

Matter of Capital Siding & Constr., LLC (Alltek Energy Sys., Inc.)
2016 NY Slip Op 02878
Decided on April 14, 2016
Appellate Division, Third Department
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Decided and Entered: April 14, 2016

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[*1]In the Matter of the Arbitration between CAPITAL SIDING & CONSTRUCTION, LLC, Doing Business as ABAR CONSTRUCTION, Appellant, and ALLTEK ENERGY SYSTEM, INC., Respondent.

Calendar Date: February 19, 2016

Before: Peters, P.J., Garry, Rose, Lynch and Clark, JJ.

Fox & Kowalewski, LLP, Clifton Park (Brendan R. Wolf of counsel), for appellant.

McNamee, Lochner, Titus & Williams, PC, Albany (Kevin Laurilliard of counsel), for respondent.

Rose, J.

MEMORANDUM AND ORDER

Appeal from an order of the Supreme Court (Platkin, J.), entered March 17, 2015

in Albany County, which denied petitioner's application pursuant to CPLR 7503 to permanently stay arbitration between the parties.

Petitioner, a contractor, entered into a construction contract (hereinafter the subcontract) with respondent subcontractor. When a dispute arose and petitioner withheld certain payments from respondent, respondent sought expedited arbitration pursuant to General Business Law article 35-E, also

known as the Prompt Payment Act (hereinafter PPA). Petitioner then commenced this proceeding, seeking to permanently stay the arbitration on the ground that section 6.2 of the subcontract expressly states that litigation, not arbitration, is the parties' chosen method of dispute resolution. Supreme Court denied petitioner's application, interpreting the PPA to render the subcontract's dispute resolution provision void and unenforceable because it denies respondent the option to arbitrate the payment dispute. Petitioner appeals.

"The governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used" [*2]([People v Brown](#), 25 NY3d 247, 250 [2015] [internal quotation marks, brackets and citations omitted]; [accord Matter of Arita v Goodman](#), 132 AD3d 1108, 1109 [2015]). The PPA's stated purpose is "to expedite payment of all monies owed to those who perform contracting services pursuant to [private] construction contracts" exceeding a certain monetary threshold (General Business Law § 756-a; *see* General Business Law § 756 [1]). As relevant here, that purpose is effectuated by General Business Law § 756-b (3) (c), which states that, if a contractor is accused of violating any of the PPA's provisions, an aggrieved subcontractor "may refer the matter . . . to the American Arbitration Association for an expedited arbitration." The PPA also states that, "[e]xcept as otherwise provided in this article," the terms and conditions of the parties' written agreement will supersede the PPA's provisions (General Business Law § 756-a). However, General Business Law § 757 (3) specifically directs that "[a] provision, covenant, clause or understanding in, collateral to or affecting a construction contract stating that expedited arbitration as expressly provided for and in the manner

established by [General Business Law § 756-b] is unavailable to one or both parties" is "void and unenforceable."

Here, petitioner contends that the PPA expressly provides that the subcontract's dispute resolution provision supersedes the PPA's requirement that expedited arbitration be available to an aggrieved party, and that it is unaffected by the "[e]xcept as otherwise provided" language of General Business Law § 756-a. Petitioner argues that the only exception to the PPA's general policy of giving primacy to the terms of a construction contract is found in General Business Law § 756-b (1), which provides for the accrual of interest on overdue payments "[n]otwithstanding any contrary agreement." Petitioner's reading of the PPA, however, ignores the existence of General Business Law § 757 (3), which, as we have stated, unambiguously voids and renders unenforceable any contractual provision that makes expedited arbitration unavailable to one or both parties. Contrary to petitioner's argument, the obvious function of section 6.2 of the subcontract is to establish litigation as the sole legal option for the resolution of disputes under the subcontract, which, in turn, denies both parties the opportunity to arbitrate such claims. Inasmuch as General Business Law § 757 (3) clearly operates to void and render unenforceable the subcontract's dispute resolution provision, we find that Supreme Court properly denied petitioner's application to stay arbitration.

Although petitioner also argues that Supreme Court's reading of the PPA violates its own constitutional right to a jury trial, petitioner admittedly raised this issue for the first time on appeal and, thus, it is unpreserved for our review ([*see People v Haskell*, 68 AD3d 1358](#), 1361 [2009]; [*Matter of County of Sullivan \[ABC Pac. Realty LLC\]*, 55 AD3d 1029](#), 1031 [2008], *lv denied* 12 NY3d 713 [2009]). Moreover, even if we were to consider this issue (*see State of New York v Butti*, 304 AD2d 917, 918 [2003]; *Matter of Woodin v Lane*, 119 AD2d 969, 970 [1986]), petitioner's argument — though styled as a challenge to the application of the PPA to the facts of this case — is, in reality, a facial challenge to the constitutionality of its provisions requiring expedited arbitration. Accordingly, petitioner was required to serve notice upon the Attorney General, who must be permitted to intervene in support of the constitutionality of the statute (*see* Executive Law § 71; CPLR 1012 [b]). As there is no evidence that petitioner did so at any stage of this proceeding, we decline to pass upon the constitutional issue at this

time (*see People v Parker*, 290 AD2d 650, 652 [2002], *lv denied* 97 NY2d 759 [2002]).

Peters, P.J., Garry, Lynch and Clark, JJ., concur.

ORDERED that the order is affirmed, with costs.

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