

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

S & G ELECTRIC, INC.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 06-3759
	:	
NORMANT SECURITY	:	
GROUP, INC.,	:	
Defendant.	:	

MEMORANDUM

STENGEL, J.

January 24, 2007

This lawsuit arises from an alleged breach of a subcontract to perform electrical work for the construction of the Women's Detention Center in Philadelphia, Pennsylvania. S&G Electric, Inc. ("Plaintiff") filed suit on August 23, 2006. On November 10, 2006, Norment Security Group, Inc. ("Defendant") moved to compel arbitration in Montgomery Alabama in accordance with the terms and conditions of the parties' subcontract. Plaintiff responded in opposition. For the reasons discussed below, I will grant Defendant's motion.

I. BACKGROUND¹

Plaintiff is an electrical contractor incorporated under Pennsylvania law and located in Philadelphia, Pennsylvania. Defendant is incorporated under Delaware law and is headquartered in Montgomery, Alabama. On July 12, 2001, the parties entered into

¹ This information is derived from the parties' briefings and does not seem to be a complete record of the parties' actions before and after the alleged breach.

a written agreement (the “Subcontract”) that Plaintiff was to provide electrical services for the construction of a Women’s Detention Facility (the “Project”) in Philadelphia, Pennsylvania. Defendant had a contract with the city of Philadelphia relating to the Project.

Plaintiff alleges that due to Defendant’s delays and inefficiencies, it was required to work on the Project for a longer time period and at a greater cost than anticipated in its bid. See Compl. ¶¶ 6-13. Plaintiff asserts that it faithfully performed its work in accordance with the Subcontract.

The parties briefings do not detail the breach of the Subcontract and the steps leading up to filing the lawsuit. Plaintiff contends that it notified Defendants of its claims while working on the Project. Def’s Reply Br. Ex. 1. September 19, 2003 was Plaintiff’s last day on the Project. Pl’s Resp. Def’s Mot. Stay p. 2. On October 17, 2003, Defendant informed Plaintiff that it had an affirmative claim against Plaintiff for work relating to the Project and expected to back charge Plaintiff for these alleged deficiencies. Id. On February 21, 2005, Defendant wrote to Plaintiff to reconcile its account. Pl’s Resp. Def’s Mot. Stay Ex. A. Defendant backcharged Plaintiff for more than the amount of unpaid invoices Plaintiff sought to collect and stated that it did not seek to collect the additional back charges because it “was a very difficult project for both companies.” Id. On February 25, 2005, Plaintiff responded that it did not agree with Defendant’s calculation and would gladly resend invoices submitted for the Project. Id. at Ex. C.

On August 23, 2006, Plaintiff initiated this lawsuit against Defendant alleging breach of the Subcontract and violations of Pennsylvania law. The Court has diversity subject matter jurisdiction under 28 U.S.C. § 1332, as this is a lawsuit between citizens of different states with damages in excess of \$75,000. Venue is proper in the Eastern District under 28 U.S.C. § 1391(a)(2) because this is the judicial district where a substantial part of the events or omissions giving rise to the claim occurred.

Defendant filed this motion to stay the proceedings and compel arbitration on November 10, 2006 pursuant to the terms of the subcontract. Article 6 of the Subcontract provides that "[a]ny controversy or claim between the Contractor and the Subcontractor arising out of or related to this Subcontract, or the breach thereof, shall be settled by arbitration." Additionally, Article 15 states that "[a]rbitration as provided for in Article 6 is at the sole discretion of [Defendant]. If the [Defendant] decides to proceed with arbitration it will be conducted in Montgomery, AL or at the nearest AAA Office as decided by [Defendant]." Pursuant to these provisions of the subcontract, Defendant elected to arbitrate the dispute in Montgomery.² Plaintiff, however, refused to withdraw this action and arbitrate its claims.

II. STANDARD OF REVIEW

A motion to stay litigation and compel arbitration is reviewed under the summary judgement standard of FED. R. CIV. P. 56(c) because the ruling will result in a summary

² Defendant does not state when it elected to arbitrate the dispute. See Def's Mot. Stay Ex. B. Declaration of Angela Crosby, Esquire.

disposition of whether the parties have agreed to arbitrate. Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 n. 9 (3d Cir.1980); Bellevue Drug Co. v. Advance PCS, 333 F. Supp.2d 318, 322 (E.D.Pa. 2004). Consistent with this standard, a party seeking to compel arbitration must “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A court must consider all of the non-moving party's evidence and construe all reasonable inferences in the light most favorable to the non-moving party. Bellevue Drug Co., 333 F. Supp. 2d at 322.

III. DISCUSSION

A. Defendant did not waive its right to compel arbitration.

According to the Third Circuit, a “party waives the right to compel arbitration only in the following circumstances: when the parties have engaged in a lengthy course of litigation, when extensive discovery has occurred, and when prejudice to the party resisting arbitration can be shown.” Great Western Mortg. Corp. v. Peacock, 110 F.3d 222, 233 (3d Cir. 1997). Defendant has not waived its right to arbitrate because it has moved for a stay at the earliest possible point in these proceedings. Gavlik Constr. Co. v. H.F. Campbell Co., 526 F.2d 777, 783-84 (3d Cir. 1975).

Plaintiff contends that Defendant waived its right to arbitrate because its motion is untimely. In support of its argument, Plaintiff cites cases where courts have held that

delay can be a waiver of the right to arbitrate. These cases are clearly distinguishable because they involve attempts to arbitrate years after litigation commenced. See Demsey & Assoc. v. The Joran Int'l Co., 461 F.2d 1009, 1017-18 (2nd Cir. 1972 (finding defendant waived the right to arbitrate when it sought to compel arbitration after a trial); Am. Locomotive Co. v. Gyro Process Co., 185 F.2d 316, 317 (6th Cir. 1950) (holding that a delay of seven years after litigation commenced constituted waiver). In this case, Defendant moved for arbitration before answering Plaintiff's complaint and before any discovery commenced. Defendant's motion to compel arbitration is timely.

Further, Plaintiff cannot allege prejudice, which is another path to waiver. While the Court may not have a complete record of the parties' negotiations and the events leading up to this lawsuit, the evidence Plaintiff proffers does not suggest that Plaintiff has suffered prejudice. Plaintiff cites court costs and attorneys fees in filing this instant action as prejudice, yet provides no case law or authority to support this assertion. As this case is at an early stage, Plaintiff's initial legal fees are not prejudicial.

Plaintiff further alleges prejudice by arguing that Defendant let three years elapse between its October 17, 2003 statement that it would be back-charging Plaintiff for work related to the Project and to its October 10, 2006 motion to compel arbitration. Plaintiff argues that this is particularly prejudicial because Article 15 of the Subcontract provides for unilateral arbitration at the election of Defendant. The last correspondence from Defendant to Plaintiff in the record defeats this argument. Defendant wrote to Plaintiff

on February 21, 2005 that although its back charge calculations showed that Plaintiff owed Defendant over \$50,000, it did not intend to collect the additional charges because it had been a difficult project for both companies. On February 25, 2005, Plaintiff informed Defendant that it contested the back charges and the invoiced amount still owed on its account.

These documents show that Defendant did not wish to pursue its claim against Plaintiff.³ Plaintiff cannot argue that Defendant delayed by not electing to arbitrate the dispute as early as February 2005.⁴ Defendant wanted to put this issue behind it. Plaintiff, not Defendant, initiated litigation. Once Plaintiff commenced litigation, Defendant moved to compel arbitration at the earliest possible point in the proceeding after Plaintiff filed its complaint on August 23, 2006. Defendant did not waive its right to arbitrate by deciding to forgo its potential claim until Plaintiff filed suit.

B. Federal Arbitration Act

(1) The Federal Arbitration Act applies to the subcontract.

The Federal Arbitration Act (“FAA”) mandates the enforcement of arbitration agreements where the agreement is part of a “maritime transaction or a contract evidencing a *transaction involving commerce...*” 9 U.S.C. § 2 (2006) (emphasis added).

³ Therefore, Plaintiff cannot allege that Defendant violated the covenant of good faith and fair dealing implied in every contract by not electing to arbitrate in February 2005. PI’s Resp. Def’s Mot. Stay p. 4 .

⁴ This is particularly true because Pennsylvania law provides for a six year statute of limitation period after a contractual breach to file a timely suit under Pennsylvania law. Romeo & Sons v. P.C. Yezbak & Son, 652 A.2d 830 (Pa. 1995).

The term "commerce" is defined as "commerce among the several States. . . .". 9 U.S.C. § 1. The contract must also be valid under general contract principles for the FAA to apply.⁵ Southland Corp. v. Keating, 465 U.S. 1, 10-11 (1984). The primary purpose of the FAA is to ensure "that private agreements to arbitrate are enforced according to their terms." Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior. Univ., 489 U.S. 468, 479 (1989).

Plaintiff incorrectly asserts that the FAA does not apply to this contract because the underlying transaction fails to meet the standard of substantially affecting interstate commerce that was required by the Court in United States v. Lopez, 514 U.S. 549 (1995). In The Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003) (per curiam), the Court expressly states that "Lopez did not restrict the reach of the FAA" and that Allied-Bruce Terminix Co. is the correct standard for determining what contracts fall under the purview of the FAA. In Allied-Bruce Terminix Co., the Court construed "involving" as being the "functional equivalent" of affecting commerce. 513 U.S. 265, 274-75 (1995). The Court further found that the FAA's interstate commerce should be broadly construed as any transaction that involves or affects interstate commerce in order to place arbitration agreements on equal footing with other contracts. Id., see also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401 n.7 (1967) (noting that the FAA's reference to interstate commerce "reaches not only the actual physical interstate shipment

⁵ Plaintiff does not allege that the arbitration clause is void under general contract principles. Plaintiff only argues that the FAA is not applicable since the contract did not involve interstate commerce.

of goods but also contracts relating to interstate commerce.”); Crawford v. West Jersey Health Sys., 847 F. Supp. 1232, 1240 (D.N.J. 1994) (stating that for the FAA to apply, the contract “need have only the slightest nexus with interstate commerce.”); Ferreri v. First Options of Chicago, Inc., 623 F. Supp. 427, 432 (E.D. Pa. 1985) (“The phrase, “involving commerce,” as used in Section 2 [of the FAA], which determines the scope of the Act, is not to be construed narrowly”).

In Citizens Bank, the Court affirmed this principle after Lopez and held that “the term ‘involving commerce’ in the FAA [is] the functional equivalent of the more familiar term ‘affecting commerce’—words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power.” 539 U.S. at 56. In that case, the Court held that transaction at issue—“a quasi-contractual relationship in which the bank agreed to provide operating capital necessary for Alafabco to secure and complete construction contracts”—involved interstate commerce. Id. at 54. The Court provided three rationales for this holding. First, Alafco engaged in interstate commerce throughout the southeastern United States using loans derived from the agreement. Id. at 57. Second, Alafabco’s business assets were the security for the debt and included an inventory of goods assembled from out-of-state parts. The Court reasoned that “[i]f the Commerce Clause gives Congress the power to regulate local business establishments purchasing substantial quantities of goods that have moved in interstate commerce, it necessarily reaches substantial commercial loan transactions secured by such goods.” Id. Third, the

Court considered the context of the particular transaction and found that “the broad impact of commercial lending on the national economy or Congress’ power to regulate that activity” fell within the Commerce Clause. Id. at 58.

Plaintiff argues that the FAA does not apply to this dispute because its Complaint is based on diversity jurisdiction⁶ and Defendant has not shown that the Project involved interstate commerce. Plaintiff’s argument, however, relies on the heightened Lopez standard. Citizens Bank sets a low threshold for applying the FAA. See e.g. Volt, 489 U.S. at 476 (finding that it was “undisputed” that a construction contract for Plaintiff to install a system of electrical conduits on Stanford’s campus involved interstate commerce and fell within the jurisdiction of the FAA); Roadway Package Sys. v. Kayser, 257 F.3d 287, 291-292 (3d Cir. 2001) (finding FAA applied to citizens from different states who agreed to ship packages across state lines); Troshak v. Terminix Int’l Co., No. 98-1727, 1998 U.S. Dist. LEXIS 9890 (July 2, 1998) (finding the FAA applicable based on an affidavit from Defendant that the pesticide applied to plaintiff’s property in Pennsylvania that was the subject of the suit was shipped from Tennessee); *contra* H. L. Libby Corp. v. Skelly & Loy, 910 F. Supp. 195, 196-98 (M.D. Pa. 1995) (holding that the FAA did not apply because the Pennsylvania branches of these two companies corresponded about the contract in Pennsylvania and the services for the contract that involved a construction of a shopping center were also performed in Pennsylvania). .

⁶ The Supreme Court has stated that the FAA does apply in federal diversity cases. Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 271 (1995).

Defendant meets this threshold. Defendant, a citizen of Alabama and Maryland, contracted with the city of Philadelphia to work on the Project and then subcontracted with Plaintiff, a Pennsylvania corporation, to perform the wiring for the Project.

Defendant's representatives in Pennsylvania or Maryland "regularly corresponded and engaged in telephone calls with their colleagues" in Alabama regarding the Project or Plaintiff's work on the subcontract. Plaintiff does not contradict this assertion.

Following the Supreme Court's rationale in Citizens Bank, the context of this transaction—an agreement between two companies from different state to undertake a large construction project—involves interstate commerce. 539 U.S. at 58. Therefore, the FAA applies and the Court is required to enforce the terms of the parties' arbitration agreement. Roadway Package Sys. v. Kayser, 257 F.3d 287, 292-293 (3d Cir. 2001).

(2) The FAA preempts Pennsylvania law.

Plaintiff argues that even if the FAA does apply to the contract, it does not preempt two Pennsylvania laws that prohibit the enforcement of contracts that compel arbitration outside of Pennsylvania. The Pennsylvania Contractor and Subcontractor Payment Act ("Payment Act") provides that "[m]aking a contract subject to the laws of another state or requiring that any litigation, arbitration or other dispute resolution process on the contract occur in another state, shall be unenforceable." 73 PA. STAT. ANN. § 514 (2006). The Pennsylvania Commonwealth Procurement Code ("Procurement Code") states that "[a] provision in the contract making it subject to the laws of another state or requiring that

any litigation, arbitration or other dispute resolution process on the contract occurs in another state shall be unenforceable. 62 PA. CONS. STAT. ANN. § 3937 (2006). Defendant argues that the FAA preempts these state laws.

The Supremacy Clause dictates that any state law conflicting with the exercise of enumerated federal power is preempted. The Supreme Court has recognized that federal preemption of state law can occur in three types of situations: (1) where Congress explicitly preempts state law ("express preemption"), (2) where preemption is implied because Congress has occupied the entire field ("field preemption"), and (3) where preemption is implied because there is an actual conflict between federal and state law ("conflict preemption"). Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300 (1988); Pokorny v. Ford Motor Co., 902 F.2d 1116, 1121-22 (3d Cir. 1990). In Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior. Univ., 489 U.S. 468, 477-79 (1989), the Court stated that the FAA does not contain an express preemption provision or reflect a Congressional intent to occupy the entire field of arbitration. The Court did leave open the possibility "that state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law." Id. Since the Court has foreclosed express or field preemption option under the FAA, Defendant can only bar the application of Pennsylvania law under a conflict preemption theory, which requires that the Court use federal law if applying Pennsylvania law would undermine the primary purpose of the FAA: "ensuring that private agreements to arbitrate are enforced according to their

terms.” Id.

