water leaks that purportedly caused damage to the Condominium were caused by flawed design, construction, or other causes. Resolution of these questions will necessarily involve Eisner, Trinity, and the subcontractor defendants.

In the absence of a contractual agreement to arbitrate, a party cannot be compelled to arbitrate (*God’s Battalion of Prayer Pentecostal Church, Inc. v Miele Assocs., LLP*, 6 NY3d 371,

374 [2006]). Because the contracts at issue in the case-in-chief and the third third-party action do not contain contractual agreements to arbitrate, the parties in those proceedings cannot be compelled to arbitrate, and this court has already declined to compel the parties in the first third-party action to arbitrate. Thus, this court is the only forum where all of the inextricably intertwined claims among these parties arising from the Condominium project may be tried together. Therefore, the motion to compel arbitration is denied. As noted in this court’s prior decision, to hold otherwise would “create an unworkable fracture between the various parties to this lawsuit,” and would prolong the litigation and invite an inconsistent result from the arbitration forum.

Accordingly, it is

ORDERED that the motion to compel arbitration is denied; and it is further

ORDERED that third-party defendant Eisner shall file an answer to the third-party complaint within 20 days of filing of this order; and it is further

ORDERED that a status conference will be held in this matter via Microsoft Teams on April 7, 2021 at 12:00 p.m.

This will constitute the decision and order of the court.

ENTER:



<u>3/9/2021</u> DATE			<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE