

Matter of Ryder Constr. Inc. v Lawrence Downtown Holdings, LLC

2023 NY Slip Op 32802(U)

August 11, 2023

Supreme Court, New York County

Docket Number: Index No. 650941/2023

Judge: Erika M. Edwards

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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. ERIKA M. EDWARDS PART 10M

Justice

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In the Matter of the Application of
RYDER CONSTRUCTION INC.,

Petitioner,

- v -

LAWRENCE DOWNTOWN HOLDINGS, LLC,
Respondent.

-----X

INDEX NO. 650941/2023

MOTION DATE 02/22/2023,
03/15/2023

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11

were read on this motion to/for STAY ARBITRATION.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISS AND COMPEL ARBITRATION.

Upon the foregoing documents, the court denies Petitioner Ryder Construction Inc.’s (“Petitioner”) Verified Petition to permanently stay the pending arbitration, filed under motion sequence 001, and the court grants in part Respondent Lawrence Downtown Holdings, LLC’s (“Respondent”) motion to dismiss Petitioner’s Verified Petition, to compel arbitration and for fees and costs, filed under motion sequence 002, to the extent that the court grants the portions of the motion seeking to dismiss the Verified Petition and to compel arbitration, but denies Respondent’s request for fees and costs.

Petitioner, a general contractor, brought this proceeding against Respondent, the owner of the premises located at 170 Amsterdam Avenue, New York, New York. The parties entered into a Construction Contract Between Owner and Contractor (“Contract”) on September 18, 2012, for

the erection of a 21-story residential building at the above-mentioned location. A Certificate of Substantial Completion of the work was certified on May 1, 2015.

On July 31, 2020, Respondent served Petitioner with a Notice of Claim advising Petitioner in substance that defective work was performed involving the concrete and concrete patching on the exterior columns of the building, which caused loose pieces of concrete to fall from the building's façade. On April 29, 2021, Respondent filed a Demand for Arbitration with American Arbitration Association ("AAA"). On August 2, 2021, Respondent filed an Amended Demand for Arbitration seeking \$2,000,000 for breach of contract and for an improper application and/or installation of concrete and concrete patch materials on the exterior columns of the building. Such arbitration is pending under AAA Case Number 01-21-0003-6661.

Petitioner filed its Verified Petition on February 22, 2023. Just one week later, the AAA Administrative Review Council ("Council") rendered its decision regarding whether Respondent met the filing requirements contained in the AAA rules. On March 1, 2023, the Council found that Respondent satisfied the requirements (Council's Decision, dated March 1, 2023). The Council stated in substance that it considered Petitioner's objections to AAA's continued administration of the proceeding and it determined that Respondent's Demand for Arbitration satisfied AAA's filing requirements (*id.*).¹ The Council ruled that the arbitration would proceed unless it was otherwise stayed by the parties or by a court order (*id.*). It further stated that its rules provide the arbitrators with "the power to determine the extent of their own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration

¹ Although Petitioner stated in substance that it did not participate in the arbitration, it appears that Petitioner filed objections which were considered by the Council in rendering the Council's determination. However, the parties did not include the objections in their filings, nor advise the court of the nature of such objections. Therefore, the court cannot determine whether Petitioner's objections which were rejected by the Council included similar arguments raised in the instant Verified Petition.

agreement and the existence or validity of a contract of which an arbitration clause forms a part” (*id.*). Additionally, it stated that the parties’ contentions will be forwarded to the arbitrator(s) once one or more is appointed and the parties will have the opportunity to submit their jurisdictional or arbitrability arguments to the arbitrator(s) for determination (*id.*).

Petitioner now seeks a court order permanently staying the AAA arbitration proceedings or dismissal of such proceedings for Respondent’s failure to comply with conditions precedent required by the Contract between the parties prior to the filing of its Demand for Arbitration. Additionally, Petitioner argues in substance that Respondent failed to properly serve Petitioner with the Demand for Arbitration and that Respondent’s claims are time-barred by the applicable statute of limitations. Petitioner argues in substance that the court, and not the arbitrator, must decide whether service was proper, whether Respondent satisfied all conditions precedent necessary to file for arbitration and whether Respondent’s claim is timely.

Petitioner argues in substance that Article 15 of the Contract sets forth a multi-tiered dispute resolution process which requires an executives meeting and exchange of relevant information to attempt to resolve the dispute. If this process is unsuccessful, then the parties must attempt mediation. If mediation is unsuccessful, then the parties can proceed to arbitration through AAA. Petitioner further argues in substance that New York courts have upheld the validity of the multi-tiered dispute resolution process.

Petitioner further argues in substance that Respondent failed to satisfy the prerequisites of the Contract by failing to participate in an executives meeting and mediation. Petitioner further argues that the conditions precedent to arbitration are conditions precedent to the agreement to arbitrate, rather than conditions precedent to initiate the arbitration proceedings. Therefore, Petitioner argues in substance that the court should not just stay the arbitration until Respondent

satisfies all conditions precedent, but the court should permanently stay the arbitration proceeding or dismiss it because the conditions precedent were not satisfied at the time Respondent filed the arbitration.

Petitioner further argues in substance that Respondent served the Demand for Arbitration without complying with the conditions precedent to attempt to toll the statute of limitations shortly before the expiration of the statute of limitations. Petitioner argues that Respondent's claims are barred by the breach of contract claim's applicable six-year statute of limitations set forth in CPLR 213(2). Petitioner further argues that since such Demand for Arbitration is improper, it should not serve to toll the statute of limitations.

Petitioner further argues in substance that Respondent failed to properly serve Petitioner with the Demand and Amended Demand for Arbitration, as they were emailed to Petitioner's counsel and not served in the manner set forth in CPLR 7503(c).

Respondent opposes the Verified Petition and moves to dismiss it, pursuant to CPLR 3211(a)(1) and (a)(7), to compel arbitration, pursuant to CPLR 7503, and for fees and expenses, under motion sequence 002. Respondent argues in substance that the questions of arbitrability and timeliness must be decided by the arbitrator and not the court. Additionally, Respondent argues that the parties agreed to resolve all disputes arising under the terms of the contract through arbitration and that courts routinely uphold such agreements.

Respondent further argues in substance that the Contract conclusively establishes that all disputes arising under the Contract, which include threshold questions, must be submitted to arbitration and are not properly before the court. Therefore, Respondent argues that the court must dismiss the Verified Petition because it fails to state a cause of action for which relief may be granted based on documentary evidence. The Contract provides that issues of timeliness and

arbitrability are reserved for the arbitrator. Therefore, Respondent argues in substance that the court should enforce the parties' agreement. Respondent further argues in substance that since the Contract only provides that it will be governed by New York law and it does not specifically state that New York law will govern both the agreement and its enforcement, all controversies, including issues of timeliness must be decided by the arbitrator.

Respondent further argues in substance that the AAA service rules apply and not the requirements of the CPLR. Respondent also argues that it is entitled to file a Demand for Arbitration to toll the statute of limitations and that the parties are not prevented from continuing to engage in conditions precedent. Respondent further argues in substance that it pursued mediation prior to arbitration, so this case is distinguished from those cases relied upon by Petitioner where the party seeking arbitration failed to satisfy any of the conditions precedent prior to proceeding to arbitration.

Respondent further argues that the AAA Council's decision already determined that Respondent's arbitration demand was properly filed under the AAA rules agreed upon by the parties. Therefore, service was found to be proper. Respondent further argues that Petitioner's Verified Petition challenging these same issues is improper and Respondent should recover its attorney's fees and costs incurred to oppose Petitioner's meritless application.

Petitioner opposes Respondent's motion to dismiss, to compel and for fees and costs and continues to assert that the court should permanently stay the arbitration or dismiss it.

Section 15.1 of the Contract between the parties defines disputes as "all unresolved Claims, counterclaims, disputes, controversies, and other matters in question between (the parties) arising out of or relating to this Construction Contract" (Contract at § 15.1).

Section 15.2 of the Contract sets forth the steps to negotiate dispute resolution. It states that the parties “shall attempt in good faith to resolve all disputes promptly by negotiation” and permits either party to serve the other with written notice of a dispute (*id.* at § 15.2). It requires the executives of both parties to meet “to exchange relevant information and attempt to resolve the dispute” within 10 days of service of the notice of a dispute (*id.*). If the meeting fails to resolve the dispute within the applicable time period set forth in the Contract, then either party may initiate mediation, pursuant to Section 15.3 of the Contract (*id.*).

Section 15.3 of the Contract requires mediation as “a condition precedent to arbitration” (*id.* at § 15.3.1). If mediation is unsuccessful to resolve the dispute within the applicable time periods, then either party may submit the dispute to final and binding arbitration (*id.* at § 15.4).

CPLR 7503(b) permits a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration to move to stay the arbitration on the ground that a valid agreement has not been complied with or that it is time barred (CPLR 7503[b]).

Pursuant to CPLR 7503(c), the notice of intention to arbitrate or a demand for arbitration must be served “in the same manner as a summons or by registered or certified mail, return receipt requested” (CPLR 7503[c]).

Here, the court denies Petitioner’s Verified Petition and grants Respondent’s motion to dismiss the Petition for failure to state a cause of action based on the provisions of the Contract and the AAA rules. The court finds that Petitioner failed to demonstrate its entitlement to a permanent stay of the arbitration or dismissal of the arbitration and that Respondent demonstrated that the parties agreed to arbitration and that the Contract incorporates the AAA rules by reference, which grant the arbitrator the power to determine the issue of arbitrability.

Therefore, it is up to the arbitrator to decide whether Respondent met the conditions precedent, whether its claims are timely and whether service of the Demand for Arbitration was proper. Thus far, AAA determined that Respondent properly filed its Demand for Arbitration, that the arbitration would proceed, that an arbitrator or arbitrators would be assigned and once such assignment was made, then the parties would be invited to submit their arguments regarding jurisdiction and arbitrability for determination. Instead of submitting its arguments to the arbitrator, Petitioner chose to continue to pursue this Verified Petition.

The court agrees with Petitioner that New York courts have routinely upheld multi-tiered dispute resolution provisions in valid contracts and that it appears that Respondent failed to satisfy all of the conditions precedent in the Contract. However, there remains a dispute as to whether mediation was properly pursued. Regardless of whether all conditions precedent were satisfied and whether the filing of the Demand for Arbitration tolled the expiration of the statute of limitations, the court finds that under the provisions of the Contract, such issues should be determined by the arbitrator and not the court.

However, although the court grants Respondent's motion to dismiss the Verified Petition, the court is not persuaded by Respondent's arguments that the arbitrator must decide all threshold issues based on the holding in *Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, as the instant matter has not been shown to involve commerce which would trigger the provisions of the Federal Arbitration Act and the requirement of the specific enforcement language in the contract (*see Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, 4 NY3d 247, 253 [2005]).

The court determines that AAA's Construction Industry Arbitration Rules apply since they are incorporated by reference in the Contract and the parties agreed to pursue arbitration as

the means to resolve their disputes. Even though Petitioner argues in substance that it only agreed to arbitration if the conditions precedent were met, the court finds that based on the agreement and the applicable binding case law, arbitration is the correct forum to determine whether such conditions precedent were met. Therefore, the court finds that the threshold issues regarding arbitrability, timeliness and other jurisdictional issues should be decided by the arbitrator and not the court.

The court is not persuaded by Petitioner's arguments to the contrary and finds that the cases relied upon by Petitioner are distinguishable to the facts in this case.

The court denies the portion of Respondent's motion seeking attorney's fees and costs to oppose the Verified Petition, as the court finds that Respondent failed to demonstrate its entitlement to such relief. The Verified Petition was filed a week prior to the Council's written decision. Therefore, although it may have been apparent to Petitioner as to how the Council would rule, the court does not find that Petitioner filed a frivolous Verified Petition solely to delay the arbitration. Although the court disagrees with Petitioner's arguments, the court finds that Respondent failed to demonstrate that Petitioner's conduct by filing the Verified Petition and refusing to arbitrate the dispute was without merit in law or frivolous to warrant Respondent's reimbursement of reasonable attorney's fees and costs.

Therefore, the court dismisses the Verified Petition and compels the pending arbitration, unless it is otherwise stayed by AAA or upon agreement of the parties.

The court has considered any additional arguments raised by the parties, but which were not specifically discussed herein, and the court denies all additional requests for relief not expressly granted herein.


As such, it is hereby

ORDERED that as to motion sequence 001, the court denies Petitioner Ryder Construction Inc.'s Verified Petition; and it is further

ORDERED that as to motion sequence 002, the court grants in part Respondent Lawrence Downtown Holdings, LLC's motion, to the extent that the court grants the portions of the motion seeking to dismiss the Verified Petition and to compel arbitration, but denies the remainder of the motion; and it is further

ORDERED and ADJUDGED that the court dismisses Ryder Construction Inc.'s Verified Petition as against Respondent Lawrence Downtown Holdings, LLC and the court compels the parties' pending arbitration under American Arbitration Association Case Number 01-21-0003-6661, without reimbursement of fees or costs of this proceeding.

This constitutes the decision and order of the court.


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8/11/2023
DATE

ERIKA M. EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE