

**Matter of StrategiX Consulting, LLC v BDCasole,
LLC**

2023 NY Slip Op 33327(U)

September 22, 2023

Supreme Court, New York County

Docket Number: Index No. 652033/2023

Judge: John J. Kelley

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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. JOHN J. KELLEY**PART****56M***Justice*

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In the Matter of

STRATEGIX CONSULTING, LLC, VINCENT
SALVATORIELLO, PH.D., and JUDITH PEARSON,

Petitioners,

- v -

BDCASOLE, LLC,

Respondent.

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INDEX NO. 652033/2023**MOTION DATE** 05/26/2023**MOTION SEQ. NO.** 001

DECISION, ORDER, and JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for

STAY ARBITRATION

StrategiX Consulting, LLC (StrategiX), its principal, Vincent Salvatoriello, Ph.D., and Salvatoriello's wife, Judith Pearson, petition pursuant to CPLR 7502(a) and 7503(b) to permanently stay arbitration demanded by the respondent, BDCasole, LLC (BDCasole), before the American Arbitration Association (AAA). In an affidavit sworn to May 22, 2023, the respondent's principal, Lior Yahalomi, withdrew the demand for arbitration against Salvatoriello and Pearson. The respondent otherwise opposes the petition. The petition is granted only to the extent that BDCasole is permanently stayed from arbitrating claims of fraud and professional malpractice. The petition is otherwise denied on the merits insofar as asserted by StrategiX and as academic insofar as asserted by Salvatoriello and Pearson. StrategiX is directed to proceed to arbitration before the AAA in connection with BDCasole's breach of contract claims.

In a construction contract dated November 12, 2018, which was executed by BDCasole on December 11, 2018, and by StrategiX on December 12, 2018, BDCasole, as owner, and StrategiX, as contractor, agreed that StrategiX would construct a single-family house on real property owned by BDCasole in Water Mill, New York. Paragraph 37 of the contract provided:

“Owner and Contractor shall endeavor to resolve all claims, disputes and other matters in question arising out of, or relating to, this Agreement or the breach thereof by mediation which shall be considered a condition precedent to litigation. Such mediation shall be in accordance with rules and procedures set forth in the American Arbitration Association’s (‘AAA’) Rules of Construction Dispute Mediation. A request for mediation shall be made in writing, delivered to the other party to this Agreement, and filed with the AAA office located in New York City. The mediation shall be conducted in New York City. The parties shall share the mediator’s fee and any filing fees equally. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.”

Paragraph 38 recited that

“Any dispute that cannot be resolved by mediation shall be subject to arbitration. Any such controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association (‘AAA’). Such arbitration shall be in accordance with rules and procedures set forth in AAA Construction Industry Arbitration Rules. The number of arbitrators shall be three. The arbitration shall be conducted in New York City. New York law shall apply. Judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction. A request for arbitration shall be made in writing delivered to the other party to this Agreement, and filed with the AAA office located in New York City. The parties shall share the arbitrators’ fee and any filing fees equally. Agreements reached in arbitration shall be binding and enforceable as settlement agreements in any court having jurisdiction.”

On August 31, 2022, BDCasole submitted a pro se written demand for arbitration to the AAA, naming Strategix and Salvatoriello as respondents. In the demand, BDCasole alleged that Strategix and Salvatoriello “led as General Contractor, the construction of a \$10MM home during 2017-2020. The GC left major damages and many incomplete items in the house with damages reaching \$1MM.” In the demand, BDCasole claimed \$480,000.00 in damages, and asserted that Strategix “refused mediation.” On April 19, 2023, while the arbitration claim was pending, BDCasole filed a “particularization” of the claim, adding Pearson, who is Salvatoriello’s wife and a Strategix employee, as a respondent in the arbitration proceeding. The crux of the claims against Strategix, as set forth in that document, was that BDCasole had initially retained Sciamme Homes, LLC (Sciamme), as the general contractor on September 22, 2016, discharged Sciamme in October 2018, and retained Strategix in December 2018 to complete the construction, but that Strategix began to encourage sub-contractors not to remediate alleged

construction deficiencies left by Sciame. In five supplemental files submitted in support of the claim, BDCasole also alleged that StrategiX was responsible for construction defects and improper concrete work and that it had failed to complete all of the work it had agreed to perform, as set forth in two punch lists.

The petitioners commenced this proceeding on April 26, 2023, alleging that neither Salvatoriello nor Pearson was a party to the December 12, 2018 contract and, hence, they had never entered into any agreement to arbitrate. Additionally, the petitioners argued that, in a Lien Law § 39 proceeding entitled *Matter of BDCasole, LLC v Sciame Homes, LLC*, commenced in the Supreme Court, Suffolk County, under Index No. 600059/2019, BDCasole sought to cancel a mechanics lien that Sciame had filed pursuant to its September 22, 2016 contract with BDCasole, and had asserted the very same claims against Sciame concerning “construction defects” in connection with specified “concrete work” that were the basis for the subject arbitration. Specifically, the petitioners noted that, in that proceeding, Yahalomi asserted that

“[r]espondent [Sciame] as general contractor, was obligated to supervise, control, and coordinate construction at the Property

“Over the following two years, Respondent mismanaged and failed to adequately supervise construction. Respondent's mismanagement has resulted construction deficiencies, including but not limited to incorrect ceiling and door wood framing, water leakage, cracking in the interior floors, and even construction of the backyard pool in the wrong location. The cost Petitioner will incur in remediating Respondent's construction deficiencies is estimated to exceed \$800,000. Petitioner, accordingly, had no choice but to terminate Respondent and hire a new general contractor.

“Due to Respondent's material breaches of the Residential Construction Agreement, on or around October 17, 2018, Petitioner sent Respondent a notice of default.”

In this regard, the petitioners argued that BDCasole's notice of default in that matter enumerated a “volume” of construction and concrete defects, including virtually all of the construction and concrete defects that are the subject of the particularized claim asserted against StrategiX in the arbitration.

Additionally, the petitioners pointed out that, in action entitled *N.L.R. Construction Corp. v Sciame Homes NY LLC, BDCasole LLC, and Lior Yahalomi*, commenced in the Supreme Court, Suffolk County, under index number 608066/2020, both BDCasole and Yahalomi asserted counterclaims against N.L.R. Construction Corp. (NLR) to recover for the same alleged construction defects and inadequate concrete work that NLR allegedly caused or undertook between September 2016 and October 2018.

The petitioners thus contended that all of the alleged breaches of contract upon which BDCasole premised its claims in the subject arbitration were breaches of contract committed by other contractors prior to the execution the BDCasole/StrategiX contract in December 2018. Hence, they argued that no agreement containing an arbitration clause had been entered into that covered the subject work. The court notes, however, that BDCasole voluntarily discontinued the Lien Law proceeding, and the record in that matter does not reflect whether the claim therein was settled. It further notes that the parties in the action commenced by NLR filed a stipulation of discontinuance. The record in that matter also does not indicate whether the claims and counterclaims were settled. Hence, the petitioners have not established that BDCasole has been compensated at all for those alleged construction defects.

The petitioners also contended that arbitration claims of fraud and professional malpractice that were newly added in the “particularization” not only were baseless, but that the professional malpractice claims barred by the applicable three-year limitations period of CPLR 214(6).

On May 22, 2023, BDCasole withdrew the demand to arbitrate insofar as asserted against Salvatoriello and Pearson. It did not address the arguments made with respect to the fraud and professional malpractice claims. BDCasole otherwise opposed the petition, arguing that, to the extent that the petition asserted that concrete and other construction defects were generated “all before December 11, 2018,” certain concrete work was in fact undertaken after BDCasole terminated Scaime’s involvement in the construction. Moreover, Yahalomi asserted

that, on June 5, 2019, and, thus, during the term of the BDCasole/StrategiX contract, he had submitted a 31-page concrete punch list to StrategiX. He alleged that, whether or not the relevant contract obligated StrategiX to remediate Sciame's and NLR's allegedly improper work, StrategiX's scope of work included completing items on the punch list, securing final lien waivers, and assuring compliance with guarantees or warranties. Yahalomi also averred that StrategiX did not complete work on any of the items set forth in a June 4, 2019 punch list that StrategiX itself authored in collaboration with the retained architect, JPA, and did not complete work on items set forth in a follow-up July 2, 2019 punch list. In this regard, Yahalomi pointed out that, pursuant to paragraph 6 of the BDCasole/StrategiX agreement, work is not deemed to be finally completed until "all the Work (including all the items set forth on the punch list) has been fully and satisfactorily completed in conformance with the contract documents," and that, since the punch lists included concrete work, StrategiX was responsible for that work.

BDCasole ultimately argued that, inasmuch as there are factual disputes as to whether its claims fell within the scope of work contemplated by its contract with StrategiX, it is for the arbitrator to determine those factual disputes, and whether claims concerning certain work were arbitrable and, ultimately, compensable.

As noted, paragraph 38 of the subject construction contract provided that any arbitration "shall be in accordance with rules and procedures set forth in AAA Construction Industry Arbitration Rules." "The AAA's Construction Industry Arbitration Rules provide that the arbitration tribunal shall rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement" (*Flowcon, Inc. v Andiva, LLC*, 200 AD3d 411, 412 [1st Dept 2021]). Thus, "the threshold issue of the arbitrability of" BDCasole's claims that StrategiX breached the construction contract, and that the disputed issues fall within the scope of StrategiX's obligations thereunder, "is one for the arbitrator, not the courts, particularly given the parties' broad arbitration clause" (*id.*). As the Appellate Division, First Department, explained it,

“[a]lthough the question of arbitrability is generally an issue for judicial determination, when the parties' agreement specifically incorporates by reference the AAA rules, which provide that ‘[t]he tribunal shall have the power to rule on its own jurisdiction, including objections with respect to the existence, scope or validity of the arbitration agreement,’ and employs language referring ‘all disputes’ to arbitration, courts will ‘leave the question of arbitrability to the arbitrators’ (see *Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 47, 689 NE2d 884, 666 NYS2d 990 [1997] [internal quotation marks omitted])”

(*Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 496 [1st Dept 2009]). Thus, “whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement” is a question more appropriately directed to the arbitrator than is the general question of who decides the issue of arbitrability in the first instance (*id.* at 497, McGuire, J., concurring, quoting *First Options of Chicago, Inc. v Kaplan*, 514 US 938, 944-945 [1995]). Where, as here, the parties have agreed to a broad arbitration clause, and the rules under which they agreed to arbitrate provide for the arbitrator to decide arbitrability, the court's role “is solely to ascertain that a valid agreement to arbitrate has been reached, applying contract law principles” (*Strongbow Consulting Group, LLC v Pricewaterhousecoopers, LLP*, 195 AD3d 532, 532 [1st Dept 2021]).

Consequently, the issues of whether BDCasole's claims to recover for inadequate and insufficient work are within the scope of the December 12, 2018 construction contract, or whether all of the allegedly inadequate and insufficient work occurred prior to StrategiX's involvement with the construction project, are for the arbitrator to decide. The petitioners, however, established that BDCasole's claim to recover for fraud, while otherwise arbitrable (see *Housekeeper v Lourie*, 39 AD2d 280, 282 [1st Dept 1972]), was not properly submitted to the AAA and is unsupported by any facts. They further established that the claim to recover for professional malpractice is barred by the applicable three-year limitations period (see CPLR 214[6]; see generally *Bowes & Co. v American Druggists' Ins. Co.*, 96 AD2d 1023, 1024 [1st Dept 1983] [time-barred claim is not arbitrable]). Since BDCasole did not address those issues here, arbitration is permanently stayed as to those claims.

In light of the foregoing, it is

ORDERED AND ADJUDGED that the petition is granted only to the extent that the claims of the respondent, BDCasole, LLC, to recover for fraud and professional malpractice are permanently stayed, the petition is otherwise denied, and the proceeding is otherwise dismissed; and it is further,

ORDERED that the petitioner StrategiX Consulting, LLC, is directed to proceed to arbitration before the American Arbitration Association in connection with the claims of the respondent, BDCasole, LLC, to recover for breach of the contract between those two parties dated November 12, 2018 and executed by StrategiX Consulting, LLC, on December 12, 2018.

This constitutes the Decision, Order, and Judgment of the court.

9/22/2023

DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

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GRANTED IN PART

☐

OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

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REFERENCE