Empire Core Group, LLC v Perennial Painting & Cleaning LLC
2020 NY Slip Op 33310(U)
October 6, 2020
Supreme Court, New York County
Docket Number: 653643/2020
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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EMPIRE CORE GROUP, LLC

Petitioner,

- v -

PERENNIAL PAINTING AND CLEANING LLC d/b/a PERENNIAL CONSTRUCTION SOLUTIONS,

Respondent.

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INDEX NO. 653643/2020

MOTION DATE 10/01/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for STAY

ORDER

Upon the foregoing documents, it is

ORDERED that the cross motion of respondent to compel arbitration pursuant to CPLR 7503 is denied; and it is further

ADJUDGED that the petition to stay the subject arbitration is granted in all respects; and, it is further

ADJUDGED and ORDERED that the parties need not and shall not proceed to arbitration, which is the subject of respondent's demand for expedited arbitration pursuant to the New York Prompt Payment Act dated July 24, 2020 and petitioner's counsel shall serve a copy of this judgment upon the arbitral tribunal; and it is further

ADJUDGED that petitioner, having an address at 270 Broadway, Suite 1003, New York, New York 10001, do recover from respondent,

having an address at 315 East 86th Street, Suite 5KE, New York, New York 10028 , costs and disbursements in the amount of $ _____ as taxed by the Clerk, and that petitioner have execution therefor.

DECISION

In Cusimano v Schnurr, 26 NY3d 391 (2015), the Court of Appeals reversed the order of the Appellate Division, First Department reversing the trial court's stay of arbitration, and reinstated the stay issued by the trial court.

In Cusimano, plaintiff business owner and investor in commercial real entities brought a plenary action against its co-owners and the accountants alleging that the accountants acted in concert with the co-owners to misappropriate distributions from the entities.

The Court observed

> "'[Like contract rights generally, a right to arbitration may be modified, waived or abandoned'. Accordingly, a litigant may not compel arbitration when its use of the courts is "clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration"' (citations omitted). While it is true that '[n]ot every foray into the courthouse effects a waiver of the right to arbitrate,' we are satisfied that the totality of plaintiff's conduct here establishes waiver."

Finding the Federal Arbitration Act applicable to the dispute before it, the Court noted that "[t]he majority of

federal courts have taken the position that waiver cannot be established in the absence of prejudice." The Court then analyzed and quoted from Louisiana Stadium & Exposition Dist. V Merrill Lynch, Pierce & Smith, Inc, 626 F.3d 156 (2d Cir.), whose facts it found "strikingly similar" to those before it:

> "The court observed that there were 'two types of prejudice: substantive prejudice and prejudice due to excessive cost and time delay,' and determined that both types had been established.
>
> "As to substantive prejudice, the court pointed out that granting the motion to arbitrate would allow plaintiff to avoid the motion to dismiss. . . As to the second type of prejudice, the court noted that it could consider 'other surrounding circumstances' beyond the burdens and expenses that would result from a grant of arbitration, 'including judicial economy'"
>
> "'Although we recognized that a plaintiff's initiation of a lawsuit does not, by itself, result in a waiver of arbitration, we also note that by filing its lawsuit and litigating it at length, [the plaintiff] "acted inconsistently with its contractual right to arbitration"'".

(26 NY3d at 400-401 [citation omitted]).

Finding the facts of the case practically on all fours with those of Louisiana Stadium, the Cusimano Court held that plaintiff therein had likewise waived arbitration and that the defendants were prejudiced by plaintiff's initial commencement of a plenary action and pursuit of the litigation strategy for a year before moving to compel arbitration. The Court found even more "telling", plaintiff's making such motion to compel only after the trial judge questioned the viability of its plenary action claims.

In the case at bar, the question is whether the petitioner, the plaintiff in the plenary action, who moves to stay arbitration, is prejudiced by the assertion of prompt payment counterclaim by respondent, defendant in such action, which interposition occurred before respondent moved to compel arbitration. This court finds that, in demanding arbitration of its prompt payment claim only after it interposed a counterclaim for such relief, and in moving to compel only after petitioner herein moved to stay arbitration, respondent prejudiced petitioner herein. Substantively, with the service of the counterclaim, petitioner was required to prepare and serve a reply. The court finds that the fact that petitioner, unlike the defendant in Cusimano, did not move to dismiss, but served a responsive pleading, is a distinction without a difference.

This court finds that petitioner herein also suffered what the Second Circuit in Louisiana Stadium characterized as the second type of prejudice. Respondent did not move to compel arbitration until after petitioner, based in part on the fact that its claim for breach of subcontract was not subject to arbitration, applied for a stay of arbitration. Both parties agree that such breach of subcontract claims are not the subject of any arbitration agreement. Thus, the prejudice to petitioner herein is "beyond the burdens and expenses that would result from a grant of arbitration" (26 NY3d at 401), as it implicates "judicial economy"

in that arbitration would require the parties to litigate their disputes in two forums. As the actions of the plaintiff in Cusimano, the actions of respondent herein indicate forum shopping, and as such prejudice has been established and respondent has waived its right to arbitrate (see 26 NY3d at 401).

10/6/2020
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE