IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

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| Anderson Group Company, Inc., | ) | |
| | ) | |
| Plaintiff, | ) | Case No. 0:17-cv-1564-TLW |
| | ) | |
| vs. | ) | |
| | ) | **ORDER** |
| MC Hotels, LLC d/b/a MC Hotel Construction, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

## INTRODUCTION

Plaintiff Anderson Group Company, Inc. filed this suit in the York County Court of Common Pleas. On June 15, 2017, Defendant MC Hotels, LLC d/b/a MC Hotel Construction removed the action to this Court. ECF No. 1. Before the Court is Defendant's "Motion to Dismiss, or in the Alternative, Motion to Stay." ECF No. 4. The Defendant asserts its motion is unopposed. However, the Plaintiff did file a motion to amend the complaint which, if granted, may impact the arbitration question. The Court has carefully considered the filings and applicable law and this matter is now ripe for disposition.

In its motion, Defendant seeks to compel mediation or arbitration consistent with a provision in paragraph 10.2 of a Subcontract Agreement between Plaintiff and Defendant.[1] Paragraph 10.2 of the Subcontract provides:

[1] Plaintiff did not attach the Subcontract as an exhibit to its Complaint. ECF No. 1-1. However, Plaintiff specifically references the Subcontract in the Complaint, *see id.* ¶ 9–17, 19, 23, 24, 27, 28, 37, 38, and in its opposition to Defendant's motion staying discovery, *see* ECF No. 15 at 3. Plaintiff does not object to the Court's consideration of the Subcontract. Thus, the Subcontract is properly before the Court for the purposes of considering the motion to dismiss. *New Beckley Min. Corp. v. Int'l Union, United Mine Workers of Am.*, 18 F.3d 1161, 1164 (4th Cir. 1994) (citing *Cortec Indus. v. Sum Holding, L.P.*, 949 F.2d 42, 47–48 (2nd Cir. 1991) (adoption by reference. Fed. R. Civ. P. 10(c))).

> **10.2 CLAIMS NOT INVOLVING THE OWNER:** The parties agree any claims not involving the Owner will be resolved as follows:
>
> (i) MEDIATION: Any Claim arising out of or related to the Subcontract shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable or other binding dispute resolution proceedings by either party. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in St. Louis. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.
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> (ii) ARBITRATION: Claims which have not been resolved by mediation shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect at the time of the arbitration. The demand for arbitration shall be filed in writing with the other party and with the American Arbitration Association. The jurisdiction for the arbitration will be St. Louis, Missouri, except as otherwise provided by law. At Contractor's option, any arbitration pursuant to this Article may be joined with an arbitration involving common issues of law or fact between Contractor and Owner and/or any person or entity with whom the Owner or Contractor has a contractual obligation to arbitrate disputes which does not prohibit consolidation or joinder, with the claims and disputes of Owner, Contractor, Subcontractor and other subcontractors involving a common question of fact or law to be heard by the same arbitrator(s) in a single proceeding. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by the parties shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.

ECF No. 4-2 at 31–32. Defendant argues that this provision applies because the Complaint contains claims against only the Contractor. ECF No. 4. In addition, Defendant asserts that the Plaintiff's causes of action all arise out of the Subcontract. *Id.* Therefore, Defendant argues that the language in paragraph 10.2 subjects the claims to arbitration and that, pending resolution in mediation or arbitration, the action should be dismissed or, in the alternative, stayed. *Id.*

After the deadline to respond to Defendant's motion expired, Plaintiff filed a Motion to Amend the Complaint stating only that it is "on the grounds the [sic] justice requires." ECF No. 8. No substantive argument is made. *Id.* Defendant responded opposing Plaintiff's motion to amend noting that the motion does not oppose mediation or arbitration and arguing that Plaintiff's motion should be denied as it is futile and made for purpose of delay. ECF No. 12. Thereafter, Defendant

filed a Motion for Protective Order Staying Discovery. ECF No. 13. Plaintiff opposed the motion. ECF No. 15.

## ANALYSIS[2]

The Federal Arbitration Act (FAA) provides that "[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, 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's purpose is "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Green Tree Fin. Corp.–Ala. v. Randolf*, 531 U.S. 79, 89 (2000). In addition, "[t]he FAA reflects a liberal federal policy favoring arbitration agreements. Underlying this policy is Congress's view that arbitration constitutes a more efficient dispute resolution process than litigation." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002) (internal quotation omitted). Parties agree to arbitrate to "trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration," and these benefits are widely recognized. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 936 (4th Cir. 1999) (internal quotation omitted). While courts maintain discretion to determine the enforceability of contract provisions, under the FAA, "[a] district court [] has no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview." *Adkins*, 303 F.3d at 500 (citing *United States v. Bankers Ins. Co.*, 245 F.3d 315, 319 (4th Cir. 2001)).

[2] As this is a motion to dismiss under Rule 12(b)(6), the Court accepts the well-pled allegations of the Complaint as true and construes the facts and reasonable inferences derived from these facts in the light most favorable to Plaintiff. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

An issue concerning whether an underlying controversy will proceed to arbitration on the merits "necessarily falls within the narrow circumstances of arbitrable issues for the court to decide." *Dell Webb Comtys., Inc. v. Carlson*, 817 F.3d 867, 874 (4th Cir. 2016); *see also Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 78 (2010) ("[Q]uestion[s] of arbitrability thus include questions regarding the existence of a legally binding and valid arbitration agreement."). In the Fourth Circuit, to compel arbitration, a defendant must demonstrate: (i) the existence of a dispute between the parties; (ii) a written agreement that includes an arbitration provision that purports to cover the dispute; (iii) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and (iv) the failure, neglect or refusal of plaintiff to arbitrate the dispute. *See Adkins*, 303 F.3d at 500–01.

In the instant case, Defendants have asserted that the elements to compel arbitration have been met. ECF No. 4-1 at 5. Consequently, Plaintiff would "bear[] the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree*, 531 U.S. at 91. As stated above, Plaintiff filed a Motion to Amend the Complaint and a Response in Opposition to Defendant's motion for protective order. ECF Nos. 8, 15. However, these filings do not specifically respond in opposition to Defendant's motion for arbitration or present any factual or legal basis upon which the Court should deny Defendant's motion. *See id.* Specifically, the Plaintiff does not present a focused position on arbitration or otherwise dispute Defendant's interpretation of the Subcontract. *Id.*

Additionally, Plaintiff's Motion to Amend the Complaint seeks to add the owner and the lender as defendants. ECF No. 8. The Court concludes the motion to amend the complaint may be an effort to avoid arbitration by adding the owner as a party to this action. The contractual language brings into play an arguable different analysis if the owner is a party. However, this dispute is between the General Contractor, Defendant MC Hotels, and the Subcontractor, Plaintiff Anderson

Group. Although amendment of the complaint shall be given when justice so requires, amendment is not proper when the purpose is for undue delay or amendment is futile. *Foman v. Davis*, 371 U.S. 178 (1962). After careful consideration of the record and the applicable law, the Court finds that the Plaintiff's motion to amend in this case is futile and results in delay of the proceedings when there is no legal or factual basis for doing so. This Court finds that adding the owner to this lawsuit through amendment of the complaint would not change the determination that the instant claims should be resolved by arbitration based on the relevant provision in the Subcontract. ECF No. 4-2 at 31–32. Thus, substantively, granting amendment to add the proposed additional defendants is not appropriate.

## CONCLUSION

For the aforementioned reasons, the Court concludes that Plaintiff's claims against Defendant should be compelled to arbitration pursuant to the Subcontract.[3] It is therefore **ORDERED** that the Defendant's Motion to Dismiss or, Alternatively, to Stay Litigation, ECF No. 4, is **GRANTED** to the extent that it seeks to compel arbitration, and this case is **DISMISSED**. In light of this Order, the parties' outstanding motions, Plaintiff's Motion to Amend, ECF No. 8, and Defendant's Motion for Protective Order, ECF No. 13, are deemed **MOOT**.

**IT IS SO ORDERED.**

*s/Terry L. Wooten*
Terry L. Wooten
Chief United States District Judge

October 13, 2017
Columbia, South Carolina

[3] To the extent that the Subcontract requires the parties to mediate as a condition precedent to arbitration, the Fourth Circuit has very clearly stated that "arbitrators—not courts—must decide whether a condition precedent to arbitrability has been fulfilled." *See Chorley Enterprises, Inc. v. Dickey's Barbecue Restaurants, Inc.*, 807 F.3d 553, 565 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 1656 (2016) (citing *BG Group PLC v. Republic of Arg*, ––U.S.––, 134 S.Ct. 1198, 1207–08 (2014); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85–86 (2002)). Therefore, the condition precedent in this case is a matter for the arbitrators.