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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

THE PETER GORDON CO.,)	
)	
Petitioner,)	
)	
v.)	CIVIL ACTION NO. 81-1103-A
)	
GILBANE BUILDING CO. and)	
AMERICAN ARBITRATION)	
ASSOCIATION,)	
)	
Respondents.)	

MEMORANDUM OPINION

This matter comes before the court on the motion of the Peter Gordon Company (Peter Gordon) for a temporary restraining order. See Fed. R. Civ. P. 65(b). The petitioner asks the court to enjoin enforcement of a state court order that temporarily halts an arbitration proceeding. This arbitration concerns a contract between Peter Gordon and respondent Gilbane Building Company (Gilbane). Peter Gordon also has moved for an order compelling arbitration. The petitioner bases jurisdiction on 9 U.S.C. § 4, 28 U.S.C. § 1332, and 28 U.S.C. § 2283.

This court's power to enjoin enforcement of the state court order is limited by the constraints of section 2283. See 28 U.S.C. § 2283 (1976). The first two prongs of this section are not applicable to this case. The third prong, however, permits this court to enjoin state court proceedings "to protect or effectuate its judgments." Id. Thus, the court cannot issue the injunction issued requested by Peter Gordon until it has a judgment to effectuate.

The only judgment in this case that would require the court to enjoin enforcement of the state court order would be an order compelling arbitration. See 9 U.S.C. § 4 (1976). The court will treat the petitioner's filing as a motion for such an order. The court, nonetheless, cannot grant such a motion until the opposing party has had five days within which to respond. See id. See also Burger Chef

Systems, Inc. v. Baldwin Inc., 365 F. Supp. 1229, 1232 (S.D. N.Y. 1973). As a consequence, the court must deny immediate relief on the ground that it does not yet have a judgment to effectuate. The court will reconsider Peter Gordon's request for an injunction after final disposition of the motion to compel arbitration.

Richard L. Williams
UNITED STATES DISTRICT JUDGE

DATE: Nov. 20, 1981

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AMERICAN ARBITRATION)	
ASSOCIATION,)	
)	
Respondents.)	

MEMORANDUM OPINION

This matter comes before the court on the petition of the Peter Gordon Company (Peter Gordon) to compel arbitration under 9 U.S.C. § 4 (1976). The petitioner also asks the court to enjoin enforcement of a state court order that temporarily stays an arbitration proceeding. This arbitration concerns a contractual dispute between Peter Gordon and respondent Gilbane Building Company (Gilbane). For the reasons stated below, the court orders Gilbane to proceed to arbitration in accordance with section 4. In addition, the court enjoins the parties from participating in any further state court proceedings relating to this arbitration until the arbitration process is completed.

On July 12, 1978, Peter Gordon entered into a subcontract with Gilbane to provide all roofing and waterproofing on a construction project in Fairfax, Virginia. Clause 7 of this contract requires the parties to submit all disputes arising out of the contract to the American Arbitration Association (AAA) for binding arbitration. Under clause 2.3.13, however, the parties must refer disputes to the architect for a preliminary determination before proceeding to arbitration.

On June 18, 1980, the petitioner filed certain disputed claims with Gilbane. The parties were unable to reach an agreement on the claims. On March 17, 1981, Peter Gordon filed a Memorandum of Mechanic's Lien against the construction property in the Circuit Court of Fairfax County. On March 20, 1981, the petitioner submitted a demand for arbitration to Gilbane and to AAA. Peter Gordon then filed a

motion to compel arbitration in the state circuit court on November 4, 1981. Gilbane countered with a motion to stay the arbitration proceeding before the AAA scheduled for November 16, 1981. On November 12, 1981, the state court issued an order staying arbitration until the court had time to decide the substantive questions in the case.

On November 18, 1981, Peter Gordon filed its petition in this court. On that same day, the court held an emergency hearing to determine whether it should immediately issue an order compelling arbitration. The court ruled that it could not make such an order until it had given Gilbane five days in which to respond to Peter Gordon's petition. See 9 U.S.C. §4 (1976). Gilbane now has filed a written response. As a consequence, the court must proceed to decide the merits of the case.

The court must issue an order compelling arbitration if Peter Gordon can demonstrate that its case meets five conditions: (1) that the court has subject-matter jurisdiction over the petition; (2) that the subcontract between the parties is in writing and evidences a transaction in interstate commerce; (3) that its claims against Gilbane are within a mandatory arbitration agreement; (4) that there is no dispute as to the making of the arbitration agreement; and (5) that there is no dispute as to Gilbane's breach of the arbitration agreement. See Nuclear Installation Services Co. v. Nuclear Services Corp., 468 F. Supp. 1187 (E.D. Pa. 1979). Gilbane does not dispute that the third and fourth requirements have been met. In addition, the respondent does not contend that the subcontract is not in writing. The parties, however, are in disagreement on the other conditions.

Section 4 of the Federal Arbitration Act gives the court subject-matter jurisdiction over this case if it would have jurisdiction, in the absence of the arbitration agreement, under any of the provisions of Title 28. See 9 U.S.C. § 4 (1976). The petitioner here claims that the court has jurisdiction under 28 U.S.C. § 1332 (1976). The court rules that it does indeed have such jurisdiction, because complete

diversity exists between the parties. Thus, the court also has jurisdiction under section 4.

The contract between Peter Gordon and Gilbane falls under the provisions of the Federal Arbitration Act only if it is a "contract evidencing a transaction involving commerce." 9 U.S.C. § 2 (1976). Section 1 of the Act defines "commerce" as interstate commerce. See id., § 1. The contract in question involves a Maryland corporation agreeing to perform work in Virginia for a Rhode Island corporation. Thus, the contract clearly meets the commerce requirement. See Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 401 (1967); Nuclear Installation Services Co. v. Nuclear Services Corp., 468 F. Supp. 1187, 1190 (E.D. Pa. 1979).

The final condition for compelling arbitration is a showing that Gilbane has breached the agreement to arbitrate. The respondent admits that it has refused to proceed to arbitration. It argues, however, that this refusal does not constitute a breach of the agreement, because Peter Gordon has not yet submitted its claims to the architect in accordance with clause 2.3.13 of the contract. Gilbane contends that it has no duty to arbitrate until Peter Gordon complies with this clause. The respondent's argument overlooks the fact that compliance with the procedures leading to arbitration is itself an arbitrable issue. See Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 402-04 (1967). Gilbane's refusal to arbitrate, therefore, does qualify as a breach of the agreement.

Peter Gordon has met all five of the conditions necessary for the issuance of an order compelling arbitration. As a consequence, the court orders Peter Gordon and Gilbane to proceed to arbitration in the Eastern District of Virginia as soon as possible.

The only question remaining for disposition is whether the court should enjoin the parallel proceedings taking place in the Circuit Court for Fairfax County. In arbitration cases,

the court may enjoin a state court proceeding only "where necessary ... to protect or effectuate its judgments." 28 U.S.C. § 2283 (1976). The judgment that the court must protect in this case is its order compelling arbitration. The purpose of the Federal Arbitration Act is to insure "that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. at 404. If the court were to allow one of the parties to tie this case up in protracted state court litigation, it would both nullify its own order and thwart the purpose of the Act. The court declines to take the extreme action of enjoining the state court, even though the case law authorizes such a measure. See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 482 F. Supp. 788, 790-93 (D. Fla. 1980), rev'd on other grounds, 637 F.2d 391 (5th Cir. 1981); Burger Chef Systems, Inc. v. Baldwin Inc., 369 F. Supp. 1229, 1233-34 (S.D.N.Y. 1973); Network Cinema Corp. v. Glassburn, 357 F. Supp. 169, 172 (S.D.N.Y. 1973); Necchi Sewing Machine Sales Corp. v. Carl, 260 F. Supp. 665, 669-70 (S.D.N.Y. 1966). The court, however, will enjoin the parties from participating in further state court litigation on the arbitration issue until the arbitration process is complete. In particular, the court will prohibit Gilbane from attempting to enforce the state court's order staying arbitration.

UNITED STATES DISTRICT JUDGE

DATE: _____