IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Destinations by Design, LLC,

Plaintiff,

v.

Case No: 2:09-cv-1099
JUDGE SMITH
Magistrate Judge King

T-Mobile USA, Inc.,

Defendant.

OPINION AND ORDER

This matter is before the Court on Defendant T-Mobile USA, Inc.'s Motion to Dismiss, or in the alternative, Stay and Compel Arbitration (Doc. 12). Plaintiff Destinations by Design, LLC has filed a response (Doc. 15) and the matter is now ripe for review. For the reasons that follow, the Court **GRANTS** Defendant's Motion to Stay and Compel Arbitration.

I. BACKGROUND

Plaintiff Destinations by Design, LLC ("Plaintiff" or "DBD") is a limited liability company organized under Ohio law with its principal place of business in Dublin, Ohio. DBD is an event management company that plans, operates, and executes business meetings and events for its corporate clients.

Defendant T-Mobile USA, Inc., ("Defendant" or "T-Mobile") is a corporation organized under Delaware law with its principal place of business in Bellevue, Washington. T-Mobile is a telecommunications company that provides telecommunications sales, support, and services nationwide.

DBD and T-Mobile began their business relationship in 2001, when DBD began providing event planning services to T-Mobile. The two entities later executed a formal Services Agreement, effective December 1, 2005. DBD's scope of work and fee schedule were included in an addendum to the Services Agreement. The Services Agreement contained a dispute resolution, Section 13, which states in pertinent part:

> If such negotiations fail to resolve any dispute arising out of or relating to this Agreement (regardless of the legal theory and including but not limited to the breach, termination, applicability, scope or validity of this Agreement or this arbitration provision), such dispute will be finally resolved by binding arbitration in accordance with the Judicial Arbitration & Mediation Services, Inc. ["JAMS"] or its successor by a sole arbitrator.

(Services Agreement, attached as Ex. A to Def.'s Mot. to Dis.). The Services Agreement also contains a survival of obligations clause, Section 15.15, which states in pertinent part:

> The respective obligations of Company and T-Mobile which, by their nature, would continue beyond expiration or earlier termination of this Agreement, and Sections 5-8, 10-14, 15.1, 15.8-15.12 and 15.17 shall survive the termination or expiration of this Agreement.

By its own terms, the Services Agreement expired three years after its effective date, on December 1, 2008.

T-Mobile and DBD had a process, controlled by the Services Agreement, in which T-Mobile identified events or locations it wished to reserve, and DBD would make the necessary planning arrangements. DBD received a commission for the events planned after settlement of the final billing with a hotel or resort.

When the Services Agreement expired on December 1, 2008, DBD was in the process of planning T-Mobile's 2009 Q-4 in Las Vegas, Nevada. DBD had begun working on the event more than seven months earlier. It had already negotiated a multimillion dollar contract with

The Venetian Hotel in Las Vegas ("The Venetian"), which was signed on April 24, 2008.

After securing The Venetian contract, DBD's planning for the event continued, securing several more contracts. T-Mobile approached DBD on October 30, 2008 about the potential cost for cancelling its 2009 Q-4 event. DBD informed T-Mobile that the cost for cancelling the event would include The Venetian's cancellation fee and DBD's fifteen percent commission of the 2009 Q-4 budgeted line items. DBD describes that it offered to reduce its commission by fifty percent in the spirit of cooperation and good faith with T-Mobile. (Compl. ¶ 16).

T-Mobile considered its options internally, and, in early November, T-Mobile allegedly instructed DBD to proceed as planned with the 2009 Q-4 event. However, T-Mobile ultimately decided to scale back the event due to financial concerns. It informed DBD of its decision to limit the 2009 Q-4 event to its management on November 24, 2008. This decision to not include T-Mobile sales staff reduced the event's scope to approximately 500 attendees. (Compl. ¶ 18).

