IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BECHTEL INFRASTRUCTURE CORP. and BECHTEL INFRASTRUCTURE & POWER CORP.,	:	
Plaintiffs,	:	CIVIL ACTION NO. 1:17-CV-1221-LMM
v.	:	
S&N COMMUNICATIONS, INC.,	:	
Defendant.	:	

ORDER

This case comes before the Court on Defendant's Motion to Stay [28]. After due consideration, the Court enters the following Order:

I. BACKGROUND

Plaintiffs filed this case on April 4, 2017, asserting claims for money damages and declaratory and injunctive relief arising from an alleged breach of contract. Dkt. No. [1] ¶ 1. Plaintiffs allege that on April 29, 2015, Plaintiff Bechtel Infrastructure Corporation ("BINFRA") formed a joint venture with Defendant for Defendant to work as a subcontractor for Plaintiff Bechtel Infrastructure and Power Corporation ("BIPC"). Id. ¶¶ 2, 14. At that time, BIPC was the primary

contractor hired by Google Fiber, Inc. to perform work in Atlanta, Charlotte, and Raleigh-Durham for its "Fiber to Home" project, a major plan to install the infrastructure for hyper-speed Internet access. Id. ¶¶ 2, 13.

Plaintiffs contend that the parties operated within the joint venture throughout the remainder of 2015 and much of 2016. Id. ¶ 14. However, Plaintiffs allege that in the fall of 2016, Defendant reported trouble managing its resources and believed it could be more efficient if it focused only on the Raleigh-Durham market. Id. ¶ 15. According to Plaintiffs, Defendant proposed dissolving the joint venture and becoming a stand-alone subcontractor for BIPC in Raleigh-Durham. Id. Plaintiffs agreed. Id.

As a result of this agreement, Plaintiffs claim that the parties executed several contracts winding up the joint venture's operations and resolving all outstanding claims. Id. ¶¶ 3, 15. Those alleged contracts include: (1) the Joint Venture Amendment, Termination and Transition Agreement; and (2) the Global Settlement and Release Agreement (the "Termination Contracts"). Id. ¶ 4.

Plaintiffs allege that, under the Joint Venture Amendment, Defendant was to become a subcontractor for BIPC in the Raleigh-Durham market and BINFRA was to become a subcontractor for BIPC in the Atlanta and Charlotte markets. Id. That agreement, according to Plaintiffs, became effective December 22, 2016. Id. ¶ 16.

Plaintiffs contend that, under the Release Agreement, the parties agreed to a general release of claims against each other arising from the joint venture,

effective December 31, 2017. Id. ¶ 17. Under this agreement, BIPC made an initial payment of $2 million to Defendant on December 30, 2016. Id. ¶ 18. However, Plaintiffs allege that, after this initial payment, BIPC "reluctantly" paid Defendant an additional $2,639,491.61 on January 31, 2017, based on Defendant's demands. Id. ¶ 21. Plaintiffs contend BIPC made the payment even though Defendant's obligations under the Joint Venture Amendment were unfulfilled. Id.

Plaintiff further alleges that, on February 15, 2017, Defendant sent BIPC a request for further payment under the Release Agreement. Id. ¶ 22. The next day, Defendant allegedly told Plaintiffs it was suspending performance under the Termination Contracts due to Plaintiffs' alleged breach.[1] Id. ¶ 23. On February 17, 2017, Defendant allegedly blocked Plaintiffs' access to facilities and material in Atlanta and other markets critical to their continued work on the Google Fiber project. Id.

In response to these issues, the parties agreed to meet on February 22-23, 2017. Id. ¶ 25. Plaintiffs contend that nothing came of this meeting and that Defendant did not participate in this meeting in good faith. Id.

After this meeting, Plaintiffs allege that Defendant, for the first time, argued on May 17, 2017, that the Termination Contracts are void and that the joint venture remains intact. Id. ¶ 26. Specifically, Defendant argues that the Termination Contracts are void because Plaintiffs failed to inform Defendant that

[1] Plaintiffs do not indicate how or why Defendant believed Plaintiffs had breached the Termination Contracts.

there was not much work left to be done in the Raleigh-Durham market. Id. ¶ 27. Plaintiffs cite to language in the Termination Contracts stating, "[t]here shall be no volume commitment or guarantee of units or quantities to be released whatsoever." Id.

Additionally, Plaintiffs allege that Defendant knew of this low volume of work in early January, before demanding the additional $2 million under the Release Agreement. Id. Plaintiffs claim that, believing the Termination Contracts are void, Defendant now demands nearly $40 million from BIPC for claims against BIPC allegedly arising before the Termination Contracts were executed. Id.

As a result, Plaintiffs seek a declaration that the Termination Contracts allegedly dissolving the joint venture and settling all outstanding claims are valid and enforceable. Id. ¶ 4. Related to that request, Plaintiffs seek both a declaration that the joint venture itself is terminated and an injunction barring Defendant from communicating with any parties on behalf of the joint venture. Lastly, Plaintiffs seek money damages for the alleged breach of the Termination Contracts and other misconduct.

Defendant initially answered Plaintiffs' Complaint and asserted its own counterclaims. Dkt. No. [11]. However, Defendant amended its Answer and dismissed its counterclaims. Dkt. No. [25]. Instead, Defendant has asserted those counterclaims against Plaintiffs in arbitration. It now moves the Court to stay this case and send Plaintiffs' claims to arbitration.

II. LEGAL STANDARD

"The [Federal Arbitration Act ("FAA")] reflects the fundamental principle that arbitration is a matter of contract." Rent-A-Car, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010). The "primary substantive provision" of the FAA provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, an 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 thereby places arbitration agreements on an equal footing with other contracts [] and requires courts to enforce them according to their terms." Rent-A-Car, 561 U.S. at 67 (internal citations omitted). In addition, "[i]n enacting the FAA, Congress demonstrated a liberal federal policy favoring arbitration agreements." MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999) (internal citations and quotations omitted). "Therefore, questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitrations." Id. However, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Id. Nonetheless, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

III. DISCUSSION

Defendant argues that Plaintiffs' claims must be sent to arbitration based on the binding arbitration provisions in the Termination Contracts and the Joint Venture Agreement memorializing the parties' joint venture. Specifically, the Termination Contracts both dictate:

> Any disputes arising under this Assignment shall first be referred to Senior Management Representatives of the Parties. [] If the Senior Management Representatives are unable to reach agreement upon a matter so referred . . . within a period of thirty (30) days after such referral, then any Party may refer the matter for final resolution to arbitration . . . to follow the procedural mechanisms and processes set out in Section 25.3 of the Joint Venture Agreement.

Dkt. No. [1-2] at 11. The Joint Venture Agreement dictates, "In the absence of an agreement between the Parties pursuant to Article 25.2, the question, dispute or difference shall be finally settled under the Construction Industry Arbitration Rules of the American Arbitration Association." Dkt. No. [28-2] at 35.

The FAA dictates that, an arbitration agreement is enforceable if three elements are met. They are: (1) the existence of a written agreement to arbitrate claims; (2) a nexus to interstate commerce; and (3) coverage of the claims by the arbitration clause. 9 U.S.C. § 2. Defendant argues that, based on the language of the arbitration agreements described above and the type of claims asserted in this case, each element is met.

As to the first and second elements, Defendant argues that the parties have a written arbitration agreement that involves and/or affects interstate commerce. In their response, Plaintiffs do not challenge these assertions. Instead, Plaintiffs

argue: (1) Defendant waived its right to arbitration; (2) the arbitration provisions are permissible, not mandatory; and (3) Plaintiffs' declaratory judgment claim is not contemplated under the arbitration provisions.

a. Waiver

Plaintiffs first argue that Defendant waived its right to arbitration by engaging in "gamesmanship [] and forum shopping." Dkt. No. [31] at 12. The Eleventh Circuit has held that a party may waive its right to arbitration by its conduct. S & H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990). However, the party arguing that arbitration has been waived bears a heavy burden, due to the federal interests in compelling arbitration. Stone v. E.F. Hutton & Co., 898 F.2d 1542, 1543 (11th Cir. 1990).

A party has waived its right to arbitrate if it has acted inconsistently with the arbitration right and has prejudiced the other party. Id.; see also Garcia v. Wachovia Corp., 699 F.3d 1273, 1277 (11th Cir. 2012). The Eleventh Circuit has described the arbitration waiver test as a "two-part inquiry." Garcia, 699 F.3d at 1277; Citibank, N.A. v. Stok & Assocs., P.A., 387 F. App'x 921, 923 (11th Cir. 2010). The Court will evaluate: (1) whether Defendant acted inconsistently with its right to arbitrate; and (2) whether its actions prejudiced Plaintiffs.

The Eleventh Circuit has held that a party acts inconsistently with its right to arbitrate when it substantially invokes the machinery of litigation prior to demanding arbitration. Garcia, 699 F.3d at 1277; S & H, 906 F.2d at 1514. Plaintiffs contend that Defendant substantially invoked the machinery of

litigation by: (1) answering the Complaint and asserting seven counterclaims; (2) participating in a discovery planning conference with Plaintiffs; (3) asking that the Court enter a scheduling order, which it did; and (4) engaging in extensive Rule 26(a)(1) disclosures. Additionally, Plaintiffs point out that Defendant failed to ask for arbitration until after Plaintiffs moved to dismiss Defendant's counterclaims, served Defendant document requests, and issued a subpoena to Defendant's private equity owner. Importantly, however, Plaintiffs do not point out any specific discovery requested or served by Defendant prior to its Motion to Compel Arbitration.

While Defendant may have acted inconsistently with its alleged right to arbitrate by failing to move to arbitrate immediately, Plaintiffs must also show that Defendant's behavior was prejudicial.[2] In measuring prejudice, the Eleventh Circuit considers how long a party delayed before demanding arbitration and the expense inflicted by that delay. S & H, 906 F.2d at 1514. Prejudice to the non-moving party may be both legal and financial in nature. See Garcia, 699 F.3d at 1278. However, mere participation in discovery does not cause prejudice sufficient to constitute a waiver where a request for arbitration is timely. Benoay v. Prudential-Bache Sec., Inc., 805 F.2d 1437, 1440 (11th Cir. 1986).

[2] In their brief, Plaintiffs argue that Defendant's inconsistent behavior is sufficient to constitute waiver. However, as discussed above, under Eleventh Circuit case law, inconsistent behavior alone is insufficient to demonstrate waiver.

As discussed above, Plaintiffs filed this case on April 4, 2017. Dkt. No. [1]. Defendant did not answer the Complaint until April 27, 2017.[3] Dkt. No. [11]. After answering, Defendant did not move to compel arbitration until June 9, 2017. This is about a month and a half delay in asking for arbitration from the date of Defendant's Answer, or a little over a two-month delay from the date Plaintiffs filed the case.

In Citibank, the Eleventh Circuit held that a one-month delay did not prejudice the non-moving party, particularly when little meaningful litigation had taken place. Citibank, 387 F. App'x at 925. In contrast, the Eleventh Circuit held, in S&H Contractors, that an eight-month delay *did* prejudice the non-moving party. S&H Contractors, 906 F.2d at 1514. Here, because Defendant delayed compelling arbitration at most by two months, the Court finds that its Motion is not untimely.

As to any financial prejudice, Plaintiffs assert that it incurred expense by: (1) preparing and serving its motion to dismiss Defendant's counterclaims; (2) by preparing and serving third-party discovery; and (3) preparing extensive Rule 26(a)(1) disclosures. As to the third-party discovery and disclosures, the Eleventh Circuit has held that mere participation in discovery does not constitute prejudice if the motion to compel is timely. Benoay, 805 F.2d at 1440. As to their expenses in preparing and serving their motion to dismiss, Plaintiffs bear the burden of

[3] The Court references the date Defendant answered the Complaint because this is the first action by Defendant that would show its inconsistent behavior within the case.

proving that they were prejudiced. Stone, 898 F.2d at 1543. Merely asserting that they incurred some expense, and failing to give even a proximate number, is insufficient. Additionally, even if Plaintiffs had provided this information, it is unlikely that preparing and serving a single motion would prejudice Plaintiffs enough to find that Defendant waived its right to arbitration. Because Plaintiffs have failed to sufficiently demonstrate prejudice, the Court finds that Defendant did not waive its right to arbitration.[4]

b. Permissive Arbitration

Next, Plaintiffs argue that, even if Defendant did not waive its right to arbitrate, the arbitration provisions contemplate permissive arbitration, not mandatory arbitration. That is, Plaintiffs argue that they had a choice to bring the case to court or to arbitrate. Importantly, in making this argument, Plaintiffs only rely on the arbitration provisions found in the Termination Contracts—not the arbitration provision in the Joint Venture Agreement.

As discussed above, the arbitration provisions in the Termination Contracts dictate that the parties "shall first" refer "[a]ny dispute arising under" the Termination Contracts to Senior Management Representatives. Dkt. No. [31] at 16. They further dictate that, if Senior Management cannot resolve the issue,

[4] Plaintiffs also argue that the Court must find prejudice based solely on Defendant's attempt to shift forums. As support, Plaintiffs cite Seventh Circuit and D.C. Circuit law. However, the Court must follow Eleventh Circuit law, which has not adopted a similar test for determining prejudice.

"any Party *may* refer the matter for final resolution to arbitration." Id. (emphasis added).

Plaintiffs argue that this language is clearly permissive because it differs from the Joint Venture Agreement which dictates that any dispute arising under the Joint Venture Agreement "*shall* be finally settled" by arbitration. Id. at 17 (emphasis added). Plaintiffs argue that the parties clearly understood that they were contracting for permissive arbitration as they specifically chose to use the permissive *may* language in the Termination Contracts in stark contrast to the mandatory *shall* language in the Joint Venture Agreement, which, according to Plaintiffs, was replaced by the Termination Contracts.

As support, Plaintiffs rely on A. Dubreuil & Sons, Inc. v. Town of Lisbon, 577 A.2d 709 (Conn. 1990). In that case, the parties printed out a standard contract form which dictated the parties "shall" direct any disputes to arbitration but amended the contract to dictate that the parties "may" direct any disputes to arbitration. Id. at 710-11. The Supreme Court of Connecticut determined that altering the contract from "shall" to "may" made arbitration permissive rather than mandatory. Id. at 712. Plaintiffs, in this case, argue that because the Termination Contracts used the term "may" rather than "shall," they clearly indicate permissive rather than mandatory arbitration.

Defendant counters that this case is distinguishable from Dubreuil. Specifically, Defendant argues that, in this case, the Termination Contracts have a two-step dispute resolution process. First, the parties "shall" refer the case to

Senior Management. According to Defendants, if Senior Management cannot fix the problem, the parties "may" refer the case to arbitration.

Defendants argue that this two-step process means that, if Senior Management cannot fix the problem, the parties may either drop the dispute or send it to arbitration. According to this logic, if the Contract stated the parties "shall" refer the case to arbitration, the parties would be required to continue the dispute rather than simply dropping the issue after Senior Management failed to resolve it. In essence, the continuation of the dispute is the permissive part, not where the dispute continues.

As support, Defendants cite Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 204 n.1 (1985). In that case, the Supreme Court found that a similar arbitration provision required arbitration. Id. Specifically, the provision dictated that "Questions . . . shall be referred to [the Committee] . . . but may be presented for arbitration in the established manner once they have been discussed and have not been resolved." Id. The Supreme Court found that this provision "required that disputes within the Committee's scope be resolved exclusively through arbitration" because "the permissive 'may' is not sufficient to overcome the presumption that parties are not free to avoid the contract's arbitration procedures." Id.

The Fourth Circuit succinctly summarized this finding when it stated, "[A] clause providing that 'disputes . . . may be referred to arbitration' has the effect of giving an aggrieved party the choice between arbitration and abandonment of his

claim." U.S. v. Bankers Ins. Co., 245 F.3d 315, 321 (4th Cir. 2001) (internal quotations omitted). This is true because, according to the Fourth Circuit, "the contrary interpretation would render the arbitration provision meaningless for all practical purposes, since parties could always voluntarily submit to arbitration." Id.

The Court agrees with Defendant that the arbitration provisions in this case are not permissive. Instead, based on the Supreme Court precedent, the provisions give the parties a choice to either continue the dispute in arbitration or abandon their claims. Lueck, 471 U.S. at 204 n.1.

c. Declaratory Judgment

Next, Plaintiffs argue that, even if the arbitration provisions require arbitration, the Court should deny Defendant's request as to the declaratory judgment claim. That claim asks the Court to determine whether the Termination Contracts are valid and enforceable.

Plaintiffs argue that this claim cannot go to arbitration because the parties did not agree to arbitrate the validity of the Termination Contracts. As support, Plaintiffs turn to the Joint Venture Agreement which specifically indicates that the party must arbitrate disputes arising out of the Agreement *and* "the validity or enforceability" of the Agreement. Dkt. No. [31] at 20. In contrast, the Termination Agreements do not have this "validity or enforceability" language. Therefore, according to Plaintiffs, by failing to include that language in the Termination Contracts after having included it in the Joint Venture Agreement,

the parties clearly wished to exclude questions of validity from arbitration. Plaintiff further argues that this question of validity does not arise out of the Termination Contracts but are antecedent to the Contracts. As such, the question cannot be arbitrated.

However, Plaintiffs have failed to cite any authority dictating, first, that the absence of this "validity and enforceability" language means the parties specifically agreed not to arbitrate that issue. Second, Plaintiffs argue that the Joint Venture Agreement is terminated, and yet they ask the Court to rely on its language to inform the Termination Contracts. Plaintiffs have failed to cite any authority, and the Court can find no authority that indicates a court should look to a presumably terminated contract to define the scope of a new contract—particularly when the contracts do not cross-reference each other in any relevant way.

The better question is simply whether the questions in the declaratory judgment claim arise out of the Termination Contracts. See Rent-A-Car, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010) (courts must apply arbitration provisions by their terms). "The term arising out of is broad," Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1218 (internal quotations omitted), and when determining whether a dispute arises out of a contract, "the focus is on whether the tort or breach in question was an immediate, foreseeable result of the performance of contractual duties." Id. (citing Telecom Italia, SpA v. Wholesale Telecom. Corp., 248 F.3d 1109, 1116 (11th Cir. 2001)). The "arising out of" inquiry "requires some

direct relationship between the dispute and the performance of duties specified by the contract." Id.

As Defendant argues, the declaratory judgment claim asks the Court, not only to determine the validity of the Termination Contracts, it also asks the Court to define the parties' respective rights under the Termination Contracts. Lastly, the declaratory judgment claim asks the Court to find that Defendant is bound by the Termination Contracts. These questions clearly arise under the Termination Contract as the Court would be required to refer to and rely on the provisions found within. For that reason, the Court finds that *all* the claims in this case should go to arbitration. Defendant's Motion is **GRANTED**.

IV. CONCLUSION

The Court **GRANTS** Defendant's Motion to Compel Arbitration [28]. This case is **ADMINISTRATIVELY CLOSED**. The parties are **DIRECTED** to petition the Court to reopen this matter following arbitration, if required. If the action is resolved prior to completion of the arbitration proceedings, the parties shall notify this Court as soon as practicable and dismiss the case.

IT IS SO ORDERED this 18th day of July, 2017

LEIGH MARTIN MAY
UNITED STATES DISTRICT JUDGE