

CUSTOM METAL INC. v. NEW YORK MERCHANTS PROTECTIVE CO. INC.

21343/08

SUPREME COURT OF NEW YORK, NASSAU COUNTY

2009 N.Y. Misc. LEXIS 2639; 241 N.Y.L.J. 70

April 6, 2009, Decided

COUNSEL: [*1] For Plaintiff: Blodnick & Baum, PC.

For Defendant: Kirschenbaum & Kirschenbaum, PC.

JUDGES: Justice William R. LaMarca.

OPINION BY: William R. LaMarca

OPINION

Defendant, NEW YORK MERCHANTS PROTECTIVE CO. INC., (hereinafter referred to as "NYMP"), moves for an order, pursuant to *CPLR § 7503(a)*, compelling arbitration of the disputes between NYMP and plaintiff, CUSTOM METAL INC. (hereinafter referred to as "CUSTOM METAL") and STEVE PRATT. Counsel for plaintiff opposes the motion, which is determined as follows:

The complaint alleges that NYMP is licensed to install and/or maintain alarm systems and that CUSTOM METAL is a customer of NYMP since 1990 when it leased and installed an alarm/security system at its principal place of business. Plaintiff alleges that, over the years, in 1998, 2002 and again in 2008, when CUSTOM METAL moved to a new location, NYMP would remove the security system and reinstall it at the new location. At the time of its last move, in 2008, a contract for the leased equipment was in place, signed by CUSTOM METAL's President, STEVE PRATT, on January 19, 2003, with an initial term of ten (10) years, automatically renewable for five (5) years and then for successive periods of one (1) year, subject [*2] to cancellation by written notice of either party thirty (30) days prior to the expiration of any term. The complaint alleges that CUSTOM METAL houses government equipment and costly metal products and requires a high level of security to conduct business with the government and private entities.

In essence, CUSTOM METAL asserts that, in 2008, it experienced numerous and recurring problems with the security system which NYMP attempted to remedy. It is alleged that, when a repairman was sent to repair and update the equipment, the workman required that PRATT sign what was purported to be an authorization for the installation and repairs, and that he was not advised that the document was actually a new contract, with an increased monthly cost and which bound CUSTOM METAL for a period of ten (10) years. CUSTOM METAL claims that said contract, dated August 27, 2008, is the contract in dispute herein, that it contains unconscionable language, that it was executed under fraudulent pretenses and that it should be declared null and void. The complaint also contends that NYMP fraudulently represented that certain features, such as a back up system, were in place, and that CUSTOM METAL later [*3] learned that was not the case when the security of their property was breached and their property was stolen. No dates are provided as to the alleged theft of property or breach of security. CUSTOM METAL claims damages for the the complaint falls within the broad arbitration agreement and that an order compelling arbitration should be granted.

In opposition to the motion, counsel for CUSTOM METAL argues that it is seeking to vitiate the entire contents of the Agreement and the Court should not enforce the arbitration provision of said Agreement which is the product of fraud in the inducement and misrepresentations. In reply, counsel for NYMP points out that, even if the 2008 contract is deemed to be invalid, the 2003 contract is enforceable, which includes an agreement to arbitrate.

The Court of Appeals in Weinrott v. Carp, 32 NY2d 190, 344 NYS2d 848, 298 NE2d 42 (C.A 1973), instructs:

...*CPLR 7503 (subd.(a))* (sic) states: "A party aggrieved by failure of another to arbitrate may apply for an order compelling arbitration. When there is no substantial question whether a Valid Agreement was made or complied with--the court shall direct the parties to arbitrate..."

The "valid agreement" referred [*4] to concerns a valid agreement to arbitrate

...Since we now hold that an arbitration provision of a contract is separable, the agreement to arbitrate would be "valid" even if the substantive portions of the contract were induced by fraud (citations omitted).

In *Weinrott*, the Court of Appeals held that a broad arbitration clause should be given full effect of its wording in order to implement the intention of the parties and, unless the alleged fraud permeated the entire agreement, the arbitration provision should be upheld. Indeed, all of the cases cited by plaintiff for the proposition that the Court must separately examine the substantive agreement and the agreement to arbitrate, upheld the arbitration clause of the agreement and, despite the claims of fraud, sent the matter to arbitration. (See, *O'Neil v. Krebs* 16 AD3d 144, 790 N.Y.S.2d 451 [2nd Dept. 2005]; *Riverside Capital Advisors, Inc. v. Winchester Global Trust Co.*, 21 AD3d 887, 800 N.Y.S.2d 754 [2nd Dept. 2005]; *Stellamack Air Conditioning & Refrigeration Corp. v. Contractors Management Systems of NH, Inc.*, 293 AD2d 956, 740 N.Y.S.2d 535 [3rd Dept. 2002].)

After a careful reading of the submissions herein, it is the judgment of the Court that NYMP is entitled loss of its property, [*5] for the costs of a new security system and for the "negligent" installation of the alarm system by NYMP.

On the instant motion, counsel for NYMP, points out that both the January 19, 2003 and the August 27, 2008 Agreements, contain broad arbitration clauses at P18, as follows:

18. LEGAL ACTION...Any action or dispute between the parties, including issues of arbitrability, shall, at the option of either party, be determined by arbitration administered by the National Arbitration Association under its Commercial Arbitration Rules...

Counsel for NYMP states that the National Arbitration Association (NAA) no longer exists and has been succeeded, by merger, by Arbitration Services, Inc., which has jurisdiction over all matters previously referred to the NAA. NYMP has demanded arbitration and moving counsel claims that every allegation in to the requested relief enforcing the arbitration provision of the parties contract. In the case at bar, the contracts contained a Severability Clause (§ 26) and the Court finds that fraud does not permeate the whole agreement so as to make the arbitration clause unenforceable. The parties' disputes arose under the subject contracts and should be determined by [*6] the Arbitrator. It is therefore

ORDERED, that NYMP's motion to compel arbitration is granted and the parties are directed to proceed to arbitration at Arbitration Services, Inc.; and it is further

ORDERED, that the instant action is stayed pending the conclusion of arbitration on those disputes deemed by the Arbitrator to be referable to arbitration (*CPLR § 7503[a]*). All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.