

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-22-72

SUSAN SQUIRES, *et al*

v.

ORDER

JOSEPH FENDERSON *et al*

Before the court is Defendants' Motion to Compel Arbitration on the claim brought by Plaintiff Kristin Pretorius. For the reasons described below, the motion is granted as to Plaintiff Kristin Pretorius claim against A.H. Custom Builders. The motion is otherwise denied.

BACKGROUND

This case arises out of two separate residential construction projects. In each case, Defendant A & H Improvements, Inc. ("Company") signed contracts with a different homeowner. The contract between the Company and Pretorius contains an arbitration clause. The contract between the Company and Plaintiffs Susan and Kelly Squires does not contain an arbitration clause. The Squires' complaint is not affected by the pending motion. There is no written agreement between Pretorius and the individual defendants, Joseph and Susan Fenderson.

Defendants filed this Motion in order to compel arbitration in accordance with the contract. Plaintiff argues that the timing of the Motion is too late and that the Defendants have waived arbitration. The Plaintiff also argues that absent a written agreement to arbitrate, arbitration is not available in her case against the individual Defendants. The Defendants were served in April, 2022, they answered the complaint, and the court issued a scheduling order on May 3.

The motion to compel was not filed until October 25, 2022. Other than the Answer and this Motion to Compel, court file does not reflect any activity regarding Plaintiff Pretorius.

Between the May scheduling order and the October motion to compel arbitration, the Defendants responded to written discovery served by the Plaintiffs. There also appears to be an extended discussion regarding mediation which had to be postponed. There has also been motion practice relating to the Squires complaint. Defendants explain the delay because they did not appear to have a copy of the contract. There is no evidence that the Defendants' counsel ever asked the Plaintiffs for a copy or served discovery asking for a copy. The Defendant Company did not have a copy of the contract because of access to the electronic signature website.

In order to compel arbitration, there must be a written arbitration agreement. A party cannot be forced to arbitrate without a writing indicating a contractual intent to be bound to do so. *Roosa v. Tillotson*, 1997 ME 121, ¶ 4. Once there is a written agreement to arbitrate, Maine has a broad presumption favoring substantive arbitrability. *Champagne v. Victory Homes*, 2006 ME 58, ¶ 9.

The presumption requires a finding that the dispute has been subjected to arbitration if "(1) the parties have generally agreed to arbitrate disputes, and (2) the party seeking arbitration presents a claim that, on its face, is governed by the arbitration agreement." *Id.* (citation omitted). Because of this strong legislative policy, a court will find a dispute arbitrable 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

V.I.P., Inc. v. First Tree Dev., 2001 ME 73, ¶4 (quotations and citations omitted).

With respect to Defendants Joseph and Susan Fenderson, they do not have a contract with the Pretorius. Therefore, the court cannot compel arbitration on the case against them. The court recognizes that the case against the individual Defendants arise out of the same events as the case against the Company. Nevertheless, the court does not have authority to compel arbitration where there is no contract. Neither party has provided the court with any authority as to whether they can be brought within the umbrella of the arbitration provision under these circumstances.

Therefore, with respect to the individual Defendants, the court denies the motion to compel arbitration.

With respect to the Company, the arbitration provision is in a written contract, it is unambiguous and it is enforceable. The only issue is whether the timing of the motion to compel means that the Company waived its right to arbitration. The Law Court has addressed the factors to be considered when determining whether a party has waived the right to compel arbitration.

A party may, by engaging in litigation, implicitly waive its contractual right to arbitrate. The relevant question is whether the parties have litigated "substantial issues going to the merits" of the arbitrable claims without any indication that, despite the dispute's presence in court, a party intends to exercise its contractual right to arbitration. Such litigation does not need to involve dispositive motions, though many courts finding waiver have noted the presence of such motions. Essentially, the party now seeking to compel arbitration must have demonstrated a "preference for litigation" over arbitration.

Saga Communs. of New England, Inc. v. Voornas, 2000 ME 156, ¶ 12, 756 A.2d 954 (citations and quotations omitted). The court should consider whether the party claiming a waiver has been prejudiced by a delay in a motion to compel. *Id.* ¶ 16.

"Prejudice . . . refers to the inherent unfairness--in terms of delay, expense, or damage to a party's legal position--that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Id.* ¶ 17. "Delay alone, or expenses that would have also been incurred in arbitration, are not enough to support a finding of prejudice. *Id.*, see *Goodrich Home Builders v. Melinda M*, 2021 Me. Super. LEXIS 140, *6 (no waiver when litigation has been limited mostly to discovery and procedural motions).

Here, the court finds that while there was significant delay before the motion seeking arbitration, the Plaintiffs were not prejudiced by the delay. The only events that have occurred, discussion regarding mediation and basic written discovery, are largely duplicative of what would have occurred had the case gone to arbitration. The record does not reflect that the

Company was choosing litigation over arbitration. There is no evidence that they initiated any litigation activity other than a motion relating to the other Plaintiff's attachment. The court does not give any weight to the Company's argument that they could not locate the contract. Instead, the law's presumption favoring arbitration, the lack of prejudice to the Plaintiffs, and the lack of litigation activity initiated by the Company persuades the court to rule in favor of arbitrability.

The court recognizes that when the case against the Company proceeds in arbitration and the case against the individuals proceeds in court creates an inefficient process, but that is not a basis for the court to deny a motion to compel a legally enforceable arbitration agreement. On reflection, the Company may choose to waive arbitration to allow the matters to proceed together, or at least make agreements regarding completing discovery and mediation together.

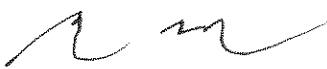
The entry is:

Defendants' Motion to Compel Arbitration is GRANTED only with respect to the Plaintiff Kristin Pretorius claim against A.H. Custom Builders. With any respect to any other claims, the motion is DENIED.

Plaintiff Kristin Pretorius' claim against A.H. Custom Builders is STAYED pending the result of arbitration. All other claims will proceed in accordance with the court's scheduling order.

This Order is incorporated on the docket by reference pursuant to M.R.Civ.P. 79(a).

DATE: 12/27/22



Thomas R. McKeon
Justice, Maine Superior Court