

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
In the Matter of the Application of

**TRIAL/IAS PART: 16
NASSAU COUNTY**

**RF DEVELOPMENT & CONSTRUCTION CORP.,
RF ELECTRICAL CONTRACTING,**

**Index No: 005498-12
Motion Seq. No. 1
Submission Date: 5/23/12**

Petitioners,

**For an Order Permanently Staying the Arbitration
Proceeding Commenced By:**

61 JERICO HOLDINGS, LLC,

Respondent.
-----x

The following papers have been read on this motion:

**Order to Show Cause, Affirmation in Support,
Verified Petition and Exhibits.....x
Emergency Affirmation in Support and Exhibit.....x
Affirmation in Opposition and Exhibit.....x**

This matter is before the Court for decision on the Order to Show Cause filed by Petitioners RF Development & Construction Corp. and RF Electrical Contracting ("Petitioners") on May 1, 2012 and submitted on May 23, 2012, following oral argument before the Court. For the reasons set forth below, the Court denies the Order to Show Cause in its entirety and directs the parties to proceed to arbitration regarding the issues raised in the arbitration demand filed by Respondent. The Court further directs that this action is stayed, pending the completion of arbitration, and further directs that either party may make an application to vacate or modify this stay upon the final determination of the arbitrator.

BACKGROUND

A. Relief Sought

Petitioners move for an Order, pursuant to CPLR §§ 7502 and 7503, permanently staying the arbitration (“Arbitration”) commenced by Respondent 61 Jericho Holdings, LLC (“Respondent”) against Petitioners on the grounds that 1) the Respondent did not comply with any purported arbitration agreement, and pursuant to the terms contained in said arbitration agreement, the Respondent issued to the Petitioners a written General Release of all claims Respondent now seeks to arbitrate; and 2) Respondent has commenced a related action against Petitioners in the Supreme Court of Nassau County, assigned Nassau County Index Number 17605-11, in which Respondent asserts, *inter alia*, breach of contract claims against Petitioners.

Respondent opposes the motion.

B. The Parties’ History

The Verified Petition Seeking to Permanently Stay Arbitration Proceeding (“Petition”) alleges as follows:

Petitioners are New York corporations with their principal place of business in Oyster Bay, New York. On or about April 21, 2010, Petitioner RF Development & Construction Corp. (“RF Development”) entered into a written contract (“Contract”) with Respondent (Ex. B to Pet.) pursuant to which RF Development was to perform renovations and construction work, and provide materials, at Respondent’s premises (“Premises”) in Jericho, New York. The construction project (“Project”) included but was not limited to the performance of renovations, demolition, exterior work, interior renovations and plumbing work. The total Contract price for labor and materials was \$1,552,000.00. In addition, RF Development submitted numerous change orders (“Change Orders”) to Respondent, and was claiming approximately \$770,000.00 in submitted Change Orders, over and above the Contract price.

To resolve issues related to the Change Orders, Petitioners and Respondent entered into an agreement (“Agreement”) on August 4, 2011 (Ex. C to Pet.). The Agreement, *inter alia*, 1) reduced the amount due to RF Development from \$770,000 to \$450,000; 2) set forth the amounts of payments and when payments would be made, and described the work to be completed by RF Development; and 3) contained a release provision at paragraph 5.

The Petition alleges, further, that Respondent intended to release Petitioners from all

claims it now seeks to arbitrate by 1) making full payment of \$450,000 to RF Development pursuant to the Agreement; and 2) having Respondent's counsel ("Respondent's Counsel") acknowledge in writing that Respondent had made the final payment to Petitioners pursuant to the Agreement and, accordingly, had met all of its obligations to Petitioners regarding the Change Orders and the Agreement.

Attached as Exhibit D to the Petition is a check in the amount of \$150,000.00 from Respondent, payable to RF Development, dated July 7, 2011, representing the first payment under the Agreement ("July Check"). The Petition alleges that the July Check was given to Petitioners on or about August 4, 2011, the date on which the parties executed the Agreement. One of the reasons for this was that RF Development would not sign the Agreement unless it contained a general release that released RF Development, and counsel for the parties negotiated the inclusion of the release in the Agreement.

The Petition also contains a check in the amount of \$300,000.00 from Respondent, payable to RF Development, dated October 20, 2011 ("October Check") (Ex. E to Pet.), representing the second and third (final) payments pursuant to the Agreement. The Petition alleges that the October Check was delivered to Petitioners along with a letter ("Letter") from Respondent's Counsel (Ex. F to Pet.), the substance of which is set forth in the Petition. Petitioners submit that the Letter demonstrates Respondent's intent to release Petitioners from all claims regarding the Agreement.

The Petition alleges that Respondent's Demand for Arbitration ("Demand") (Ex. A to Pet.) was made in bad faith, both because Respondent waited almost six (6) months after making its final payment to file the Demand, and because Respondent is seeking \$450,000 in the Arbitration, which is the same amount Respondent paid to RF Development pursuant to the Agreement and which Respondent's Counsel allegedly acknowledged in the Letter was the sum owed by Respondent to RF Development. The Petition also makes reference to a letter dated October 21, 2011 from RF Development's prior counsel to Respondent's Counsel acknowledging payment in the amount of \$300,000 but reminding Respondent's Counsel that RF Development's acceptance of that payment was without prejudice to any other claims that RF Development might have, as set forth in a September 13, 2011 letter from RF Development's prior counsel. Petitioners note that, notwithstanding the September 13, 2011 letter from RF

Development's prior counsel, Respondent still made the \$300,000 payment to Petitioners on October 20, 2011, pursuant to the Agreement.

Petitioners allege, further, that RF Development was still owed monies from Respondent based on the Contract and Change Orders which had not yet been submitted and, therefore, were not a part of the Agreement. In addition, by accepting the \$450,000.00 pursuant to the Agreement related to submitted change orders, Petitioners had not waived their rights to pursue claims for base contract and change orders that were not submitted pursuant to the Contract. To protect its rights and claims for labor and materials, on or about November 15, 2011, RF Development filed a Notice of Mechanic's Lien ("Lien") against the Premises in the amount of \$294,000.00 (Ex. K to Pet.).

After the Lien was filed, Respondent filed an action in Nassau County Supreme Court titled *61 Jericho Holdings, LLC v. RF Development & Construction Corp., RF Electrical Contracting, and Robert A. Fazzalari*, Index No. 17605/11 ("Prior Action"). In the complaint in the Prior Action (Ex. L to Pet.), 61 Jericho Holdings alleges that the defendants breached the Contract, and also makes claims based on negligence and fraud, and requests damages in the sum of \$692,570.00. RF Development filed a counterclaim (*id.* at Ex. M) in which it sought to foreclose on the Lien.

Petitioners filed a Request for Judicial Intervention in the Prior Action on March 15, 2012 as well as a Request for Preliminary Conference. Petitioners allege that Respondent filed the Demand on April 11, 2012 as a tactic to cause RF Development to incur additional fees. Petitioners also allege that Respondent has not complied with the arbitration provision in the Agreement ("Arbitration Clause") by pursuing arbitration notwithstanding Respondent's release of RF Development pursuant to paragraph 5 of the Agreement.

The Arbitration Clause, set forth at paragraph 10 of the Agreement, reads as follows:

Any claims, disputes or controversies arising out of or relating to this Agreement that cannot be resolved through mutual discussion and negotiation by the parties shall be decided by arbitration in accordance with the Rules of the American Arbitration Association [“AAA”] then in effect, with the word of the arbitrator final and binding without the right of appeal to the courts, and the prevailing party entitled to recover from the other party all reasonable attorneys’ fees and other expenses they incurred supporting the arbitration. Such arbitration shall be before one arbitrator. The Parties agree that should either party determine that a resolution could not be reached that they may apply for arbitration by forwarding a letter to the [AAA]. Upon the appointment of an Arbitrator, such Arbitrator will then schedule an expedited arbitration, within seven (7) days of the date of the request for arbitration by either Party.

In opposition to Petitioners’ Order to Show Cause, Respondent’s Counsel submits that “there can be no broader arbitration clause than the one agreed to by the parties in the August 4, 2011 [Agreement]” (Wolcott Aff. in Opp. at ¶ 3). Respondent’s Counsel affirms that Respondent fully complied with the Agreement and has submitted all required payments. He affirms that Petitioners, however, have not complied with the Agreement, and have not fulfilled the requirements that would entitle them to assert the defense of a release. Moreover, the dispute regarding whether there was a release does not eliminate Respondent’s right to commence an arbitration proceeding, but rather would be a defense if such an arbitration proceeding were commenced.

Respondent’s Counsel reaffirms the truth of the allegations in the Petition regarding the execution of the Contract, submission of Work Orders, and execution of the Agreement. The Agreement addressed 1) change orders allegedly submitted above the original Contract, and 2) additional work that had to be performed. The Agreement was a “completely separate, distinct Contract” (Wincott Aff. in Opp. at ¶ 6), pursuant to which Petitioner would be paid \$450,000 for the additional change orders and additional work to be performed.

Respondent’s Counsel affirms, further, that Respondent filed the Demand on or about April 11, 2012, pursuant to the Arbitration Clause, due to a dispute arising out of the Agreement. The release clause on which Petitioners rely provides that a release would be given to Petitioner only in consideration of the obligations set forth in the Agreement, which Petitioners have allegedly not met. Respondent’s Counsel notes that none of the documentation provided in

support of Petitioners' motion 1) establishes that Petitioners completed the required work under the Agreement 2) reflects Respondent's intention to release Petitioners from any claims Respondent might have for Petitioners' failure to comply with their obligations under the Agreement; or 3) demonstrates Respondent's concession that Petitioners complied with the Agreement. Respondent's Counsel provides a copy of his letter dated October 28, 2011 to Petitioners' counsel (Ex. A to Wincott Aff. in Opp.) which, he submits, clearly reflects Respondent's position that Petitioners had not performed all the required work under the Agreement. Finally, Respondent's Counsel notes that the Prior Action relates to the Contract, which is a distinct agreement, and does not make claims related to the Agreement. Thus, the existence of the Prior Action has no bearing on Respondent's right to arbitrate the instant action.

C. The Parties' Positions

Petitioners submit that the Court should permanently stay the Arbitration in light of Respondent's alleged failure to comply with the Agreement, specifically the general release provision, which rendered the Agreement unenforceable. Petitioners argue that Respondent may pursue its claims in the Prior Action. Petitioners also contend that they will be severely prejudiced by the denial of their application because they will be forced to incur substantial costs in participating in the Arbitration, which should not go forward in light of documentation reflecting Respondent's intention to release Petitioners from the very claims it seeks to arbitrate.

Respondent opposes Petitioners' motion, submitting that 1) the purpose of the release provision in the Agreement was to release Petitioners only after all obligations were met under the Agreement, which Respondent alleges did not occur; 2) Respondent never released Petitioners from Respondent's claims, and has consistently maintained that Petitioners have not complied with their obligations under the Agreement; 3) given the breadth of the Arbitration Clause, any issues regarding the release should be determined by the arbitrator; 4) the Prior Action, which relates to the separate Contract, has no bearing on Respondent's right to arbitrate the Agreement; and 5) Respondent will be prejudiced if the Court grants Petitioners' application for a stay, as its only remedy for breach of the Agreement is through an arbitration hearing.

RULING OF THE COURT

Arbitration is favored in New York State as a means of resolving disputes, and courts should interfere as little as possible with agreements to arbitrate. *Shah v. Monpat Construction*, 65 A.D.3d 541, 543 (2d Dept. 2009). The Court must determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement. *Sisters of Saint John the Baptist v. Geraghty*, 67 N.Y.2d 997, 999 (1986). The Court's inquiry ends, however, when the requisite relationship is established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate. *Id.* The ultimate disposition of the merits is reserved for the arbitrator and the courts are expressly prohibited from considering whether the claim regarding which arbitration is sought is tenable, or otherwise passing on the merits of the dispute. *Nationwide General Insurance Company v. Investors Insurance Company of America*, 37 N.Y.2d 91, 95 (1975), citing CPLR § 7501.

With regard to the scope of an arbitration clause, a broad arbitration clause should be given the full effect of its wording in order to implement the intention of the parties. *Weinrott v. Carp*, 32 N.Y.2d 190 (1973). A court may exclude a substantive issue from issues that are submitted to an arbitrator only if the arbitration clause itself specifically enumerates the subjects intended to be put beyond the arbitrator's reach. *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299 (1984).

The Court denies Petitioners' Order to Show Cause in its entirety. Given the breadth of the Arbitration Clause, and the fact that the Prior Action relates to the Contract which is separate and distinct from the Agreement, the parties are required to arbitrate their disputes regarding the Agreement. Petitioners' claim that Respondent released Petitioners from any claims under the Agreement, which Respondent disputes, does not alter the Court's analysis as it is for the arbitrator to make the determination regarding that issue, as well as all other issues relevant to the arbitration.

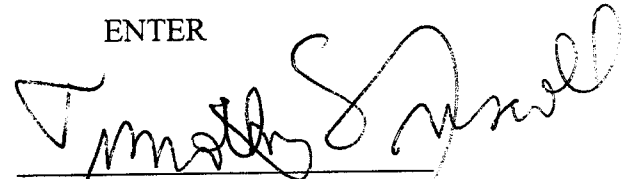
In light of the foregoing, the Court denies the Order to Show Cause in its entirety and directs the parties to proceed to arbitration regarding the issues raised in the arbitration demand filed by Respondent. The Court further directs that this action is stayed, pending the completion of arbitration, and further directs that either party may make an application to vacate or modify this stay upon the final determination of the arbitrator.

All matters not decided herein are hereby denied.

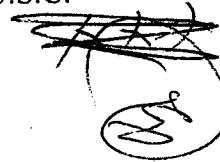
This constitutes the decision and order of the Court.

DATED: Mineola, NY
May 29, 2012

ENTER


HON. TIMOTHY S. DRISCOLL

J.S.C.



ENTERED

JUN 07 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**