IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 17-cv-1507-WJM-MJW

LIONSBROOD ENTERPRISES, LLC, a Colorado Limited Liability Company,

Plaintiff,

v.

INSTALLATION SOLUTIONS, INC., a Minnesota Corporation.

Defendant.

ORDER GRANTING MOTION TO COMPEL ARBITRATION

Plaintiff Lionsbrood Enterprises, LLC ("Lionsbrood"), a Colorado limited liability company, filed this lawsuit against Defendant Installation Solutions, Inc. ("ISI"), a Minnesota Corporation, in Denver District Court. ISI removed the lawsuit to this Court as permitted by 28 U.S.C. §§ 1332(a)(1), 1441, and 1446. (ECF No. 1.)

Lionsbrood alleges that it was a subcontractor to ISI, a general contractor, and that ISI owes Lionsbrood approximately $120,000 for services rendered. (ECF No. 2 ¶¶ 7–15.) Lionsbrood pleads five theories of relief: (1) breach of contract; (2) violation of Colo. Rev. Stat. § 38-22-127, which requires contractors who receive payments from their clients to hold such money in trust for subcontractors and others who have labored on behalf of the contractor; (3) promissory estoppel; (4) unjust enrichment; and (5) conversion. (*Id*. ¶¶ 6–39.)

Each of the contracts by which Lionsbrood became a subcontractor to ISI for a particular construction project contains an arbitration clause stating that "any dispute

arising out of this agreement shall be arbitrated under the laws of the State of Minnesota in Brooklyn Park, Hennepin County, Minnesota." (*See* paragraph 23 in each of ECF Nos. 27-1 through 27-6.) ISI accordingly moves to compel arbitration. (ECF No. 25.) In response, Lionsbrood states that "the arbitration agreement is likely binding and enforceable" with respect to its common-law claims, but arbitration should be denied as to "the Trust Fund Claim," referring to its cause of action under Colo. Rev. Stat. § 38-22-127. (ECF No. 31 ¶¶ 4, 15.)

Lionsbrood's argument that the Trust Fund Claim should be exempt from arbitration is that ISI "has cited no case law, nor does any appear to exist, that would support the fact that the arbitration agreement would subsume Colorado's statutory rights put into place designed to protect Colorado residents and construction claims." (*Id*. ¶ 16.) It is not clear what Lionsbrood means by "subsume." The arbitration agreement certainly does not nullify Lionsbrood's Trust Fund Claim. In any event, as ISI counters, there is ample federal and Colorado authority supporting the notion that statutory rights may be resolved in arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625–26 (1985); *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116, 122 (Colo. 2007). Colorado has held that certain statutory rights may not be arbitrated if the statute provides a right to resolve disputes in court *and* if the statute also precludes waiver of the rights it provides. *Id*. at 122–23. Whether or not this exception comports with arbitration principles under the Federal Arbitration Act, Lionsbrood makes no argument the exception applies to the Trust Fund Claim.

Lionsbrood also invokes the doctrine of *forum non conveniens* to argue, "[P]ublic interest dictates that, in order to provide a fair resolution, the Trust Fund Claim and

accompanying contract claims[] should be litigated in front of this present Court." (ECF No. 31 ¶¶ 22–24.) *Forum non conveniens* is a common-law doctrine "under which a federal district court may dismiss an action on the ground that *a court abroad* is the more appropriate and convenient forum for adjudicating the controversy." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) (emphasis added). This case raises no question of whether some court outside of the United States should resolve the dispute between the parties, so *forum non conveniens* has no relevance. Even if it had relevance, and even if Lionsbrood instead meant to invoke the federal statutory equivalent (28 U.S.C. § 1404), Lionsbrood fails to cite any case law in which the highly discretionary factors regarding transfer from one forum to another have any bearing on the enforceability of an arbitration clause.

In sum, the Court holds that Lionsbrood must arbitrate all of its current claims in Minnesota. Pursuant to the FAA, the Court will compel arbitration and stay this case. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration . . . , the court . . . shall 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 . . . .").

ISI further moves the Court to award it attorneys' fees incurred in having to move to compel arbitration. (ECF No. 33 at 7.) ISI first invokes an indemnity clause in its contracts with Lionsbrood:

> SUB agrees to indemnify and hold harmless (ISI) and its officers and employees from all claims, loss, damage, injury, costs and expenses of whatsoever kind/nature, including attorney fees, resulting directly or indirectly from the nature of work performed or covered by SUB, including injury or death to any person or persons and damage to any property,

including but not limited to owner.

(Paragraph 17 in each of ECF Nos. 27-1 through 27-6.) This provision is explicitly linked to damages resulting from Lionsbrood's work as a subcontractor (*e.g.*, poorly built structures that fall apart, an inadequately secured construction site that leads to a third person's injury, etc.). It is not a general fee-shifting clause.

ISI also invokes 28 U.S.C. § 1927 and this Court's inherent authority. Section 1927 provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Given this statutory language, "[a] court may assess attorney[s'] fees against an attorney under § 1927 if (a) the actions of the attorney multiply the proceedings, and (b) the attorney's actions are vexatious and unreasonable." *Shackelford v. Courtesy Ford, Inc.*, 96 F. Supp. 2d 1140, 1144 (D. Colo. 2000). "Actions are considered vexatious and unreasonable if the attorney acts in bad faith . . . or if the attorney's conduct constitutes a reckless disregard for the duty owed by counsel to the court." *Id.*; *see also Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1342 (10th Cir. 1998) (collecting various specific scenarios that evince sanctionable conduct). The attorney's conduct is judged objectively; subjective bad faith is not required to justify § 1927 sanctions. *See Hamilton v. Boise Cascade Exp.*, 519 F.3d 1197, 1203 (10th Cir. 2008) ("Where, 'pure heart' notwithstanding, an attorney's momentarily 'empty head' results in an objectively vexatious and unreasonable multiplication of proceedings at expense to his opponent, the court may hold the attorney personally responsible."). Ultimately, whether to award § 1927 sanctions is a matter committed to this Court's discretion. *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1278–79 (10th Cir. 2005).

The Court, through its inherent authority, may also award attorneys' fees for various reasons, including when a party has acted in bad faith or vexatiously. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–46 (1991). But the Court's inherent authority should only be

> exercise[d] [with] caution . . . and [such exercise] must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees. Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the [Federal Rules of Civil Procedure], the court ordinarily should rely on the Rules rather than the inherent power.

Id. at 50 (citation omitted). As under § 1927, whether to award inherent-authority sanctions is a matter within the Court's discretion. *Id*.

The Court disapproves of Lionsbrood's counsel's conduct here. ISI's counsel attempted to confer in good faith on multiple occasions about Lionsbrood's basis for avoiding arbitration and Lionsbrood provided no clear response. (*See* ECF No. 25 at 4.) Lionsbrood's counsel then filed their client's response brief *five days late, without explanation*, and the substantive arguments contained in that brief are without merit.

Having considered all of the circumstances, the Court finds that this is a close case. Lionsbrood's attorneys of record—Donald C. Eby, Andrew D. Kurpanek, Kevin S. Hoskins, and Stephen M. Whitmore—have not approached this matter with the seriousness and forthrightness that officers of the Court should display. However, the Court finds that Lionsbrood's counsel's behavior was not sufficiently egregious to warrant an award of attorneys' fees under § 1927 or under the Court's inherent authority. In the Court's discretion, then, ISI's request for sanctions is denied.

Accordingly, for the reasons set forth above, the Court ORDERS as follows:

1. ISI's Motion to Compel Arbitration, Stay Proceeding and Award Fees (ECF No. 25)

is GRANTED with respect to ISI's request to compel arbitration and stay this case, but DENIED as to ISI's request for fees;

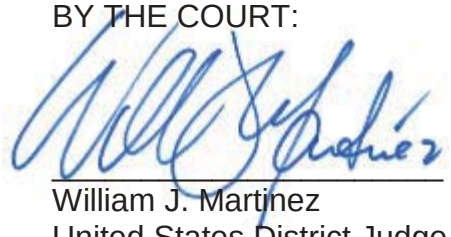
2. Lionsbrood, to the extent it wishes to pursue its claims alleged in this lawsuit, must do so through arbitration under the laws of the State of Minnesota in Brooklyn Park, Hennepin County, Minnesota;

3. This action is hereby STAYED pending the conclusion of Lionsbrood's arbitration proceeding in Minnesota, should Lionsbrood choose to commence one;

4. Pursuant to D.C.COLO.LCivR 41.2, the Clerk shall ADMINISTRATIVELY CLOSE this case, subject to a motion to reopen for good cause subsequent to the conclusion of Lionsbrood's arbitration proceeding in Minnesota, should Lionsbrood choose to commence one.

Dated this 20th day of February, 2018.

BY THE COURT:



William J. Martínez
United States District Judge