UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No.94-40742

Summary Calendar

CONSTRUCTION AGGREGATES INC.,

Plaintiff-Appellee,

VERSUS

SENIOR COMMODITY COMPANY,
S.A.M. and RINY DOYLE,

Defendants,

SENIOR COMMODITY COMPANY,
S.A.M.,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Texas

(B-94-CV-86)

(February 14, 1995)

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

Thornberry, Circuit Judge:[*]

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."

Appellant Senior Commodity Company, S.A.M. (hereinafter SENIOR) requests review of the district court's denial of its motion to compel arbitration. Because we find that the district court's denial of the motion was correct, we affirm.

Facts and Prior Proceedings

Construction Aggregates, Inc. (CONAGG) and SENIOR entered into eight sales contracts at different times. On August 30, 1991, the first contract was signed and was labeled SENIOR contract no. 9145 (the August contract). The August contract contained an arbitration clause. It was signed by both parties. On October 23, 1991, SENIOR submitted to CONAGG another agreement, assigned SENIOR contract no. 9156 (the October contract). The October contract contained the same arbitration clause as the August contract, but called for a change in delivery of the goods. CONAGG did not immediately sign and return the October contract and as a result, the time for delivery of the goods under both contracts expired. Thereafter, a dispute arose between SENIOR and CONAGG as to whether the October contract was a valid contract. After negotiation, the controversy was settled, and a new contract was signed by both parties and was labeled CONAGG contract no. 920410 (the new contract). The new contract did not contain an arbitration clause. About a year later, CONAGG filed a suit in Texas state court against SENIOR, alleging breach-of-contract and fraud in connection with the new contract. The action was removed to federal district

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

court on the basis of diversity. Soon thereafter, SENIOR filed a motion to compel arbitration. The district court denied the motion because there was no express arbitration clause in the new contract nor evidence that the parties intended that arbitration be a part of the new contract. SENIOR timely appeals to this Court for relief. We affirm.

Discussion

An order denying a motion to compel arbitration is immediately appealable. 9 U.S.C. § 16(a)(1). We review *de novo* the district court's decision not to compel arbitration. **Tays v. Covenant Life Insurance Company**, 964 F.2d 501 (5th Cir. 1992). While the Federal Arbitration Act does establish a strong federal policy favoring arbitration, unless the parties to the dispute have contractually bound themselves to arbitrate their disputes, the Act does not require arbitration. **In re Talbott Big Foot, Inc.,** 887 F.2d 611, 614 (5th Cir. 1989).[1]

SENIOR urges this Court to order arbitration and argues that it matters not that the new contract fails to contain an arbitration clause because all of the other contracts entered into by the parties do contain arbitration clauses. Thus, the parties' "course of dealings" establishes that an arbitration clause was intended in the new contract. SENIOR does not present any evidence

[1] Although federal law governs the interpretation and validity of arbitration clauses, federal law on the existence *vel non* of an arbitration clause consists of general principles of state contract law. **Neal v. Hardee's Food Systems, Inc.**, 918 F.2d 34, 37 & n.5 (5th Cir. 1990).

of any other oral agreements between the parties regarding arbitration relevant to the new contract.

We are unpersuaded that the parties' "course of dealings" illustrates that both parties intended that arbitration be a term of the new contract. "A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Tex. Bus. & Com. Code Ann. § 1.205(a) (West 1994).[2] Clearly, "course of dealing" is restricted to conduct between the parties ***previous*** to the agreement. SENIOR'S course of dealing argument is unpersuasive because no course of dealing is clearly established when the parties never performed the first two contracts. The new contract obviously stands on its own as an agreement reached after negotiations concerning the nonperformance of the first two contracts. The new contract does not contain an arbitration clause, and there is no evidence that the parties made an agreement concerning arbitration with regard to the new contract. There is simply no conduct by the parties that would indicate that they intended their silence to create an obligation to arbitrate. In the absence of the parties' intent to arbitrate, a federal court will not order arbitration. **Talbott Big Foot**, 887 F.2d at 614. Furthermore, SENIOR'S argument that the six

[2] Because the new contract is a contract for the sale of goods, the U.C.C. applies. Tex. Bus. Com. Code. Ann. §§ 2.102, 2.105(a), 2.106(a) (West 1994); **Westech Engineering, Inc. v. Clearwater Constructors, Inc.,** 835 S.W.2d 190, 197 (Tex. Ct. App. 1992).

subsequent contracts containing arbitration clauses illustrates "course of dealing" is unpersuasive because those contracts were executed subsequent to the contract at issue in this case. **See Smith v. Renz**, 840 S.W.2d 702, 705 (Tex. Ct. App. 1992).

Finally, SENIOR urges us to engraft an arbitration clause into the new contract because the contracts that it replaced contained such a clause. While this Court has addressed a situation in which an arbitration clause in one contract was engrafted onto another, the contracts at issue in the instant case are not interrelated such that the initial contract contained the "keystone" of the relationship. **Neal**, 918 F.2d at 37-38. **Neal** involved one set of contracts that were executed at the same time by the same parties for the same purpose, which were to create a franchisee-franchisor relationship. **Id.** The main contract in question contained the "keystone" of the relationship and included a broad arbitration clause covering "any and all disputes." **Id.** at 38. There were also subsidiary contracts covering aspects of the relationship, but these contracts did not contain arbitration clauses. **Id.** at 37. This Court held that a dispute as to the subsidiary contract came within the arbitration clause of the keystone agreement. **Id**. at 38.

The new contract in the instant case, however, is obviously not one of a series of contracts nor are the contracts related such that one is the keystone agreement covering all of the rights and obligations of the parties. The contracts between the parties in this case are separate contracts for the delivery of goods, the terms of which are different in each contract. In other words,

there is no relationship between the contracts; the only similarity between the contracts are the parties and the general type of commodity to be bought and sold. We therefore agree with the district court that arbitration was not mutually intended by the parties, and the motion to compel was correctly denied.

Conclusion

Based on the foregoing, we AFFIRM the district court.