I. Referenced Authorities

A. *Miller Brewing Co. v. Fort Worth Dist. Co., Inc.*, 781 F.2d 494 (1986)

B. *Burton v. Bush*, 614 F.2d 389 (4th Cir. 1980).

C. *U.S. ex rel. TGK Enterprises, Inc. v. Clayco, Inc.*, 978 F.Supp.2d 540 (E.D.N.C. 1980).

II. Draft Arbitration Clauses

A. No Discovery

Notwithstanding any other provision of this Agreement, and in recognition of their mutual desire to assure the expeditious, efficient and inexpensive resolution of any dispute subject to arbitration hereunder, the Parties acknowledge and agree that the Arbitrators shall have no authority or jurisdiction to enter any order allowing discovery in connection with any such proceeding. Nothing in the preceding sentence shall be deemed to abrogate, or in any way impair, any Party's inspection or audit rights under this Agreement, and the Arbitrators shall retain full authority and jurisdiction to enter such orders with respect to such rights as they otherwise deem appropriate.

B. Dollar Threshold

The Parties, in agreeing to arbitration, desire to assure the expeditious, efficient and inexpensive resolution of any dispute subject to arbitration hereunder. Consequently, and notwithstanding any other provision of this Agreement, the Parties acknowledge and agree that the Arbitrators shall have no authority or jurisdiction to enter any order allowing discovery in connection with any such proceeding; provided, however, that in any arbitration where the total monetary relief (or, in the case of injunctive relief, the value of the rights or remedies sought to be obtained thereby) sought by the Parties exceeds [INSERT DOLLAR FIGURE], the Arbitrators shall have the authority and all requisite jurisdiction to permit such discovery as they deem appropriate. Nothing in the preceding sentence shall be deemed to abrogate, or in any way impair, any Party's inspection or audit rights under this Agreement, and the Arbitrators shall retain full authority and jurisdiction to enter such orders with respect to such rights as they otherwise deem appropriate.

C. Time Limitation

The Parties, in agreeing to arbitration, desire to assure the expeditious, efficient and inexpensive resolution of any dispute subject to arbitration hereunder. Consequently, the Parties acknowledge and agree that any discovery permitted in connection with any arbitration arising hereunder shall be completed (and not merely initiated) within [INSERT TIME] of [INSERT STARTING EVENT, *i.e.* ARBITRATION INITIATION, CONCLUSION OF ORGANIZATIONAL MEETING, *etc.*]. The Parties further acknowledge and agree that the Arbitrators shall have no authority or jurisdiction to enter any order extending, or in any way enlarging, that discovery period. Nothing in this subparagraph shall, however, be deemed to abrogate, or in any way impair, any Party's inspection or audit rights under this Agreement, and the Arbitrators shall retain full authority and jurisdiction to enter such orders with respect to such rights as they otherwise deem appropriate.

D. Limited Depositions

The Parties, in agreeing to arbitration, desire to assure the expeditious, efficient and inexpensive resolution of any dispute subject to arbitration hereunder. Consequently, the Parties acknowledge and agree that, in connection with any Arbitration, each Party shall be limited to the taking of no more than two (2) depositions, each such deposition having a duration of no more than eight (8) hours. Notwithstanding any other provision of this Agreement, the Arbitrators shall have no authority or jurisdiction to enter any order purporting to enlarge the number of depositions, or the duration thereof. Nothing in this subparagraph shall be deemed to abrogate, or in any way impair, any Party's inspection or audit rights under this Agreement, and the Arbitrators shall retain full authority and jurisdiction to enter such orders with respect to such rights as they otherwise deem appropriate.

E. Limited E-Discovery

The Parties, in agreeing to arbitration, desire to assure the expeditious, efficient and inexpensive resolution of any dispute subject to arbitration hereunder. Consequently, the Parties agree that

[ALTERNATIVE A]

neither Party shall be required, in response to any document production request, to search for documents or records on media or device other than as utilized by that Party within the five years preceding the initiation of any Arbitration.

[ALTERNATIVE B]

neither Party shall be required, in response to any document production request, to search for metadata in connection with any produced document.

[ALTERNATIVE C]

, in connection with any e-discovery permitted by the Arbitrators, each Party shall be permitted to furnish the other Party with no more than [INSERT NUMBER] discrete search terms, and to request that the Party to whom such terms have been furnished produce documents containing such terms.

[ALTERNATIVE D]

production of electronic documents shall generally be limited to those located in sources or media that are used in the ordinary course of business. Except upon a showing of good cause, the Arbitrators shall not order the restoration of backup tapes; erased, damaged, or fragmented data; archived data; or data that has been deleted in the ordinary course of business.[1]

[ADDITIONAL PROVISIONS CAN BE INSERTED TO PROVIDE THE ARBITRATORS WITH FLEXIBILITY TO ADDRESS TECHNOLOGICAL OR COST ISSUES (SEE BELOW), OR TO LIMIT THE ARBITRATORS' AUTHORITY TO VARY THESE PROVISIONS.]

F. COST-SHIFTING

In connection with any discovery that may be permitted by the Arbitrators, the Arbitrators shall have the authority, either by way of interim relief or in connection with any final award, to allocate the costs and expenses associated with such discovery to the Parties in whatever manner the Arbitrators deem appropriate.

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[1] *See Dispute Resolution: Arbitration Contract Clauses*, John H. Wilkinson, GPSOLO Magazine, American Bar Association, March 2010, https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/wilkinson.html (last visited Sept. 19, 2017).

G. EXPERTS

[ALTERNATIVE A]

The Parties, in agreeing to arbitration, desire to assure the expeditious, efficient and inexpensive resolution of any dispute subject to arbitration hereunder. Consequently, the Parties each waive the right to proffer expert testimony in connection with any Arbitration. Such testimony shall only be permitted by order of the Arbitrators, which order shall only enter upon a showing of good cause.

[ALTERNATIVE B]

In any Arbitration where a Party elects to offer expert testimony, such Party shall, at least [INSERT TIME] prior to the Hearing, furnish the other Party with an expert report. The report shall contain:

1. a complete statement of all opinions the witness will express and the basis and reasons for them such that the report may fairly serve as a full and complete recitation of any testimony that the witness would be expected to testify to in his/her direct examination;

2. the facts or data considered by the witness in forming them;

3. any exhibits that will be used to summarize or support them;

4. the witness's qualifications, including a list of all publications authored in the previous 10 years;

5. a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

6. a statement of the compensation to be paid for the study and testimony in the arbitration.

[OPTIONAL PARAGRAPH]

The Parties acknowledge and agree that no depositions of experts shall be permitted, and the Arbitrators shall have no authority or jurisdiction to enter any order permitting the same. Given the

foregoing, however, the Arbitrators shall strictly apply the foregoing provisions concerning the expert's report, and the expert shall not be permitted to testify regarding any matter not fully therein disclosed.

H. NO INTERROGATORIES OR REQUESTS TO ADMIT

Notwithstanding any other provision of this Agreement, and in recognition of their mutual desire to assure the expeditious, efficient and inexpensive resolution of any dispute subject to Arbitration hereunder, the Parties acknowledge and agree that the Arbitrators shall have no authority or jurisdiction to enter any order allowing the propounding of interrogatories or requests to admit in connection with any such proceeding. Nothing in the preceding sentence shall be deemed to abrogate, or in any way impair, any Party's inspection or audit rights under this Agreement, and the Arbitrators shall retain full authority and jurisdiction to enter such orders with respect to such rights as they otherwise deem appropriate.

III. Hypotheticals

A. Long Life Insurance Co. has had a ten year non-exclusive relationship with CYA Reinsurance Co. in connection with "executive" life insurance policies written primarily for key employees. Recently, CYA became aware of a noticeable increase in claims on its book and, following an audit, determined that Long Life had been "cutting tables," *i.e.* providing preferred coverage to policy purchasers who did not, in actuality, meet the relevant health requirements for underwriting. CYA declined to pay on the particular policies at issue and Long Life initiated arbitration. In response, CYA sought rescission of the relevant treaties on the basis of fraud and a breach of the duty of utmost good faith. Long Life countered by claiming that "cutting tables," at least to the modest extent present here, was an industry practice designed to meet competition in a competitive rate environment.

CYA has now sought to review all of Long Life's underwriting files for a ten year period, whether such policies were retained, reinsured by CYA, or covered by some other reinsurer. Long Life counters that such files are irrelevant because it has already admitted that it cut tables, so the files will only establish that already agreed-upon fact.

Should the discovery be permitted?

B. Neverpay Insurance Company is property and casualty company that is reinsured by Ever Faithful Reinsurance Corporation pursuant to a 50% quota share covering risks associated with damage at common interest communities. The present treaty is derived from a form that goes back to the mid-1990s and that was heavily

negotiated by Neverpay and Ever Faithful. A dispute has developed over the nature of the risks that Ever Faithful agreed to reinsure, and the treaty is admittedly ambiguous on the issue. Nevertheless, all of the parties who were associated with the original form's negotiation are available to testify as regards their intent in choosing the particular language at issue. In addition, the various drafts that were exchanged during the negotiation process are also all readily available.

Ever Faithful has asked for all of Neverpay's emails and imaged documents (which include drafting notes and the mental impressions of the various draftspersons). Neverpay points out that these documents are all e-discovery that go back 20+ years, and that it has, in the intervening timeframe, switched its form of storage media at least twice. Neverpay has provided an affidavit from a third-party e-discovery expert to establish that the cost of recovery will be approximately $100,000.

Should Neverpay be compelled to provide the requested documentation? If so, who should pay for it? Would your answer be any different if Ever Faithful no longer had access to any of its witnesses?

C. Acme Insurance Co. writes homeowner's policies, with an emphasis on luxury properties. It is reinsured under a 100% quota share with Stable Re, Inc. Recently, a hurricane struck the coast of North Carolina, a location widely serviced by Acme. Acme was deluged (pun intended) by claims, and a substantial amount of litigation ensued over whether the resulting damages were the result of storm surge (where coverage would not exist) or wind-driven rain (where coverage would be present). While a fair amount of publicly available evidence suggested that most of the damage was, in actuality, the result of flooding, a group of plaintiffs nevertheless sought class certification. While that motion was pending, Acme settled with a large majority of the claimants in their individual capacities based, it claims, on advice it received from its counsel, Dewey, Screwem and Howe.

Acme sought reinsurance proceeds from Stable and, as part of its investigation, Stable sought to review all documents evidencing the advice provided by Dewey to Acme. Acme declined to provide access to these documents, citing attorney/client privilege. Stable then denied Acme's claims, citing its "unfettered" right to audit Acme's claims files. Acme initiated arbitration.

Stable filed a document production request as part of the arbitration, seeking the Dewey documents. Acme declined again to provide them and Stable now seeks an order from the Panel instructing Acme to produce the documents based upon Stable's audit rights and its document production requests.

How should the Panel respond? Is your answer any different in the absence of the audit right? Is your answer any different had Acme simply settled without in any way asserting that its decision to do so was based on advice of counsel?

D. Always Right Insurance Company writes D & O coverage that is 100% reinsured by Diligent Re. In response to a series of claims, Diligent contends that Always Right made a series of oral misrepresentations to it regarding the risks and underwriting histories associated with the underlying book. In particular, Diligent claims that a number of Always Right executives conspired with one another to provide this false information to Diligent.

Diligent served a comprehensive set of document production requests on Always Right seeking cell phone records and, more importantly, text messages exchanged between those executives. The executives have filed sworn affidavits that, to the extent they ever existed (which is denied), the executives no longer have access to such records on their phones because they routinely delete their messages once they are read.

Diligent has learned that Z-Mobile, the cell phone carrier, can retrieve the messages, but it will be expensive for it to do so and, in any event, the law in the relevant jurisdiction does not allow for third-party discovery in arbitration, including by way of document production. Diligent has, accordingly, asked the Panel for an order instructing Always Right to request the records from Z-Mobile and to pay the costs associated therewith.

What should the Panel do?

Would your answer be any different if each of the executives responded with an affidavit to the effect that they "virtually never" use text messaging for anything other than personal matters? What about if the phones are actually not company phones but, instead, are personal phones that Always Right provides the executives with a monthly stipend for?

781 F.2d 494
United States Court of Appeals,
Fifth Circuit.

MILLER BREWING COMPANY,
Plaintiff-Appellant,
v.
FORT WORTH DISTRIBUTING CO., INC.,
Defendant-Appellee.

No. 85-1156.
|
Jan. 30, 1986.

After distributor notified beer company that it was demanding arbitration pursuant to distributorship agreement, beer company sought stay of arbitration proceedings. The United States District Court for the Northern District of Texas, A. Joe Fish, J., dismissed company's application for injunctive relief, and company appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) distributor waived its right to arbitration by substantially invoking judicial process to the considerable inconvenience, detriment and prejudice of beer company, and (2) even if waiver did not apply, distributor was barred from arbitration under doctrine of res judicata.

Reversed.

West Headnotes (4)

[1] **Alternative Dispute Resolution**
Waiver or Estoppel
Alternative Dispute Resolution
Evidence

Waiver of arbitration is not a favored finding, and there is a presumption against it; nevertheless, under appropriate circumstances a waiver may be found.

50 Cases that cite this headnote

[2] **Alternative Dispute Resolution**
Suing or Participating in Suit

Waiver of arbitration will be found when party seeking arbitration substantially invokes judicial process to detriment or prejudice of the other party.

170 Cases that cite this headnote

[3] **Alternative Dispute Resolution**
Suing or Participating in Suit

Distributor waived its right of arbitration under distributorship agreement with beer company, where distributor only announced its intention to arbitrate nearly eight months after bringing a state court suit, and demand for arbitration laid dormant for three and one-half years, while distributor busily pursued its legal remedies; moreover, beer company's position would be prejudiced and compromised in arbitration by distributor's use of pretrial discovery going to the merits.

64 Cases that cite this headnote

[4] **Judgment**
Nature and Form of Remedy

Distributor could not invoke arbitration clause of distributorship agreement with beer company; arbitration was barred by doctrine of res judicata because distributor could have included, and implicitly did include, in its prior state court proceeding claim for damages it sought to arbitrate.

39 Cases that cite this headnote

Attorneys and Law Firms

***495** John T. Helm, Cecil W. Casterline, Mark M. Petzinger, Drew R. Heard, Dallas, Tex., for plaintiff-appellant.

Goins, Underkofler, Crawford, Durwood D. Crawford, Dallas, Tex., for defendant-appellee.

Appeal from the United States District Court for the District of Northern Texas.

Before GOLDBERG, REAVLEY and GARWOOD, Circuit Judges.

Opinion

GOLDBERG, Circuit Judge:

This case has been brewing far too long. Things came to a head when plaintiff-appellee Fort Worth Distributing Company went into state court in 1980 to prevent Miller Brewing Company from terminating a distributorship agreement between the two companies. After having its state court suit dismissed with prejudice for want of prosecution, however, Fort Worth Distributing now invokes an arbitration clause in order to pursue essentially the same claim. We find Fort Worth Distributing's case flat and stale at this juncture, and direct the district court to grant Miller Brewing's application for a stay of arbitration.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 28, 1978, Miller Brewing Company ("Miller") and Fort Worth Distributing Company, Inc. ("FWDC") entered into a Distributorship Agreement. 2 Record on Appeal ("Rec."), Exhibit A, at 10. This Agreement granted FWDC the right to distribute Miller beer products in Tarrant County, Texas, for five years, but provided that Miller could terminate the Agreement at any time on ten days' notice. *Id.* at 1-2. The Agreement further provided that, in the event of early termination, FWDC could demand that an arbitration panel be formed to hear "[a]ny claim by Distributor arising out of, relating to, or resulting from the termination of this Agreement by Miller...." *Id.* at 2, 9. If an arbitration panel found that Miller had terminated FWDC without "cause," as defined by an accompanying Addendum on Arbitration, the panel could order Miller to pay compensatory monetary damages to FWDC. *Id.* at 9-13.

On the same day that they signed the Distributorship Agreement Miller and FWDC also entered into a supplemental Memorandum Agreement. This Memorandum Agreement addressed certain events and activities that had taken place during the term of FWDC's previous Distributorship Agreement with Miller. Apparently, FWDC employees or officers had been making payments and giving gifts to Miller's ***496** regional managers.[1] The Memorandum Agreement provided that FWDC would furnish to Miller all evidence, documents, and records relating to payments made to Miller employees; in return, Miller agreed that "no information obtained pursuant to this Agreement will be used to terminate, cancel or refuse to renew the ... Distributorship Agreement...." Memorandum Agreement (2 Rec., Exhibit E) at 1.

In a letter dated April 7, 1980, however, Miller notified FWDC that the Distributorship Agreement was being terminated as of July 10, 1980. In response, FWDC brought a lawsuit in Texas state court on April 29, 1980, complaining that Miller's action would result in damages in excess of five million dollars; FWDC sought to enjoin Miller from terminating the Distributorship Agreement and also demanded attorney's fees and "such other and further relief to which it may show itself justly entitled." *Fort Worth Distributing Co., Inc. v. Miller Brewing Company, et al.,* No. 141-60627-80, Plaintiff's Original Petition (2 Rec., Exhibit E), at 10. Miller had the state court action removed to the United States District Court for the Northern District of Texas. The removal decision came before this court on appeal, and the case was remanded to the state district court. *B., Inc. v. Miller Brewing Co.,* 663 F.2d 545 (5th Cir.1981) (companion case).

Meanwhile, FWDC had notified Miller in a letter of January 2, 1981, that it was demanding arbitration pursuant to the Distributorship Agreement and the supplemental Memorandum Agreement. As FWDC acknowledges in its brief, however, "Neither Miller nor FWDC took steps to cause the American Arbitration Association to schedule a hearing until FWDC did so on September 22, 1984." Appellee's Brief at 2. FWDC probably chose that occasion to set arbitration in motion because its state court suit had just been dismissed with prejudice for want of prosecution the day before. Miller sought a stay of arbitration proceedings in the United States District Court, Fish, J., and now appeals the dismissal by that court of its application for injunctive relief.

II. STANDARD OF REVIEW

As it comes before this court, this case presents few, if any, important factual disputes. Jurisdiction is proper under 28 U.S.C. §§ 1332 (diversity of citizenship (Texas and Wisconsin)) and 1291 (final decisions). Both parties have stipulated to the essentials of the factual and procedural history outlined above. Stipulation and Agreement, 1 Rec., at 2. The only question before this court is whether the district court properly dismissed Miller's application for a stay of arbitration proceedings.

In ruling on Miller's application for injunctive relief the district court below saw no witnesses and heard no testimony. As contemplated by Fed.R.Civ.P. 43(e), the matter was determined on affidavits. Of course, the parties are in disagreement as to the legal implications that should be drawn from the facts. But in these circumstances an appellate tribunal has broad authority to substitute its own conclusions of law for those of the trial court. *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (the clearly-erroneous standard "does not inhibit an appellate court's power to correct errors of law").

III. WAIVER OF ARBITRATION

[1] We first consider whether FWDC has waived its right to arbitration by invoking the judicial process and forcing Miller to expend substantial amounts of time and money defending itself in that forum. Waiver of arbitration is not a favored finding, and there is a presumption against it. As the Supreme Court stated in *Moses H. Cone Memorial Hospital v. Mercury Construction Company,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983), "questions ***497** of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *See* 9 U.S.C. § 2. Nevertheless, under appropriate circumstances a waiver of arbitration may be found. Even in stressing the policy favoring arbitrability the *Moses Cone* Court noted that "Congress' clear intent, in the Arbitration Act, [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." 460 U.S. at 22, 103 S.Ct. at 940.[2] Here, of course, FWDC's first step was to move the parties *into* court; its belated attempt to arbitrate 3 ½ years later, after losing in court, can hardly be seen as moving the parties into arbitration "as quickly and easily as possible."[3]

[2] Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.[4] "The right to arbitration, like any other contract right, can be waived. A party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right." *Cornell & Co. v. Barber & Ross Co.,* 360 F.2d 512, 513, 513 (D.C.Cir.1966) (footnotes omitted); *accord Burton-Dixie Corp. v. Timothy McCarthy Const. Co.,* 436 F.2d 405, 407-08 (5th Cir.1971). As this court noted in *E.C. Ernst, Inc. v. Manhattan Const. Co.,* 559 F.2d 268, 269 (5th Cir.1977), "When one party reveals a disinclination to resort to arbitration on any phase of suit involving all parties, those parties are prejudiced by being forced to bear the expenses of a trial.... Substantially invoking the litigation machinery qualifies as the kind of prejudice ... that is the essence of waiver."[5]

[3] FWDC has demonstrated a clear and unmistakable "disinclination" to arbitrate, and has done so to the substantial detriment and prejudice of Miller. FWDC's Original Petition in the Texas court suit against Miller did not rely on or even mention the arbitration clause. Only in January, 1981-nearly eight months after bringing its state court suit-did FWDC announce its intention to arbitrate. Thereafter, however, "Neither Miller nor FWDC took steps to cause the American Arbitration Association to schedule a hearing until FWDC did so on September 22, 1984." Appellee's Brief at 2.

While its demand for arbitration lay dormant for 3 ½ years, FWDC was busily pursuing its legal remedies. Lawsuits were filed, at one time or another, in state trial court, the state court of appeals, federal district court, and this court. Of course, Miller had to participate and defend its interests in all these actions. The record reveals that numerous depositions were taken, and that Miller paid over $85,000 in legal fees and expended more than 300 hours of its own employees' time defending ***498** the FWDC claims. Affidavit of Warren H. Dunn, 3 Rec., Exhibit G; Affidavit of John T. Helm, 1 Rec. at 39. *Cf. Brown-McKee, Inc. v. Fiatallis,* 587 F.Supp. 38, 40 (N.D.Tex.1984) (finding waiver of arbitration where defendant in earlier suit expended 100 man-hours and $1,400 in attorney's fees).

Even more significant, perhaps, is the prejudice to Miller's legal position that resulted from FWDC's actions. A party to arbitration does not have a right to the pre-trial discovery procedures that are used in a case at law. A party "may not invoke arbitration and yet seek pre-trial discovery going to the merits.... [A]ny attempt to go to the merits and to retain still the right to arbitration is clearly impermissible." *Graig Shipping Co. v. Midland Overseas Shipping Corp.,* 259 F.Supp. 929, 931 (S.D.N.Y.1966).[6] There is every indication that Miller's position would be prejudiced and compromised in

arbitration by FWDC's use of pre-trial discovery going to the merits. In its Brief in Support of Remand filed in Federal District Court, for example, FWDC notes that

> In the four depositions already taken by Plaintiff of Hall, White, Andrews, and Warren Dunn, General Counsel of Miller Brewing Company, several important and undisputed facts have emerged, already proving many of the elements of the alleged conspiracy.
>
> Brief in Support of Plaintiff's Motion for Remand (3 Rec., Exhibit I), at 4. Later in the same brief FWDC concludes as follows:
>
> > Plaintiff expects to prove considerably more through its own witnesses at time of trial, but it believes and alleges that the above undisputed facts taken from the testimony or documentary evidence produced by Defendants themselves already establish the major elements of a case against Defendants White, Andrews and Hall, and establish their complicity in the scheme for Miller Brewing Company to terminate Fort Worth Distributing Company in violation of agreements.
>
> *Id.* at 6. Clearly, the discovery taken by FWDC in its legal proceedings goes to the merits of the claim it now seeks to arbitrate, namely the issue of wrongful termination. We have no difficulty concluding from these facts alone that FWDC thus waived its right to arbitration.

IV. RES JUDICATA

[4] Even if the waiver considerations outlined above did not apply, we would still have good grounds for enjoining arbitration proceedings in this case. The doctrine of res judicata, as developed by Texas courts, ensures that when a court of competent jurisdiction has entered a final judgment on the merits of a case, the parties are bound as to all claims that were raised or that *could* have been raised.[7] The Texas Supreme Court has declared that

> the rule of res judicata in Texas bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in a former action as well as those which were actually tried.... Stated differently, a party cannot relitigate matters which he might have interposed, but failed to do so, in an action between the same parties or their privies in reference to the same subject matter.
>
> ***499** *Abbott Laboratories v. Gravis,* 470 S.W.2d 639, 642 (Tex.1971); *see also Segrest v. Segrest,* 649 S.W.2d 610, 612 (Tex.1983); *State v. Sunray DX Oil Co.,* 503 S.W.2d 822, 827-28 (Tex.Civ.App.-Corpus Christi 1973). The Arbitration Act contemplates that awards made pursuant to arbitration will be confirmed in the federal courts. 9 U.S.C. § 9. Since an arbitration award involves the entry of judgment by a court, parties should be barred from seeking relief from arbitration panels when, under the doctrine of res judicata, they would be barred from seeking relief in the courts. *See Ank Shipping Co. v. Seychelles National Commodity Co.,* 596 F.Supp. 1455, 1458-59 (S.D.N.Y.1984); *N.Y.S. Association for Retarded Children v. Carey,* 456 F.Supp. 85, 96 (E.D.N.Y.1978).

Counsel for appellee and the district court below emphasized repeatedly that FWDC's state court suit involved non-arbitrable matters. This claim is true but irrelevant. As Miller correctly and succinctly notes in its brief,

> It is irrelevant that FWDC did not have a right to arbitrate its claim for injunctive relief. FWDC had the right to seek damages for wrongful termination in the court action against Miller in addition to its seeking injunctive relief. Simply put, when FWDC elected to file its lawsuit, it elected its forum for relief and was required to raise all issues and theories of recovery in that proceeding.

Appellant's Brief at 11. Once FWDC elected state court as its forum for relief, the relevant question is whether the damages provided for in the arbitration clause could have been sought in court, not whether the injunctive relief sought in court could have been granted in arbitration. FWDC's claim is logically of the same form as the claim: "Not all mammals are rabbits." This claim is doubtless true, but who (other than a lawyer) would bother to assert it? The relevant claim would be: "Not all rabbits are mammals." In other words, FWDC should argue that the more inclusive category of claims that can be adjudicated in state court (the "mammals") does not include all its arbitrable claims (the "rabbits"). This claim, if true, would

explain and justify FWDC's attempt to "reserve" its arbitrable claims for later and separate determination, after its lawsuit had been concluded. But FWDC does not, and by all indications cannot, make this claim; instead, it appears that FWDC could have amended its state court pleadings at virtually any point in this protracted litigation to include a claim for the damages (for wrongful breach of the Distributorship Agreement) it now seeks to arbitrate. *See* Texas Rules of Civil Procedure 63 (Amendments), 66 (Trial Amendment), 67 (Amendments to Conform to Issues Tried Without Objection).

Thus, even if we assume that FWDC's state court suit did not include a claim for damages of the sort covered by the arbitration clause, FWDC is nonetheless barred from arbitrating that claim now because such a claim *could* have been included in the state court suit. On closer examination, moreover, it appears that FWDC *did* implicitly make the same claim for damages in state court that it now seeks to arbitrate.

We turn first to FWDC's state court pleadings. Essentially, they allege causes of action for breach of contract, tortious interference with existing and prospective contractual relations, and conspiracy; they estimate that FWDC's damages are in excess of five million dollars and demand injunctive relief, attorney's fees, and "such other and further relief to which [FWDC] may show itself justly entitled." FWDC maintains that these pleadings "*never sought to recover against Miller because of Miller's termination without cause, i.e., for breach of the Distributorship Agreement,*" and characterized the Memorandum and Distributorship Agreements as "totally separate" contracts giving rise to completely different causes of action. Appellee's Brief at 18, 4. To hear FWDC tell it, the state court suit was simply an action for injunctive relief, based solely on the Memorandum Agreement, while the arbitration would be for damages under the Distributorship Agreement.

***500** We cannot help but note, however, that the one-page Memorandum Agreement refers by its terms to the Distributorship Agreement no less than four times and concludes as follows: "Miller agrees that no information obtained pursuant to this [Memorandum] Agreement will be used to terminate, cancel or refuse to renew the above described Distributorship Agreements...." As for the pleadings, in paragraph I FWDC cites the Distributorship Agreement and compliance therewith as the basis for its claims, making no mention of the Memorandum Agreement. Plaintiff's Original Petition (3 Rec., Exhibit E), at 1. In paragraph V FWDC alleges that Miller's planned cancellation of the "Distributorship Agreement ... is in violation and breach of the Memorandum Agreement...." *Id.* at 3. Paragraph VII alleges a "conspiracy ... to intentionally cause great and irreparable damage to Fort Worth Distributing by preventing the renewal of the Distributorship Agreement and thus preventing compliance by Miller with the Memorandum Agreement," and paragraph VIII restates this as a "conspiracy to violate the Memorandum Agreement and to cancel Fort Worth Distributing's Distributorship Agreement." *Id.* at 4. In light of these pleadings, we are unable to view FWDC's state court action as simply an application for injunctive relief premised solely on the Memorandum Agreement. The two agreements are inextricably intertwined, and the Distributorship Agreement is the *sine qua non* of FWDC's state court action.

Further clarification of FWDC's state court claims is provided by other briefs and papers filed in court. In its Brief in Support of Plaintiff's Motion for Leave to File First Amended Complaint, filed in Federal District Court on June 11, 1980, FWDC stated that "There has been no change to the substance of the liability theory or *damages* theories asserted by Plaintiff." 1 Rec. at 66 (emphasis added). In its letter of January 2, 1981, putting Miller on notice that it was demanding arbitration, FWDC asserted:

> This demand for arbitration is made without waiving our claim for *damages* arising out of the matters alleged in Civil Action No. CA 4-80-138-E in the United States District Court for the Northern District of Texas Fort Worth Division, styled *Fort Worth Distributing Company, Inc. v. Miller Brewing Company, et al,* and we continue to insist upon our right to recover in that suit *full damages....*

Id. at 65 (emphasis added). We take FWDC literally at its own word, then in determining that its state court suit could have included, and in fact did include, a claim for damages.

In arguing that its state court suit and its demand for arbitration are based on different causes of action, and that the latter is thus not barred by the doctrine of res judicata, FWDC faces a difficult hurdle. As this court observed recently in *Flores v. Edinburg Consolidated Independent School District,* 741 F.2d 773, 779 (5th Cir.1984), under Texas law "A different cause of action is not merely a different theory of recovery; it should differ in 'the theories of recovery, *the operative facts,* and the

measure of recovery,' *Dobbs v. Navarro,* 506 S.W.2d 671, 673 (Tex.Civ.App.1974) (emphasis added)." As detailed above, the "operative fact" underlying both FWDC's state court suit and its demand for arbitration is the early termination of its Distributorship Agreement with Miller. Without that bedrock fact, neither claim would have any basis.[8] Moreover, it is not altogether clear that the two actions even differ in their theories of recovery or their measures of recovery. As noted amply above, FWDC managed to assess its monetary damages in its Original Petition filed ***501** in state court, and in briefs and other official documents it consistently styled its state court suit an action for damages. We thus conclude that FWDC is barred under the doctrine of res judicata from pursuing essentially the same claim now in arbitration.

V. CONCLUSION

This case has consumed more than its share of judicial resources. We acknowledge that the doctrines of waiver and res judicata are stern ones, and that with more foresight or prescience FWDC might have avoided their harsh consequences. As this case comes before us, however, the equities weigh so strongly in Miller's favor that even a draught from the fabled Pierian Springs would probably not lend FWDC sufficient inspiration to prevail.

We conclude that FWDC has waived its right to arbitration by substantially invoking the judicial process to the considerable inconvenience, detriment, and prejudice of Miller. We conclude further that, even if waiver considerations did not apply, FWDC is barred from arbitration under the doctrine of res judicata because it could have included, and implicitly did include, in its state court proceedings a claim for the damages it now seeks to arbitrate.

Accordingly, we REVERSE and direct the district court to grant Miller Brewing Company's application for a stay of arbitration.

REVERSED.

All Citations

781 F.2d 494

Footnotes

1 FWDC notes in its brief that the gifts, as befits Texas-style bribery, consisted of rifles, hats, and boots. Appellee's Brief at 4.

2 *Cf. Radiator Specialty Co. v. Cannon Mills,* 97 F.2d 318, 319 (4th Cir.1938) ("[i]t is clearly the intention of Congress to provide that the party seeking to enforce arbitration can do so only when not guilty of dilatoriness or delay."); *Prima Paint Corp. v. Flood & Conklin,* 388 U.S. 395, 404, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270 (1967) (honoring "clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

3 We are mindful of the admonitions of the Chief Justice and others that arbitration is ordinarily preferable to litigation, but to allow arbitration on top of the protracted litigation in this case would be to add insult to injury. The doctrine of res judicata, *see* section IV *infra,* and its cousin collateral estoppel have probably done more to prevent useless and wasteful litigation than arbitration ever could.

4 The issue of arbitrability under the United States Arbitration Act is a matter of federal substantive law. *Prima Paint,* 388 U.S. at 402-08, 87 S.Ct. at 1805-08; *In re Mercury Const. Corp.,* 656 F.2d 933, 938-41 (4th Cir.1981), *aff'd, Moses Cone,* 460 U.S. at 23-26, 103 S.Ct. at 941-42; *E.C. Ernst, Inc. v. Manhattan Const. Co. of Texas,* 551 F.2d 1026, 1040 (5th Cir.1977). We thus dismiss out of hand FWDC's citation of 60 Tex.Jur.2d 199 for the propositions that "waiver is a question of fact based largely on intent. It is defined as 'an intentional release, relinquishment, or surrender of a right that is at the time known to the party making it.' "

5 *See also Midwest Window Systems v. Amcor Industries,* 630 F.2d 535 (7th Cir.1980) (right to arbitration waived even where issue submitted to court was non-arbitrable).

6 *Cf. Penn Tanker Co. of Delaware v. C.H.Z. Rolimpex, Warszawa,* 199 F.Supp. 716, 718 (S.D.N.Y.1961); *Commercial Solvents Corp. v. Louisiana Fertilizer Co., Inc.,* 20 F.R.D. 359, 361 (S.D.N.Y.1957) ("By voluntarily becoming a party to a contract in which arbitration was the agreed mode for settling disputes thereunder respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations."); Note, *Developments in*

the Law-Discovery, 74 Harv.L.Rev. 940, 943 (1961) (expense of discovery as inconsistent with desire to arbitrate).

7 In applying the doctrine of res judicata we look to the effect that a Texas state court would give to a prior Texas state court judgment. *Flores v. Edinburg School District,* 741 F.2d 773 (5th Cir.1984); *Southern Jam, Inc. v. Robinson,* 675 F.2d 94, 97-98 (5th Cir.1982); *Allen v. McCurry,* 449 U.S. 90, 95-96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980) (interpreting 28 U.S.C. § 1738); Restatement (Second) of Judgments § 134 (Tent. Draft No. 7, 1980).

8 *See Flores,* 741 F.2d at 777 (" '[A] different cause of action' is one that proceeds not only on a sufficiently different legal theory but also on a different factual footing as not to require the trial of facts material to the former suit; that is, an action that can be maintained even if all the disputed factual issues raised in the plaintiff's original complaint are conceded in the defendant's favor.")

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614 F.2d 389
United States Court of Appeals,
Fourth Circuit.

William G. BURTON t/a William Burton Nurseries, Appellant,
v.
R. E. BUSH; John J. Digges; R. A. Lawson, Jr.; Bush Development Corporation, a Virginia Corporation; Virginia South-Eastern Corporation, a Virginia Corporation; Monroe Construction Corporation, a Virginia Corporation; Baycon Corporation, a Virginia Corporation; All doing business as: The Bush Organization, a General Partnership, Appellees.

No. 78-1826.
|
Argued Dec. 3, 1979.
|
Decided Feb. 7, 1980.

Nursery appealed from a judgment of the United States District Court for the District of Maryland, Herbert F. Murray, J., upholding an arbitration award to an owner of property in the amount of $83,258.35. The Court of Appeals, Donald Russell, Circuit Judge, held that a litigant in arbitration proceedings had no right to pretrial discovery.

Affirmed.

West Headnotes (4)

[1] **Alternative Dispute Resolution**
Mode and Course of Proceedings in General
Alternative Dispute Resolution
Discovery and Depositions

When contracting parties stipulate that dispute will be submitted to arbitration, they relinquish right to certain procedures and niceties which are normally associated with formal trial, including pretrial discovery.

20 Cases that cite this headnote

[2] **Alternative Dispute Resolution**
Discovery and Depositions

Party to arbitration of contract between owner and nursery had no right to pretrial discovery.

6 Cases that cite this headnote

[3] **Alternative Dispute Resolution**
Subpoenas

While arbitration panel may subpoena documents or witnesses, litigating parties have no comparable privilege.

8 Cases that cite this headnote

[4] **Damages**
Particular Cases

Arbitration award of $83,258.35 to owner of real property from nursery on basis of claim for breach of contract to install trees, shrubs and sod was supported by the facts.

Cases that cite this headnote

Attorneys and Law Firms

***389** Samuel Gordon, Gaithersburg, Md. (Robert H. Haslinger, Gordon & Haslinger, Gaithersburg, Md., on brief), for appellant.

S. Leonard Rottman, Baltimore, Md. (Tabor & Rottman, Baltimore, Md., on brief), for appellees.

Before WINTER, RUSSELL and HALL, Circuit Judges.

Opinion

***390** DONALD RUSSELL, Circuit Judge:

William G. Burton, t/a William Burton Nurseries seeks review of an arbitration panel's award in favor of the appellees The Bush Organization. Burton sued The Bush Organization for failure to make payments as called for under the terms of their contract. The Bush Organization counterclaimed for damages based on the alleged breach of certain guarantees in the contract.

In January and February of 1974 the parties entered into two contracts which required Burton to install trees, shrubs, and sod at the appellee's job site. The relationship between the parties was strained by difficulties encountered during the course of performance. Finally in April of 1975 Bush notified Burton that he was replacing him on the contract work. A dispute arose over Burton's claim of payment for part performance and Bush's claim for breach of warranty. The parties agreed to submit their dispute to an arbitration panel, and on February 6, 1978 an award was rendered in favor of the appellees in the amount of $83,258.35.

The appellant challenged the arbitration award on two grounds. First, Burton contended that the award should be set aside due to unfair surprise and prejudice. When testimony before the arbitration panel concluded on September 8, 1977 all parties agreed that the proceedings would be continued to October 27th. On October 5th Burton's counsel requested a continuance until the latter part of November. Counsel argued that a continuance was necessary in light of the prejudice visited upon his client through the "surprise" testimony of opposition witnesses. This request was denied. Given the facts of this case, such an argument is unbelievable, and was so found by both the arbitration panel and the district court.

When the panel first convened more than two years had elapsed since The Bush Organization had given notice to Burton that his work was unsatisfactory. During this time period Burton was well aware of Bush's complaints. The gist of these complaints was that Burton's trees were dying and his grass would not grow. The obvious theory underlying Bush's claim was that these unfortunate results were caused by Burton's negligence. Since the final demise of the trees and the grass was not in issue, Burton knew or should have known that a proper defense required some showing of alternative causation. Thus, even though the applicable arbitration rules did not provide for pre-trial discovery, and the parties chose to forego any voluntary or gratuitous discovery, it cannot be said that Burton was somehow taken unawares.

[1] [2] [3] An arbitration hearing is not a court of law. Walden v. Local 71, International Brotherhood of Teamsters, (4th Cir. 1972) 468 F.2d 196. When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. Great Scott Markets Inc. v. Local Union No. 337, International Brotherhood of Teamsters, (E.D.Mich.1973) 363 F.Supp. 1351; Commercial Solvents Corporation v. Louisiana Liquid Fertilizer Co., (S.D.N.Y.1957) 20 F.R.D. 359. One of these accoutrements is the right to pre-trial discovery. While an arbitration panel may subpoena documents or witnesses, Commercial Metals Co. v. International Union Marine Corp., (S.D.N.Y.1970) 318 F.Supp. 1334; the litigating parties have no comparable privilege. Foremost Yarn Mills, Inc. v. Rose Mills, Inc., (E.D.Pa.1960) 25 F.R.D. 9; 9 U.S.C. s 7; Fed.Rules Civ.Proc. Rule 81(a)(3), 28 U.S.C.; 74 Harv.L.Rev. 940, 943 (1961); 4 Moore's Fed. Practice s 26.54 (2d Ed. 1975).

Since Burton never applied to the district court for an order to compel discovery we need not consider those cases allowing discovery upon a showing of special need, Bigge Crane and Rigging Co. v. Docutel Corp., (E.D.N.Y.1973) 371 F.Supp. 240; Ferro Union Corp. v. SS Ionic Coast, (S.D.Tex.1967) 43 F.R.D. 11; International Association of Heat and Frost Insulators and Asbestos Workers, Local 66, AFL-CIO v. Leona Lee Corp., (5th Cir. 1970) 434 F.2d 192; ***391** Penn Tanker Co. v. C. H. Z. Rolimpex, Warszawa, (S.D.N.Y.1961) 199 F.Supp. 716; or need we consider those cases allowing the district court to permit limited discovery as to the arbitrability of a particular dispute, H. K. Porter Co. Inc. v. Local 37 United Steelworkers of America, AFL-CIO, (4th Cir. 1968) 400 F.2d 691; International Union of Electrical, Radio & Machine Workers, AFL-CIO v. Westinghouse Electric Corp., (S.D.N.Y.1969) 48 F.R.D. 298. In passing, however, we note that the former cases would not have aided the appellant since there is a total absence of special need or hardship. The latter group of cases is equally unpersuasive, since there was no contention that the controversy in question was not the proper subject of arbitration.

While at least one commentator has referred to the limited discovery provisions during arbitration as a return to the "sporting theory of justice," Jones, The Accretion of Federal Power in Labor Arbitration The Example of Arbitral Discovery, 116 Penna.L.Rev. 830, 837 (1968); we believe that such limitations are in keeping with the policy underpinnings of arbitration speed, efficiency, and reduction of litigation expenses.

[4] Burton's second contention that the arbitration award was contrary to the facts as established at the hearing is without merit.

We conclude that the arbitration award was correct and accordingly we affirm the judgment of the district court.

AFFIRMED.

All Citations

614 F.2d 389

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978 F.Supp.2d 540
United States District Court,
E.D. North Carolina,
Southern Division.

UNITED STATES of America for the use and benefit of TGK ENTERPRISES, INC. d/b/a Enterprise Electrical and Mechanical Co., Plaintiff,
v.
CLAYCO, INC. and Travelers Casualty and Surety Company of America, Defendants.

No. 7:12–CV–266–FL.
|
Sept. 23, 2013.

Synopsis

Background: Subcontractor brought claims of breach of contract and unjust enrichment against contractor and against contractor's surety under the Miller Act, alleging that subcontractor had not been fully paid by contractor. Contractor and surety moved to dismiss or in the alternative to stay and compel arbitration.

Holdings: The District Court, Louise W. Flanagan, J., held that:

[1] allegations were insufficient to establish procedural unconscionability;

[2] arbitration agreement was not substantively unconscionable;

[3] Federal Arbitration Act (FAA) preempted North Carolina law precluding enforcement of contracts that required out-of-state arbitration;

[4] subcontractor's breach of contract and unjust enrichment claims fell within scope of arbitration agreement; and

[5] the District Court would stay subcontractor's Miller Act claims against surety pending resolution of arbitration.

Motion to dismiss denied, motion to stay granted, and motion to compel arbitration denied.

West Headnotes (13)

[1] **Alternative Dispute Resolution**
Constitutional and statutory provisions and rules of court

Federal Arbitration Act (FAA) reflects a liberal federal policy favoring arbitration agreements, and courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms. 9 U.S.C.A. § 1 et seq.

1 Cases that cite this headnote

[2] **Alternative Dispute Resolution**
Validity
Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement

In determining whether the dispute at issue is one to be resolved through arbitration under the Federal Arbitration Act (FAA), the court must engage in a limited review to ensure that the dispute is arbitrable, that is, that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement. 9 U.S.C.A. § 1 et seq.

2 Cases that cite this headnote

[3] **Alternative Dispute Resolution**
Modification or termination

The judicial inquiry under the Federal Arbitration Act (FAA) into the revocation of an arbitration agreement is highly circumscribed, and the grounds for revocation must relate specifically to the arbitration clause and not just to the contract as a whole. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[4] **Contracts**
Procedural unconscionability
Contracts
Substantive unconscionability

Under North Carolina law, a party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability.

1 Cases that cite this headnote

[5] **Contracts**
Procedural unconscionability

Under North Carolina law, procedural unconscionability involves bargaining naughtiness in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power.

Cases that cite this headnote

[6] **Contracts**
Substantive unconscionability

Under North Carolina law, substantive unconscionability refers to harsh, one-sided, and oppressive contract terms.

1 Cases that cite this headnote

[7] **Contracts**
Procedural unconscionability
Contracts
Substantive unconscionability

Under North Carolina law, the procedural and substantive unconscionability analysis is more of a sliding scale than a true dichotomy, and a finding of unconscionability may be appropriate when a contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa.

1 Cases that cite this headnote

[8] **Alternative Dispute Resolution**
Unconscionability

Under North Carolina law, allegations that none of the terms in a dispute resolution provision of an agreement between subcontractor and general contract were negotiable, and subcontractor was required to accept such terms to work on the project were insufficient to establish surprise, lack of meaningful choice, and an inequality of bargaining power, as required to revoke an agreement to arbitrate on grounds of procedural unconscionability; subcontractor was a sophisticated party working on a subcontract worth more than $5 million, and subcontractor was free to contract in its own business interests.

Cases that cite this headnote

[9] **Alternative Dispute Resolution**
Unconscionability

Under North Carolina law, arbitration agreement which provided that contractor could invoke at its sole option a hybrid mediation/arbitration procedure, that limited discovery and presentation of evidence, and allowed the mediator to serve as arbitrator if mediation failed was not substantively unconscionable, as required to revoke an arbitration agreement, where there was no requirement that an arbitration agreement obligate all parties equally, the limitations of discovery and presentation of evidence applied to both parties equally, and a dual role for a mediator/arbitrator was expressly contemplated by the American Arbitration Association.

Cases that cite this headnote

[10] **Alternative Dispute Resolution**
Preemption
States
Particular cases, preemption or supersession

Federal Arbitration Act (FAA) preempted a North Carolina law that found agreements to arbitrate that required out-of-state arbitration of contracts entered into in North Carolina were void and unenforceable as against public policy. 9 U.S.C.A. § 2; West's N.C.G.S.A. § 22B–3.

1 Cases that cite this headnote

[11] **States**
Conflicting or conforming laws or regulations

State law may be pre-empted to the extent that it actually conflicts with federal law, that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Cases that cite this headnote

[12] **Alternative Dispute Resolution**
Disputes and Matters Arbitrable Under Agreement

Subcontractor's breach of contract and unjust enrichment claims against contractor fell within the scope of a broad agreement to arbitrate, where the agreement provided for arbitration of any claim arising out of or related to the agreement, and subcontractor's claims, based on the wrongful withholding of payment, were actionable only by virtue of subcontractor's alleged performance under the agreement.

1 Cases that cite this headnote

[13] **Alternative Dispute Resolution**
Particular cases

The District Court would stay subcontractor's Miller Act claim against surety of contractor, instead of dismissing the action in favor of out-of-state arbitration, despite argument that subcontractor's claim against surety was within the scope of an agreement to arbitrate as a claim arising out of or related to the agreement, where the arbitration agreement specified that arbitration was to take place in Missouri, the surety was not a party to the arbitration agreement, and the District Court for the Eastern District of North Carolina lacked the authority to compel arbitration in another forum. 40 U.S.C.A. § 3131 et seq.

1 Cases that cite this headnote

West Codenotes

Preempted
West's N.C.G.S.A. § 22B–3

Attorneys and Law Firms

***542** Michael J. Alerding, Stefan A. Kirk, Alerding Castor Hewitt LLP, Indianapolis, IN, H. Mark Hamlet, Hamlet & Associates, PLLC, Wilmington, NC, for Plaintiff.

