

SCAN

SHORT FORM ORDER

Present: SUPREME COURT - STATE OF NEW YORK
HON. JOSEPH A. DE MARO

Justice

----- TRIAL/IAS, PART 10
NASSAU COUNTY
JEFFREY B. GARBER and LONNIE M. GARBER,

Plaintiffs,

MOTION DATE:
August 29, 2001
INDEX No. 6897/01

-against-

SEQUENCE No. 1, 2, 3

GOLD COAST KITCHENS AND BATHS, INC.
and HIGH POTENTIAL, INC.,

Action #1

Defendants.

DISTRICT COURT OF THE COUNTY OF NASSAU
FIRST DISTRICT: HEMPSTEAD (Small Claims Part)

HIGH POTENTIAL ELECTRIC, INC.,

INDEX No. NCC-268/01

Plaintiff,

Action #2

-against-

JEFFREY and LONNI GARBER,

Defendants.

The following papers read on this motion:

Notice of Motion and Supporting Papers (Plaintiffs)
Notice of Cross Motion and Supporting Papers (Defendant Gold Coast Kitchens and Baths, Inc.)
Notice of Cross Motion and Supporting Papers (Defendant High Potential, Inc.)
Memorandum of Law in Opposition to Plaintiffs' Motion and in Support of Defendant High Potential's Cross Motion)
Affidavit in Opposition (Defendant High Potential Electric, Inc.)
Affidavit in Opposition to Cross-Motion to Dismiss and in Reply to Motion (Plaintiffs)
Affidavit in Opposition to Cross-Motion to Compel Arbitration and in Reply to Motion (Plaintiffs)
Reply Affirmation (Defendant High Potential Electric, Inc.)
Reply Affirmation (Defendant Gold Coast Kitchens and Baths, Inc.)

Motion by plaintiffs for an order pursuant to CPLR 602(b) removing the action (Action #2) entitled High Potential Inc. v Jeffrey Garber and Lonnie Garber (Index No. NCC-00268/01) now pending in the District Court of Nassau County, First District, Hempstead (Small claims Part), and consolidating it with this action (Action #1) is granted to the extent the actions are consolidated for joint trials.

Cross-motion by defendant Gold Coast Kitchen & Baths, Inc. (Gold Coast), for an order pursuant to CPLR 7503(a) compelling arbitration of the claims raised in this complaint is denied.

Cross-motion by defendant High Potential Electric, Inc. (High Potential) for an order pursuant to CPLR 3211(a)(4), (7) dismissing the complaint against it is granted.

In August, 2000, the Garber plaintiffs retained the services of defendant Gold Coast to do home improvements at their home in Lido Beach. Defendant Gold Coast was the general contractor. It hired various subcontractors, including defendant High Potential for electrical work. In this action commenced on May 3, 2001, plaintiffs seek the vacatur of the Notice of Lien filed against their property by defendant Gold Coast as well as damages and civil penalties. Plaintiffs also seek via their tenth cause of action to recover from High Potential the costs it incurred in having the electrical work completed after Gold Coast's services were terminated by them. Prior to the commencement of this action, on March 29, 2001, a commercial claims complaint form was filed against the Garbers by High Potential in District Court. Therein, High Potential seeks to collect \$1,471.00 for an electrical service upgrade done by it in July, 2000. In the District Court complaint form, High Potential notes that "customer claims amount was paid to general contractor. No payment was made to contractor."

Presently before this Court are Gold Coast's application to compel arbitration; High Potential's application to dismiss the only cause of action against it pursuant to CPLR 3211(a)(4)

[another action pending] and (7) [failure to state a claim]; and, plaintiffs' (Garber's) application to consolidate High Potential's District Court action with this action.

While Gold Coast agreed to do a great deal of work throughout plaintiffs' entire home, only one written contract was entered into by plaintiffs and Gold Coast. That agreement was made on or about September 25, 2000 and concerned only the work for plaintiffs' kitchen. It provides "this agreement sets forth the entire transaction between the parties; any and all prior Agreements, warranties or representations made by either party are superseded by this Agreement.... Any unresolved controversy or claim arising from or under this contract shall be settled by arbitration...." Although defendant Gold Coast sought to arbitrate the entire home improvement dispute between the plaintiffs and it, the Arbitrator, after accepting briefs on the jurisdictional issue, concluded that pursuant to the contract, the Arbitration proceeding is limited to only the kitchen contract and the related work, labor and materials. The defendant Gold Coast's motion pursuant to CPLR 7503(a) to compel arbitration is accordingly denied.

As concerns the upgrade in electrical service by defendant High Potential which is the subject of the District Court action, plaintiffs adamantly deny any independent agreement between them and High Potential. Rather, they repeatedly assert that

everything done by defendant High Potential was arranged for through and by the general contractor, defendant Gold Coast. In fact, the plaintiffs were not billed by defendant High Potential for the electrical upgrade work done in the summer of 2000 until November, 2000, after Gold Coast had been fired by the plaintiffs. And, upon receipt of High Potential's bill, plaintiffs promptly informed it that all electrical work was arranged for via the defendant general contractor Gold Coast and said that the general contractor had been paid for the work. In contrast, both defendants Gold Coast and High Potential aver that the electrical service upgrade was arranged for between the Garbers and defendant High Potential, only, and that Gold Coast had no part in it.

In view of plaintiffs' own version of events, High Potential was strictly a sub-contractor of Gold Coast. Plaintiffs accordingly lack privity and do not have a claim against defendant High Potential. (See, Port Chester Elec. v Atlas, 40 NY2d 652; see also, Key International Mfg. Inc. v Morse Diesel, Inc., 142 AD2d 448). Defendant High Potential's cross motion against plaintiffs under CPLR 3211(a)(7) is granted.

Defendant High Potential's allegation of a separate agreement in contrast affords it a claim vis a vis the plaintiffs. Nevertheless, in view of the highly related nature of this action (Action #1) and the action presently pending in

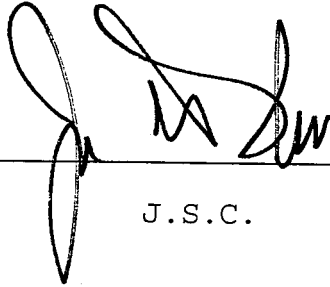
District Court (Action #2) and the fact both actions appear to have common questions of law and fact and involve similar parties, plaintiffs' application to consolidate the District Court action with the action presently before this Court is in the best interests of judicial economy and efficiency granted for purpose of joint trials. (One of the parties in both actions is both a plaintiff in one action and a defendant in the other action).

The Clerk of First District Court, Nassau County, shall upon receipt of a certified copy of this Order and payment of any appropriate fee, if any, transfer to the Clerk of this Court all the papers in District Court under Index No. NCC268/01 styled "High Potential Inc. v. Jeffrey Garber and Lonnie Garber".

The Clerk of this Court shall upon payment of any required fees issue an index number to the transferred case and consolidate same for purpose of joint trial with the above captioned Action #1 (Index No. 6897/01).

Counsel for plaintiffs here shall, within 15 days of date of entry serve a certified copy of this Order upon the Clerk of First District Court, Nassau County and on the Clerk of this Court, upon counsel for plaintiff in the District Court action and upon counsel for defendants in this action all by certified mail return receipt requested.

The matter is to be conferenced on Wednesday, December 19, 2001 at 9:30 a.m. in this Court to coordinate discovery and pretrial matters. There shall be no adjournment of this conference without consent of the Court.



J.S.C.

Dated: November 9, 2001

ENTERED

NOV 14 2001

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**