Daily Development for Tuesday, August 31, 2010
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Note that there are two cases here.

CONSTRUCTION LAW; ALTERNATIVE DISPUTE RESOLUTION; ARBITRATION; INCORPORATION CLAUSES: An incorporation clause binding a subcontractor to all terms in a prime contract does not incorporate an arbitration agreement in absence of an express and specific agreement to arbitrate.

Wonder Works Construction v. R.C. Dolner, Inc. 901 N.Y.S. 2d 30 (N.Y. App. Div. 2010).

Contractor demanded that Subcontractor participate in arbitration proceedings with the project owner. The Subcontractor petitioned to stay the arbitration. The subcontract contained incorporation clauses binding subcontractor to all provision and terms in the prime contract. The Subcontractor was also required to assume all of the rights and obligations that the Contractor had assumed in respect of the project regarding the Subcontractor's work. A provision within the prime contract stated that the Subcontractor is bound by any arbitration award between the Contractor and project owner.

The prime contact contained inconsistencies with respect to the arbitration provision, at one point giving the project owner with the exclusive right to consent to the addition of a subcontractor in an arbitration proceeding and in another provision providing the Contractor with such a right. The prime contract also stated that arbitration would not include "by consolidation as joinder or in any manner " parties other than the project owner and Contractor.

The trial court dismissed the Subcontractor's petition, ordering the Subcontractor to participate in the arbitration.

The appellate court reversed, holding that the arbitration clause in the prime contract was not incorporated by reference into the subcontract. Under New York law, incorporation clauses referencing prime contract clauses in a construction subcontract bind a subcontractor only to "prime contract provisions relating to the scope, quality, character, and amber of the work to be performed by the subcontractor" which the court held was not included an arbitration agreement. The court found that intent to incorporate the terms of an arbitration provision must be clear to be enforceable. On this basis, the court held that the arbitration provision in the prime contract relied on "implication and subtlety" and thus lacked any express and specific agreement holding the Subcontractor to arbitration.

Comment: Note that the decision and supporting authority relate only to the construction context - contractors and subcontractors. Further, it included the

notion that the prime contract relied upon "implication and subtlety." What does that do to this case as authority, even in the construction law context?

MORTGAGES; FORECLOSURE; ARBITRATION; WAIVER:. A mortgagor may waive its right to compel arbitration if it acts inconsistently with the intention to arbitrate in the litigation of the foreclosure.

LZG Realty, LLC v. H.D.W. 2005 Forest, LLC 896 N.Y.S.2d 389 (N.Y. App. Div. 2010).

Mortgagees brought a foreclosure action A year and a half later, while the action was still pending, Mortgagor asserted the right to arbitrate the debt claim under a provision in the loan agreement. The Mortgager had failed to assert his right to arbitrate in his answer to the action. The trial court held that the Mortgagor had waived his right to arbitration.

The appellate court affirmed, finding that the Mortgagor acted inconsistently with the intention to arbitrate as (i) Mortgagor used litigation tools such as extensive discovery, (ii) Mortgagor waited until over one year after the action aroused to assert his arbitration right, and (iii) the Mortgagor's only reason for not asserting his arbitration right earlier was that he lacked a copy of the contract and had forgotten that he had the right to arbitrate.

Comment: Once again, the principle is interesting, but the court's analysis of the equitable basis for waiver is somewhat special - as the alleged waiver was non-volitional. Perhaps an estoppel claim would be more appropriate - if the court could show that the mortgagee was injured by the delay.

Is the waiver based upon sheer laziness of the mortgagor (and its counsel) by failing to read the loan agreement for a year after the filing of foreclosure?

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