IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Charleston Equities, Inc., Plaintiff, vs. M. Clay Winslett, Defendant.	C/A No. 3:17-cv-137-JFA **ORDER**
M. Clay Winslett, Third-Party Plaintiff, vs. Gary J. Davies and David P. Hill, Third-Party Defendants.	

This action is currently before the court on Third-Party Defendants Gary Davies ("Davies") and David Hill's ("Hill") motion to compel Defendant Clay Winslett ("Winslett") to arbitrate his third-party claims in this case.

I. FACTUAL AND PROCEDURAL HISTORY

Although this action originally arose out of the execution of a promissory note and guaranty agreement, Winslett's third-party claims arise out of a now tumultuous relationship between him and his two former business partners, Davies and Hill. In 2006, Davies, Hill, and Winslett, all through separate legal entities, agreed to develop several shopping center projects. Each shopping center project was established under separate LLCs. Winslett received a 30% membership interest

in eight projects including Marshall Creek Retail Holdings, LLC. Each LLC was governed by an operating agreement. Each operating agreement contains the following arbitration provision:

> 11.16. Arbitration. Except as otherwise provided herein, any controversy or claim arising out of or relating to this Agreement, whether the breach, termination or validity thereof, or the transaction contemplated herein, shall be settled by arbitration in Charlotte, North Carolina, under the Federal Arbitration Act in accordance with the American Arbitration Association's Rules for Commercial Arbitration.

The operating agreements also include a choice of law provision selecting North Carolina law as the governing law.

In the original claims in this case, Charleston Equities, Inc. ("Charleston Equities"), a company formed by Davies and Hill, acquired promissory notes executed by Marshall Creek Retail Investors, LLC and a guaranty agreement personally executed by Winslett, Hill, and Davies, after Marshall Creek Retail Investors, LLC declared bankruptcy and subsequently reorganized. Charleston Equities then initiated this action seeking to enforce the guaranty agreement on Winslett. Winslett responded by asserting several counterclaims and third-party claims against Davies and Hill in their individual capacities.

Here, Davies and Hill seek to compel Winslett to arbitrate the third-party claims asserted solely against them.[1]

II. LEGAL STANDARD

The Federal Arbitration Act (FAA) provides a federal district court with the authority to enforce an arbitration agreement by compelling parties to arbitrate their dispute. 9 U.S.C. § 4. Section 2 of the FAA applies to any "contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract," and it provides that the

[1] Winslett's remaining third-party claims and counterclaims are addressed in a separate opinion.

written agreements to arbitrate contained in such contracts "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 United States Supreme Court and the Fourth Circuit have a strong policy favoring arbitration. *See, e.g., Mitsubishi Motors Corp. v. Selex Chrysler–Plymouth,* 473 U.S. 614, 626, (1985) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002) ("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.").

A litigant can compel arbitration under the FAA if he can show "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute." *Adkins* at 500–01.

III. ANALYSIS

Winslett's remaining third-party claims include breach of fiduciary duty and civil conspiracy. Davies and Hill assert that these claims are subject to the arbitration agreement contained in the operating agreements and therefore, Winslett must be compelled to arbitrate.

The existence of these third-party claims clearly indicate a dispute that has failed to be arbitrated. Also, Winslett's complaint alleges that "Davies and Hill and Winslett have entered into many investment ventures over the course of many years, in multiple states." (ECF No. 28 ¶ 69). Therefore, the transactions complained of clearly have a relationship to interstate commerce.

Consequently, the arbitration agreement is enforceable if the written agreement covers the dispute. *Adkins* at 500–01. Davies and Hill argue that the arbitration provision should be broadly construed to include these claims. Conversely, Winslett argues that his claims arise out of conduct separate and apart from any activities described in the operating agreements.

The Fourth Circuit has repeatedly compelled arbitration where the arbitration clause applies to any dispute "arising from or related to" the agreement. *Long v. Silver,* 248 F.3d 309, 316 (4th Cir.2001); *Kvaerner ASA v. Bank of Tokyo–Mitsubishi, Ltd.*, 210 F.3d 262, 265–66 (4th Cir.2000); *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir.1996). This type of arbitration language is considered "broad." *See Am. Recovery Corp.*, 96 F.3d at 93; *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir.1988). "[A] broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." *Long*, 248 F.3d at 316 (citing *Am. Recovery Corp.*, 96 F.3d at 93).

Here, the arbitration provision applies to "any controversy or claim arising out of or relating to this Agreement, whether the breach, termination or validity thereof, or the transaction contemplated herein. . . ." Because this provision is "broad," Davies and Hill need only show a significant relationship between Winslett's claims and the operating agreements. *Long*, 248 F.3d at 316.

Winslett's claim for breach of fiduciary duty alleges that "Davies and Hill and Winslett have entered into many investment ventures over the course of many years, in multiple states. In connection with each project, Winslett has rightfully reposed confidence in Hill and Davies to exercise fair and prudent judgment and to protect his legitimate interests." (ECF No. 28 ¶ 69).

Winslett's claim bases the existence of the fiduciary duty upon his relationship to Davies and Hill throughout the course of their dealings with the many shopping center projects, specifically the Marshall Creek Retail LLC. Because this relationship arose out of the many LLCs governed by the operating agreements, Winslett's claim for breach of fiduciary duty is significantly related to the arbitration provisions in those operating agreements and is therefore subject to arbitration.

Additionally, Winslett's claim for civil conspiracy alleges that Davies and Hill combined for the purposes of "commencing Chapter 11 bankruptcy proceeding for Marshall Creek without Winslett's consent; and devising, promoting, and consummating a plan of reorganization which divested and deprived Winslett of his ownership interest, and wrongfully increasing the respective ownership interest of Hill and Davies." (ECF No. 28 ¶ 75).

This claim specifically references the Marshall Creek bankruptcy and subsequent reorganization. Because this entity was governed by an operating agreement, its reorganization is significantly related to the agreement's arbitration provision. Accordingly, the claim for civil conspiracy is also subject to arbitration.

IV. CONCLUSION

For the reasons stated above, Winslett's third-party claims for civil conspiracy and breach of fiduciary duty must be submitted to arbitration.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.

August 8, 2017
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge