UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-20456-CIV-WILLIAMS

U.S.A. INSTITUTIONAL TAX CREDIT FUND LXXI, L.P., *et al.*,

Plaintiffs,

v.

BROWNSVILLE VILLAGE III, LLC,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DISMISSING AND CLOSING CASE

THIS MATTER is before the Court on Defendant's motion to compel arbitration and dismiss or stay lawsuit. (DE 22). Plaintiffs filed a response in opposition (DE 26), and Defendant a reply. (DE 30). For the reasons set forth below, Defendant's motion to compel arbitration is **GRANTED** and this case is **DISMISSED**.

I. BACKGROUND

On February 8, 2016, Plaintiffs filed a two-count complaint for declaratory judgment and injunctive relief seeking to establish that they rightfully removed Defendant Brownsville Village III, LLC ("BV III") as the general partner to the Parties' limited partnership. (DE 1). Count I is Plaintiffs' claim for declaratory relief, in which they seek a declaration that they appropriately removed Defendant as the general partner of the limited partnership under Section 8.13 of the Parties' limited partnership agreement ("LPA"). (DE 1 at 14-15). Count II requests injunctive relief enjoining Defendant from continuing to act as general partner. (DE 1 at 16-17).

Plaintiffs appended the LPA to their Complaint. (DE 1-3). The LPA contains an arbitration clause under Section 16.11, entitled "Arbitration of Disputes" ("Arbitration Clause"). (DE 1-3 at 87-88). The Arbitration Clause states, "The parties agree that any dispute arising under this Agreement shall be submitted to and determined in binding arbitration. Except as set forth herein the rules of the American Arbitration Association ("AAA") shall apply." (*Id.* at 87). The Clause sets forth an enumerated list of rules, which includes, *inter alia*, designating Dade County, Florida as the forum for arbitration, the procedure for selecting an arbitrator, the authority conveyed to the arbitrator, the manner in which arbitration is conducted, and the submissions required by the Parties in arbitration. (*Id.* at 87-88). Finally, the Arbitration Clause states, "The duty to arbitrate set forth herein shall survive the cancellation or termination of the Agreement." (DE 1-3 at 88).

On March 2, 2016, three weeks after filing their Complaint, Plaintiffs filed a motion for preliminary injunction and motion for hearing. (DE 9; DE 10). On March 8, 2016, Defendant filed a motion to dismiss the Complaint, and on March 9 and 10, Defendant served its initial round of discovery requests. (DE 11; DE 26-1). The Parties subsequently briefed the motions for preliminary injunction, for a hearing, and to dismiss. (DE 15; DE 16; DE 18; De 19; DE 20). On April 14, 2016, Defendant notified Plaintiffs that it intended to invoke the Arbitration Clause and withdrew its discovery requests. (DE 26-1). On April 18, 2016, Defendant filed its motion to compel arbitration. (DE 22). Plaintiffs filed a response in opposition to Defendant's motion to compel arbitration, arguing only that Defendant has waived its right to arbitration by acting "inconsistently" with its right to invoke the LPA's arbitration clause based on two

months of motion practice and Defendant's service (and withdrawal) of discovery requests on Plaintiff. (DE 26).

II. APPLICABLE LAW

The validity of an arbitration agreement is generally governed by the Federal Arbitration Act ("FAA"). 9 U.S.C. § 1 *et seq.* Under the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract." 9 U.S.C. § 2. The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original).

Under the FAA, questions regarding arbitrability "must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983). Because the FAA creates a presumption in favor of arbitrability, the "parties must clearly express their intent to exclude categories of claims from their arbitration agreement." *Paladino v. Avnet Comput. Techs., Inc.*, 134 F.3d 1054, 1057 (11th Cir. 1998). Accordingly, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 24-25; *see also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (ambiguities as to the scope of an arbitration provision are resolved in favor of arbitration).

Before the Court can compel the parties to arbitrate a dispute, the Court must consider three factors: (1) whether the plaintiff entered into a written arbitration agreement that is enforceable under ordinary state-law contract principles; (2) whether the claims before the court fall within the scope of that agreement; and (3) whether the right to arbitration has been waived. *See Lambert v. Austin Ind.*, 544 F.3d 1192, 1195 (11th Cir. 2008); *Sims v. Clarendon Nat'l. Ins. Co.*, 336 F. Supp. 2d 1311, 1326 (S.D. Fla. 2004).

III. DISCUSSION

A. The Arbitration Agreement Is Enforceable

Under Florida law, an enforceable contract requires offer, acceptance, consideration, and sufficiently specific terms. *See Ferguson v. Carnes*, 125 So. 3d 841, 842 (Fla. 4th DCA 2013). Plaintiffs do not challenge the arbitration clause's enforceability in its brief. (DE 26). The Court finds that upon review of the LPA, Defendant's motion, and Plaintiff's response in opposition, that the LPA is an enforceable contract between the Parties.

B. Plaintiff's Claim Is Subject to Arbitration

In determining the scope of an arbitration agreement, the Court is guided by both the FAA's presumption in favor of arbitrability and the actual text of the agreement. *See Lambert*, 544 F.3d at 1197. Such a presumption is "particularly applicable" where the arbitration clause is broadly worded. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). In such cases, "in the absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* (quoting *United*

Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-85 (1960)); *see also Paladino*, 134 F.3d at 1057 ("parties must clearly express their intent to exclude categories of claims from their arbitration agreement").

Any doubts concerning the scope of arbitrable issues are resolved in favor of arbitration and the parties must clearly express their intent to exclude claims from their arbitration agreement. *See Ivax Corp. v. B. Braun of Am. Inc.*, 286 F.3d 1309, 1320 (11th Cir. 2002); *see also Advantage Dental Health Plans Inc. v. Beneficial Adm'rs Inc.*, 683 So. 2d 1133, 1134 (Fla. 4th DCA 1996) (using the FAA as a guide and finding that when "[t]he trial court stayed arbitration because the contract arbitration provision d[id] not unambiguously exclude the claim . . . the trial court erred. Actually, the rule is exactly the opposite . . . all doubts as to the scope of an arbitration agreement are to be resolved in favor of arbitration.").

Here, the LPA expressly provides that "any dispute arising under this Agreement shall be submitted to and determined in binding arbitration." (DE 1-3 at 87). The LPA's Arbitration Clause survives the cancelation or termination of the LPA. (*Id.* at 88). There are no exclusions or carveouts. The Court concludes that the arbitration provision unequivocally applies to the entirety of Plaintiffs' claims, which arise from their removal of Defendant as the general partner under the LPA.

C. Defendant Has Not Waived Its Right to Arbitrate

Even if the first two factors are met, courts will not compel arbitration when the party who seeks to arbitrate has waived its right to do so. *Garcia v. Acosta Tractors, Inc.*, No. 12-cv-21111, 2013 WL 462713, at *3 (S.D. Fla. Feb. 7, 2013) ("[A]n agreement to arbitrate, like any other contract, may be waived" (citations omitted)). "Nonetheless,

because federal policy strongly favors arbitration, the party who argues waiver bears a heavy burden of proof." *Id.* The Eleventh Circuit applies a two-part test to determine whether a party has waived its right to arbitrate: (1) whether under the totality of the circumstances, the party has acted inconsistently with the arbitration right, and (2) whether, by doing so, the party has prejudiced the other party. *Ivax Corp.*, 286 F.3d at 1316. Under the test, "[c]ourts find that waiver occurs where the party seeking arbitration substantially participates in litigation to a point inconsistent with an intent to arbitrate, and this participation results in prejudice to the opposing party." *Tok v. Royal Caribbean Cruises, Ltd.*, No. 10-20031-CIV, 2010 WL 1433175, at *1 (S.D. Fla. Apr. 9, 2010) (citing *Morewitz v. W. England Ship Owners Mut. Prot. & Indem. Ass'n (Luxembourg)*, 62 F.3d 1356, 1366 (11th Cir. 1995)).

Here, Defendant filed its motion to arbitrate two months after the commencement of this action and early motion practice. No scheduling order has been entered, nor has discovery exchanged hands.[1] Given the early stages of this case, the Court cannot find that Defendant has substantially invoked the "litigation machinery" to find that it acted inconsistently with its right to arbitrate. *Machado v. Labor Ready Se., Inc.*, No. 14-24234, 2015 WL 6829061, at *4 (S.D. Fla. Nov. 6, 2015) (finding that "a mere filing of a motion to dismiss before filing a motion to compel arbitration does not constitute a waiver of [defendant's] contractual arbitration rights"); *Dockeray v. Carnival Corp.*, 724 F. Supp. 2d 1216, 1222 (S.D. Fla. 2010) (two-month delay during which defendant filed an answer and affirmative defenses and a motion for an extension of time did not

[1] While Plaintiffs point to the fact that Defendants served discovery requests on them in March 2016, Defendant withdrew these requests a month later, and Plaintiffs do not offer anything to show what, if any, effort and expense they undertook to comply with these discovery requests.

constitute substantial litigation for waiver); *Hodgson v. Royal Caribbean Cruises, Ltd.*, 706 F. Supp. 2d 1248, 1257-58 (S.D. Fla. 2009) (defendant "did not substantially litigate to a point inconsistent with an intent to arbitrate" where it filed a motion to compel after it had served discovery, replied to discovery requests, moved to dismiss, and when its motion to dismiss was denied, served an answer and affirmative defenses).

In addition, the Court fails to see substantial prejudice to Plaintiffs where the only actual prejudice is the Parties' engaging in preliminary motion practice. Plaintiffs have not documented the amount expended in instituting this action, nor have they given any indication that they engaged in discovery during the month between Defendant's service of discovery requests and its notice withdrawing them. *Hodgson*, 706 F. Supp. 2d at 1258; *Smith v. Pay-Fone Sys., Inc.*, 627 F. Supp. 121, 124 (N.D. Ga. 1985). In any event, the Court is not convinced that Plaintiffs' prosecution of its case, including filing an 18-page motion for preliminary injunction with one exhibit and a response in opposition to a motion to dismiss, constitutes the substantial prejudice necessary to find waiver. *Collado v. J&G Transp., Inc.*, No. 14-80467-CIV, 2015 WL 1478209, at *6 (S.D. Fla. Mar. 31, 2015) (declining to find prejudice to Plaintiff where "Plaintiff has not pointed to any significant litigation expenses . . . of the type that arbitration is meant to curtail"); *Hodgson*, 706 F. Supp. 2d at 1258 (defendant "cannot be said to have caused [plaintiff] to incur significant expense" where plaintiff's filing of a complaint and service of initial discovery requests "were not attributable to [defendant's] doing" and the expenses incurred were a response to a motion to dismiss, a one-page reply to an answer, a motion to strike, service of interrogatories, and giving notice that the case was to be

tried). Accordingly, the Court concludes that Defendant has not waived its arbitration rights under the LPA.

D. Dismissal

Defendant has moved to compel arbitration the basis of the LPA's Arbitration Clause, which the Court construes as a motion to dismiss under Rule 12(b)(1). Because Plaintiff's claim, in its entirety, is subject to binding arbitration, the Court's analysis turns to whether this matter should be stayed or dismissed.

The FAA states that a district court "shall" stay proceedings pending arbitration upon the motion of one of the parties. *See* 9 U.S.C. § 3. However, several circuits have held that this mandatory language regarding a stay does not apply when all claims are subject to arbitration. In that instance, courts are free to exercise their discretion to dismiss the case. *See Perera v. H&R Block E. Enters.*, 914 F. Supp. 2d 1284, 1289-1290 (S.D. Fla. 2012) (collecting cases); *see also Caley v. Gulfstream Aerospace Corp.*, 333 F. Supp. 2d 1367, 1379 (N.D. Ga. 2004) *aff'd*, 428 F.3d 1359 (11th Cir. 2005) (citing *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) ("The weight of authority clearly supports dismissal of the case when *all* of the issues raised in the district court must be submitted to arbitration") (emphasis in original)). Because all of the issues raised in Plaintiffs' complaint must be submitted to binding arbitration, the Court exercises its discretion to dismiss the case with prejudice pursuant to Rule 12(b)(1). *See Perera*, 914 F. Supp. 2d at 1290.

IV. CONCLUSION

Plaintiffs and Defendant have entered into a valid, enforceable binding arbitration agreement that applies to Plaintiffs' claims in their entirety. Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant's motion to compel arbitration and dismiss (DE 22) is **GRANTED**. Plaintiffs are **COMPELLED** to submit their claims to arbitration and this matter is **DISMISSED**. All pending motions are **DENIED AS MOOT**. The Clerk is directed to **CLOSE** this case for administrative purposes.

DONE AND ORDERED in Chambers at Miami, Florida this 7th day of June, 2016.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE