THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 95-52041
ROGER FRANCIS COMPANIES, INC.	)	
DEBTOR	)	CHAPTER 11
	)	
ROGER FRANCIS COMPANIES, INC.	)	
PLAINTIFF	)	
	)	ADVERSARY NO. 96-5050
v.	)	
	)	
FAMOUS ARTISTS	)	**ORDER GRANTING DEFENDANTS'**
AGENCY, INC. ET AL.	)	**MOTION TO STAY ADVERSARY**
DEFENDANTS	)	**PROCEEDING**

On November 13, 1995, Debtor filed its voluntary chapter 11 petition. On March 22, 1996, Debtor filed this adversary proceeding against Defendants, Famous Artists Agency, Inc., Idolmakers, and Salt-n-Pepa, to recover money damages suffered from an alleged conversion and breach of contract. On April 19, 1996, Defendants filed a "Motion to Stay Proceeding" (the "Motion") alleging that the contract at issue in this adversary proceeding is subject to the Federal Arbitration Act ("FAA") and that any dispute regarding that contract should be adjudicated before the American Arbitration Association. Thereafter, Plaintiff filed a brief opposing such action by this Court.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. The decision regarding whether this adversary proceeding should be stayed is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) over which this Court has jurisdiction pursuant to 28 U.S.C. §§1334(b), 157(a) and (b). Based upon a

review of the file and the briefs submitted by counsel, the Court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

The following facts are not in dispute.

1. That Plaintiff, Roger Francis Companies, Inc., is a promoter of entertainment events.

2. That Defendant, Famous Artists Agency, Inc., is a booking agency that represents performing artists in screening and obtaining engagements from promoters wishing to hire these artists to give live performances in various types of venues including theaters and concert halls.

3. That Defendant, Salt-n-Pepa, is a group of musical performing artists.

4. That Defendant, Idolmakers, is a management company that manages Defendant, Salt-n-Pepa.

5. That during 1994 and 1995, Plaintiff and Defendants, Famous Artists Agency, Inc. and Idolmakers, had discussions regarding the performance of Defendant, Salt-n-Pepa, at a Plaintiff sponsored entertainment event.

6. That the aforementioned discussions were reduced to writing in the form of multiple documents, all of which may or may not be the subject of the underlying adversary proceeding.

7. That one of the aforementioned documents included a provision stating that:

> Any claim or dispute arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration in New York, New York in accordance with the rules and regulations then obtaining of the American Arbitration Association. The parties hereto agree to be bound by the award in such arbitration and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

8. That although the parties ultimately dispute what documents and terms comprise the agreement regarding Salt-n-Pepa's performance, they do not dispute that the aforementioned arbitration clause was included and operative.

II. DISCUSSION

In their motion, Defendants contend that because of the arbitration clause

in the agreement between the parties, any dispute involving that agreement is subject to the FAA and should be adjudicated before the American Arbitration Association. The Plaintiff contends that the agreement between the parties constitutes an agreement to "employ" Defendant, Salt-n-Pepa, and that, therefore, the agreement is excluded from the enforcement power of the FAA. The Plaintiff further contends that even if the agreement is not one for employment and thus not excluded from the purview of the FAA, this Court has the discretion to refuse to stay this proceeding and that such discretion should be exercised for the benefit of the parties in interest to this chapter 11.

A. IS THE AGREEMENT AT ISSUE EXCLUDED FROM THE ENFORCEMENT POWER OF THE FAA?

The FAA was originally enacted in 1925 to reverse the courts' longstanding judicial hostility to arbitration agreements by placing such arbitration agreements on the same footing as other contracts. *See Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24 (1991). Section 1 of the FAA addresses what agreements are and are not included within the statute's purview and provides in pertinent part that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[1] 9 U.S.C. §1. Although the proper scope of this exclusionary provision has been the subject of much

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[1] The full text of §1 reads as follows:

> "Maritime transactions," as herein defined, means charter parties, bills of lading or water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment or seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

debate,[2] it is clear that it excludes only "contracts of employment."

The principal issue in determining whether an employment relationship exists is that of control. *William H. Sill Mortgages, Inc. v. Ohio Casualty Ins. Co.,* 412 F.2d 341, 344 (6th Cir. 1969). If the right to control the manner or means of performing the work is in the entity for whom the work is performed, then the relationship is that of employer and employee. *Fisher v. United States,* 356 F.2d 706, 708 (6th Cir. 1966), *cert. denied,* 385 U.S. 819 (1966). However, if the control of the manner or means of performing the work is delegated to the entity performing the work then no employer and employee relationship exists. *Id.*

In the case at bar, it is undisputed that the agreement at issue deals with a one night performance by Defendant, Salt-n-Pepa, at a Plaintiff sponsored entertainment event. Further, a review of the documents submitted with both the Plaintiff's and the Defendants' pleadings indicates that Plaintiff was a "purchaser" of Defendant, Salt-n-Pepa's, services and that Plaintiff was required to obtain Defendant, Salt-n-Pepa's, approval prior to executing upon many provisions of the agreement. *See, e.g.,* Brief in Opp. to Def. Mot. to Stay, Ex. A, B; and Reply Mem. in Support of Mot. to Stay, Ex. A, B. In fact, a contract executed by Plaintiff's president, a copy of which is attached as Exhibit B to Plaintiff's brief, provides that Defendant, Salt-n-Pepa, "shall have the sole and exclusive control over production, presentation and performance of the engagement hereunder, including but not limited to the details, means and methods of performances of the performing personnel." Brief in Opp. to Def. Mot. to Stay, Ex. B at unnumbered page 2, para. 3.

Therefore, based upon Plaintiff's own admissions, it is clear that Plaintiff did not have the requisite control over Defendant, Salt-n-Pepa, to establish the existence of an employer-employee relationship. As such, the agreement at

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[2] *See, e.g., United States v. Lopez,* ___ U.S. ___ , 115 S.Ct. 1624 (1995); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.,* 484 U.S. 29 (1987); *Asplundh Tree Expert Co. v. Bates,* 71 F.3d 592 (6th Cir. 1995); *Bacashihua v. U.S. Postal Service,* 859 F.2d 402 (6th Cir. 1988); *Pietro Scalzitti Co. v. Int'l Union of Operating Eng'r, Local No. 150,* 351 F.2d 576 (7th Cir. 1965);*United Elec., Radio & Mach. Workers v. Miller Metal Products, Inc.,* 215 F.2d 221 (4th Cir. 1954); and *Tenney Eng'r., Inc. v. United Elec. Radio & Mach. Workers of Am., Local 437,* 207 F.2d 450 (3d Cir. 1953).

issue is not an employment contract and not included within the exception provision of the FAA.

B. DOES THIS COURT HAVE THE DISCRETION TO DENY DEFENDANTS' MOTION?

> Again turning to the text of the FAA, §3 of that legislation states that:
> 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,...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.

9 U.S.C. §3. In 1987, the Supreme Court decided *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220 (1987), and addressed when it could be appropriate for a court to override the seemingly mandatory language of 9 U.S.C. §3.

In the *Shearson/American Express* case, the Supreme Court was required to decide whether customers who filed tort, securities fraud, and RICO claims against their broker in a federal district court would instead be required to arbitrate those claims pursuant to the arbitration clause in their contract with the broker and the FAA. In deciding that the parties would be required to arbitrate their claims, the Supreme Court recognized a "federal policy favoring arbitration," and determined that the FAA's mandatary enforcement provisions could only be overridden by a contrary congressional command.[3] *Shearson/American Express,* 482 U.S. at 226. The Court further determined that "[t]he burden is on the party opposing arbitration...to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 227. Therefore, in the case at bar, Plaintiff can only defeat

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[3] The Supreme Court also indicated that "[i]f Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes." *Shearson/American Express,* 482 U.S. at 227 (*citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985)).

Defendants' Motion if it can demonstrate that the text, legislative history, or purpose of the Bankruptcy Code conflicts with the enforcement of the arbitration clause at issue. *Id.* *See also Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 885 F.2d 1149 (3d Cir. 1989); *After Six, Inc. v. Abraham Zion Corp. (In re After Six Inc.),* 167 B.R. 35 (E.D. Pa. 1994); *In re Statewide Realty Co.,* 159 B.R. 719 (Bankr. D.N.J. 1993).

In its Brief in Opposition to the Motion, Plaintiff contends that the cause of action at issue should not go to arbitration because it could be resolved more expeditiously in the bankruptcy court. Plain. Brief in Opp. at pg. 5. Plaintiff also contends that the resolution of the issues involved do not require the special expertise offered by an arbitration panel and that arbitration will be more time consuming and expensive to Plaintiff. *Id.* at pg. 6. However, even if Plaintiff's contentions are correct, such facts do not meet Plaintiff's burden of showing that Congress intended to preclude the enforcement of the parties' arbitration clause for the sake of the Plaintiff's rights under the Bankruptcy Code. Given the absence of such a showing, this Court cannot ignore the strong federal policy favoring arbitration. *See also American Freight System, Inc. v. Consumer Products Assoc. (In re American Freight System, Inc.),* 164 B.R. 341, 345 (D. Kan. 1994) ("[i]f there is any doubt as to whether a claim is subject to arbitration, it must be resolved in favor of arbitration").

Furthermore, to support its contentions, Plaintiff relies upon cases that are factually distinctive from the one at bar. For instance, Plaintiff cites to the case of *Matter of Interco Inc.*, 137 B.R. 993 (Bankr. E.D. Mo. 1992), in which the court was required to determine whether the amount of a debtor's alleged liability for pension fund withdrawal should be determined through ERISA's statutory arbitration procedure or through the claims procedure established by the Bankruptcy Code. In determining that the issue should not be arbitrated, the court relied upon the fact that it was dealing with a core bankruptcy proceeding and that the issue of claims determination is specifically dealt with through §502(c) of the Bankruptcy Code. Unlike the *Matter of Interco*, however, the

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issue in the case at bar is a non-core proceeding that deals with a pre-petition breach of contract claim, *see* 11 U.S.C. §157(b)(2) and 1334,[4] and there exist no specific Bankruptcy Code provisions dictating that the resolution of such an issue should be determined by the bankruptcy court. *See also In re Hupp Indus., Inc.,* 157 B.R. 360, 361 (Bankr. N.D. Ohio 1993)(indicating that a pre-petition breach of contract claim is a non-core proceeding).

Plaintiff also relies upon *Zimmerman v. Continental Airlines, Inc.,* 712 F.2d 55 (3d Cir. 1983), *cert. denied,* 484 U.S. 1038 (1984), a case where the court did not stay an adversary proceeding pending arbitration because it concluded that the facts in that case created an obvious contradiction between the FAA and the Bankruptcy Code. Unlike *Zimmerman*, however, Plaintiff has not demonstrated that the facts of the case at bar give rise to any contradictions between those two statutes. Further, as was explained in the later third circuit case of *Hays & Co. v. Merrill Lynch,* 885 F.2d at 1159-60, the congressional policy deduced in *Zimmerman* is no longer persuasive given the 1984 amendments to the Bankruptcy Code and the recent line of Supreme Court arbitration cases such as *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220 (1987) (*see supra* pg. 5-6).

III. CONCLUSIONS OF LAW

Based upon the foregoing, the Court determines that the agreement at issue does not fall within the exclusionary provision of the §1 of the FAA and that Plaintiff has not met its burden of proving that Congress intended to preclude the arbitration of the issues as provided for in the parties' agreement. As such, Defendants' Motion is well taken and this adversary proceeding is hereby stayed pending resolution of the matter via arbitration.

Given the Court's decision in this matter the adjourned pre-trial conference previously scheduled for July 3, 1996, at 2:00 p.m., in room 250, U.S. Courthouse, Federal Building, will not go forward. Further, counsel are

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See also Sanders Confectionery Products, Inc. v. Heller Financial, Inc., 973 F.2d 474, 483 (6th Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993), indicating that a core proceeding involves a substantive right created by federal bankruptcy law or a right which could not exist outside of the bankruptcy.

hereby instructed to file in this adversary proceeding a memorandum regarding the disposition of this matter via arbitration not later that 10 days after the arbitrators' decision has been rendered.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 6/28/69