Takats v Portside Condominium A
2024 NY Slip Op 34909(U)
June 24, 2024
Supreme Court, Erie County
Docket Number: Index No. 810227/2022
Judge: Michael A. Siragusa

At a term of the Supreme Court, Part 29, held in and for the County of Erie, State of New York at 50 Delaware Avenue, Buffalo, on the 18th day of June 2024.

PRESENT: HON. MICHAEL A. SIRAGUSA, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

JOSEPH R. TAKATS, III, and AMICA MUTUAL INSURANCE COMPANY, as Subrogee of JOSEPH R. TAKATS, III,

Plaintiffs,

v.

DECISION AND ORDER
INDEX NO. 810227/2022

PORTSIDE CONDOMINIUM A, PORTSIDE CONDOMINIUM BOARD OF MANAGERS, PORTSIDE CONDOMINIUM HOMEOWNERS ASSOCIATION, TWIN LAKES ASSOCIATES, LP PORTSIDE HOMEOWNERS' ASSOCIATIONS, INC., FAIRWOOD REALTY MANAGEMENT CORP., and JOHN PARKS,

Defendants.

Defendant John Parks has moved this Court pursuant to CPLR Section 7503 for an order compelling arbitration of the claims brought by plaintiff, Amica Mutual Insurance Company ("Amica"), as subrogee of Joseph R. Takats III. Defendants, Portside Condominium Associates, Inc., Portside Condominium Board of Managers, and Fairwood Realty Management Corp., have joined in defendant Parks' request for an order compelling arbitration of plaintiff Amica's claims in this matter.

FACTS

In this case, plaintiff Joseph R. Takats, III, alleges that a burst pipe in January 2019, and a refrigerator leak in June 2019, both originated from an area under control of one or more of the defendants, causing damage to the condominium owned by plaintiff Takats, in the amount of $74,877.37 and $25,367.34 respectively. *See NYSCEF Doc. No.22.* Plaintiff Amica has brought a subrogation claim for reimbursement of funds paid to repair the property of their insured, Mr. Takats. Defendant John Parks was insured for this claim in question under a policy of insurance issued by Adirondack Insurance Exchange, a subsidiary of National General Insurance Company. The Portside defendants are insured for this claim under a policy issued by Travelers Companies, Inc.

ARGUMENT

Defendants argue that pursuant to the Arbitration Forums Inc. Property Subrogation Arbitration Agreement, "signatory companies must forgo litigation and submit any… property subrogation claims" to Arbitration Forums, Inc. *See NYSCEF Doc. No. 22 at ¶ 14.* Defendants further argue that since Amica, Travelers and Adirondack are signatories to the Property Subrogation Agreement, the claims of Amica must be arbitrated. Defendants further contend that according to the rules, "when a matter that should have been filed in arbitration . . . is placed in litigation, the party filing the litigation must dismiss/discontinue the suit within 60 calendar days of notification of the adverse party's signatory status." *See NYSCEF Doc. No. 22 at ¶15.* Defendants further argue that they did not waive arbitration by serving an answer and engaging in limited discovery before moving to compel arbitration because their limited participation was necessary to defend the non-arbitrable claim by plaintiff Takats. *See NYSCEF Doc. No. 43.* Defendants last contention is that plaintiffs failed to show that the 11 month delay or any other conduct by the defendants resulted in prejudice to them, therefore, they did not waive the contractual remedy of arbitration. *Id. at ¶ 8.*

Plaintiffs contend that defendants waived their right to arbitrate this dispute when they engaged in litigation for almost a year. *See NYSCEF Doc. No. 39.* Plaintiffs further contend that since the defendants participated in this litigation and affirmatively accepted this judicial forum, they are precluded from later raising the claim that arbitration is the only manner to resolve the dispute. Plaintiffs further contend that since neither defendant raised arbitration as an affirmative defense, they have waived it. *Id. at ¶15.* Plaintiffs last contention is that plaintiff Takats is not a party to any insurance arbitration rules and has no interest in submitting his claim to an arbitration process. *Id. at ¶16.*

DECISION

While arbitration is an accepted method to resolve disputes if the parties contracted for that remedy, "a defendant who utilizes the tools of litigation, or participates in litigation for an unreasonable period without asserting the right to arbitrate, may lose the right to compel arbitration." *Estate of Castellone v. JP Morgan Chase Bank, N.A., 60 AD3d 621, 623 [2009].* As stated by the Court of Appeals. "the crucial question, of course, is what degree of participation by the defendant in the action will create a waiver of a right to stay the action. In absence of unreasonable delay, so long as the defendant's actions are consistent with an assertion of the right to arbitrate, there is no waiver. However, where the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer in the particular case, his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory." *De Sapio v. Kohlmeyer, 35 NY2d 402, 405 [1974].*

The court has reviewed and considered *NYSCEF Document Nos. 21-45,* as well as the arguments made before this Court by counsel for all parties. In this case, the record evidence demonstrates that defendants participated in this action for nearly a year; filed answers without raising

arbitration as an affirmative defense; asserted cross-claims; served omnibus discovery demands; responded to plaintiffs' demands; filed Bill of Particulars and served notices for depositions in this matter. It was not until nearly a year later, by filing this instant motion to compel arbitration, that defendants provided notice to plaintiffs that they wanted inter-company arbitration. Defendants failed to notify the plaintiffs or plaintiffs' counsel, either through the assertion of an affirmative defense, emails, letters or any correspondence whatsoever that they intended to proceed to arbitration on these claims. In support of their position, defendants cite the *Byrnes v. Castaldi* case for the proposition that since the period of four months between the service of the answer and the motion to compel was not lengthy, their conduct was not deemed to waive their right to arbitrate. *See Byrnes v. Castaldi, 72 AD 3d 718 [2010].* In the case before this court, the period of time between the service of the answer and this instant motion was nearly a year, which this court determines as lengthy. Further, in the Byrnes case the defendants' answer included an affirmative defense that the parties' dispute should be determined by arbitration thereby placing the plaintiff on notice of defendant's intent to arbitrate. *Id.* However, in this case, the defendants failed to assert in their answers that the claims were subject to arbitration. Moreover, as set forth above, the defendants provided no notice whatsoever to plaintiffs of their intent to arbitrate for almost one year. Under these circumstances, defendants' actions manifested an intent to accept this judicial forum. Therefore, the Court concludes that defendants have waived their right to inter-company arbitration relative to this dispute. *See Spatz v. Ridge Lea Assoc., 309 A.D. 2d 1248 [2003]; C.I Planning v. Weeks, 112 A.D. 2d 854, 856 [1985]; De Sapio v. Kohlmeyer, 35 N.Y. 2d 402 [1974].*

Accordingly, for the reasons and authorities set forth above, it is hereby ORDERED that Defendant's motion to compel arbitration is DENIED.

ENTER:

Dated: June 24, 2024

HON. MICHAEL A. SIRAGUSA, A.J.S.C.