SEG Servs. Corp. v Smyrna Ready Mix Concrete, LLC
2024 NY Slip Op 31389(U)
March 26, 2024
Supreme Court, Kings County
Docket Number: Index No. 533904/2023
Judge: Rupert V. Barry
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Index No.: 533904/2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 13

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SEG SERVICES CORP.,

Petitioner,

-against-

SMYRNA READY MIX CONCRETE, LLC,

Respondent.

Index No. 533904/2023
Motion Seq. No.: 1
Cal. No.: 41

DECISION & ORDER

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of Petitioner's application, by order to show cause, to stay arbitration under CPLR 7503: NYSCEF Nos. 1-13; 22-40

Upon the foregoing cited papers, the Court's Decision and Order on the order to show cause filed by Petitioner for an order staying arbitration is as follows:

Petitioner seeks to stay arbitration on the grounds that (1) there does not exist a valid, enforceable contract, and that (2) the Prompt Payment Act ("PPA") does not apply in this case. Petitioner points to an unsigned, 4-page, written quote that is superimposed with the word "draft" on the first 3 of pages as evidence that the contract is not binding, and therefore, that there was not an agreement between the parties to arbitrate. Respondent, in his opposition to stay arbitration, argues that the matter does fall in the ambit of the PPA and that the failure of the parties to sign the agreement does not negate the fact that there was a valid, enforceable contract between the parties. For the following reasons, Petitioner's application to stay arbitration is **denied.**

In November 2022, Respondent was assigned the rights to a contractual agreement with the Petitioner for the purchase and delivery of concrete. Respondent asserts that Petitioner violated New York's Prompt Payment Act by failing to pay for concrete materials that was furnished to it by the Respondent. It is the policy and purpose of the Prompt Payment Act to expedite payment

of all monies owed to those who perform contracting services pursuant to construction contracts. General Business Law (GBL) § 756-a. The plain language of the PPA reveals its arbitration provision was broadly drafted in favor of arbitrability (*Pike Co., Inc. v Tri-Krete Ltd*., 349 F Supp 3d 265, 276 [WDNY 2018]). While there is little caselaw specifically interpreting this arbitration provision, the available decisional law supports the conclusion that a claim alleging a violation of the PPA is subject to arbitration so long as the prerequisites of GBL § 756-b(3) have been satisfied (*Pike Co., Inc. v Tri-Krete Ltd.*, 349 F Supp 3d 265, 276 [WDNY 2018]). In other words, if a subcontractor alleges that the PPA was violated and satisfies the prerequisites of § 756-b(3), then the claim may proceed to arbitration where the contractor may raise any applicable defense to support its non-payment (*Dakota, Inc. v. Nicholson & Galloway, Inc.*, 2019 NY Slip Op 30270[U] [Sup Ct, New York County 2019]).

Section 756-b(3)(a) and (b) requires delivery of written notice of a complaint, with third-party verification of delivery to the last business address, that a contractor or subcontractor has violated the provisions of this PPA article, followed by attempts to resolve the matter between the parties. The PPA further provides that if the parties fail to reach a mutually agreeable resolution, the aggrieved party may refer the matter, not less than fifteen days of the receipt of third-party verification of delivery of the complaint, to the American Arbitration Association for an expedited arbitration (GBL § 756-b[3] [c]; *Flintlock Constr. Servs., LLC v Global Precast, Inc*., 2019 NY Misc Lexis 2165 [Sup Ct, New York County 2019]). This Court finds that this case does not fall in the ambit of the Prompt Payment Act as the prerequisites were not met. There was no evidence put forth that Petitioner was ever served with a written complaint outlining any PPA violations, nor were there any arguments made by Respondent that they attempted settlement negotiations with Petitioner.

This Court does find, however, that the quote[1] became a valid contract despite the absence of the parties' signatures. On page 3 of the quote, paragraph number 1 reads in pertinent part that "This Quotation becomes a valid contract upon signing and/or acceptance of materials ordered by Customer…." Written language in the quote indicated that it was to expire on April 14, 2022. It is undisputed that the document was not signed. However, it is also undisputed that Petitioner, at some point prior to the expiration of the quote, ordered concrete, and thereafter received the concrete from Respondent. Petitioner also did not refute Respondent's claim that the parties operated under the terms of the agreement with respect to the purchase price of the concrete. Although Petitioner argues that the agreement was unsigned and contained a watermark of the word "DRAFT" superimposed on the pages of the agreement, the Court finds that the quote became a valid, binding contract upon Petitioner's acceptance of the concrete.

Parties have the right to stay arbitration "on the ground that a valid Agreement was not made or has not been complied with...." CPLR 7503(b). While CPLR 7501 requires that an agreement to arbitrate be in writing, there is no such requirement that the agreement must be signed, so long as there is other proof that the parties intended to be bound by documents containing arbitration obligations (*Highland HC, LLC v Scott*, 113 AD3d 590 [2d Dept 2014]). Here, Petitioner made several purchase orders from Respondent between 2022 and 2023; all such orders having been delivered to Petitioner. Petitioner neither alleges non-delivery of any of its orders, nor do they allege any issues with the concrete that was received, or the amount alleged to be owed. Based on the actions of the parties, this Court finds that they intended to be bound by the agreement and by the arbitration clause as well.

[1] Petitioner refers to the document as a "supply agreement" and Respondent refers to the document as a "purchase order."

Arbitration is a matter of contract grounded in agreement of the parties (*Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626 [2013]). As a consequence, notwithstanding the public policy favoring arbitration, non-signatories are generally not subject to arbitration agreements (*Id*, at 630). The Court of Appeals has, however, recognized limited theories under which an arbitration agreement can be enforced against a non-signatory, including direct benefits/equitable estoppel (*see, TNS Holdings v MKI Securities Corp*, 92 NY2d 335 [1998]). The question of whether a non-signatory should be bound by an arbitration agreement is a threshold issue that should be resolved by the court in the first instance (*Matter of KPMG LLP v Kirschner*, 182 AD3d 484 [1st Dept 2020]).

New York courts have relied on the direct benefits estoppel theory to abrogate the general rule against binding non-signatories (*McCarthy v Sea Crest Health Care Ctr., LLC*, 189 AD3d 818 [2d Dept 2020]); *Arboleda v White Glove Enter. Corp*, 179 AD3d 632 [2d Dept 2020]). Under the direct benefits theory of estoppel, a non-signatory may be compelled to arbitrate where the non-signatory "knowingly exploits" the benefits of an agreement containing an arbitration clause and receives benefits flowing directly from the agreement (*Matter of Long Is. Power Auth. Hurricane Sandy Litig.*, 165 AD3d 1138 [2d Dept 2018]). The guiding principle is whether the benefit gained by the non-signatory is one that can be traced directly to the agreement containing the arbitration clause. *Id*, at 1142. To be bound under a theory of direct benefits estoppel, the non-signatory beneficiary must actually invoke the contract to obtain its benefit, or the contract must expressly provide the beneficiary with a benefit (*see, Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626 [2013]).

Under its purchase agreement with Respondent, Petitioner derived a direct benefit, receiving concrete, allegedly in an amount worth over $200,000. Petitioner does not deny that it

ordered concrete from the Respondent, prior to the expiration of, and in accordance with the terms of the agreement, and that it did in fact receive the concrete it ordered. Therefore, Petitioner received a direct benefit from the agreement in furtherance of its project and is, therefore, estopped from avoiding arbitration.

Accordingly, for the reasons stated, it is

ORDERED, that Petitioner's application, by way of order to show cause, to stay arbitration is DENIED.

This constitutes the decision and order of this Court.

*All applications not specifically addressed herein are denied.

Dated: March 26, 2024

HON. RUPERT V. BARRY, A.J.S.C.