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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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PECK ORMSBY CONSTRUCTION
COMPANY,

CIV. NO. 1:10-00545 WBS

Plaintiff,

MEMORANDUM AND ORDER RE: STAY
PENDING ARBITRATION

v.

CITY OF RIGBY, PARKSON
CORPORATION, and WESTERN
SURETY COMPANY,

Defendants.

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Plaintiff Peck Ormsby Construction Company ("Peck Ormsby") brought this action against defendants City of Rigby ("Rigby"), Parkson Corporation ("Parkson"), and Western Surety Company arising from a wastewater facility construction project for which Peck Ormsby was the contractor and Parkson the subcontractor. Rigby filed a third-party complaint against Travelers Casualty and Surety Company, who had delivered a performance bond to Rigby guaranteeing Peck Ormsby's performance.

1 (Docket No. 151.)

2 In addition to the performance bond involving Rigby,
3 Travelers, and Peck Ormsby, Parkson was required to deliver a
4 Performance Guarantee to Rigby. The court originally held that
5 an arbitration clause in the Performance Guarantee was not
6 enforceable. (Docket No. 84.) After reversal and remand by the
7 Ninth Circuit, (Docket No. 158), the court ordered that Parkson
8 and Rigby arbitrate the claims between them, (Docket No. 163).
9 The court also ordered that the remaining parties brief the issue
10 of whether the remaining claims should be stayed pending
11 arbitration. (Id.)

12 I. The Court Will Not Stay the Non-Arbitable Claims

13 The court is in receipt of the remaining parties'
14 briefs on the subject. (Docket Nos. 165 & 166.) The court held
15 conferences on August 28th, 2013 and September 16, 2013 in which
16 all parties participated.

17 Where an arbitration agreement is enforced as to some
18 parties in the litigation but claims between parties not subject
19 to the agreement remain, "it may be advisable to stay litigation
20 among the non-arbitrating parties pending the outcome of the
21 arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr.
22 Corp., 460 U.S. 1, 20 n.23 (1983); see also United States v.
23 Neumann Caribbean Int'l, 750 F.2d 1422, 1427 (9th Cir. 1985)
24 (staying all proceedings in case, including non-arbitrable third-
25 party complaint, pending arbitration due to considerations of
26 "economy and efficiency"). When deciding whether to stay the
27 non-arbitrable claims, the court "considers economy and
28 efficiency, the similarity of the law and fact to those that will

1 be considered during arbitration, and the potential for
2 inconsistent findings absent a stay." Wolf v. Langemeier, No.
3 2:09-CV-03086-GEB-EFB, 2010 WL 3341823, at *8 (E.D. Cal. Aug. 24,
4 2010).

5 While the law and facts at issue in the federal court
6 proceedings are similar to those at issue in the arbitration, the
7 court declines to stay the claims between the remaining parties
8 during the course of the arbitration. Any potential inconsistent
9 findings by the arbitrator would not be binding against Peck
10 Ormsby, who will not have an opportunity to participate in the
11 arbitration. Cf. Contracting N.W., Inc. v. City of
12 Fredericksburg, 713 F.2d 382, 387 (8th Cir. 1983) (noting that
13 "the arbitrator's findings will not be binding as to those not
14 parties to the arbitration"). The parties have completed all
15 discovery, filed dispositive motions, and are currently preparing
16 for a trial on January 14, 2014.

17 As the parties noted at the September 16, 2013 hearing,
18 Rigby has not yet even initiated arbitration proceedings. Should
19 the arbitrable claims proceed to arbitration, the parties
20 estimate that it would take up to five months to select
21 arbitrators and proceed through preparations similar to trial.
22 Any economy and efficiency to be gained through prompt
23 arbitration has already been lost. Furthermore, while the court
24 does not have the power to order a stay of the arbitration, the
25 arbitrator would not be precluded from holding the arbitration
26 proceedings in abeyance while the federal proceedings advance.
27 Thus economy and efficiency do not favor staying the non-
28 arbitrable claims pending arbitration.

1 The court accordingly declines to stay the action
2 between Rigby, Peck Ormsby, and Travelers.

3 II. The Court Would Not, Over Parkson's Objection, Dismiss
4 Rigby's Claim Against Parkson Without Prejudice

5 At the September 16, 2013 hearing, it was suggested
6 that Rigby might seek to dismiss its remaining claim against
7 Parkson without prejudice. As the parties seem to agree, without
8 Parkson's consent, the court would have discretion to deny any
9 request by Rigby to dismiss its claim against Parkson without
10 prejudice. See Hamilton v. Firestone Tire & Rubber Co., Inc.,
11 679 F.2d 143, 145 (9th Cir. 1982) ("The Ninth Circuit has long
12 held that the decision to grant a voluntary dismissal under Rule
13 41(a)(2) is addressed to the sound discretion of the District
14 Court, and its order will not be reversed unless the District
15 Court has abused its discretion."); see also Searcy v. Thomas,
16 1:10-CV-00294-EJL, 2013 WL 837936, at 2 (D. Idaho Mar. 6, 2013).

17 Under the circumstances of this case, the court would
18 not exercise its discretion to dismiss Rigby's claim against
19 Parkson without prejudice. The parties have already spent
20 significant amounts of time, as well as court and financial
21 resources, litigating the arbitration issue. The court sees no
22 benefit to a dismissal without prejudice. Were the court to
23 dismiss without prejudice and Rigby to later bring the same claim
24 against Parkson again, there would be only the drawbacks of
25 further delay and the duplication of costs and efforts already
26 expended.

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IT IS SO ORDERED.

DATED: September 17, 2013



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

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