

**Ecker Window Corp. v Indian Harbor Ins. Co.**

2025 NY Slip Op 33099(U)

August 15, 2025

Supreme Court, New York County

Docket Number: Index No. 651491/2025

Judge: Kathleen Waterman-Marshall

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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. KATHLEEN WATERMAN-MARSHALL PART 31**

*Justice*

-----X

ECKER WINDOW CORP.,

Petitioner,

- v -

INDIAN HARBOR INSURANCE COMPANY,

Respondent.

-----X

INDEX NO. 651491/2025

MOTION DATE 03/18/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 16, 18, 19, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41

were read on this motion to/for STAY.

Upon the foregoing papers and following on-the-record oral argument on June 3, 2025, the petition and motion by Petitioner Ecker Window Corp. (“Ecker”) for an order, pursuant to CPLR § 7503, permanently staying the arbitration proceeding commenced by Respondent Indian Harbor Insurance Company (“Indian Harbor”), is denied.

Upon the same record, the joint cross-petition and motion by Indian Harbor and non-party Suffolk Construction Co. (“Suffolk”) for an order joining Suffolk as a necessary party and to compel arbitration, is granted.

Accordingly, the temporary restraining order staying arbitration contained in the Order to Show Cause signed on March 24, 2025 (NYSCEF Doc. No. 16), is vacated and this matter is disposed.

**Background**

This Article 75 special proceeding to permanently stay arbitration arises out of a \$500 million construction project in downtown Manhattan. Suffolk, as general contractor of the project, engaged Ecker as a subcontractor pursuant to a subcontract agreement (the “Subcontract”). Indian Harbor insured Suffolk for any subcontractor defaults. Section 8.16 of the Subcontract requires arbitration for all disputes arising out of the subcontract.

In pertinent part, Section 8.16 provides:

8.16 Disputes. Any claims arising out of this Subcontract, including, without limitation, claims for an adjustment to the Subcontract Amount or Time of performance, which cannot be resolved by negotiations shall be considered a dispute within the meaning of this section.

[...]

All disputes (single or aggregate) which exceed \$50,000.00 or where injunctive relief is sought, shall be submitted to a panel of three arbitrators in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, upon Contractor's election and subject to the following paragraph. The results of any arbitration shall be binding on the parties thereto, and shall be enforceable by court order at the request of either party.

[...]

[t]he Subcontractor agrees, upon Contractor's written demand, to become a party to and be bound by any arbitration, litigation or other proceeding involving the Contractor, the Architect or the Owner in the event that such proceedings involve any of the rights or obligations of the Subcontractor under this Subcontract. In any dispute resolution process involving the Contractor's surety, if any, Contractor's surety shall have and shall be entitled to raise any and all defenses available to Contractor under this Subcontract, at law or otherwise.

(NYSCEF Doc. No. 25 at 14 [emphasis supplied]).

The construction project ran into delays and problems. Eventually, Suffolk issued a notice of default to Ecker and filed a claim under its insurance policy with Indian Harbor, which paid \$14,406,376.00 on Suffolk's claim. Thereafter, Suffolk and Indian Harbor filed a demand for arbitration with American Arbitration Association ("AAA") against Ecker to recover the amount Indian Harbor paid to Suffolk and any additional amounts due to Suffolk as a result of Ecker's work on the project and/or breach of the Subcontract.

In response, Ecker commenced this proceeding to permanently stay the arbitration and vacate the arbitration demand. On March 24, 2025, the Court signed Ecker's order to show cause and granted a temporary restraining order staying arbitration proceedings pending resolution of this special proceeding. Indian Harbor and Suffolk jointly cross-moved for an order permitting Suffolk to join as a necessary party, and to compel arbitration.

#### *Parties' Contentions*

In the main, Ecker contends that Indian Harbor cannot enforce the arbitration provision in the Subcontract and, thus, cannot commence arbitration proceedings against it because Suffolk assigned to Indian Harbor only the right to recoup payment from Ecker, and not the duties or obligations under the Subcontract. Ecker also argues that Suffolk need not be joined as a party in this proceeding because Indian Harbor, as the subrogated insurer, may maintain an action in its own name.