The Services Agreement expired on December 1, 2008, a week after T-Mobile informed DBD of the change in scope. DBD alleges it entered into an oral contract with T-Mobile on or about December 1, 2008, under which it agreed to continue planning the 2009 Q-4 event in return for a fifteen percent commission of the event's gross budgeted line items whether or not the event was cancelled or completed. (Compl. ¶ 8).

T-Mobile and DBD representatives met in early January 2009 in Las Vegas during the Consumer Electronics Show, and discussed the continued planning efforts for the 2009 Q-4 event. T-Mobile told DBD that it still planned to proceed with the event. (Compl. ¶ 19). DBD informed T-Mobile on January 13, 2009, that The Venetian's cancellation fee would escalate significantly if T-Mobile cancelled the 2009 Q-4 event. (Compl. ¶ 21).

DBD continued to work on the project until it received T-Mobile's letter on May 11, 2009. Among other things, the letter instructed DBD to cease work on any and all T-Mobile projects, to provide written status reports for all projects, and provide an itemized description of all charges and credits to T-Mobile for work performed from January 1, 2008 through the present.

Plaintiff DBD initiated the current litigation when it filed its Complaint in the Court of Common Pleas of Franklin County, Ohio on October 28, 2009. The Complaint consists of four counts: breach of contract, promissory estoppel, unjust enrichment, and fraud. The Defendant removed the case to this Court on December 2, 2009. Defendant T-Mobile then filed a Motion to Dismiss or, in the alternative, a Motion to Stay and Compel Arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, on the bases of the arbitration provision in the Services Agreement.

II. STANDARD OF REVIEW

The FAA provides that an arbitration clause in a "transaction involving commerce . . . 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. If the Court determines that an issue brought before it is referable to arbitration under a written arbitration agreement, it shall, on the application of one of the parties, stay the proceedings until arbitration is completed. 9 U.S.C. § 3. The FAA mandates when the Court is "satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4.

When considering a motion to stay proceedings and compel arbitration under the Act, a court has four tasks: (1) it must determine whether the parties agreed to arbitrate; (2) it must determine the scope of that agreement; (3) if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and (4) if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration. *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 392 (6th Cir. 2003) (quoting *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000)).

A court may not deny a motion to stay or dismiss "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT & T Technologies, Inc. v. Comms. Workers*, 475 U.S. 643, 650 (1986); *Nestle Waters North Am. v. Bollman*, 505 F.3d 498, 504 (6th Cir. 2007). The "party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Financial Corp.Alabama v. Randolph*, 531 U.S. 79, 91 (2000). But "[i]n order to show that the validity of the agreement is 'in issue' [under 9 U.S.C. § 4], the party opposing arbitration must show a genuine issue of material fact as to the validity of the agreement to arbitrate." *Great Earth Cos. v. Simons*, 288 F.3d 878, 889 (6th Cir. 2002).

The FAA establishes a liberal policy favoring arbitration agreements, and any doubts regarding arbitrability should be resolved in favor of arbitration over litigation. *See Nestle Waters*, 505 F.3d at 503 ("[w]e examine arbitration language in a contract in light of the strong federal policy in favor of arbitration, resolving any doubts as to the parties' intentions in favor of arbitration."). However, "[w]hile ambiguities ... should be resolved in favor of arbitration, we do

not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (internal citation omitted).

Although the facts must arguably be construed in the light most favorable to Plaintiff DBD under the standards related to a motion under Federal Rule of Civil Procedure 12(b)(6), the Supreme Court clearly explains that doubts about the legal conclusions drawn from those facts must favor arbitration. For this reason, although Plainitff DBD repeatedly argues that this Court must accept its "uncontested facts" – that its December 1, 2008 oral agreement represented a new contract, and that work performed after that date arose out of and related to the oral agreement and not the expired Services Agreement – these are not facts the Court must accept as true, but are legal conclusions that the Court must decide for itself. *See Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007) ("While all the factual allegations of the complaint are accepted as true, we need not accept as true legal conclusions or unwarranted factual inferences.").

III. DISCUSSION

Defendant T-Mobile argues that this Court should stay litigation while an arbitrator determines the scope of the Services Agreement's arbitration provision. Defendant argues that the Services Agreement's arbitration provision specifically states that the arbitrability of disputes arising out of, or relating to the Services Agreement, will be determined by a JAMS arbitrator. JAMS Rule 11 specifically empowers the arbitrator to "determine jurisdiction and arbitrability issues as a preliminary matter." JAMS Comprehensive Arbitration Rules & Procedures, Rule 11(c) (*available at* http://www.jamsadr.com/rules-comprehensive-arbitration/).

Plaintiff DBD's Complaint and its Memorandum in Opposition do not dispute that the Services Agreement contains an arbitration provision that allows the arbitrator to determine arbitrability. However, DBD disputes that the case arises out of or relates to the Services Agreement. Plaintiff argues the dispute involves a matter completely separate from the Services Agreement, and therefore, there is no agreement to arbitrate, and no clear and unmistakable agreement that they arbitrate arbitrability.

Although doubts regarding the scope of an arbitration clause (i.e. what is arbitrable) must be resolved in favor of arbitration, the presumption is reversed when determining who should determine arbitrability. *Bishop v. Gosiger, Inc.*, --- F. Supp. 2d ---, Civ. No. 09-12182, 2010 WL 809847, at *5 (E.D. Mich. March 4, 2010). The United State Supreme Court explained that "[c]ourts should not assume that parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514. U.S. 938, 944 (1995) (citing *AT & T Technologies*, 475 U.S. at 649).

It is insufficient that the Services Agreement between DBD and T-Mobile contains a clause demonstrating the parties intended to arbitrate arbitrability. Without evidence that the arbitration clause in the Services Agreement encompasses the instant dispute, the Services Agreement's arbitration provision is of little import. This Court cannot compel arbitration unless it find that the parties agreed to arbitrate.

The Court finds that DBD's claims relate to the Services Agreement and its arbitration provision. Because the arbitration provision expressly states the parties agree to arbitrate arbitrability, the Court leaves the final determination regarding arbitrability to the JAMS arbitrator. If he or she should interpret the contract at issue and side with DBD–that is, find that

the claims do not arise out of or relate to the Services Agreement–DBD can return to this Court for a determination on the merits.

Defendant T-Mobile asserts that Plaintiff DBD's claims are subject to arbitration because the Services Agreement contained a binding arbitration clause, Section 13, and a survival of obligations clause, Section 15.15, that expressly includes Section 13. DBD does not dispute that the Services Agreement contains a binding arbitration clause, nor has it disputed that the Services Agreement contains a survival of obligations clause.

Plaintiff DBD's opposition to T-Mobile's Motion is premised on its belief that the dispute currently before the Court is subject to an oral agreement, and that it did not arise out of or relate to the now expired Services Agreement. Because the oral agreement did not include an agreement to arbitrate, DBD argues that, as a general matter, there is no basis for this court to compel arbitration. DBD has directed this Court's attention to two cases in particular, where courts have declined to compel arbitration of disputes arising under oral agreements made after a written agreement had expired: *Vantage Technologies Knowledge Assessment, LLC v. College Entrance Board*, 591 F. Supp. 2d 768 (E.D. Pa. 2008) and *Bogen Communications v. Tri-Signal Integration*, Civ. A. No. 04-6275, 2006 U.S. Dist. LEXIS10497 (D.N.J. Feb. 22, 2006), *aff'd*, 227 Fed. App'x 159 (3d Cir. 2007).

There are some similarities between the present dispute and the disputes in both *Vantage Technologies* and *Bogen*. The companies in both *Vantage Technologies* and *Bogen* had conducted business with one another for a period time under written agreements that included arbitration provisions. Also, like the case at bar, the companies in both *Vantage Technologies* and *Bogen* continued to work together even after the written agreements naturally expired.

However, unlike the dispute between DBD and T-Mobile, in both *Vantage Technologies* and *Bogen* the disputes involved work that was begun and completed after the written agreements had expired. The work performed could not relate back to contractual obligations under the written agreements. In *Vantage Technologies*, the dispute involved tests administered and scored by Vantage Technologies on behalf of the College Entrance Board after the written contract had expired in 2002. *Vantage Technologies*, 591 F. Supp. 2d at 769. In *Bogen*, the dispute "did not arise until more than two years after the original contract expired and does not relate back to that contract." *Bogen Communications v. Tri-Signal Integration*, 227 Fed. App'x 159, 161 (3d Cir. 2007).

Plaintiff DBD began the disputed project work for T-Mobile before the Services Agreement expired. DBD's Complaint characterizes the work performed under the oral agreement as a continuation of DBD's project efforts to plan T-Mobile's event. (Compl. ¶ 25). This fact–that the disputed project work began under the terms of the Services Agreement, but ended after the agreement expired–establishes that the current dispute relates back to the Services Agreement.

Plaintiff DBD has argued that its current dispute with Defendant T-Mobile does not relate to or arise out of the Services Agreement because: (1) there is no need to reference the expired Services Agreement to resolve the current dispute; and (2) the majority of the material facts and occurrences arose after the expiration of the Services Agreement. The Court rejects both arguments, and will address each in turn.

DBD argues that the current dispute is beyond the scope of the expired Services Agreement's agreement to arbitrate because it believes that the current action can be maintained

without referencing the Services Agreement. DBD relies on Sixth Circuit precedent that states "if an action can be maintained without reference to the contract or relationship at issue, the action is likely outside the scope of the arbitration agreement." *NCR Corp. v. Korala Assocs.*, 512 F.3d 807, 814 (6th Cir. 2008); *Nestle Waters North America, Inc. v. Bollman*, 505 F.3d 498, (6th Cir. 2007).

In support of its position that its action can be maintained without reference to the expired Services Agreement, DBD alleges that it "does not reference the Services Agreement in any allegation contained in the Complaint." (Plaintiff's Memo. in Opp. at 7). The Court, however, observes that DBD specifically describes the Services Agreement's creation in paragraph 8 of its Complaint. DBD also described actions that all occurred while the Services Agreement was effective in paragraphs 9-18. DBD then expressly incorporated these paragraphs into all four counts of its Complaint.[1]

Count One of Plaintiff's Complaint is a breach of contract claim against Defendant T-Mobile. As a general matter, "a contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1. "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." RESTATEMENT (SECOND) OF CONTRACTS § 2. In describing the oral agreement, Plaintiff DBD described it as an agreement to continue its work on Defendant T-Mobile's 2009 Q-4 event. The pleadings themselves refer the adjudicator back to the Services Agreement – and DBD's planning responsibilities under it – in order to understand

[1] Each count begins with the following declaration: "Plaintiff realleges and incorporates each of the foregoing paragraphs as if fully rewritten herein."

the nature and scope of the work to be performed under the oral agreement. It is not possible to understand the oral agreement without a reference back to the Services Agreement. The Court, therefore, finds that the breach of contract dispute involving work performed after December 1, 2008 directly relates back to work performed under the Services Agreement and its arbitration provision.

Count Two of Plaintiff's Complaint is a promissory estoppel claim against Defendant T-Mobile. Plaintiff DBD argues that its reliance on the Defendant's promises were reasonable and justifiable because Plaintiff had no reason to know of Defendant's misrepresentations at the time they were made. In evaluating this claim, an adjudicator would need to reference the Services Agreement and the working relationship that it created between T-Mobile and DBD to accurately evaluate whether or not Plaintiff's reliance was reasonable or unreasonable. It is not possible to assess the reasonableness of DBD's conduct without a reference back to the pre-December 1, 2008 relationship between the two companies. The Court, therefore, finds that any dispute involving promissory estoppel relates back to the working relationship that was governed by the Services Agreement and its arbitration provision.

Count Three of Plaintiff's Complaint is an unjust enrichment claim against Defendant T-Mobile. Plaintiff DBD pleads that T-Mobile knowingly, accepted, and retained the benefits of Plaintiff's work in planning the cancelled 2009 Q-4 event. DBD began planning the event under the Services Agreement and ended its efforts after the agreement ended. In assessing DBD's promissory estoppel claim, an adjudicator will have to determine what benefits were derived by T-Mobile from work performed after December 1, 2008. This will require referencing the Services Agreement and the working relationship between DBD and T-Mobile. It is not possible

to determine the benefits of the work performed after December 1, 2008 without finding a way to differentiate those benefits from the benefits of work performed prior to December 1st. The Court, therefore, finds that any dispute involving unjust enrichment relates back to the working relationship that was governed by the Services Agreement and its arbitration provision.

Count Four of Plaintiff's Complaint is a fraud claim against Defendant T-Mobile. Plaintiff DBD pleads that T-Mobile knew or should have known that it was planning to cancel its event as early as November 2008. In evaluating DBD's fraud claim, an adjudicator will have to reference the Services Agreement and the working relationship it established between DBD and T-Mobile because the first incident of fraud is alleged to have taken place prior to Services Agreement's expiration on December 1, 2008. The Court, therefore, finds that any dispute involving fraud relates back to the working relationship that was governed by the Services Agreement and its arbitration provision.

Plaintiff DBD also resists Defendant's Motion by arguing that the dispute between T-Mobile and DBD does not arise out of the the Services Agreement because a majority of material facts and occurrences occurred after the Services Agreement expired on December 1, 2008. However, the plain language of the Services Agreement's arbitration provision does not limit the arbitration of disputes between the parties only to those that arise under the Services Agreement. The plain language of the arbitration provision requires the arbitration of disputes that either arise out of or relate to the Services Agreement. A dispute relates to a contract when it is necessary for a court to consider or interpret that contract in resolving the matter currently

before it. *See, e.g.*, *Panepucci v. Honigman Miller Schwartz, Cohn, LLP*, 408 F.Supp.2d 374, 380 (E.D. Mich. 2005).[2]

The Court finds that all four counts of Plaintiff's Complaint relate to matters governed by the Services Agreement arbitration clause because it is necessary to interpret the Services Agreement and the working relationship it created between DBD and T-Mobile in addressing each of Plaintiff's claims. Therefore, all four counts are likely arbitrable. The Court cannot say with positive assurance that the arbitration clause in the Services Agreement does not cover the present dispute, and therefoer, it must enforce the Services Agreement's arbitration provision. *See AT & T Technologies*, 475 U.S. at 650. The Court therefore grants Defendant T-Mobile's Motion to Stay Litigation and Compel Arbitration as to all of Plaintiff DBD's claims.

[2] "In considering whether this dispute "relates to" the Partnership Agreement, it is apparent that the claims in this case cannot be resolved without consideration or interpretation of the Agreement itself. Like the long line of cases decided in relation to collective bargaining agreements, such a finding compels the conclusion that this dispute "relates to" the Agreement, and must, therefore, be arbitrated." *Panepucci*, 408 F.Supp.2d at 380.

IV. CONCLUSION

Based on the above, the Court **GRANTS** the Defendant's Motion to Stay and Compel Arbitration. The parties are **ORDERED** to proceed in accordance with the Arbitration Agreement. The parties are also **ORDERED** to advise the court of the status of this controversy no later than thirty (30) days after the day the arbitration is concluded.

The Clerk shall remove Document 12 from the Court's pending motions list, and hereby stay this case pending arbitration.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT