UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

INNER SPACE SERVICES, INC.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 00-380-P-H***
	)	
GUY F. ATKINSON CONSTRUCTION CORPORATION d/b/a/ ATKINSON CONSTRUCTION, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON MOTION OF DEFENDANTS NORTHEAST DRILLING AND RANGER INSURANCE TO DISMISS AND MOTION OF DEFENDANT ATKINSON TO COMPEL ARBITRATION

Two of the defendants in this action arising out of a construction project involving dredging, drilling and blasting in Bath, Maine, Northeast Drilling, Inc. ("NDI") and Ranger Insurance Company ("Ranger") seek dismissal of the claims asserted against them on the ground of *res judicata*. The remaining defendant, Guy F. Atkinson Construction Corporation ("Atkinson") seeks an order compelling arbitration of the claims asserted against it and asks the court to dismiss those claims or, in the alternative, to stay all proceedings until that arbitration is complete. I recommend that the court grant the motions and stay the proceedings with respect to Atkinson and the plaintiff.

I. Factual Background

The first amended complaint includes the following relevant factual allegations. The plaintiff, Inner Space Services, Inc. ("ISSI"), entered into a contract with Atkinson pursuant to which it performed dredging services in connection with a construction project at Bath Iron Works in Bath,

Maine. First Amended Complaint (Docket No. 7) ¶¶ 5, 8. ISSI in turn contracted with NDI for certain drilling and blasting services on the project. *Id*. ¶ 9. Ranger provided a performance bond on behalf of NDI. *Id*. at 1.[1] On or about March 31, 1999 NDI withdrew from the project without completing its contractual obligation. *Id*. ¶ 43.

In November 1999 ISSI notified Atkinson that it had completed its contractual obligation and Atkinson ordered ISSI to demobilize. *Id*. ¶¶ 10, 12. In December 1999 Atkinson alleged a default under its contract with ISSI due to the alleged discovery of unblasted ledge. *Id*. ¶ 13. ISSI and Atkinson entered into a settlement agreement on or about February 28, 2000. *Id*. ¶ 14. The agreement provided that Atkinson would retain over $129,000 until completion of additional dredging work by ISSI. *Id*. ¶¶ 15, 18. On or about May 16, 2000 ISSI informed Atkinson that its work under the settlement agreement would be completed on May 17, 2000. *Id*. ¶ 20. By letter dated on or about June 2, 2000 ISSI demanded release of part of the retained funds and informed Atkinson that the work was complete. *Id*. ¶ 23. On or about June 8, 2000 Atkinson informed ISSI by letter that ISSI had not completed all of the work required by the settlement agreement. *Id*. ¶ 25. ISSI disputed this statement. *Id*. ¶ 26. ISSI incurred costs of $150,000 in connection with the dredging that was subject to the settlement agreement "over and above the amounts received in payment resulting from the settlement agreement." *Id*. ¶ 42.

NDI sued ISSI in an action that was removed to this court from the Maine Superior Court by ISSI on May 21, 1999. Docket, *Northeast Drilling, Inc. v. Inner Space Services, Inc.*, Civil Docket

[1] The first amended complaint contains no other mention of Ranger. Ranger has filed a motion to dismiss on the basis of *res judicata* only. Motion of Defendants Northeast Drilling, Inc. and Ranger Insurance Company to Dismiss, etc. ("Motion to Dismiss") (Docket No. 11). Accordingly, and in addition because my recommendation that the motion be granted makes it unnecessary, I will not address the possible effect of this less-than-minimal pleading.

No. 99-173-P-H. That action arose out of the same project and the same contract between NDI and ISSI that are at issue in this proceeding. Findings of Fact and Conclusions of Law, *Northeast Drilling, Inc. v. Inner Space Services, Inc., et al.*, Civil Docket No. 99-173-P-H, at 1-2 ("Findings and Conclusions") (copy attached as Exh. E to Motion to Dismiss).[2] Following a bench trial which began on February 8, 2000, Docket at 9, the court held that "ISSI shall recover nothing on its counterclaim against NDI or Ranger." Findings and Conclusions at 20.

On January 11, 2000 ISSI filed a motion to continue the trial in the earlier action. Docket at 7. The motion sought an indefinite continuance because "ISSI may have an increased damage claim against NDI" due to claims then allegedly being made against ISSI by Atkinson that, according to ISSI, were based on alleged deficiencies in NDI's work at the project site. Defendants' Motion to Continue Trial, *Northeast Drilling, Inc. v. Inner Space Services, Inc., et al.*, Civil Docket No. 99-173-P-H, at 2-3 (copy attached as Exh. B to Motion to Dismiss). This motion was denied. Docket at 7. On January 25, 2000 ISSI filed a motion for compulsory joinder of Atkinson in the earlier action, *id*., arguing that Atkinson was a necessary party because NDI was responsible for any deficiencies that Atkinson might allege were present in ISSI's work at the project site. Defendants' Motion for Compulsory Joinder Pursuant to Fed. R. Civ. P. 19(a), etc., *Northeast Drilling, Inc. v. Inner Space Services, Inc., et al.*, Civil Docket No. 00-173-P-H, at 1-3, 5-6 (copy attached as Exh. C to Motion to Dismiss). The motion was argued by counsel on the first day of trial. Transcript of Proceedings, *Northeast Drilling, Inc. v. Inner Space Services, Inc., et al.*, Civil Docket No. 00-173-P-H, at 6-9 (partial copy attached as Exh. D to Motion to Dismiss). The court denied the motion, stating in pertinent part:

> I believe that the lateness of the motion here is grounds for denying it independently . . . .

[2] Ranger was a defendant to ISSI's counterclaim in the earlier action. Docket at 2, 4.

* * *

> I do understand that Inner Space believes it has some defenses because of the circumstances where it now stands with Atkinson, I will certainly entertain those defenses as we move forward.

Id. at 9-10, 11. ISSI filed a notice of appeal following the entry of judgment in the earlier action, Docket at 11, and that appeal is presently pending before the First Circuit Court of Appeals. The judgment has been stayed. *Id*. at 12.

The first amended complaint in the instant action asserts claims against Atkinson for breaches of contract (both the initial contract and the settlement agreement), unjust enrichment, violation of chapter 201-A of Title 10 of the Maine Revised Statutes, and negligence, as well as seeking recovery in quantum meruit and an equitable accounting. First Amended Complaint at 8-11. The complaint raises claims against NDI for breach of contract and negligence. *Id*. at 11-12.

II. Discussion

A. Motion to Dismiss

ISSI requests the court to "stay any decision" on the motion to compel arbitration "until the Motion to Dismiss . . . has been heard and decided thereby allowing NDI to respond." Memorandum in Support of Plaintiff, Inner Space Services, Inc.'s, Response to Defendant, Guy F. Atkinson Construction Corporation d/b/a Atkinson Construction's, Motion to Compel Arbitration, etc. ("Objection to Atkinson Motion") (Docket No. 12) at 1. In support of this request, ISSI asserts that "should NDI fail in its Motion to Dismiss, it may well need to comment on the issue of arbitration as it may well be an indispensable party to the arbitration." *Id*. at 9. Although it was filed after the motion to compel arbitration, the motion to dismiss has now been fully briefed. In accordance with ISSI's request, but without determining whether its argument on this point has merit, I will consider the motion to dismiss before addressing the merits of the motion to compel arbitration.

NDI and Ranger take the position that the claims asserted against them in this action are barred by the doctrine of *res judicata* due to the earlier action between them and ISSI. Motion to Dismiss at 5-9. In response, ISSI contends that it could not have known at the time of trial in the earlier action "the extent of the damages it would sustain upon completion of the contract with Atkinson" and that because it "was precluded from" raising the issue of these damages in the earlier action, it should not be barred from pursuing its claims in this action. Plaintiff's Response to Defendants' [sic] Northeast Drilling, Inc. and Ranger Insurance Company's Motion to Dismiss ("Objection to NDI Motion") (Docket No. 16) at 6. In the alternative, ISSI claims entitlement to an equitable exception to application of *res judicata*. *Id*. at 11-12.

Because the earlier action was tried in federal court, federal *res judicata* principles apply to this motion. *Porn v. National Grange Mut. Ins. Co.*, 93 F.3d 31, 33-34 (1st Cir. 1996).[3] "Under the federal law of res judicata, a final judgment on the merits of an action precludes the parties from relitigating claims that were raised or could have been raised in that action." *Id*. at 34.

> For a claim to be precluded, the following elements must be established: (1) a final judgment on the merits in an earlier action, (2) sufficient identity between the causes of action asserted in the earlier and later suits, and (3) sufficient identity between the parties in the two suits.

Id. For purposes of the pending motion, ISSI does not dispute the existence of the first and third elements. Objection to NDI Motion at 7.

While it is axiomatic that a judgment "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case," *Lawlor v. National Screen Serv. Corp*., 349 U.S. 322, 328 (1955), it is also true that "[t]he focal inquiry in assessing the applicability of res judicata . . . is whether the causes of action raised in

[3] The facts that an appeal from the judgment in the earlier action is pending and that the judgment in that action has been stayed does not destroy the *res judicata* effect of that judgment. *Taunton Gardens Co. v. Hills*, 557 F.2d 877, 879 n.2 (1st Cir. 1977).

separate lawsuits are indeed the same," *Apparel Art Int'l, Inc. v. Amertex Enters. Ltd.*, 48 F.3d 576, 583 (1st Cir. 1995). At the direction of the First Circuit, this court must "follow a transactional approach to determine the identity of the underlying claims or causes of action," pursuant to the methodology set forth in the Restatement (Second) of Judgments. *Id*.

> Under this approach, a cause of action is defined as a set of facts which can be characterized as a single transaction or a series of related transactions. The cause of action, therefore, is a transaction that is identified by a common nucleus of operative facts. Although a set of facts may give rise to multiple counts based on different legal theories, if the facts form a common nucleus that is identifiable as a transaction or series of related transactions, then those facts represent one cause of action.
>
> * * *
>
> This Court has enumerated several factors which are useful in determining whether a party has advanced claims in multiple litigations which derive from the same nucleus of operative facts. These factors include: 1) whether the facts are related in time, space, origin or motivation; 2) whether the facts form a convenient trial unit; and 3) whether treating the facts as a unit conforms to the parties' expectations. Additionally, when defining the contours of the common nucleus of operative facts, it is often helpful to consider the nature of the injury for which the litigant seeks to recover.

Id. at 583-84 (citations omitted).

Here, there can be no serious question that the claims asserted against NDI and Ranger in this action by ISSI derive from the same nucleus of operative facts as did those asserted in the earlier action. ISSI nevertheless contends that the events were not related in time because it could not have known the extent of its damages arising from the additional work it agreed to undertake in the settlement agreement at the time of the earlier trial and that the facts did not form a convenient trial unit because the court refused to continue the trial or to allow ISSI to bring Atkinson into the earlier action and because NDI opposed its attempts to do so. Objection to NDI Motion at 8-11. This argument ignores the facts that the first element of the transactional test is stated in the disjunctive ("whether the facts are related in time, space, origin *or* motivation" — emphasis added), that the motions in the first

trial to which it refers were denied as untimely, and that the court in the first trial specifically allowed ISSI to present evidence on the issues discussed in those motions as a defense.

The facts giving rise to ISSI's claims against NDI in both actions are related in space, origin and motivation. They are related in time as well, in the sense that the alleged deficiencies in NDI's work that give rise to the claims occurred at only one point in time. Even assuming *arguendo* that ISSI could not have known the exact amount of its damages allegedly arising from NDI's conduct or misconduct at the time of trial in the first action, nothing precluded ISSI from bringing in that action a timely claim for future damages that were clearly known to ISSI to be likely to arise from that conduct. NDI's opposition to ISSI's untimely attempts to delay the first trial or to add Atkinson as a party is irrelevant to a consideration of the question whether the facts would have formed a convenient trial unit. It is obvious that, had the claim for damages been timely raised via motion, or had evidence been presented on this claim at trial as invited by the court, the facts would have formed such a unit. In this regard, ISSI also attempts, *id*. at 8-9, to rely on an exception to the transactional approach adopted by the Restatement for circumstances in which the plaintiff "was unable to . . . seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action," Restatement (Second) of Judgments § 26 (1980). However, in order to invoke that exception "it must be shown that the claim pressed in the second suit could not have been asserted and resolved in the first suit by reason of limitations on the first court's jurisdiction." *Kale v. Combined Ins. Co. of Am*., 924 F.2d 1161, 1168 (1st Cir. 1991). To the extent that ISSI was prevented from raising its current damages claims against NDI in the earlier action at all, that limitation was not due to a lack of jurisdiction in the court but rather to ISSI's delay in raising the claim.

The pending issue appears to be squarely addressed and governed by the First Circuit's decision in *Johnson v. SCA Disposal Servs. of New England, Inc.*, 931 F.2d 970 (1st Cir. 1991). In that case, the plaintiff moved on the eve of trial in the first action to amend its complaint to include additional damages for which it was first notified that it might be liable seven months earlier; that motion was denied as untimely. *Id*. at 972. A year and a half after trial in the first action, the plaintiff filed a new action against the defendant seeking those damages, contending that the claim required separate proof and discovery from that undertaken in the first action and that the claim did not become ripe until the damages were actually sustained, which occurred after the conclusion of the first action. *Id*. at 972, 974. The First Circuit held that the first action "determined liability *and* awarded damages, and a second suit for additional, but quite different, damages is thereby barred." *Id*. at 975 (emphasis in original). It noted that "whatever the reason for [the plaintiff's] dilatoriness, it has proven to be fatal to [the second action], and we decline to reward [the plaintiff] for its own delinquency by permitting [the second action] to go forward." *Id*. Appeal of the denial of the motion to amend was the plaintiff's "only recourse in such a situation." *Id*. at 976. In the earlier action at issue here, of course, it appears that, while ISSI's motions were denied due to tardiness, it was not precluded from presenting evidence concerning the damages now at issue. Even if ISSI's view of the first action is correct, however, *Johnson* requires that the current claims against NDI and Ranger be dismissed.

Finally, ISSI's contention that it is entitled to an exception to application of the doctrine of *re judicata* due to "unusual hardship," citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), and *Kale*, 924 F.2d at 1168, Objection to NDI Motion at 11-12, is without merit. As was the case in *Kale*, ISSI has shown no basis for abandoning the "time-honored principles of claim

preclusion" in this case, 924 F.2d at 1168, where its inability to obtain in the first action the damages which it now seeks was due to its own actions or failures to act.

B. Motion to Compel Arbitration

Atkinson relies on the following language in its contract with ISSI to support its motion to compel arbitration of the claims asserted against it by ISSI:

> a. In the event of any dispute involving the work performed or to be performed, Atkinson shall issue a decision which shall be followed by Subcontractor, without interruption, deficiency, or delay. If Subcontractor does not agree with such decision, Subcontractor may make a claim under Article 9, and the matter shall be resolved as set forth in Article 11.b or 11.c, as applicable. . . .
>
> b. In case of any dispute between Atkinson and Subcontractor, in any way relating to or arising from any act or omission of [the general contractor] or involving the Contract Documents, Subcontractor agrees to be bound to Atkinson to the same extent that Atkinson is bound to [the general contractor], by the terms of the Contract Documents, and by any and all preliminary and final decisions or determinations made thereunder by the party, board or court so authorized in the Contract Documents or by law . . . . Atkinson will, at its option, (1) present to [the general contractor], in Atkinson's name, or (2) authorize Subcontractor to present to [the general contractor], in Atkinson's name, all of Subcontractor's claims . . . .
>
> c. To the extent not resolved under Article 11.b above, any dispute between Atkinson and Subcontractor shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. . . . The forgoing agreement to arbitrate shall be specifically enforceable in any court of competent jurisdiction. . . . The award rendered by the arbitrators shall be final and judgment may be entered upon it in accordance with applicable law in any court of competent jurisdiction.

Atkinson Construction Subcontract Agreement No. 17001-0102 ("Atkinson/ISSI contract") (Exh. A to Affidavit of Herb Middleton (Docket No. 4), Article 11.

Atkinson also invokes the Federal Arbitration Act, which provides in relevant part:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being

> satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. *See also* 9 U.S.C. § 4 (court may order parties to proceed to arbitration where they have agreed upon that method of dispute resolution).

> In order to grant a motion brought pursuant to these provisions, the Court must find that (i) there exists a written agreement to arbitrate, (ii) the dispute in question falls within the scope of that arbitration agreement, and (iii) the party seeking an arbitral forum has not waived its right to arbitration.

Bangor Hydro-Elec. Co. v. New England Tel. & Tel. Co., 62 F.Supp.2d 152, 155 (D. Me. 1999). "The question whether the parties agreed to arbitrate certain matters [is] for the court to decide." *Coady v. Ashcraft & Gerel*, 223 F.3d 1, 8 (1st Cir. 2000). "[I]n applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement with the scope of the [Federal Arbitration] Act, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt Info. Sciences, Inc. v. Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989) (citation omitted).

ISSI first contends that "there is a dispute as to the existence of a written arbitration agreement requiring both parties to arbitrate," Plaintiff, Inner Space Services, Inc.'s, Response to Defendant Guy F. Atkinson Construction Corporation d/b/a Atkinson Construction's Motion to Compel Arbitration, etc. ("Objection to Atkinson Motion") (Docket No. 12) at 5, because the arbitration clause in the contract is ambiguous and must therefore be construed against Atkinson, which drafted the contract, *id.* at 6. ISSI does not discuss in its memorandum of law the manner in which it contends the contract language is ambiguous, merely citing the affidavit of Laurie L. Mason in support of its conclusory

statement.[4] *Id*. Ms. Mason's affidavit states that, during negotiations before the contract at issue was signed, "ISSI would not agree to arbitration solely at the election of Atkinson," "it was agreed that both parties had to agree to arbitration," and, in order to effectuate this agreement, the words "at Atkinson's sole option," which had initially followed the words "any dispute between Atkinson and Subcontractor shall," were struck from Article 11.c, Affidavit of Laurie L. Mason (Docket No. 14), ¶¶ 5-8, as remains evident on the copy of the agreement submitted to the court by Atkinson through the Middleton affidavit.

However, Mason's assertion conflicts with the language of Article 11.c, which on its face is not ambiguous. The language as written is not reasonably susceptible of differing interpretations. ISSI seeks to create an ambiguity in the arbitration clause through the use of extrinsic evidence, which is not permitted as a matter of law. *See Blackie v. State of Maine*, 75 F.3d 716, 721 (1st Cir. 1996) ("[A] contract is not ambiguous merely because a party to it, often with a rearward glance colored by self-interest, disputes an interpretation that is logically compelled."). In addition, the contract includes the following integration clause:

> This Subcontract contains the entire agreement between the parties hereto with respect to the matters covered herein. No other agreements, representations, warranties, or other matters, oral or written, shall be deemed to bind the parties hereto.

Atkinson/ISSI Contract, Article 2 at 1. When a writing is intended by the parties to integrate their understandings with respect to its subject matter, extrinsic evidence offered to vary, add to, or contradict its terms may not be considered. *Farley Investment Co. v. Webb*, 617 A.2d 1008, 1010 (Me. 1992). Here, ISSI offers no suggestion that the parties did not intend the contract at issue to be fully integrated; the only evidence on the point is the unambiguous integration clause itself. Under the

[4] Citing to an entire affidavit, rather than to specific numbered paragraphs of that affidavit, is not acceptable practice in this court.

circumstances, the only possible conclusion is that the contract language at issue unambiguously requires arbitration of disputes; neither party has the option to refuse arbitration.

ISSI next contends that its negligence claim, presented in Count VII of the first amended complaint, is not within the scope of the arbitration clause of the contract "based upon equitable principles." Objection to Atkinson Motion at 6. It is not at all clear from ISSI's memorandum why it contends that a negligence claim is not within the scope of the contract language. Count VII clearly involves the work performed or to be performed under the contract, even though it is specifically based on testimony concerning that work offered at the trial of the action between ISSI and NDI. First Amended Complaint ¶¶ 66-69. In the absence of any developed argument concerning an asserted equitable reason for the court to take this claim outside the scope of the contract language, ISSI is not entitled to relief on this basis from its agreement to arbitrate.

ISSI's final argument is that Atkinson has waived its right to arbitration under the contract because it did not seek arbitration in May or June 2000 when it took the position that ISSI had not completed its work under the settlement agreement and itself violated the settlement agreement. Objection to Atkinson Motion at 7-8. ISSI contends that it was prejudiced by Atkinson's "avoid[ing] any discussion of arbitration," which caused ISSI "great consternation and difficulty in securing bonding." *Id*. at 8. There are no factual allegations in the first amended complaint to support ISSI's claim of prejudice, nor are there any such statements in the Mason affidavit, the only document other than the contract at issue submitted by ISSI in support of its opposition to the motion to compel arbitration.

> In order to successfully assert waiver by the opposing party, a plaintiff must demonstrate that it has been prejudiced. The burden to prove waiver is a weighty one, particularly where the party seeking arbitration has not answered the complaint, as in this case, or otherwise locked litigious horns.

Bangor Hydro, 62 F.Supp.2d at 159 (citations and internal punctuation omitted). ISSI has offered even less evidence of prejudice than that found insufficient in this context in *Bangor Hydro*. *See generally* 62 F.Supp.2d at 160-61. For all that appears in the record, ISSI claims to have been prejudiced by "the predictable consequences of protracted and apparently unsuccessful negotiations in which [it] participated on a voluntary basis." *Id*. at 161. Neither those consequences nor some undefined "difficulty in securing bonding" for some unspecified purpose constitute prejudice sufficient to support a finding that Atkinson waived its right to arbitration under the parties' contract.

C. Dismissal v. Stay

Atkinson asks the court to dismiss this action rather than stay it pending the ordered arbitration. Motion to Compel Arbitration/Motion to Dismiss or in the Alternative to Stay Proceedings (Docket No. 2). While the court has the discretion to do so, *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 156 n.21 (1st Cir. 1998), I recommend that the court retain jurisdiction and stay the action as a matter of administrative convenience.

III. Conclusion

For the foregoing reasons, I recommend that the motion of defendants Northeast Drilling, Inc. and Ranger Insurance Company to dismiss be **GRANTED,** that the motion of defendant Guy F. Atkinson Construction Corporation to compel arbitration be **GRANTED** and that this action, insofar as it asserts claims against Atkinson, be stayed pending completion of that arbitration.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 13th day of March, 2001.

_____

David M. Cohen
United States Magistrate Judge

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