NOT FOR PRINTED PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

ULTRA LANE MANAGEMENT,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION No. 9:17-cv-76
v.	§	
	§	JUDGE RON CLARK
THOMAS MCKELLAR, et al.,	§	
	§	VSL
Defendants.	§	

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss Plaintiff's Original Petition, arguing that Plaintiff's claims are subject to a binding arbitration clause under direct benefits estoppel and intertwined claims estoppel. (Dkt. # 5). In fact, other claims by Plaintiff under the Agreement in question are currently in arbitration in Bienville Parish, Louisiana. The court finds that Plaintiff's tortious interference claim is subject to arbitration under direct benefits estoppel and that each of Plaintiff's claims are subject to arbitration under intertwined claims estoppel. The court dismisses Plaintiff's claims in this court with prejudice, as far as further pursuit of such claims in federal or state court actions, but without any intent to predetermine whether those claims can be added to the currently pending arbitration proceeding in Bienville Parish, Louisiana, or in another arbitration proceeding.

BACKGROUND

Plaintiff and nonparty Lanrick Contractors, LLC d/b/a Site-Prep ("Site-Prep") entered into a contract (the "Agreement"), effective October 7, 2015, whereby Ultra Lane agreed to provide to Site-Prep services including proper and safe removal of spent railroad ties at a site in Bienville Paris, Louisiana, and transportation of the spent ties to a site near Midlothian, Texas ("Midlothian

site"), in exchange for payment ("the project"). (Dkt. # 5-1, at p. 2). The Agreement also included a broadly worded arbitration clause.

Defendant 5 Point Industry Services, LLC ("5 Point") was the general contractor for the project but Site-Prep assumed the role of general contractor on behalf of 5 Point. Defendant McKeller was the President and Owner of Site-Prep and designated a substantial amount of the oversight and coordination to Defendants Craft and Walker. Plaintiff alleges that 5 Point and, by assumption of the responsibility, Site-Prep, agreed to pay for all materials and labor provided by Plaintiff for the project, while Plaintiff made the facility site ready and expended funds to transport materials for the Project.

Plaintiff alleges that on September 8, 2015, Defendants McKellar, Craft, and Walker met with Plaintiff's representatives and made representations to Plaintiff, including but not limited to (1) promising twenty-four hour operations six days a week at the receiving site for transportation, and (2) promising to acquire scale equipment for the project, so that Plaintiff would continue to pursue the project. Defendants McKellar, Craft, and Walker knowingly made the false promises to induce Plaintiff to enter into an agreement for services to complete the project. Defendants allegedly conspired to limit the ability of Plaintiff to complete the project and diverted funds intended for Plaintiff and eventually sought remedies to bar Plaintiff from finishing the project so that Defendants could assume the benefits of the Agreement and its funding of $1,300,000.00. Plaintiff also alleges that Defendants acted to defraud Plaintiff from the benefit of the bargain and tortuously interfered with the Agreement. Plaintiff alleges that based on the Agreement, it would have recovered a sum of $1,300,000.00 which included a profit of an amount not less than $250,000.00.

On April 5, 2016, Plaintiff filed suit against Site-Prep, 5 Point, and the Louisiana and Northwest Railroad Company, LLC in the Second Judicial District Court of Bienville Parish, Louisiana, alleging, among other things breach of contract and unjust enrichment (the "Bienville litigation"). Subsequently, Plaintiff agreed that the Bienville litigation should be stayed so that Plaintiff could commence an arbitration proceeding as mandated by the Contract. 5 Point and the Louisiana and Northwest Railroad Company, LLC were dismissed from the Bienville litigation or otherwise omitted from arbitration. No Defendant in the case currently before this court was named in the Bienville Parish proceedings or in the arbitration proceedings. The arbitration proceeding between Plaintiff and Site-Prep is ongoing.

On January 9, 2017, Plaintiff filed the instant lawsuit before this court. Plaintiff Ultra Lane Management sued Defendants Thomas McKellar, Jessie Craft, and Olivia Walker in the 159th Judicial District Court of Angelina County, Texas, alleging claims of conspiracy, tortious interference with contract, misrepresentation and fraud, and breach of fiduciary duty. (Dkt. # 7). On May 8, 2017, Defendants timely removed the action based on diversity of citizenship.

DISCUSSION

A motion to dismiss pursuant to Rule 12(b)(6) challenges a complaint on the basis that it fails to state a claim upon which relief may be granted. FED. R. CIV. P. 12(b)(6). Specifically, Defendants argue that Plaintiff's claims are subject to the arbitration clause in the Agreement, that Plaintiff has waived the claims by not raising them in the Bienville litigation or arbitration, and that therefore, Plaintiff's claims should be dismissed with prejudice.

Under the Federal Arbitration Act ("FAA"), "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . 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. The FAA "is a congressional declaration of liberal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also* 9 U.S.C. § 1, *et seq*.

The Fifth Circuit follows a two-step analysis to determine whether the parties have agreed to arbitrate a dispute. *JP Morgan Chase & Co. v. Conegie*, 492 F.3d 596, 598 (5th Cir. 2007). First, the court must determine whether the party agreed to arbitrate the dispute in question. *Id.* This step has "two considerations: (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." *JP Morgan Chase & Co.*, 492 F.3d at 598 (internal citations omitted) (citing *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003)). State law governs whether the parties formed a valid agreement to arbitrate. *JP Morgan Chase & Co.*, 492 F.3d at 598. "Accordingly, in determining whether the parties agreed to arbitrate a certain matter, courts apply the contract law of the particular state that governs the agreement." *Wash. Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004). The court must also "give due regard to the federal policy favoring arbitration, and it must resolve any ambiguities as to the scope of the arbitration clause itself in favor of arbitration." *Kershaw v. CB Rests., Inc.*, No. 5:15-CA-462-OLG, 2015 WL 12743609, at *1 (W.D. Tex. Aug. 6, 2015).

Under Texas law, "[t]he initial burden of establishing the existence of an arbitration agreement requires proof that the party seeking to enforce the agreement was a signatory to the agreement or otherwise had the right to enforce it." *Inland Sea, Inc. v. Castro*, 420 S.W.3d 55, 58 (Tex. App.—El Paso 2012, pet. denied). This burden falls on the person seeking to enforce the arbitration agreement. *VSR Fin. Servs., Inc. v. McLendon*, 409 S.W.3d 817, 827 (Tex. App.—Dallas 2013, no pet.).

Federal courts have recognized that equitable estoppel can be used by a nonsignatory seeking to compel a signatory to arbitration. *See, e.g., Hill v. GE Power Sys., Inc.*, 282 F.3d 343, 349 (5th Cir. 2002) (finding equitable estoppel "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"). The Texas Supreme Court has expressly recognized that the "direct-benefits" theory of equitable estoppel. *In re Merrill Lynch Tr. Co. FSB*, 235 S.W.3d 185, 192–94 (Tex. 2007). Additionally, the Fifth Circuit has made an *Erie* guess that the Texas Supreme Court would also recognize a theory of equitable estoppel known as "intertwined claims estoppel." *Hays v. HCA Holdings, Inc.*, 838 F.3d 605, 611 (5th Cir. 2016).

If the court determines that the parties agreed to arbitrate the dispute in question, then the court must determine "whether any federal statute or policy renders the claim nonarbitrable." *JP Morgan Chase & Co.*, 492 F.3d at 598.

I. Defendants can enforce arbitration under direct benefits estoppel and intertwined claims estoppel.

A. Direct Benefits Estoppel

Pursuant to direct benefits estoppel, a nonsignatory may estop a signatory claimant from denying the applicability of an arbitration provision in a contract when the claimant seeks a "direct benefit" from the contract. *Hays*, 838 F.3d at 609. "Whether a claim seeks a direct benefit from a contract containing an arbitration clause turns on the substance of the claim, not artful pleading." *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131 (Tex. 2005). "Direct benefits estoppel applies when the claim depends on the contract's existence and would be 'unable to stand independently without the contract.'" *Hays*, 838 F.3d at 609 (quoting *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 528 (Tex. 2015) (internal quotations and citation omitted)). Conversely,

"[w]hen the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law, rather than contract, direct benefits estoppel does not apply, even if the claim refers to or relates to the contract." *Hays*, 838 F.3d at 609 (quoting *G.T. Leach Builders, LLC*, 458 S.W.3d at 528) (internal quotations and citation omitted).

