STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19 CVS 7604
DEAN SIPE, Plaintiff, v. KENNETH HELTEMES, Defendant.	**ORDER ON MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS**

THIS MATTER comes before the Court on Defendant Kenneth Heltemes's ("Defendant") Motion to Stay Proceedings and Compel Arbitration. ("Motion", ECF No. 7.) Defendant moves pursuant to N.C.G.S. § 1-569.7 and the D&K Franchise Sales, Inc. Shareholders Agreement, attached as Exhibit A to the original Complaint. ("Shareholders Agreement", ECF No. 3 at Ex. A.) Defendant filed a Brief in Support of the Motion. (ECF No. 8.) Plaintiff filed a Responsive Brief in opposition to the Motion, (ECF No. 14), and Defendant filed a Reply, (ECF No. 15). With the Reply Defendant filed an affidavit. ("Aff. of Kenneth Heltemes", ECF No. 17.) The Motion is now ripe for disposition, and, pursuant to Rule 7.4 of the Business Court Rules ("BCR"), the Court decides the Motion without a hearing.

A. Legal Standard and Analysis

1. In deciding a dispute concerning an agreement to arbitrate, the Court must "proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate." N.C.G.S. § 1-569.7(a)(2). "[I]n determining the threshold issue of whether a mandatory arbitration agreement

exists, the court necessarily must sit as a finder of fact." *Worldwide Ins. Network v. Messer Fin. Grp.*, 2018 NCBC LEXIS 103, at *6 (N.C. Super. Ct. Oct. 2, 2018) (citation omitted). Therefore, "[t]he Court elects to make the following findings of fact and conclusions of law for the limited purpose of resolving the Motion's request to stay litigation and compel arbitration . . . . Accordingly, for such limited purpose, the court also may consider evidence as to facts that are in dispute." *AP Atl., Inc. v. Crescent Univ. City Venture, LLC*, 2016 NCBC LEXIS 60, at *3–4 (N.C. Super. Ct. July 28, 2016) (citations and quotations omitted).

2. When a party moves to compel arbitration, a court must first address whether the Federal Arbitration Act ("FAA") or the North Carolina Revised Uniform Arbitration Act ("NCRRUAA") applies to any agreement to arbitrate. *King v. Bryant*, 225 N.C. App. 340, 344, 737 S.E.2d 802, 806 (2013). Ultimately, under the FAA or the North Carolina Act, "whether a dispute is subject to arbitration is a matter of contract law." *Raspet v. Buck*, 147 N.C. App. 133, 135, 554 S.E.2d 676, 678 (2001). The party seeking to compel arbitration "must show that the parties mutually agreed to arbitrate their disputes." *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (quoting *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271–72, 423 S.E.2d 791, 794 (1992)).

3. Typically, the Court decides issues of "substantive arbitrability," including "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *AP Atl., Inc.*, 2016 NCBC LEXIS 60, at *13 (quoting *Bailey v. Ford Motor Co.*, 244 N.C. App. 346, 351, 780 S.E.2d 920, 925 (2015))

(quotation marks omitted). To decide such issues, the Court must determine: (1) "whether the parties had a valid agreement to arbitrate," and (2) "whether 'the specific dispute falls within the substantive scope of that agreement.'" *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 478, 583 S.E.2d 325, 330 (2003) (quoting *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990)).

4. Parties, however, can contractually agree that the arbitrator, not the Court, will decide issues of substantive arbitrability. *See Gaylor, Inc. v. Vizor, LLC*, 2015 NCBC LEXIS 102, at *15 (N.C. Super. Ct. Oct. 30, 2015) (quoting *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)) ("The United States Supreme Court has held that '[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.'"). Under the FAA, to overcome the presumption that the Court addresses issues of substantive arbitrability, a party must show "that the parties clearly and unmistakably intended for the arbitrator, instead of a court, to decide issues of substantive arbitrability." *Bailey*, 244 N.C. App. at 352–53, 780 S.E.2d at 925 (quotations omitted).

5. Under the FAA, when the parties' arbitration agreement specifically incorporates the American Arbitration Association's ("AAA") rules, such incorporation demonstrates that the parties intended for the arbitrator to resolve disputes regarding arbitrability. "'[V]irtually every [federal] circuit to have considered the issue' has held that incorporation of the AAA Rules into an arbitration agreement serves as clear and unmistakable evidence that the parties agreed to

arbitrate arbitrability." *Worldwide Ins. Network*, 2018 NCBC LEXIS 103, at *8–9 (alterations in original) (citing *Oracle Am., Inc. v. Myriad Grp., A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (listing cases) and *Epic Games, Inc. v. Murphy-Johnson*, 247 N.C. App. 54, 63, 785 S.E.2d 137, 144 (2016)); see also *AP Atl., Inc.*, 2016 NCBC LEXIS 60, at *15, 17–18 (concluding that "the parties delegated in clear and unmistakable terms the threshold issue of substantive arbitrability to the Arbitrator" because the parties' arbitration agreement stated that the arbitration "would be 'governed by the [AAA] Construction Industry Rules'"); *Gaylor, Inc.*, 2015 NCBC LEXIS 102, at *18 (concluding that the arbitrability of the claim at issue must be determined by the arbitrator because the arbitration agreement adopted the AAA Construction Industry Rules). *See also Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 493 (5th Cir. 2017) (quoting *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012)) ("An arbitration agreement that expressly incorporates the AAA Rules 'presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.'"). *See also, Hall v. Dancy*, 2018 NCBC LEXIS 63, at *5–7 (N.C. Super. Ct. June 27, 2018).

B. Findings of Fact

6. Plaintiff Dean Sipe ("Plaintiff") and Defendant are shareholders in D&K Franchise Sales, Inc. ("D&K"), a North Carolina corporation with its principal place of business in Wake County, North Carolina. (Amend. Compl., ECF No. 13, at ¶¶ 1–3.) D&K is a corporation organized and existing under the laws of the State of North Carolina and is a regional franchisor for the Weed Man® franchise of lawn care

companies in North Carolina and Georgia. (*Id*. at ¶ 2.) D&K sells franchises in North Carolina and Georgia and provides consultation and support to franchisees in those states. (*Id*.) Plaintiff and Defendant are both signatories to, and bound by, the Shareholders Agreement. (ECF No. 13 at ¶ 9; "Shareholder Agreement", ECF No. 3 at Ex. A, sec. 13.)

7. The Shareholder Agreement is contract evidencing a transaction involving commerce. *Local Soc., Inc. v. Stallings*, 2017 NCBC LEXIS 94, at *9–10 (N.C. Super. Ct. Oct. 9, 2017) ("The agreements at issue concern the ownership and management of a corporation doing business in multiple states . . . . [t]hus, the agreements involve interstate commerce and are governed by the FAA.").

8. The Shareholders Agreement provides as follows:

> MEDIATION of DISPUTES.
>
> > The parties all agree that if any dispute arises between or among them, they will earnestly try to resolve the matter by careful negotiation among themselves. If that is not successful, they will retain the services of a private mediator, with the expenses being paid by [D&K]. The parties all agree to participate fully in the mediation process. If that fails to produce a solution, they agree to take the matter to binding arbitration with an arbitrator approved by the American Arbitration Association according to the rules and procedures of the American Arbitration Association. If the parties cannot agree to an arbitrator, the buying Shareholders and the selling Shareholders may each select an arbitrator, who will select a third and a decision by a majority vote of the three arbitrators will be binding on the parties and may be entered in the Court as a judgment.

(ECF No. 3 at Ex. A, sec. 16.)

9. Defendant argues, and Plaintiff does not dispute, that the "Mediation of Disputes" provision in the Shareholder Agreement is a binding and mandatory arbitration agreement. Plaintiff instead disputes the scope of the arbitration agreement and the timing of its application to this dispute. (ECF No. 14.)

10. In 2017, Plaintiff indicated to Defendant that he wanted Defendant to purchase Plaintiff's interest in D&K. (ECF No. 17, at ¶ 4.) On March 23, 2018 Defendant provided to Plaintiff an offer to purchase Plaintiff's interest. (*Id*. at ¶ 5.) Defendant attempted to negotiate the purchase of Plaintiff's interest in D&K with Plaintiff for the next 14 months. During the negotiations, Defendant provided Plaintiff's attorneys with financial information regarding D&K and offered on multiple occasions to meet with Plaintiff. Plaintiff claimed he would provide Defendant with Plaintiff's valuation of D&K, but never provided it. (*Id*. *passim*; and ECF No. 17 at Exs. A–J.) Finally, on June 5, 2019, Plaintiff filed the original complaint in this action alleging misconduct by Defendant as the president and majority shareholder, making claims for constructive fraud, breach of contract, breach of fiduciary duty, conversion, and unjust enrichment, and seeking dissolution of D&K. (ECF No. 3.)

11. On July 3, 2019, Defendant filed the Motion seeking to compel arbitration. Defendant argues that the Shareholders Agreement's arbitration provision is broad, and that Plaintiff's claims and allegations "relate entirely to the operation of [D&K], the company to which the shareholders Agreement and the response to the Motion. (ECF No. 8, at p. 3.)

12. On August 2, 2019, Plaintiff filed a response in opposition to the Motion. (ECF No. 14.) Plaintiff argues that Plaintiff's claims do not fall within the scope of the arbitration provision of the Shareholders Agreement, and that Defendant's Motion is premature because the parties have not "earnestly tr[ied] to resolve the matter by careful negotiation among themselves," nor "participate[d] fully in the mediation process," as required in the Shareholders Agreement. (*Id.* at pp. 3–6.)

13. In his Reply, Defendant addresses Plaintiff' second argument by providing evidence that Defendant had been trying to negotiate with Plaintiff for over fifteen months, but Plaintiff has repeatedly refused to participate meaningfully in either negotiation. (ECF No. 15, at pp. 10–11; ECF No. 17.)

C. Conclusions of Law

14. The arbitration agreement in this case is governed by the FAA.

15. Here, the arbitration agreement in the Shareholder Agreement states that "any dispute aris[ing] between or among them," if not resolved through "careful negotiation" or mediation, will be "take[n] [to] binding arbitration with an arbitrator approved by the American Arbitration Association *according to the rules and procedures of the American Arbitration Association*." (ECF No. 3 at Ex. A, sec. 16 (emphasis added).) The Court concludes that this language establishes a clear and unmistakable agreement of the parties that the arbitrator, not the Court, will decide issues of substantive arbitrability.

16. Regarding Plaintiff's argument that the Motion is premature because the parties have not yet engaged in an "earnest" negotiation nor conducted a

mediation prior to submitting disputes to arbitration, (ECF No. 14, at p. 6), the Court concludes that this contention raises an issue of procedural arbitrability. Traditionally, "courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration. These procedural matters include . . . the satisfaction of prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." *Bailey v. Ford Motor Co.*, 244 N.C. App. 346, 351, 780 S.E.2d 920, 925 (2015) (quoting BG Group plc v. Republic of Arg., 572 U.S. 25, 34 (2014)) (quotation marks omitted); *see also Local Soc., Inc., v. Stallings*, 2017 NCBC LEXIS 94, at *14 (N.C. Super. Ct. Oct. 9, 2017) ("Courts presume that the parties intend arbitrators to decide issues of procedural arbitrability."). Therefore, the issue of whether Defendants complied with section 16 of the Shareholders Agreement by trying to resolve the matter through negotiation and participation in mediation is an issue that the parties intended to be decided by, and is properly put before, the arbitrator.

D. Order

THEREFORE, IT IS ORDERED that Defendant's Motion is GRANTED, and the determination of the questions of substantive and procedural arbitrability of Plaintiff's claims is DEFERRED to the arbitrator, and the parties are to submit this matter to arbitration pursuant to the procedures provided in the Shareholder Agreement and the rules of the American Arbitration Association.

IT IS FURTHER ORDERED that this matter is hereby STAYED, until further order from this Court, while the parties participate in arbitration. Pursuant to North Carolina Business Court Rule 2.7, the parties SHALL file a status report with the Court within fourteen (14) business days following resolution of the arbitration.

SO ORDERED, this the 9th day of September, 2019.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge for
Complex Business Cases