UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

FENCEMART, INC. **PLAINTIFF**

V. **NO.: 1:16-cv-00054-M-S**

STEWART ENVIRONMENTAL CONSTRUCTION, INC. AND JOHN DOES 1-10 **DEFENDANTS**

MEMORANDUM OPINION AND ORDER

Presently before the Court is a motion to dismiss [4] filed by Defendant Stewart Environmental Construction, Inc. ("Stewart"). Plaintiff FenceMart, Inc. ("FenceMart") has responded in opposition to the motion [10], and Stewart has filed a reply [12]. The Court, having considered the memoranda and submissions of the parties, finds that Stewart's motion to dismiss is well-taken and should be granted.

A. Factual and Procedural History

This case arises out of a subcontract between Stewart and FenceMart to perform work on the Highway 57 Sports Complex project (the "Project") for the City of Ocean Springs (the "City"). On August 19, 2009, Stewart entered into a prime contract with the City to complete work on the Project, which involved the construction of various public ball fields. On October 25, 2010, FenceMart signed a subcontract with Stewart to perform work on the Project. Paragraph 19 of the subcontract contains a provision which states that "[a]ll claims and disputes arising out of [the] Subcontract shall be resolved by arbitration before the American Arbitration Association."

The total subcontract sum was $231,601.90, which was increased by two change orders to a total sum of $272,401.90. FenceMart's complaint alleges that Stewart has paid $227,502.20, and that FenceMart is still owed $44,899.70 under the terms of the subcontract and subsequent change orders. Instead, the complaint alleges, Stewart offered FenceMart $10,000.00 as "final payment" on January 31, 2014, which FenceMart "did not accept…because [the] amount does not honor the subcontract Stewart…and FenceMart previously entered into and agreed."

Stewart, however, argues in its motion to dismiss that during the pendency of the Project, "Plaintiff disappeared from the job without notice; abandoning the project before it was completed." Stewart states that FenceMart's Director, President, Secretary, and Treasurer, Larry W. Davis ("Davis") disappeared from the job because he was arrested on September 22, 2008, convicted of sexually abusing a minor on June 24, 2010,[1] and was subsequently released from prison on January 13, 2014. Stewart asserts that when Davis "contracted with Stewart [on October 25, 2010], he failed to inform them that he had been arrested and was being prosecuted for a felony." Stewart argues that, as a result of Davis's alleged absence from the job, it "incurred significant costs in completing and repairing [FenceMart's] work" and thus refused to pay once Davis was released from prison in 2014 and began demanding money from Stewart. Stewart asserts that the Project was completed on or about November 12, 2011.

Stewart's motion further states that "[o]n or about April 16, 2014…Davis…sued Stewart in the Circuit Court of Marion County, Alabama," and that "[a]fter being informed of the arbitration clause in the subcontract…Davis and FenceMart moved [along with Stewart] to dismiss that lawsuit and refer it to arbitration." In support, Stewart submitted a copy of the joint motion as Exhibit A to its motion to dismiss. FenceMart, in opposition, contends that it "did not

[1] Stewart attached to this motion an Alabama Offender Profile for Larry W. Davis, to which FenceMart filed a motion to strike [8].

provide its former counsel [who signed the joint motion to dismiss] with consent…[thus] waiving its argument that the arbitration clause was not applicable [or] enforceable."

On March 30, 2016, FenceMart filed the present action in this Court, bringing claims against Stewart for breach of contract, breach of the covenant of good faith and fair dealing, conversion, and unjust enrichment. In response, Stewart filed the present motion to dismiss.

B. Analysis and Discussion

In 1925, Congress enacted the Federal Arbitration Act ("FAA") to reverse a longstanding, widespread judicial hostility toward arbitration agreements. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); *Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 492-93 (5th Cir. 2006). The FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Because "arbitration is a matter of contract," courts must "rigorously enforce arbitration agreements according to their terms." *Hendricks v. UBS Fin. Servs., Inc.*, 546 F. App'x 514, 517-18 (5th Cir. 2013) (quoting *Am. Exp. Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2309, 186 L.Ed.2d 417 (2013) (citation and internal quotation marks omitted)). Thus, arbitration may be compelled only if the parties agreed to arbitrate the dispute in question. *See* 9 U.S.C. § 4; *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 66-67, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010); *VT Halter Marine, Inc. v. Wartsila N. Am., Inc.*, 511 F. App'x 358, 360 (5th Cir. 2013) (per curiam) (citing *Pennzoil Expl. & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1064 (5th Cir. 1998)).

In evaluating whether claims brought under a contract must be arbitrated, the Court first assesses whether "the parties have agreed to arbitrate a particular claim…[by] determin[ing]: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in

question falls within the scope of that arbitration agreement." *Pers. Sec. & Safety Sys. Inc. v. Motorola, Inc.*, 297 F.3d 388, 392 (5th Cir. 2002) (citation and internal quotation marks omitted). Additionally, the Court must examine "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002) (quoting *Mitsubishi Motors*, 473 U.S. at 628).

1. Validity of the Arbitration Clause

The determination of whether there is a valid agreement to arbitrate is "governed by ordinary state-law contract principles." *Klein v. Nabors Drilling USA L.P.*, 710 F.3d 234, 236 (5th Cir. 2013) (citing *Gaskamp*, 280 F.3d at 1073). The "initial question of whether there is a valid agreement to arbitrate usually concerns matters of contract formation." *Id.* at 237 (citing *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381 (5th Cir. 2008)). It is well-settled that "[a]rbitration is strictly a matter of consent." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) (quoting *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (internal quotation marks omitted)). In the instant case, FenceMart does not dispute that it willingly entered into the subcontract with Stewart.

When "a contract is unambiguous, determining its meaning is a question for the court to decide, and the contract must be enforced as written." *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So.2d 1077, 1087 (Miss. 2000). In the instant matter, the subcontract between Stewart and FenceMart states that "[a]ll claims and disputes arising out of th[e] Subcontract shall be resolved by arbitration before the American Arbitration Association." Based on the plain language of the agreement, the Court finds that the subcontract between Stewart and FenceMart contains a valid arbitration clause.

2. Scope of the Arbitration Clause

"In view of the policy favoring arbitration, [the Court] ordinarily resolve[s] doubts concerning the scope of coverage of an arbitration clause in favor of arbitration." *Motorola*, 297 F.3d at 392 (quoting *Neal v. Hardee's Food Sys. Inc.*, 918 F.2d 34, 37 (5th Cir. 1990) (internal quotation marks omitted)); *see also Moses H. Cone Mem. Hosp. v. Mercury Const.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). As a result, "a valid agreement to arbitrate applies 'unless it can be said with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.'" *Motorola*, 297 F.3d at 392 (alteration in original) (quoting *Neal*, 918 F.2d at 37) (internal quotation marks omitted). To reiterate, the subcontract between FenceMart and Stewart clearly states that "[a]ll claims and disputes arising out of th[e] Subcontract" shall be resolved by arbitration.

FenceMart argues that the disputed payments do not fall within the scope of the arbitration agreement, because they arise out of the subsequent change orders, and not from the subcontract. However, Paragraph 17 of the subcontract clearly contemplates change orders, stating, in relevant part, that:

> The CONTRACTOR may issue written change orders to this subcontract, without notice to the SUBCONTRACTOR's sureties. The SUBCONTRACTOR shall be obligated to perform such written change orders without delay. With respect to any change in the subcontract work, in whole or in part, the SUBCONTRACTOR may be entitled to an adjustment in the subcontract amount and an extension in the subcontract time if the circumstances justify such[.]

Thus, the language of the subcontract clearly provides for change orders, and does not render change orders new, separate and/or distinct contracts. Rather, it deems them a "change" to the subcontract. Moreover, the allowance for change orders does not nullify the arbitration clause in the original subcontract. Because each of the claims raised by FenceMart arises from its work on

the Project through its subcontract with Stewart, the Court finds that the claims fall within the scope of the arbitration clause.

3. Legal Constraints External to the Agreement

The Court must also examine "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Gaskamp*, 280 F.3d at 1073 (quoting *Mitsubishi Motors*, 473 U.S. at 628); *see also Folse v. Richard Wolf Med. Instruments Corp.*, 56 F.3d 603, 605 (5th Cir. 1995). After considering the submissions of the parties, the Court finds that there are no legal constraints of the subcontract that preclude arbitration of this dispute.

4. Unconscionability

As a defense to arbitration, FenceMart asserts both substantive and procedural unconscionability as defenses to "invalidate" the arbitration clause. As an initial matter, there is no doubt that "agreements to arbitrate [may] be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2010). However, because of the "national policy favoring arbitration, the party opposing arbitration bears the burden to prove that a contract defense applies in a particular case." *Smith v. Express Check Advance of Miss., LLC*, 153 So.3d 601, 606 (Miss. 2014), *reh'g denied* (Jan. 15, 2015). Additionally, because "an arbitration provision is severable from the remainder of the contract," *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010), FenceMart must demonstrate that the arbitration clause itself is unconscionable.

a. Substantive Unconscionability

To determine whether a contract is substantively unconscionable, the court must "look within the four corners of [the] agreement in order to discover any abuses relating to the specific

terms which violate the expectations of, or cause gross disparity between, the contracting parties." *Caplin Enters., Inc. v. Arrington*, 145 So.3d 608, 614 (Miss. 2014) (quoting *Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So.3d 695, 699 (Miss. 2009)). If a contract is so one-sided that one party "is deprived of all the benefits of the agreement or left without a remedy for another party's nonperformance or breach," then it is substantively unconscionable. *Arrington*, 145 So.3d at 614 (quoting *Estate of Moulds*, 14 So.3d at 699-700). Here, there are no signs of gross disparity, nor does FenceMart allege any facts that would support such a claim. Moreover, FenceMart is neither denied the benefits of the subcontract nor left without a remedy because of the arbitration agreement. Instead, the provision merely requires that the dispute be resolved by an arbitrator, rather than by a court. Thus, the Court finds that the arbitration provision is not substantively unconscionable.

b. Procedural Unconscionability

Under Mississippi law, procedural unconscionability can be shown by any of the following six factors: "(1) lack of knowledge; (2) lack of voluntariness; (3) inconspicuous print; (4) the use of complex, legalistic language; (5) disparity in sophistication or bargaining power of the parties; and/or (6) lack of opportunity to study the contract and inquire about the terms." *Arrington*, 145 So.3d at 614. Additionally, contracts of adhesion, which are "drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms," makes unconscionability "easier to prove." *Id.* at 615. Nevertheless, contracts of adhesion are not automatically unconscionable. *Id.* (citing *Estate of Moulds*, 14 So.3d at 701).

FenceMart fails to demonstrate how the arbitration provision is itself procedurally unconscionable. First, FenceMart fails to allege facts that meet any of the factors enumerated in

Arrington. Second, FenceMart presents no proof to indicate that it lacked an opportunity to review the subcontract or any "real opportunity to bargain about" the agreement's terms, including the arbitration provision.

Moreover, FenceMart's reliance upon *East Ford, Inc. v. Taylor*, 826 So.2d 709 (Miss. 2002) to support its claim of unconscionability is inapposite. In *Taylor*, the Mississippi Supreme Court observed that procedural unconscionability involves "a great imbalance in the parties' relative bargaining power" in which "the stronger party's terms are unnegotiable, and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all." *Id.* at 716. Although FenceMart, in its memorandum in opposition, refers to the subcontract as "one of adhesion where the terms were nonnegotiable," it does not assert that there was an imbalance in bargaining power between the parties, nor does it present any facts showing that it was prevented from seeking more favorable terms. Further, whereas *Taylor* involved a contract between a consumer and a car dealership, the instant case involves a contract between two businesses. As has been stated, FenceMart's claims fail to satisfy the standard articulated in *Taylor*.

Because FenceMart does not provide proof showing that its arbitration agreement with Stewart was subject to any of the factors that demonstrate procedural unconscionability, its claim must fail.

Conclusion

Based upon the foregoing analysis, Stewart's motion to dismiss [4] under Fed. R. Civ. P. 12(b)(1) and/or 12(b)(3)[2] is hereby granted. By virtue of the holding herein, FenceMart's motion to strike the Alabama Offender Profile [8] is denied as moot.

So ordered, this the 3rd day of November, 2016.

/s/ MICHAEL P. MILLS
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF MISSISSIPPI

[2] *See Murchison Capital Partners, L.P. v. Nuance Commc'ns, Inc.*, 625 F. App'x 617, 627 (5th Cir. 2015) (dismissing case due to arbitration clause but declining to hold whether Fed. R. Civ. P. 12(b)(1) or 12(b)(3) applies); *see also Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 472 n.3 (5th Cir. 2010); *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 901-02 (5th Cir. 2005).