IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DCK WORLD WIDE, LLC,
Plaintiff,

-vs- **Case No. A-16-CA-666-SS**

PACIFICA RIVERPLACE, L.P.,
Defendant.

ORDER

BE IT REMEMBERED on the 26th day of July 2016, the Court held a hearing in the above-styled cause at which the parties appeared through representation of counsel and made oral arguments on Plaintiff's Motion for Preliminary Injunction [#4], Defendant's Response [#15] in opposition, Plaintiff's Reply [#18] in support, and Defendant's Supplement to Response [#20] in opposition. Having considered the parties' arguments, the governing law, and the file as a whole, the Court now enters the following opinion and orders.

Background

The issue in this case is jurisdictional: does this Court or the arbitrator have authority to determine questions of arbitrability? Plaintiff DCK Worldwide, LLC (DCK) claims the Court is empowered to determine "gateway issues" such as arbitrability. Defendant Pacifica Riverplace, LP (Pacifica) responds when the parties "clearly and unmistakably" delegate the power to decide arbitrability questions to the arbitrator, the Court must defer to the arbitrator's decision.

This conflict first arose when Pacifica, the owner of a Residence Inn Hotel, entered into a construction contract (Contract) with Summit dck, LLC (Summit). *See* Mot. Prelim. Inj. [#4] ¶¶ 1–2.

The Contract, which governs a project related to Pacifica's hotel (Project), included an arbitration provision. *See id.* [#4-3] Ex. 2 (Contract) at § 13.2. As part of the Project, Summit hired JA Plumbing, Inc. (JA Plumbing), a subcontractor, to perform plumbing work. *See id.* [#4] ¶ 3. When Summit failed to pay JA Plumbing for the work, JA Plumbing sued Pacifica and Summit in state court. *See id.* The court signed an Agreed Order, submitted by Pacifica, Summit, and JA Plumbing, to abate the state court proceedings and arbitrate based on the Contract's arbitration provision. *See id.* ¶¶ 3–4.

In the arbitration proceeding, Pacifica filed a demand for arbitration against JA Plumbing, Summit, and DCK. *See id.* ¶ 5. Pacifica alleged DCK bought Summit before the Contract was signed and was liable on the Contract as the parent company of Summit. *See id.* [#4-2] Ex. 1 (Pacifica's Demand Arbitration) ¶ 14. During a telephonic conference call with the arbitration administrator, DCK objected to being included in the arbitration. *See id.* [#4] ¶ 6. In an email to all of the parties, the administrator explained the arbitration would proceed against all parties, and the arbitrator would address DCK's objection when appointed unless a court order required a different action. *See id.* When the parties' answers were due, DCK objected again to its inclusion in a formal letter to the administrator. *See id.* ¶ 8.

DCK then filed its Motion for Preliminary Injunction in this Court to enjoin Pacifica from pursuing claims against DCK in the arbitration, claiming the Court, not the arbitrator, has jurisdiction to determine whether DCK is bound by the Contract's arbitration provision. *See id.* at 6. After this case was filed, an arbitrator was appointed in the arbitration proceeding and ruled (1) the arbitrator has authority to determine if DCK is bound to the Contract, and (2) DCK is bound to the Contract via theories of assumption, direct benefits estoppel, and, potentially, alter ego. *See* Suppl.

Mot. Compel Arbitration Stay Proceedings [#20-1] Ex. A (Arbitrator's Ruling DCK's Obj. Arbitrability) at 1–5.

Analysis

A preliminary injunction may be granted only if the moving party establishes each of the following four factors: (1) a substantial likelihood of success on the merits; (2) a substantial threat that failure to grant the injunction will result in irreparable injury; (3) that the threatened injury outweighs any damage that the injunction may cause the opposing party; and (4) that the injunction will not disserve the public interest. *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir. 1991). Because DCK has failed to establish these factors, the Court denies its Motion for Preliminary Injunction.

The parties agree the claim underlying DCK's preliminary injunction is governed by the Federal Arbitration Act (FAA) and Texas case law. *See* Mot. Prelim. Inj. [#4] at 5; Resp. [#15] ¶ 30; *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("[W]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.").