Christopher O. Bauman, Blitz Bardgett & Deutsch LC, St. Louis, MO, James A. Roberts, III, Jessica E. Bowers, Lewis & Roberts, PLLC, Raleigh, NC, for Defendant.

ORDER

LOUISE W. FLANAGAN, District Judge.

This matter comes before the court on defendants' motion to dismiss and, in the alternative, motion to stay and compel arbitration (DE 19). Plaintiff responded in opposition, and defendants replied. The court previously denied plaintiff's motion for leave to file surreply, but allowed the parties to file two notices of recently decided

authority. In this posture, the issues raised are ripe for ruling.

BACKGROUND

Plaintiff filed suit on September 12, 2012, asserting claims for damages against defendant Clayco, Inc. ("Clayco") on the basis of breach of contract, N.C. Gen.Stat. § 22C–2 et seq., and unjust enrichment. Plaintiff also asserts a claim against defendant Travelers' Casualty and Surety Company of America ("Travelers") on the basis of a surety bond pursuant to the Miller Act, 40 U.S.C. § 3131 et seq.

Plaintiff's claims against Clayco arise out of the execution and performance of a subcontract agreement to provide services for a federal construction project in Camp Lejeune, North Carolina. Clayco was awarded a contract by the federal government to design and build a dining hall and barracks at the Naval Facilities Engineering Command and Marine Corps Base in Camp Lejeune, North Carolina (the "project"). In connection with this project, Clayco executed a subcontract agreement with plaintiff, which is attached as an exhibit to the complaint, wherein for the exchange of payment of $5,138,000.00, plaintiff would perform installation and design of the HVAC, electrical, and plumbing work for the project.

According to the complaint, plaintiff performed and completed the work for the project as required in the subcontract agreement, but plaintiff has not been fully paid by Clayco. Plaintiff claims Clayco has breached the subcontract agreement by asserting improper "back-charges," failing ***543** to make timely and required payments, improperly coordinating and scheduling, failing to work with plaintiff in good faith to timely accomplish installation and design required by the subcontract agreement, and interfering with plaintiff's performance. Plaintiff asserts that $458,234.02 is past due and owing under the subcontract agreement, and that is owed more than $800,000.00 in costs incurred.

Plaintiff asserts that in connection with the project, Clayco purchased a Miller Act payment bond issued by Travelers, and that Travelers is a surety in connection with the contract between Clayco and the federal government. Plaintiff contends that all of its claims are recoverable under the Miller Act, and, where plaintiff has performed all applicable conditions precedent, Travelers and Clayco are jointly and severally liable to plaintiff for the damages claimed. Plaintiff asserts that it attempted mediation with Clayco to resolve the dispute, and it has filed this lawsuit in order to protect its interests under the Miller Act.

On November 8, 2012, defendants filed a motion to dismiss and, in the alternative, to stay and compel arbitration, on the basis of an arbitration agreement in the subcontract, including the following provisions:

> A. Mediation: Any Claim arising out of or related to the Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable or other binding dispute resolution proceedings by either party.
>
> * * *
>
> D. Arbitration: Claims which have not been resolved by mediation shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect at the time of the arbitration. The demand for arbitration shall be filed in writing with the other party to the Agreement and with the American Arbitration Association. The jurisdiction of the Arbitrator, and the arbitrability of any issue raised by the parties shall be decided by the Arbitrator.
>
> * * *
>
> K. ....Any mechanic's liens or payment bond claims filed with a Court shall be promptly stayed pending resolution of the dispute in accordance with these dispute resolution provisions.

(Motion to Dismiss ¶¶ 4, 6, 7, quoting Compl. Ex. B, sections XXVI.A, D, K).

Defendants assert that these provisions comprise an arbitration agreement which deprive the court of subject matter jurisdiction of the parties' disputes, and that the complaint therefore should be dismissed. In the alternative, defendants assert that this court should stay the action in its entirety and compel arbitration pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 2 et seq.

COURT'S DISCUSSION

A. Standard of Review

Section 2 of the FAA provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Under section 3

of the FAA, "a court must stay 'any suit or proceeding' pending arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration.' " *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir.2005) (quoting 9 U.S.C. § 3).

[1] [2] The FAA reflects "a liberal federal policy favoring arbitration agreements," ***544** and "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *AT & T Mobility LLC v. Concepcion,* —— U.S. ——, 131 S.Ct. 1740, 1745, 179 L.Ed.2d 742 (2011) (internal citations omitted). In determining whether the dispute at issue is one to be resolved through arbitration, the court must "engage in a limited review to ensure that the dispute is arbitrable—i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." *Murray v. United Food & Commercial Workers Int'l Union,* 289 F.3d 297, 302 (4th Cir.2002) (citations omitted).

B. Analysis

The parties in this case dispute both the validity and scope of the arbitration agreement in the subcontract. Plaintiff first contends that the arbitration agreement is unenforceable because it is unconscionable. Plaintiff next contends that the forum selection provisions contained in the arbitration agreement are in violation of North Carolina law, thus rendering the arbitration agreement void and unenforceable. With respect to the scope of the arbitration agreement, plaintiff argues that the state statutory claim and the Miller Act claim are not arbitrable and that plaintiff should be allowed to proceed on those claims in this case. By contrast, defendant argues that the arbitration agreement is valid and that the court must dismiss and compel arbitration of all of plaintiff's claims. The court will address these arguments in turn below.

1. Unconscionability

[3] Under section 2 of the FAA, a party may seek revocation of an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract," including "generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT & T Mobility LLC,* 131 S.Ct. at 1746 (quoting 9 U.S.C.A. § 2, additional citations omitted). The judicial inquiry is "highly circumscribed," and "the grounds for revocation must relate specifically to the arbitration clause and not just to the contract as a whole." *Hooters of Am., Inc. v. Phillips,* 173 F.3d 933, 938 (4th Cir.1999). In this case, where the subcontract is "governed by the laws of the State where the Project is located," (Compl. Ex. B, section XXVII.F), the court will apply North Carolina law in determining whether the arbitration agreement is unconscionable.

[4] [5] [6] [7] "A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability." *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 655 S.E.2d 362, 370 (2008). "[P]rocedural unconscionability involves 'bargaining naughtiness' in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power." *Id.* (citations omitted). "Substantive unconscionability, on the other hand, refers to harsh, one-sided, and oppressive contract terms." *Id.* The procedural/substantive analysis is "more of a sliding scale than a true dichotomy," and a finding of unconscionability "may be appropriate when a contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa." *Id.* (citation omitted).

[8] In this case, plaintiff claims that the arbitration agreement was procedurally unconscionable because it was "not subject to negotiation," and because it was "drafted by Clayco and thrust upon TGK." (Opp. at 7). In support of this assertion, plaintiff attaches an affidavit of Chuck Mandrell, the president of TGK, wherein he states:

> ***545** With the exception of the contract price and some scope of work provisions of the Agreement, none of the material terms of the Agreement, including the terms related to dispute resolution, were negotiable and TGK was required to accept such terms to work on the project.
>
> TGK and Clayco entered into several agreements whereby TGK agreed to provide various services and materials as a subcontractor to Clayco, including the Camp Lejeune, North Carolina project at issue in the Complaint. These agreements also contained the same, non-negotiable dispute resolution provisions that are at instant issue.

(Opp., Ex. A, ¶¶ 5–6).

Under the circumstances of this case, the court finds that these assertions are insufficient to establish " 'bargaining naughtiness' in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power," required for procedural unconscionability under North Carolina law. *Tillman,* 655 S.E.2d at 370. Plaintiff

is a sophisticated subcontractor, a finding which is supported both by the scope of work and expected performance under the subcontract, (see Compl., Ex. B), the contract price of $5,138,000.00, (*id.*, Ex. B. p. 1), and the fact that plaintiff entered into multiple contracts to provide "various services and materials as a subcontractor to Clayco." (Opp., Ex. A, ¶ 6). Against this background, where plaintiff is a commercial entity free to contract in its own business interest, a finding of unfair surprise, lack of meaningful choice, and inequality of bargaining power is not warranted. In this respect, the subcontract agreement stands in contrast to contracts found unconscionable involving "unsophisticated consumers contracting with corporate defendants" for provision of consumer goods or employment services. *See e.g. Tillman,* 655 S.E.2d at 370 (individuals obtained loans and insurance); *Hooters,* 173 F.3d at 935–36 (company conditioned eligibility for raises and promotions upon existing employees signing arbitration agreement); *Murray,* 289 F.3d at 303 (arbitration agreement was condition of employment).

[9] Plaintiff also has not established substantive unconscionability. Plaintiff argues that arbitration agreement is substantively unconscionable because of several elements. First, plaintiff contends the arbitration agreement lacks mutuality because Clayco can, at its sole option, invoke a hybrid mediation/arbitration procedure in subsection N of the dispute resolution provisions instead of arbitration as specified in subsection D. Second, plaintiff notes that the subsection N procedures are unconscionable because they forbid discovery, curtail evidence presentation, and require the arbitrator to select one of the parties' last best offers without modification. Third, plaintiff notes that subsection N procedures prevent confidential communication with the mediator, given that the mediator will become the arbitrator if the mediation fails.

As noted above in the background of this order, subsection D of the dispute resolution procedures in the subcontract provides as follows:

> D. Arbitration: Claims which have not been resolved by mediation shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect at the time of the arbitration. The demand for arbitration shall be filed in writing with the other party to the Agreement and with the American Arbitration Association. The jurisdiction of the Arbitrator, and the arbitrability of any issue raised by ***546** the parties shall be decided by the Arbitrator.

(Compl. Ex. B, Section XXVI.D). Subsection N, which is the focus of plaintiff's argument regarding substantive unconscionability, includes an alternative procedure at the option of Clayco. In particular, this subsection sets for a mediation/arbitration procedure, which commences with the following mediation provisions:

> N. Notwithstanding the foregoing Paragraphs A through M of this Section XXVI, Contractor at its option may invoke the following dispute resolution provisions, to which Subcontractor agrees to be bound in lieu of the provisions stated in Paragraphs A through M above. Specifically, upon written application of Contractor, the parties agree to submit their dispute to resolution before the American Arbitration Association ("AAA") in accordance with the Construction Industry Mediation Rules of the AAA currently in effect at the time of mediation, adjusted as follows: (a) Contractor will file a written demand with the AAA for mediation of the dispute, with the dispute to be heard by a mediator in St. Louis, Missouri; (b) the mediation shall be completed within 60 days after written demand for mediation is served upon the other party; (c) the mediation shall be completed within 60 days after written demand for mediation is served upon the other party; (c) by no later than 14 days prior to the mediation, the parties shall serve upon the mediator and each other a written position statement, with exhibits, outlining their respective claims and defenses; (d) by no later than 3 days prior to the mediation, the parties shall serve upon the mediator and each other a written position statement in reply to that earlier filed by the other party;

(*Id.*, subsection N). Then, with respect to arbitration, subsection N continues as follows:

> (e) after eight hours of actual mediation time to be conducted in a single day, if the matter is not resolved, the mediator shall immediately assume the role of an arbitrator; (f) the arbitrator shall not consider any item of evidence which was not produced by the parties in their respective statements of position nor disclosed to the other in the course of Mediation, all as determined by the arbitrator; (g) at such time as the mediator shall be become an arbitrator, each party shall promptly make one last, best and final offer and demand in writing, which shall be simultaneously submitted to the arbitrator; (h) the arbitrator shall then disclose to the parties the amounts of said last offers and demands; (i) within five days of having received said last offers and demands (but not earlier than seventy-two hours of having received said last offers and demands), the arbitrator shall issue an Award which shall adopt one and only one of said last offers or demands, without modification or amendment, and the same shall then constitute the Award. Each side shall bear its own attorneys fees, costs and expenses, including AAA fees and expenses. The Award of the arbitrator shall be final and binding, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. If the Award is issued prior to the final completion of the Project, then the parties agree to sign a Change Order to reflect the Award.

(*Id.*).

The court finds that the elements of subsection N procedures raised by plaintiff in this case are not sufficient to establish substantive unconscionability. As an initial ***547** matter, the fact that the arbitration agreement leaves to Clayco's discretion the decision whether to invoke subsection N mediation/arbitration does not render the agreement unconscionable. *See Senior Mgmt., Inc. v. Capps,* 240 Fed.Appx. 550, 553 (4th Cir.2007) (stating that under North Carolina law "there is no requirement that an arbitration provision in the contract place an obligation to arbitrate on all parties to the contract").

Second, while subsection N sets forth circumscribed rules for evidence presentation and method of decisionmaking by the arbitrator, such rules apply to both parties equally and are not skewed to one side or the other. Such streamlined procedures may provide benefits to both contracting parties in a construction context to have disputes resolved as expeditiously as possible. Accordingly, these limitations do not render the arbitration agreement unconscionable. Indeed, as the Fourth Circuit has observed, "[w]hen contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of these accoutrements is the right to pre-trial discovery." *Burton v. Bush,* 614 F.2d 389, 390 (4th Cir.1980) (internal citations omitted).

Third, the possibility of a dual role for a mediator/arbitrator is expressly contemplated by the American Arbitration Association Construction Industry Arbitration Rules, which allow a mediator to be appointed as arbitrator when requested by all parties. *See* American Arbitration Association Construction Industry Arbitration Rules R–10(a) ("R–10. Mediation (a) At any stage of the proceedings, the parties may agree to conduct a mediation conference under the AAA Construction Industry Mediation Procedures in order to facilitate settlement. Unless requested by all parties, the mediator shall not be an arbitrator appointed to the case"). Although plaintiff claims that the American Arbitration Association has "frowned upon" the mediator/arbitrator role, (Opp. at 8), this does not render this procedure unconscionable, especially where sophisticated business entities have agreed to such a provision in a commercial contract.

Cases cited by plaintiff are instructively distinguishable. For example, in *Hooters,* the Fourth Circuit found rescission of an arbitration agreement warranted where the employer arbitration rules that gave the employer several procedural rights that the employer did not have, including "unrestricted control" of the employer over selection of the arbitration panel, and the employer's exclusive right to modify the rules promulgated without notice to the employee. *Hooters,* 173 F.3d at 938–39; *see*

also Murray, 289 F.3d at 303 (invalidating arbitration agreement which placed control over selection of arbitrator in hands of employer). None of these features are present in the instant arbitration agreement.

In sum, plaintiff has not established that the arbitration agreement in the subcontract is unconscionable.

2. Forum selection clause

[10] Plaintiff argues that the forum selection provisions contained in the arbitration agreement are in violation of North Carolina law, thus rendering the arbitration agreement void and unenforceable. In particular, the subcontract provides that mediation and arbitration shall be conducted in St. Louis, Missouri. (Compl. Ex. B, section XXVI. C, D, N).[1] At the ***548** same time, the subcontract provides that the subcontract is "governed by the laws of the State where the Project is located," (Compl. Ex. B, section XXVII.F), which in this case is North Carolina. Plaintiff points out that North Carolina General Statute Section 22B–3 provides in pertinent part:

> any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable.

N.C. Gen.Stat. § 22B–3. Plaintiff argues that this statute serves to invalidate the arbitration agreement in the subcontract. By contrast, defendant contends that this provision and a similar provision in § 22B–2, which is more properly applicable to construction contracts,[2] both directly conflict with section 2 of the Federal Arbitration Act and are thus inapplicable.

[11] "State law may ... be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 477, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). "In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, [the Supreme Court has] held that the FAA pre-empts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' " *Volt,* 489 U.S. at 478, 109 S.Ct. 1248 (quoting *Southland Corp. v. Keating,* 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984)).

In this case, plaintiff seeks to enforce N.C. Gen.Stat. 22B–3 to invalidate the arbitration agreement because the agreement requires the parties to arbitrate in Missouri. As such, where enforcement of the North Carolina statute in this manner would "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," the statute is preempted by the FAA. *Southland,* 465 U.S. at 10, 104 S.Ct. 852. Pursuant to section 2 of the FAA, the court must enforce the arbitration agreement in accordance with its terms, which requires the parties to arbitrate in Missouri, preempting the North Carolina statute to the contrary.

Plaintiff argues that *Volt* requires the court to apply the North Carolina statute to invalidate the arbitration agreement. *Volt,* however, is distinguishable. There, interpreting a construction contract governed by California law, the court held that the FAA does not preempt a California state procedural rule which "permits a court to stay arbitration pending resolution of related litigation between a party to ***549** the arbitration agreement and third parties not bound by it." 489 U.S. at 471, 109 S.Ct. 1248. The Supreme Court reasoned that "[w]here, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed." *Id.* at 479, 109 S.Ct. 1248. In the instant case, by contrast, application of the North Carolina statute as plaintiff urges would not result in merely staying arbitration pending litigation in North Carolina, but rather extinguishing arbitration altogether. Thus, the North Carolina statute falls squarely within the preempted category of state laws as recognized by *Volt* which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 478, 109 S.Ct. 1248 (quoting *Southland,* 465 U.S. at 10, 104 S.Ct. 852).

Plaintiff also argues that several district court cases cited by defendants finding that the FAA preempts N.C. Gen.Stat. §§ 22B–2 and 22B–3 are distinguishable because none of those cases involved a contract requiring application of North Carolina law.[3] Notably, however, in *Southern Concrete Products, Inc. v. ARCO Design/Build, Inc.,* No. 1:11–cv–194, 2012 WL 1067906 (W.D.N.C. March 29, 2012), the district court upheld an arbitration provision like the one here requiring arbitration in Missouri, even though the contract required application of North Carolina law, on the basis that the FAA pre-empts North Carolina forum selection statute, N.C. Gen.Stat. § 22B–2. 2012 WL 1067906 *2.

In sum, the parties' arbitration agreement is neither unconscionable nor invalidated by N.C. Gen.Stat. §§ 22B–2 and 22B–3. Accordingly, the court turns next to consideration of whether plaintiff's claims fall within the scope of the arbitration agreement.

3. Claims subject to arbitration

[12] As noted above, the subcontract agreement in this case requires arbitration of "[a]ny Claim arising out of or related to the Agreement." (Compl. Ex. B, section XXVI.A). The Supreme Court and the Fourth Circuit have recognized that such language represents a "broad" arbitration provision. *Drews Distrib., Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 350 (4th Cir.2001) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)). On the basis of this broad language, plaintiff's state law claims against Clayco squarely fall within the scope of the arbitration agreement. Indeed the complaint in this case expressly states that the claims against Clayco arise out of the execution and performance of the subcontract agreement. (Compl. ¶ 4).

Despite this plain statement in its complaint, plaintiff argues in opposition to defendants' motion that plaintiff's state statutory claim against Clayco is "[u]nrelated to the [s]ubcontract." (Opp. at 12). Even assuming, as plaintiff argues, that plaintiff's state statutory claim "arises out of Clayco's wrongful withholding of payments due on this project based on other projects that are not related to the Subcontract at issue," such withholding of payment is still actionable by virtue of plaintiff's alleged performance under the subcontract agreement. *See* Compl. ¶ 42 (stating in support of state statutory claim that payment was required under the "Contract" defined as ***550** the subcontract agreement). Accordingly, the state statutory claim is a claim "arising out of or related to the Agreement." (Compl. Ex. B, section XXVI.A).

