

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DOCTOR'S ASSOCIATES, INC.,	:	
Plaintiff,	:	
	:	
-vs-	:	Civil No. 3:01cv1842 (PCD)
	:	
CLAUDE W. MELTON,	:	
Defendant.	:	

RULING

Plaintiff moves to compel arbitration pursuant to 9 U.S.C. § 4. The motion to compel is granted.

I. BACKGROUND

On January 29, 1999, plaintiff and defendant entered into a written franchise agreement ("franchise agreement"), which permitted defendant to operate a Subway restaurant in Oklahoma. The franchise agreement contains an arbitration clause covering "[a]ny dispute or claim arising out of or relating to this Agreement." On the same day, plaintiff and defendant entered into a purchase and sale agreement ("purchase and sale agreement"), by which plaintiff sold defendant a "sandwich shop together with a SUBWAY franchise." The purchase and sale agreement provided that "Buyer agrees to abide by all terms and conditions of the Franchise Agreement executed between Doctor's Associates, Inc. and Buyer on January 29, 1999. Furthermore, Buyer agrees that the SUBWAY unit purchased herein shall be operated in conformity with the aforesaid Franchise Agreement and sublease. (A copy of the Franchise Agreement is annexed [to the purchase and sale agreement] as 'Schedule D')."

On May 8, 2000, defendant filed a complaint against plaintiff in Oklahoma state court, alleging that he was defrauded into becoming a Subway franchisee. On September 8, 2000, defendant sought and obtained a default judgment against plaintiff. The judgment was later vacated for failure to serve plaintiff with the complaint.

Plaintiff was properly served on April 25, 2001. On May 14, 2001, plaintiff filed its answer and defenses, asserting arbitration as an affirmative defense. On May 23, 2001, plaintiff removed the case to an Oklahoma federal district court. Plaintiff invoked the mediation provision in the franchise agreement during the June 20, 2001 planning meeting. On June 28, 2001, the court issued a scheduling order providing for a January 7, 2002 trial date. On September 20, 2001, the parties unsuccessfully attempted mediation of the dispute. On September 28, 2001, plaintiff moved for a stay of the Oklahoma proceedings, which was denied on October 18, 2001.

On September 26, 2001, plaintiff filed with this court the present motion to compel arbitration pursuant to 9 U.S.C. § 4. On November 8, 2001, an order was issued staying any action on the Oklahoma proceedings until a ruling issued on the motion to compel arbitration.

II. STANDARD

An order compelling arbitration brought pursuant to 9 U.S.C. § 4 requires determination of (1) whether a valid agreement to arbitrate exists in the contract in question and (2) whether the dispute for which arbitration is sought falls within the scope of the arbitration agreement. *Nat'l Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 135 (2d Cir. 1996). “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to

arbitrability.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). “Arbitration should be ordered unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *S.A. Mineracao da Trindade-Samitri v. Utah Int’l, Inc.*, 745 F.2d 190, 194 (2d Cir. 1984) (internal quotation marks omitted).

III. DISCUSSION

Plaintiff argues that the dispute arising from a breach of the purchase and sale agreement is subject to the broad arbitration provision contained in the franchise agreement. Defendant asserts that there is no arbitration clause included in the purchase and sale agreement, thus there is no agreement to arbitrate claims arising from that agreement. Furthermore, if such an agreement exists, plaintiff waived any right to arbitration through delay and participation in the Oklahoma proceedings.

A. Whether the Claims Are Arbitrable

Plaintiff argues that the parties agreed to arbitration on a broad range of disputes and that the present dispute properly fell with that range. Defendant asserts that the failure to include an express arbitration provisions manifests an intention not to arbitrate disputes arising under that agreement. The parties do not contest the validity of the arbitration clause in the franchise agreement. Thus an agreement to arbitrate exists, and the inquiry turns to defendant’s assertion that his claims are beyond the scope of the arbitration agreement.

As an initial matter, an arbitration clause must be construed as either broad or narrow. *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995). An arbitration clause that includes the phrase “[a]ny claim or controversy arising out of or relating to th[e] agreement” is “the

paradigm of a broad clause.” *Id.* (internal quotation marks omitted). This phrase is substantially similar to the language used in the franchise agreement, which provides for arbitration of “[a]ny dispute or claim arising out of or relating to the Agreement.” The arbitration provision is thus construed as broad.

A broad arbitration clause carries with it the presumption of arbitrability. *Collins*, 58 F.3d at 23. “[I]f, however, the dispute is in respect of a matter that, on its face, is clearly collateral to the contract, then a court should test the presumption by reviewing the allegations underlying the dispute and by asking whether the claim alleged implicates issues of contract construction or the parties’ rights and obligations under it.” *Id.* The purchase and sale agreement is such a collateral agreement, which is defined as “a separate, side agreement, connected with the principal contract which contains the arbitration clause.” *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 228 (2d Cir. 2001) (internal quotation marks omitted). “Where the arbitration clause is broad, . . . arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties’ rights and obligations under it.” *Id.* at 224.

When considering whether a particular claim falls within the scope of the parties’ arbitration agreement, the focus is on “the factual allegations in the complaint rather than the legal causes of action asserted. If the allegations underlying the claims touch matters covered by the parties’ . . . agreements, then those claims must be arbitrated, whatever the legal labels attached to them.” *Smith/Enron Cogeneration Ltd. P’ship, Inc. v. Smith Cogeneration Intern., Inc.*, 198 F.3d 88, 98 (2d Cir. 1999). It must therefore be determined whether defendant’s allegations, that plaintiff breached the purchase and sale agreement by failing to deliver title to the sandwich shop free of encumbrances and defrauded it by delivering equipment with existing liens with the knowledge that there were existing

liens, touch matters within the scope of the arbitration agreement.

Defendant's allegations do not place the factual allegations beyond the reach of the arbitration agreement and defeat the presumption of arbitrability. The franchise agreement containing the arbitration clause delineates the expectations of parties to the franchise relationship. The purchase and sale agreement provides for the sale of a franchise and the property and equipment associated with the franchise. It would be disingenuous to argue that the latter agreement purporting to sell a "sandwich shop together with a SUBWAY franchise" and executed on the same day and between the same parties is not inextricably tied to the franchise relationship. The mere existence of two separate agreements, as asserted by defendant, does not suffice to place the claims beyond arbitration. *See Tepper Realty Co. v. Mosaic Tile Co.*, 259 F. Supp. 688, 692-93 (S.D.N.Y. 1966) ("In the face of the complaint and the express provisions of the written contracts, plaintiffs' contention that there is no arbitration agreement simply because the parties to the agreements did not choose to express an arbitration clause in the body of their contracts or resort to the rubric of incorporating the specifications by express reference is untenable."). Further, the purchase and sale agreement effectively invokes and incorporates the franchise agreement in which an arbitration clause appears. The claims are thus within the scope of arbitration contemplated by the franchise agreement. Applicable defenses to arbitration are now addressed.

B. Waiver of Right to Arbitration

Defendant asserts that plaintiff's participation in the Oklahoma proceedings is sufficient to constitute waiver of its right to arbitrate the claims. Plaintiff argues that the defense of waiver is not applicable because it has not substantially litigated its claims in Oklahoma.

“The rule preferring arbitration, when agreed upon, ha[s] led to its corollary that any doubts concerning whether there has been a waiver are resolved in favor of arbitration.” *Louis Dreyfus Negoce S.A.*, 252 F.3d at 229 (internal quotation marks omitted). A party waives its right to arbitration by “engag[ing] in protracted litigation that results in prejudice to the opposing party.” *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993). A determination of whether a party waives the right to arbitrate a claim includes consideration of three factors: (1) the length of time between commencement of litigation and the request for arbitration; (2) the degree to which litigation of the claim has been pursued through motion practice and discovery; and (3) proof of prejudice to party opposing arbitration. *Id.*

It is beyond dispute that plaintiff participated in the Oklahoma proceedings. Plaintiff filed answers and defenses. It also removed the action to federal court and opposed the motion to remand. It also participated in scheduling conferences and filed interrogatories, requests for production and admissions and witness and exhibit lists. The question remains whether the participation is of a sufficient degree to constitute waiver of the right to arbitrate.

Defendant asserts as a basis for his waiver claim “lapse of time coupled with significant legal action in another forum” whereas plaintiff argues that it “scrupulously follow[ed] the dispute resolution procedures set forth in the contract.” Defendant further argues that it will suffer prejudice through costs incurred in the Oklahoma litigation and by denial of the opportunity to litigate in Oklahoma where a scheduling order has issued.

As an initial matter, the relevant time period for determining whether plaintiff waived its right to arbitrate the claims is when it had notice of the complaint against it. The delay in pursuing arbitration is

thus five months. This delay, in and of itself, will not suffice to require a finding of waiver. *PPG Indus., Inc. v. Webster Auto Parts Inc.*, 128 F.3d 103, 108 (2d Cir. 1997). A determination of waiver is reached following assessment of delay and other factors surrounding the litigation and resulting prejudice to the party seeking to avoid arbitration. *Id.* at 109. Mindful that “there is a strong presumption in favor of arbitration and that waiver of the right to arbitration is not to be lightly inferred,” *Coca-Cola Bottling Co. of N.Y., Inc. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 57 (2d Cir. 2001) (internal quotation marks omitted), defendant’s claim of prejudice is not sufficient to defeat this presumption.

In general, waiver has been found under circumstances where there was “substantially more protracted involvement in litigation . . . , often with the party charged with waiver delaying until the very last opportunity or even until it has lost on the merits.” *Id.* at 58 (internal quotation marks omitted). As defendant correctly states, waiver results when a party “act[s] inconsistently with its right to arbitrate.” *See Kingston v. Latona Trucking Inc.*, 159 F.3d 80, 83-84 (2d Cir. 1998) (waiver found where right to arbitration invoked on eve of trial after fifteen month delay and substantial discovery involving three depositions, nineteen interrogatories, and production of 2100 pages of documents); *Cotton v. Slone*, 4 F.3d 176, 179-80 (2d Cir.1993) (waiver found after filing of motions, taking of two depositions and losing on merits). A finding of waiver has been deemed proper where a party “engaged in extensive pre-trial discovery and forced its adversary to respond to substantive motions, delayed invoking arbitration rights by filing multiple appeals and substantive motions while an adversary incurred unnecessary delay and expense, and engaged in discovery procedures not available in arbitration.” *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 163 (2d Cir. 2000), *cert. denied*, --- U.S. ---, 121

S. Ct. 1356, 149 L. Ed. 2d 286 (2001). Waiver appears to be the exception, not the rule, and more egregious scenarios have been found not to constitute waiver of the right to arbitration. *See Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir.1985) (no waiver found in case involving eight months of litigation including “extensive discovery,” a motion to dismiss, and thirteen affirmative defenses to amended complaint).

The circumstances in the present case are not comparable to those in which waiver was found. Plaintiff has not filed a dispositive motion seeking adjudication of the merits of its claims. Plaintiff’s actions related to the Oklahoma litigation were essentially procedural and did not litigate the substance of the issues between the parties. Moreover, the delay in asserting the right to arbitrate is five months after notice and four months prior to the trial date. Furthermore, much of the delay is attributable to its pursuit of mediation as provided for in the franchise agreement. Such assertions do not defeat the strong presumption favoring arbitration of the claims.

Having failed to establish that the claims are beyond the scope of arbitration or that defendant waived its right to arbitration, “it cannot be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *S.A. Mineracao da Trindade-Samitri*, 745 F.2d at 194. The parties are therefore ordered to arbitrate the claims.

IV. CONCLUSION

Defendant's motion to compel arbitration (Doc. 1) is **granted**. The Oklahoma case shall remain stayed pending arbitration. The foregoing order having entered and thus resolved all matters, the case is dismissed without prejudice to moving to reopen in response to any matter properly brought pertaining to arbitration. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, November ____, 2001.

Peter C. Dorsey
United States District Judge