Sciame Constr. LLC v Resource N.J. Inc.

2017 NY Slip Op 31294(U)

June 15, 2017

Supreme Court, New York County

Docket Number: 651491/2017

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32
--X
SCIAME CONSTRUCTION LLC,

Petitioner,

-against-

RESOURCE NEW JERSEY INC.,

Respondent.
--X

Index No. 651491/2017
Motion Seq: 001

DECISION, ORDER & JUDGMENT
ARLENE P. BLUTH, JSC

The petition to permanently stay arbitration pursuant to CPLR 7503(b) is denied and this proceeding is dismissed.

Background

This proceeding arises out of a contract between petitioner and respondent relating to a construction project located at 71 Laight Street, New York, New York. Petitioner claims that it was the general contractor for the construction project and entered into a contract with respondent, a subcontractor, on or about September 9, 2013. Petitioner contends that the contract provides in two separate places that all disputes are to be resolved through litigation rather than arbitration.

In opposition, respondent claims that a provision in the subcontract states that any claims related to the subcontract shall be subject to mediation and arbitration administered by AAA. Respondent claims that it is owed payments from petitioner and initiated a mediation and arbitration proceeding with AAA on March 3, 2017. Respondent argues that the exhibits to the contract that contain references to litigation (as opposed to arbitration) to resolve disputes are insufficient because they are not signed and do not specifically reference respondent.

Discussion

"On motions to stay or to compel arbitration, there are three threshold questions to be resolved by the courts: whether the parties made a valid agreement to arbitrate, whether if such an agreement was made it has been complied with, and whether the claim sought to be arbitrated would be barred by limitation of time had it been asserted in a court of the State" *(Rockland County v Primiano Constr. Co., Inc.*, 51 NY2d 1, 6, 431 NYS2d 478 [1980]). "It is further settled that a party will not be compelled to arbitrate absent an express agreement or clear intent to do so" (*All Metro Health Care Servs., Inc. v Edwards*, 25 Misc3d 863, 867, 2009 NY Slip Op 29365 [Sup Ct, NY County 2009]).

Here, the only issue for the Court is whether the parties made a valid agreement to arbitrate. In order to make that determination, the Court must sort through the conflicting provisions contained in the documents. The documents contain a negotiated contract which is signed by the parties and several exhibits thereto which are incorporated by reference into that contract. While the negotiated contract is personalized, the exhibits are not. The negotiated contract has essential terms between these parties (price, payment terms, their names); the exhibits are other agreements covering the entire project (for example, general insurance requirements) and do not mention respondent at all.

The negotiated contract was prepared with a computer program; in the old days (before computers), there would be form and in order to alter it the parties would cross-out the inapplicable provisions and the blanks would be filled in by either a typewriter or by hand. The computer program used here indicates, on the very first page of the negotiated contract, how to tell what has been altered: it states that "A vertical line in the left margin of this document

indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text" (petition, exh 1 at 1).

Therefore, it is easy to determine where things have been deleted and what has been affirmatively added. And Section 6.2 of the parties' negotiated contract, titled *Binding Dispute Resolution*, provides that "For any claim subject to, but not resolved by mediation pursuant to Section 6.1, the method of binding dispute resolution shall be as follows" (*id.* at 7). Underneath this provision is an "X" marked next to "Arbitration pursuant to Section 6.3 of this Agreement" (*id.*). In fact, next to the "X" selecting the arbitration provision is a vertical line showing that these parties agreed to arbitrate their disputes. Petitioner, as the author of the contract, affirmatively checked that box and chose to arbitrate disputes with respondent (*see id.* at 14). Moreover, the box labeled "Litigation in a court of competent jurisdiction" is blank (*id.*). This evidences a clear intent of these parties to arbitrate any claim between them.

Petitioner's arguments require the Court to consider two other dispute resolution provisions, contained in two of the exhibits. Section U of Exhibit A to the negotiated contract mandates that disputes between the parties that cannot be resolved through negotiation or by mediation may go to arbitration if the dispute is deemed arbitrable by the Construction Manager–presumably Sciame (*id.* exh A at 18-19). If the dispute is not deemed arbitrable, then it is to be resolved by litigation in the Supreme Court in New York County (*id.* at 19). And section 43 of Exhibit B to the negotiated contract provides that "The Subcontractor agrees that the Venue of any action claim or other proceeding arising out of this Agreement or the termination thereof shall lie exclusively in the Supreme Court of the State of New York, County of New York or the

United States District Court for the Southern District of New York (New York County)" (*id.* exh B at 30).

These three provisions obviously conflict– a result the parties could not have intended. Therefore, the Court must identify the intent of the parties. "It is a well-established rule of construction that the written or typewritten portions of an agreement represent an express manifestation of the parties' actual intentions and take precedence over any inconsistent provisions in the printed form" (*Cale Dev. Co., Inc. v Conciliation & Appeals Bd.*, 94 AD2d 229, 234, 463 NYS2d 814 [1st Dept 1983]). The provisions contained in exhibits A and B to the negotiated contract cover the entire project and were not negotiated between petitioner and respondent. They do not even name respondent.

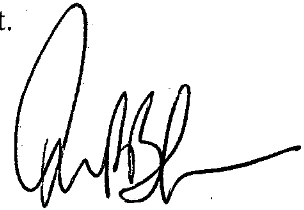
Although Exhibit B refers to subcontractors litigating (rather than arbitrating), this exhibit does not mention respondent and cannot vitiate the parties' clear intent to arbitrate as indicated in their negotiated contract. Nor does the fact that the signature page references the exhibits to the contract mean that the parties should litigate. Clearly, if both parties had read through each page of the entire contract, including exhibits, they would have discovered these inconsistent provisions. But that did not happen.

The clearest intent of the parties is that they intended to arbitrate. In the contract negotiated by these parties, they affirmatively checked the box that indicated they would arbitrate their disputes and they left the litigation box unchecked. Therefore, the Court finds that the provision contained in the negotiated contract (as opposed to the exhibits), which requires the parties to arbitrate, controls and the parties must arbitrate their dispute.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition to stay the arbitration is denied and this proceeding is dismissed.

This is the Decision, Order and Judgment of the Court.



Dated: June 15, 2017
New York, New York

ARLENE P. BLUTH, JSC