[13] Plaintiff's Miller Act claim asserted against defendant Travelers, by contrast, presents a different set of issues with respect to whether this claim falls within the scope of the arbitration provision. On the one hand, Travelers is not a party to the subcontract agreement, and the arbitration provision expressly provides that "payment bond claims filed with a Court shall be promptly *stayed* pending resolution of the dispute in accordance with these dispute resolution provisions." (Compl. Ex. B, sections XXVI.K) (emphasis added). On the other hand, plaintiff's Miller Act claim is premised upon its work on the project, which was governed by the subcontract agreement. (Compl. ¶ 56). Accordingly, there is some support for characterizing the Miller Act claim against Travelers as a "[c]laim arising out of or related to the Agreement." (Compl. Ex. B, section XXVI.A). *See Brantley v. Republic Mortgage Ins. Co.*, 424 F.3d 392, 395–96 (4th Cir.2005) (recognizing that arbitration with a non-signatory may be appropriate "[w]hen each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, and the signatory's claims arise out of an relate directly to the written agreement") (citations omitted).

Touching on these considerations, the parties propose significantly diverging views concerning the impact of plaintiff's Miller Act claim on the course of proceedings in this court. Plaintiff proposes that the court must allow continued litigation of the Miller Act claim to the exclusion of arbitration. (Opp. at 13). Defendants propose that the court should dismiss all of plaintiff's claims and compel arbitration of all the claims, including the Miller Act claim. (Reply at 8–10). For the reasons stated below, the court finds neither the plaintiff's proposed resolution nor the defendants' proposed resolution regarding the Miller Act claim appropriate under the circumstances of this case.

Contrary to plaintiff's position, even assuming the Miller Act claim is not itself arbitrable and that jurisdiction for such a claim lies in this court, it is appropriate to stay the Miller Act claim rather than allow plaintiff to proceed on the Miller Act claim while the other claims are arbitrated.[4] Although the Fourth Circuit has not directly addressed the issue, one district court within this circuit has recognized "a long history of Miller Act cases which resolve the tension between the Miller Act and the Federal Arbitration Act by staying the Miller Act claim pending arbitration of the underlying dispute." *U.S. ex rel. MPA Const., Inc. v. XL Specialty Ins. Co.*, 349 F.Supp.2d 934, 941 (D.Md.2004) (quoting *U.S. ex rel. Tanner v. Daco Constr., Inc.*, 38 F.Supp.2d 1299, 1304–05 (N.D.Okla.1999) (collecting cases)). This approach is reflected in the Fourth Circuit's decision in *Agostini Bros. Bldg. Corp. v. U.S. on Behalf of and for use of Virginia–Carolina Elec. Works*, 142 F.2d 854 (4th Cir.1944), where the court stayed proceedings on a Miller Act claim "brought by a subcontractor against a contractor and surety" pending arbitration of contract claims arising under a contract for the construction of a government building. 142 F.2d at 855.[5]

***551** Based on the same line of cases, defendant's primary suggestion to dismiss rather than stay all of plaintiff's claims, including plaintiff's Miller Act claim, also is not the proper course of action. Indeed a stay is

consistent with the provision in the subcontract noted above that provides that "payment bond claims filed with a Court shall be promptly *stayed* pending resolution of the dispute in accordance with these dispute resolution provisions." (Compl. Ex. B, sections XXVI.K) (emphasis added). In addition, while there is some support in the cases cited by defendants for compelling arbitration of stayed Miller Act claims,[6] this court does not have authority to compel arbitration as defendants request under present circumstances.

As noted above, the subcontract agreement provides that mediation and arbitration shall be conducted in St. Louis, Missouri, which is within the Eastern District of Missouri. With respect to district court action in compelling arbitration, section 4 of the Federal Arbitration Act provides, in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. *The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.*

9 U.S.C. § 4 (emphasis added). A majority of courts interpreting this provision have held that "where the parties agreed to arbitrate in a particular forum only a district court in that forum has authority to compel arbitration under § 4." *Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214, 1219–20 (10th Cir.2005) (citing, among other decisions, *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1018 (6th Cir.2003); *Mgmt. Recruiters Int'l, ***552** Inc. v. Bloor*, 129 F.3d 851, 854 (6th Cir.1997); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 327 (7th Cir.1995)).

Although the Fourth Circuit has not directly addressed the issue, the Fourth Circuit has recognized that "section 3 authorizes a stay even though the arbitration must take place beyond the jurisdiction of the court," *Agostini*, 142 F.2d at 857, thus reinforcing the determination here that a stay pending arbitration is warranted, even though section 4 does not provide the court authority to compel the arbitration proceedings. To this end, the court in *Agostini* further noted that "there is no reason to imply that the power to grant a stay is conditioned upon the existence of power to compel arbitration in accordance with section 4 of the act." *Id.*

More recently, the Fourth Circuit recognized the same rule in *Elox Corp. v. Colt Indus., Inc.*, No. 90–2456, 1991 WL 263127, *1 (4th Cir. Dec. 16, 1991) ("Federal Arbitration Act provides that a district court deciding a motion to compel arbitration shall defer to the terms of the parties' agreement. The district court must, therefore, apply a forum selection clause contained in the agreement if such a clause exists. Further, if a court orders arbitration, the arbitration must be held in the same district as the court.") (citations omitted). And, several district courts in the Fourth Circuit recently have recognized that a district court does not have authority to compel arbitration in another district. See *e.g., Southern Concrete Products*, 2012 WL 1067906 *8 ("a district court lacks authority under § 4 of the FAA to compel arbitration outside of its geographic jurisdiction"); *Wake Cnty. Bd. of Educ. v. Dow Roofing Sys., LLC*, 792 F.Supp.2d 897, 904 (E.D.N.C.2011) ("This Court cannot compel arbitration in another district.").

Accordingly, the court is limited to staying proceedings in this case pending arbitration in St. Louis, Missouri, as specified in the parties' arbitration agreement. The court expresses no opinion on whether defendant Travelers can compel plaintiff to arbitrate the Miller Act claim. It suffices for present purposes that plaintiff's claims against Clayco are arbitrable, and that plaintiff's claims asserted in this litigation, including plaintiff's Miller Act claims against Travelers, properly will be stayed by this court.

CONCLUSION

Based on the foregoing, defendant's motion to dismiss and, in the alternative, motion to stay and compel arbitration (DE 19) is GRANTED IN PART and DENIED

IN PART as follows. Defendants' motion to dismiss is DENIED. Defendants' motion to stay this action is GRANTED, and this matter is hereby stayed pending resolution of arbitration in St. Louis, Missouri. Defendants' motion to compel arbitration is DENIED. The clerk is DIRECTED to remove this case from the court's active docket, with leave for any party to move to reinstate the same on the active docket at the conclusion of arbitration proceedings.

All Citations

978 F.Supp.2d 540

Footnotes

1 The agreement also provides an exception to this location if the arbitration is "joined with an arbitration between the Owner and the Contractor, in which case it shall take place in the location prescribed for in the General Contract." (Compl. Ex. B, section XXVI.C & D). Neither party contends that this exception applies, or that it would apply in such a manner as to mandate a different venue for arbitration other than St. Louis under the circumstances of this case.

2 N.C. Gen.Stat. § 22B–2 provides, in pertinent part:

> A provision in any contract, subcontract, or purchase order for the improvement of real property in this State, or the providing of materials therefor, is void and against public policy if it makes the contract, subcontract, or purchase order subject to the laws of another state, or provides that the exclusive forum for any litigation, arbitration, or other dispute resolution process is located in another state.

3 *See, e.g., Wake Cnty. Bd. of Educ. v. Dow Roofing Sys., LLC,* 792 F.Supp.2d 897, 902 (E.D.N.C.2011); *Aspen Spa Properties, LLC v. Int'l Design Concepts, LLC,* 527 F.Supp.2d 469, 473 (E.D.N.C.2007).

4 As such, the court need not reach plaintiff's alternative argument that defendant waived its right to compel arbitration of the Miller Act claim by failing to make a demand for arbitration. (*See* Opp. at 14–15).

5 Federal courts outside of this Circuit have also followed this approach, including in recent district court decisions. *See e.g. United States ex rel. Portland Constr. Co. v. Weiss Pollution Control Co.,* 532 F.2d 1009, 1013 (5th Cir.1976) (noting, in a Miller Act case, "the Federal Arbitration Act specifically provides for a stay rather than a dismissal"); *United States v. Endicott Constructors, Corp.,* CA 12–10152–MLW, 2012 WL 6553457 *1–*2 (D.Mass. Dec. 13, 2012) ("proceedings brought against a contractor and surety under the Miller Act, are typically stayed pending arbitration"); *U.S. ex rel. Postel Erection Grp., L.L.C. v. Travelers Cas. & Ins. Co. of Am.,* 6:12–CV–182–ORL–37, 2012 WL 2505674 (M.D.Fla. June 28, 2012) ("Regardless of whether a subcontractor is bound by an arbitration clause, a subcontractor's claim against a surety on a payment bond may be stayed pending arbitration between the primary contractor and the subcontractor.").

6 *See e.g., U.S. for Use & Benefit of Air–Con, Inc. v. Al–Con Dev. Corp.,* 271 F.2d 904, 905 (4th Cir.1959) (affirming an order staying litigation and directing arbitration of all claims in suit brought by subcontractor under the Miller act against contractor and sureties, based on application of Virginia arbitration law); *U.S. for Use & Benefit of Capolino Sons, Inc. v. Elec. & Missile Facilities, Inc.,* 364 F.2d 705, 706 (2d Cir.1966) (affirming district court order granting motion to stay proceedings in an action to recover contract damages brought by appellant against appellees, 1 pursuant to Sections 1 and 2 of the Miller Act. 40 U.S.C. §§ 270a–270b). Notably, in both cases, the court did not dismiss the plaintiffs' claims, but rather stayed them pending arbitration.

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