

Workshop/APD Architecture, D.P.C. v Cohen
2023 NY Slip Op 32820(U)
August 14, 2023
Supreme Court, New York County
Docket Number: Index No. 159731/2022
Judge: Judy H. Kim
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM **PART** **05RCP**

Justice

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WORKSHOP/APD ARCHITECTURE, D.P.C.,

Petitioner,

- v -

ABE COHEN,

Respondent.

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INDEX NO. 159731/2022

MOTION DATE 11/14/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 6, 7, 8, 9 were read on this motion for DISCOVERY - PRE-ACTION.

Upon the foregoing documents, petitioner Workshop/APD Architecture, D.P.C.'s ("Workshop") petition, pursuant to CPLR §3102, for an order directing discovery in advance of a future arbitration proceeding between the parties is denied.

In the Petition, Workshop alleges that on October 22, 2018, it entered into a written agreement with respondent Abe Cohen (the "Contract") in which Workshop agreed to perform architectural and interior design services to Cohen in connection with the construction of respondent's future home located at 8 Harry Lane, Long Branch, New Jersey (the "Property") (NYSCEF Doc. No. 1 [Petition at ¶3]). Under the Contract, Workshop's fee for the first seven phases of its work would be twelve percent of the project's "Construction Cost" as defined in the Contract (NYSCEF Doc. No. 2 [Contract at p. 9]). The Contract also provided that New York law governs the interpretation of Contract and that any dispute arising from Workshop's contractual obligations would be resolved through arbitration "in the County, City, and State of New York" (Id. at Art. XVII, XVIII).

Workshop alleges that, although it substantially performed under the Contract, respondent refused to provide Workshop with documentation as to the total Construction Cost, thereby preventing Workshop from calculating its fee (NYSCEF Doc. No. 1 [Petition at ¶¶13-14]).

Workshop now brings this special proceeding for an order, pursuant to CPLR §3102(c), compelling respondent to produce “all documentation sufficient to perform an accounting of the actual construction cost of the new home” in advance of an arbitration that Workshop intends to commence at some indeterminate point in the future. Respondent opposes the Petition, arguing that this Court lacks personal jurisdiction over respondent because he is not domiciled in New York, does not conduct in business in this state, and executed the Contract in Long Branch, New Jersey (NYSCEF Doc. No. 9 [Cohen Aff. at ¶¶1-4]). Respondent further notes that “[a]ll of the services Workshop rendered to [him] related to, and were in furtherance of, construction of a new home on property ... in Long Branch, New Jersey, other than six planning and design review meetings at Workshop’s offices” (Id. at ¶4).

Respondent also argues that, in light of the foregoing, New Jersey is the proper forum to adjudicate this dispute, and notes that while this motion was sub judice he commenced an action against Workshop for, inter alia, breach of the Contract in the Superior Court of New Jersey, Monmouth County, under docket number MON-L-3464-22 (the “New Jersey Action”), and that Workshop has answered in the New Jersey Action and asserted, as relevant here, a counterclaim for breach of contract based upon respondent’s refusal to pay Workshop’s fees and produce documentation of the Property’s Construction Cost, the same issue Petitioner’s wish to arbitrate at some future date.

Finally, respondent contends that, even if this Court had jurisdiction over him, the Petition should be denied because Workshop is not entitled to disclosure under CPLR §3102(c) where, as here, no arbitration has been commenced. Petitioner does not submit reply.

DISCUSSION

Workshop's petition is denied. As a threshold matter, this Court lacks personal jurisdiction over respondent. Personal jurisdiction over respondent may be obtained in three ways: (i) general jurisdiction pursuant to CPLR §301; (ii) specific jurisdiction pursuant to CPLR §302; or (iii) by the respondent's consent (See e.g., Transasia Commodities Ltd. v Newlead JMEG, LLC, 45 Misc 3d 1217(A) [Sup Ct, NY County 2014]). None of these categories apply.

Respondent's undisputed affidavit establishes that he is not subject to jurisdiction under CPLR §301 or CPLR §302. Neither has respondent otherwise consented to personal jurisdiction. The fact that the Contract contains a choice-of-law provision designating New York law as controlling "does not constitute a voluntary submission to personal jurisdiction in New York" (ABKCO Music, Inc. v McMahon, 175 AD3d 1201, 1201 [1st Dept 2019]). Moreover, although the Contract contains an agreement to arbitrate in New York, such language only establishes a party's consent to this Court's jurisdiction over "arbitration-related proceedings" (SLS Capital, S.A. v CRT Capital Group LLC, 2020_NY Slip Op 30696[U], *7 [Sup Ct, NY County 2020]) and, as petitioner has not commenced an arbitration or even sought to compel arbitration, the Court does not consider this proceeding as an arbitration-related proceeding (See e.g., SPX Corp. v Infoswitch, Inc., 2020 NY Slip Op 30326[U], *5 [Sup Ct, NY County 2020] [proceeding to confirm arbitration award constitutes arbitration-related proceeding]). In a similar vein, the Court notes that, even if it had jurisdiction over respondent, petitioner's failure to commence an

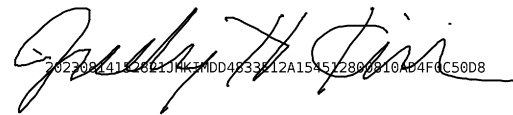
arbitration proceeding prior to commencing this special proceeding precludes the relief sought herein (See Timeplex, Inc. v Racal-Milgo, Ltd., 87 AD2d 753 [1st Dept 1982]).

Ultimately, however, as this Court lacks personal jurisdiction over respondent, the petition is dismissed solely on this basis (See e.g., Hall v Lipstickalley.com, 2011 NY Slip Op 33764[U] [Sup Ct, NY County 2011] [dismissing petition for pre-action discovery for lack of personal jurisdiction over the respondent]). Given this lack of jurisdiction, the Court is without power to address the forum non conveniens argument raised in respondent’s opposition (See Wyser-Pratte Mgt. Co., Inc. v Babcock Borsig AG, 23 AD3d 269, 269 [1st Dept 2005]).

Accordingly, it is

ORDERED and **ADJUDGED** that the petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the Court.



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8/14/2023

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE