

Vasquez v 720 Fifth Sub A LLC

2024 NY Slip Op 34935(U)

December 10, 2024

Supreme Court, Bronx County

Docket Number: Index No. 33263/2019E

Judge: Paul L. Alpert

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

-----X
Victor M. Vasquez,

Index No. 33263/2019E

-against-

Hon. Paul L. Alpert

720 Fifth Sub A LLC and L&Z Restoration Corp.,

Justice Supreme Court

-----X
The following papers numbered 1 to _____ were read on this motion (Seq. No. 6)
for _____ noticed on _____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

The second third-party defendant's motion is decided in accordance with the annexed decision and order of the court.

Motion is Respectfully Referred to Justice: _____

Dated: _____

Dated: 12/10/24

Hon. _____


HON. PAUL ALPERT

J.S.C.

1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

Index No.: 33263/2019E

-----X
Victor M. Vasquez,

Plaintiff,

DECISION/ORDER

-against-

720 Fifth Sub A LLC & L&Z Restoration Corp.,

Defendants.

-----X
720 Fifth Sub A LLC,

Third-Party Plaintiff,

-against-

L&Z Restoration Corp.,

Third-Party Defendant.

-----X
720 Fifth Sub A LLC,

Second Third-Party Plaintiff,

-against-

Silverthread Falls Asset Services NYC, LLC, Advisors
Commercial Re, CBC Alliance, Progo CRE, LLC, HSP
Asset Services, Resolution Real Estate Services and
Merritt Engineering Consultants, P.C.,

Second Third-Party Defendants.

-----X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the motion as indicated below:

Papers	Numbered
Notice of Motion and Affirmation in Support & Exhibits.....	1
Memorandum of Law in Support.....	2
Affirmation in Opposition.....	3
Affirmation in Reply & Exhibits.....	4

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

The plaintiff commenced this action for personal injuries following an accident that occurred when the plaintiff, Victor Vasquez, was in the course of his employment. The plaintiff climbed a vertical pipe scaffolding on the tenth-floor terrace of the building when movement in the scaffolding caused him to fall to the terrace on the tenth floor of the building. The second third-party defendant, Merritt Engineering Consultants moves to stay the second third party claims against it and compel arbitration of the second third-party claims against it pursuant to CPLR § 7503 or in the alternative to dismiss or sever the Second Third-party action pursuant to CPLR § 1010. Merritt also moves to dismiss the cause of action seeking damages for failure to procure insurance and to provide a defense pursuant to CPLR §§ 3211(a)(1) and (a)(7) and to dismiss all claims in excess of the contractually agreed limitation of liability of \$50,000 pursuant to CPLR §§ 3211(a)(1) and (a)(7). The second third party plaintiff 720 Fifth Sub A LLC (hereinafter “720 Fifth”) partially opposes the motion.

Merritt argues that the Court must stay the second third party action and compel arbitration of the second third-party claims by third-party plaintiff 720 Fifth against Merritt and sever the Second Third-party claims so that Merritt can exercise its right to arbitrate the claims by 720 Fifth. In support of the motion, Merritt includes the agreement to perform professional engineering services. Pursuant to the agreement, the clause that mandates arbitration of claims between Merritt and 720 Fifth section 4.1 states “claims disputes or other matters in questions between the parties of this Agreement arising out of or relating to this Agreement or breach thereof, including claims, disputes or other matters in questions involving amounts in excess of \$5,000.00 shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise”

Pursuant to CPLR § 7501, a written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

Pursuant to CPLR § 7503, a party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of § 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

The arbitration clause in the agreement states “any controversy or claim out of or relating to this proposal, or the breach thereof, shall be settled by small claims court breach thereof, shall be settled by small claims court if \$5,000 or less or, if in excess of \$5,000 by arbitration in accordance with the Construction Industry Arbitration Association Rules of the American Arbitration Association”

In deciding an application to compel arbitration pursuant to CPLR 7503(a), the court is required to make a determination as to whether the parties have entered into a valid arbitration agreement and if so, whether the issued sought to be submitted to arbitration falls within the

scope of that agreement (*Edgewater Growth Capital Partners, L.P. v. Greenstar North America Holdings, Inc.*, 69 AD3d 439, citing, *Koob v. IDS Fin. Servs.*, 213 AD2d 26, 30). Once the court has determined that the parties agreed to arbitrate the subject matter in dispute, their role has ended and they may not proceed to decide whether particular claims are tenable (*Matter of Praetorian Realty Corp. (Presidential Towers Residence)*, 40 NY2d 897, 898).

Merritt has demonstrated that the agreement has an arbitration clause. 720 Fifth does not make an argument in its opposition papers regarding the branch of the motion to compel arbitration. Accordingly, the court grants the branch of the motion to compel arbitration.

Merritt next argues to dismiss the fourth cause of action of the second amended complaint which seeks damages due to Merritt's failure to procure insurance and for failure to defend 720 Fifth. Pursuant to CPLR § 3211(a)(1), a party may move to dismiss on the ground that a defense is founded upon documentary evidence. Dismissal based on CPLR § 3211(a)(1) is warranted when the documentary evidence utterly refutes the plaintiffs' factual allegations (*Amsterdam Hospitality Group, LLC v. Marshall-Alan Associates, Inc.*, 120 AD3d 431). To be considered documentary, evidence must be unambiguous and of undisputed authenticity (*Fontanetta v. John Doe 1*, 73 AD3d 78).

Merritt argues that because the agreement does not include terms obligating it to procure insurance and naming 720 Fifth an additional insured the fourth cause of action must be dismissed. In opposition, 720 Fifth maintains that the cause of action should not be dismissed because the agreement is unauthenticated by either a certificate or an affidavit by a representative of Merritt. To qualify as documentary evidence, a paper must meet the following criteria: 1) it is unambiguous; 2) it is of undeniable authenticity; and 3) its contents are essentially undeniable (*VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC*, 171 AD3d 189, citing, *Fontanetta v. Doe*, 73

AD3d 78). “Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” (*Bianco v. Law Offs. Of Yuri Prakhin*, 189 AD3d 1326, 1328). The agreement between the parties constitutes documentary evidence. A review of the document reflects that it does not obligate Merritt to procure insurance. Accordingly, the branch of the motion dismissing the fourth cause of action pursuant to CPLR § 3211(a)(1) is granted.

Finally, the branch of the motion seeking to dismiss all claims in excess of the contractually agreed limitation of liability of \$50,000 pursuant to CPLR § 3211(a)(1) is granted. Merritt has met its burden through the attached agreement. The agreement states “the Owner agrees to limit the liability of MEC and its employees and consultants, to the Owner or its respective officers, employees, agents, and representatives, and any party claiming through the Owner, for any and all claims, losses, damages, and expenses, including reasonable attorneys’ fees, to the extent such claims, losses damages, or expenses result from or arise out of this Agreement or the services hereunder, to a total aggregate amount of \$50,000.00 or the aggregate fees paid to MEC, whichever is less” (see Exhibit A Proposal and Agreement). Accordingly, this branch of the motion is granted.

Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that the second third-party defendant Merrit Engineering Consultants, P.C.’s motion to compel arbitration and stay the second third party action is granted, and it is further,

ORDERED AND ADJUDGED, that the branch of the motion to dismiss the fourth cause of action against Merritt Engineering Consultants, P.C., pursuant to CPLR § 3211(a)(1) is granted, and it is further,

ORDERED AND ADJUDGED, that the branch of the motion to dismiss all claims in excess of the contractually agreed limitation of liability of \$50,000 pursuant to CPLR § 3211(a)(1) is granted, and it is further,

ORDERED AND ADJUDGED, that the second third-party defendant shall serve a copy of this decision and order on all parties within twenty (20) days of notice of entry.

This constitutes the decision and order of the court.

Dated: December 10, 2024



Hon. Paul L. Alpert, J.S.C.