

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JOCA-ROCA REAL ESTATE, LLC,)	
)	
<i>Plaintiff</i>)	
)	
v.)	No. 2:13-cv-64-JAW
)	
ROBERT T. BRENNAN, JR.,)	
)	
<i>Defendant</i>)	

MEMORANDUM DECISION ON MOTION TO STAY ARBITRATION

The defendant, Robert T. Brennan, Jr., moves to stay the arbitration of this dispute, after that arbitration was initiated by the plaintiff well after it initiated this action. I grant his motion.

I. Procedural Background

On March 4, 2013, the plaintiff filed this action alleging breach of contract and fraud. ECF No. 1. A scheduling order issued on March 28, 2013. ECF No. 8. A consent motion for a confidentiality order was filed on September 18, 2013, and granted later that day. ECF Nos. 14 & 15. Four telephone conferences were held, resulting in, *inter alia*, extended discovery deadlines. ECF Nos. 11, 18, 21, 28. On December 6, 2013, nine months after commencing this action, the plaintiff filed a motion to stay this court action pending arbitration of the matters in dispute pursuant to a term of the underlying contract at issue. ECF No. 30.

While that motion was pending, the plaintiff initiated arbitration, and the defendant filed the instant motion to stay that arbitration on January 18, 2014. ECF No. 36. The defendant has not participated in the arbitration proceeding, which apparently is being postponed by the arbitrator pending the outcome of the defendant's motion. On January 27, 2014, I denied the

plaintiff's motion to stay this action pending the arbitration. ECF No. 39. I granted a motion for oral argument on the defendant's motion to stay the arbitration, and oral argument was held on March 10, 2014.

II. Discussion

A. Jurisdiction

The parties disagree on the threshold issue of whether a federal court has the power to enjoin arbitration proceedings in this case. Defendant's Motion to Stay Arbitration ("Motion") (ECF No. 36) at 2; Opposition to Defendant's Motion to Stay Arbitration ("Opposition") (ECF No. 41) at 1-3. The authority cited by the defendant, *Societe Generale de Surveillance v. Raytheon European Mgt. & Sys. Co.*, 643 F.2d 863 (1st Cir. 1981), holds that a federal court has the power to enjoin arbitration where both parties have not agreed by contract to arbitrate or where two arbitration proceedings dealing with the same issue are taking place simultaneously. *Id.* at 868. Neither situation is present here, where the court has held that the plaintiff has waived its contractual right to arbitrate. Memorandum Decision on Motion to Stay (ECF No. 39); Order Overruling Objection to Memorandum Decision on Motion to Stay (ECF No. 52).

The plaintiff cites nothing beyond case law supporting the general proposition that the Federal Arbitration Act, which is silent on the question now before the court, reflects a federal policy in favor of arbitration as a means of resolving disputes. Opposition at 1-2. In any event, the First Circuit settled the matter in *PCS 2000 LP v. Romulus Telecomms., Inc.*, 148 F.3d 32 (1st Cir. 1998), when it said:

[The plaintiff] seeks an order *staying* arbitration as opposed to an order *compelling* arbitration. We deem this to be a distinction without a difference. We have held squarely that the power to enjoin an arbitration is "the concomitant of the power to compel arbitration," *Societe General de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co.*, 643 F.2d

863, 868 (1st Cir. 1981), and thus the same provision of the FAA, 9 U.S.C. § 4, authorizes both types of orders.

Id. at 35 (emphasis in original).

The plaintiff argues, in the alternative, that Maine law controls on this question, and 14 M.R.S.A. § 5928(2) allows a court to stay an arbitration proceeding only upon a showing that there is no agreement to arbitrate. Assuming *arguendo* that this is a correct interpretation of the Maine statute, the foundation upon which the plaintiff bases this argument cannot bear its weight. The plaintiff asserts that the agreement that includes the arbitration provision at issue also includes an agreement that “Maine law . . . would control the interpretation of their agreement[,]”¹ and that this language makes Section 5928(2) applicable to this dispute. Opposition at 3. It does not. Resolution of the question of whether this court may stay an arbitration that the plaintiff seeks to press in the face of this court’s ruling that the plaintiff has waived its contractual right to do so does not involve interpretation of the agreement in which the right to arbitrate appears. It is a question of law independent of the language of the agreement, which is all that can be “interpreted” under the terms of the agreement in any reasonable sense of the word.

This court has the power to enjoin the arbitration initiated by the plaintiff.

B. The Merits

The plaintiff seeks to relitigate its motion to stay this action, asserting that “there has been no valid finding that plaintiff waived its contractual right.” Opposition at 3. That ship has sailed, and I will not revisit the issue.

The plaintiff’s only other argument is that a waiver of arbitration “does not impact the parties’ underlying *contractual* right to arbitration.” *Id.* at 4 (emphasis in original). According

¹ See Asset Purchase Agreement (ECF No. 30-1) at 20: “This Agreement shall be interpreted according to the laws of the State of Maine.”

to the plaintiff, it waived only its right to compel arbitration and not its contractual right to arbitration. *Id.* Thus, it appears to be asserting that it brought the motion to stay this action knowing all along that, even if unsuccessful on its motion to stay, it would assert a contractual right to arbitration that included the right to force the defendant to engage in arbitration at the same time that he had to defend himself in this court against an identical claim.

At oral argument, counsel for the plaintiff argued that it could not waive arbitration when it had “already” initiated arbitration. That was an argument not made to the court in connection with the plaintiff’s motion to stay this action, which it had also initiated. Furthermore, the plaintiff initiated this action well before it purported to initiate arbitration, and it only purported to initiate arbitration while its motion to stay this action was pending. This court will not allow the plaintiff to avoid the consequences of its waiver by an apparently tactical maneuver undertaken in an attempt to bolster its tardy choice of arbitration over litigation.

Counsel for the plaintiff also dismissed at oral argument the potential for different outcomes on the same issue if both the litigation and the arbitration go forward, asserting that the potential for such an overlap “is why we filed the motion to stay the litigation.” Again, that argument is foreclosed by the ruling on the motion to stay, which is the law of this case. Counsel cited *L. F. Rothschild & Co. v. Katz*, 702 F. Supp. 464 (S.D.N.Y. 1988), for the proposition that the possibility of inconsistent results “is one of the risks of choosing arbitration.”

That case, however, involved two parallel arbitration proceedings, one initiated by each party, and the court held that

to permit both proceedings to continue would require the parties to pursue the same claims or defenses in two separate forums, resulting in the duplication of the arbitrators’ efforts and risking inconsistent outcomes.

To avoid these problems, only one of these proceedings should go forward. As a general rule, the forum where an action is first filed takes priority over the forum where a subsequent action arising out of the same facts is filed.

Id. at 466-67. The court enjoined the party that had initiated the second arbitration from proceeding there. *Id.* at 468.

All of the quoted language could be applied to the instant case, and, if so, the plaintiff, who after all initiated both proceedings, would be enjoined from proceeding with the arbitration. The plaintiff's argument, that this court found only that it had waived its right to compel arbitration and not its contractual right to arbitrate, renders the doctrine of waiver, recognized in many reported federal case opinions, a practical nullity, and would allow one party to compel the other contracting party to arbitrate in virtually any circumstance. It would also allow one party to impose on the other the costs inherent in duplicate proceedings and, as I noted at oral argument, would countenance an unseemly race to the finish between an arbitrator and the court, which may ultimately be asked to enforce the arbitrator's decision. This cannot be an accurate statement of the state of federal law on this issue.²

III. Conclusion

For the foregoing reasons, the motion to stay the arbitration is **GRANTED**, and the plaintiff is enjoined from proceeding with the arbitration it has initiated pursuant to the contract at issue in this case.

² At oral argument, counsel for the plaintiff offered to "allow" its fraud claim to be resolved in this court proceeding, while the contract claim would be resolved in the arbitration. In the absence of agreement by the defendant, and perhaps in any event, this court cannot bargain with a party and cede its jurisdiction over a claim brought before it to a plaintiff's change of heart about where the plaintiff wants that claim to be resolved. At the very least, the plaintiff would have to seek leave to withdraw its contract claim, and be granted that leave, before it could proceed with such a plan.

NOTICE

In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.

Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.

Dated this 30th day of March, 2014.

/s/ John H. Rich III
John H. Rich III
U.S. Magistrate Judge

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