Indian Harbor and Suffolk disagree, citing the plain language of Section 8.16 of the Subcontract which states, *inter alia*, that "[a]ny claims arising out of this Subcontract" and "all disputes which exceed \$50,000" shall be submitted to arbitration and that Ecker, as subcontractor, agrees to participate in and be bound by such arbitration. Indian Harbor, as surety

of Suffolk, also argues, based upon recent subrogation case law, that it may indeed raise any and all defenses available to Suffolk under the Subcontract.

## **Discussion**

### *I. Joinder as Necessary Party*

Under CPLR § 1001, a non-party “who might be inequitably affected by a judgment” shall be joined as a necessary party to the action. The parties in an arbitration proceeding are necessary to the related Article 75 special proceeding seeking to stay that same arbitration proceeding (*see generally, Eagle Ins. Co. v Villegas*, 307 AD2d 879 [1st Dept 2003] [arbitration should not have been stayed without joining parties to arbitration and their insurers]). They will, invariably, be affected by a judgment compelling or staying the arbitration, and are therefore necessary under CPLR § 1001. Additionally, as “all arbitration-related applications should be concentrated in a single proceeding or action” (*Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117 [2001]; *see also* CPLR § 7502[a][iii]), a party named in the arbitration proceeding is necessary to the Article 75 special proceeding to compel or stay that arbitration, so that they may seek relief against the petition within the same special proceeding.

Ecker’s representation that Suffolk is not a party to the arbitration proceeding is inaccurate. Suffolk, together with Indian Harbor, brought the underlying arbitration proceeding against Ecker and both are named in the arbitration caption. Suffolk and Indian Harbor collectively seek to adjudicate the dispute arising out of the Subcontract between Suffolk and Ecker, and they each assert a cause of action in the AAA arbitration (NYSCEF Doc. No. 41). Ecker’s reliance on Court of Appeals cases from more than 100 years ago for its contention that Suffolk need not be named in this special proceeding is misplaced (*Ocean Acc. & Guar. Corp. v Hooker Electrochemical Co.*, 240 NY 37 [1925]; *Lord & Taylor, Inc. v Yale & Towne Mfg. Co.*, 230 NY 132 [1920]). Those cases are factually inapposite, and stand for the principle that where an insurer has paid the entire amount of a loss, the insurer may maintain an action to recover the loss in its own name (*id.*). The cases do not address whether a party to an underlying arbitration is necessary or may join a court action to stay or compel the underlying arbitration.

Under these circumstances, Suffolk is a necessary party to this action and its joinder motion is granted.

### *II. Motion – Stay / Compel Arbitration*

Although the underlying dispute between the parties involves a complex construction project, the issue presented herein is straightforward. Simply put, the Court must determine whether the Subcontract between Suffolk and Ecker constitutes a valid arbitration agreement and, if it does, whether Indian Harbor, as the subrogee of Suffolk may enforce the arbitration agreement. The Court is not called upon to address the arbitrability of any particular issue, as Section 8.16 of the parties’ Subcontract provides that the arbitrability of issues shall be resolved by the arbitrators (*see Snazzi Reporting, Inc. v Veritext, LLC*, 231 AD3d 687 [1st Dept 2024] [issue of arbitrability reserved for arbitrator pursuant to parties’ contract]).

Article 75 of the CPLR provides that a party may seek to compel or stay arbitration proceedings (CPLR § 7503[a], [b], and [c]). The party seeking to stay arbitration bears the burden of establishing sufficient facts to justify the stay (*AIU Ins. Co. v Cabreja*, 301 AD2d 448,

449 [1st Dept 2003]). The party seeking to compel arbitration bears the burden of demonstrating a clear and unequivocal agreement to arbitrate the issue (*Gerling Global Reinsurance Corp. v Home Ins. Co.*, 302 AD2d 118 [1st Dept 2002]).

Section 8.16 of the Subcontract contains a clear and unequivocal agreement to arbitrate. As noted above, this provision defines “Disputes” as “[a]ny claims arising out of this Subcontract” and requires that “[a]ll disputes. . . which exceed \$50,000.00. . . shall be submitted to a panel of three arbitrators in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.” In addition, Section 8.16 memorializes Ecker’s agreement upon Suffolk’s demand

. . .to become a party to and be bound by any arbitration. . . involving the Contractor . . . in the event that such proceedings involve any of the rights or obligations of the Subcontractor under this Subcontract. In any dispute resolution process involving the Contractor’s surety, if any, Contractor’s surety shall have and shall be entitled to raise any and all defenses available to Contractor under this Subcontract, at law or otherwise. (NYSCEF Doc. No. 25 at 14).

