UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-23374-CIV-ALTONAGA/O'Sullivan

ATCI COMMUNICATIONS, INC.,

Plaintiff,

v.

FEDERAL INSURANCE COMPANY,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court upon Defendant, Federal Insurance Company's ("Defendant['s]" or "Federal['s]") Motion to Dismiss or in the Alternative, to Stay Proceedings and Compel Arbitration . . . ("Motion") [ECF No. 26], filed on September 7, 2016. Plaintiff, ATCi Communications, Inc. ("Plaintiff" or "ATCi") filed a Response . . . ("Response") [ECF No. 28] on September 8, 2016; Defendant filed a Reply . . . ("Reply") [ECF No. 29] on September 15, 2016. The Court has carefully considered the parties' written submissions, the record, and applicable law.

I. BACKGROUND[1]

This suit involves claims against a surety for money allegedly due under a construction payment bond. Suffolk Construction Company, Inc. ("Suffolk") was the general contractor for construction of the Miami-Dade County Children's Courthouse (the "Project"). Suffolk entered into a subcontract ("Suffolk Contract" [ECF No. 27-1]) with Johnson Controls, Inc. ("JCI") to

[1] The factual allegations in the Amended Complaint ("Complaint") [ECF No. 1-1] are accepted as true. *See Northbrook Indem. Co. v. First Auto. Serv. Corp., N.M.*, No. 3:07-cv-683-J-32JRK, 2008 WL 3009899, at *1 n.2 (M.D. Fla. Aug. 1, 2008) (citing *Int'l Underwriters AG v. Triple I: Int'l Invs., Inc.*, 533 F.3d 1342, 1345–46 (11th Cir. 2008)).

perform work on the Project. To protect the owner and the Project from liens, and as required by the Suffolk Contract, Suffolk entered into a labor and material payment bond (the "Bond" [ECF No. 1-1] 24–25)[2] with JCI as principal, Suffolk as obligee, and Federal as surety. The Bond incorporates by reference the Suffolk Contract.

JCI sub-subcontracted with ATCi ("JCI-ATCi Subcontract" [ECF No. 27-2]) to perform work for the Project. The JCI-ATCi Subcontract incorporates by reference both the Suffolk Contract and the Bond. The Bond does not incorporate the JCI-ATCi Subcontract.

The Bond authorizes any claimant, who has not been paid ninety days after completing its work, to sue under the payment bond instead of proceeding against the owner's property. ATCi qualifies as a claimant under the Bond, which defines claimant as "one having a direct contract with the Principal [(JCI)] . . . for labor, material, or both, used or reasonably required for use in performance of the [Suffolk] Contract." (Bond ¶ 1 (alterations added)). Alleging ninety days have passed since completing work for which it has not been paid under the JCI-ATCi Subcontract, ATCi brought an action in state court for payment under the Bond against Federal as surety. (*See generally* Compl.). Federal removed the case under 28 U.S.C. sections 1332, 1441, 1146, based on diversity jurisdiction.

Federal now moves to compel ATCi to arbitrate its dispute based on an arbitration clause in the JCI-ATCi Subcontract, to which Federal is not a signatory. The JCI-ATCi Subcontract contains the following arbitration clause ("Arbitration Agreement"): "All disputes not settled by negotiation or mediation . . . shall be submitted to arbitration in accordance with the prevailing Construction Industry Rules of the American Arbitration Association, except as modified in this paragraph." (JCI-ATCi Subcontract 10, section 6.6 "**Disputes**") (alteration added).

[2] Citations to page numbers of documents attached to the Notice of Removal of Action [ECF No. 1] as docket entry number 1-1 refer to the ECF page numbers, which may differ from the page numbers on the documents themselves.

II. LEGAL STANDARD

"The Federal Arbitration Act ('FAA') establishes a general federal policy favoring arbitration." *Mims v. Global Credit & Collection Corp.*, 803 F. Supp. 2d 1349, 1352 (S.D. Fla. 2011). "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (alterations added). "As a result of the well-established federal policy favoring arbitration, the burden is on the party opposing arbitration to prove to the court that arbitration is improper." *Kozma v. Hunter Scott Fin., L.L.C.*, No. 09-80502-CIV, 2010 WL 724498, at *2 (S.D. Fla. Feb. 25, 2010) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26–27 (1991)).

"District courts consider three factors in reviewing a motion to compel arbitration: 1) [w]hether there is a valid, written agreement to arbitrate; 2) [w]ether there is an arbitrable issue; and 3) [w]hether the right to arbitrate was waived." *Booth v. S. Wine & Spirits of Am., Inc.*, No. 14-22357-CIV, 2014 WL 5523123, at *2 (S.D. Fla. Oct. 31, 2014) (alterations added; citations omitted). As to the first factor, the FAA provides that pre-dispute agreements to arbitrate "evidencing a transaction involving commerce" are "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. "Section 3 of the . . . FAA[] requires that a court, upon motion by a party to an action in federal court, stay the action if it involves an 'issue referable to arbitration under an agreement in writing.'" *Gunson v. BMO Harris Bank, N.A.*, 43 F. Supp. 3d 1396, 1399 (S.D. Fla. 2014) (alterations added) (quoting 9 U.S.C. § 3).

III. ANALYSIS

Plaintiff challenges Defendant's Motion primarily on three grounds: (1) there is no agreement to arbitrate between ATCi and Federal; (2) the Bond claim does not fall within the scope of the Arbitration Agreement; and (3) there is no ongoing arbitration between JCI and ATCi and, therefore, no ground to grant a stay. (*See* Resp. 4–11). The Court addresses each argument in turn.

A. A Valid, Written Agreement to Arbitrate

Plaintiff argues (a) the Bond is a separate written instrument and does not contain an arbitration provision, but rather provides a right to bring suit in court; and (b) the Bond incorporates by reference the Suffolk Contract, which also does not contain an arbitration provision but again provides a right to bring suit in court.[3] (*See* Resp. 1–11). Accordingly, Plaintiff argues there is no valid, written agreement to arbitrate between ATCi and Federal.[4]

Yet, the "lack of a written arbitration agreement is not [necessarily] an impediment to arbitration." *Sunkist Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993)

[3] Defendant also makes a convoluted incorporation by reference argument. (*See* Mot. 8 ("The Bond expressly incorporates by reference the Suffolk Contract, which in turn is expressly incorporated into the [JCI-ATCi Subcontract]." (alteration added))). The Court is not persuaded the Bond's incorporation into the JCI-ATCi Subcontract is the same thing as the JCI-ATCi Subcontract, along with the Arbitration Agreement, being incorporated into the Bond. Fortunately, as discussed below, it is not necessary to address either party's incorporation by reference argument as the Court decides this issue on other grounds.

[4] Plaintiff also argues there is a direct conflict between the various documents, where the JCI-ATCi Subcontract requires arbitration while the Suffolk Contract and Bond require suit in federal or state court. (*See* Resp. 5–11). Plaintiff further argues the "Bond would control this direct conflict." (*Id.* at 7).

The Court finds no conflict between the provisions, where the Bond provision is clearly permissive ("may sue on this bond" (Bond ¶ 2)), and the Arbitration Agreement is clearly mandatory ("shall be submitted to arbitration" (JCI-ATCi Subcontract 10, section 6.6)). Also, the Court acknowledges Plaintiff's concern regarding the redacted copy of the Suffolk Contract filed in the public record. (*See* Resp. 1 n.1). The Court has reviewed the unredacted Suffolk Contract [ECF No. 24], and this does not alter the Court's analysis. Additionally, the Suffolk Contract applies only to disputes between non-parties to this litigation, Suffolk and JCI.

(alteration added), *abrogated on other grounds by Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009). While it is true "arbitration is a matter of contract . . . [and] the FAA's strong proarbitration policy only applies to disputes that the parties have agreed to arbitrate[,]" *Klay v. All Defendants*, 389 F.3d 1191, 1200 (11th Cir. 2004) (alterations added), courts recognize an exception to this rule where a non-signatory may compel arbitration "if the relevant state contract law allows him to enforce the agreement" to arbitrate, *Carlisle*, 556 U.S. at 632. *See also Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1168 (11th Cir. 2011) (recognizing state law principles of "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel" as potentially allowing non-signatory enforcement of arbitration agreement); *Bd. of Trs. of City of Delray Beach Police & Firefighters Ret. Sys. v. Citigroup Global Mkts., Inc.*, 622 F.3d 1335, 1342–43 (11th Cir. 2010) (applying state contract law to determine if a non-signatory to an arbitration clause could be compelled to arbitrate under agency principles); *Mims*, 803 F. Supp. 2d at 1354 ("[T]he Eleventh Circuit has recognized that a non-signatory to a contract may invoke an arbitration clause therein in three limited circumstances: (1) under a theory of equitable estoppel, (2) under agency or related principles, or (3) where the nonsignatory is an intended third-party beneficiary of the contract." (alteration added; citation omitted)).

Relevant here, Florida law recognizes equitable estoppel as one of the exceptions permitting non-signatories to a contract to compel arbitration.[5] *See, e.g., Koechli v. BIP Int'l,*

[5] Plaintiff argues "[u]nder Florida law, a surety can move to compel arbitration only IF the underlying contract incorporated into the underlying bond contained an arbitration provision." (Resp. 7 (emphasis in original; alteration added) (citing Florida federal district court, Florida state appellate court, and Eleventh Circuit cases)). Unfortunately for Plaintiff, while all of the cases cited permit a surety to compel arbitration if the bond incorporates by reference a contract with an arbitration provision, none limit a surety to compelling arbitration only under these facts. Likewise, whether Federal is an incidental or third-party beneficiary under the JCI-ATCi Subcontract (*see* Resp. 6), is irrelevant under an equitable estoppel theory.

Inc., 870 So. 2d 940, 944 (Fla. 1st DCA 2004); *Armas v. Prudential Sec., Inc.*, 842 So. 2d 210, 212 (Fla. 3d DCA 2003); *Kolsky v. Jackson Square, LLC*, 28 So. 3d 965, 969 (Fla. 3d DCA 2010); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999), *abrogated on other grounds by Carlisle*, 556 U.S. 624 (2009).[6] Equitable estoppel allows a non-signatory to compel arbitration in two circumstances. First, "equitable estoppel applies when the signatory to a written agreement containing an arbitration clause 'must rely on the terms of the written agreement in asserting [its] claims' against the nonsignatory." *MS Dealer*, 177 F.3d at 947 (alteration in original) (quoting *Sunkist Soft Drinks*, 10 F.3d at 757); *see also In re Humana Inc. Managed Care Litig.*, 285 F.3d 971, 976 (11th Cir. 2002) ("The plaintiff's actual dependance [sic] on the underlying contract in making out the claim against the nonsignatory defendant is therefore always the *sine qua non* of an appropriate situation for applying equitable estoppel."), *rev'd on other grounds*, *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003). Second, equitable estoppel applies when the allegations are of interdependent and concerted misconduct between a non-signatory and a signatory. *See Bailey v. ERG Enters., LP*, 705 F. 3d 1311, 1320 (11th Cir. 2013); *MS Dealer*, 177 F. 3d at 947; *Marcus*, 112 So. 3d at 633–34.

Although Defendant does not explicitly use the term equitable estoppel in its Motion, Defendant argues: (1) Plaintiff's claims against the Bond "necessarily arise from an alleged breach of Plaintiff's rights under the [JCI-ATCi Subcontract; and (2)] [a]ny claim on the Bond is 100% derivative of Plaintiff's rights under the [JCI-ATCi Subcontract]." (Mot. 9 (alterations

[6] As the court recognized in *Gunson*, "[w]hile *MS Dealer* was abrogated by [*Carlisle*] to the extent that *MS Dealer* did not make clear that state law governs the analysis, *Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1170–71 (11th Cir. 2011), *MS Dealer* has since been relied on by the Eleventh Circuit and Florida state courts when analyzing equitable estoppel." 43 F. Supp. 3d at 1400 n.1 (alterations added) (citing, as examples, *Marcus v. Fla. Bagels, LLC*, 112 So. 3d 631, 634 (Fla. 4th DCA 2013); *Escobal v. Celebration Cruise Operator, Inc.*, 482 F. App'x 475, 476 (11th Cir. 2012) (per curiam)).

added)). The Court agrees and finds Defendant can compel arbitration under the first circumstance described above and expounded in *MS Dealer*. *See* 177 F.3d at 947.

Plaintiff's claim against Federal under the Bond is based on the underlying contractual obligation between JCI and ATCi. ATCi only meets the definition of a claimant under the Bond because of the JCI-ATCI Subcontract. (*See* Bond ¶ 1). Whether Federal is liable to ATCi under the Bond is entirely dependent on whether ATCi is entitled to payment from JCI for labor, materials, and services under the JCI-ATCi Subcontract. *See Henderson Inv. Corp. v. Int'l Fidelity Ins. Co.*, 575 So. 2d 770, 771 (Fla. 5th DCA 1991) ("[O]bligations of a surety under its bond agreement are coextensive with that of a contractor (principal)." (alteration added)); *U.S. Fidelity & Guar. Co. v. Miami Sheet Metal Prods., Inc.*, 516 So. 2d 29, 30 (Fla. 3d DCA 1987) (holding a surety is entitled to the same defenses as the owner or principal in an action on a payment bond brought by a subcontractor). Accordingly, ATCi is equitably estopped from avoiding arbitration with Federal when the claim stems from the same contractual obligation ATCi is relying on to make a claim against the Bond. *See Armas*, 842 So. 2d at 212 (citing *In re Humana*, 285 F.3d at 971) ("[The P]urpose of the equitable estoppel doctrine is to prevent a plaintiff from relying on a contract when it works to his advantage and repudiating it when it works to his disadvantage by requiring arbitration." (alteration added)).[7]

[7] In its Reply, Defendant argues Plaintiff is equitably estopped from avoiding arbitration based on "substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." (Reply 2 (quoting *MS Dealer*, 177 F.3d at 947)). The Court is not convinced Plaintiff's allegations of nonpayment amount to "interdependent and concerted misconduct" by Federal and ATCi; however, it is not necessary for the Court to reach this issue. As discussed, equitable estoppel applies based on ATCi's reliance on the JCI-ATCi Subcontract to make its claim against Federal under the Bond.

B. Scope of the Arbitration Agreement

Plaintiff also argues the Bond claim does not fall with the scope of the Arbitration Agreement. (*See* Resp. 5–6). The extent of Plaintiff's argument is that neither Federal, nor the Bond, nor the term "surety" is mentioned in the Arbitration Agreement. (*See id.*). But, as discussed, equitable estoppel allows enforcement of the Arbitration Agreement even absent these terms. What is more, the Arbitration Agreement is very broad:

> If **any** dispute shall arise between Subcontractor and Contractor in connection with this Subcontract, the parties shall promptly attempt in good faith to settle the same by negotiation. . . . **All** disputes not settled by negotiation or mediation . . . **shall** be submitted to arbitration . . . .

(JCI-ATCI Subcontract 10, section 6.6 "**Disputes**") (alterations and emphasis added).

Nonpayment under the JCI-ATCi Subcontract certainly falls within this broad arbitration provision, and a claim against the Bond based on this nonpayment, therefore, also falls within its scope. The presumption of arbitrability under the FAA is "particularly applicable" where the arbitration provision in question is very broad, and this presumption may only be overcome by "the most forceful evidence." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 585 (1960)). Plaintiff has not met this burden, and the Court finds Plaintiff's claim falls within the scope of the Arbitration Agreement.

C. Lack of Ongoing Arbitration and Staying the Proceedings

Finally, Plaintiff argues the "only time a court may properly compel arbitration where a subcontractor sues a payment bond surety and there is no arbitration provision in the bond or the incorporated contract is when there is **already an initiated arbitration** between the subcontractor and contractor pursuant to the terms of their contract." (Resp. 9 (emphasis in original)). Plaintiff cites no legal authority for this position, and the Court has found none.

Instead, Plaintiff cites cases permitting litigation stays where there is an ongoing arbitration between the contractor and subcontractor. (*See id.*) Plaintiff's cases are inapposite, as none addresses compelling arbitration. Federal is entitled to compel arbitration based on equitable estoppel, which does not require an already initiated arbitration.

ATCi is, however, entitled to a stay of this litigation rather than dismissal.[8] *See* 9 U.S.C. § 3 ("[T]he court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ." (alterations added)). According to the parties, the Bond is a common law payment bond or private bond, not a statutorily required bond on a public project. (*See* Compl. ¶ 9; Mot. 1; Resp. 1–2). Private bonds are still governed by Florida statute where the bonds' purpose is to protect an owner and the owner's real property from liens. *See Houdaille Indus., Inc. v. United Bonding Ins. Co.*, 453 F.2d 1048, 1052 (5th Cir. 1972) (holding where "surety on private construction work issues a bond that purports to protect against mechanics' liens it must be construed and applied in accordance with the conditions and provisions of [Fla. Stat.] § 713.23" (alteration added)). By filing suit against Federal on the Bond, ATCi has tolled the statute of limitations set out in section 713.23 and the limitations period provided for in the Bond. *See Kidder Elec. of Florida, Inc. v. U.S. Fid. & Guar. Co.*, 530 So. 2d 475, 476–77 (Fla. 5th DCA 1988) (staying bond litigation pending arbitration to "permit the subcontractor to toll the statute of limitations on its cause of action on the bond"); *see also*

[8] Although Federal titles its Motion as a Motion to Dismiss or in the Alternative, to Stay . . . , Federal never provides legal support for, and never even discusses, dismissal in the text of its argument. (*See generally* Mot.).

Fla. Stat. § 713.23(1)(e) (providing limitations period); (Bond ¶ 3(b) (same)). To avoid unnecessary litigation, the Bond litigation is stayed pending arbitration. *See* 9 U.S.C. § 3.

IV. CONCLUSION

For the foregoing reasons, it is herby

ORDERED AND ADJUDGED that the Motion **[ECF No. 26]** is **GRANTED in part** as follows:

1. Arbitration of Plaintiff, ATCi Communications, Inc.'s claim against Defendant, Federal Insurance Company is compelled in accordance with the JCI-ATCi Subcontract and the FAA.
2. This case is **STAYED** pending arbitration.
3. The Clerk is directed to **administratively CLOSE** this case. All pending motions are **DENIED as moot**.

DONE AND ORDERED in Miami, Florida, this 26th day of October, 2016.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT COURT JUDGE

cc: counsel of record