

Prepared by the Court

Delaware River Properties, LLC	:	Superior Court of New Jersey
Plaintiff	:	Law Division- Gloucester County
v.	:	
	:	CIVIL ACTION
Railroad Construction Company, Inc.,	:	Docket No. GLO-26-21 (CBLP)
Riggs Distler and Company, Inc., and	:	
Hunter Site Services, LLC	:	Memorandum of Decision
Defendants	:	

This matter arises out of an Engineering Procurement and Construction Contract entered into by Plaintiff, Delaware River Partners, LLC (“DRP”) and Defendant, Railroad Construction Company, Inc. (“Railroad”) for the design and construction of a liquified petroleum gas loading facility (the “Project”) known as the Repauno Port and Rail Terminal Project. DRP hired Railroad to construct the facility for a total contract price of \$75,935,467. Railroad then entered into a contract with Riggs Distler and Company, Inc. (“Riggs”) to perform certain mechanical work for a contract price of \$13,500,000 (the “subcontract”). Riggs also claims significant change order work that was specifically authorized by Railroad. Disputes arose over Railroad’s timely performance, and informal dispute resolution procedures outlined in the Contract failed to resolve the issues. In January 2021, plaintiff filed a complaint against defendant, Railroad in the Law Division and also named Riggs as a defendant as Riggs had filed a construction

lien claim against the property as a result of Riggs' dispute with Railroad regarding payment. Railroad's initial pleading was a motion to dismiss pursuant to the arbitration clause within the Contract. This court denied the motion, but that decision was reversed by the Appellate Division on June 24, 2022. Of note to the instant decision was the Appellate Division's instruction that "the parties are free to present arguments to the Law Division judge whether plaintiff's claims against Riggs and Hunter should proceed, be stayed pending arbitration between plaintiff and defendant [Railroad], or be 'subsumed' within the arbitration proceeding..". Following the Appellate Division's decision, the court entertained briefs as to what to do with the construction lien claims of Riggs and Hunter.

Riggs vehemently argues that their payment claims against Railroad should be included in the arbitration between plaintiff and Railroad. They suggest that judicial economy dictates that result. They contend that they will be a necessary participant in the arbitration proceeding as many of plaintiff's claim involve the sub-contract work they performed on the Project. No one seems to dispute this contention.

On the other hand, Railroad requests that Riggs' claims be stayed pending the outcome of the arbitration. Railroad quotes the arbitration provisions of the subcontract, specifically Section 10.8, 19.2 and 19.5 which state that arbitration of Railroad and Riggs Distler's claims is at the sole and exclusive option of Railroad. Section 10.8 of Riggs Distler's Subcontract states: "Notwithstanding anything to the contrary, Contractor [Railroad] shall have the exclusive and unilateral right to elect to proceed in either arbitration or a court of competent jurisdiction concerning any claim or dispute between Contractor and Subcontractor [Riggs Distler]. If Contractor elects arbitration, completion

of the arbitration between Contractor and Subcontractor shall act as a condition precedent to Subcontractor commencing any civil action against the bond or surety of Contractor. Disputes shall be determined pursuant to Paragraph 19 below". Section 19.2 of Riggs Distler's Subcontract states: "Claims not resolved by mediation shall, at the sole and exclusive option of Contractor". These sections plainly and unambiguously demonstrate that disputes between Railroad and Riggs can only proceed to arbitration at the sole and exclusive option of Railroad. Railroad has declined to include Riggs in the arbitration of the underlying dispute. The court has no power to rewrite this contract regardless of its feelings that all issues should be included.

Therefore, without Railroad's consent to arbitrate, the court has only two options left, i.e. stay the lien claims or allow the matters to concurrently litigate, one in court and the other in arbitration. Interestingly, it was Riggs, who joined in the motion to dismiss the litigation in favor of arbitration, that cited N.J.S.A. 2A:44A-24.1(c) which provides:

The court shall stay the suit to the extent that the
lien claimant's contract or the contract of another party
Against whose account the lien claim is asserted provides
that any disputes pertaining to the validity or amount of a lien
claim are subject to arbitration or other dispute resolution mechanism.

Moreover, as the Appellate Division stated, "[O]ur caselaw also support staying proceeding in the trial court in situations where some parties in the litigation are not parties to the arbitration agreement being enforced." Citing, Elizabethtown Water Co. v. Watchung Square Assoc., LLC, 376 N.J. Super 571, 578 (App. Div. 2005).

Further, to a large extent Riggs' claims are derivative of Railroad's claims against DRP. In other words, if Railroad does not fully prevail in obtaining payment from plaintiff, Railroad's payment obligation to Riggs is diminished. Pursuant to Sections 10.1-10.3 of the subcontract, Riggs is only entitled to receive from Railroad the amounts that Railroad recovers from DRP. In those contract provisions, Riggs waives any claims above and beyond that amount.

It makes no sense to permit concurrent litigations. The Riggs and Hunter claims will be stayed pending the outcome of the arbitration between DRP and Railroad. All pending motions regarding discovery will be marked withdrawn and can be addressed in the arbitration proceeding.

James R. Swift, J.S.C.