The plain meaning of Section 8.16 requires arbitration for disputes in excess of \$50,000 which arise out of the Subcontract. The dispute at issue here exceeds \$14 million, and arises out of Ecker’s performance under the Subcontract. Suffolk’s notice of Ecker’s default, and payment for claims thereof, are issues which arise out of the Subcontract. Thus, the Subcontract, by its express terms, is a clear and unequivocal agreement to arbitrate the issue.

Ecker’s reliance on *Kaufman* for the proposition that the arbitration provision does not apply to Indian Harbor, as assignee, due to a distinction between the assignment of rights and the assignment of obligations, is misplaced (*Kaufman v William Iselin & Co.*, 272 AD 578 [1st Dept 1947]). *Kaufman* expressly found that where a factor sues upon an assigned contract, an active effort, it assumes the arbitration provision – as opposed to where an assignee is sued or joined as a third-party, passively (*id.*; see also *GMAC Commercial Credit LLC v Springs Industries, Inc.*, 171 F.Supp.2d 209, 216 [SDNY 2001]). Indian Harbor has undertaken active efforts to enforce the Subcontract, by jointly bringing the arbitration with Suffolk, and has therefore assumed the arbitration provision in the Subcontract.

In any event, it is well established that “[t]he assignee of a contract acquires the assignor’s rights therein, and assumes its obligations including an agreement to arbitrate” (*Fabrics Corp v Deering Milliken, Inc.*, 35 AD2d 469 [1st Dept 1971]). “[A] subrogee acquires all of the rights, defenses and remedies of the subrogor and is subject to any defenses or claims which may be raised against the subrogor (*Solomon v Consolidated Resistance Co. of Am.*, 97 AD2d 791 [1983]). “The rights of plaintiffs’ insurer as subrogee must therefore be determined with reference to the rights of the named plaintiffs, and if the named plaintiffs would be required to submit the controversy to arbitration, then plaintiff’s insurer will be similarly bound” (*id.*). This recognizes the “elementary ancient law that an assignee never stands in any better position than [their] assignor. An assignee is subject to all the equities and burdens which attach to the

property assigned because [they] receive no more ... than [their] assignor” (*Septembertide Publishing, B.V. v Stein and Day, Inc.*, 884 F.2d 675 [2d Cir. 1989]).

There is no dispute that Suffolk and Ecker must arbitrate issues regarding their performance under the Subcontract. Accordingly, Indian Harbor, as subrogee of Suffolk, must likewise arbitrate issues regarding Suffolk’s and Ecker’s performance under the Subcontract. Consequently, Ecker’s motion to stay arbitration is denied.

Turning to Suffolk’s and Indian Harbor’s cross-motion to compel arbitration, that relief is granted. CPLR § 7503(a) provides that “[w]here there is no substantial question whether a valid agreement was made, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate.” There is no substantial question that Section 8.16 of the Subcontract contains an arbitration provision applying to disputes arising out of the subcontract. As discussed, *supra*, Suffolk’s notice to Ecker of its default, and Indian Harbor’s payment for claims thereof, are issues which arise out of the Subcontract. No party has raised statute of limitations claims. Consequently, enforcement of the arbitration agreement is warranted.

Accordingly, it is

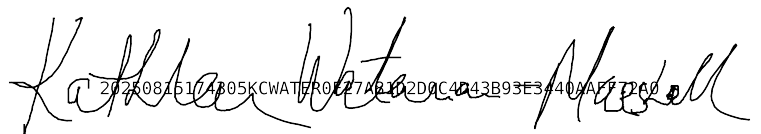
**ORDERED** that Suffolk Construction Co.’s cross-motion for joinder as a necessary party is granted; and it is further

**ORDERED** that Ecker Window Corp.’s motion to stay arbitration is denied; and it is further

**ORDERED** that the temporary restraining order staying arbitration is vacated; and it is further

**ORDERED** that Suffolk Construction Co.’s and Indian Harbor Insurance Company’s cross-motion to compel arbitration is granted and the arbitration shall proceed before the arbitration panel in accordance with the Subcontract; and it is further

**ORDERED** that the matter shall be marked disposed.



8/15/2025

DATE

KATHLEEN WATERMAN-MARSHALL,  
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