

BR Worth, LLC v ConnectOne Bank
2022 NY Slip Op 32109(U)
July 6, 2022
Supreme Court, New York County
Docket Number: Index No. 153878/2022
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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BR WORTH, LLC,	INDEX NO.	<u>153878/2022</u>
Petitioner,		
- v -	MOTION DATE	<u>05/23/2022, 06/02/2022</u>
CONNECTONE BANK,	MOTION SEQ. NOS.	<u>001, 002</u>
Respondent.		

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 26, 28 were read on this Petition for DISCOVERY IN AID OF ARBITRATION.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 30, 31, 32, 33, 34, 35, 36 were read on this motion for INTERVENTION, QUASH SUBPOENA.

Petitioner BR Worth, LLC (“BR Worth” or “Petitioner”) petitions (NYSCEF 1) for an order pursuant to CPLR 3102(c) compelling Respondent ConnectOne Bank (“ConnectOne” or “Respondent”) to comply with a subpoena *duces tecum* dated March 21, 2022 (“Subpoena”), issued in connection with the American Arbitration Association (“AAA”) proceeding known as *Legacy Builders/Developers Corp. v. BR Worth LLC*, Case No. 01-22-001-0902 (the “Arbitration”). ConnectOne opposes and seeks, by way of a counterclaim, a declaratory judgment that the Subpoena is unauthorized and unenforceable (NYSCEF 12 [Answer]). BR Worth opposes the Counterclaim (NYSCEF 27).

In Motion Sequence Number 2, non-party Legacy Builders/Developers Corp. (“Legacy”) – the Claimant in the Arbitration – moves (NYSCEF 14) to intervene pursuant to CPLR 1012,

1013; for a protective order denying the Subpoena pursuant to CPLR 3103 or, in the alternative, for an order quashing the Subpoenas pursuant to CPLR 2304 and, finally, for an order imposing sanctions on Petitioner BR Worth pursuant to 22 NYCRR 130-1.1. Legacy's proposed Answer and Counterclaim (NYSCEF 36) seeks the same declaratory relief as sought by ConnectOne vis-à-vis the Subpoena.

For the following reasons, the Petition is DENIED; the Counterclaim of ConnectOne is DENIED as moot; and the motion to intervene and for related relief by Legacy is similarly DENIED as moot.

BACKGROUND

Legacy filed a Demand for Arbitration against BR Worth dated March 14, 2022 (NYSCEF 3) with the AAA. BR Worth filed an Answering Statement with Counterclaim (NYSCEF 4) with the AAA dated March 31, 2022. The Arbitration is being administered under the AAA's Construction Industry Arbitration Rules and Mediation Procedures ("Construction Rules") (NYSCEF 8).

Prior to its filing with the AAA or initiating this proceeding, BR Worth issued the Subpoena dated March 21, 2022 – which bears the caption of the Arbitration - to ConnectOne (NYSCEF 7). ConnectOne objected in writing on April 26, 2022 (NYSCEF 8) and BR Worth commenced this special proceeding by filing its Petition on May 4, 2022 (NYSCEF 1). On May 16, 2022, Legacy moved to intervene and for related relief (NYSCEF 14).

DISCUSSION

A. BR Worth's Petition is Denied in the Absence of "Exceptional Circumstances"

As explained by the First Department:

In exceptional circumstances, pre-hearing discovery pursuant to CPLR 3102(c) may be ordered after the demand for arbitration has been made. However, a court may not review the interim orders of an arbitrator. Thus, judicial review of procedural rulings made in this arbitration administered by the American Arbitration Association is barred.

(*Kramer v Geldwert*, 123 AD3d 507 [1st Dept 2014] [citations omitted]). Subsequent decisions make clear that Petitioner bears the burden of demonstrating “extraordinary circumstances” that make the disclosure “necessary” at this early juncture. (*Langham v Raasch* [N.Y. Sup Ct, New York County 2020] [citing *id.*, other citations omitted]).

Rule R-23 of the AAA’s Construction Rules provides that the arbitrator shall hold a preliminary hearing “after the arbitrator has been appointed.” Rule R-23(b) refers to Sections P-1 and P-2 of the Construction Rules which respectively provide, as relevant here, that the preliminary hearing should be held “as early in the process as possible” and that the arbitrator should consider disclosure including “whether any procedure needs to be established for the issuance of subpoenas” (Rule P-29[xv]). Rule R-35(d) of the AAA’s Constructions Rules provides:

An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently. Parties who request that an arbitrator sign a subpoena shall provide a copy of the request and proposed subpoena to the other parties to the arbitration simultaneously upon making the request to the arbitrator.

The Subpoena was issued bearing the caption of the Arbitration but without resort to the Construction Rules applicable in the Arbitration and prior to the commencement of this Special Proceeding. Thus, BR Worth prematurely sought discovery in the context of the Arbitration and now seeks the Court’s permission to do so.

Moreover, email correspondence between counsel for BR Worth and Legacy indicates that BR Worth has sought documents it now seeks via the Subpoena since July of 2021

(NYSCEF 23). According to BR Worth, the AAA held an Initial Administrative Process to “begin the process of arbitrator selection” on May 20, 2022 (NYSCEF 30 [Castellon Affirmation ¶ 7 and Ex. 2]). In sum, BR Worth has sought and may continue to seek disclosure in the context of the Arbitration.

BR Worth has not demonstrated that “exceptional circumstances” exist warranting judicial intervention at this juncture. The First Department has affirmed the quashing of subpoenas designed to evade the limits imposed by the rules governing arbitration. (*The Bd. of Managers of Parc Vendome Condominium v Cambourakis*, 2011 N.Y. Slip Op. 34232[U], 4 [N.Y. Sup Ct, New York County 2011], *affd* 99 AD3d 554 [1st Dept 2012] *citing* CPLR 3102[b][c] [case citations omitted] [“The court properly denied the petition seeking discovery from respondent Bright Horizons, a nonparty in the underlying arbitration proceeding, because the parties to the arbitration did not stipulate to conduct discovery of Bright Horizons”]). As set forth above, the AAA Construction Rules include a procedure to obtain disclosure from non-parties and there is no basis to interfere with the process agreed to by the parties to the Arbitration. (*Flowcon, Inc. v Andiva LLC*, 200 AD3d 411 [1st Dept 2021] [AAA Construction Rules authorize the arbitration panel to rule on its own jurisdiction]). Accordingly, the Petition is denied and judgment shall be entered by the Clerk of Court pursuant to CPLR 411.

B. Declaratory Relief and Intervention are Moot

ConnectOne’s Counterclaim for declaratory relief is moot given the denial of the Petition. (*Big Four LLC v Bond St. Lofts Condominium*, 94 AD3d 401, 403 [1st Dept 2012]). Legacy’s motion to intervene to oppose the Subpoena and to assert a counterclaim for declaratory relief is also moot. (*In re Raven K.*, 130 AD3d 622, 624 [2d Dept 2015]). Legacy’s motion for sanctions pursuant to 22 NYCRR 130-1.1 is denied.

* * * *

Accordingly, it is

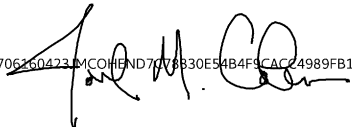
ORDERED that the Petitioner’s Petition seeking discovery in aid of arbitration pursuant to CPLR 3102(c) is **DENIED** and the Petition is **DISMISSED**; it is further

ORDERED that Respondent’s Counterclaim for a declaratory judgment is **DENIED** as moot; it is further

ORDERED that non-party Legacy’s motion to intervene and for related relief is **DENIED** as moot; it is

ORDERED that this proceeding is dismissed, and the Clerk of Court is directed to enter judgment accordingly and mark this case disposed.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

7/6/2022

DATE

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