

**New York Mar. Hwy. Transp., LLC v Fidelity &
Deposit Co. of MD**

2020 NY Slip Op 32198(U)

July 7, 2020

Supreme Court, New York County

Docket Number: 651124/2019

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
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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INDEX NO. 651124/2019

NEW YORK MARINE HIGHWAY TRANSPORTATION, LLC,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
ZURICH AMERICAN INSURANCE COMPANY

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 56, 57, 58, 59

were read on this motion to/for INTERIM RELIEF.

The motion by plaintiff, brought by order to show cause, to stay this action pending arbitration is granted. The cross-motion by defendants for a partial stay of the arbitration is denied.

Background

Plaintiff claims it transported stone aggregate in barges, which were later mixed with asphalt as part of dozens of public works projects done by non-party Intercounty Paving Associates, LLC (“Intercounty”). Plaintiff claims it is owed more than \$3.5 million from Intercounty and that there is a pending arbitration between them. It asserts that defendants are sureties who provided labor and material payment bonds on behalf of Intercounty.

It argues that defendants have refused to participate in the arbitration despite the fact that it told defendants about it. Plaintiff contends that this action should be stayed pending a determination in the arbitration with Intercounty. It points out that its remedy against Intercounty

is limited to arbitration pursuant to the parties' contract and that it was required to bring the instant lawsuit in order satisfy the one-year limitations period. Plaintiff maintains that the liability of a surety is based on the liability of its principal; therefore, the result of the arbitration will have a binding effect on the defendants here.

In opposition and in support of their cross-motion for a partial stay of the ongoing arbitration between plaintiff and Intercounty to the extent a determination is made regarding defendant Zurich's liability, defendants claim that the aggregate products transported by plaintiff have nothing to do with the public works projects done by Intercounty (and bonded by defendants). They point out that the materials transported by plaintiff were left at factories, miles away from the bonded construction projects, and the aggregate was incorporated into a slurry of asphalt that was later used by many different customers.

Defendants theorize that this matter is plaintiff's attempt to seek recovery based on destinations of raw materials shipped via hundreds of barge deliveries that were then used by intermediaries to make asphalt, then transported by other intermediaries for the 40 road projects listed in plaintiff's complaint. They complain that a Court should not force a surety's bond principal (here Intercounty) to litigate its surety's exposure and liability without the surety's consent. Defendants contend plaintiff waived its right to arbitration by waiting to file for the now-pending arbitration. They conclude that collateral estoppel is not appropriate in this case.

In reply and in opposition to the cross-motion, plaintiff emphasizes that there has been no discovery in this proceeding or in the pending arbitration. It asserts that defendants cannot cross-move to stay the arbitration because they are not a party to that arbitration and they did not timely commence a proceeding under CPLR Article 75. Plaintiff contends its delay in commencing the arbitration was the product of having months-long settlement negotiations that

ultimately proved unsuccessful. Plaintiff says it offered defendants the chance to participate in the arbitration and that it intends to bind defendants to any determinations in the arbitration. However, plaintiff acknowledges that defendants “personal defenses” will be resolved in this action and any resolution of collateral estoppel would be premature and must wait until the arbitration is completed.

In reply to its cross-motion, defendants stress that arbitration cannot be imposed on a party that did not agree to arbitrate. They complain that any imposition of collateral estoppel with respect to findings in the arbitration implicates its due process rights in this case. Defendants assert that the only issue in the arbitration in the compensation owed by Intercounty to plaintiff which is calculated based on tonnage carried while in this case the issue is whether the stones were used in the projects.

Discussion

CPLR 2201 provides that “Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.”

The Court grants the stay. Despite the parties’ flurry of arguments, many of which are irrelevant to the issues presented in this motion, the fact is that there is a pending arbitration between plaintiff and defendants’ bond principal (Intercounty). Defendants know about this arbitration and can choose to participate or not to participate. Obviously, as defendants suggest, not every finding in the arbitration will necessarily have preclusive effect in this case. And, as plaintiff admits, defendants will still be able to assert “personal defenses” to plaintiff’s claims in this case.

But that does not change the fact that plaintiff claims it is owed money for transporting goods in the arbitration and claims it can recover based on performing those same acts in this case. The arbitration will explore exactly what plaintiff did and what, if anything, Intercounty owes plaintiff. That presents a clear overlap with the issues presented in this case. Simply because the arbitration will not resolve every issue in the instant case does not mean that a stay is inappropriate.

To be clear, this motion simply asks the Court to stay this action while the arbitration proceeds. The Court sees no reason not to grant that request. Plaintiff explained that it tried to avoid the arbitration through settlement negotiations and that it only filed this case because of the relatively short statute of limitations. There is no basis to find that plaintiff waived its right to seek arbitration and the Court questions whether defendants have standing to raise such an argument. There is no prejudice to defendants and a stay will prevent plaintiff from having to simultaneously litigate two proceedings about similar issues.

The Court also declines to stay the arbitration as requested in the cross-motion. Defendants do not deny that they know about the arbitration or that plaintiff asked them to participate. They cannot refuse to do so and then ask the Court to interfere with that arbitration. Whether a finding in the arbitration about defendant Zurich has an effect in this case remains to be seen, but defendants cannot have it both ways.

Summary

This is not a case where a pending arbitration involves some vaguely related non-party. It involves a non-party that obtained bonds through defendants. In other words, defendants' connection to this dispute arises directly from Intercounty's projects. Under those

circumstances, it makes sense to stay this proceeding while an arbitration between plaintiff and *Intercounty* proceeds. The parties' arguments about collateral estoppel and whether a surety is bound by a liability finding against the principal are premature as there have been no determinations made in the arbitration.

Accordingly, it is hereby

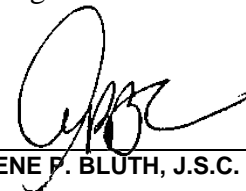
ORDERED that the motion to stay this proceeding pending a determination of the arbitration between plaintiff and non-party Intercounty Paving Associates, LLC is granted; and it is further

ORDERED that the cross-motion by defendants for a partial stay of that arbitration is denied.

Next Conference: December 8, 2020 at 10 a.m. The parties are directed to consult the docket and this part's rules regarding whether the conference will take place virtually. If the arbitration has not yet been completed, then an adjournment may be sought.

7/7/2020

DATE



ARLENE F. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE