

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-020869

11/12/2003

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
K. Ballard
Deputy

FILED: 11/17/2003

HOMEWARD BOUND INC

GREG S COMO

v.

BURKE WYATT, et al.

DEAN C ROBERTSON

DAN CAMPBELL
STANLEY M HAMMERMAN
KYLE A ISRAEL
HOWARD L TOWNSEND
RICHARD J WOODS
JACK G BARONE
RYAN J LINDER

RULING

Defendants Wyatt and A12, Inc.'s Motion to (1) Dismiss Action Without Prejudice and (2) Compel Arbitration has been under advisement. The Court finds and rules as follows:

FACTUAL AND PROCEDURAL BACKGROUND

The contract documents between Homeward Bound and A12 (f/ka "Wyatt Rhodes Architects, Inc.") require that all disputes relating to the project are subject to arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA"). Homeward Bound filed suit on November 20, 2001 against the project's general contractor, Johnson Carlier, Inc. ("JCI"), and Burke Wyatt. A summons was issued with respect to Burke Wyatt on March 16, 2002 and served in June 2002. On July 16, 2002, Burke Wyatt answered, and raised the mandatory arbitration provision as an affirmative defense.

On October 31, 2002, Homeward Bound filed an Amended Complaint that named A12 as a Defendant. On January 16, 2003, A12's counsel accepted service without waiving any available defense. Before answering the Amended Complaint, counsel for A12 had discussions

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with Homeward Bound's counsel regarding the arbitration provision. *See Exhibit A to A12's Reply.*

On July 8, 2003, Homeward Bound stipulated to the applicability of the arbitration provision in a pleading filed with the Court, which states:

"Article 7 of the contract between Homeward Bound and Wyatt/Rhodes provides that any disputes relating to the contract shall be decided by binding arbitration. However, because the same contractual provision does not apply to Johnson Carlier and there are other third party defendants in this action that may not have similar arbitration provisions in their contracts, the parties will meet and confer with respect to the arbitration clause in the Homeward Bound/ Wyatt/Rhodes contract to determine whether the other parties will agree to binding arbitration in this case."

(*See Exhibit B, to A12's Reply*, ADR Statement filed July 8, 2003).

On August 5, 2003, A12's counsel sent a letter to Homeward Bound's counsel demanding arbitration pursuant to the parties' contract. (See Exhibit A). The Wyatt Defendants filed their Motion to Dismiss/Motion to Compel Arbitration. In its Response, Homeward Bound opposed A12's motion, claiming that the Wyatt Defendants had "waived" their right to arbitrate.

DISCUSSION

Burke Wyatt/A12 Have Not Waived the Arbitration Provision

"Waiver occurs when a party relinquishes a known right or exhibits conduct that clearly warrants inference of an intentional relinquishment." *In re Shahan*, 188 Ariz. 74, 932 P.2d 1345 (App. 1996). (Emphasis added). The Court notes that the "waiver of an arbitration agreement is generally not favored and the facts of each case must be considered in light of the strong policy approving of arbitration." *Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576, 892 P.2d 1365 (App. 1994). The waiver of an arbitration clause is disfavored, and the party opposing arbitration has a "heavy burden of proof." *Palozie v. State Farm Mut. Auto Ins. Co.*, 1996 WL 814533 (D.Ariz. 1996).

(A) Homeward Bound Stipulated To The Applicability Of The Arbitration Provision In The July 2003 Joint Pleading Filed With This Court

Homeward Bound drafted and filed the ADR Statement with the Court. In the ADR Statement, Plaintiff stipulated that "Article 7 of the contract between Homeward Bound and Wyatt/Rhodes provides that any disputes relating to the contract shall be decided by binding arbitration . . . the parties will meet and confer with respect to the arbitration clause in the Homeward Bound/Wyatt/Rhodes contract to determine whether the other parties will agree to

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binding arbitration in this case.” The Court is of the opinion that the ADR Statement resolves Homeward Bound’s “waiver” argument.

(B) A12 Did Not Act “Inconsistently” With the Arbitration Clause

(1) Burke Wyatt

Burke Wyatt raised the arbitration clause as an affirmative defense on July 16, 2002. *See Wyatt Answer, at 4* (“Plaintiff has failed to comply with . . . Article 7 of the Agreement . . . [which mandates that all disputes] shall be subject to and decided by arbitration . . .”).

(2) A12’s Actions

The Court is of the opinion that the timeliness of A12’s answer is not significant. Homeward Bound represented in its ADR Statement that there was an applicable arbitration clause and when A12 did answer the Amended Complaint, it raised Homeward Bound’s alleged non-compliance with the contract documents as a Rule 8(c), affirmative defense.

(C) *Meineke v. Twin Cities Fire Ins. Co.* is not Applicable

In *Meineke*, neither party invoked the insurance policy’s appraisal clause before Plaintiff filed suit. Although the defendant had previously indicated to the plaintiff that it might invoke the clause, it never did during the negotiations that took place for over 2 years and only did so after the complaint was answered and filed. *Id.* 181 Ariz. at 578-579, 892 P.2d at 1367-1369.

In this case, Homeward Bound stipulated to the arbitration clause in a recent court filing. Both Burke Wyatt and A12’s answer raised arbitration as an affirmative defense at the first opportunity.

Based upon the foregoing,

IT IS ORDERED:

- 1) Granting Burke Wyatt/A12’s Motion to Stay as to Burke Wyatt/A12 only pending Arbitration.
- 2) Granting Burke Wyatt/A12’s Motion to Compel Arbitration.