

Bose v Think Constr.
2015 NY Slip Op 32313(U)
December 8, 2015
Supreme Court, New York County
Docket Number: 154628/2015
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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ARANI BOSE AND SHUMITA BOSE,

Plaintiffs,

-against-

Index No. 154628/2015

DECISION/ORDER

THINK CONSTRUCTION, ET AL., ,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affidavits in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Defendants Think Construction LLC (“Think”) and Timothy Moss have bought the present motion for an order compelling arbitration and staying the present action against Think based on an arbitration clause contained in an agreement between plaintiffs and Think. They also seek an order dismissing the action as against Moss or in the alternative an order staying the action against Moss pending the arbitration. They also seek the cost and expenses of this motion including attorneys’ fees.

The relevant facts are as follows. In August 2009, the plaintiffs and Think entered into a contract for Think to perform certain construction renovation services for plaintiffs (the “Contract”). The Contract provides that for “any Claim subject to, but not resolved by, mediation pursuant to 15.3 of AIA Document A201-2007, the method of binding dispute resolution shall be as follows: Arbitration pursuant to 15.4 of AIA Document A201-2007.” Section 15.3 of the General Conditions provides that “[c]laims, disputes, or other matters in controversy arising out of or related

to the Contract... shall be subject to mediation as a condition precedent to binding dispute resolution.” Section 15.4 of the General Conditions states that:

If the parties have selected arbitration as a method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement.

The issue before this court is whether arbitration should be compelled. On a motion to compel arbitration, “[i]f the court concludes that the parties made a valid agreement to arbitrate, that the dispute sought to be arbitrated falls within its scope, and that there has been compliance with any agreed on conditions precedent to arbitration, judicial inquiry is at an end (absent any issue as to bar by limitation of time) and the parties should be directed to proceed to arbitration.” *Matter of County of Rockland*, 51 N.Y.2d 1, 8 (1980). Moreover, where an arbitration provision incorporates the AAA rules as it does in this case, courts have held that the determination as to what claims are encompassed within the scope of the arbitration provision is properly placed before the arbitration panel and not the courts. *Life Receivables Trust v. Goshawk Syndicates 102 at Lloyd's*, 66 A.D.3d 494 (1st Dept 2009). “Although the question of arbitrability is generally an issue for judicial determination, when the parties' agreement specifically incorporates by reference the AAA rules, which provide that “[t]he tribunal shall have the power to rule on its own jurisdiction, including objections with respect to the existence, scope or validity of the arbitration agreement,” and employs language referring “all disputes” to arbitration, courts will “leave the question of arbitrability to the arbitrators.” *Id.* at 495.

In the present case, the court grants Think's motion to compel arbitration. The Contract between plaintiffs and Think clearly contains a valid agreement to arbitrate. Moreover, the contract

provides that “[c]laims, disputes or other matters in controversy arising out of or related to the Contract” should be submitted to mediation, and if such mediation is not successful, arbitration.

To the extent that plaintiffs argue that the work performed by Think upon which they base their suit is not subject to the Contract containing the arbitration provision because it was work that was performed after the Contract between the parties concluded, the issue of whether the present dispute between the parties is covered by the arbitration clause contained in the Contract should be determined by the arbitrator rather than the court. Plaintiffs argue that the claim they are bringing against Think is for work performed after the Contract between the parties concluded in February 2012. Defendants vigorously dispute plaintiffs’ position and argue that all the work performed by Think in connection with the construction project was pursuant to and governed by the Contract. The court finds that the issue of whether the work performed by Think was pursuant to and governed by the Contract should be determined by the arbitrator and not by the court. Thus, it is up to the arbitrator to decide whether the dispute between the parties is within the scope of the arbitration provision.

The argument by plaintiffs that they should not be required to arbitrate even claims which are arbitrable because they are inextricably intertwined with claims against other parties that are not arbitrable is without merit. “Where arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where, as here, the determination of issues in arbitration may well dispose of nonarbitrable matters” *County Glass & Metal Installers, Inc. v. Pavarini McGovern, LLC*, 65 A.D.3d 940 (1st Dept 2009). See also *Weiss v. Nath*, 97 A.D.3d 661 (2d Dept 2012); *Anderson St. Realty Corp. v. New Rochelle Revitalization, LLC*, 78 A.D.3d 972 (2d Dept 2010) ; *Estate of Castellone v. JP Morgan Chase*

Bank. N.A., 60 AD3d 621, 624 (2d Dept 2009); *Matter of Colonial Coop. Ins. Co.*, 46 AD3d 1012 (3d Dept 2007). However, “courts have the power to sever arbitrable causes of action from nonarbitrable causes of action where judicial economy would not be served by their consolidation, and where there is no danger of inconsistent rulings by the arbitrator and the court, or where there is no potential that the determination of the arbitrable causes of action would dispose of or significantly limit the issues involved in the nonarbitrable causes of action.” *Weiss*, 97 A.D.3d at 663. Based on the foregoing, if plaintiffs’ claims against the other defendants in this action are inextricably interwoven with plaintiffs’ claims against Think, which is plaintiffs’ position on this motion, the proper remedy is for this action to be stayed in its entirety pending the resolution of the dispute between plaintiffs and Think by the arbitrator.

Finally, the action against Moss should be stayed pending the arbitration of the claims between plaintiffs and Think as the claims against Moss are inextricably intertwined with the claims against Think.

Based on the foregoing, the motion by Think for an order compelling arbitration and staying the present action against Think and Moss is granted. The request for cost and attorneys’ fees is denied as movants have failed to establish sufficient basis for this relief. The foregoing constitutes the decision and order of the court.

Dated: 12/8/15

Enter: _____ *CK*

J.S.C.
CYNTHIA S. KERN
 J.S.C.