I. DCK Has Not Established a Substantial Likelihood of Success on the Merits.

To establish a substantial likelihood of success on the merits, DCK must show a substantial likelihood the Court, not the arbitrator, has authority to determine the arbitrability question of whether DCK, a non-signatory, is bound by the Contract's arbitration provision.[1] Texas courts have

[1] DCK does not always clearly state the claim underlying its preliminary injunction motion. At times, DCK asserts the claim is the Court, not the arbitrator, has the authority to determine if DCK is bound by the Contract's arbitration provision; other times, DCK implies the claim is DCK is not bound by the arbitration provision. *Compare* Reply [#18] at 7 (The preliminary injunction "motion raises only one issue: the arbitrator's lack of authority to decide whether DCK, a non-signatory, can be compelled to participate in the arbitration proceeding before her.") *with* Compl. [#1] ¶ 36 ("Since [DCK] was never a contractual party with [Pacifica], or

adopted the general rule that "[u]nder the FAA, whether an arbitration agreement binds a nonsignatory is a gateway matter to be determined by courts rather than arbitrators unless the parties clearly and unmistakably provide otherwise." *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (citation omitted). In other words, if DCK and Pacifica clearly and unmistakably agreed to delegate the issue of arbitrability to the arbitrator, the arbitrator has jurisdiction.

Pacifica argues it and DCK clearly and unmistakably agreed to delegate arbitrability issues to the arbitrator. *See* Resp. [#15] ¶ 36. Pacifica asserts the Contract's adoption of the American Arbitration Association (AAA) rules, which delegate questions of arbitrability to the arbitrator, shows the parties to the Contract clearly and unmistakably agreed the arbitrator would decide arbitrability questions. *See id.* DCK, of course, is not a party to the Contract. Accordingly, Pacifica claims DCK, as the parent company of Summit, is bound to the Contract—and thus agreed to the Contract's adoption of the AAA rules—because DCK (a) assumed the Contract, (b) is an alter ego of Summit, and (c) directly benefitted from the Contract. *See id.* ¶ 40.

In light of Pacifica's arguments and the relevant case law, the Court concludes DCK has not established a substantial likelihood it will succeed in showing the parties did not clearly and unmistakably delegate arbitrability questions to the arbitrator. Under Texas law, courts find "a broadly-worded arbitration clause, coupled with incorporation by reference of rules giving an arbitrator power to rule on his own jurisdiction, is enough to demonstrate the parties' intent to strip the trial court of all power and submit even gateway issues of arbitrability to an arbitrator." *Lucchese*

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an alter ego of Summit, and the parties have no agreement to arbitrate, [DCK] has a substantial likelihood of success in obtaining a permanent injunction staying the arbitration proceedings."). At the preliminary injunction hearing, DCK clarified its underlying claim is jurisdictional. The Court applies the preliminary injunction standard as such.

Boot Co. v. Licon, 473 S.W.3d 390, 397 (Tex. App.—El Paso 2015, no pet.) (citing cases).

Here, the Contract's arbitration provision is broadly-worded and incorporates arbitration rules giving the arbitrator authority to rule on her own jurisdiction. Specifically, the Contract's arbitration provision incorporates another document, the AIA Document A201-2007 (AIA Document), by reference: "[f]or any Claim subject to, but not resolved by mediation . . . , the method of binding dispute resolution shall be . . . Arbitration pursuant to Section 15.4 of AIA Document . . . ." Contract at § 13.2. Section 15.1 of the AIA Document broadly defines "Claim" as "a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract . . . [and] also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract."[2] Mot. Prelim. Inj. [#4-3] Ex. 2 (AIA Document) at § 15.1.

In addition, Section 15.4 of the AIA Document states, "any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules . . . ." *Id.* at § 15.4. These Rules give the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Resp. [#15] ¶ 38. Ultimately, this contractual language and

[2] DCK argues "Claim" is defined in the Contract, not the AIA Document, and applies "only to issues where the 'Contractor contend[s] that any order (which shall include direction, instruction, interpretation or determination) from Owner or other event or occurrence shall cause a Change in the Work entitling the Contractor to adjustment to the Guaranteed Maximum Price or Contract Time.'" Reply [#18] at 5. The Contract, however, does not define the term "Claim." Instead, the Contract explains how, through a "Claim," the "Contractor" can be reimbursed by the "Owner" due to a "Change in Work" that entitles the Contractor to "adjustment to the Guaranteed Maximum Price or Contract Time." Contract at § 6.1.13–.14. This section does not describe "Claims" in terms of dispute resolution and does not apply to the arbitration provision.

construction weighs in favor of finding the parties to the Contract clearly and unmistakably delegated jurisdiction of arbitrability questions to the arbitrator. DCK has not established it will likely succeed in showing otherwise.

The Court must now determine whether there is a substantial likelihood DCK will prove it was not bound by the Contract and thus did not clearly and unmistakably agree to delegate jurisdiction over arbitrability issues to the arbitrator. Because the record is replete with support that DCK is bound to the Contract based on direct benefits estoppel and assumption,[3] there is not a substantial likelihood DCK will prevail in showing the Court has jurisdictional authority.

Direct benefits estoppel binds a non-signatory to an arbitration agreement in two different situations: (1) when "a non-signatory who uses the litigation process to sue based on a contract subjects him or herself to the contract's terms"[4]; or (2) when "a non-signatory seeks or obtains direct benefits from a contract by means other than a lawsuit." *ENGlobal U.S., Inc. v. Gatlin*, 449 S.W.3d 269, 275 (Tex. App.—Beaumont 2014, no pet.) (internal quotations and citation omitted). With regard to the second situation, "[i]f the non-signatory consistently and knowingly insists that others

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[3] The Court is less convinced by Pacifica's alter ego theory. Texas law requires actual fraud to pierce the corporate veil on the basis of alter ego. *See* TEX. BUS. ORG. CODE § 21.223(b); *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 451 (Tex. 2008) ("[T]he limitation on liability afforded by the corporate structure can be ignored only when the corporate form has been used as part of a basically unfair device to achieve an inequitable result," such as "when the corporate structure has been abused to perpetrate a fraud, evade an existing obligation, achieve or perpetrate a monopoly, circumvent a statute, protect a crime, or justify wrong.") (internal quotations omitted); *Latham v. Burgher*, 320 S.W.3d 602, 606 n.1 (Tex. App.—Dallas 2010, no pet.) (stating that a "finding of actual fraud" is "a threshold finding necessary for the ultimate finding of alter ego"). Actual fraud involves "dishonesty of purpose or intent to deceive . . . ." *Castleberry v. Branscum*, 721 S.W.2d 270, 273 (Tex. 1986) (internal quotations and citation omitted). The record does not show DCK used Summit to perpetrate actual fraud against Pacifica.

[4] DCK argues direct benefits estoppel applies only to this first scenario when a non-signatory brings a claim against a signatory. Reply [#18] at 12. As illustrated in the second scenario, however, the theory applies even if the non-signatory does not bring a claim under the contract.

treat it as a party to the contract during the life of the contract, the nonparty cannot later turn [ ] its back on the portions of the contract, such as an arbitration clause, that it finds distasteful." *Id.* (internal quotations omitted).

Similarly, Texas courts find a non-signatory can be held liable under a contract if it expressly or implicitly assumes the obligations of the contract. *NextEra Retail of Tex., LP v. Inv'rs Warranty of Am., Inc.*, 418 S.W.3d 222, 226 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). *See also In re Citgo Petroleum Corp.*, 248 S.W.3d 769, 774 (Tex. App.—Beaumont 2008, no pet.) ("If one party signs a contract, the other party's acceptance may be demonstrated by its conduct, thus making it a binding agreement on both parties.") (internal quotations and citation omitted). In Texas, assumption usually arises in the assignor-assignee context. Thus, an implied assumption of contractual obligations may arise "when the benefit received by the assignee is so entwined with the burden imposed by the assignor's contract that the assignee is estopped from denying assumption and the assignee would otherwise be unjustly enriched." *NextEra Retail of Tex.*, 418 S.W.3d at 227–28.

Both of these theories are based on the same principle: a non-signatory can be bound to a contract if it assumes the obligations and benefits of that contract. The evidence from the record shows there is not a substantial likelihood DCK can prove it did not assume any obligations or benefits from the Contract and is therefore not bound to the Contract. Pacifica presented the following evidence, only some of which DCK rebutted, relying solely on Mr. Brian Contino's affidavit:

- Pacifica claims during the Project, Mr. Contino worked as both the Vice President of Operations with DCK and the Managing Director with Summit. *See* Resp. [#15] Ex. A (Brinich Aff.) ¶ 5–6. Pacifica points to Mr. Contino's LinkedIn page which

states he is currently the Executive Vice President and General Manager of Summit DCK and Vice President of Operations at DCK. *See* Resp. [#15] Ex. C (Wheatley Aff.) at Ex. C-1.

- Pacifica states Mr. Contino directed the activities of Summit in Texas, including which projects Summit should execute. *See* Resp. [#15] Ex. A (Brinich Aff.) ¶ 5–6. In his affidavit, Mr. Contino admits his role at Summit included "(1) which projects [Summit] will pursue and which project[s Summit] will not pursue, as new work; [and] (2) general management oversight for contracts [Summit] is executing." Reply [#18] Ex. A (Contino Aff.) ¶ 6.

- Pacifica alleges Mr. Contino led weekly conferences calls, which included other DCK employees. Resp. [#15] Ex. A (Brinich Aff.) ¶ 6. While the parties dispute whether Mr. Contino provided payment direction to both Summit and DCK subcontractors and suppliers during these weekly calls, Mr. Contino states he was involved "in discussions with other employees of [Summit] regarding priority of payments and urgent decisions for the [Summit] projects." Reply [#18] Ex. A (Contino Aff.) ¶ 7.

- Pacific claims in May 2014, a little less than a year after the Contract was signed, Mr. Contino told Mr. John Brinich, a Senior Project Executive for Summit, that Summit's Texas division would close. *See* Resp. [#15] Ex. A (Brinich Aff.) ¶ 7. Mr. Contino disputes this allegation, and instead asserts he "informed Mr. John Brinich that [Summit] needed to shift its focus from pursuing new work to executing its existing work in-place at that time." Reply [#18] Ex. A (Contino Aff.) ¶ 10.

- Pacifica states after May 2014, Pacifica had no contact with any Summit employees located in Texas. *See* Resp. [#15] Ex. B (Sandoval Aff.) ¶ 7. Citing Mr. Contino's affidavit, DCK claims, "[A]s of September 2014, there were in fact [Summit] employees in Texas." Reply [#18] Ex. A (Contino Aff.) ¶ 12.

- Pacifica states it dealt with only Mr. Contino and David Burton from DCK after May 2014. *See* Resp. [#15] Ex. B (Sandoval Aff.) ¶ 7. Mr. Burton introduced himself to Mr. Sergio Sandoval, Pacifica's Senior Project Manager, as "a 30+ year DCK employee." *Id.* Mr. Colin Peoples, the Project Superintendent, also introduced himself as "a long-time employee of DCK." *Id.* ¶ 11.

- Pacifica provides emails it received from Mr. Chris Butler, the Project Manager, and Mr. Peoples—both email addresses had a "dckww.com" domain. *See id* ¶¶ 10–11. In addition, Mr. Peoples' email signature block stated "dck worldwide LLC." *See id.* ¶ 12.

- Pacifica also provides: (1) a Project Schedule that has a "dck worldwide" logo on it;

(2) various Meeting Minutes for the Project, which recorded the participation of three DCK employees and no Summit employees; and (3) a "Project Management—Project Contract List Report," which listed three DCK employees and referenced DCK's corporate address. *See id.* ¶¶ 11, 13, 15.

- Pacifica presents a Daily Sign-in Sheet associated with JP Plumbing's work on the Project. On the sheet, DCK wrote "see DCK below" in the space provided for "Summit dck, LLC approval." *See id.* Ex. D (Suppl. Sandoval Aff.) ¶ 9. Then at the bottom of the page, DCK signed on a handwritten line labeled "DCKWW." *See id.*

- Pacifica claims in September 2014, the Summit Texas office closed. *See id.* Ex. A (Brinich Aff.) ¶ 8.

This evidence weighs in favor of finding DCK assumed the obligations and benefits of the Contract between Summit and Pacifica. Thus, DCK has not established a substantial likelihood that it will succeed in showing DCK did not assume obligations or benefits from the Contract and thus was not bound to the Contract's delegation of authority to determine arbitrability issues to the arbitrator.

II. DCK Fails to Establish a Substantial Threat of Irreparable Injury.

DCK claims it will suffer an irreparable injury if it is forced to arbitrate. *See* Mot. Prelim. Inj. [#4] at 6–7. By denying DCK's preliminary injunction, however, the Court is not forcing DCK to arbitrate. Rather, the Court is merely concluding the arbitrator has authority to determine whether DCK is forced to arbitrate. The Court thus finds DCK has failed to establish a substantial threat of irreparable injury.

III. DCK Fails to Establish the Threatened Injury Outweighs Any Harm to Pacifica.

DCK argues Pacifica suffers no harm because Pacifica only has a contractual right in arbitration against Summit and JA Plumbing, signatories to the Contract, and loses nothing if DCK is not bound to arbitrate. *See id.* at 9. The Court agrees Pacifica suffers no harm if the arbitrator has

power to determine arbitrability questions. But neither does DCK. DCK has therefore failed to show its threatened injury outweighs any harm to Pacifica.

IV. DCK Fails to Establish an Injunction Will Not Disserve the Public Interest.

Finally, DCK asserts by denying the injunction, the Court would force a non-signatory to arbitrate, which violates the public policy supporting parties' right to freely contract to arbitrate. *See id.* at 10. As explained above, the Court's denial of the injunction does not force DCK to arbitrate. It provides the arbitrator has proper jurisdiction to determine whether DCK is bound to arbitrate.

Thus, the Court finds DCK has failed to establish the factors necessary for a preliminary injunction and DENIES its request.

Conclusion

Accordingly:

IT IS ORDERED that DCK's Motion for Preliminary Injunction [#4] is DENIED.

SIGNED this the 28th day of July 2016.

Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE