

SCANNED ON 3/26/2010

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

LINDSAY ACKROYD,

Plaintiff,

-against-

ROBERT PROFFITT and PROFFITT/NY,

Defendants.

INDEX NO. 111946/07

MOTION DATE

MOTION SEQ. NO. 002

FILED
MAR 26 2010
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: In this action, the plaintiff seeks damages from the architectural firm which she retained to prepare the plans and specifications for the reconstruction of her home in Brooklyn and to thereafter supervise the work. She claims that the firm, along with its principal, were negligent in performing the requisite services. By decision and order dated February 23, 2009, this court found that since the contract between the parties contained a broad arbitration clause which covers this dispute, the plaintiff was required, pursuant to the terms thereof, to first submit her claims against the defendants to mediation and, if unsuccessful, then to arbitration. The court therefore granted the defendants' to compel the plaintiff to arbitrate this dispute and to stay this action pending such arbitration.

On March 17, 2009, the plaintiff served the defendants with notice of entry of this order. Now, more than eight months later, the plaintiff has moved to reargue on the ground that the arbitration clause in the parties' contract is unenforceable under General Business Law § 399-c, which provides that "[n]o written contract for the sale or purchase of consumer goods * * * * to which a consumer is a party shall contain a mandatory arbitration clause." As the plaintiff points out, the Second Department - - the only New York appellate court to address the issue - - has ruled that residential architectural services are "consumer goods" which are thus covered by this provision. See *Ragucci v. Professional Construction Services*, 25 AD3d 43 (2nd Dept 2005). In the absence of a decision from either the First Department or the Court of Appeals, this court is required to follow the Second Department's determination. See *People v. Shakur*, 215 AD2d 184, 185 (1st Dept 1995); *Mountain View Coach Lines, Inc. v. Storms*, 102 AD2d 663, 664 (2nd Dept 1984). As such, the arbitration clause at issue herein is unenforceable.

It is true, as the defendants contend, that the plaintiff's motion to reargue suffers from two procedural defects. First, it is untimely since, under CPLR 2221(d)(3), a motion to reargue must be brought within 30 days of service on the opposing party of a copy of the order with notice of entry, irrespective of whether the party which served such notice is the party moving to reargue. See CPLR 5513(a). As already noted, this motion to reargue was brought more than eight months after service of the order with notice of entry. Second, a motion to reargue may not be based on a new theory of law not previously advanced. See *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 (1st Dept 2005); *Frisenda v. X Large Enters.*, 280 AD2d 514 (2nd Dept 2001). Here, in the papers which it submitted in opposition to defendants' motion to compel arbitration, the plaintiff failed to even mention GBL § 399-b.

Nevertheless, despite these procedural defects, the court may, in its discretion, reconsider its prior ruling in the interests of justice. See, e.g., *Garcia v. The Jesuits of Fordham*, 6 AD3d 163, 165 (1st Dept 2004). In this respect, the Court of Appeals has held that an untimely application to stay arbitration may be granted if the agreement for which arbitration is sought is facially illegal or otherwise violative of public policy. See *Matter of Land of the Free v. Unique Sanitation*, 93 NY2d 942, 943 (1999). See also *Baranoff v. Kean Development Co.*, 12 Misc3d 627, 631 (Sup Ct Nassau Co 2006). In *Baranoff*, the court specifically held that since GBL § 399-c deems mandatory arbitration provisions null and void, public policy is necessarily implicated and the timeliness of an application to stay arbitration did not prevent the

court from addressing the issue. *Id.* at 631. Moreover, in *Hirsch v. Hirsch*, 37 NY2d 312, 315(1975), the Court of Appeals stated that the arbitrability of an issue on public policy grounds may be raised either on an application for a stay of arbitration or on a motion to vacate the award. Thus, if this court were to deny the plaintiff's motion to reargue on technical grounds and the parties then proceeded to arbitrate their dispute, any award which may be issued would be subject to certain vacatur since the arbitration clause in question is unenforceable. This court sees no reason to require the parties to engage in such futile arbitration.

Accordingly, the plaintiff's motion to reargue is granted and, upon reconsideration, the defendants' cross-motion to compel arbitration is denied and the court's order directing the plaintiff to initiate the arbitration process pursuant to the terms of the governing contract is vacated.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on April 20, 2010 at 10:30 a.m. for a preliminary conference.

ENTER ORDER

Dated: 3-17-10

MGD

MARYLIN G. DIAMOND, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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