

Matter of Central Sutton, LLC v Y Levy Contr. Corp.
2023 NY Slip Op 33738(U)
October 12, 2023
Supreme Court, New York County
Docket Number: Index No. 652972/2023
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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INDEX NO. 652972/2023

In the Matter of

MOTION DATE 07/31/2023

CENTRAL SUTTON, LLC, MOSHE WIEDER, and BETH WIEDER,

MOTION SEQ. NO. 001

Petitioners,

- v -

DECISION, ORDER, AND JUDGMENT

Y LEVY CONTRACTING CORP.,

Respondent.

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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

were read on this motion to/for STAY ARBITRATION.

In this proceeding pursuant to CPLR 7503(b), the petitioners Central Sutton, LLC, Moshe Wieder, and Beth Wieder petition for a permanent stay of arbitration in connection with an arbitration that had been demanded by the respondent, Y Levy Contracting Corp., before National Arbitration and Mediation (NAM). The respondent answers the petition. The petition is denied, and the proceeding is dismissed.

In their petition, the petitioners asserted that Moshe Wieder and Beth Wieder, in their individual capacities, were not proper parties to the arbitration, as they were not parties to the construction agreement that contained the relevant arbitration clause. The petitioners further asserted that NAM is not an appropriate arbitral forum, inasmuch as the parties never agreed upon an arbitration tribunal or a method for selecting one.

In its answering affirmation, the respondent contended that the petitioners are barred from seeking a stay of arbitration pursuant to CPLR 7503, inasmuch as CPLR 7503(b) only permits persons who have not participated in the arbitration to seek a stay, while the petitioners already have participated in the arbitration proceeding by replying to the respondent's arbitration

claim and by asserting counterclaims in the arbitration proceeding before NAM. It additionally asserted that the Wieders were indeed identified in the subject construction contract as parties to the agreement, and that the arbitration clause did not preclude it from designating NAM as the arbitral forum. The respondent further contended that the petitioners commenced this proceeding more than 20 days after being served with the demand to arbitrate and that, hence, the proceeding was not commenced within the time limits set forth in CPLR 7503(c).

CPLR 7503(b) provides, in relevant part, that,

“[s]ubject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made.”

Consequently, where, as here, a party has participated in an arbitration by serving a response in the arbitration proceeding that advanced a counterclaim, and no application to compel arbitration has been made to any court, that party may not avail itself of a judicial proceeding to stay arbitration pursuant to CPLR 7503(b) (see *Nachmani v By Design, LLC*, 74 AD3d 478, 479 [1st Dept 2010]; see also *Matter of Flintlock Constr. Servs., LLC v Weiss*, 122 AD3d 51, 56 [1st Dept 2014] [parties who participated in arbitration cannot avail themselves of the mechanisms set forth in CPLR 7503(b)]; *Matter of JJF Assoc., LLC v Joyce*, 59 AD3d 29 [1st Dept 2009] [same]; *Mark Ross & Co., Inc. v XE Capital Mgt., LLC*, 46 AD3d 296 [1st Dept 2007] [same]). The petition in the instant matter thus must be denied on that ground.

Further, there is no merit to the petitioners’ contention that the Wieders are not proper parties to the arbitration. “The issue of whether there is a clear, unequivocal, and extant agreement to arbitrate is for the court and not the arbitrator to determine” (*Matter of Jalas v Halperin*, 85 AD3d 1178, 1181 [2d Dept 2011]), unless the rules of the arbitral forum expressly “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]). Since no party submitted or referred to any

NAM rule that addressed this issue, it is for the court to determine whether the Wieders were in fact parties to the contract. The subject construction contract identified both Central Sutton, LLC, and the Wieders as parties to the contract, and Moshe Wieder did not expressly execute the contract in his capacity as a member of Central Sutton, LLC. Moreover, while the term “contractor” was expressly defined in the contract to refer to the respondent, the definition of the term “client” was not limited to Central Sutton, LLC. Consequently, the petitioners’ contention that the Wieders were not parties to the arbitration agreement must be rejected.

The court also rejects the petitioners’ contention that NAM is not an appropriate arbitral forum. The relevant arbitration clause recited, in its entirety, that

“[w]ith G-d's help, all will go smoothly, and Client and Contractor will be satisfied, at the completion of the project. However, if G-d forbid, there is any kind of misunderstanding between the parties that cannot be resolved amongst them, then both parties agree to settle their differences with legal arbitration within the city of New York.”

Where, as here, it is conceded that a validly executed contract exists, and that it contains an arbitration clause, “[t]hat the provision did not specify the particular arbitration forum is of no moment” (*Chris Grant Brohawk Films v Digital Seven*, 2021 NY Misc LEXIS 11515, *3 [Sup Ct, N.Y County, Jan. 8, 2021]). It is not disputed that NAM’s headquarters are located on East 42nd Street within the City of New York, and there is nothing in the very limited arbitration clause that required a more detailed or involved mechanism for selecting an arbitral forum. The petitioners’ contentions in this regard thus are without merit.

The respondent also contends that this proceeding was not timely commenced. The court notes, however, that the arbitration demand did not include a warning that, if the petitioners did not petition to stay arbitration within 20 days after receipt of the demand, they would be precluded from doing so. Thus, contrary to the respondent’s contention, the instant application for a stay of arbitration cannot be considered untimely under CPLR 7503(c), as that statutory provision requires the demand to include such a warning as a condition precedent to

invoking the 20-day period as a defense to the application (see *Cooper v Bruckner*, 21 AD3d 758, 759-760 [1st Dept 2005]).

In light of the foregoing, it is

ORDERED that the petition is denied; and it is,

ADJUDGED that the proceeding is dismissed; and it is further,

ORDERED that the petitioners are directed to proceed to arbitration before National Arbitration and Mediation forthwith, or on any date to which the respondent otherwise agrees.

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

10/12/2023

DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE