Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

ST. JOHN'S UNIVERSITY, NEW YORK,

Plaintiff,

- against -

SKANKSA USA BUILDING INC., CONSTRUCTION SERVICES USA, INC., n/k/a CONSTRUCTION SERVICES OF NY, INC., BARRETT, INC. f/k/a BARRETT ROOFING, AND SUPPLY COMPANY OF DANBURY, INC., ATAS INTERNATIONAL, INC., SARNAFIL, INC. and DRYVIT SYSTEMS, INC.

Defendants.

Index Number 16349 2010

Motion Date November 24, 2011

Motion Cal. Number 17

Motion Seq. No. 1

The following papers numbered 1 to 7 read on this motion by defendant Sika Corporation, sued herein as Sarnafil, Inc., for an order pursuant to CPLR 7503(a) compelling plaintiff St. John's University, Inc. to arbitrate its claims and dismissing this action, and in the alternative, staying the action pending arbitration.

	Papers Numbered
Notice of Motion-Affirmation -Exhibits(A-B).....	1-4
Affirmation in Opposition-Exhibits(1-3).....	5-7

Upon the foregoing papers this motion is follows:

This action arises out of the construction of the St. Thomas More Church on the Jamaica New York campus of St. John's University (SJU). Plaintiff SJU, commenced the within action on June 25, 2010, and alleges in its amended complaint that subsequent to the completion of the church, said church building has sustained on going property damage due to the infiltration of water through the Exterior Insulation and Finish System (EIFS) and/or roof which began shortly after the construction was completed and continues to the present time.

SJU alleges that it entered into a contract on May 6, 2003, with defendant Skanska USA Building Inc, (Skanska) wherein Skanska agreed to serve as construction manager for the construction of said church; that Skanska entered into a subcontract with defendant Construction Services USA, Inc., the predecessor in interest to Construction Services of NY, Inc., (CS) for the construction of the EIFS; that Skanska entered into a subcontract with defendant Barrett Inc., formerly known as Barrett Roofing and Supply Company of Danbury, Inc.; and that Skanska, CS and or Barrett entered into agreements with defendants Atas International Inc., Sarnafil Inc., and Dryvit Systems Inc.

It is alleged that the infiltration of water through the roof and/or EIFS was caused by improper installation of the EIFS and/or roof system and/or points where the roof and EIFS meet; and that in the alternative that the infiltration of water through the EIFS and/or roof was caused by defects in the material supplied by Barrett, Atas and/or Sarnafil which were used to construct the EIFS and roof. It is alleged that Skanska and the other defendants were promptly notified of the water infiltration, and that SJU demanded that Skanska take all necessary action to stop the water infiltration and that the defective materials and/or workmanship corrected, and that none of the defendants have corrected the defective workmanship or replaced the defective materials causing the water infiltration.

The within action has been discontinued with prejudice as to Atas International Inc., dated January 18, 2011 and filed with the court on January 20, 2011. The amended complaint has been filed with the court. Plaintiff, in its first cause of action of the amended complaint, alleges a claim for breach of contract against Skanska; the second cause of action alleges a claim against Skanska for negligence; the third cause of action alleges a claim against CS for negligence; the fourth cause of action alleges a claim against CS for breach of an express guaranty; the fifth cause of action alleges a claim against Dryvit for breach of warranty; the sixth cause of action alleges a claim against Sarnafil for breach of an express written warranty; the seventh cause of action alleges a claim against ATAS for breach of warranty; the eight and ninth causes of action allege claims against Barrett for breach of a guaranty and for negligence. Plaintiff seeks to recovery compensatory damages on each of the causes of action, as well attorney's fees and costs.

SJU, in its claim against Sarnafil Inc., alleges that this defendant provided plaintiff with an express written warranty that its roofing materials would be free of any manufacturing defects, effective September 24, 2004, for a period of twenty years. Plaintiff alleges that the materials supplied by this defendant for the construction of the church contained manufacturing defects that are the proximate cause of water infiltrating through the roof and walls of the church, causing excessive amounts of water to intrude into the church causing damages to the walls, floors, ceilings and structures.

Sarnafil issued a "20 Year System Warranty" dated September 21, 2004, which states that it is a "SARNAFIL ROOFING WARRANTY FOR COMMERCIAL BUILDING" and identifies the building owner as "St. John's University", the building as St. Thomas More Church, and the contractor as Barrett Roofing & Supply. The warranty states as follows: "Sarnafil Inc. ("Sarnafil") warrants to the owner of the building described above("Owner"), that subject to the terms, conditions and limitations stated herein, Sarnafil will repair leaks originating from the Sarnafil Roofing Membrane, Sarnatherm Insulation or Sarnafil Roofing Accessories installed according to Sarnafil's Technical instructions by a Sarnafil Authorized Roofing Applicator for a period of 20 (twenty) years commencing with the date of substantial completion of the installation of the Roofing Membrane". The warranty's "TERMS, CONDITIONS, AND LIMITATIONS", states in pertinent part, as follows:

"2. If on Sarnafil's inspection, Sarnafil determines that the lease is caused by a defect in Sarnafil's Roofing Membrane, Sarnatherm Insulation or Accessory provided by Sarnafil to the Applicator for this building or from a defect in the Sarnafil Authorized Apllicator's workmanship applied to that Sarnafil Membrane except as provided in paragraph three (3) Owner's remedies and Sarnafil's liability shall be limited to Sarnafil's repair of the Roofing Membrane, Sarnatherm Insulation or Accessory".

"10. Any controversy or claim arising out or relating to this Warranty shall be settled by arbitration in Boston, Massachusetts by the American Arbitration Association in accordance with the Construction Industry Arbitration Rules, and judgment upon the arbitration award may be entered in any court having jurisdiction thereof."

Defendant Sika Corporation sued herein as Sarnafil asserts that the parties unequivocally agreed to arbitrate disputes arising out of the warranty, as evidenced by agreement's arbitration clause. It is asserted that as the warranty is still in effect, the arbitration clause is enforceable. Defendant Sika (Sarnafil) therefore seeks an order pursuant to CPLR 7503(a) compelling SJU to arbitrate its claim for breach of warranty, and dismissing the within action, or in the alternative, compelling arbitration and staying the within action.

SJU, in opposition, asserts that it never signed the subject warranty and that there is no evidence that SJU agreed to arbitrate its disputes in connection with the church project. SJU asserts that it specifically deleted from the standard AIA construction management agreement it had entered into with Skanska all provisions which would have required it to mediate or arbitrate disputes with pertaining to mediation or arbitration from the it had entered into with Skanska; that said agreement provided that all subcontracts must be substantially similar to a "Standard Form of Subcontract"; that Article XXI of the Subcontract Form provides that the subcontractors' guarantees may of periods longer than two years that "may normally be provided by the manufacturers" and that Article XXIV of the Subcontract Form requires that any dispute between Skanska and the subcontractor be resolved by the courts of the State of New York; and that SJU was the intended third party beneficiary of the subcontracts. It is asserted that Sika was either a subcontractor of Skanska, or was a subcontractor of Barrett, who entered into a subcontract with Skanska.

Arbitration is favored in New York State as a means of resolving disputes, and courts should interfere as little as possible with agreements to arbitrate (see Matter of Smith Barney *Shearson v Sacharow*, 91 NY2d 39, 49 [1997]; Matter of Miller, 40 AD3d 861, 861-862, [2007]). "Although CPLR 7501 confers jurisdiction on courts to enforce written arbitration agreements, "[t]here is no requirement that the writing be signed so long as there is other proof that the parties actually agreed on it" (*Crawford v Merrill Lynch, Pierce, Fenner & Smith*, 35 NY2d 291, 299, [1974] [internal quotation marks deleted]; *see also Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 370, [2005]). A party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties' "clear, explicit and unequivocal" agreement to arbitrate (Matter of Waldron [Goddess], 61 NY2d 181, 183, [1984]), but our case law makes it clear that a signature is not required." (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc.*, LLP, 6 NY3d 371, 374 [2006]). Nonsignatories have been held estopped to avoid arbitration where they derived a direct benefit from the contract containing the arbitration provision. (Matter of SSL Intl., PLC v Zook, 44 AD3d 429,[2007]; *HRH Constr. LLC v Metropolitan Transp. Auth.*, 33 AD3d 568, [2006].)

Here, the warranty issued by Sarnafil is clear, explicit, and unequivocal and establishes a valid agreement to arbitrate. Although SJU did not sign the warranty, it is evident that it intends to be bound by it, as its complaint alleges that Sarnafil breached the warranty, thereby acknowledging and relying on the very agreement that contains the arbitration clause it seeks to disclaim. Moreover, as SJU does not assert that the arbitration clause would be unenforceable even if the agreement were signed, it may not pick and choose which provisions suit its purposes, disclaiming part of a contract while alleging breach of the rest. A contract "should be read to give effect to all its provisions" (*Mastrobuono v Shearson Lehman Hutton, Inc.*, 514 US 52, [1995]; *see also God's Battalion*

of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP, supra; *Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46, [1956]; *Arrowhead Golf Club, LLC v Bryan Cave, LLP*, 59 AD3d 347, [2009]).

Finally, SJU's contention that it expressly eliminated the arbitration provisions in its agreement with Skanska, that Skanska's subcontracts do not contain arbitration clauses, and therefore the warranty's arbitration clause is unenforceable, is unavailing. Although SJU may have eliminated arbitration clauses in its agreement with its Skanska, and Skanska may have eliminated such clauses in its agreements with its subcontractors, this does not serve to eliminate the arbitration clause contained in the warranty provided to SJU by a sub-subcontractor materialman, following the substantial completion of the church building.

In view of the foregoing, the motion by Sika Corporation, sued herein as Sarnafil Inc, to compel plaintiff to proceed to arbitration is granted and the within action and all cross claims are stayed as to this defendant pending arbitration.

Dated: March 1, 2011

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J.S.C.