IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RELIABLE ENERGY SOLUTIONS, Plaintiff, V. AMALFI APARTMENT CORPORATION, ET AL., Defendants.	§ § § § § § § § § §	CIVIL ACTION NO. 4:16-cv-03346

MEMORANDUM AND RECOMMENDATION

Before the Magistrate Judge upon referral from the District Judge is Defendant Tremar Management, LLC's ("Tremar") Motion to Dismiss or, Alternatively, to Compel Arbitration and Stay Action Pending Arbitration (Document No. 6). Having considered the motion, the responses and additional briefing, the claims at issue in this case against Defendants Tremar and Amalfi Apartment Corporation ("Amalfi"), the contract between Reliable Energy Solutions ("Reliable") and Tremar that contained an arbitration provision, the contract between Tremar and Amalfi that contained an arbitration provision, and the applicable law, the Magistrate Judge RECOMMENDS, for the reasons set forth below, that Defendant Tremar's Motion to Compel Arbitration be GRANTED, and that this action be stayed and abated pending completion of arbitration.

I. Background

This is a contract dispute based on Reliable's allegations that Tremar refused to pay the money owed from a contractor agreement (the "Agreement") for the retrofitting and upgrading of lighting fixtures in an apartment complex owned by Amalfi. Prior to forming the contract at issue, Amalfi and Tremar formed a general contractor agreement for various renovations and

installations at said property. The contract at issue is what is commonly understood as a subcontractor agreement. It was formed subsequent to, and in fulfillment of, the general contractor agreement. The case was initially filed in state court, and timely removed by Defendants to this Court on the basis of diversity jurisdiction. Tremar filed a prompt Motion to Dismiss or, Alternatively, to Compel Arbitration and Stay Action Pending Arbitration, based on the arbitration provision in the Agreement at issue. Reliable is not opposed to arbitration, but Amalfi is.

Tremar argues in the Motion to Dismiss or, Alternatively, to Compel Arbitration and Stay Action Pending Arbitration that the arbitration provision in the Agreement signed by Reliable requires arbitration of all of Reliable's claims against it. That arbitration provision states in relevant part:

> "Article XXI. Arbitration.
>
> A. All claims, disputes and other matters in question arising out of or relating to the contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . unless the parties mutually agree otherwise.
>
> B. Except by written consent of the person or entity to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder, or in any other manner, any person or entity not a party to the Agreement under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that:
>
> a. Such person or entity is substantially involved in a common question of fact or law;
>
> b. The presence of such person or entity is required if complete relief is to be accorded in the arbitration;
>
> ...
>
> E. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with the applicable law in any court having jurisdiction thereof."

(Document No. 1-3 at 5). Amalfi, in response to Defendant Tremar's Motion to Dismiss and Compel Arbitration, maintains that it is not bound by the arbitration provision in the Agreement because it is not a signatory to the Agreement.

II. Arbitration

"[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

The Federal Arbitration Act ("FAA") governs arbitration agreements in contracts involving commerce. Under section 2 of the FAA,

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the 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 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, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. The FAA represents a "congressional declaration of a liberal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 103 S. Ct. 927, 941 (1983); *see also Buckeye Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006) (citing 9 U.S.C. §§ 1-16), with its central purpose being to ensure "'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1214 (1995) (quoting *Volt Information Sciences, Inc. v. Board Trustees of Leland Stanford Junior Univ.*, 109 S. Ct. 1248, 1256 (1989)).

In the Fifth Circuit, a two-prong inquiry is used to determine whether parties should be compelled to arbitrate their disputes. *OPE International LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 445-46 (5th Cir. 2001); *Webb v. Investacorp., Inc.*, 89 F.3d 252, 257-58 (5th Cir. 1996). The first prong requires the court to determine to determine whether "the parties agreed to arbitrate their dispute." *OPE*, 258 F.3d at 445; *see also Kaplan*, 115 S. Ct. 1920, 1924 (1995); *Webb*, 89 F.3d at 258 (citing cases). Two considerations guide the court in making this determination: (1) whether a valid agreement to arbitrate exists between the parties; and (2) whether the dispute in question is within the scope of the arbitration agreement. *Id.* Under the second prong, the court must ensure that no legal restraints external to the agreement have foreclosed arbitration. *Id.* at 446. If the court finds that both prongs of this test are met, arbitration is mandatory. *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

In determining whether there is a valid agreement to arbitrate, the court must consider the language of the contract entered into by the parties. *Commerce Part at DFW Freeport v. Mardian Constr. Co.*, 729 F.2d 334, 338 (5th Cir. 1984). And, "[s]ince arbitration agreements are matters of contract, the validity and scope of such an agreement are governed by state law." *Gonzales v. Brand Energy & Infrastructure Services, Inc.*, No. H12-1718, 2013 WL 1188136 (S.D. Tex. 2013); *see also Kaplan*, 514 U.S. at 944 ("When 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."); *Klein v. Nabors Drilling USA, L.P.*, 710 F.3d 234, 236 (5th Cir. 2013) ("whether there is a valid agreement to arbitrate . . . is governed by ordinary state-law contract principles.").

In determining whether the dispute in question falls within the scope of the arbitration agreement, again, it is state law contract rules that govern. *Tittle v. Enron Corp.*, 463 F.3d 410, 419 (5th Cir. 2006) (in determining the scope of the arbitration clause, the court is to "apply Texas rules of contract interpretation"). But, where there are any doubts or ambiguities as to scope of the arbitration provision, they are ordinarily resolved in favor of arbitration. *Klein*, 710 F.3d at 236-37 ("It is only in step two of the analysis, determining the scope of a valid arbitration agreement, that we apply the federal policy and resolve ambiguities in favor of arbitration."); *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 37 (5th Cir. 1990); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 752 (5th Cir. 1995); *Mar-Len of La., Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 & 636 (5th Cir. 1985) ("[W]henever the scope of an arbitration clause is fairly debatable or reasonably in doubt, the court should decide the question of construction in favor of arbitration." "The weight of this presumption is heavy."). Consequently, "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.'" *Personal Security & Safety Systems, Inc. v. Motorola, Inc.*, 297 F.3d 388, 392 (5th Cir. 2002) (quoting *Neal*, 918 F.2d at 37)).

III. Discussion

A. There is an agreement to arbitrate.

Here, the arbitration provision at issue is contained in the Agreement signed by Reliable (Document No. 1-3 at 5). The signature, coupled with the Terms and Conditions containing the arbitration provision, renders the arbitration provision a valid "agreement" to arbitrate. In addition, because Reliable's claims against Defendants Tremar and Amalfi in this case – for breach of contract, quantum meruit, and unjust enrichment – all relate to the nature and quality of the goods

and services that formed the basis for the Agreement, and any representations made in connection therewith, the dispute at issue herein falls within the scope of the arbitration provision. In this case, the parties do not dispute whether there is a valid arbitration agreement. However, the parties do dispute whether Amalfi, a non-signatory to the Agreement, is bound by the arbitration provision. The Court finds Amalfi's defense to arbitration – that it is not bound by the provision – to be without merit.

"In order to be subject to arbitral jurisdiction, a party must generally be a signatory to a contract containing an arbitration clause." *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 353 (5th Cir. 2003). Exceptions to this apply "only in rare circumstances." *Westmoreland v. Sadoux*, 299 F.3d 462, 465. Deciding "[w]ho is actually bound by an arbitration agreement is a function of the intent of the parties, as expressed in the terms of the agreement." *Bridas*, 345 F.3d at 355.

While it is clear that Amalfi is not a signatory to the Agreement, it is also clear that Amalfi was an intended third-party beneficiary of the Agreement. "[F]ederal courts have held that so long as there is *some* written agreement to arbitrate, a third party may be bound to submit to arbitration. Ordinary principles of contract and agency law may be called upon to bind a non-signatory to an agreement whose terms have not clearly done so." *Id.* at 355-56. "[T]hird-party beneficiary status does not permit the avoidance of contractual provisions otherwise enforceable." *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 202-04 (3rd Cir. 1983), *overruled on other grounds by Lauro Lines v. Chasser*, 490 U.S. 495, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989).

In order to determine whether a party is a third-party beneficiary, a court "must look to the intentions of the parties at the time the contract was executed." *E.I. DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F.3d at 200 n. 7. The contract evinces

a third-party beneficiary when (a) the contracting parties must have intended that the third-party beneficiary benefit from the contract, (b) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (c) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract. *Id.* at 196 (following *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1386 (1990)).

In the instant case, the Agreement refers to three parties: the "Contractor" (Defendant Tremar), the "Subcontractor" (Plaintiff Reliable), and the "Owner". The Agreement makes special mention of the "Owner" in multiple provisions of the contract – albeit not in the Arbitration provision, but in the Articles concerning Contract Sum, Final Payment, Indemnification, and Warranty (Document No. 1-3 at 1-4). Having signed at the end of all these provisions, it is beyond dispute that both signatories to the Agreement were aware at formation that another party stood to benefit from the contract's performance. Moreover, on the first page of the Agreement, where the signatory parties are first defined, it is clear that the Agreement is "For the Project known as Lighting Retrofit at The Amalfi (address included)" (*Id.* at 1). The language in the Agreement that refers to Tremar as the "Contractor" presumes that the Agreement is for the satisfaction of a pre-existing obligation on the part of Tremar to the "Owner." Clearly, the Agreement would not be in existence but for the contractor agreement made between Amalfi and Tremar, signed in February of 2015 (Document No. 11-2 at 5). Furthermore, that a contractor such as Tremar entered into a subcontract like the one before the Court should come as no surprise to Amalfi. These types of agreements and subcontractor relationships should be nothing new to a business entity with multiple properties across a number of states. Bearing in mind the language of the Agreement, the intention of the parties, and the nature of the contractual relationship, it follows that Defendant Amalfi is a third-party beneficiary to the subcontractor Agreement between Reliable and Tremar.

Amalfi, in its Supplemental Response, relies on the analysis that the Supreme Court of Texas used in *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732 (Tex. 2005), where it denied a motion to compel arbitration as applied to a non-signatory subcontractor. Although there are similar facts, there are a few key distinctions to be made from the case at hand. First, in *Kellogg* it was the subcontractor plaintiff that wanted to avoid arbitration, as opposed to the defendant who was brought into court, like Amalfi. *Id.* at 734. To address the defendants' argument for arbitration, the Court analyzed the facts under the Direct Benefits Estoppel theory, in which a non-signatory can be bound by an arbitration provision found within a contract which it seeks to benefit. *Id.* at 739. However, the subcontractor sought to enforce a contract that lacked an arbitration provision, not the defendants' contract, which they hoped would bind the plaintiff. *Id.* It is under this theory that the motion was denied, but there are other theories which can bind a non-signatory that the Court in *Kellogg* did not need reach. Additionally, the party avoiding arbitration in *Kellogg* was not a signatory to *any* contract containing an arbitration provision within the context of the contractual relationships of the case. *Id.* at 734. Contrast this with the fact that Amalfi, while a non-signatory to the contract at issue, is a signatory to an arbitration agreement with Tremar. This distinction lies at the heart of the FAA, which "generally 'does not require parties to arbitrate when they have not agreed to do so.'" *Id.* at 738 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. Of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). Without a viable alternative theory by which to bind the non-signatory, the Court was obligated by basic contract principles to deny the motion to compel the subcontractor to arbitrate. *Kellogg*, 166 S.W.3d at 738-41.

B. The dispute falls within the scope of the arbitration agreement.

Amalfi also argues that the claims against it, for quantum meruit and unjust enrichment, are extraneous to the Agreement, and therefore arbitration for those claims is unavailable. It is true that quantum meruit is an action independent of any contract, based on an *implied* agreement to pay for benefits rendered and knowingly accepted. *City of Corpus Christi v. Heldenfels Bros., Inc.*, 802 S.W.2d 35 (Tex. App.—Corpus Christi 1990), *aff'd*, 832 S.W.2d 39 (Tex. 1992) (emphasis added). However, the fact that it is based on an implied agreement supports going to arbitration in that the nature of the claim is another logical outgrowth of the contractual relationship between all three parties.

Tremar argues in its Reply that the claims raised in this suit involve a common question of law and fact such that if Reliable's claims against Tremar are to be resolved in arbitration, then so should the claims against Amalfi. We agree. The 5th Circuit has adopted the intertwined-claims test developed by the 11th Circuit, where a party can be estopped from avoiding arbitration "when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000) (quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)). Deciding whether the claims are so intertwined is dependent upon the facts and it is up to the discretion of the District Court. *Id.* The Agreement for retrofitting and upgrading light fixtures entailed the performance of a service directly onto the property owned by Amalfi. There is no daylight between the performance of Reliable and the intended benefit to Amalfi. In order to resolve the dispute in arbitration, all three parties must be present.

III. Conclusion and Recommendation

Based on the foregoing and the conclusion that there is a binding agreement to arbitrate between Plaintiff and Defendant Tremar, and that the claims asserted by Plaintiff herein against Defendants Tremar and Amalfi fall within the terms of that agreement to arbitrate, it is

RECOMMENDED that Defendant Tremar's Motion to Compel Arbitration (Document No. 6) be GRANTED and that the claims of Plaintiff against Defendants Tremar and Amalfi be ABATED, without prejudice, from this suit, in favor of being asserted and pursued in an arbitration proceeding pursuant to the terms for such in the Agreement.

The Clerk shall file this instrument and provide a copy to all counsel and unrepresented parties of record. Within fourteen (14) days after being served with a copy, any party may file written objections pursuant to 28 U.S.C. § 636(b)(1)(C), FED. R. CIV. P. 72(b), and General Order 80-5, S.D. Texas. Failure to file objections within such period shall bar an aggrieved party from attacking factual findings on appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Ware v. King*, 694 F.2d 89 (5th Cir. 1982), *cert. denied*, 461 U.S. 930 (1983); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (en banc). Moreover, absent plain error, failure to file objections within the fourteen day period bars an aggrieved party from attacking conclusions of law on appeal. *Douglas v. United Services Automobile Association*, 79 F.3d 1415, 1429 (5th Cir. 1996). The original of any written objections shall be filed with the United States District Clerk.

Signed at Houston, Texas, this 30th day of June, 2017.

FRANCES H. STACY
UNITED STATES MAGISTRATE JUDGE