

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FOUR B DEVELOPMENT CORPORATION,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 00-31-P-C</i>
)	
CLIFF REALTY CORPORATION,)	
)	
<i>Defendant</i>)	

**MEMORANDUM DECISION ON
DEFENDANT’S MOTION TO STAY ARBITRATION**

Defendant Cliff Realty Corporation (“Cliff Realty”) moves pursuant to 9 U.S.C. § 4 and 14 M.R.S.A. § 5928 for a stay of ongoing American Arbitration Association (“AAA”) proceedings pending resolution of a petition by plaintiff Four B Development Corporation (“Four B”) to compel arbitration. Motion To Stay Arbitration Pending Determination of Plaintiff’s Petition To Compel Arbitration (“Motion To Stay”) (Docket No. 3) at 1; *see also* Four B Development Corporation’s Petition and Complaint To Compel Arbitration Pursuant to 9 U.S.C. § 4 (“Petition To Compel”) (Docket No. 1). For the reasons that follow, I deny the Motion To Stay.

I. Background

In opposing the Motion To Stay, Four B incorporates by reference its Petition To Compel and papers filed in support thereof. *See* Plaintiff’s Objection to Defendant’s Motion To Stay Arbitration (Docket No. 4) at 1. These, together with Cliff Realty’s papers, establish the following. Four B, a construction contractor, is a Massachusetts corporation with its principal place of business in Rochdale,

Massachusetts. Affidavit of Robert F. Grenier (“Grenier Aff.”), attached as Exh. E to Plaintiff’s Memorandum in Support of Petition To Compel Arbitration (“Memorandum”) (Docket No. 2), ¶¶ 1-2. On June 2, 1997 Four B and Cliff Realty entered into a contract requiring Four B to construct nine golf-course holes and install a new irrigation system for Cliff Realty at the Cape Neddick Country Club in Cape Neddick, Maine (the “Project”). *Id.* ¶¶ 2-4; Golf Course Construction Agreement (the “Contract”), attached as Exh. A to Memorandum, at 1. Among the Contract’s provisions are the following:

Section 4.3 Governing Law. The Agreement shall be governed by the laws of the State of Maine.

Section 4.6a Mediation. Any disputes arising out of this contract shall be submitted to a mutually selected mediator if not resolved within three (3) days of the occurrence of the dispute.

Section 4.6b Arbitration. In the event a dispute or claim between the Owner and Contractor is not settled within ten (10) days of its occurrence, the claim, dispute, and/or other matter in question between the parties hereto arising out of or relating to this Agreement or the breach thereof shall be decided by arbitration in accordance with the construction industry rules of the American Arbitration Association in Maine, or such other place as the parties to the arbitration may agree. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The demand shall be made within a [sic] ten (10) days after the claim, dispute or other matter in question has arisen. No party shall demand arbitration based upon any claim which would be barred by the applicable statute of limitations. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in any court having jurisdiction thereof.

Contract at 4-5.

During the course of the Project’s construction Four B used, purchased and transported to Maine labor, materials, supplies and equipment from Massachusetts and other New England states. Grenier Aff. ¶ 5. The majority of Four B’s work force are citizens of Massachusetts and commuted

from Massachusetts to Maine to work on the Project. *Id.* ¶ 6. Several of Four B’s subcontractors are located in Massachusetts and transported their employees, equipment and supplies to Maine to work on the Project. *Id.* ¶ 7. Four B also transported all of its equipment, including tractors, bulldozers and loaders, from Massachusetts to Maine. *Id.* ¶ 9.

On January 10, 2000 Four B filed a demand for arbitration with the AAA seeking \$505,507.90 in compensatory damages and unspecified punitive damages from Cliff Realty on grounds that it was not paid money due and owing under the Contract and performed extra work for which it was not paid. Demand for Arbitration, attached as Exh. C to Memorandum. Cliff Realty responded that Four B had forfeited its right to arbitration by failing to follow the procedures or adhere to the deadlines outlined in sections 4.6a and 4.6b of the Contract. Letter from James B. Bartlett, Esq. to Scott W. Rostock dated January 20, 2000, attached as Exh. D to Memorandum. Cliff Realty sought a stay of arbitration directly from the AAA — a request to which Four B strenuously objected. *See* Letter from Edward F. Vena to Clare Wilson dated February 25, 2000, attached as Exh. D to Motion To Stay. The AAA determined that, absent the consent of both parties or a court order directing otherwise, it would proceed with further administration on the case. *See* Letter from Clare A. Wilson to Edward F. Vena, Esq. and James B. Bartlett, Esq. dated February 25, 2000, attached as Exh. C to Motion To Stay. Cliff Realty has “elect[ed] not to default the AAA process although it has always contested its obligation to be there.” Motion To Stay at 4.

II. Analysis

Resolution of the Motion To Stay turns on one issue: whether the court or the AAA is empowered to adjudicate Cliff Realty’s claim that Four B waived its right to demand arbitration. If (as I conclude) the answer is the AAA, there is no basis to stay the AAA proceedings.

Cliff Realty argues as an initial matter that the question of which body should adjudicate its

waiver defense should be resolved with reference to Maine, rather than federal, arbitration law. *Id.* at 3. This is so, it posits, because the Contract contains a choice-of-law clause mandating the application of Maine law and, in any event, the Project did not involve interstate commerce. *Id.* Both arguments are readily dismissed. Although parties to a contract theoretically could agree to follow state arbitration law, general choice-of-law clauses (such as that contained in section 4.3 of the Contract) have not been construed to evince a sufficiently clear intent to do so. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (declining to construe general choice-of-law clause as importing state law relating to arbitration); *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 382-83 (4th Cir. 1998) (same); *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 594 (1st Cir. 1996) (same).

With respect to its interstate-commerce argument, Cliff Realty directs the court's attention to the fact that all construction activities incident to the Project occurred only in Maine. Motion To Stay at 3 n.1. It nonetheless does not dispute that Four B, a Massachusetts corporation, transported people, supplies and machinery from Massachusetts to Maine in the course of working on the Project. *Id.*¹ These constitute sufficient interstate dealings to implicate the Federal Arbitration Act (the "FAA").² *See, e.g., Societe Generale de Surveillance, S.A. v. Raytheon European Mg't & Sys. Co.*, 643 F.2d 863, 867 (1st Cir. 1981) (term "commerce" in FAA to be "broadly construed"; encompasses contract

¹Cliff Realty suggests that resolution of the question whether the parties' transaction implicates interstate commerce "may require a trial" and should be deferred for decision in the context of the Petition To Compel. Motion To Stay at 3 & n.1. Resolution of the issue cannot be deferred; it is central to the outcome of the Motion To Stay. Four B introduces evidence sufficient to demonstrate as a matter of law that the parties' transaction involved interstate commerce; Cliff Realty does not controvert that evidence.

²The FAA provides in relevant part, "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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.

between American and French company concerning transportation and testing in Europe of missiles made in California and Massachusetts); *M & L Power Servs., Inc. v. American Networks Int'l*, 44 F.Supp.2d 134, 140 (D.R.I. 1999) (fact that project performed solely in one state not dispositive in determining applicability of FAA; parties travelled between states, sent documents and money across state lines, relied on out-of-state materials).

Cliff Realty finally contends that, viewed even through the lens of the FAA, the Contract directs a court rather than an arbitrator to determine whether a party comported itself in such a manner as to forfeit its right to arbitration. Motion To Stay at 5-6. The First Circuit follows a two-tier framework for the analysis of such questions:

[T]he signing of a valid agreement to arbitrate the merits of the subject matter in dispute presumptively pushes the parties across the “arbitrability” threshold; we will then presume that other issues relating to the substance of the dispute or the procedures of arbitration are for the arbitrator. . . . But, if the parties clearly and unmistakably provide that an issue is one of “arbitrability” — *i.e.*, that the issue is a threshold matter that must be determined before any adjudicative power will be granted to the arbitrator — then the court must respect that clear expression of intent and decide that threshold issue, rather than compelling arbitration.

PaineWebber, 87 F.3d at 599.³

Here, there is no dispute that the Contract contains a valid agreement to arbitrate the subject matter in issue — the claim that monies are due and owing to Four B. A presumption accordingly arises that the parties intended other issues relating to the substance of the dispute (including Four B’s alleged waiver) to be decided by arbitration. That presumption is not dispelled by close examination of the Contract — which, as *PaineWebber* directs, is undertaken by reference to general state-law

³Cliff Realty’s attempt to distinguish *PaineWebber* on grounds that it involved the arbitration rules of the National Association of Securities Dealers falls wide of the mark. See Motion To Stay at 5-6. *PaineWebber* transparently sets forth a framework for analysis of precisely the type of question at issue here. See *PaineWebber*, 87 F.3d at 599-600.

principles of contract interpretation with “due regard” to federal policy favoring arbitration. *PaineWebber*, 87 F.3d at 600. Under Maine law (chosen by the parties via section 4.3 of the Contract), “[c]ontract language is considered ambiguous if it is reasonably possible to give that language at least two different meanings.” *Bourque v. Dairyland Ins. Co.*, 741 A.2d 50, 53 (Me. 1999). The parties’ arbitration clause is sweeping, encompassing “a claim, dispute, and/or other matter in question between the parties hereto arising out of or relating to this Agreement or the breach thereof.” Contract § 4.6b. It reasonably could be read either to encompass — or not to encompass — the claim that Four B forfeited its right to arbitration. There being an ambiguity, the presumption stands. Inasmuch as Cliff Realty’s defense to arbitration must itself be decided via arbitration, there is no basis for the issuance of a stay of the AAA proceedings.

III. Conclusion

For the foregoing reasons I conclude that the Motion To Stay should be, and it hereby is, **DENIED**.⁴

Dated this 13th day of April, 2000.

David M. Cohen
United States Magistrate Judge

⁴The clerk’s office shall promptly schedule a telephone conference of the court and counsel to discuss the appropriate next step in this litigation.

STNDRD

U.S. District Court District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-31

FOUR B DEVELOPMENT v. CLIFF REALTY CORP

Filed: 01/28/00

Assigned to: JUDGE GENE CARTER

Jury demand: Defendant

Demand: \$0,000

Nature of Suit: 890

Lead Docket: None

Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 09:1 U.S. Arbitration Act

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