

**Metro-Tech Erectors, Corp. v Whitestone Constr. Corp.**

2022 NY Slip Op 30422(U)

February 3, 2022

Supreme Court, New York County

Docket Number: Index No. 453877/2021

Judge: Melissa A. Crane

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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. MELISSA CRANE PART 60M

Justice

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METRO-TECH ERECTORS, CORP.

Plaintiff,

- v -

WHITESTONE CONSTRUCTION CORP., et al.

Defendants.

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INDEX NO. 453877/2021
MOTION DATE 1/27/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 102-147, were read on this motion to/for STAY

This action concerns the construction of a new building at the New York City College of Technology in Brooklyn, New York (the Project). Defendant Whitestone Construction Corp. (Whitestone or Contractor) was the project's general contractor. Whitestone engaged plaintiff (MT or Subcontractor) to perform building exterior work as a subcontractor. Defendant F.J. Sciame Construction Co. (Sciame) was the project's construction manager and defendant City University Construction Fund (CUCF) was the owner.

In Motion Seq. No. 001, plaintiff seeks the following relief: (1) an injunction staying the arbitration proceeding that Whitestone commenced against plaintiff; (2) leave to file a third amended complaint adding four new causes of action against "up-stream" defendants Sciame and CUCF for failure to procure a payment bond under State Finance Law § 137 and breach of a related payment guarantee; and (3) to join this action for trial and discovery with the prior related case commenced by Whitestone against Sciame and other defendants, Whitestone Constr. Corp. v F.J. Sciame Constr. Corp., Index No. 654109/2019.

The court notes that plaintiff discontinued this action against defendant City University of New York (CUNY) after oral argument was held, therefore all relief relating to CUNY is denied as moot. In addition, the court denied the cross motion (MS 01) of defendants Sciamé, CUCF, and CUNY at oral argument as it was procedurally defective.

### **Background and Procedural History**

In January 2021, plaintiff filed its first mechanic's lien in connection with the Project in the amount of \$997,460.55 for labor and materials allegedly due and payable as of September 16, 2019. Whitestone discharged that lien by filing a discharge bond from defendant Liberty Mutual Insurance Co. (Liberty Mutual) as surety. Plaintiff filed a second mechanic's lien in April 2021 in the amount of \$1,240,192.16 for labor and materials allegedly due and payable as of March 31, 2021. Whitestone also filed a bond discharging the second lien.

In the operative pleading, plaintiff's second amended complaint, it seeks the following: (1) damages for breach of the sub-contract against Whitestone; (2) damages under a theory of quantum meruit against Whitestone; (3) to foreclose on the first lien against Liberty Mutual; (4) to foreclose on the second lien against all defendants; and (5) to recover \$2,237,653.71 against unknown sureties for a Payment Bond procured under State Finance Law (SFL) § 137<sup>1</sup> (*see* Doc 10).

In connection with this motion, plaintiff seeks leave to serve a third amended complaint modifying the fourth cause of action [foreclosing on the second lien] to be directed at only Liberty Mutual (Doc 38 [proposed third amended compl.]). Additionally, plaintiff seeks to add the following new causes of action: (6) damages against CUCF for failure to obtain a Payment Bond under SFL § 137; (7) damages against CUCF under the contractual payment guarantee in

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<sup>1</sup> There was no payment bond obtained in connection with this Project.

the prime contract; (8) damages against Sciame for failure to obtain a Payment Bond under SFL § 137; (9) damages against Sciame under the contractual payment guarantee in the prime contract; and (10) damages against Whitestone for failure to obtain a Payment Bond under SFL § 137.

### Discussion

#### 1. *Plaintiff's application to stay the Contractor-Subcontractor arbitration*

Plaintiff argues that the subcontract is ambiguous with respect to the definition of “Claims Relating to Owner,” “Claims Relating to Contractor,” and how the arbitration provision in Article 33 operates. Whitestone argues that the motion to stay arbitration is procedurally defective and, in the alternative, that the arbitration provision is broad and not ambiguous.

Preliminarily, the court rejects Whitestone’s erroneous argument that a stay of arbitration is impermissible under CPLR 7503 because it moved to compel arbitration before plaintiff made this motion to stay the arbitration. Plaintiff previously sought this relief before any motion to compel was filed.

“CPLR 7501 provides, ‘A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable . . . and confers jurisdiction on the courts of the state to enforce it.’ Furthermore, ‘[w]here there is no substantial question whether a valid agreement was made or complied with . . . the court shall direct the parties to arbitrate.’ Thus, it is for the courts to determine, in the first instance, whether the parties have entered into a binding agreement to arbitrate” (*Liberty Mgt. & Const. Ltd. v Fifth Ave. & Sixty-Sixth St. Corp.*, 208 AD2d 73, 77 [1st Dept 1995] [internal citations omitted]). “[T]he judicial inquiry ends once it is determined that a valid agreement to arbitrate exists and that the matter in controversy falls within the scope of the agreement” (*id.* at 80).

