UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAMES D. BASKIN, *Plaintiff*,	§	
v.	§	CIVIL ACTION NO. 4:23-cv-02701
BOTTINI & BOTTINI, INC. AND FRANCIS A. BOTTINI, *Defendants*.	§	

MEMORANDUM AND ORDER

Before the Court is Defendant Bottini & Bottini, Inc.'s Motion to Dismiss the Action and to Compel Arbitration.[1] ECF 15. Plaintiff filed a response. ECF 17. Defendant filed a reply. ECF 23. The Court held a hearing on April 24, 2024. *See* ECF 37. Having reviewed the parties' submissions, arguments, and the applicable law, Defendant's Motion (ECF 15) is GRANTED IN PART and DENIED IN PART for the reasons set forth below.

[1] The District Judge referred this case to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. ECF 7. Although the Fifth Circuit has not ruled on the issue, courts in this district have held that a motion to compel arbitration is a non-dispositive motion subject to review by the District Court under the deferential clearly erroneous or contrary to law standard of review. *Adams v. Energy Transfer Partners*, No. 2:16-CV-400, 2017 WL 2347425, at *1 (S.D. Tex. May 30, 2017) (collecting cases); *Prangner v. EK Real Est. Servs. of NY, LLC*, No. H-21-3406, 2023 WL 2143605, at *1 n.1 (S.D. Tex. Feb. 21, 2023) (issuing an order, not a recommendation, on a motion to compel arbitration); *Glob. Indus. Contractors, LLC v. Red Eagle Pipeline, LLC*, 617 F. Supp. 3d 633, 636 (S.D. Tex. 2022) (following precedent from First and Third Circuits).

I. Factual and Procedural Background.

Plaintiff James Baskin is a former of-counsel attorney of Defendant Bottini & Bottini, Inc. ("B&B"). ECF 1 at ¶ 9. B&B is one of three firms that represented the plaintiffs in a shareholder derivative action entitled *Hack v. Wright*, No. 4:14-CV-3442 (S.D. Tex.). ECF 1 at ¶ 8; ECF 15-1 at ¶ 2. Plaintiff alleges that "B&B agreed to pay the reasonable value of [his] services in connection with the Case (*i.e., quantum meruit*), to be paid out of the settlement or judgment, if any, in the Case after it was finally concluded including any appeal." ECF 1 at ¶ 11.

The *Hack* case settled in March 2022. ECF 1 at ¶ 14. On March 15, 2022, the Court entered a Final Order and Judgment approving the derivative settlement in the amount of $11 million. *Id.* at ¶ 16. The Stipulation and Agreement of Settlement (the Agreement) provided for an additional award of $3.2 million in attorneys' fees and $225,000 in expenses. *Id.* at ¶¶ 14, 16. The Agreement contained an arbitration clause which provides:

> 4.4 The payment of the Fee and Expense Amount pursuant to ¶¶ 4.1, 4.2, and 4.3 hereof shall constitute final and complete payment for Plaintiffs' Counsel's attorneys' fees and for the reimbursement of expenses and costs that have been incurred, or will be incurred, in connection with the Derivative Action. Plaintiffs' Counsel shall allocate the Fee and Expense Amount among themselves. *Plaintiffs' Counsel agree that any disputes regarding the allocation of the Fee and Expense Amount among them shall be presented to and be mediated, and, if necessary, finally decided and resolved by the Mediator through binding arbitration on the terms and subject to the processes and procedures set forth by the Mediator.*

ECF 15-2 at ¶ 4.4 (emphasis added). Under the agreement, "'Plaintiffs' Counsel' means Bottini & Bottini, Inc., Shuman, Glenn & Stecker, (collectively, 'Plaintiffs' Co-Lead Counsel') and Sponsel Miller Greenberg PLLC." *Id.* at ¶ 1.17. The Agreement was signed by Francis Bottini on behalf of B&B as counsel for plaintiff Robert Hack. *Id.* at 27. Plaintiff did not sign the Settlement Agreement.

In April 2022, the Final Order and Judgment in the *Hack* case was appealed to the Fifth Circuit. ECF 1 at ¶ 17. The money awarded for attorneys' fees and expenses remained in a trust account pending the appeal. *Id.* at ¶¶ 16, 17. The appeal was resolved on January 26, 2023. *Id.* at ¶ 17.

Plaintiff initiated this action against B&B and Francis A. Bottini on July 24, 2023, but later dismissed the claims against Francis Bottini. ECF 1; ECF 9. Plaintiff alleges that he has not been paid for his work on the *Hack* case and asserts claims for breach of contract, quantum meruit, unjust enrichment, and restitution against Defendants as "conscious wrongdoers." ECF 1. B&B filed the instant Motion to Dismiss the Action and to Compel Arbitration on September 22, 2023. ECF 15. Plaintiff filed a response (ECF 17) and B&B replied (ECF 23). The Court stayed discovery and other activity in the case pending its ruling on Defendant's Motion. ECF 19. The Court held a hearing on April 24, 2024 at which counsel for both parties appeared.

II. Legal Standards.

The Federal Arbitration Act (FAA) provides that agreements to arbitrate are valid and enforceable. 9 U.S.C. § 2. However, parties that have not agreed to arbitrate are not required to do so. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). Determining whether the parties have agreed to arbitrate requires the court to decide (1) whether the parties have a valid arbitration agreement and (2) whether the specific dispute in question falls within the scope of their arbitration agreement. *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 445 (5th Cir. 2001); *Galvez v. Arandas Bakery No. 3 Inc.*, No. 4:22-CV-712, 2023 WL 2652249, at *2 (S.D. Tex. Mar. 24, 2023). If both elements are met, the court must compel arbitration unless there is a federal statute or policy against arbitration. *OPE Int'l LP*, 258 F.3d at 445; *Galvez*, 2023 WL 2652249, at *2. If the court compels arbitration, the Federal Arbitration Act provides that the court shall stay the lawsuit until arbitration is completed. 9 U.S.C. § 3; *see Smith v. Spizzirri*, __ S.Ct. __, 2024 WL 2193872, at *4 (May 16, 2024).

III. Analysis.

A. Plaintiff is bound by the valid arbitration clause in the *Hack* Settlement Agreement.

State law contract principles govern whether the parties entered into a valid arbitration agreement, including whether, on equitable grounds, a party may compel a non-signatory to arbitrate. *Morrison v. Amway Corp.*, 517 F.3d 248, 254 (5th Cir.

2008); *IMA, Inc. v. Columbia Hosp. City at Dallas, Subsidiary L.P.*, 1 F.4th 385, 391 (5th Cir. 2021). The party seeking to compel arbitration bears the burden to establish the existence of a binding agreement to arbitrate. *See Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 688 (5th Cir. 2018).

Generally, "[a]rbitration agreements apply to nonsignatories only in rare circumstances." *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 358 (5th Cir. 2003). However, courts have recognized six theories, arising out of agency or contract-law principles, that may bind a non-signatory to an arbitration agreement: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel, and (6) third-party beneficiary. *Antonio Leonard TNT Prods., LLC v. Goossen-Tutor Promotions, LLC*, 47 F. Supp. 3d 500, 513–14 (S.D. Tex. 2014) (citing *Bridas*, 345 F.3d at 356). In this case, B&B argues the agency and equitable estoppel theories require Plaintiff to arbitrate his claims for fees against B&B. ECF 15. Specifically, B&B argues Plaintiff is bound by the arbitration clause in the Agreement because (1) Plaintiff is seeking a direct benefit from the Agreement and is therefore estopped from avoiding the arbitration clause therein, and (2) Plaintiff, a former "of counsel" with B&B, acted as B&B's agent when working on the case and thus falls within the definition of "Plaintiffs' Counsel" for purposes of the Agreement. ECF 15 at 1–2. Because the Court concludes below

that the direct benefits estoppel theory applies, it need not reach B&B's agency argument.

"Under 'direct benefits estoppel,' a non-signatory plaintiff seeking the benefits of a contract is estopped from simultaneously attempting to avoid the contract's burdens, such as the obligation to arbitrate disputes." *Taylor Morrison of Tex., Inc. v. Ha*, 660 S.W.3d 529, 533 (Tex. 2023) (quoting *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005)). A plaintiff seeks to obtain the benefits of a contract containing an arbitration clause not only by suing to enforce the contract, but also by "deliberately seek[ing] and obtain[ing] substantial benefits from the contract itself." *Id.* To determine whether the claim seeks a direct benefit, courts must look at "the substance of the claim, not artful pleading." *Hays v. HC Holdings, Inc.*, 838 F.3d 605, 609 (5th Cir. 2016) (quoting *G.T. Leach Builders v. Sapphire V.P., LP*, 458 S.W.3d 502, 528 (Tex. 2015)). When the alleged liability "arises solely from the contract or must be determined by reference to it," direct benefits estoppel applies to prevent a person from avoiding the arbitration clause that was part of that agreement. *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 132 (Tex. 2005); *see Franlink Inc. v. BACE Servs., Inc.*, 50 F.4th 432, 443 n.9 (5th Cir. 2022) (quoting *Bridas*) (explaining that the Fifth Circuit "has limited direct-benefits estoppel to when 'the nonsignatory has brought suit against a signatory premised in part upon the agreement'"). On the other hand, when the claim "arises from general

obligations imposed by state law … or federal law, rather than from contract, direct benefits estoppel does not apply, even if the claim refers to or relates to the contract." *Hays*, 838 F.3d at 609 (citation omitted).

In this case, the allegations in Plaintiff's Complaint demonstrate that he is seeking a direct benefit under the Agreement. Plaintiff's suit seeks compensation from B&B for his work on the *Hack* case, which is to be paid from the award of attorneys' fees set forth in the Agreement. Plaintiff did not sign the Agreement on behalf of himself or B&B; however, as a counsel for the *Hack* plaintiffs, he participated in the preparation of the motions for court approval of the Settlement and his time was submitted to the court in support of the overall award of attorneys' fees. ECF 15-1 at ¶ 11; *see Hack v. Wright*, No. 14-CV-3442 (ECF 177 at 21; ECF 181 at 21). Plaintiff characterizes his suit against B&B as involving only an "intra-firm compensation dispute." ECF 17 at 15–17. But, Plaintiff seeks a direct benefit from the Agreement because his claim is predicated on an alleged oral agreement that he would be "paid out of the settlement or judgment, if any, in the Case." ECF 1 at ¶ 11 ("B&B agreed to pay the reasonable value of Baskin's services in connection with the Case … *to be paid out of the settlement or judgment*, if any, in the Case after it was finally concluded including any appeal.") (emphasis added); *id.* at ¶ 8 ("The Court-ordered attorneys' fees, *from which Baskin was to be paid*, originated in this District.") (emphasis added).

Plaintiff relies on *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732 (Tex. 2005), as authority for his position that his quantum meruit claim is not covered by the Agreement and therefore not subject to arbitration. ECF 17 at 13–14. *In re Kellogg* involved a second-tier subcontract between KBR and a first-tier subcontractor to supply labor and materials to the first-tier subcontractor. The first-tier subcontract contained an arbitration provision; the second-tier subcontract with KBR did not. The first-tier contractor sought to compel arbitration of KBR's alternative quantum meruit claim, arguing the claim was "based on" the first-tier subcontract because KBR's labor and services were linked inextricably to the first-tier subcontract. Rejecting the first-tier contractor's argument, the Texas Supreme Court held that KBR's quantum meruit claim did not seek a "direct benefit" from the first-tier subcontract and therefore was not subject to arbitration. The Texas Supreme Court explained:

> We conclude that, under "direct benefits estoppel," although a non-signatory's claim may relate to a contract containing an arbitration provision, that relationship does not, in itself, bind the non-signatory to the arbitration provision. Instead, a non-signatory should be compelled to arbitrate a claim only if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision.

In re Kellogg, 166 S.W.3d at 741. Thus, *In re Kellogg* is inapplicable here because Plaintiff seeks a direct benefit from the Agreement—a portion of the fees awarded in the Agreement equal to the reasonable value of his services in the case. Because Plaintiff, a non-signatory, brought suit against B&B, a signatory, and seeks a direct

benefit of the Agreement, Plaintiff is bound by the arbitration clause in the Agreement.

