| **Concrete Structures Inc. v Armory Bldr. III, LLC.** |
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| 2022 NY Slip Op 30064(U) |
| January 10, 2022 |
| Supreme Court, Kings County |
| Docket Number: 508000/20 |
| Judge: Leon Ruchelsman |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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CONCRETE STRUCTURES INC.,
Plaintiff, Decision and order

- against - Index No. 508000/20

ARMORY BUILDER III, LLC.,
Defendant, January 10, 2022
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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §7510 seeking to confirm an arbitration award. The defendant has cross-moved seeking to transfer this matter to a pending matter in Suffolk County and alternatively to vacate the arbitration award. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On July 24, 2019 the defendant hired the plaintiff to engage in construction work at three buildings known as the Bedford Union Armory located at 1089 President Street in Kings County. On March 30, 2020 the plaintiff did not send any workers to the site and did not send any workers the entire week. The Plaintiff sent a reduced work force on April 6, 2020, however, by this time the defendant terminated the plaintiff's contracts. On April 9, 2020 the plaintiff commenced this action alleging that they had been wrongfully terminated and asserted causes of action for specific performance, breach of contract, wrongful termination,

breach of good faith and fair dealing and for an injunction. On May 15, 2020 the parties stipulated to resolve this dispute with arbitration. On November 22, 2021 an arbitration panel concluded the plaintiff's termination was not warranted and issued a decision finding that the defendant owed the plaintiff $1,092,757.82, together with interest at the judgment rate of nine percent per annum calculated from April 6, 2020. On December 8, 2021 the defendant commenced an action in Suffolk County entitled *Armory Builder III LLC v. Concrete Structures Inc.*, (Index Number 622802/2021) seeking to vacate the arbitration award. The plaintiff has now moved seeking to confirm the arbitration award and the defendant has opposed that request as noted and seeks to transfer this case to the Suffolk County action or to vacate the award.

## Conclusions of Law

CPLR §7502(a)(1) states that "a special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action" (id). The defendant asserts that while this action was commenced first, the statute affords a party the choice whether to proceed by special proceeding or to file a motion in a pending action. Specifically, the defendant argues

the language of CPLR §7502 when contrasted with the language of CPLR §7503 compels the conclusion such choice exists. CPLR §7503(a) states that "if an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action" (id). However, the language of CPLR §7502, argues the defendant, is equivocal wherein it merely states that "a special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action" (id). The defendant insists that "the phrase 'which is not made' in CPLR §7502(a) gives litigants the option of proceeding by special proceeding or through motion in a pending action" (Memorandum of Law in Support of Cross-Motion, page 7). Further, the defendant notes that "had the Legislature intended to require that the first application regarding an arbitrable controversy be brought only in a pending action, it could have crafted the statute to so require, as it did with CPLR §7503" (id).

It is true the two statutes are phrased differently, however, that difference cannot compel the defendant's arguments they had the right to commence a special proceeding while this action exists and existed prior to the Suffolk County action. The above language regarding CPLR §7503 concerns a motion made to

compel arbitration where a party has chosen to proceed in court instead. In that situation the statute requires a motion to compel to be made in the court that has acquired jurisdiction over the matter. Indeed, there is really no other venue where such motion to compel could possibly be made. It would make no sense allowing a party to institute a new lawsuit merely to move to compel arbitration where an existing lawsuit already provides the avenue for such relief. However, CPLR §7502(a) merely provides that unless a motion can be made in a pending action then any application, termed the "first application" can be made by special proceeding. Notwithstanding the different phraseology no such choice exists and if an action is pending a motion must be brought in that action. The Practice Commentaries support this understanding. The Commentaries state that "unless a related action is already pending, the first application to a court with respect to arbitration is to be prosecuted in the form of a special proceeding. CPLR §7502(a). This will ensure that arbitration-related disputes are resolved in a relatively expeditious manner" (see, Practice Commentaries by Vincent Alexander). Further, in In re Gleason (Michael Vee Ltd.), 96 NY2d 117, 726 NYS2d 45 [2001] the court explained that amendments enacted regarding CPLR §7502(a) were designed to insure "that all arbitration-related applications should be concentrated in a

single proceeding or action, to promote judicial economy and prevent forum shopping" (id). Therefore, where an action is already pending, as in this case, a party is not given a choice where to file any motion, rather, the motion, any motion, must be filed in the venue where the action is already pending. Therefore, the motion seeking to transfer the matter to Suffolk County is denied.

Turning to the motions seeking to confirm and alternatively vacate the arbitration award, CPLR Article 75 establishes mechanisms for court confirmation, vacatur, modification, and enforcement of arbitration awards. The Article states that a "court shall confirm an award upon application of a party ...unless the award is vacated or modified upon a ground specified in section 7511"(CPLR §7510). Where no such grounds exist, a "judgment shall be entered upon the confirmation of an award" (CPLR §7514(a)). Thus, to overturn an arbitration award the party maintains a heavy burden and must establish such vacatur by clear and convincing evidence (Jurcec v. Moloney, 164 AD3d 1461, 84 NYS3d 433 [2d Dept., 2018]). CPLR §7511 present four grounds for vacatur of an arbitration award. They are, corruption, fraud or misconduct in procuring the award, partiality of an arbitrator appointed as a neutral, an arbitrator, or agency or person making the award exceeded his

power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made or the failure to follow the procedure of CPLR Article 75.

The defendant argues the arbitration award ignored the clear meaning of contract terms and made a determination in manifest disregard of the law. There is no dispute that the termination of CSI occurred at around the same time as the COVID-19 pandemic spread in late March and early April 2020. The defendant argues the arbitration panel "effectively created a new contract for the parties containing a novel "disruption, fear and misinformation" basis for non-performance that they must have perceived was occurring in New York generally as a result of the virus" (see, Memorandum of Law in Support of Cross-Motion, page 18). This impermissible conclusion expanded the contractual basis which excused CSI's performance and was therefore improper. The defendant further explains that while the contract did contain a force majeure provision, the arbitration panel relied upon that legal expedient improperly, effectively re-writing the contract without any authority. Consequently the award must be vacated.

However, a review of the actual arbitration award reveals that its conclusion was not based upon any COVID-19 force majeure basis at all. The arbitration decision admits that the arbitration panel did "not believe that COVID-19 played a

critical role in the resolution of this matter" (see, Final Award, November 22, 2021, page 4). Further, far from creating a new standard called 'disruption, fear and misinformation' to excuse CSI's non-performance, as argued by the defendant, the panel found the exact opposite noting that "the Panel concludes that there was sufficient disruption, fear and misinformation in the first weeks of the pandemic that a termination on that ground alone, for that one week of confusion, would have been inappropriate" (id). Thus, clearly, the panel did not base it's decision upon any new interpretation of contract provisions or upon an unfounded expansion of any force majeure provision in particular. Rather, the panel concluded the sole basis the termination of CSI was improper was due to the fact the claims of under-manning charged against CSI were unfounded. The panel explained in great detail that while the defendant repeatedly and consistently complained CSI under-manned the project they rarely instructed where extra workers could be found to work. This was particularly true, noted the panel, because CSI was delayed in excavation work by soil testing that was necessary, by pumping out water from open downspouts left uncorrected by the defendant and by a stop work order due to the engineer's faulty design. Further delays were caused by structural issues regarding the pool in one of the buildings and redesigns. The panel noted that "despite repeated claims that CSI was delaying the job by months

and months, Armory did not offer any testimony detailing how any specific acts or omissions by CSI delayed the critical path of the Project and, if so, by how much. Moreover, without a useable baseline schedule against which to measure delay, any such calculation of critical path delays was futile. Armory did not present a credible delay impact analysis or any expert witness on the subject of the cause or duration of delay(s) to the Project. It offered no more than vague and imprecise guesses of the impact of CSI's supposed delays" (id). The panel concluded that the defendant failed to satisfy its burden necessary to establish CSI breached any of its contracts sufficient to warrant a termination. Therefore, the panel concluded that "Armory's termination of CSI for cause was not warranted" (id).

Therefore, it is difficult to discern, considering the panel's actual decision, how the panel engaged in any improper misinterpretation of the contract or ignored contract terms or created new contract terms. Although the panel decision did mention COVID-19, the basis for the award was not based on COVID-19 at all, but rather on matters that had nothing whatsoever to do with COVID-19. The defendant's insistence the arbitration panel impermissibly excused CSI for unfounded COVID-19 fears is simply not supported by a fair reading of the actual panel decision.

Thus, the defendant has not presented any reason why the arbitration award should be vacated. There is no basis to conclude the determination was arbitrary or contrary to well established law (Brisman v. Hebrew Academy of Five Towns & Rockaway, 70 AD3d 935, 895 NYS2d 482 [2d Dept., 2010]). Indeed, other than the reasons presented above, which the court rejected, no other errors have been raised. Further, this court may not second guess or attempt to impose its own opinion upon the arbitration's conclusions. As the court stated in Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 NY3d 471, 813 NYS2d 691 [2006], citing, Matter of Sprinzen [Nomberg], 46 NY2d 623 [1979] "the courts should not assume the role of overseers to mold the award to conform to their sense of justice" (id).

Therefore, based on the foregoing, the motion seeking to confirm the arbitration award is granted and the motion seeking to vacate such award is denied.

So ordered.

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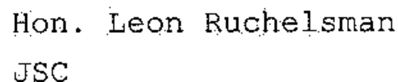

DATED: January 10, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC