NOT FOR CITATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CROSS LINK, INC. DBA WESTAR MARINE SERVICES,

Petitioner,

v.

SALT RIVER CONSTRUCTION CORPORATION,

Respondent.

Case No. 16-cv-05412-JSW

ORDER GRANTING PETITION TO CONFIRM ARBITRATION AWARD

Re: Dkt. No. 1

Now before the Court for consideration is the Petition to Confirm Arbitration Award filed by Cross Link., Inc. d/b/a Westar Marine Services ("Petitioner"). The Court has considered the parties' papers, relevant legal authority, and the record in this case. For the reasons set forth in this Order, the Court HEREBY GRANTS the Petition.[1]

BACKGROUND

On or about November 11, 2011, Petitioner and Respondent Salt River Construction Corporation ("Respondent") executed a contract, pursuant to which Petitioner agreed to provide "Vessel(s) to tow [Respondent's] vessel(s) as requested by [Respondent] on a call out basis (subject to Vessel availability)." (Petition, Ex. 2 ("Services Agreement").) The Services

[1] On December 9, 2016, the Court issued an order to show cause why this case should not be stayed pending a state court proceeding discussed later in this Order. (Dkt. No. 23.) The Court has considered the parties' papers on that issue. It also reviewed the state court docket, which shows the state court has deferred setting a trial date pending a resolution of this Petition. The Court has considered the factors relevant to a stay under *Landis v. North American Co.*, 299 U.S. 248 (1936), and it concludes that they do not weigh in favor of a stay. First, as noted, the state court has deferred setting a trial date until the Court issues a ruling in this case. Second, it is not clear that a ruling from the state court would simplify the issues in this case. Accordingly, the Court declines to exercise its discretion to stay this case in favor of the state court proceedings.

Agreement does not contain any provisions regarding its duration. Petitioner asserts that Respondent breached the terms of the Services Agreement by failing to pay it "in accordance with the terms of the" Services Agreement and failed to "pay any of the [Petitioner's] invoices or otherwise compensate [Petitioner] for any services rendered during 2014."[2] (Petition, ¶ 6 at 4:2-3, 4:10-12 (emphasis in original); *see also id.*, Ex. 3, Final Award of Arbitration ("Final Award") at 2 (noting that services at issue were provided in 2014).)

The Services Agreement contains an arbitration clause, which provides, in part, as follows:

> In the event of any dispute whatsoever between the parties, they shall exhaust every effort to settle or dispose of the same.
>
> Any controversy or claim arising out of or relative to this agreement or breach hereof not disposed of under the previous paragraph within fourteen (14) days from the written notice of a part[y] to the other of its request for a resolution under this dispute clause shall be settled by arbitration administered by the American Arbitration Association ["AAA"] under its Construction Industry Rules, and judgment upon the award rendered by the arbitrator(s) may be entered into any court having jurisdiction.

(Services Agreement, § 15.)

The Services Agreement also contains an integration clause, which provides "[t]his agreement constitutes the entire agreement between the parties with respect to matters addressed herein and expressly supersedes all prior and contemporaneous negotiations, communications, understandings and agreements, whether written or oral. This agreement shall not be modified or amended except through a writing signed by both parties." (*Id.* § 17.)

Petitioner demanded arbitration on or about September 25, 2015. (Final Award at 1.) According to the record, "[o]n November 11, 2015, Respondent advised the AAA and Claimant that the parties' dispute was not governed by [the Services Agreement] and thus Respondent had not agreed to AAA arbitration." (*Id.*) On December 23, 2015, the arbitrator conducted a preliminary hearing, which Respondent attended. From what the Court can glean from the record, the arbitrator issued a Preliminary Hearing Order and directed Respondent to provide evidence of a second contract by January 26, 2016, a date the arbitrator later extended to February 23, 2016.

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[2] Petitioner also asserts that Respondent breached the Services Agreement by failing to exhaust efforts to settle and by failing to participate in arbitration.

(Petition, Ex. 6, Email string at 2-3.) The record also shows that the arbitrator raised the issue of whether it had jurisdiction to decide the contract questions. (*Id.* at 3.) Petitioner advised the arbitrator that it believed it had jurisdiction to do so. (*Id.* at 3-4.)

On December 29, 2015, Respondent filed a complaint in Marin County Superior Court, and it filed an amended complaint on February 19, 2016 (the "state court litigation"). (Dkt. No. 20, Opp. Br., Ex. B, *Salt River Construction Corp. v. Cross Link, Inc.*, No. 1504626, First Amended Complaint ("FAC").) There, Respondent alleged that it "entered into a verbal and written contract with [Petitioner] in May of 2014 for [Petitioner] to provide tug boat services to [Respondent] on three public projects[.]" (FAC ¶ 5; *see id.* ¶¶ 6-8 (alleging agreements regarding rates)). Respondent alleged that Petitioner failed to provide services on the projects, and it asserted claims for breach of contract and for indemnification. Respondent also alleged the Services Agreement had expired, and it sought a declaration that the work performed in 2014 was "governed by the agreement formed in May, July, and August of 2014, not the expired agreement of November 2011." (FAC ¶ 22; *see also id.* ¶ 14.) In its opposition, Respondent argues that the contract the parties allegedly formed in 2014 "was memorialized in a series of emails and also via oral communications between the parties." (Opp. Br. at 1:13-14.)

On December 31, 2015, Respondent sent a letter to the arbitrator and the AAA, in which it stated that it continued to object "to jurisdiction by AAA and proceeding in this forum." (Opp. Br., Ex. A, Letter dated 12/31/2015 at 1.) Respondent maintained "that it did not agree to arbitration of its claims, and did not agree that the question of arbitrability was further submitted to arbitration, and the question is reserved to the courts." (*Id.*) On February 9, 2016, the arbitrator sent an email to counsel in which it stated that it would proceed with the arbitration, "unless a court stays the proceedings." (Email string at 2.) The arbitrator also advised the parties that "[i]f Respondent does not submit documents comprising the contract it believes to govern the dispute …, the arbitrator will have no recourse but to declare [Petitioner's] contract to be controlling." (*Id.*)

On April 18, 2016, the arbitrator issued the Final Award in favor of Petitioner. As set forth in that award, Respondent did not provide the arbitrator with any further information about the

alleged second contract, and it declined to participate in the arbitration proceedings. (*Id.* at 1-2.) The arbitrator found Respondent breached the Services Agreement and awarded relief in the amount of "$244,804.73 plus legal costs and fees incurred subsequent to the evidentiary hearing, according to proof." (Petition, ¶ 9; Final Award at 3.) The award was served on Petitioner and Respondent on May 23, 2016. (Petition, ¶ 10.)

Respondent objected to the award and requested that the arbitrator withdraw it on the basis that the arbitrator lacked jurisdiction over the dispute. (Petition, Ex. 1, Ruling of Arbitrator on Claimant's Request to Modify Award and Respondent's Objection to Award ("Mod. Order").) The arbitrator denied that request and stated:

> Respondent reiterates the basis on which it has previously objected to this arbitration going forward. In summary, it cites California cases that reserve to the court the jurisdiction to determine the arbitrability of a case. However, what distinguishes this case is that no specific facts have been alleged, let alone documents supporting those facts, that constitute a contract on which Respondent says governs the work which is the subject of the disputes between the parties. There is no case of which the arbitrator is aware that deprives an arbitrator from asserting jurisdiction where there is not even a colorable claim of a contract that would exist instead of the clear written contract that on its face covers the scope and the duration of the work.

(Mod. Order at 2.)

The Court shall address additional facts as necessary in the analysis.

ANALYSIS

A. The Court Grants the Petition.

Petitioner moves to confirm the arbitration award, pursuant to Section 9 of the Federal Arbitration Act ("FAA"). Section 9 states "at any time within one year after [an] award is made any party may apply to the court . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected." 9 U.S.C. § 9. Unless clear statutory grounds exist for vacating an award, a court must grant the motion to confirm. *Id.* "These grounds afford an extremely limited review authority, a limitation that is designed to preserve due process but not to permit unnecessary public intrusion into private arbitration matters." *Kyocera Corp. v. Prudential Bache Trade Servs.*, 341 F.3d 987, 998 (9th Cir.

2003); *see also G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1105 (9th Cir. 2003) (noting that courts "have interpreted sections 9 and 10 [of the FAA] narrowly.").

The issue before this Court is whether the arbitrator exceeded his powers when he went forward with the arbitration proceedings after Respondent asserted that the Services Agreement had expired and asserted there was no agreement to arbitrate. *See* 9 U.S.C. § 10(a)(4) (court may vacate an arbitration award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made"). "A party seeking relief under that provision bears a heavy burden." *Oxford Health Plans, LLC v. Sutter*, __ U.S. __, 133 S.Ct. 2064, 2068 (2013). A court cannot find an arbitrator exceeded his or her powers "when they merely interpret or apply the governing law incorrectly." *Kyocera*, 341 F.3d at 997. Rather, a court must uphold an arbitrator's decision unless it is "completely irrational …or exhibits a manifest disregard of law[.]" *Id.* (internal quotations and citations omitted). "The burden of establishing grounds for vacating an arbitration award is on the party seeking" to vacate that award. *U.S. Life Ins. Co. v. Superior Nat. Ins. Co.*, 591 F.3d 1167, 1172 (9th Cir. 2010).

When a court is faced with a motion to compel arbitration, it is required to decide two issues: (1) is there a valid agreement to arbitrate; and (2) do the parties' claims fall within the scope of that agreement. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967). Parties, however, may delegate gateway issues of arbitrability to the arbitrator, if they do so "clearly and unmistakably." *Rent-A-Center West., Inc. v. Jackson*, 561 U.S. 63, 69-70 & n.1 (2010); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-85 (2002); *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201, 1208-09 (9th Cir. 2016). Although parties may delegate questions of arbitrability to an arbitrator, under the FAA, "whether parties have agreed to submit a particular dispute to arbitration is typically an issue for judicial determination. … It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide." *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 296 (2010) (internal brackets, quotations, and citations omitted); *accord Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140-41 (9th Cir. 1991); *Bruni v. Didion*, 160 Cal. App.

4th 1272, 1284 (2008); *see also* 9 U.S.C. § 4 ("If the making of the arbitration agreement … be in issue, the court shall proceed summarily to the trial thereof.").

The Court finds guidance in *Camping Construction Co. v. District Council of Iron Workers*, 915 F.2d 1333 (9th Cir. 1990). In that case, which involved a labor agreement, the party opposing arbitration took the position that the agreement containing the arbitration clause had been terminated and, thus, the parties' dispute was not subject to arbitration. The Ninth Circuit held that "once it is found that a contract did exist at some time, the questions of whether that contract has expired, or has been terminated or repudiated, may well present arbitrable issues, depending upon the language of the agreed-upon arbitration clause." *Id.* at 1340. If the arbitration clause is broad enough, questions about termination may be arbitrable. *Id.* at 1339-40.

Respondent did not dispute the Services Agreement contained an arbitration provision, and it did not challenge the formation of that agreement or the arbitration clause contained therein, which distinguishes this case from *Three Valleys* and *Bruni*. Rather, Respondent took the position that the parties formed a new and different contract, which did not contain an arbitration provision. The arbitration clause in the Services Agreement provides that "[a]ny claim or controversy arising out of or relative to this agreement … shall be settled by arbitration[.]" (Services Agreement § 15.) The language "arising out of or relative to" has been construed broadly. *See, e.g., G.C. and K.B.*, 326 F.3d at 1104 (finding clause that "any claim, dispute, suit, action or proceeding arising out of or relating to this Agreement ... to binding arbitration" is broad).

In addition, the arbitration clause incorporated by reference the AAA Construction Industry Rules. Those rules provide, in part, that "[t]he arbitrator shall have 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." (Petition, Ex. 5, AAA Construction Industry Rule 9(a) (emphasis added).) Those rules also provide that "[u]nless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement." (AAA Construction Industry Rule 32.)

Although the issue is not entirely settled in the Ninth Circuit, it has noted that"[v]irtually every circuit to have considered the issue has determined that incorporation of the American

Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Oracle Amer., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (citing cases); *accord Rodriguez v. American Technologies, Inc.*, 136 Cal. App. 4th 1110, 1123 (2006) (finding parties "clearly evidenced their intention to accord the arbitrator the authority to determine issues of arbitrability" by incorporating AAA Construction Industry Rules into contract).

The Court also finds guidance in *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138 (7th Cir. 1985). In that case, the defendants were parties to an arbitration agreement with the plaintiff, received notice of the arbitration, and then refused to participate. *Id.* at 139. When the plaintiff petitioned to confirm the award, the defendants argued that the district court "should not have rejected, as too late, their offer to prove that they did not actually know about the arbitration clause." *Id.* The court affirmed the district court's decision to confirm the arbitration award. The court acknowledged that

> [n]o one should be forced into an arbitration without an opportunity to show that he never agreed to arbitrate the dispute that is the subject of the arbitration. The Rudells had that opportunity when they were notified of the arbitration, and they let it pass by. It was then too late for them to sit back and allow the arbitration to go forward, and only after it was all done, and enforcement was sought, say: oh by the way, we never agreed to the arbitration clause. That is a tactic that the law of arbitration, with its commitment to speed, will not tolerate.
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> This would be clear enough if the Rudells had actually participated in the arbitration without challenging the arbitrator's authority [until] the arbitration was completed and they had lost. … But, it may be asked, what concretely could the Rudells have done when they were notified of the arbitration, given that the arbitration clause allowed the arbitration to proceed in their absence. They might have brought suit to enjoin the arbitration. At the very least, they could have told the arbitrator that they did not recognize his authority to proceed, because they had not agreed to arbitration. That would have put the arbitrator and Comprehensive on notice that the arbitrator's jurisdiction was questioned. Comprehensive might then have moved under section 4 of the [FAA] for an order to arbitrate, and the Rudells would have gotten their day in court to challenge the existence of an agreement to arbitrate, before Comprehensive was put to the expense of the arbitration. If Comprehensive had not moved under section 4, but had gone ahead with the arbitration in the Rudell's absence, then the Rudells, having put Comprehensive on notice of their reservation, *might be allowed in the confirmation proceeding to litigate the question whether there was a valid*

agreement to arbitrate[.]

Id. at 140-41 (emphasis added).

When Petitioner initiated the arbitration proceedings, the arbitrator was presented with the Services Agreement, which contained a broadly drafted arbitration provision and which incorporated the AAA Construction Industry Rules. It is undisputed that Respondent raised the issue of jurisdiction to hear the dispute with the arbitrator. The arbitrator then provided Respondent with the opportunity to come forward with evidence to support its assertion that the arbitrator lacked jurisdiction over the dispute. Respondent declined to do so, apparently to preserve its objections to the arbitrator's authority. It is not clear, however, that presenting evidence to support the lack of jurisdiction would have resulted in a waiver of that issue. *See, e.g.*, *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006) ("Nagrampa forcefully objected to arbitrability at the outset of the dispute, never withdrew that objection, and did not proceed to arbitration on the *merits* of the contract claim.") (emphasis added); *see also Wools v. Superior Court*, 127 Cal. App. 4th 197, 204 n.3 (2005) (concluding party resisting arbitration did not waive arguments regarding arbitrator's authority to proceed by participating in proceedings when it moved for a stay and presented written objections to arbitrator, which were overruled); *National Marble Co. v. Bricklayers & Allied Craftsman*, 184 Cal. App. 3d 1057, 1064 (1986) (under California arbitration law, "[w]here an arbitration proceeding proceeds under a self-executing agreement, without a preliminary court order, the objecting party is required to participate in the proceeding and then raise his objections by a petition to vacate the award … or by opposition to a petition to confirm").[3]

Respondent also never moved to stay the arbitration, although the arbitrator stated a willingness to stay the proceedings if ordered by a court to do so. Therefore, the only contract

[3] To the extent Respondent argues Petitioner should have obtained an order compelling arbitration, the arbitration clause in the Services Agreement was self-executing. Therefore, Petitioner was not required to seek a court order before proceeding with arbitration. *See, e.g.*, *Greg Opinski Const., Inc. v. Braswell Const., Inc.*, No. 1:09-cv-00641-LJO GSA, 2009 WL 3789609, at *4 (E.D. Cal. Nov. 10, 2009); *see also National Marble*, 184 Cal. App. 3d at 1063-64.

before the arbitrator was the Services Agreement. The same is true here. Apart from the allegations in the FAC, Respondent has not provided this Court with evidence of the contract the parties allegedly entered in 2014. *Cf. Three Valleys*, 925 F.2d at 1141 (noting that "[o]nly when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement"); *Metter v. Uber Technologies, Inc.*, No. 16-cv-6552-RS, 2017 WL 1374579, at *4 (N.D. Cal. Apr. 17, 2017) (on motion to compel where plaintiff denied formation of arbitration provision, court noted that "a litigant … can[not] defeat a motion to compel arbitration simply by claiming he never saw [a] terms of service alert").

In light of these facts, and the authority discussed above, the Court concludes the arbitrator did not exceed his powers by exercising jurisdiction over the dispute and issuing the award in favor of Petitioner. Accordingly the Court GRANTS the Petition to confirm the arbitration award. The Court shall enter judgment in the amount of $244,804.73 plus legal costs sand fees incurred subsequent to the evidentiary hearing, according to proof.

IT IS SO ORDERED.

Dated: May 8, 2017

JEFFREY S. WHITE
United States District Judge