A tortious interference claim does not comfortably fit into either the category of claims in which liability arises from general obligations imposed by law, or the category of claims in which liability arises from contract. *See In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 761 (Tex. 2006); *see also Hays*, 838 F.3d at 609. The obligation not to interfere with existing contracts is imposed by law, but it is not imposed on the parties to that contract because a party cannot tortiously interfere with its own contract. *Id.* The Texas Supreme Court has held that "tortious interference claims between a signatory to an arbitration agreement and agents or affiliates of the other signatory arise more from the contract than general law, and thus fall on the arbitration side of the scale." *Id.* at 762. This is because (1) corporations must act through human agents, and every contract against a corporation could otherwise be recast as a tortious interference claim against its agents; and (2) "[w]hen contracting parties agree to arbitrate all disputes under . . . a contract, . . . they generally intend to include disputes about their agents' actions because as a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts." *Id.*

Here, Plaintiff brings a tortious interference claim against Defendants. Plaintiff alleges that Defendant McKellar is the president and owner of Site-Prep, a signatory to the Agreement. (Dkt. # 8, at p. 6). Plaintiff also alleges that Defendant McKellar delegated a substantial amount of the oversight and coordination of the Project to Defendants Craft and Walker. (Dkt. # 8, at p. 6). Based on Plaintiff's own allegations, Defendants McKellar, Craft, and Walker are therefore

agents of Site-Prep. Because Defendants McKellar, Craft, and Walker are agents of Site-Prep, they are not strangers to the Agreement between Plaintiff and Site-Prep and cannot be held liable for tortiously interfering with the contract. It appears to the court that Plaintiff repackaged a claim subject to arbitration as a claim for tortious interference. In other words, liability for Plaintiff's claim of "tortious interference," is grounded in the Agreement, not in tort, and Defendants, as nonsignatories, can enforce the arbitration clause in the Agreement as to Plaintiff's tortious interference claim, provided it falls within the scope of the clause.

B. Intertwined Claims Estoppel

A court compels arbitration under intertwined claims estoppel "when a nonsignatory defendant has a 'close relationship' with one of the signatories and the claims are 'intimately founded in and intertwined with the underlying contract obligations.'" *Hays*, 838 F.3d at 610 (quoting *Merrill Lynch*, 235 S.W.3d at 193–94) (internal citation and quotations omitted)). Intertwined claims estoppel "applies when there is a tight relatedness of the parties, contracts, and controversies." *Hays*, 838 F.3d at 610 (citing *JLM Indus. v. Stolt-Nielsen SA*, 387 F.3d 163, 177 (2d Cir. 2004) ("Our cases have recognized that under principles of estoppel, a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate a dispute where a careful review of the relationship among the parties, the contracts they have signed, and the issues that had arisen among them discloses that the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.") (internal quotations and citation omitted)). "Courts have employed [intertwined claims estoppel] to dismiss 'strategic pleading' that seeks to avoid arbitration." *Hays*, 838 F.3d at 610 (citing *Merrill Lynch*, 235 S.W.3d at 194).

Plaintiff's conspiracy, misrepresentation and fraud, breach of fiduciary duty, and tortious interference claims against Defendants are barred by intertwined claims estoppel. In the Bienville litigation, Plaintiff brought suit against Site-Prep, 5 Point, and the Louisiana and Northwest Railroad Company, LLC, for breach of contract and unjust enrichment, among other claims. Defendants state that in the Petition currently before the court, Plaintiff "has done little more than taken the meat of its original Bienville Parish District Court proceeding, swapped out . . . Site-Prep for the named Defendants in this matter, and recycled its argument for a third time." (Dkt. # 5, at p. 4). Plaintiff does not dispute this statement.

Plaintiff refers to Defendants McKellar, Craft, and Walker collectively throughout its Petition. Plaintiff's claims of conspiracy, misrepresentation and fraud, breach of fiduciary duty, and tortious interference against Site-Prep's agents are a strategic re-pleading of its breach of contract and unjust enrichment claims against Site-Prep. As agents of Site-Prep, Defendants McKellar, Craft, and Walker satisfy the requisite "close relationship" with Site-Prep, a signatory to the Agreement. *In re Merrill Lynch*, 235 S.W.3d at 193–94. Likewise, Plaintiff's claims against Defendants are "intimately founded in and intertwined with the underlying contract obligations." *Id.* In other words, in this lawsuit, Plaintiff has strategically sued Site-Prep's nonsignatory principals or agents for pulling the strings. *See, e.g., Santos v. Wincor Nixdorf, Inc.*, No. 1:16-cv-440 RP, 2016 WL 4435271, at *4 (W.D. Tex. Aug. 19, 2016). Plaintiff cannot avoid the Agreement's arbitration clause through this strategic pleading. Despite their status as nonsignatories, Defendants can enforce the arbitration clause against Plaintiff under a theory of intertwined claims estoppel, provided Plaintiff's claims fall within the scope of the clause.

II. Plaintiff's claims fall within the broad arbitration clause.

The Fifth Circuit "distinguishes between broad and narrow arbitration clauses." *Complaint of Hornbeck Offshore (1984) Corp.*, 981 F.2d 752, 754 (5th Cir. 1993). "[A]rbitration clauses containing the 'any dispute' language, such as the one presently before us, are of the broad type." *Id.* at 755. It is difficult to imagine broader language than ones including "any dispute" or "any and all disputes." *Id.*

The Agreement between Plaintiff and Site-Prep included the following arbitration clause.

> **11. ARBITRATION.** Any controversies or disputes arising out of or relating to this Contract shall be resolved by binding arbitration in accordance with the then-current Commercial Arbitration Rules of the American Arbitration Association. . . . The decision rendered by the arbitrator(s) shall be final and binding on the parties, and judgment may be entered in conformity with the decision in any Texas court having jurisdiction.

(Dkt. # 5-1, at p. 4). The arbitration clause at issue here references "[a]ny controversies or disputes arising out of relating to this Contract." (Dkt. # 5-1, at p. 4). Plaintiff's claims of conspiracy, fraud and misrepresentation, breach of fiduciary duty, and tortious interference fall within the scope of this broadly worded arbitration clause, especially when coupled with the federal and Texas policies favoring arbitration.

III. No federal statute or policy renders Plaintiff's claims nonarbitrable.

The court must also determine whether legal constraints external to the arbitration agreement, such as a federal statute or policy, forecloses arbitration of the relevant claims. Plaintiff offers no federal statute or policy reason that would render the instant claims nonarbitrable. Likewise, the court finds no federal statute or policy that would foreclose arbitration of Plaintiff's claims.

IV. Dismissal of this case is appropriate.

Defendants argue that Plaintiff's claims should be dismissed, because Plaintiff should have raised the claims in the Bienville litigation, and the claims are now barred by res judicata. Plaintiff's res judicata argument is premature as the arbitration related to the Bienville litigation is not yet completed.

However, the Fifth Circuit has held that "when *all* of the issues raised in the district court must be submitted to arbitration," dismissal of the claim may be proper. *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (emphasis added). Neither party presents a justification for a stay rather than a dismissal with prejudice. Retaining jurisdiction and staying the case would accomplish nothing. This court will not be involved in consideration of post-arbitration remedies, and the court will be taking no part of the arbitration or playing any role after arbitration is completed. The arbitrator can determine all the claims or issues, including whether Plaintiff has waived his right to arbitrate the claims that are the subject of this case.[1] *See Apache Bohai Corp., LDC v. Texaco China, B.V.*, 330 F.3d 307, 309 (5th Cir. 2003); *see also Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992). The court therefore finds that this case should be dismissed with prejudice, as far as further pursuit of such claims in federal or state court actions, but without any intent to predetermine whether those claims can be added to the currently pending arbitration proceeding in Bienville Parish, Louisiana, or in another arbitration proceeding.

[1] The FAA provides that when an issue in a lawsuit may be referred to arbitration, a federal district court must, "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." 9 U.S.C. § 3. No party in this case has requested a stay.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss (Dkt. # 5) is GRANTED; Plaintiff's claims are DISMISSED WITH PREJUDICE, as they are subject to arbitration.

The Case Management Conference set for July 7, 2017, at 9:00 AM, is CANCELLED.

So Ordered and Signed
Jun 30, 2017

Ron Clark, United States District Judge