B. This dispute falls within the scope of the arbitration agreement.

When a valid arbitration agreement exists, there is a presumption in favor of arbitration. *McClairne v. Titlemax of Tex., Inc.*, No. 4:22-CV-03334, 2023 WL 3739085, at *3 (S.D. Tex. May 30, 2023). Any doubt as to whether the dispute at issue falls within the scope of the agreement must be resolved in favor of arbitration. *Id.*; *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996). Arbitration "should not be denied unless it can be said with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the asserted dispute." *McClairne*, 2023 WL 3739085, at *3 (quoting *Neal v. Hardee's Food Sys., Inc.* 918 F.2d 34, 37 (5th Cir. 1990)).

The arbitration clause in the Agreement provides, in part:

> Plaintiffs' Counsel shall allocate the Fee and Expense Amount among themselves. Plaintiffs' Counsel agree that any disputes regarding the allocation of the Fee and Expense Amount among them shall be presented to and be mediated, and, if necessary, finally decided and resolved by the Mediator through binding arbitration on the terms and subject to the processes and procedures set forth by the Mediator.

ECF 15-2 at ¶ 4.4. Plaintiff argues that the clause is narrow and applies only to "'fee allocation' disputes between and among the law firms." ECF 17 at 15, 17. B&B maintains that the clause is broad, but even if narrow, Plaintiff's claims fall squarely within the clause which includes "any disputes" about the Fee and Expense Amount.

ECF 23 at 15–18. The Court agrees with B&B that Plaintiff's dispute falls within the arbitration clause.

Under Texas law, "[w]hether a claim falls within the scope of an arbitration agreement … depends on the factual allegations of the complaint instead of the legal causes of action asserted." *Polyflow, L.L.C. v. Specialty RTP, L.L.C.*, 993 F.3d 295 (5th Cir. 2021) (quoting *Ford v. NYLCare Health Plans*, 141 F.3d 243, 250 (5th Cir. 1998)). "[A] party's allegations need only be factually intertwined with arbitrable claims or otherwise touch upon the subject matter of the agreement containing the arbitration provision" to fall within the scope of an arbitration agreement. *Matter of Amberson*, 54 F.4th 240, 266 (5th Cir. 2022) (citation omitted). Here, all of Plaintiff's allegations relate to his alleged entitlement to an allocation of the Fee and Expense Amount awarded in the Agreement. Therefore, Plaintiff's dispute falls within the scope of the agreement.

C. Plaintiff's suit will be stayed pending arbitration.

Upon determining that a matter should be referred to arbitration, § 3 of the Federal Arbitration Act directs the Court to stay the lawsuit until arbitration is completed. 9 U.S.C. § 3. Under prior Fifth Circuit precedent, "when all of the issues raised in the district court must be submitted to arbitration," the Court retained discretion to dismiss the case without prejudice. *Adam Techs. Int'l S.A. de C.V. v. Sutherland Glob. Servs., Inc.*, 729 F.3d 443, 447 n.1 (5th Cir. 2013). B&B seeks

dismissal of Plaintiff's suit on this basis. ECF 15 at 1. However, the Supreme Court recently clarified that § 3 "overrides any discretion a district court might otherwise have had to dismiss a suit when the parties have agreed to arbitration." *Smith*, 2024 WL 2193872, at *4. Therefore, "[w]hen a federal court finds that a dispute is subject to arbitration, … the court does not have discretion to dismiss the suit on the basis that all the claims are subject to arbitration." *Id.* at *3. Accordingly, Defendant's motion to dismiss is denied. Plaintiff's suit must be stayed pending arbitral proceedings. *Id.*

IV. Conclusion and Order.

For the reasons stated above, it is hereby

ORDERED that Defendant's Motion to Dismiss the Action and to Compel Arbitration (ECF 15) is GRANTED IN PART and DENIED IN PART. The Motion is GRANTED such that Plaintiff is compelled to arbitrate his claims pursuant to the Agreement; the Motion is DENIED such that Plaintiff's suit will not be dismissed. It is further

ORDERED that this case is STAYED pursuant to 9 U.S.C. § 3 pending completion of arbitration.

Signed on May 20, 2024, at Houston, Texas.

Christina A. Bryan
United States Magistrate Judge