To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION
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In the Matter of the Application of:

TERN CONSTRUCTION & DEVELOPMENT, LLC,

Petitioner,

Index No. 56394/2020
Motion Seq. No. 1
Motion Date: 8/25/2020

For a Permanent Stay of Arbitration Pursuant to Article 75 of the Civil Practice Law and Rules,

DECISION AND ORDER

-against-

EXTREME CONSTRUCTION AND BOSSI SUPPLY,

Respondents.
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WALSH, J.

The following e-filed documents, listed in NYSCEF by document numbers 1-45 were read on this Petition by Petitioner Tern Construction & Development, LLC ("Petitioner" or "Tern") against Respondents Extreme Construction ("Extreme Construction") and Bossi Building Supply Company ("Bossi") (together "Respondents") for an order pursuant to CPLR 75 granting a permanent stay of the arbitration before the American Arbitration Association ("AAA") entitled *Bossi Supply and Extreme Construction v Tern Construction and Development,* Case Number 01-20-0005-2926 (the "Arbitration"). Respondents oppose the Petition.

Upon the foregoing papers, and for the reasons stated herein, Petitioner's Petition shall be denied, and the proceeding shall be dismissed.

PETITIONER'S ALLEGATIONS

Petitioner contends that it is a domestic limited liability company duly authorized to do business in the State of New York, with a principal place of business at 57 Route 6, Suite 207, Baldwin Place, New York (Verified Petition at ¶ 1). It states that, upon information and belief,

Bossi is a foreign (New Jersey) business corporation authorized to do business in the State of New York, with a principal place of business at 20 Nami Lane, Suite 20, Hamilton, New Jersey (*id.* at ¶ 2).

Petitioner further states that, upon information and belief, Extreme Construction is a domestic business corporation authorized to do business in the State of New York with a principal place of business at 20 Nami Lane, Suite 20, Hamilton, New Jersey (*id.* at ¶ 3). Petitioner alleges that, on or about December 21, 2017, Tern entered into a Master Subcontract Agreement with Bossi (the "Bossi Agreement") to furnish all materials as required for the framing in connection with the construction of a new building located at 178 Main Street, Poughkeepsie, New York, known as the Queen City Lofts (the "Project") (*id.* at ¶ 4). Petitioner states that, on or about December 21, 2017, Tern entered into a Master Subcontract Agreement with Extreme Residential Corp. ("Extreme Residential") (the "Extreme Residential Agreement")[1] to perform labor and provide equipment as required for the framing in connection with the construction of the Project (*id.* at ¶ 5).

According to Petitioner, upon information and belief, Extreme Residential is a separate corporation from Extreme Construction (*id.* at ¶ 6). Petitioner also contends that, while Extreme Construction is a domestic business corporation, Extreme Residential is a foreign (New Jersey) business corporation authorized to do business in the State of New York (*id.* at ¶ 7). Petitioner contends that it never agreed to participate in an arbitration with Extreme Construction and that, in fact, Tern and Extreme Construction did not enter into any type of agreement in connection with the Project (*id.* at ¶ 8).

Petitioner further contends that on several occasions Extreme Residential and Bossi were notified, verbally and in writing, by Tern that the work was defective and that they were not complying with the project schedule annexed to the Agreements (*id.* at ¶ 9).

Petitioner states that:

Paragraphs 16(a) of both the Bossi Agreement and Extreme Residential Agreement provide as follows:

> This Subcontract shall be governed by and constructed in accordance with the laws of the State of New York without regard to conflict of law principles.

Paragraphs 9(d) of both the Bossi Agreement and Extreme Residential Agreement provide as follows:

> Anything to the contrary in the Contract Documents notwithstanding, any controversy between Contractor and Subcontractor not involving Owner, the Contract Documents, or any Owner Claim and which is not amicably resolved by the parties in accordance with Paragraph 9.c., will be submitted, at the sole and exclusive discretion of the Contractor, to either (1) a court of competent jurisdiction in the State of New York, County of

[1] Together the Bossi Agreement and the Extreme Residential Agreement are referred to as the "Master Subcontract Agreements" or the "Agreements."

> Westchester (the Subcontractor consents to that jurisdiction and venue); or (2) arbitration pursuant to the Construction Industry Rules of the American Arbitration Association to be conducted in Westchester County, New York, unless mutually agreed otherwise. The prevailing party in any litigation/arbitration shall be entitled to recover reasonable attorney's fees, costs and expenses incurred in connection with the litigation.

Paragraphs 18(b) of both the Bossi Agreement and Extreme Residential Agreement provide as follows:

> No action or proceeding shall lie or shall be maintained by Subcontractor against the Contractor unless such action shall be commenced within one (1) year after the last day of Subcontractor's Work on the Project, or, if the Subcontract is terminated, unless such action or proceeding is commenced within six (6) months after the date of such termination. Subcontractor acknowledges that it is expressly agreeing to limit the time to commence an action otherwise available to it by statute.

(Verified Petition at ¶¶ 10-12).

Petitioner alleges that, on November 14, 2018, Bossi issued Payment Application Number 8 for the period thru November 30, 2018 certifying that its work was 100% complete (*id.* at ¶ 13). It further contends that, on January 14, 2019, Bossi issued Payment Application Number 9 for the period thru January 31, 2019 certifying that not only was its work 100% complete, but that Bossi was entitled to the payment of its retainage (*id.* at ¶ 14). Petitioner argues that, as set forth in Bossi Agreement, it is clear that Bossi failed to commence its Arbitration within the one (1) year contractual statute of limitation expressly provided for in the Bossi Agreement and which statute of limitation is applicable to any "action or proceeding" maintained by Bossi against Tern (*id.* at ¶ 15).

Petitioner states that Bossi's Payment Application Number 8, expressly certified that it completed its work no later than November 30, 2018, when Bossi invoiced for 100% complete (*id.* at ¶ 16). Therefore, according to Petitioner, the Arbitration filed on May 18, 2020 is untimely as it was filed approximately five and one half (5 1/2) months after the expiration of the one (1) year contractual statute of limitations, *i.e.,* November 2019 (*id.*). Petitioner further argues that, even considering if Bossi's work was fully completed at the time Bossi requested its Retainage in Payment Application Number 9 on January 31, 2019, the Arbitration was still untimely as it was filed approximately three and one half (3 1/2) months after the expiration of the one (1) year contractual statute of limitations, *i.e.,* January 31, 2020 (*id.* at ¶ 17). According to Petitioner, under either accrual date, Bossi's Arbitration is untimely, and the Arbitration should be permanently stayed (*id.* at ¶ 18). It states that, on November 14, 2018, Extreme Residential issued Payment Application Number 8 for the period thru November 30, 2019 [*sic*][2], certifying that its work was 100% complete (*id.* at ¶ 19). Petitioner also alleges that, on January 14, 2018

[2] This date appears to be just a typo in the Petition in that November 30, 2019 should be November 30, 2018 (*see* Verified Petition Ex. I).

[*sic*][3], Extreme Residential issued Payment Application Number 9 for the period thru January 31, 2019, certifying that not only was its work 100% complete, but that Extreme Residential was entitled to the payment of its retainage (*id.* at ¶ 20).

Petitioner argues that, notwithstanding that Extreme Construction is not the proper party herein, the Extreme Residential Agreement is clear that the Arbitration was not commenced within the one (1) year contractual statute of limitation expressly provided for in the Extreme Residential Agreement and which statute of limitation is applicable to any "action or proceeding" maintained against Tern (*id.* at ¶ 21). Petitioner states that Extreme Residential's Payment Application Number 8 expressly certified that it completed its work no later than November 30, 2019, when Extreme Residential invoiced for 100% complete and that, therefore, the Arbitration filed on May 18, 2020 is untimely as it was filed approximately five and one half (5 1/2) months after the expiration of the one (1) year contractual statute of limitations, *i.e.* November 2019 (*id.* at ¶ 22).

According to Petitioner, "even considering that Extreme Residential's Work was fully completed at the time it requested its Retainage in Payment Application Number 9 – January 31, 2019, the Arbitration was still untimely as it was filed approximately three and one half (3 1/2) months after the expiration of the one (1) year contractual statute of limitations, *i.e.*, January 31, 2020" and that, under either accrual date, Respondent Extreme Construction's Arbitration is untimely, and the Arbitration should be permanently stayed (*id.* at ¶¶ 23-24).

Petitioner contends that, on or about May 13, 2020, Respondents' attorney submitted to the AAA a Demand for Arbitration, but that the Demand for Arbitration was mailed to Tern's old address and Tern did not receive a copy until June 1, 2020 (*id.* at ¶ 25). Petitioner further contends that, on May 21, 2020, a representative of the AAA sent a letter via email to Tern referencing an arbitration entitled *Bossi Supply and Extreme Construction v. Tern Construction and Development* Case Number 01-20-0005-2926. According to Petitioner, this was the first time it became aware of the pending Arbitration. Petitioner contends that the letter acknowledged the receipt of Respondents' Demand for Arbitration and that the Case was filed on May 18, 2020. Petitioner states that the Demand for Arbitration includes, *inter alia*, a copy of the both the Bossi and Extreme Residential Agreements (*id.* at ¶ 26).

Petitioner contends that, on June 4, 2020, Petitioner's attorneys sent an email to Respondents' counsel requesting that the Arbitration be withdrawn on the grounds that the claims are timed barred under the applicable one (1) year statute of limitations set forth in both Bossi and Extreme Residential Agreements (*id.* at ¶ 27).

According to Petitioner, its Petition to Stay the Arbitration is being filed and is timely under Governor Cuomo's Executive Orders 202.08, 202.14 and 202.28 which tolled "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but

[3] This date appears to be just a typo in the Petition in that January 14, 2018 should be January 14, 2019 (*see* Verified Petition Ex. J).

not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof" (*id.* at ¶ 28). Petitioner states that this tolling of any specific time limit under the above Executive Orders expired on June 6, 2020 and, therefore, Petitioner requests that this Court issue an Order: (i) permanently staying the Arbitration pursuant to CPLR § 7503(b); (ii) permanently staying the Arbitration on the grounds that a valid agreement to arbitrate was not made between Tern and Extreme Construction; (iii) permanently staying the Arbitration claim by Bossi pursuant to CPLR § 7502(b) because the claim is time barred under the one (1) year statute of limitations set forth in the Master Subcontract Agreement; (iv) permanently staying the Arbitration claim by Extreme Construction and/or Extreme Residential pursuant to CPLR § 7502(b) because the claim is time barred under the one (1) year statute of limitations set forth in the Master Subcontract Agreement; (v) granting Petitioner its reasonable attorneys' fees, costs and expenses incurred in making the application; and (vi) granting Petitioner such other and further relief as this Court may deem just and proper (*id.*).

RESPONDENTS' OPPOSITION

In opposition to Petitioner's Petition, Respondents submit: (1) an affidavit of Daniel Bossi, sworn to July 28, 2020, together with various exhibits ("Bossi Aff."); and (2) a memorandum of law dated July 30, 2020, together with various exhibits ("Respondents' Opp."). In their memorandum, Respondents argue that Extreme Construction and Bossi were hired to supply labor and material to Tern on a particular project; however, the "[p]roper entity that entered into the contract with Petitioner is 'Extreme Residential Corp.'; not 'Extreme Construction'" (Respondents' Opp. at 2 n 1).[4]

According to Respondents, after completing their work, Extreme Residential and Bossi sought to receive final payment from Tern (*id.* at 2).[5] Respondents contend that Tern "essentially strung Extreme and Bossi along, even having them come back to the project in May 2019 and July 2019 stating that if Extreme and Bossi came back they would receive final payment that had been submitted in early 2019" (*id.*). Respondents contend that Petitioner now claims that Extreme and Bossi's claim is untimely and the arbitration venue is not appropriate (*id.*). Respondents argue that "Extreme and Bossi's claim is timely, especially considering they came back at the request of Tern to address issues with their work" and that "Extreme and Bossi communicated on multiple occasions regarding payment and were told by representatives from Tern that payment was being looked into" (*id.*). Respondents argue that "Extreme and Bossi came back in the summer of 2019 on the basis that if they came back Tern would pay them the

[4] Respondents refer to Extreme Residential as "Extreme."

[5] Although the Court is reciting the facts as detailed in Respondents' memorandum of law, these same facts are supported by the averments made by Daniel Bossi in his affidavit, together with the accompanying exhibits.

monies owed" and, therefore, "Extreme and Bossi's claim against Tern is timely under New York law as well under theories of equitable estoppel" (*id.*). Finally, Respondents contend that counsel for Extreme and Bossi asked Tern on at least one occasion to identify what venue it would like to adjudicate disputes, but Tern never answered and thus waived any right to choose the necessary venue (*id.*).

Respondents argue that, on or about December 21, 2017, Tern entered into a subcontract agreement with Extreme to perform framing work at the Project (*id.* at 3). They contend that, or about December 21, 2017, Tern also entered into a Subcontract Agreement with Bossi to furnish the materials required for framing work at the Project (*id.*). According to Respondents, "[b]ut for the obvious differences with scopes of work, Tern retained Extreme and Bossi pursuant to separate, yet identical, 12-page subcontracts" (*id.*).

After reciting portions of the subcontracts, Respondents contend that both Extreme and Bossi carried out the work called for by their respective Subcontract Agreements and that the work done by each of the Respondents was compliant and completed in a timely, workmanlike manner within specifications (*id.* at 5). Respondents state that Extreme Residential, believing its work called for in its Subcontract with Tern was completed by January 14, 2019, submitted its final application for payment bearing the same date (*id.*). Respondents argue that under paragraph 8 of its Subcontract Agreement, Tern would have had until January 17, 2019 to submit written notice to Extreme Residential if it had failed to comply with the terms of the Subcontract, and that Tern did not submit any written notice or even immediately respond to Extreme Residential's final payment application (*id.*). Respondents contend that, to date, Tern owes and has not paid Extreme Residential well over $100,000 for labor performed under its subcontract (*id.*). Respondents contend that Bossi was contracted by Tern for "nothing more than providing framing materials" and that, "[b]elieving its work called for in its subcontract was completed, Bossi submitted Payment Application Number 8 dated November 14, 2018" (*id.*). According to Respondents, "[f]ollowing a period of nonpayment, Bossi submitted Payment Application Number 9 dated January 14, 2019 reflecting the new amount owed by Tern" (*id.*).

Respondents state that, to date, Tern owes and has not paid Bossi for retainage and materials supplied for the Project (*id.*). According to Respondents, John Pozzi and Gregory Thomas were the project supervisors who oversaw Extreme Residential's work on a daily basis, and at no time did either Pozzi or Thomas ever express dissatisfaction with Extreme Residential's framing work, nor with the materials supplied by Bossi (*id.*). Respondents contend that, on September 28, 2018, Extreme Residential's Controller, Nelson Luna ("Luna"), emailed Tern's Judy McNulty to provide Tern with six (6) unpaid invoices and Additional Work Order Logs reflecting work done by Extreme Residential at the Project that was unrelated to the original contract (*id.* at 5-6). Respondents state that no response was received from Tern (*id.* at 6).

Respondents contend that Kearney Realty & Development Group ("Kearney Realty") was the Owner of the Project and that Kearney Realty and Tern are related entities owned and operated by the same man, Sean Kearney ("Kearney") (*id.*). Respondents argue that, upon information and belief, Tern facilitates construction and Kearney Realty facilitates realty aspects

of land development projects such as the one at issue in this action (*id.*). Respondents assert that, at all relevant times, they "understood communications with Kearney are communications with Tern" (*id.*).

According to Respondents, on March 25, 2019, Sean Kearney emailed Extreme Residential to advise that there were "sagging" issues with the roof that Tern believed related to framing (*id.*). They state that, in response, on May 1, 2019, Joe Leahy of Extreme Residential returned to the Project accompanied by John Pozzi, Tern's project manager, to inspect the issues identified in Kearney's email and, at that time, Leahy intended to walk the roof with Pozzi and the Project's contracted roofer, but the roofer did not appear (*id.*). Respondents contend that, as a result, the roof could not be opened and Leahy could not personally observe the framing to assess the alleged "issues" detailed by Kearney (*id.*). Leahy's observations at that time led him to believe that either the boom lift or something else had pushed down on top of the parapet bending it (*id.*). Respondents state that Extreme Residential sent workers back to the Project the following day on May 2, 2019 to install DensGlass, an architecturally specified fiberglass mat gypsum sheathing that provides moisture and mold resistance, at the exterior of the retail space and to do any necessary repairs to the parapets (*id.*). Respondents contend that, despite Extreme Residential's two trips to the Project in early May 2019, "Kearney again emailed Extreme on May 22, 2019 reiterating the purported 'issue with our cornice framing' claiming that it 'hasn't been resolved' and claiming it was 'evident that the cornice wasn't installed correctly and is failing'" (*id.* at 6-7).

Respondents argue that "this same Kearny email directly based Respondents' ability to receive final payment of its invoices at issue here on resolving these issues" and quote the email's text:

> This is obviously extremely urgent as it's [*sic*] huge liability by either completely failing or compromising our roof. Please have someone contact me directly so we can resolve this. ***I want this to resolved*** [*sic*] and ***everyone to be paid in full*** as soon as possible

(*id.* at 7 [emphasis added by Respondents]).

Respondents argue that they "(rightfully) believed that returning to the Project to confirm and resolve the issues identified by Kearney were directly related to Respondents' contracted work" (*id.*). According to Respondents, "it was made clear by Kearney's email that the ability for Respondents to be paid pursuant to their subcontract agreements with Tern was conditioned upon Extreme returning to work at the Project" and that "one might reasonably interpret this email as the closest that Tern ever came to complying with Paragraph 8(a) of the subcontract agreements with Respondents" (*id.*). Respondents contend that, although written notice was definitely not provided within the time prescribed by the subcontracts (*i.e.*, three business days), this does appear to be an effort to invoke the "specific performance" provision within that section of the subcontracts (*id.*).

Respondents state that Extreme Residential responded on May 22, 2019 by way of email from Joe Leahy who vehemently disputed that Extreme's work was the cause of the purported

roof "sagging" issue (*id.*). Despite the dispute, Respondents contend, Extreme Residential returned to the Project on July 25, 2019 to assess and address any outstanding issues with its framing work (*id.*). According to Respondents, on July 25, 2019 Leahy walked the roof with Greg Thomas, another Tern project manager and, at that time, Leahy observed tapered insulation had been added to the tops of the parapets which pitched water back to the roof but contends that, once again, nobody on site opened the roof for Extreme and that the roof was never opened to allow it to assess the alleged "sagging" while it was on site (*id.*). Respondents argue that "[n]obody ever contacted Extreme to inform it that the roof had been opened to permit any repairs (if any were actually necessary)" (*id.* at 7-8).

According to Respondents, July 25, 2019 is the final date Extreme Residential was on site to perform work pursuant to its December 21, 2017 subcontract agreement and that "Extreme Residential and Bossi both reasonably believed being paid pursuant to their subcontracts was dependent on Extreme being on site on July 25, 2019" (*id.* at 8). Respondents state that, on May 1, 2019, Luna again emailed McNulty (of Tern) asking for payment information on open invoices that Luna attached to the email and that McNulty responded promptly on the same day (May 1, 2019) stating that she was "checking and will get back to [Luna]" (*id.* at 8). Respondents then argue that, twenty (20) days later, Luna followed up with McNulty by email again asking if she had payment information for the open items and the following day, May 22, 2019, McNulty responded that she was "reaching out to find out if they are good to pay now" (*id.*). According to Respondents, Luna responded the following day on May 23, 2019 asking again if Tern could release payment for Bossi while Extreme Residential and Tern "work out the structures" (*id.*).

Respondents then contend that, "[a]fter a period of non-response, Luna emailed McNulty again on October 23, 2019 seeking contact information for a Tern manager who might be able to address the unpaid balance owed for the above referenced work" and on October 28, 2019, Luna spoke with McNulty by phone (*id.*). Respondents contend that McNulty advised Luna that she would provide Extreme with the contact information for Tern's president, or that Tern would contact Daniel Bossi (owner of both Extreme and Bossi), but that Tern never expressed to Respondents, at any point in time, that it intended to withhold payments due to either entity under their respective subcontracts (*id.*). Respondents states that instead "Kearney advised that it was experiencing 'issues' which it wanted resolve so everyone could be 'paid in full as soon as possible'" and that they relied on that representation to their detriment and continued to show up to the Project in good faith (*id.* at 8-9). Respondents argue that, "[a]fter believing the issues had been resolved, Respondents continued to contact Tern seeking payments due and owing" but that "Respondents' emails and phone calls were met with delay, and nebulous responses such as 'checking,' and 'looking into'" (*id.* at 9).

Based on the foregoing facts, Respondents argue the Petition should be denied and the proceeding should be dismissed because: (1) Tern and Respondents entered into a valid agreement to arbitrate and while Tern had the option to decide whether the parties would arbitrate or litigate, it waived its right by failing to respond to Respondents' inquiries over which way it wished to proceed; (2) Respondents complied with the one year statute of limitations since Extreme last worked at the Project on July 25, 2019 and the Demand for Arbitration was filed on

May 13, 2020; (3) even if Extreme had not returned to work on July 25, 2019, Tern should be equitably estopped from enforcing the one year statute of limitations since it lulled Respondents into not filing their Demand for Arbitration by making promises of payment if Respondents corrected the work; (4) Tern is precluded by unclean hands from enforcing the one year statute of limitations given its own defaults under the subcontracts and its unconscionable conduct; (5) to the extent there is any ambiguity in paragraphs 8, 9 and 18 of the Master Subcontract Agreements, they should be construed against their drafter Tern; and (6) Tern is not entitled to an award of its attorneys' fees.

PETITIONERS' REPLY

In Reply, Petitioner submits: (1) an affirmation of counsel, Marisa Lanza, Esq., dated August 25, 2020; (2) an affidavit of Sean Kearney, sworn to August 25, 2020; and (3) a reply memorandum of law dated August 25, 2020, ("Pet's Reply Mem.").

In short, Petitioner replies that: (1) it entered into an agreement with Extreme Residential not Extreme Construction; (2) Extreme Construction's argument that July 2019 is the accrual date for purposes of statute of limitations is flawed and inconsistent with Extreme Construction's project records; (3) Respondents fail to present any evidence that Bossi's Arbitration Demand is timely; (4) equitable estoppel is inapplicable because Respondents did not reasonably rely on Petitioner's single email; (5) Petitioner does not have unclean hands; (6) the Master Subcontract Agreement is not ambiguous; and (7) Petitioner is entitled to attorneys' fees under the prevailing party clause in connection with this proceeding (*id.* at 1).

Petitioner replies that Respondents ignore Petitioner's contentions that the named Respondent Extreme Construction was not in privity of contract with Petitioner, that Respondents ignore their own determinations that their respective work was complete when each issued their respective and separate final payment applications certifying 100% completion of the work, and Respondents ignore that they are two (2) separate entities with different scope of work thereby generating separate accrual dates for the applicable one (1) year statute of limitations set forth in the Master Subcontract Agreements, hence, the alleged actions of Extreme do not extend to Bossi (*id.* at 2).

DISCUSSION

On May 13, 2020, Respondents' attorney submitted to the AAA a Demand for Arbitration (Verified Petition Ex. A). On June 23, 2020 Petitioner filed the instant Verified Petition seeking to permanently stay the Arbitration.

As a threshold matter, in its Verified Petition, Tern contends that it entered into a subcontract agreement with Extreme Residential -- not Extreme Construction, the entity named in this action and in the Demand for Arbitration and, therefore, "Tern Construction never agreed to participate in an arbitration with Respondent Extreme Construction" (Verified Petition at ¶¶ 5-

8, Ex. A). However, because the Arbitration was brought by both Bossi and Extreme Construction, and Tern does not dispute that it entered into the Subcontract with Bossi that contains an arbitration clause, there is no basis for this Court to stay the Arbitration in total even if Petitioner is correct that Extreme Construction has no basis to demand arbitration against Tern.

A review of the Demand for Arbitration with its annexed exhibits reflects that counsel for Bossi and Extreme Residential identified the claimant as Extreme Construction in error given that the check for the Arbitration was drawn on Extreme Residential's bank account and given that counsel attached the Subcontract between Extreme Residential and Tern to the Arbitration Demand. Although the Court is not familiar with the AAA Rules regarding amendments to arbitration demands to correct such misnomers, the law in New York is very liberal in terms of granting such amendments.[6] Here, there is no doubt that the parties understand that it is the Subcontract between Tern and Extreme Residential that is at issue in the Arbitration and this litigation (*see* Respondents Opp. at 2 n 1 [admitting that "[p]roper entity that entered into contract with Petitioner is "Extreme Residential Corp."; *not* "Extreme Construction"]; Petitioner's Reply at 4 n 1 ["For the remainder of this Reply, Petitioner will discuss the claims as they related to both Extreme Residential Corp. and Extreme Construction, notwithstanding that Extreme Residential Corp. is not a party to this action and will use the name 'Extreme' to refer to Respondent"]; Verified Petition Ex A [Demand for Arbitration listing "Extreme Construction" but enclosing a check from Extreme Residential]). In any event, the Court finds that the institution of the Arbitration by Extreme Construction rather than Extreme Residential Construction is simply the result of a misnomer of such an insubstantial nature as to be insufficient to warrant a stay of the Arbitration unless and until it is determined that Extreme Residential cannot be substituted in as the claimant in the Arbitration (*see, e.g., Matter of NRD, Inc. v Herbert Prods., Inc.,* 153 Misc 2d 968 [Sup Ct, Erie County 1992]; *Chubb & Son, Inc. v Altson*, 77 Misc 2d 490 [Sup Ct, Monroe County 1974]; *Matter of Darlington Fabrics Corp. v Aqua Free Corp.,* 77 Misc 2d 948 [Sup Ct, NY County 1973]). As such, the Court shall deny this branch of the Petition, without prejudice and with leave to renew if Extreme Residential cannot be substituted in the place and stead of Extreme Construction in the Arbitration.

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[6] Courts may grant leave to amend to substitute parties who could have brought the claim to begin with as long as it does not result in surprise or prejudice to the non-moving party (*Fulgum v Town of Cortlandt Manor*, 19 AD3d 444, 445-46 [2d Dept 2005]; *see also Catnap LLC v Cammeby's Mgt. Co., LLC*, 170 AD3d 1103, 1106 [2d Dept 2019]; *United Fairness, Inc. v Town of Woodbury*, 113 AD3d 754, 755 [2d Dept 2014]). "'It is well settled that an amendment which would shift a claim from a party without standing to another party who could have asserted that claim in the first instance is proper since such an amendment, by its nature, does not result in surprise or prejudice to defendants who had prior knowledge of the claim and an opportunity to prepare a proper defense'" (*JCD Farms, Inc.*, v *Juul-Nielsen*, 300 AD2d 446, 446 [2d Dept 2002]; *D'Angelo v Kujawski*, 164 AD3d 648 ,649 [2d Dept 2018]; *United Fairness, Inc.*, 113 AD3d at 755).

A. The Timeliness of Respondents' Arbitration Demand is a Question for the Arbitrator

The parties do not dispute that, on or about December 21, 2017, Tern entered into Master Subcontract Agreements with Extreme Residential and Bossi containing identical terms. Provision 9(d) of both Agreements provide that:

> Anything to the contrary in the Contract Documents notwithstanding, any controversy between Contractor and Subcontractor not involving Owner, the Contract Documents, or an Owner Claim and which is not amicably resolved by the Parties in accordance with Paragraph 9.c will be submitted, at the sole and exclusive discretion of the Contractor, to either (1) a court of competent jurisdiction in the State of New York, County of Westchester (the Subcontractor consents to that jurisdiction and venue); or (2) arbitration pursuant to the Construction Industry Rules of the American Arbitration Association to be conducted in Westchester County, New York, unless mutually agreed otherwise. The prevailing party in any litigation/ arbitration shall be entitled to recover reasonable attorneys' costs and expenses incurred in connection with the litigation.

Although this provision states that the determination of whether to submit any controversy between Petitioner and Respondents to either a court or arbitration is "at the sole and exclusive discretion of the Contractor," Petitioner has not exercised its option to require that the parties litigate rather than arbitrate. By email dated May 1, 2020, Respondents' counsel reached out to Tern to advise it that because Respondents had not received a response to their payment demands, they would be filing a demand for arbitration. There is no evidence in the present record that Petitioner exercised its option to submit this dispute to litigation rather than arbitration, nor does Petitioner argue that the Arbitration should be stayed on this basis. The provision does not foreclose Respondents' right to file a demand for arbitration. Therefore, because Tern did not exercise its option to submit the dispute to the courts,[7] Respondents properly filed a Demand for Arbitration as provided in the Master Subcontract Agreements "pursuant to the Construction Industry Rules of the American Arbitration Association."

In its Petition to stay the Arbitration, Tern argues that Respondents failed to commence the Arbitration within the one-year contractual state limitations expressly provided for in the Master Subcontract Agreements and which is applicable to "any action or proceeding" maintained by Extreme Residential or Bossi against Tern, including an arbitration pursuant to the Construction Industry Rules of the AAA, as initiated by Respondents (Verified Petition at ¶¶ 15-25). However, the determination of whether Respondents' demand was timely pursuant to the

[7] The Court shall not address Respondents' argument that Tern waived its right to exercise its option as it is unnecessary to this Court's determination.

terms of the Master Subcontract Agreements is a matter for the arbitrator to determine, not the Court.

In the context of contracts incorporating the AAA rules, courts have held that where there is a broad arbitration clause and the parties' agreement specifically incorporates by reference the AAA rules providing that the arbitration panel shall have the power to rule on its own jurisdiction, courts will "leave the question of arbitrability to the arbitrators" (*Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 496 [1st Dept 2009], *affd* 14 NY3d 850 [2010], *cert denied* 562 US 962 [2010] ["Although the question of arbitrability is generally an issue for judicial determination, when the parties' agreement specifically incorporates by reference the AAA rules, which provide that '[t]he tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement,' and employs language referring 'all disputes' to arbitration, courts will 'leave the question of arbitrability to the arbitrators'"]; *see also Lake Harbor Advisors, LLC v Settlement Serv. Arbitration and Mediation, Inc.*, 175 AD3d 479, 480 [2d Dept 2019] [same]; *Matter of WN Partner, LLC v Baltimore Orioles L.P.*, 179 AD3d 14, 17 [1st Dept 2019] [same]; *Matter of Flintlock Constr. Serv., LLC. v Weiss*, 122 AD3d 51, 54 [1st Dept 2014], *lv dismissed* 24 NY3d 1209 [2015] [same]).[8]

In *Gwathmey Siegel Kaufman & Assoc. Architects, LLC v Rales,* 898 F Supp 2d 610 [SD NY 2012], *affd* 518 Fed Appx 20 [2d Cir 2013]), the court held that because the parties had incorporated the AAA rules into their agreement, the timeliness of the claim was for the arbitrator and not the court to decide. This determination was affirmed by the United States Court of Appeals for the Second Circuit. Here, the parties have specifically incorporated in their Subcontracts that the Construction Industry Rules of the AAA are applicable, and, as such, they have agreed to the

[8] By incorporating the AAA rules, the parties have expressly agreed to have the statute of limitations decided by the arbitrator. But even if the parties had not incorporated the AAA rules, there is authority that time limitations set forth in agreements are procedural matters to be decided by the arbitrator (*Matter of Vil. of Saranac Lake, Inc. (H. Schickel Gen. Contr., Inc.),* 154 AD2d 855, 856 [3d Dept 1989], *lv denied* 75 NY2d 707 [1990] [distinguishing questions of compliance with contractual limitations expressly made conditions precedent to arbitration by a contract and conditions in arbitration such as limitations of time in within which the demand for arbitration must be made]; *Rockland County v Primiano Const. Co., Inc.*, 51 NY2d 1, 8, 11 [1980] [whether contractor's demand was untimely within the meaning of a contract provision requiring that the demand be made within a reasonable time held to be a matter for the arbitrator]; *Matter of Kachris (Sterling),* 239 AD2d 887, 887 [4th Dept 1997] [where an agreement contains a broad arbitration clause the issue of compliance with the contractual time requirement for filing a grievance is for the arbitrator to determine]; *see also Matter of Barbalious v Exterior Wall Sys., Inc.*, 14 AD3d 508, 508 [2d Dept 2005] ["the provision requiring submission of claims to the architect within 21 days, although termed a condition precedent, is a matter of contract interpretation for the arbitrator to resolve"]).

arbitrator deciding the issue of the timeliness of Respondents' Demand for Arbitration. Accordingly, because the issue of timeliness is a question reserved for the arbitrator, Petitioner's Petition shall be denied, and the Petition shall be dismissed.

B. Even if the Court Were to Decide the Threshold Question of Arbitrability, Respondents Have Raised Questions of Fact as to the Timeliness of Their Claims

CPLR 201 permits parties to contract for a shorter statute of limitations period than that prescribed by a statute (*John J. Kassner & Co. v City of N.Y.*, 46 NY2d 544 [1979]; *Jamaica Hosp. Med. Ctr. v Carrier Corp.*, 5 AD3d 442, 443 [2d Dept 2004]; *Matter of Incorporated Vil. of Saltaire v Zagata*, 280 AD2d 547, 547-48 [2d Dept 2001] *lv denied* 97 NY2d 610). "Absent proof that the contract is one of adhesion or the product of overreaching or that [the] altered period is unreasonably short, the abbreviated period of limitation will be enforced" (*Matter of Incorporated Vil. of Saltaire*, 280 AD2d at 547-48, *quoting Timberline Elec. Supply Corp. v Insurance Co. of N.A.*, 72 AD2d 905, 906 [4th Dept 1979], *affd* 52 NY2d 793 [1980]). It is to be assumed that the shortened period was agreed to voluntarily unless the party against whom an abbreviated statute of limitations is sought to be enforced demonstrates that the time is unreasonably short or was the product of duress, fraud, or misrepresentation in regard to its agreement to the shortened period (*Matter of Incorporated Vil. of Saltaire*, 280 AD2d at 548]). "In making the determination of whether the contractual period of time is reasonable, consideration must be given to all provisions of the contract, the circumstances of its performance, and the relative abilities and bargaining positions of the parties ... It is 'well established that the contractual limitation must not be so short as to be unreasonable in the light of the [other] provisions of the contract and the circumstances of its performance and enforcement'" (*USA United Holdings, Inc. v Tse-Peo, Inc.*, 2009 NY Slip Op 50775[U], 23 Misc 3d 1114(A) at * 7 [Sup Ct NY County 2009] [citations omitted], *quoting Fitzpatrick & Weller v Miller*, 309 Ad2d 1273, 1273 [4th Dept 2003], *quoting Matter of Brown & Guenther v North Queensview Homes, Inc.*, 18 AD2d 327, 329 [1st Dept 1963]). "To be reasonable, a contractually shortened limitations period must provide sufficient time to investigate and pursue a judicial remedy. A contractual limitations provision that would require that the action be brought before the loss or damage can be ascertained is per se unreasonable" (54 CJS Limitations of Actions § 65).

Even if the issue over the timeliness of Respondents' claims were within this Court's purview (which they are not), the Court would deny Tern's Petition as there are questions of fact surrounding this issue. First, Respondents have submitted evidence showing that Extreme Residential and Bossi understood that their ability to obtain payment was predicated on their return to the Project on July 25, 2019 to remediate any defective work or materials, and that by returning to work on the Project on July 25, 2019, they timely asserted their claims on May 13, 2020. Second, Respondents have presented evidence raising a question of fact over whether Tern should be equitably estopped from relying on the one-year statute of limitations.

In support of its argument that Respondents cannot show compliance with the statute of limitations, Tern improperly relies on cases involving the accrual of a breach of contract claim based on the six year statute of limitations set forth in CPLR 213[9] as opposed to the accrual of

[9] *City School Dist. of City of Newburgh v Hugh Stubbins & Assocs., Inc.*, 85 NY2d 535 (1995); *Phillips Constr. Co. v City of N.Y.*, 61 NY2d 949 (1984); *State of N.Y. v Lundin*, 60 NY2d 987

the breach of contract claim under the language of the Subcontracts. It is axiomatic that when the contract specifies when the statute of limitations begins to run, the contract's language is controlling (*Putrelo Constr. Co. v Town of Marcy*, 105 AD3d 1406 [4th Dept 2013]). Here, the Subcontracts provided that Respondents had to file their claims within one year of the last day of the subcontractor's work and because Respondents have presented evidence that the last day of their work occurred on July 25, 2019,[10] there is a question of fact concerning the timeliness of their claims under the subcontracts' statute of limitations.

Turning to whether Tern should be equitably estopped from asserting the one-year statute of limitations, it is well settled that the law will equitably toll a statute of limitations where a defendant induces a plaintiff to refrain from instituting an action, either by false statements of fact, or by active concealment of the true facts. Thus, "a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations, or deception to refrain from filing a timely action" (*Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]; *see also Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175 [1982]). To establish estoppel, a party must prove:

> "(1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts'(21 NY Jur. Estoppel, § 21.)' (*Matter of Carr,* 99 AD2d 390, 394). The party asserting estoppel must show with respect to himself: "(1) lack of knowledge of true facts; (2) reliance upon the conduct of the party estopped;[11] and (3) a prejudicial change in his position" (*Airco Alloys Div. Niagara Mohawk Power Corp.,* 76 AD2d 68, 81-82) (*BWA Corp. v Alltrans Express U.S.A., Inc.,* 112 AD2d 850, 853 [1st Dept 1985]).

The doctrine requires proof that the defendant made an actual misrepresentation or, if a fiduciary, concealed facts which he was required to disclose, that the plaintiff relied on the

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(1983); *New York Mar. & Gen. Ins. Co. v Evans Constr. of N.Y., LLC*, 2017 NY Misc LEXIS 1554 (Sup Ct, NY County 2017), *Cabrini Med. Ctr. v Desina*, 64 NY2d 1059 (1985).

[10] Relying on, *inter alia*, Kearney's (Tern) email of May 22, 2019 (NYSCEF Doc. No. 33), Respondents argue that Extreme Residential "had clearly been asked to return to the Project to correct 'issues' with its work so that '***everyone to be paid in full*** as soon as possible'" and that "Extreme returned to work at the Project on July 25, 2019 at the direct instruction of Tern believing payment for both Extreme, and Bossi was reliant on its return" (Respondents' Opp. at 11). As such, it is Respondents' position that because their last day of work was July 25, 2019 and their demand for arbitration made on May 13, 2020, their demand was within the one-year contractual period (*id.* at 11-12).

[11] [T]he plaintiff must demonstrate reasonable reliance on defendant's misrepresentation ... and due diligence on the part of plaintiff in ascertaining the facts, and in commencing the action, is an essential element when plaintiff seeks shelter of this doctrine" (*Pahlad v Brustman*, 33 AD3d 518, 519-20 [1st Dept 2006], *affd* 8 NY3d 901 [2007]).

misrepresentation and that the reliance caused plaintiff to delay bringing timely action (*Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 122 [1st Dept 1985], *affd* 67 NY2d 981 [1986]; *Jordan v Ford Motor Co.*, 73 AD2d 422, 424 [4th Dept 1980]). However, the misrepresentation or act of concealment underlying the estoppel claim cannot be the same act which forms the basis of plaintiff's underlying substantive cause of action (*Rizk v Cohen*, 73 NY2d 98, 105-106 [1989]).

In *Highland Mech. Indus., Inc. v Herbert Constr. Co.* (216 AD2d 161 [1st Dept 1995]), the First Department found questions of fact existed on the subcontractor's claim of equitable estoppel based on the subcontractor's affidavit that "from August 1989 through the commencement of this litigation in February 1993, he personally telephoned defendant and was repeatedly advised that defendant had not yet received final payment from the owner" (*id.* at 162; *see also Kyle v Village of Catskill*, 81 Misc 2d 1035, 1038 [Sup Ct, Greene County 1975] [defendant estopped from asserting statute of limitations as defense based on letters reflecting that "adequate negotiations prior to commencement of the [action occurred which were] … sufficient to permit the plaintiff to believe that the dispute could be adjusted without the necessity of suing"]).

Similarly, in *Triple Cities Constr. Co. v Maryland Cas. Co.* (4 NY2d 443 [1958]), the New York Court of Appeals found ample evidence to support the jury's finding that "defendant had misled the plaintiff, that it was thereby lulled into inactivity and it was thereby estopped from urging plaintiff had not perfected its lien" given that

> the defendant, through its attorneys, engaged in protected settlement negotiations, in the course of which it informed the plaintiff and its lawyers that the only "real controversy", the only "real question", was over some excavation yardage" and that, if the "amount to be paid: could be agreed upon, payment would be promptly made. And, following these assertions, one of defendant's attorneys called plaintiff's counsel to say that he "had not as yet had an opportunity" to check the figures, promising that he would do so and "let [him] know further." When advised by opposing counsel that the settlement awaited only the determination of amount and that prompt payment would be made, the plaintiff and its attorneys were, the jury was entitled to infer, reasonably led to believe that for all practical purposes the matter was settled. Accordingly, they did – again reasonably, the jury was permitted to conclude – nothing ….From facts such as these, the jury was certainly warranted in finding that the [surety] had from the start determined upon a course of conduct designed to lead the plaintiff to believe that it was not necessary for it to do anything with respect to the lien (*id.* at 448-49).

Respondents contend that Extreme (through Luna) was in contact with Term (through its representatives Judy McNulty and Sean Kearny) "via emails and phone conversations about overdue payments beginning in September 2018 up until as recently as October 28, 2019" and that "at no point did McNulty or any other Tern representative indicate Tern intended to withhold payment to Respondents" (*id.* at 13-14). Instead, Respondents contend they "relied on these communications to their detriment assuming they would be paid for their services rendered" but that Tern instead "strung along the communications in a concerted effort to evade payment while hoping to also evade legal action until it believed it had a time limitation defense" (*id.* at 14). In support, Respondents submit an affidavit from Edgar Bossi, the President and sole

owner of both Extreme Residential Corp. and Bossi, detailing the communications purportedly occurring between the parties during the relevant period and attaching as exhibits email correspondence (Bossi Aff. at ¶¶ 11-49). Based on Respondents' evidence (which includes both email correspondence as well as oral communications as attested to by Bossi),[12] Respondents have raised questions of fact both over whether they timely commenced their Arbitration within the one year contractual statute of limitations and whether Tern should be equitably estopped from raising the statute of limitations defense based on its alleged deliberate misrepresentations of its intention to pay, upon which Respondents relied, lulling Respondents into delaying their institution of the Arbitration based on their belief they were going to be paid (*see Highland Mech. Indus., Inc.*; *Triple Cities Constr. Co., supra*; *Kyle, supra*). Because Respondents have submitted evidence raising triable issues of fact over whether the Arbitration is time barred, even if the issue over the statute of limitations were properly before this Court, the Court would nevertheless deny Petitioner's Petition to stay the Arbitration (*Collins Bros. Moving Corp. v Pierleoni*, 155 AD3d 601 [2d Dept 2017]).

Based on the foregoing, it is hereby

ORDERED that the branch of the Petition by Tern Construction & Development, LLC for an order permanently staying the Arbitration entitled *Bossi Supply and Extreme Construction v Tern Construction and Development,* Case Number 01-20-0005-2926 to the extent the Arbitration is brought by Extreme Construction and not Bossi Supply is denied without prejudice and with leave to renew in the event Extreme Residential Corp. cannot be substituted as claimant for Extreme Construction; and it is further

ORDERED that the remaining branches of the Petition are denied with prejudice and the Petition is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
December 2, 2020

ENTER:

HON. GRETCHEN WALSH, J.S.C.

[12] In this regard, the Court disagrees with Petitioner's contention that the sole evidence on which Respondents rely is the single email from Tern six months before the expiration of the statute of limitations wherein Tern stated (in effect) that if the issue is resolved, everyone would be paid (Pet's Reply at 10).

TO:

MILBER MAKRIS PLOUSADIS
& SEIDEN, LLP
By: Marisa Lanza, Esq.
Attorneys for Petitioner
709 Westchester Avenue, Suite 300
White Plains, New York 10604

GFELLER LAURIE LLP
By: Gary Strong, Esq.
Kevin Riexinger, Esq.
Attorneys for Respondents
100 Overlook Center, Second Floor
Princeton, New Jersey 08540