

**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. ORIN R. KITZES**  
**Justice**

**PART 17**

-----X  
**SECURITY MANAGEMENT SYSTEMS, INC.,**  
**Plaintiff,**

**- against -**  
**GJF CONSTRUCTION CORP., d/b/a/ BUILDERS**  
**GROUP,**  
**Defendant.**

**Index No. 9947/05**  
**Motion Date: 10/17/07**  
**Motion Cal. No. 52, 53, & 54**

-----X  
**GJF CONSTRUCTION CORP., d/b/a/ BUILDERS**  
**GROUP,**  
**Defendant-Third Party Plaintiff,**

**- against -**  
**EMPIRE STATE BUILDING COMPANY, LLC.,**  
**a/k/a EMPIRE STATE BUILDING COMPANY,**  
**Third-Party Defendant.**

-----X  
The following papers numbered 1 to 34 on the motion by third-party defendant, EMPIRE STATE BUILDING COMPANY, LLC., a/k/a EMPIRE STATE BUILDING COMPANY (“Empire”) for an order pursuant to CPLR 3211 (a) (7) dismissing the third-party complaint, or, in the alternative, permanently staying this action and compelling arbitration, pursuant to CPLR 7503 (a); the motion by third-party defendant Empire for an order pursuant to CPLR 603 & 1010 severing the third-party action or, in the alternative, striking the Note of Issue filed by plaintiff SECURITY MANAGEMENT SYSTEMS, INC., (“Security”), vacating the Certificate of Readiness and striking this action from the trial calendar; and the motion by defendant/third-party plaintiff **GJF CONSTRUCTION CORP., d/b/a/ BUILDERS GROUP** (“Builders”) for an order vacating plaintiff’s Note of issue and striking the Certificate of Readiness. For purposes of disposition, the motions numbered 52, 53, & 54 are consolidated.

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Upon the foregoing papers it is ordered that the motions by third-party defendant, EMPIRE STATE BUILDING COMPANY, LLC., a/k/a EMPIRE STATE BUILDING COMPANY (“Empire”) for an order pursuant to CPLR 3211 (a) (7) dismissing the third-party complaint, or, in the alternative, permanently staying this action and compelling arbitration, pursuant to CPLR 7503 (a); the motion by third-party defendant Empire for an order pursuant to CPLR 603 & 1010 severing the third-party action or, in the alternative, striking the Note of Issue filed by plaintiff SECURITY MANAGEMENT SYSTEMS, INC., (“Security”), vacating the Certificate of Readiness and striking this action from the trial calendar; and the motion by defendant/third-party plaintiff for an order vacating plaintiff’s Note of issue and striking the Certificate of Readiness are decided as follows:

These actions stem from the installation of a security system at the Empire State Building in New York City. Empire, the building’s owner, entered into a contract with Builders in which Builders was to supply and install a new security system in the lobby of the Empire State Building. The first party action between Security and Builders involves the money allegedly owed by Builder to Security for work Security performed in the installation of the security system pursuant to the subcontract between them. The third-party action by Builders seeks contribution and indemnity from Empire against the claims of Security and money damages in connection with the installation of the security system and the contract under which Builders was retained by Empire to renovate lavatories in the Empire State Building. Empire has now brought the motion to dismiss the third-party action or in the alternative, staying the action and compelling arbitration. Defendant/Third-Party Plaintiff Builders has opposed this motion.

Empire claims that the Court should dismiss the Third-Party complaint, pursuant to CPLR 3211(a)(7), because Builders Group failed to satisfy certain conditions precedent prior to the filing of this action. Empire also claims that the Third-Party complaint fails to state a cause of action upon which relief can be granted. Empire claims that this Court must determine whether the parties made a valid agreement to arbitrate, whether such agreement to arbitrate has been complied with and whether the claim sought to be arbitrated would be barred by limitation of time had it been asserted in a court of the State. Empire argues that Builders is seeking damages for Empire’s alleged breach of the Contract, including a failure to

pay for work that Builders performed and failing to provide Builders with workable plans, instructions and guidance dealing directly with subcontractors of Builders. Empire claims that these claims fall within the purview of the mandatory arbitration clause. As such, Builders was required to comply with the contractual conditions precedent and had to fulfill such conditions before seeking any redress. These conditions were in the contract between the parties and included submitting its claim to an architect and then to a mediator to resolve the dispute. By failing to perform these conditions, the Third-party complaint should be dismissed and a permanent stay of any arbitration of the claims should be issued.

Builders opposes this branch of the motion by claiming that it should be treated as a motion to compel the arbitration of Builders' claims and not as a traditional CPLR 3211(a) motion to dismiss the complaint and even if the instant application is considered as a motion to dismiss, CPLR 3211(a)(5) and (7) require a strong showing before a claim may be dismissed for purported pleading deficiencies. A showing not made by Empire, according to Builders.

The Court finds that there is a valid agreement to arbitrate. Paragraph 4.6.1 of the Contract requires that if the parties could not resolve certain disputes, then those disputes would be arbitrated. Paragraph 4.6.1 provides, in pertinent part, that: "[a]ny claim arising out of or related to the Contract, except claims relating to aesthetic effect and except those waived as provided for in subparagraphs 4.3.10, 9.10.5, shall, after decision by the Architect or 30 days after submission of the claim to the Architect, be subject to arbitration." The term claim has a broad definition under the Contract and is defined as: "a demand or assertion by one of the parties seeking, as a matter of right, adjustment interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract." Since it is clear that this Court's determination regarding whether the claims are subject to arbitration is determinative of the CPLR 3211 motion, the motion should be treated as a motion to compel arbitration of the Third-party claims. Lopez v 14<sup>th</sup> Street Development, 40 AD3d 313 (1<sup>st</sup> Dept 2007).

In any event, "[I]t is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited

purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, supra, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.) Based on this standard, the Third-part complaint makes out causes of action and, at this time, the Court is not satisfied that any failure to comply with the condition precedents, by Builders, were such as to preclude seeking redress for the claims.

The branch of the motion seeking to compel arbitration is granted. It is well settled that on a motion to compel or stay arbitration, the court must determine, whether the parties made a valid agreement to arbitrate, whether the agreement has been complied with, whether the dispute at issue falls within the agreement to arbitrate, and whether the claim is time-barred. Matter of Smith Barney, Harris Upham & Co. v Luckie, 85 NY2d 193, (1995.) See also, Levkoff-Sennet Partnership v Levkoff, 154 AD2d 352 (2d Dept 1998. ) Once it is determined that the parties have agreed to arbitrate the subject matter in dispute, the court's role has ended and it may not address the merits of the particular claims. See, Matter of Praetorian Realty Corp, 40 NY2d 897( 1976.)

Empire claims that any claim by Builders Group against Empire should be stayed pending a demand for arbitration. Empire points to portions of the Contract, set forth above, that contain a valid agreement - Paragraph 4.6.1 of the Contract - to arbitrate all claims and disputes arising between Empire and Builders Group relating to the Project and the Contract. Empire also claims that the Third Party Complaint seeks damages for Empire's alleged breach of the Contract, including a failure to pay for work that Builders Group performed, failing to provide Builders Group with workable plans, instructions and guidance dealing directly with subcontractors of Builders Group. Empire argues that the all-inclusive nature of the mandatory arbitration clause covers these claims and, therefore, this matter should be permanently stayed and Builders should be compelled to arbitrate this matter.

Builders opposes this motion on the following grounds: The claims arose after the expiration of any purported agreement to arbitrate; The claims are non-contractual and not within the purview of the alleged arbitration agreement; Empire has failed to establish that there is a clear and unequivocal agreement to arbitrate the claims set forth in the Third party complaint; Builders did not waive any rights by declining to invoke the arbitration provision in the contract between Builders and Empire; Empire has waived its rights to assert the applicability of the arbitration clause and/or should be equitably estopped from compelling arbitration at this late date; and, The facts essential to Builders opposition to the instant motion exist but are not

available to Builders at this time.

The Court finds that submitting a claim to the architect, commencing mediation and then filing a demand for arbitration are exclusive remedies for all claims arising out of the Contract and the Third-party claims fall within the purview of the Arbitration Clause. First, Lopez v. 14th Street Development, LLC, 40 A.D.3d 313, supra, does not preclude the arbitration of the instant claims because they did not arise after final payment, in fact Builders claims involve the lack of full and final payment. In addition, since the claims set forth in the Third Party Complaint arose while Builders was performing contracted work, Builders was required to submit such claims to the architect as a prerequisite to a mediation and subsequent arbitration. It is also clear that the Third Party action is not for contribution or indemnification since it does not include the allegation that if Builders is liable to Security then Empire is liable to Builders. Instead, this action is for damages arising out of claims for breach of the contract, unjust enrichment, account stated, breach of implied contract, fraud, and tortious interference with contract.

The Court also finds that the causes of action set forth in the Third Party Complaint fall within the purview of the arbitration clause. The facts upon which the causes of action set forth in the Third Party Complaint are based all occurred while Builders was performing work related to the installation of the security system. Builders alleges that it performed all of its work under the contract and was, thus, entitled to payment and while it was performing work on the project it submitted statements to Empire which were not disputed. Builders also alleges that it performed work on the project with the expectation that Empire would pay for such work and it did not, and Empire was unjustly enriched by Builders performance of its work on the project. Builders also claims that Empire, while Builders was performing work on the Project, interfered with its subcontractors and suppliers including Security. These actions are claims within the definition of "claim," which is defined in the Contract as: a demand or assertion by one of the parties seeking, as a matter of right, adjustment interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Clearly, a review of these factual allegations in the complaint involve matters covered by the contract at issue and are subject to arbitration. *See, Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Dept. 1987)(citation omitted).

Furthermore, there was no waiver of the arbitration provisions of the Contract by Empire. The contract provisions clearly contemplate arbitration for resolving claims and the fact that the parties may have resolved disputes throughout the course of construction without the need for filing a claim with the architect does not constitute a waive of the right to arbitrate other claims. Moreover, there has been no undue delay by Empire in filing its demand to compel arbitration as indicated in the filing of this motion prior to its having participated in any phase of the litigation. Stark v. Molod Spitz DeSantis & Stark, PC, \_ NY3D\_ 2007 NY Slip Op 7740( 2007.) Additionally, Empire has not manifested a clear preference clearly inconsistent with its claim to

arbitrate the matter. *Id.* Finally, Builders has failed to show that discovery is needed for it to fully oppose this motion and given the extensive papers submitted by the parties, the Court is confident it has all the information necessary to decide this motion.

Based on the above the branch of the motion seeking an order to compel arbitration of the Third-Party claims is granted. Accordingly, the parties are directed to proceed to arbitration, pursuant to the contract. If this is not possible, they shall proceed in accordance with the rules of the American Arbitration Association, at its offices located at 1633 Broadway, 10<sup>th</sup> Floor, New York, New York 10019 and in accordance with the CPLR. An arbitrator shall be designated by the American Arbitration Association whom shall act in accordance with this order. CPLR 7504. Consequently, the motions under calendar numbers 52 and 53 are held in abeyance, pending the arbitration.

A copy of this decision is being sent to the parties via facsimile transmission on October 23, 2007.

**Dated: October 23, 2007**

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**ORIN R. KITZES, J.S.C.**

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