

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

U.S. PIPELINING LLC,) CIVIL NO. 16-00132 HG-RLP
) *Consolidated with*
 Plaintiff,) CIVIL NO. 16-00518 HG-RLP
)
 vs.) ORDER DENYING US PIPELINING,
) LLC'S MOTION TO STAY ARBITRATION
 JOHNSON CONTROLS, INC., ET) AND GRANTING JOHNSON CONTROLS,
 AL.,) INC.'S COUNTERMOTION TO STAY
) JUDICIAL PROCEEDINGS
 Defendants.)
)
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 CURAFLO SERVICES, LLC,)
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 Plaintiff,)
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 vs.)
)
 U.S. PIPELINING LLC, ET AL.,)
)
 Defendants.)
 _____)

ORDER DENYING US PIPELINING, LLC'S MOTION TO STAY
ARBITRATION AND GRANTING JOHNSON CONTROLS, INC.'S
COUNTERMOTION TO STAY JUDICIAL PROCEEDINGS

Before the Court is US Pipelining, LLC's ("USP") Motion to Stay Arbitration, filed on August 23, 2017 ("Motion") and Johnson Controls, Inc.'s Countermotion to Stay Judicial Proceedings, filed on September 6, 2017 ("Counter Motion"). ECF Nos. 125, 136. Larry Wright filed an Opposition to the Motion and a Statement in Support of the Counter Motion on September 15, 2017. ECF Nos. 144, 145. Association of Apartment Owners of Ka'anapali Ali'i filed a Statement of No Position regarding the

Motion and a Qualified Statement of No Opposition to the Counter Motion, provided that the stay of judicial proceedings would apply to all parties and would not be imposed until after the pending dispositive motions are decided. ECF Nos. 146, 147. CuraFlo Services, LLC ("CuraFlo") filed a Statement of No Position regarding the Motion on September 15, 2017. ECF No. 148. Regarding the Counter Motion, CuraFlo filed a Statement on September 20, 2017, noting that the Counter Motion does not request a stay as to all parties and opposing any such stay. See ECF No. 155. In response to CuraFlo's Statement, Larry Wright filed a Statement in support of the Counter Motion and requesting that the entire case be stayed pending the resolution of the arbitration. ECF No. 160. USP filed its Reply in support of the Motion and Opposition to the Counter Motion on October 2, 2017. ECF No. 161.¹ Johnson Controls filed its Reply in support of the Counter Motion on October 10, 2017. ECF No. 176. The Court found these matters suitable for disposition without a hearing pursuant to Local Rule 7.2(d). ECF No. 127. After careful consideration of the Motion, Counter Motion, Statements, the supporting and opposing memoranda, declarations, and exhibits attached thereto, and the record established in this action, the

¹ Pursuant to Local Rule 7.9, USP's Opposition to the Counter Motion was due on September 20, 2017. Although USP provides no reason for its late filing, the Court will consider the untimely opposition for purposes of judicial efficiency.

Court DENIES the Motion and GRANTS the Counter Motion.

BACKGROUND

This consolidated action involves renovation work done at the Ka'anapali Ali'i condominium complex in Lahaina, Maui, Hawaii ("the Project"). Johnson Controls was the general contractor on the Project hired by the the Project's owner, the Association of Apartment Owners of Ka'anapali Ali'i ("Owners"). In April 2015, Johnson Controls and USP entered into a written subcontract for USP to perform pipeline repair and reconditioning work on the Project ("the Subcontract"). USP then hired CuraFlo to provide certain sub-subcontractor work. During the course of the renovation work at the Project, a dispute arose regarding USP's work. Johnson Controls refused to pay for all of the work performed.

On March 22, 2016, USP brought suit against Johnson Controls, the Owners, and Allana, Buick & Bers, Inc., the engineering company on the Project, alleging that the condition of the pipes that USP was subcontracted to rehabilitate was significantly worse than was represented and that Johnson Controls' actions caused delays and added costs. ECF No. 1 ¶¶ 36-51. USP alleges that the modified scope of the work required USP to hire other contractors to conduct specialized pipe cleaning work that USP was not capable of performing. Id. ¶¶ 52-55. USP alleges that Johnson Controls failed to honor

legitimate change orders and failed to make the required final payment of more than \$1.8 million. Id. ¶¶ 59-62. USP asserts claims for breach of contract, breach of the covenant of good faith and fair dealing, negligent and/or intentional misrepresentation, negligence, fraudulent concealment/deceit, and unjust enrichment. Id. ¶¶ 63-84.

CuraFlo brought suit against USP, Larry Wright, dba Sub Gallagher Investment Trust, who provided a payment and performance bond for certain work on the Project, and Patricia Moore, as Trustee of the Sub Gallagher Investment Trust. See Civil No. 16-00508 HG-RLP, Docket No. 54, First Amended Compl., ¶¶ 2-7, 34-36. CuraFlo alleges that it had a written agreement with USP to perform certain epoxy coating work for the Project. Id. ¶¶ 17-19. CuraFlo alleges that it completed the work, but USP refused to pay the \$243,000 owed to CuraFlo. Id. ¶¶ 30-32. CuraFlo asserts claims for breach of contract, joint and several liability under the bond, bad faith, breach of the covenant of good faith and fair dealing, unjust enrichment, quantum meruit, and fraud and/or negligent or intentional misrepresentation. Id. ¶¶ 42-91.

These two actions were consolidated by the Court on December 6, 2016. See ECF No. 81.

On July 13, 2017, Johnson Controls filed a demand for arbitration against USP and its surety, Sub Gallagher Investment

Trust. ECF No. 136-4. On August 7, 2017, USP filed an Answering Statement and Counterclaim, attaching its Complaint against Johnson Controls and submitting all disputes for resolution in the arbitration proceeding. ECF No. 136-5. On August 9, 2017, USP and Johnson Controls participated in an administrative conference with respect to the pending arbitration, at which time USP stated that it intended to file a motion to stay the arbitration and Johnson Controls stated that it intended to seek a stay of the litigation. ECF No. 136-2 ¶ 6. The present Motion and Counter Motion followed.

DISCUSSION

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., which applies to arbitration agreements in contracts involving transactions in interstate commerce, provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. The FAA provides that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); see also Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1217 (9th Cir. 2008) ("Congress enacted the FAA more than

eighty years ago to advance the federal policy favoring arbitration agreements."). In construing the terms of an arbitration agreement, the district court "appl[ies] general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration." Wagner v. Stratton Oakmont, Inc., 83 F.3d 1046, 1049 (9th Cir. 1996) (citation omitted). The Court is required to stay litigation pending arbitration if the issues involved are referable to arbitration. See 9 U.S.C. § 3.

Here, the parties do not dispute that the Subcontract requires arbitration of "any dispute . . . between Subcontractor and Contractor in connection with this Subcontract." See ECF No. 125-3 § 6.6. The Subcontract provides that disputes "shall be submitted to arbitration in accordance with the prevailing Construction Industry Rules of the American Arbitration Association." Id. The parties do not contest that the "dispute" between USP and Johnson Controls arises under the Subcontract. As such, the arbitration agreement "encompasses the dispute at issue." See Lifescan, Inc. v. Premier Diabetic Servs., Inc., 363 F.3d 1010, 1012 (9th Cir. 2004). The Subcontract provides for fast-track resolution of claims, without discovery, requiring the arbitrator to issue a scheduling order within three months after the demand for arbitration and to issue a decision within nine

months after the demand for arbitration. Id.

In the present Motion, USP argues that the arbitration proceedings initiated by Johnson Controls must be stayed because Johnson Controls waived its right to arbitrate. ECF No. 125. Conversely, Johnson Controls argues in its Counter Motion that this litigation must be stayed pending the resolution of the arbitration. ECF No. 136.

I. Johnson Controls Did Not Waive Its Right to Arbitration.

"A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." Hoffman Const. Co. of Oregon v. Active Erectors and Installers, Inc., 969 F.2d 796, 798 (9th Cir. 1992) (quoting Fisher v. A.G. Becker Paribas Incorporation, 791 F.2d 691, 694 (9th Cir. 1986)); see also Cty. of Haw. v. UNIDEV, LLC, 289 P.3d 1014, 1040 (Haw. Ct. App. 2012), *aff'd in relevant part*, 301 P.3d 588 (Haw. 2013). The Ninth Circuit has held that "waiver of the right to arbitration is disfavored because it is a contractual right, and thus any party arguing waiver of arbitration bears a heavy burden of proof." United States v. Park Place Assocs., Ltd., 563 F.3d 907, 921 (9th Cir. 2009) (citation omitted); see also UNIDEV, LLC, 289 P.3d at

1039 ("Due to the public policy encouraging arbitration as a means of settling differences, waiver of a contractual right to arbitration will not be lightly inferred.").

Here, there is no dispute that Johnson Controls had knowledge of an existing right to compel arbitration. As discussed in detail below, the Court finds that Johnson Controls did not waive its right to arbitration because its acts were not inconsistent with the right to arbitration and USP has not demonstrated prejudice resulting from the allegedly inconsistent acts.

A. Johnson Controls Did Not Act Inconsistently With Its Right to Arbitrate.

USP argues that Johnson Controls acted inconsistently with its right to arbitrate by moving for summary judgment on licensure grounds and by engaging in this litigation for more than a year before it demanded arbitration. ECF No. 161 at 6-12. A party's acts are inconsistent with the right to compel arbitration where the party makes a "conscious decision to continue to seek judicial judgment on the merits of the arbitrable claims." Van Ness Townhouses v. Mar Indus. Corp., 862 F.2d 754, 759 (9th Cir. 1988) (citation omitted); see also Shimote v. Vincent, 905 P.2d 71, 75 (Haw. Ct. App. 1995) (holding that the court must consider whether the party's actions were "completely inconsistent with any reliance on the right to

arbitration" in determining waiver). In determining whether waiver has occurred, "courts usually consider the amount of litigation, the time elapsed from the commencement of litigation to the request for arbitration, and the proximity of a trial date when arbitration is sought." Creative Telecomm., Inc. v. Breeden, 120 F. Supp. 2d 1225, 1233 (D. Haw. 1999).

First, the Court finds that Johnson Controls' filing of its motion for summary judgment was not inconsistent with its right to arbitration. As this court has held, a summary judgment motion "does not mandate a finding of waiver." See Creative Telecomm., Inc., 120 F. Supp. 2d at 1235 (D. Haw. 1999). Here, the motion for summary judgment was on the issue of state licensure. See ECF No. 25. It was not "on the merits of the arbitrable claims." See Van Ness Townhouses, 862 F.2d at 759. Because the motion for summary judgment challenged USP's right to bring the suit, the filing of the motion was not inconsistent with Johnson Controls' right to arbitration. See Ass'n of Apartment of Kukui Plaza v. Swinerton & Walberg Co., 705 P.2d 28, 36 (Haw. 1985) (citation omitted) (holding that the defendant's filing of two motions for summary judgment based on the plaintiff's failure to name correct defendant and a lack of contractual privity were not inconsistent with the defendant's right to arbitration).

Second, although Johnson Controls did not demand

arbitration until more than fifteen months after USP filed this action, the Court concludes that Johnson Controls' actions in this litigation were not completely inconsistent with the right to arbitrate under the facts of this case. Johnson Controls has consistently stated that USP's claims are subject to arbitration and that it retains the right to seek arbitration. In its Answer, Johnson Controls included as its third affirmative defense a statement that the claims against it were "subject to binding arbitration under the Subcontract" and that it "reserves the right to compel arbitration of said claims." ECF No. 18 at 14. In its Scheduling Conference Statement Johnson Controls stated that the "Subcontract contains a binding arbitration clause. In the near term, [Johnson Controls] intends to file a demand for arbitration of its claims against USP (and USP's surety), along with a motion to stay this action." ECF No. 60 at 2. USP acknowledged in its own Scheduling Conference Statement that its claims against Johnson Controls may proceed to arbitration. See ECF No. 59 at 4-5. Johnson Controls reiterated its position that it retained its right to seek arbitration in its Qualified Non-Opposition to USP's Motion to Consolidate. See ECF No. 75 at 2 (stating that Johnson Controls "has at all times intended, and has at all times clearly communicated its intent, to arbitrate its claims with USP."). Johnson Controls explains in its Counter Motion that it waited to begin the arbitration

process until July because of the ongoing nature of the claims at issue. See ECF No. 136-1 at 14. Based on Johnson Controls' consistent statements throughout this litigation that it intends to seek arbitration of USP's claims, the Court finds that Johnson Controls' decision to wait until July 2017 to demand arbitration was not inconsistent with its right to arbitrate.

B. USP Has Not Been Prejudiced By Johnson Controls' Actions.

USP argues that it has been prejudiced by Johnson Controls' actions in this litigation and delay in seeking arbitration. See ECF No. 161 at 12-19. First, the Court rejects USP's argument that it was prejudiced by Johnson Controls' choice to file a motion for summary judgment. Although the Court understands that USP devoted time and resources to defending the motion, as noted above, the motion for summary judgment did not involve the merits of the claims that are subject to arbitration.

Second, the Court finds that Johnson Controls' delay in seeking arbitration did not prejudice USP. As detailed above, USP has been on notice since Johnson Controls filed its Answer that it intended to seek arbitration of these claims. The fact that USP has been on notice weighs against a finding of prejudice for any delay in seeking arbitration. See Creative Telecomm., Inc., 120 F. Supp. 2d at 1234 (holding that the plaintiff's inclusion in its complaint and amended complaint of a reservation

of its right to arbitrate "put Defendant on notice of Plaintiff's desire to seek arbitration, and factors against Defendant claiming prejudice for Plaintiff's delay in filing the instant motion"). Although motions were filed related to CuraFlo's claims and related scheduling issues, see ECF Nos. 82, 98, 100, it appears that little happened in this case for several months after the Court issued its decision consolidating these cases in December 2016. Although this litigation has been pending for some time, trial is not set until February 2018, more than six months after Johnson Controls initiated arbitration. See ECF No. 116. Given these time frames, the Court finds that Johnson Controls' delay did not prejudice USP.

Third, the Court rejects USP's argument that it has been prejudiced because Johnson Controls has refused to provide discovery. ECF No. 161 at 12-13. According to USP, Johnson Controls refused to provide initial disclosures while USP and other parties did so. Id. at 13. Although the Subcontract provides that no discovery will be permitted in arbitration, USP has failed to demonstrate how it has been prejudiced by the very limited discovery that has taken place in this case. As USP concedes, Johnson Controls has refused to provide discovery. No motions to compel have been filed by any party in this action. It appears that the only discovery that USP has provided is its initial disclosures. In these circumstances, the Court finds that there has been no prejudice from the discovery conducted.

Finally, USP argues that it would be prejudiced if only some of the claims in this litigation are sent to arbitration and other claims proceed. See ECF No. 161 at 17-18. As discussed in detail below, the Court finds that it is appropriate to stay this entire action pending arbitration, which moots any argument regarding prejudice to USP that might have resulted from some claims proceeding in this litigation.

Based on the circumstances of this case, the Court finds that Johnson Controls did not waive its right to arbitration because its acts were not inconsistent with the right to arbitrate and there is no prejudice to USP. Accordingly, USP's Motion is DENIED. Given this finding, the Court must GRANT Johnson Controls' Counter Motion and stay the litigation of all claims between USP and Johnson Controls pending arbitration. See 9 U.S.C. § 3.

II. The Court Exercises Its Discretion to Stay All Proceedings.

As noted by the parties, an arbitration decision on the claims between USP and Johnson Controls will likely affect the outcome of the claims between the other parties in this consolidated action. See ECF No. 160 at 3; ECF No. 161 at 18-19. Although the Court appreciates CuraFlo's arguments regarding delay, see ECF No. 155, as noted above, the arbitration provision at issue calls for expedited proceedings, which lessens the likelihood of delay and any resulting prejudice to CuraFlo. Additionally, the Court finds that it will conserve judicial

resources to stay this entire consolidated action pending the outcome of the arbitration because there is a common nucleus of facts. See Moses H. Cone Mem. Hosp., 460 U.S. at 20-21, n.3 (1983) ("In some cases, of course, it may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration. That decision is one left to the district court . . . as a matter of its discretion to control its docket."). Because the most efficient course of action is for this Court to stay this case while arbitration between USP and Johnson Controls goes forward, the entire consolidated case is STAYED.

CONCLUSION

In accordance with the foregoing, US Pipelining, LLC's Motion to Stay Arbitration is DENIED and Johnson Controls, Inc.'s Countermotion to Stay Judicial Proceedings is GRANTED. This consolidated action is STAYED until the pending arbitration is resolved. No later than December 1, 2017, Johnson Controls, Inc. shall file a Status Report regarding the pending arbitration.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, OCTOBER 16, 2017.




Richard L. Puglisi
United States Magistrate Judge

U.S. PIPELINING LLC V. JOHNSON CONTROLS, INC., ET AL.; CIVIL NO. 16-00132 HG-RLP; ORDER DENYING US PIPELINING, LLC'S MOTION TO STAY ARBITRATION AND GRANTING JOHNSON CONTROLS, INC.'S COUNTERMOTION TO STAY JUDICIAL PROCEEDINGS