Metropolitan Transp. Auth. v Westfield Fulton Ctr., LLC

2021 NY Slip Op 31367(U)

April 23, 2021

Supreme Court, New York County

Docket Number: 450428/2021

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY Petitioners, - v - WESTFIELD FULTON CENTER, LLC, Respondent.	**INDEX NO.** 450428/2021 **MOTION DATE** 02/26/2021, 03/12/2021 **MOTION SEQ. NO.** 001 002 **DECISION + ORDER ON MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5
were read on this Petition to STAY ARBITRATION.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46
were read on this motion for a PRELIMINARY INJUNCTION.

This is a special proceeding to stay arbitration under CPLR §§ 7502 and 7503(b).

Background

Petitioners (collectively, "MTA" or "Landlord") and Respondent Westfield Fulton Center, LLC ("Westfield" or "Tenant") are parties to a lease agreement dated May 16, 2014, with respect to certain portions of the Fulton Center transportation complex in lower Manhattan (NYSCEF Doc. No. 3 [the "Lease"]).

The Lease provides that New York state and federal courts "shall have exclusive jurisdiction over any case or controversy arising from, under or in connection with this Lease and shall be the sole and exclusive forum in which to adjudicate any such dispute, ***except for any***

dispute that by the express terms of this Lease is to be resolved by Arbitration" (*id*. at § 29.5 [emphasis added]).

The Lease describes seven specific categories of disputes that are subject to Arbitration, including (as relevant here) "any dispute between Landlord and Tenant as to whether Substantial Completion or Final Completion has occurred" (*id*. at § 3.1). If an arbitrable dispute is "construction-related," the arbitration "shall be administered under the Construction Industry Arbitration Rules and Mediation Procedures of the AAA" (*id*. at § 23.1). Under those Rules, "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement" (Construction AAA Rule 9.1).

On February 16, 2021, Westfield filed with the AAA a Demand for Arbitration (NYSCEF Doc. No. 18) and a Statement of Claim (NYSCEF Doc. No. 2) against MTA for Breach of the Lease, Unjust Enrichment, Breach of the Covenant of Good Faith and Fair Dealing, and Attorney's Fees pursuant to Section 23 of the Lease. At a high level, Westfield alleges that:

- "The Commercial Usage Areas of the Premises that the MTA delivered to Westfield … was [sic] not in Tenant-Ready Condition. Westfield conditionally accepted the delivery in good faith, predicated upon the MTA's agreement to diligently pursue the completion and correction of its work. The MTA thereafter failed to perform" (*id*. at ¶3);
- "For nearly two years, Westfield was forced to track MTA deliverables, incurring costs in excess of $1.5 million and suffering diversion of internal human resources in its engineering, cleaning and janitorial, development, leasing, and

management departments. The MTA also forced Westfield to perform additional construction works not contemplated in the Lease by, for example, altering or adding certain requirements after Westfield already had performed its work" (*id.* at ¶ 4); and

- "As a result, Westfield has suffered and continues to suffer significant damages. Westfield is entitled to compensation from the MTA" (*id.* at ¶ 5).

Westfield seeks compensation for the following categories of work that Westfield performed throughout the Fulton Center, and that Westfield claims were MTA's responsibility under the Lease: "(a) infrastructure for kiosks and Retail Merchandising Units, (b) installation of 'Employee-Only' designated restrooms for Westfield's tenants, (c) subtenant storefront magnetic release closure requirement, (d) additional fire alarm work, (e) level two build-up and egress requirements, (f) additional work for the Christian Science Reading Room, (g) Base Building design changes for the Dey Street Headhouse, (h) changes to egress and design on the street level, (i) the restoration of the façade of Corbin Building due to its designation as a landmark, (j) access to the roof HVAC systems, and (k) the service lift on the Concourse Level" (*id.* at ¶11). Westfield also seeks to recover costs.

In response, on February 26, 2021, MTA brought a Petition in this Court seeking a permanent stay of the arbitration under CPLR §§ 7502 and 7503(b). MTA asserts that Westfield's claims for relief in the arbitration do not fall "within any of the narrow grounds for arbitration identified in the Lease" (NYSCEF Doc. No. 1 [the "Petition"] at ¶ 4). MTA seeks: (i) an order "permanently staying the Arbitration commenced by Westfield or, in the alternative, staying arbitration of all claims alleged in Westfield's Statement that are not arbitrable under the narrow arbitration clauses in the Lease"; and (ii) recovery of its costs and expenses in this

proceeding, including reasonable attorney's fees as provided in Section 28.1 of the Lease (*id*. at ¶¶ 9-10).

