

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**FOUR B DEVELOPMENT** )  
**CORPORATION,** )  
 )  
**Plaintiff** )  
 )  
**v.** )  
 )  
**CLIFF REALTY CORPORATION,** )  
 )  
**Defendant** )

**Docket No. 00-31-P-C**

**RECOMMENDED DECISION ON**  
**PLAINTIFF'S PETITION TO COMPEL ARBITRATION**

Plaintiff Four B Development Corporation (“Four B”) moves pursuant to 9 U.S.C. § 4 for an order compelling arbitration in a contract dispute with Cliff Realty Corporation (“Cliff Realty”) arising from a golf-course construction project. Four B Development Corporation’s Petition and Complaint To Compel Arbitration Pursuant to 9 U.S.C. § 4 (“Petition”) (Docket No. 1). For the reasons that follow, I recommend that the Petition be granted.

**I. Analysis**

On April 13, 2000 I issued a memorandum decision in this case denying a motion by Cliff Realty to stay arbitration pending resolution of issues raised in the Petition. Memorandum Decision on Defendant’s Motion To Stay Arbitration (“Decision”) (Docket No. 6); *see also* Motion To Stay Arbitration Pending Determination of Plaintiff’s Petition To Compel Arbitration (“Motion To Stay”) (Docket No. 3). In deciding the Motion To Stay I found it necessary to address the two issues at the

core of the Petition, ruling that the parties' agreement should be interpreted with reference to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and that a threshold claim by Cliff Realty that Four B had waived its right to arbitration was itself subject to arbitration. Decision at 3-6. Accordingly, I requested a conference of counsel to discuss the appropriate next step in the litigation. *Id.* at 6 n.4; Report of Conference of Counsel and Order ("Report") (Docket No. 9). At that conference, held by telephone on April 28, 2000, counsel for Four B suggested that in view of the Decision no further action of the court was necessary and the court should simply stay this action pending the outcome of the arbitration. Report at 1. However, counsel for Cliff Realty pressed for a decision on the merits of the Petition. *Id.* The Petition was then taken under advisement. *Id.* at 2.

Having now thoroughly reviewed Cliff Realty's opposition to the Petition, I am satisfied that nothing therein calls into question the bases for my earlier rulings that the Federal Arbitration Act applies and that, pursuant thereto, the threshold claim of waiver must itself be arbitrated.

Cliff Realty contends, in opposing the Petition, (i) that the issue of arbitrability is one for the courts, rather than arbitrators, to decide and (ii) that the parties' dealings did not comprise interstate commerce for purposes of the applicability of the Federal Arbitration Act. Opposition to Plaintiff's Petition To Compel Arbitration ("Opposition") (Docket No. 8) at 5-11.

Taking these in reverse order, Cliff Realty submits affidavits in support of its contention that the entire golf-course renovation was accomplished in Maine and that the parties intended it to be a local project, governed by Maine law. *Id.* at 10; affidavits attached thereto. None of these materials undermines my earlier findings that Cliff Realty chose to do business with a Massachusetts contractor, Four B, and that Four B sent workers and equipment from Massachusetts to the site. *Compare, e.g.,* Decision at 2-3 *with* Affidavit of Kenneth Wood, attached to Opposition, ¶¶ 2-3. The

fact that the workers and equipment may have remained in Maine for the duration of the project, *see* Opposition at 10, is immaterial.

Turning next to the issue of who decides arbitrability, Cliff Realty relies entirely on non-First Circuit caselaw for the proposition that a court must decide whether the right to arbitration has been waived. *See* Opposition at 5-9. In so doing Cliff Realty ignores controlling First Circuit caselaw that compels a different conclusion.<sup>1</sup> *See* Decision at 5-6.

## II. Conclusion

For the foregoing reasons I recommend that the Petition be **GRANTED**.

### 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.*

*Dated this 3rd day of May, 2000.*

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*David M. Cohen*  
*United States Magistrate Judge*

STNDRD

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<sup>1</sup>Cliff Realty cites a Supreme Court case, *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643 (1986), in support of its contention that the waiver issue must be decided by a court. *See* Opposition at 8. The *AT&T* case is discussed at some length in the decision I consider dispositive of the instant Petition, *PaineWebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996).

U.S. District Court  
District of Maine (Portland)  
CIVIL DOCKET FOR CASE #: 00-CV-31  
FOUR B DEVELOPMENT v. CLIFF REALTY CORP  
Filed: 01/28/00  
Assigned to: JUDGE GENE CARTER  
Jury demand: Defendant  
Demand: \$0,000  
Nature of Suit: 890  
Lead Docket: None  
Jurisdiction: Federal Question  
Dkt# in other court: None  
Cause: 09:1 U.S. Arbitration Act

FOUR B DEVELOPMENT CORPORATION  
W. SCOTT O'CONNELL, ESQ.\* plaintiff [COR LD NTC]  
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603-628-4000

v.

CLIFF REALTY CORPORATION  
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