There is no dispute that plaintiff and Whitestone agreed to arbitrate, at least, “Claims Relating to Contractor” within the meaning of the subcontract. Section 33.3 states “Any and all disputes between or among the parties which may arise under or pertain to this Agreement, shall, if Contractor decides (at its sole option) be decided by arbitration in New York County pursuant to the Construction Industry Dispute Resolution Procedures of the American Arbitration Association then in affect [sic].” However, the subcontract contains ambiguities that prevent this court from finding that the matter in controversy falls within the scope of a valid agreement to arbitrate.

Section 33.1.1 of the subcontract defines “Claims Relating to Owner” [Owner meaning Sciame, the construction manager] as “all claims for which the Owner is or may be liable.” For those claims, plaintiff is obligated to follow the procedures set forth in Sections 33.1.2 through 33.1.6.<sup>2</sup> Under § 33.1.3, “the Contractor, at its option, may address [a properly noticed Claim Relating to Owner] by permitting the Subcontractor to prosecute it directly against the Owner, in the name of the Contractor, for the use and benefit of the Subcontractor, or by presenting such claims itself on behalf of the Subcontractor, in the manner provided in the Contract Documents [e.g., the prime contract] for the prosecution of like claims by the Contractor against the Owner.” Section 33.2 defines “Claims Relating to Contractor” as “all claims for which the Owner is not or may not be liable.”

Section 33.3 [“Legal Forum”] states:

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<sup>2</sup> Those sections of Article 33 explain the notice requirements for all “Claims Relating to Owner” [§ 33.1.2]; the manner of prosecuting Claims Relating to Owner [§ 33.1.3]; plaintiff’s duty to cooperate with Whitestone when Whitestone elects to pursue plaintiff’s Claims Relating to Owner [§ 33.1.4]; limitations on Whitestone’s liability for Claims Relating to Owner that are not pursued by plaintiff [§ 33.1.5]; and that all disputes and claims pertaining to plaintiff’s work on the project “in which the Owner [Sciame] is involved” are governed by Article 33.

“Any and all disputes between or among the parties which may arise under or pertain to this Agreement, shall, if Contractor decides (at its sole option) be decided by arbitration in New York County pursuant to the Construction Industry Dispute Resolution Procedures of the American Arbitration Association then in affect [sic] . . . .

Contractor and Subcontractor's expressly agree that any arbitrators shall not have jurisdiction to determine and decide the issue of whether a dispute concerns ‘Claims Relating to Owner.’ ”

“Although no particular wording is required to constitute a valid, binding arbitration agreement, . . . the language used must be clear and unambiguous” (*Lovisa Const. Co., Inc. v Suffolk County*, 108 AD2d 791, 792 [2d Dept 1985], citing *Matter of Waldron v Goddess*, 61 NY2d 181, 183 [1984]). Here, although the parties agreed to arbitrate all claims arising under the subcontract at Whitestone’s option, their express exception that “any arbitrators shall not have jurisdiction to determine and decide the issue of whether a dispute concerns ‘Claims Relating to Owner’ ” renders the arbitration provision unenforceable at this juncture. The agreements definitions of “Claims Relating to Owner” and “Claims Relating to Contractor” are nebulous, at best, and it is far from clear that “the matter in controversy falls within the scope of the agreement.” The subcontract and the prime contract are silent as to who, if not an arbitrator, is authorized to determine whether a claim is one “Relating to Owner” or to Whitestone.

Plaintiff has established that an injunction staying the arbitration is appropriate under CPLR Article 63 to maintain the status quo. It has established, at least, a likelihood of success on the merits to the extent that the arbitration provision is vague and unenforceable. Further, plaintiff will be irreparably harmed if it is compelled to arbitrate its claims where there is no valid arbitration provision (*see e.g. Maryland Cas. Co. v Realty Advisory Bd. on Labor Relations*, 107 F3d 979, 985 [2d Cir 1997]). Whitestone cites no law in support of its argument

that plaintiff would not be irreparably harmed, and cites no law supporting its contention that it would be prejudiced by the injunction. The balance of the equities favors plaintiff.

Accordingly, Motion Seq. No. 01 is granted to the extent that the arbitration proceeding between Whitestone and Metro-Tech is stayed pending the resolution of this litigation.

2. *Plaintiff's application for leave to file a third amended complaint*

Plaintiff next seeks leave to serve a third amended complaint modifying its fourth causes of action and adding four new causes of action. Plaintiff's motion is granted with respect to modifying the fourth cause of action to foreclose on the second mechanic's lien. The motion for leave to amend is otherwise denied.

