

THE PIKE COMPANY, INC.,

Plaintiff,

v.

GENERAL DRYWALL CORPORATION and THE
AMERICAN ARBITRATION ASSOCIATION,

Defendants.

DECISION AND ORDER

Ind # 2005/4510

Plaintiff, the Pike Company, Inc., has moved by order to show cause for an order enjoining defendants from proceeding, or attempting to proceed, with arbitration of any dispute between the parties unless any such dispute has previously been submitted for mediation as required under Article 6 of the applicable subcontract between Pike and General Drywall Corporation. A temporary restraining order was issued pending determination of this motion. Defendant, General Drywall Corporation, has cross moved for an order denying the request for a preliminary injunction, vacating the TRO, and compelling Pike to proceed to arbitration. General Drywall also seeks reasonable attorneys fees, costs, and any additional arbitration costs resulting from this judicial intervention.

In June, 2003, Pike and General Drywall entered into a subcontract by which General Drywall agreed to provide construction materials and services in connection with a prime

construction contract between Pike and Malta Hotel Group LLC. Pike alleges that it has fulfilled its obligations under the prime contract but that Malta has failed to make the required payments. As a result, Pike filed a mechanics lien and also filed suit against Malta. Pike further alleges that no further payments are due to General Drywall because General Drywall allegedly caused delays in the construction about which Malta complains in the other pending action.

General Drywall served a demand for arbitration in January, 2005. Pursuant to the parties' contract, Pike rejected that demand and informed General Drywall that the parties should proceed to mediation under Paragraph 6.2.1 which states "[p]rior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with paragraph 6.1." Paragraph 6.2.2 states that if a claim is not resolved by mediation, it can then proceed to arbitration. Pike brought the instant order to show cause because the American Arbitration Association was proceeding with the arbitration and has appointed an arbitrator.

General Drywall relies on Paragraph 6.1 of the subcontract, referenced in the language quoted above in ¶6.2.1, which states: "Any claim arising out of or related to this Subcontract, except claims as otherwise provided in Subparagraph 4.1.5 and except those waived in this Subcontract, may be subject to mediation or the institution of legal or equitable proceedings by either

party." (emphasis in original). The preprinted language of ¶6.1.1 contained the word "shall," which was crossed out by the parties. Moreover, the pre-printed form read "subject to mediation as a condition precedent to arbitration." (emphasis supplied). The emphasized portion was crossed out by the parties. That the parties negotiated the subcontract is evidenced by the many cross-outs and inter-delineations throughout the pre-printed subcontract. Moreover, General Drywall points out that Pike never applied to this court for a stay of arbitration pursuant to CPLR §7503. AAA notified the parties that it would conduct a preliminary conference in this matter on April 19, 2005. Pike informed AAA that it would not participate in the conference. During the conference, however, the question of whether mediation was mandatory or a condition precedent to arbitration was submitted to the arbitrator for determination. On April 21, 2005, the arbitrator issued a decision stating that mediation was permissive and not a condition precedent to arbitration. The arbitrator further scheduled an arbitration date of May 3, 2005.

The issue as to "whether there is any preliminary requirement or condition precedent to arbitration to be complied with and, if so, whether there has been compliance with such requirement or condition precedent" is to be presented to a court for determination. See In re County of Rockland, 51 N.Y.2d 1, 7

(1980). "In such event the reluctant party may be forced to arbitration only if the court determines that this portion of the agreement to arbitrate has been complied with...." Id. at 7-8. The Court of Appeals has distinguished between contracts expressly providing for "conditions precedent," issues which are for the court to decide, and the concept of "conditions in arbitration," which are considered "procedural stipulations that the parties may have laid down to be observed in the conduct of the arbitration proceeding itself...." Id. at 8. The latter are subject to determination by the arbitrator.

The language of Section 6.2.1, relied upon by Pike, states that the parties to the contract should attempt to resolve their dispute "by mediation in accord with the provisions of Paragraph 6.1" before proceeding with arbitration. Paragraph 6.2.1 (emphasis supplied). Paragraph 6.1, however, as modified by the parties, states that mediation is permissive and not mandatory, and that (by the cross-out) mediation is not a condition precedent to arbitration. Accordingly, ¶6.2.1 merely incorporates this modified language of the contract, which is permissive and not mandatory, as it would be if the words "condition precedent" were not crossed out.

The Court of Appeals observed in County of Rockland that "the parties by explicit provision of their agreement have the ability to place any particular requirement in one category or

the other, to make it a condition precedent to arbitration or to make it a condition in arbitration.” Id. 51 N.Y.2d at 9. But the court was careful to insist that language making a requirement a condition precedent be in language expressly set forth. Id. 51 N.Y.2d at 8 (“where contractual limitations are expressly made conditions precedent to arbitration by the terms of the arbitration agreement”). To the same effect is In re United Nations Dev. Corp. v. Norkin Plumbing Co., Inc., 45 N.Y.2d 358 (1978):

Notwithstanding the existence of a broad arbitration clause, compliance with contractual limitations, expressly made conditions precedent to arbitration by the parties’ agreement, is a question for threshold judicial resolution [citations omitted]. . . . Noticeably absent from paragraph 7.10.2 of the agreement, the contractual limitation at issue here, is any language making the provisions of that paragraph an express condition precedent to submission of a claim to arbitration. Consequently, the question of compliance with the conditions contained in that paragraph must be determined by the arbitrator, rather than by the court.

Id. 45 N.Y.2d at 364 (emphasis supplied). See also, Matter of Kachris, 239 A.D.2d 887, 888 (4th Dept. 1997).

In this case, there is not merely an absence of such express language, but the parties affirmatively crossed-out such language, thereby signaling (especially in the face of this well settled case law) their manifest intent. Compare In re Lakeland

Fire Dist. v. East Area Gen. Contractors, Inc., 16 A.D.3d 417 (2nd Dept. 2005) (where there was such explicit "clear and unambiguous" language "requiring that the claim be submitted to mediation"). Even if the provision cited by Pike was a stand alone provision and did not reference ¶6.1.1, as it indeed does, it is a general and long standing rule of contract interpretation that inter-delineations and the like in a form contract control over the pre-printed language. Kratzenstein v. Western Assur. Co. of Toronto, 116 N.Y. 54, 57 (1889); Home Fed. Sav. Bank v. Sayegh, 250 A.D.2d 646, 647 (2nd Dept. 1998); Honigsbaum's Inc. v. Stuyvesant Plaza, Inc., 178 A.D.2d 702 (3d Dept. 1991).

Pike's motion for a preliminary injunction (or a stay of arbitration) until the dispute is submitted to mediation is denied. The TRO previously issued is vacated. General Drywall's cross motion to compel arbitration is granted. The question of mediation is for the arbitrator to determine.

General Drywall has cross moved for reasonable attorneys' fees, costs, and any additional arbitration fees incurred due to this litigation. Section 15.2 of the subcontract states the following:

Payments due and unpaid under this Subcontract shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

Following this provision, the parties apparently negotiated the inclusion of this addition, which is in bold and underlined in the original: "**one and one-half (1-1/2%) percent per month (18% per annum) together with attorneys fees, costs, expenses, witnesses fees and all other costs incurred in recovery of funds owed and claimed.**" Although this provision has been cited by defendant in support of its claim for attorneys fees and costs on this motion, this is not a provision stating that in the event litigation is necessary to require performance under the subcontract (such as to compel arbitration or to defend a motion to stay arbitration) such amounts are collectable. Rather, Section 15.2 relates to interest, fees, and costs collectible if payments are due and unpaid under the subcontract. Whether payments are due under the contract will be determined by the arbitrator. As such, the arbitrator will likewise make a determination as to whether payment is due under Section 15.2. General Drywall's motion for fees and costs is denied, of course without prejudice to the grant of such an award by the arbitrator.

Although no motion has been submitted, counsel for AAA has submitted a letter to counsel (and has copied in the court) indicating that this action was improperly commenced against it and requests that plaintiff's counsel voluntarily withdraw the litigation against AAA. If Pike will not discontinue as against

AAA, file motion forthwith.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: May 26, 2005
Rochester, New York