

MAY 27 2004

(N)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

MAY 24 2004

GREGORY C. LANGHAM
CLERK

Civil Action No. 03-N-1371 (CBS) M JW

GARY L. CUMMINGS, et al.,

Plaintiffs,

v.

FEDEX GROUND PACKAGE SYSTEMS, INC.,

Defendant.

ORDER AND MEMORANDUM OF DECISION

This is a fraud, breach of implied contract, and deceptive trade practices case. Plaintiffs Gary L. Cummings, Yelena Z. Cummings, James Bittle, Bonnie Bittle, and Sean Steiner ("plaintiffs") allege that Defendant FedEx Ground Package System, Inc. ("FedEx")¹ misrepresented the viability of defendant's package delivery routes it assigned to plaintiffs and did not provide proper support to plaintiffs on these routes. On December 19, 2003, defendant moved to dismiss plaintiffs' fourth and fifth amended claims for relief pursuant to Federal Rule of Civil Procedure 12(b)(1) and to compel arbitration. (Def. FedEx Ground's Mot. Pursuant to Fed. R. Civ. P. 12(b)(1) and the Federal Arbitration Act to Compel Arbitration and Supporting Legal Authority in Resp. to Pl.'s [sic] Am. Compl. at 2-3 [filed Dec. 19, 2003] [hereinafter "Def.'s Br."].) Jurisdiction in this case is based upon diversity of citizenship, 28 U.S.C.A. §

¹Plaintiffs originally stated claims against two other defendants. These other defendants have settled with plaintiffs, so I address this case only as it relates to defendant FedEx. All references hereinafter to defendant are to FedEx Ground Package System, Inc.

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FACTS

1. *Factual Background*

Each of the plaintiffs was an owner of one of defendant's package delivery routes. (Am. Compl. ¶ 1 [filed Dec. 5, 2003] [hereinafter "Am. Compl."].) According to plaintiffs, in 2000, prior to the formation of a business relationship between plaintiffs and defendant, defendant made numerous oral misrepresentations to plaintiffs regarding, *inter alia*, the profitability of the delivery routes. (*Id.*) Each of the plaintiffs then entered into a written contract with defendant in regards to the scope of his or her work with defendant. (Def.'s Br. at 2-3; Pls.' [A] Resp. to Def. FedEx Ground's Mot. Pursuant to Fed. R. Civ. P. 12(b)(1) and the Federal Arbitration Act to Compel Arbitration Act [sic] to Compel Arbitration [sic] and Supporting Legal Authority; and [B] Request for Hr'g at 2-3 [filed Sept. 11, 2003] [hereinafter "Pls.' Resp."].) These contracts were each entitled "Pick-up and Delivery Contractor Operating Agreement." (Def.'s Br., Exs. 2-4 [Plaintiffs' Agreements with Defendant].) Each of these contracts contained an arbitration provision regarding wrongful termination, which provided:

12.3 Arbitration of Asserted Wrongful Termination. In the event [defendant] acts to terminate this Agreement (which acts shall include any claim by [a plaintiff] of constructive termination) and [a plaintiff] disagrees with such termination or asserts that the actions of [defendant] are not authorized under the terms of this Agreement, then each such disagreement (but no others) shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA).

(*Id.* [emphasis in original].) This clause also required each of the plaintiffs to notify defendant of a demand of arbitration within ninety days of the wrongful termination. (*Id.*) In 2001, each of

the plaintiffs stopped running their respective delivery routes and ended their business relationships with defendant. (Am. Compl. ¶¶ 10, 16, 21.)

2. *Procedural History*

Plaintiffs' filed a state court action alleging, *inter alia*, that defendant misrepresented the viability of the package delivery routes it assigned to plaintiffs and did not provide proper support to plaintiffs on these routes. (Am. Compl. and Jury Demand [filed June 24, 2003].) Plaintiffs asserted nine claims for relief: (1) rescission, (2) fraud, (3) negligent misrepresentation, (4) breach of contract / promissory estoppel, (5) breach of covenant of good faith and fair dealing, (6) deceptive trade practices, (7) conspiracy, (8) failure to insure, and (9) exemplary damages. (*Id.*) Plaintiffs alleged in their fourth claim for relief that defendant "contracted with Plaintiffs, either directly or through promissory estoppel, to aid the Plaintiffs in selling their routes and or trucks if things did not work out. [Defendant] breached this agreement with Plaintiffs and Plaintiffs have been damaged thereby." (*Id.* ¶¶ 44–45 [paragraph numbering omitted].) Plaintiffs alleged in their fifth claim for relief that

Plaintiffs had a contractual relationship with [defendant] and implied thereby is the covenant of good faith and fair dealing. By failing to inform Plaintiffs of the efforts necessary to make the type of money being represented, by making the daily requirements of fulfilling the job as difficult as possible, by failing to act reasonably in the demand upon Plaintiffs, by failing to aid Plaintiffs in selling their routes or trucks, and by other similar or related acts, [defendant] has breached the covenant of good faith and fair dealing with the Plaintiffs. Plaintiffs have been damaged by such breach.

(*Id.* ¶¶ 47–49 [paragraph numbering omitted].) Defendant removed the case to this court on July 28, 2003 pursuant to diversity of citizenship. (Notice of Removal [filed July 28, 2003].)

On August 4, 2003, defendant filed a motion to dismiss and compel arbitration regarding plaintiffs' fourth and fifth claims for relief based upon the assertion that these are contract claims that fall within the purview of the arbitration clause between the parties. (Def. FedEx Ground's Mot. Pursuant to Fed. R. Civ. P. 12(b)(1) and the Federal Arbitration Act to Compel Arbitration and Supporting Legal Authority [filed Aug. 4, 2003].) Plaintiffs filed a response to this motion on September 11, 2003. (Pls.' Resp.) Defendant filed its reply on September 22, 2003. (Def., FedEx Ground Package System, Inc.'s Reply to Pls.' Resp. to FedEx Ground's Mot. Pursuant to Fed. R. Civ. P. 12(b)(1) and Request for Argument [filed Sept. 22, 2003].)

Then, on December 5, 2003, plaintiffs' filed an amended complaint which, *inter alia*, altered plaintiffs' fourth and fifth claims for relief. (Am. Compl. ¶¶ 43–49.) The amended complaint explains that “[a]ll claims against [defendant] stated herein are based on oral representations concerning income, workload and aid in selling the trucks and route, and do not arise from the terms of the signed contract between [defendant] and the Plaintiffs.” (*Id.* ¶ 24.) Plaintiffs allege in their amended fourth claim for relief that defendant

contracted with Plaintiffs, either directly or through promissory estoppel, to aid the Plaintiffs in selling their routes and or trucks if things did not work out. Such agreement does not arise from the terms of the written Contract supplied by [defendant. Defendant] breached this agreement with Plaintiffs and Plaintiffs have been damaged thereby.

(*Id.* ¶¶ 44–45 [paragraph numbering omitted].) Plaintiffs allege in their amended fifth claim for relief that

Plaintiffs had an implied contractual relationship with [defendant] concerning income, time to complete routes and aid in selling trucks and routes upon termination, and implied thereby is the covenant of good faith and fair dealing. By failing to inform

Plaintiffs of the efforts necessary to make the type of money being represented, by failing to aid Plaintiffs in selling their routes or trucks, and by other similar or related acts, [defendant] has breached the covenant of good faith and fair dealing with the Plaintiffs. Plaintiffs have been damaged by such breach.

(*Id.* ¶¶ 47–49.)

On December 19, 2003, defendant filed a new motion to dismiss and compel arbitration regarding plaintiffs' fourth and fifth amended claims for relief. (Def.'s Br.) Defendant's new motion generally follows defendant's reasoning in its original motion on this issue and does not raise issues such as the statute of frauds or the merger clauses in the contracts. (*Id.*) Plaintiffs have not responded to this new motion.

On March 23, 2004, I denied defendant's August 4, 2003 motion to dismiss as moot because defendant's August 4, 2003 motion to dismiss was directed at plaintiffs' earlier complaint, and this complaint was superseded by plaintiffs' amended complaint. (Order and Mem. of Decision [filed March 23, 2004].)

ANALYSIS

1. *Standard of Review*

Federal Rule of Civil Procedure 12(b)(1) provides that a defendant may move the court to dismiss the claim for "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1) (2003). When a defendant challenges subject matter jurisdiction, the plaintiff must establish such jurisdiction by a preponderance of the evidence. *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995). Unlike a 12(b)(6) motion, a motion under 12(b)(1), "can include references to evidence extraneous to the complaint without converting it to a Rule 56 motion." *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir. 1987). Indeed, the

court has “wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts under 12(b)(1).” *Id.*

2. *Legal Analysis*

“Arbitration is a matter of contract. Interpretation of a contract such as the arbitration agreement at issue is a question of law where the contract’s construction does not depend on extrinsic evidence and where the language is susceptible of only one reasonable interpretation.” *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 13 F.3d 330, 332 (10th Cir. 1993) (citations omitted). Since arbitration is a matter of contract, unsurprisingly, a party can only be forced to arbitrate “those issues it specifically has agreed to submit to arbitration.” *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945, 115 S.Ct. 1920, 1925 (1995). In interpreting arbitration clauses, courts should be mindful that “any doubt about the arbitrability of an issue should be resolved in favor of arbitration.” *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001).

Here, the arbitration provision, by its clear and unequivocal language, covers only two types of disputes. First, it covers defendant’s “acts to terminate th[e] [a]greement.” (Def.’s Br., Exs. 2–4 [Plaintiffs’ Agreements with Defendant].) Second, it covers acts claimed by plaintiffs to constitute defendant’s “constructive termination” of the agreement. (*Id.*) This provision is not the type of arbitration provision, commonly used, that demands that “any and all disputes” between the parties be settled by arbitration. (*Id.*)

Under plaintiffs’ amended fourth claim for relief, plaintiffs’ explicitly state that their claim for relief is not premised upon this contract. (Am. Compl. ¶ 44.) This claim for relief, therefore, cannot be subject to the arbitration provision that is limited only to defendant’s

termination breach or constructive termination of the contract. Furthermore, this claim is not premised upon the termination of the contract, but upon defendant's alleged pre-termination and post-termination actions.

Under plaintiffs' amended fifth claim for relief, plaintiffs' explicitly state that they "had *an implied contractual relationship* with [defendant] concerning income, time to complete routes and aid in selling trucks and routes upon termination, and implied thereby is the covenant of good faith and fair dealing." (*Id.* ¶ 47 [emphasis added].) This claim, also, is not premised upon the contract and thus cannot be subject to the arbitration provision. Moreover, like plaintiffs' amended fourth claim for relief, this claim is not premised upon the termination of the contract, but upon defendant's pre-termination and post-termination actions.

Defendant cites a recent order of Chief Judge Babcock regarding the same arbitration provision, wherein he determined that the plaintiff's claims fell within the arbitration clause and therefore must be arbitrated. (FedEx Ground's Supplemental Authority in Supp. of Its Mot. to Compel Arbitration [filed Apr. 1, 2004] [citing *Usher v. FedEx Ground Package Sys., Inc.*, Civ. Action No. 03-B-1370 (D. Colo. March 26, 2004)].) The *Usher* case is not analogous because in *Usher*, the plaintiff's complaint averred that "[d]efendant breached the [Operating Agreement] by wrongfully terminating the contract." *Usher v. FedEx Ground Package Sys., Inc.*, Civ. Action No. 03-B-1370 at 4 (D. Colo. March 26, 2004) (alteration in original). Here, for the reasons set forth above, plaintiff does not aver that any of its claims arose from defendant's wrongful termination of the contract.

Since defendant only argues in its motion that plaintiff's fourth and fifth claims for relief must be dismissed because they fall within the purview of the arbitration provision, defendant's

motion to dismiss is without merit.

3. **Conclusions**

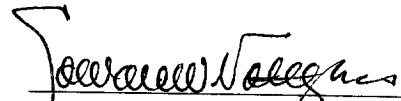
Based on the foregoing it is therefore

ORDERED as follows:

1. Defendant's Motion to Dismiss and to Compel Arbitration (# 56) is DENIED.
2. Plaintiff's Motion for Reconsideration and/or Renewed Motions for Extension of Time (# 55) is DENIED as moot.


Dated this 24 day of May, 2004.

BY THE COURT:


EDWARD W. NOTTINGHAM
United States District Judge

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UNITED STATES DISTRICT COURT
DENVER, COLORADO

MAY 25 2004

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IN THE UNITED STATES DISTRICT COURT
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Order and Memorandum of Decision signed by Judge Edward W. Nottingham on May 24, 2004 was served on May 24, 2004 by hand-delivery, where a "D.C." box number or asterisk (*) is indicated after the recipient's name, by electronic mail to the electronic mail address specified where a double asterisk (**) is indicated after the recipient's name, or otherwise by depositing it in the United States mail, postage prepaid, addressed to the recipient:

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GREGORY C. LANGHAM, CLERK

By


Deputy Clerk or Secretary