

**ELC Mech. Corp. v R.P. Brennan Gen. Contrs. & Bldrs., Inc.**

2005 NY Slip Op 30614(U)

September 9, 2005

Supreme Court, New York County

Docket Number: 111822/04

Judge: Marcy Friedman

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 57

ELC MECHANICAL CORP.,  
*Plaintiff,*

Index No.: 111822/04

*against*

DECISION/ORDER

R.P. BRENNAN GENERAL CONTRACTORS  
& BUILDERS, INC.,  
*Defendant/Third-party plaintiff,*

*against*

LENOX 124 LLC,  
*Third-party defendant.*

**FILED**  
SEP 15 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

Present: HON. MARCY FRIEDMAN  
Justice, Supreme Court

This action arises out of a building construction project at 138-140 West 124<sup>th</sup> Street in Manhattan. Plaintiff ELC Mechanical Corp., a heating and air conditioning subcontractor, sued to recover damages for alleged breach of contract by defendant R.P. Brennan General Contractors & Builders, Inc. ("Brennan"), the general contractor, claiming that Brennan failed to pay a balance due of \$64,038.80 for work done by plaintiff. Brennan commenced a third-party action against Lenox 124 LLC ("Lenox"), the property owner, for indemnification, contribution, and breach of contract, alleging that Lenox failed to provide funds to Brennan to pay ELC as required by their contract. Lenox now moves to compel arbitration of Brennan's claim against Lenox or, alternatively, to dismiss the third-party complaint on the basis of a release signed by Brennan.

It is undisputed that Lenox, as owner, and Brennan, as contractor, entered into a contract dated March 11, 2004, for the construction of a building located at 138-140 West 124<sup>th</sup> Street,

New York, New York. Article 1 of the contract provides that “[t]he Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement.” (Standard Form of Agreement Between Owner and Contractor, Ex. 1 to Frost Aff. In Support of Third-Party Defendant’s Motion to Dismiss.)

Sections 4.3 through 4.6 of the General Conditions of the Contract for Construction define and provide for the resolution of claims and disputes under the contract. (Id. at 20-24.) A “claim” is defined as “a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term ‘Claim’ also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.” (Id., Sec. 4.3.1.) Section 4.4.1 provides that claims “shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation.” Section 4.5.1 further provides that, after an initial decision by the architect, a claim shall “be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.” Section 4.6.2 then provides that “[c]laims not resolved by mediation shall be decided by arbitration \* \* \* in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association.”

Brennan argues that these contract provisions do not apply here because its third-party

claims for indemnification and contribution are “contingent” on the outcome of the main claim. However, Brennan fails to otherwise demonstrate that its claims against Lenox are not subject to the dispute resolution provisions of the contract. In fact, Brennan does not dispute that its claims against Lenox are related to the contract. Brennan therefore is obligated to follow the contractual procedures with respect to its third-party claims against Lenox. (See Gershen v Hess, 163 AD2d 17 [1<sup>st</sup> Dept 1990]; Steinberg v Nolan & Co., 18 AD3d 244 [2005].)

As to the branch of Lenox’s motion which seeks dismissal based on the release signed by Brennan, the parties have not adequately addressed the issue of whether the scope of the release is for the arbitrator to decide. However, assuming arguendo that it is not, given the ambiguity of the terms of the release, there are triable issues of fact as to whether the release extends to the claims at issue. The release by its terms states that Brennan acknowledges final payment for “all labor and materials furnished and installed by us at the above job, and do hereby release the Owner and its agents from any all claims relating to this job.” (Release, Ex. 3 to Frost Aff. In Support.) Brennan submits an affidavit of its vice president, in which he attests that the language of the release was the result of negotiations and was not intended to cover claims by subcontractors. The affidavit, together with supporting documentation submitted by Brennan, is sufficient to raise a triable issue of fact as to whether the release applies under these circumstances, where Brennan’s third-party claim against Lenox is based on subcontractor ELC’s claim for payment for its work.

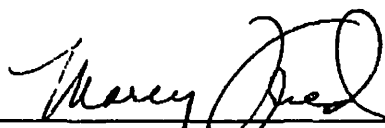
Accordingly, the motion is granted to the extent that it is

ORDERED that Brennan is directed to follow the procedures for dispute resolution set forth in Article 4 of the parties’ contract, including arbitration; and it is further

ORDERED that the instant third-party action is stayed pending arbitration of Brennan's claim, following compliance with any conditions precedent to arbitration under the parties' contract.

This constitutes the decision and order of the court.

Dated: New York, New York  
September 9, 2005

  
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MARCY FRIEDMAN, J.S.C.

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