Case law clearly establishes that the FAA preempts state laws that require a judicial forum to resolve claims that parties have agreed to resolve through arbitration. Volt, 489 U.S. at 478 *citing* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). See also Doctor’s Assocs. v. Casarotto, 517 U.S. 681 (1996) (holding that a Montana law requiring that arbitration agreements be subject to specific first-page notice requirements that were not required of other contracts was invalid and preempted by the FAA). Even if a state law does not prohibit arbitration but places additional procedural restrictions on the right, the federal policy underlying the FAA favors enforcing private agreements to arbitrate according to their own terms. Volt, 489 U.S. at 477-79; see also Roadway Package Sys. v. Kayser, 257 F.3d 287, 292 (3d Cir. 2001) (stating that courts must enforce the terms of parties arbitration agreement and that “[w]hen a court enforces the terms of an arbitration agreement that incorporates state law rules, it does so not because the parties have chosen to be governed by state rather than federal law. Rather, it does so because federal law requires that the court enforce the terms of the agreement.”).

For example, in the Volt decision, the Court concluded that the FAA did not preempt a state law provision that permitted courts to stay arbitration pending resolution of related litigation because this state law did not undermine the goals and policies of the FAA. However, a key factor in the Court’s analysis was that the parties had agreed that California law would govern their arbitration agreement. Id. at 470. The Court stated

that “it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself.” Id. at 479. The Court’s analysis shows that the language of a parties agreement is central to preemption issues.

A New Jersey state court also focused on the terms of the parties’ arbitration to use the FAA to enforce a forum selection clause to arbitrate in Minneapolis in the face of contrary state law. B & S Ltd, Inc. v. Elephant & Castle Int’l, Inc., 906 A.2d 511 (N.J. Super. Ct. 2006).⁷ A New Jersey franchise law authorized franchisees to sue franchisors in state court. Id. at 517. The court found that the FAA preempted the New Jersey law because the state law would have the effect of invalidating the forum selection clause in the parties’ agreement. Id. at 520.

Applying Pennsylvania law would undermine the FAA goal of enforcing arbitration agreements according to their own terms. Therefore, the Court will hold the parties to their agreement and require them to arbitrate as per the terms of their subcontract.

(3) The arbitration agreement is enforceable under the FAA.

If the agreement is enforceable, a court is required to stay the lawsuit when the issue before the court is referable to arbitration under a written agreement and the

⁷ In this case, the arbitration agreement stated that any issues related to arbitration will be governed by the FAA. 906 A.2d at 519. In contrast, it is not clear based on the record before this Court what law governs the arbitration clause in the subcontract.

applicant for the stay is not in default in proceeding with arbitration. 9 U.S.C. § 3 (2006). The Third Circuit follows the strong federal policy favoring arbitration. John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 137 (3d Cir. 1998). Before compelling arbitration, a district court must conduct a "limited review" focused on a two-prong test: (1) did the parties enter into a valid arbitration agreement and (2) does the dispute between the parties fall within the language of the arbitration agreement. Id. In conducting this brief review, the court must apply ordinary contract law principles. Id.

Defendant argues that the arbitration clause is valid because it "was negotiated at arms length by two sophisticated parties" and Plaintiff seeks to enforce other aspects of the subcontract. Def's Mot. to Stay p. 6. Plaintiff does not argue that the arbitration agreement is invalid, therefore, the Court must only determine whether the dispute falls within the language of the broad arbitration clause. Article 6 applies to "any controversy or claim...arising out of or related to this Subcontract." The Third Circuit has stated that phrases in arbitration clauses such as "arising out of" are typically given broad construction. Tripp v. Renaissance Advantage Charter Sch., No. 02-9366, 2003 U.S. Dist. LEXIS 19834 at *12 (E.D. Pa. 1983)(citing Battaglia v. McKendry, 233 F.3d 720, 725 (3d Cir. 2000)). An alleged breach of the subcontract would fall within this broadly written clause and the arbitration agreement is enforceable.

IV. CONCLUSION

For the reasons discussed above, I will grant Defendant's motion. An appropriate

Order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

S & G ELECTRIC, INC.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 06-3759
	:	
NORMANT SECURITY	:	
GROUP, INC.,	:	
Defendant.	:	

ORDER

AND NOW, this 24th day of January, 2007, upon consideration of Defendant's Motion to Stay and to Compel Arbitration (Document No. 8), and Plaintiff's response thereto, it is hereby **ORDERED** that the Defendant's Motion is **GRANTED**.

The Clerk of the Court is directed to mark this case closed for statistical purposes.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.