

Matter of S. Constr. NY, Inc. v Rezo Holdings LLC

2023 NY Slip Op 33391(U)

September 26, 2023

Supreme Court, Kings County

Docket Number: Index No. 505592/2023

Judge: Francois A. Rivera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of September 2023

HONORABLE FRANCOIS A. RIVERA

-----X

In the matter of the Application of
S. CONSTRUCTION NY, INC.

Plaintiff,

- against -

REZO HOLDINGS LLC, 520 PARKSIDE LLC

Defendants.

-----X

Recitation in accordance with CPLR 2219 of the papers considered on the notice of petition and petition filed on February 21, 2023, under motion sequence number one, by S. Construction NY, INC (hereinafter the petitioner) seeking an order pursuant to CPLR 7511 vacating or modifying the arbitration award (the "Award") of Lisa Aldoroty, Esq., dated November 22, 2022, in the American Arbitration Association ("AAA") arbitration proceeding captioned Rezo Holdings LLC; 520 Parkside LLC vs. S. Construction, NY Inc. Case # 01-19-0002-219

- Notice of petition
- Petition
- Exhibits A-KK
- Memorandum of law in support
- Answer

Recitation in accordance with CPLR 2219 of the papers considered on the notice of cross petition and petition filed on May 12, 2023, under motion sequence number two, by Rezo Holdings LLC and 520 Parkside LLC (hereinafter the respondents) for an order pursuant to CPLR 7510 (1) confirming the Award entered on November 22, 2022 in the American Arbitration Association ("AAA") arbitration proceeding captioned Rezo Holdings LLC; 520 Parkside LLC vs. S. Construction, NY Inc. Case # 01-19-0002-219

- Notice of cross petition¹
- cross petition
- Memorandum of law in opposition to the petition and in support of the cross petition

DECISION & ORDER

Index No.: 505592/2023

Oral Argument: 8/17/2023

Cal. No.: 63, 64, Ms. No.: 1, 2

¹ The cross-petition papers also served as opposition to the petition.

-Affirmation of counsel
Exhibits 1-2

BACKGROUND

On February 21, 2023, the petitioner commenced the instant special proceeding by filing a notice of petition and petition with accompanying exhibits with the Kings County Clerk's office. On May 12, 2023, the respondents interposed and filed an answer to the petition and a notice of cross petition with the Kings County Clerk's office.

Petitioner has contended, in sum and substance, that arbitrator Lisa Aldoroty, Esq (the Arbitrator) committed the following errors. On November 22, 2022, the Arbitrator issued her Award, providing little to no substantive reasoning for her award. In the Award, the Arbitrator accepted respondents' allegation, made for the first time in their post-hearing brief, that the Second Amendment should be enforced, and that petitioner breached certain obligations thereunder. The Award improperly awarded moneys to the respondents for the completion of the project for work that was outside the scope of S. Construction's work. The Arbitrator awarded \$1,679,286.52 for Amount in Excess of Project Completion Costs above Contract Sum. This amount was improperly awarded because it did not consider that most sums claimed by respondents as completion costs were, in fact, costs related to enhancing the projects, or to completing items outside of petitioner's scope of work. The alleged proof of such costs included amounts that were clearly outside of petitioner's scope. The Award also wrongfully found that Petitioner "Misappropriated" funds due to subcontractors despite the fact that the subcontractors all signed lien waivers indicating that they had been paid when Respondents took over the Project, (and the obligation to pay the subcontractors) and despite the fact that Respondents allegation of "fraudulent change orders" was disproven by the fact that each change order was performed with the knowledge or at the request of respondents, and the work

thereunder was actually completed. Finally, the Arbitrator's decision was unlawful as it was based on a claim that had not been asserted in the arbitration until respondents' final briefing. As a result, petitioner had no opportunity to respond substantively or to focus its examination of witnesses on this un-alleged claim.

The respondent interposed a joint verified answer which, as relevant here, included two affirmative defenses. The first affirmative defense was that the petitioner waived any alleged procedural defects when they proceeded with the Arbitration, with notice of the alleged defect and without objection without seeking a stay pending a judicial decision regarding such alleged procedural defects. The second affirmative defense is that the award offered more than a "barely colorable justification" for the outcome reached.

LAW AND APPLICATION

An arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the outcome reached (*Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479 [2006]). Judicial review of arbitration awards is extremely limited (*Kotlyar v. Khlebopros*, 176 A.D.3d 793, 795 [2nd Dept 2019], citing *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479 [2006]). Pursuant to CPLR 7511(b)(1)(iii), a court may only vacate an arbitrator's award that violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power (*Matter of New York City Tr. Auth. v. Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 N.Y.3d 332, 336 [2005]). Additionally, an award may be vacated where it exhibits a manifest disregard of law (*Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d at 480, quoting *Duferco Intern. Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 [2d Cir.2003]). The burden is on the movant to establish grounds for vacatur by clear and convincing evidence (see *Matter of Soliman v. Suffolk*

County Dept. of Pub. Works, 155 A.D.3d 1049 at 1050 [2nd Dept 2017]), *Matter of Government Empls. Ins. Co. v. Schussheim*, 122 A.D.3d 849, 849 [2nd Dept 2014]).

To modify or vacate an award on the ground of manifest disregard of the law, a court must find both that (1) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator was well defined, explicit, and clearly applicable to the case (*Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d at 481). An arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be (*Matter of Erin Constr. & Dev. Co., Inc. v. Meltzer*, 58 A.D.3d 729, 730 [2nd Dept 2009]). Therefore, manifest disregard of the law is a doctrine of last resort limited to the rare occurrences of apparent egregious impropriety on the part of the arbitrators (*Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d at 480).

The instant petition is a special proceeding. The procedure for special proceedings contemplates that the petition will be accompanied by affidavits demonstrating the evidentiary grounds for the relief requested (see CPLR 403[a]). It is settled that a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment, requiring the court to decide the matter upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised (CPLR 409 [b]; *Saadia Safdi Realty, LLC v Melvin Press*, 207 AD3d 633, 635 [2d Dept 2022], citing *Matter of Arben Corp. v Durastone, LLC*, 186 AD3d 599 at 600 [2nd Dept 2020]).

Notwithstanding the petitioner's contentions, the evidentiary submissions and legal reasoning proffered by the petitioner did not make a clear and convincing showing that the arbitrator's award violated a strong public policy, was irrational or clearly exceeds a specifically

enumerated limitation on the arbitrator's power. Moreover, the arbitrator did offer a colorable justification for the outcome reached (*Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479 [2006]). Consequently, the motion to vacate or modify the arbitrator's award is denied and the respondent's cross motion to confirm the arbitrator's award is granted.

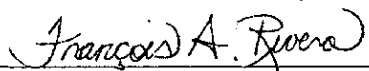
CONCLUSION

The petition by S. Construction NY, Inc for an order pursuant to CPLR.7511 vacating or modifying the arbitration award (the "Award") of Lisa Aldoroty, Esq., dated November 22, 2022, in the American Arbitration Association ("AAA") arbitration proceeding captioned Rezo Holdings LLC; 520 Parkside LLC vs. S. Construction, NY Inc. is denied.

The cross petition by respondents Rezo Holdings LLC and 520 Parkside LLC for an Order Pursuant to CPLR 7510 (1) confirming the Award entered on November 22, 2022, in the American Arbitration Association ("AAA") arbitration proceeding captioned Rezo Holdings LLC; 520 Parkside LLC vs. S. Construction, NY Inc. Case # 01-19-0002-219 is granted.

The forgoing constitutes the decision and order of this Court.

ENTER:



J.S.C. x

HON. FRANCOIS A. RIVERA
J.S.C.