SHORT FORM ORDER

INDEX NO.: 606706-20

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 7-2-20
SUBMITTED: 7-2-20
MOTION NO.: 001-MG; CASE DISP

BEDFORD COURTS III, LLC, BEDFORD COURTS III LIHTC, LLC, BEDFORD COURTS III HOUSING DEVELOPMENT FUND CORPORATION, BEDFORD COURTS LOCAL DEVELOPMENT CORPORATION, WELLS FARGO COMMUNITY DEVELOPMENT ENTERPRISE ROUND 12 SUBSIDIARY 24, LLC, NCIF NEW MARKETS CAPITAL FUND XXXV CDE, LLC, NYCR SUB-CDE 6, LLC, AND CITI NMTC SUBSIDIARY CDE XXXV, LLC,

Petitioners,

-against-

CONCRETE STRUCTURES, INC.,

Respondent.

SILVERMAN SHIN & BYRNE PLLC
Attorneys for Petitioners
Wall Street Plaza
88 Pine Street, 22nd Floor
New York, New York 10005

RODRIGUEZ-MCCLOSKEY PLLC
Attorneys for Respondent
300 Cadman Plaza W., 12th Floor
Brooklyn, New York 11201

Upon the following papers read on these applications to stay arbitration ; Order to Show Cause and supporting papers 1-24 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 26-34 ; Replying Affidavits and supporting papers ; it is,

ORDERED that these applications by the petitioners for an order staying arbitration of the respondent's claims against them is granted.

On January 31, 2019, the petitioners Bedford Courts III, LLC, and Bedford Courts Local Development Corporation (collectively "Bedford") entered into an agreement with non-party Armory Builders III, LLC ("Armory"), as general contractor, for the construction of an affordable housing project in Brooklyn, New York (the "Prime Contract"). The project consisted of the rehabilitation and development of one building as a community center, among other

things, and the construction of two new residential buildings. The agreement provided that any disputes between Armory and Bedford arising out of or related to the agreement and not resolved by mediation would be resolved by arbitration.

On July 24, 2019, Armory entered into three subcontracts with the respondent, Concrete Structures, Inc. ("CSI"), one for each of the three buildings that comprised the project. The subcontracts provided that any claims or disputes between Armory and CSI arising out of or in connection with the subcontract or the work "shall be resolved by litigation unless [Armory], at its sole option, advises [CSI] in writing . . . that [Armory] elects to have the claim or dispute resolved by arbitration."

Disputes arose between Armory and CSI regarding CSI's performance, which led Armory to terminate the subcontracts in early April 2020. CSI then commenced an action against Armory in the Supreme Court, Kings County, for breach of the subcontracts, among other things. By a letter dated May 4, 2020, Armory advised CSI that, pursuant to the terms of the subcontracts, it was electing to have CSI's claims against it resolved by arbitration. On May 6, 2020, Armory commenced an arbitration proceeding against CSI. On May 28, 2020, CSI commenced an arbitration proceeding against Armory, Bedford, and the other petitioners alleging, inter alia, wrongful termination of the subcontracts. On June 8, 2020, Bedford and the other petitioners commenced this special proceeding pursuant to CPLR 7503(b) to permanently stay the arbitration commenced by CSI on the ground that there is no agreement to arbitrate between them and CSI. They subsequently moved by order to show cause for the same relief and for a temporary restraining order.

Arbitration is essentially a creature of contract (**Wolf v Wahba**, 164 AD3d 1405, 1407). Thus, a party will not be compelled to arbitrate, and thereby surrender the right to resort to the courts, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes (**Matter of Waldron v [Goddess]**, 61 NY2d 181, 183). The agreement must be clear, explicit, and unequivocal (**Id.**). Absent clear language to the contrary, an arbitration agreement may not be extended by construction or implication to include someone who is not a party to the agreement (**Id.** at 185). Thus, a nonsignatory to a contract containing an arbitration clause is not obligated to arbitrate a dispute with either of the parties to such contract (**Alexander, Practice Commentaries**, McKinney's Cons Laws of NY, Book 7B, CPLR C7501:3 at 322).

There is no agreement to arbitrate between the petitioners and CSI. While the Prime Contract between Armory and Bedford contains an arbitration provision, CSI is not a party to that agreement. Moreover, the controversy that CSI seeks to arbitrate does not arise out of, nor is it related to, the Prime Contract. It is related to the subcontracts between Armory and CSI. Bedford is not a party to the subcontracts, nor are the other petitioners, who are not even parties to the Prime Contract. CSI attempts to include them as parties to the Prime Contract by using the definition of "owner" found in the subcontracts, blurring the distinction between the Prime Contract and the subcontracts and treating them as one agreement.

CSI contends that, under the incorporation-by-reference doctrine, the petitioners are barred from staying the arbitration. CSI contends that the petitioners clearly intended to arbitrate claims and disputes arising under the Prime Contract, which includes the subcontracts. Moreover, the Prime Contract provides in § 15.4.3 that "other agreements to arbitrate with an additional person or entity duly consented to by parties to the [Prime Contract] shall be specifically enforceable under applicable law in any court having jurisdiction thereof." In addition, the performance bond incorporates the terms of the Prime Contract. Thus, CSI contends that the petitioners, who are parties to the performance bond, intended that all disputes arising out of the Prime Contract, including the subcontracts, would be resolved by arbitration.

CSI has again blurred the distinction between the two agreements. Neither the subcontracts nor the Prime Contract explicitly corporate the other by reference. In fact, the Prime Contract specifically provides that the contract documents "shall not be construed to create a contractual relationship of any kind . . . between [Bedford] and a Subcontractor or a Sub-subcontractor[.]" Moreover, § 15.4.3 of the Prime Contract clearly requires the consent of both Bedford and Armory to arbitrate with an additional person or entity such as CSI. Contrary to CSI's contentions, the petitioners are not parties to the performance bond, which is between the surety and Armory. The petitioners are merely additional obligees or beneficiaries thereof. The performance bond does not contain an arbitration clause; and, while it incorporates the Prime Contract by reference, it does not specifically refer to the arbitration provision of the Prime Contract (*see*, **Navillus Tile, Inc. v Bovis Lend Lease LMB, Inc.**, 74 AD3d 1299, 1301-1302 [general incorporation clauses, without any specific reference to the ADR provisions of the Prime Contract, are insufficient to incorporate those ADR provisions into the subcontract]). Accordingly, CSI's incorporation-by-reference argument fails.

The Federal Arbitration Act, upon which CSI relies, does not warrant a different result. Even under the Federal Arbitration Act, where expanded arbitration coverage is favored if there is a question regarding scope, arbitration will not be imposed upon a party unless that party has agreed to such procedure (**Matter of Saturn Constr. Co., Inc. v Landis & Gyr Powers, Inc.**, 238 AD2d 428). An arbitration agreement must be clear, explicit and unequivocal and must not depend upon implication or subtlety (**Navillus Tile, Inc.** *supra* at 1301). In the absence of an express and specific agreement to arbitrate, the right to ordinary judicial process is not waived (**Matter of Saturn Constr. Co., Inc.**, *supra*). CSI has not established an express and specific agreement to arbitrate its disputes with the petitioners and, instead, relies on subtle inferences and implications.

The cases upon which CSI relies in support of its intertwined theory of estoppel are not binding on this court. Moreover, the Court of Appeals has rejected the notion that an entire case should be referred to arbitration when arbitrable and nonarbitrable claims are "inextricable interwoven," stating that interrelatedness, standing alone, is not enough to subject a nonsignatory to arbitration (**Alexander, Practice Commentaries**, McKinney's Cons Laws of NY, Book 7B, CPLR C7501:3 at 322, *citing* **TNS Holdings, Inc. v MKI Securities Corp.**, 92 NY2d 335, 340).

Lastly, CSI contends that the petitioners are estopped from staying the arbitration under the direct-benefits theory of estoppel, which provides that a nonsignatory may be compelled to arbitrate when the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause and receives benefits flowing directly from the agreement (**Matter of Belzberg v Verus Invs. Holdings Inc.**, 21 NY3d 626, 631). CSI contends that, as the owners of the property where the project is located, the petitioners are the direct beneficiaries of the work performed under the subcontracts and that the subcontracts contain arbitration clauses.

CSI's reliance on the arbitration clauses in the subcontracts is misplaced. The subcontracts evince an intent to resolve disputes arising thereunder by litigation, not arbitration. They provide, in pertinent part, that any claims or disputes between Armory and CSI arising out of or in connection with the subcontract or the work "**shall be resolved by litigation** unless [Armory], at its sole option, advises [CSI] in writing . . . that [Armory] elects to have the claim or dispute resolved by arbitration [emphasis added]." Thus, only Armory can compel arbitration under the subcontracts. Unless Armory makes the election to proceed to arbitratration, all disputes arising under the subcontracts are to be resolved by litigation. CSI cannot compel Armory or anyone else, signatory or nonsignatory, to proceed to arbitration. Accordingly, the petitioners' application for a stay of the arbitration is granted.

CSI's reliance on CPLR 6312 for the posting of an undertaking is misplaced. CPLR 6312 applies to preliminary injunctions. An undertaking is not needed when, as here, a stay is granted pursuant to CPLR 7503 (b).

Dated: September 17, 2020

J.S.C.