Although leave to amend should be freely given in the absence of prejudice or surprise to the opposing party, the motion should be denied where the proposed amendment is palpably insufficient or patently devoid of merit (CPLR 3025 [b]; *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]).

In its proposed sixth cause of action, plaintiff seeks to assert a claim for damages against CUCF for failure to obtain a Payment Bond under SFL § 137. Plaintiff seeks to assert the same claim against Sciame in the proposed eighth cause of action and against Whitestone in the proposed tenth cause of action. These amendments are without merit because SFL § 137 does not confer an express private right of action (*Diontech Consulting, Inc. v New York City Hous. Auth.*, 2009 N.Y. Slip Op. 33312[U] [Sup Ct, NY County 2009], *affd* 2010 NY Slip Op. 08440 [1st Dept 2010]; *Aldo Frustaci Iron Work, Inc. v Promotech, Inc.*, Index No. 601278/2000 [Sup Ct, NY County Oct. 24, 2001] [Ramos, J.] [noting in a similar situation where a bond was not procured under § 137 that “[a] private right of action would be inconsistent with the legislative intent and the scheme behind State Finance Law section 137”]; *see also New York Wheel Owner*

*LLC v Mammoet Holding B.V.*, 481 F Supp 3d 216, 240 [SDNY 2020] [concurring with *Diontech Consulting and Aldo Frustaci Iron Work*]).

In its proposed seventh and ninth causes of action, plaintiff seeks to hold CUCF and Sciame liable under the contractual payment guarantee provision of the prime contract. In Article 11.6 of the prime contract, CUCF issued a payment guarantee for the benefit of the Project's subcontractors in place of a payment bond pursuant to SFL § 137 (Doc 61 [prime contract]). CUCF agreed "[t]he payment guarantee made pursuant to this Article 11.6 shall be construed in a manner consistent with Section 137 of the State Finance Law and shall afford to persons furnishing labor or materials to the Construction Manager or its Subcontractors in the prosecution of the Work under this Agreement all of the rights and remedies afforded to such persons by such section, including but not limited to, the right to commence an action against CUCF on the payment guarantee provided by this Article within the one year limitations period set forth in Section 137."

Leave to amend is denied with respect to the proposed ninth cause of action against Sciame because Sciame did not issue any payment guarantee under the applicable agreements. Leave to amend is granted, however, with respect to the proposed seventh cause of action against CUCF because there is an issue of fact whether plaintiff provided timely, valid notice of its payment guarantee claim (*see* Doc 146 [plaintiff's 10/19/2020 demand letter]).

3. *Plaintiff's application to join this action with the Whitestone action*

True consolidation of the two actions is not appropriate. Plaintiff's motion is granted to the extent that this action will be joined with the related *Whitestone* Action for the purposes of joint discovery and trial only.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that Motion Sequence No. 001 is granted in part and denied in part; and it is further

ORDERED that plaintiff's motion is granted to the extent that the arbitration proceeding demanded by defendant Whitestone is stayed pending the resolution of this action pursuant to CPLR 7503; and it is further

ORDERED that plaintiff's motion for leave to amend the complaint is granted to the extent that plaintiff may file a third amended complaint that includes the proposed modification to the fourth cause of action and adds the new proposed seventh cause of action against defendant CUCF (in the form provided in Doc 38). Plaintiff's motion for leave to amend the complaint is otherwise denied; and it is further

ORDERED that plaintiff's motion is granted to the extent that this action is joined only for the purposes of joint discovery and joint trial with *Whitestone Construction Corp. v F.J. Sciame Construction Co. Inc.*, Index No. 654109/2019, and the joined actions will bear the following caption:

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WHITESTONE CONSTRUCTION CORP.,

Plaintiff,

Index No. 654109/2019

- against -

Action No. 1

F. J. SCIAME CONSTRUCTION CO. INC.,

Defendants.

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METRO-TECH ERECTORS CORP.,

Plaintiff,

Index No.: 453877/2021

- against -

Action No. 2

WHITESTONE CONSTRUCTION CORP., F. J. SCIAME  
 CONSTRUCTION CO., INC., CITY UNIVERSITY  
 CONSTRUCTION FUND, LIBERTY MUTUAL  
 INSURANCE COMPANY, JOHN DOE "1" through  
 JOHN DOE "10", defendants being unknown to plaintiff  
 and having issued payment bonds in connection with the public  
 improvement project referenced herein, and JOHN DOE "11"  
 through JOHN DOE "21", defendants being unknown to  
 plaintiff and having a claim or claiming an interest in connection  
 with the public improvement project foreclosed herein,  
 Defendants.

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And it is further:

ORDERED that the remainder of plaintiff's motion is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on February 17,

2022.

2/3/2022  
DATE



MELISSA CRANE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/>	<input type="checkbox"/>