On March 12, 2012, MTA moved by Order to Show Cause for a preliminary injunction and temporary restraining order enjoining Westfield from proceeding with the arbitration (NYSCEF Doc. No. 14). In response, Westfield asserted that its claims in the arbitration are disputes "as to whether Substantial Completion or Final Completion has occurred," and therefore are subject to mandatory arbitration under Section 3.1 of the Lease. The Court signed the order to show cause, temporarily staying the arbitration pending the hearing on MTA's motion for a preliminary injunction (NYSCEF Doc. No. 29).

Given that the pending motion and the Petition itself seek essentially the same relief, the parties jointly requested the Court to consider them together based on the same set of papers (NYSCEF Doc. No. 13), which the Court has done. Accordingly, this decision resolves both the motion and the Petition.

The Court held oral argument on April 14, 2021, after which it took the matter under submission and extended the temporary stay until resolution of the motion. For the reasons that follow, the Court dissolves the temporary restraining order, denies the motion for a preliminary injunction, and denies the Petition seeking a permanent stay of the arbitration.

Discussion

The principal question in this case is whether some or all of the claims asserted by Westfield in its Statement of Claims come within the scope of the matters subject to mandatory arbitration under Section 3.1 of the Lease.[1]

1. *Arbitrability is for the Court to Decide*

As an initial matter, the parties dispute whether this Court or the arbitrator should determine whether Westfield's claims are covered by the arbitration provisions of the Lease. The Court agrees with the MTA that this is a question for the Court.

"Whether a dispute is arbitrable is generally an issue for the court to decide unless the parties clearly and unmistakably provide otherwise" (*Zachariou v Manios*, 68 AD3d 539, 539 [1st Dept 2009]). Westfield contends that because the Lease adopts AAA rules governing arbitration, and because those rules provide that the arbitrator has the power to determine arbitrability, the parties "clearly and unmistakably" agreed that the arbitrator (not the Court) would decide whether Westfield's claims are subject to arbitration under the Lease.

As the First Department has observed, "[w]here there is a broad arbitration clause and the parties' agreement specifically incorporates by reference the AAA rules providing that the arbitration panel shall have the power to rule on its own jurisdiction, courts will 'leave the question of arbitrability to the arbitrators'" (*id.*; cf. *Henry Schein, Inc. v Archer and White Sales,*

[1] The threshold question in assessing a Petition to Stay Arbitration is whether there is a valid and binding arbitration agreement (CPLR § 7503 [b] ["a party may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with"]). Here, there is no dispute that there is a valid and binding agreement between the parties to arbitrate certain disputes.

Inc., 139 S Ct 524, 530 [2019] ["[i]f a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue"]).

However, if the parties' agreement "contains a narrow arbitration provision, the reference to the AAA rules does not constitute clear and unmistakable evidence that they have intended to have an arbitrator decide arbitrability. Thus, that question is for the court to decide in the first instance" (*Zachariou*, 68 AD3d at 539).

The rationale for this distinction is clear. When the parties include a broad arbitration provision covering all or substantially all disputes under the agreement (*see e.g.*, *Flintlock Const. Services, LLC. v Weiss*, 122 AD3d 51, 54 [1st Dept 2014]), it is reasonable to conclude that they clearly and unmistakably agreed to refer disputes regarding the scope of the arbitration provision itself to the arbitrator as well. When the arbitration provision is more limited, as it was in *Zachariou* (where the arbitrator was limited to determining the amount of certain distributions), there is no such clarity as to whether the parties agreed to defer the question of arbitrability to the arbitrator. Thus, in such cases, the default rule controls (*i.e.*, the Court decides).[2]

Although the arbitration provisions in the Lease cover more territory than the provision at issue in *Zachariou*, they are nevertheless limited in scope. Most importantly, the default rule under Section 29 of the Lease is that "any case or controversy arising from, under or in connection with this Lease" are to be resolved exclusively *in litigation* unless the dispute is

[2] This Court's decision in *Gol v TNJ Holdings, Inc.*, 2020 WL 5224230 [Sup Ct 2020], to which Westfield's counsel made reference during oral argument, is not to the contrary. In that case, the broad arbitration provision ("any unresolved controversy or claim arising out of or relating to this Agreement") contained an exception for certain intellectual property claims (which were not involved in the case). For analytical purposes, the key point was that the *default* rule in the agreement was that any and all non-IP disputes – thus including questions as to the scope of the arbitration provisions – would be decided by arbitrators.

expressly directed to arbitration elsewhere in the agreement. Although there are several provisions in the Lease directing the parties to arbitrate specific substantive disputes, including Section 3.1 upon which Westfield relies, there are no provisions stating "clearly and unmistakably" that the question of arbitrability is to be decided by the arbitrator.

Accordingly, the Court must decide whether the instant dispute comes within the scope of the arbitration provision contained in the Lease.

2. *Westfield's Claims Are Arbitrable*

New York "favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties" (*Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 49-50 [1997] [citations omitted]). Under the Federal Arbitration Act, which governs any agreement to arbitrate contracts evidencing a transaction involving commerce, "'questions of arbitrability must be addressed with a healthy regard for the federal policy … [and] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'" (*Singer v Jefferies & Co., Inc.*, 78 NY2d 76, 81-82 [1991] [quoting *Cone Mem. Hosp. v Mercury Constr. Corp.,* 460 US 1, 24–25 [1983]].

Thus, "it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" (*AT&T Techs. v Communs. Workers of Am.*, 475 US 643, 650 [1986]] [citations omitted]; *see also Wilson v PBM, LLC*, 193 AD3d 22 [2d Dept 2021]). Although the intention of the parties is controlling, "those intentions are generously construed as to issues of arbitrability" (*Singer*, 78 NY2d at 82 [citation omitted]; *see also Daly v Citigroup Inc.*, 939 F3d 415, 421 [2d Cir 2019] ["In accordance with the 'strong

federal policy favoring arbitration as an alternative means of dispute resolution,' we resolve any doubts concerning the scope of arbitrable issues in favor of arbitrability'"] [citations omitted]), *cert denied*, 140 S Ct 1117 [2020].

With those considerations in mind, the Court concludes that Westfield's claims as set forth in the Statement of Claims, broadly construed, are arbitrable under Section 3.1 of the Lease. As noted above, that section of the Lease mandates arbitration of "any dispute between Landlord and Tenant as to whether Substantial Completion or Final Completion has occurred." The Lease, in turn, defines Substantial Completion to include, among other things, that "the Tenant-Ready Condition has been satisfied, subject to the completion of non-material items that do not, individually or in the aggregate, have a material adverse effect on the use or occupancy of the Premises for its intended purpose (*see* Lease Exhibit Q, NYSCEF Doc. No. 31). The Lease further defines Final Completion to include, among other things, that "the Tenant-Ready Condition has been satisfied" (*id.*).

The gravamen of Westfield's Statement of Claim is that MTA failed to deliver the Commercial Usage Areas of the Premises to Westfield in "Tenant-Ready Condition" (*see* Statement of Claim at ¶¶ 2 – 3). As such, the Statement of Claim concerns a dispute as to whether MTA satisfied a condition of Substantial Completion and Final Completion.[3] Although MTA argues that Westfield's claims, even if proven, do not impact Substantial Completion or Final Completion, that will be a matter for the arbitration panel to determine. For present

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[3] In its brief in opposition to the instant motion, Westfield asserts that it also challenges whether MTA satisfactorily completed the "Core and Shell/Base Building Improvements" which (if proven) could present another ground for claiming a failure of Substantial and Final Completion under the Lease. The Statement of Claim – which is the subject of the Petition – does not reference such a failure, and thus the Court does not consider it for purposes of this decision and order.

purposes, all that is required is that Westfield's claims come within the scope of the arbitration provision.

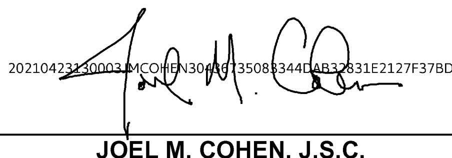
For the avoidance of doubt, nothing in this decision and order should be construed as determining the arbitrability of any claims other than (i) "whether Substantial Completion or Final Completion has occurred," and (ii) what, if any, damages or other relief the prevailing party is entitled to under the Lease with respect to that claim, including reasonable attorneys' fees and costs under Section 23 of the Lease.

Accordingly, it is hereby

ORDERED that MTA's Petition to Stay Arbitration (Motion Seq. 001) and its Motion for a Preliminary Injunction (Motion Seq. 002) are **denied**; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the Petition.

This constitutes the decision and order of the Court.



4/23/2021			JOEL M. COHEN, J.S.C.		
DATE					
CHECK ONE:	[X] CASE DISPOSED		[ ] NON-FINAL DISPOSITION		
APPLICATION:	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART	[ ] OTHER	
	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
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