

**WKR Constr. Inc. v 56 E. 66th St. Residence LLC**

2022 NY Slip Op 33857(U)

November 15, 2022

Supreme Court, New York County

Docket Number: Index No. 152902/2022

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 14

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WKR CONSTRUCTION INC.,

Plaintiff,

- v -

56 EAST 66TH STREET RESIDENCE LLC, J.A.G.  
CUSTOM GROUP INC., NYC DEPARTMENT OF  
TRANSPORTATION, FIRST REPUBLIC BANK,  
ATLANTIC SPECIALTY INSURANCE COMPANY, JOHN  
DOE

Defendants.

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INDEX NO. 152902/2022

MOTION DATE 11/04/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 24, 25, 26, 34, 37, 38, 39, 40

were read on this motion to/for STAY.

Defendant JAG Custom Group, Inc.’s motion to compel arbitration and stay the action is granted.

**Background**

This action arises out of an unpaid lien for services performed by plaintiff, a subcontractor. Defendant JAG Custom Group, Inc. (“JAG”), a contractor, hired plaintiff to supply materials, labor, and services for a building project, pursuant to an agreement dated December 13, 2019. Plaintiff completed performance in early March 2022, with a total value owed by JAG claimed as \$1,199,677.86. JAG paid \$778,154.16 to plaintiff, and plaintiff filed a mechanic’s lien on March 9, 2022 seeking the remaining \$421,523.70. Plaintiff brought this action seeking to recover the lien amount.

JAG filed the instant motion to stay this action or alternatively to compel arbitration. JAG claims that the contract between the parties requires them to bring all disputes to arbitration and that any of plaintiff's statutory lien rights are automatically protected under New York law, further assuaging plaintiff's presumed hesitation to submit its claim to arbitration.

In response, plaintiff claims that JAG's motion is premature. Plaintiff alleges the owner of the property where the project took place is a necessary party to the case. Additionally, because JAG posted a bond for the lien through a surety, the surety entity is also a necessary party to this action. Plaintiff contends the parties must wait until the property owner and surety lender have filed answers until proceeding with any further actions. Additionally, plaintiff refutes the validity of the contract offered by JAG, stating plaintiff is not a signatory to the contracts JAG presented to the Court. Plaintiff further contends that even if it was a party to the contract, the contract presented by JAG requires the parties to bring disputes to mediation prior to arbitration. Plaintiff contends this further renders JAG's motion premature.

In reply, JAG submitted a fully executed contract between the parties along with an affidavit swearing to the authenticity of the document. JAG also contends that the property owner is not a necessary party to this action, claiming that once a bond is posted, a property owner no longer has an interest in litigation regarding any liens. JAG further claims that plaintiff waived the right to mediation when it filed the instant action; however, JAG contends that mediation is a viable option if the parties so wish but, in any event, JAG's motion should be granted to pursue such options.

### **Discussion**

"It is settled that a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent evidence which affirmatively establishes that the parties

expressly agreed to arbitrate their disputes. The agreement must be clear, explicit and unequivocal and must not depend upon implication or subtlety” (*Waldron v Goddess*, 61 NY2d 181, 183-84, 473 NYS2d 136 [1984]).

The Court grants the motion to stay and refers this matter to mediation and then, if mediation is not successful, to arbitration. Pursuant to § 6.1.1 of the agreement, “claims, disputes, or other matters in controversy arising out of or related to this Subcontract...shall be subject to mediation as a condition precedent to binding dispute resolution,” (NYSCEF Doc. No. 38 at 9). The agreement further states, “parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement,” (*id.*). The agreement also states that a demand for arbitration “shall be made no earlier than concurrently with the filing of a request for mediation,” (*id.*). Although defendant indicates in its reply that its motion should be granted if the Court finds mediation appropriate, the parties have made no distinct request for mediation. Nevertheless, this Court is not interested in dragging this dispute along where the contract contains clear and unambiguous dispute resolution procedures, none of which actually involve this Court. Therefore, this action is stayed pending the parties’ request to mediate and then, if necessary, to arbitrate.

Plaintiff contends that defendant submitted an unexecuted version of the contract in its moving papers and therefore cannot demonstrate that plaintiff is bound to arbitration. Defendant JAG submitted an executed contract in reply. While, ordinarily, a party cannot make new arguments in reply, the Court will consider this document. Plaintiff raised an issue in opposition and so JAG was entitled to address it in reply. In any event, the Court prefers to decide motions

on the merits; if the contract presented is not the contract between the parties, the plaintiff may make a motion to reargue and include the version it claims applies.

To the extent that plaintiff claims staying this action is premature because the owner and surety lender have not submitted answers, this Court does not see the property owner as a necessary party following the posting of the bond (*see also Doma Inc. v 885 Park Ave. Corp.*, 59 Misc3d 703, 73 NYS3d 401 [Sup Ct, NY County 2018] [holding that the filing of a bond discharging a mechanic's lien causes the owner to no longer be a necessary party]).

As noted, plaintiff's statutory lien rights are protected pending alternative dispute resolution. Moreover, this Court will order JAG to keep the bond in full force and effect, renewing every cycle, until further order of this Court (if the case resolves in mediation or arbitration, the parties may submit a stipulation for this Court to so-order to allow defendant to stop the bond).

Accordingly, it is hereby

ORDERED that defendant's motion to compel arbitration and to stay this action is granted and the parties shall endeavor to first resolve the instant dispute via mediation with the American Arbitration Association as prescribed in the parties' agreement; and it is further

ORDERED that if that mediation is unsuccessful, then the dispute shall be arbitrated in the same forum as required in the parties' agreement; and it is further


ORDERED that defendant JAG shall keep the bond in full force and effect and renew it continuously, pending further order of this Court; and it is further

ORDERED that this action is hereby stayed, except for an application to vacate or modify said stay or compel renewal of the bond/contempt for failing to renew the bond; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration or, if the parties agree, by stipulation.

Next Conference: June 6, 2023 at 11:30 a.m.

By May 30, 2023, the parties are directed to upload a status update about the mediation and or arbitration. The failure to upload anything will result in an adjournment of the conference.

11/15/2022 DATE		 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE