STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 4067

KEAREY BUILDERS, INC. and KEAREY BUILDERS, INC., derivatively for and on behalf of GALLERIES@NODA, LLC,

Plaintiff,

v.

GALLERIES@NODA, LLC; ROBERT NIXON; TAO TONY ZHANG; and STUDIO FUSION, PA,

Defendants.

ORDER AND OPINION ON STUDIO FUSION, PA'S MOTION TO DISMISS COUNT NINE OF PLAINTIFF'S COMPLAINT AND PLAINTIFF'S MOTION TO STAY PROCEEDINGS IN FAVOR OF ARBITRATION

1. **THIS MATTER** is before the Court on the 30 May 2023 filing of Defendant Studio Fusion, PA's Motion to Dismiss Count Nine of Plaintiff's Complaint (the "Motion to Dismiss"), (ECF No. 19 ["Mot. Dismiss"]), and the 6 June 2023 filing of Plaintiff Kearey Builders, Inc.'s Motion to Stay Proceedings in Favor of Arbitration (the "Motion to Stay," and with the Motion to Dismiss, the "Motions"),[1] (ECF Nos. 3, 21).

2. For the reasons set forth herein, the Court **GRANTS**, in part, and **DENIES**, in part, the Motions.

Eisele Vogel Dixon, PLLC by Kathleen L. Vogel, for Plaintiff.

Rosenwood, Rose & Litwak, PLLC by Whitaker B. Rose and Carl J. Burchette, for Defendants Galleries @ NoDa, LLC, Robert Nixon, and Tao Tony Zhang.

[1] The Motion to Stay was made in the Complaint but was not accompanied by a brief as required by Business Court Rule ("BCR") 7.2. (Compl. 2, ECF No. 3 ["Compl."].) The Court considers the Motion to Stay to be filed as of the date that the brief in support of that motion was filed. *See* BCR 7.2.

Hamilton Stephens Steele + Martin, PLLC by Allen L. West and Robert J. Shelton, for Defendant Studio Fusion, PA.

Robinson, Judge.

I. INTRODUCTION

3. This action arises out of an agreement for the design and construction of a mixed-use building in Mecklenburg County, North Carolina, which would ultimately become condominium units and retail space. Plaintiff, the general contractor, alleges that after construction began on that project, Galleries @ NoDa, LLC, the property owner, was unable to pay for the costs already incurred by Plaintiff, and ultimately, that Plaintiff was not fully paid for work completed. Defendant Studio Fusion, PA, the architect who oversaw construction, seeks dismissal of Plaintiff's claim against it arising from its alleged tortious interference with Plaintiff's construction contract with the property owner. The Court must also determine whether it is appropriate to stay portions, or the entirety, of this action in favor of an alleged arbitration agreement between Plaintiff and Galleries @ NoDa, LLC.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

4. Plaintiff Kearey Builders, Inc. ("Kearey" or "Plaintiff") is a North Carolina corporation with its principal place of business in Mooresville, North Carolina. (Compl. ¶ 1.) Kearey is engaged in commercial building projects, and at all times relevant to this matter was licensed as a general contractor by the State of North Carolina. (Compl. ¶ 9.)

5. Defendant Galleries @ NoDa, LLC ("Galleries") is a North Carolina limited liability company with its principal place of business in Concord, North Carolina. (Compl. ¶ 2.) Galleries is the owner of the real property located at 3630 North Davidson Street, Charlotte, North Carolina (the "Property"), where the building project at issue is located. (Compl. ¶ 10.)

6. Defendant Studio Fusion, PA ("Studio Fusion"), an architectural and interior design firm, is a North Carolina professional corporation with its principal place of business in Charlotte, North Carolina. (Compl. ¶¶ 3, 12.)

7. Robert Nixon ("Mr. Nixon") and Tao Tony Zhang ("Mr. Zhang") are individuals who reside in Mecklenburg County, North Carolina. (Compl. ¶¶ 4–5.) Mr. Nixon and Mr. Zhang are the managing members of Galleries, each having a 44% membership interest in it. (Compl. ¶ 11.)

B. <u>The Agreements at Issue</u>

8. Plaintiff alleges that on 26 June 2020, it and Galleries entered into a contractual agreement comprised of AIA Document A102–2017 and other documents, including at least AIA Document A201–2007 (the "Contract"). (Compl. ¶ 13; Compl. Ex. A ["Form Contract"]; ECF No. 27.1 ["Gen. Conditions"].) The Contract provided that Kearey agreed to construct a building consisting of 39 residential condominiums, retail space, and common space on the Property in exchange for payment from Galleries (the "Project"). (Compl. ¶ 13.) The Contract provides that Kearey's fee for its services shall be a "[l]ump sum of $657,626.00 (7.647%) included in the $8,600,000 total" construction cost for the Project. (Form Contract 3.)

9. Further, Studio Fusion, as the architect, was to design the plans and specifications for the Project. (Compl. ¶¶ 13–14.) Plaintiff alleges that in addition to designing the building, Studio Fusion was responsible for the administration of the Contract, meaning it was required to "issue certificates for payment directing Galleries to pay Kearey for completed work on the Project and a certificate of substantial completion." (Compl. ¶ 14.)

10. Certain portions of the Contract are particularly relevant to the Motions: (1) the architect's delivery of a certificate of substantial completion to Kearey; and (2) the arbitration provisions. The Contract provides, in relevant part:

> § 13.1 Initial Decision Maker[.] The Architect will serve as Initial Decision Maker pursuant to Article 15 of AIA Document A201–2017[.]
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> ***
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> § 15.1.1 DEFINITION[.] A Claim is a demand or assertion by one of the parties seeking . . . payment of money, or other relief with respect to the terms of the Contract.
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> ***
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> § 15.2.1 Claims, excluding those arising under Sections 10.3, 10.4, 11.3.9, and 11.3.10, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement.
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> ***
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> § 15.2.2 The Initial Decision Maker will review Claims and within ten days of the receipt of a Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Initial Decision Maker is unable to resolve the Claim if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in

> the Initial Decision Maker's sole discretion, it would be inappropriate for the Initial Decision Maker to resolve the Claim.
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> § 13.2 Binding Dispute Resolution[.] For any Claim subject to, but not resolved by mediation pursuant to Article 15 of AIA Document A201–2017, the method of binding dispute resolution shall be as follows: [x] Arbitration pursuant to Section 15 of AIA Document A201–2017[.]
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> ***
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> § 15.4.1 If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement.

(Form Contract 12; Gen. Conditions 36–38.)

11. Kearey alleges that, following execution of the Contract, it began furnishing labor, materials, and general contracting services to Galleries on or about 17 July 2020. (Compl. ¶ 15.) Kearey further alleges that by December 2020, it incurred more than $1,000,000.00 in construction costs on the Project. (Compl. ¶ 16.) Galleries, however, was unable to secure financing for the Project and was also unable to pay Kearey. (Compl. ¶ 16.) Kearey alleges that Mr. Nixon and Mr. Zhang—Galleries's only members at the time—sought Kearey's help in securing financing. (Compl. ¶ 17.) By 24 December 2020, Galleries allegedly owed Kearey over $1,500,000.00 in construction costs associated with the Project. (Compl. ¶ 18; Compl. Ex. B.)

12. On 18 February 2021, Kearey alleges that it, Galleries, Mr. Nixon, and Mr. Zhang entered into an agreement which "allowed Galleries to defer payment of

$650,000.00 in construction costs then owed to Kearey until the payment in full of a construction loan . . . of $8,320,000.00 which Galleries was seeking from Carter Bank & Trust," (the "Deferral Agreement"). (Compl. ¶ 19 (citing Compl. Ex. C ["Deferral Agt."]).)

13. The Deferral Agreement provided that Kearey "agreed to allow Galleries to delay payment of $650,000.00 due to Kearey for work it has already performed" and that "Nixon and Zhang have each agreed to assign a 6% interest in the Membership [of Galleries], for a total assignment to Kearey of 12% . . . as consideration for Kearey's agreement to act as a guarantor of the Loan and to allow Galleries to delay payment[.]" (Deferral Agt. 1.) Concurrent with signing the Deferral Agreement, Plaintiff alleges that Mr. Nixon and Mr. Zhang each transferred 6% of their membership interest in Galleries to Kearey. (Compl. ¶ 22.)

14. Plaintiff alleges that Galleries received the $8,320,000.00 loan from Carter Bank & Trust (the "Loan"), and that three principals of Kearey personally guaranteed the Loan. (Compl. ¶ 21.)

C. <u>Completion of the Project</u>

15. Plaintiff alleges that it completed construction on the Project "substantially in accordance with the plans and specifications applicable," and that on or about 10 May 2022, the Project reached substantial completion. (Compl. ¶ 24.) Plaintiff also alleges that the Mecklenburg County Code Enforcement Office issued certificates of occupancy as follows: on 10 May 2022, 27 of the 39 residential units were certified; on 18 May 2022, 7 of the remaining 12 uncertified units were certified; on

1 June 2022, 3 of the remaining 5 uncertified units were certified; and the remaining 2 uncertified units were certified on or about 6 July 2022. (Compl. ¶ 24.)

16. Plaintiff alleges that by mid-July 2022, closings occurred for nearly all the residential condominium units and the Loan was fully paid off. (Compl. ¶ 25.) A certificate of satisfaction for the Loan was filed on 18 July 2022. (Compl. ¶ 25.)

17. Kearey alleges that it made demands on Studio Fusion for the issuance of a certificate of substantial completion beginning in May 2022, but that Studio Fusion refused to issue it. (Compl. ¶ 26.) Kearey further alleges that, beginning in late July 2022, it made repeated demands on Galleries for payment of the $650,000.00 that it was owed following satisfaction of the Loan, but that Galleries refused to pay. (Compl. ¶ 28.)

18. On 8 September 2022, Kearey "worked to finalize installation of a security gate" and thereafter engaged in corrective and warranty work. (Compl. ¶ 29.) Kearey also filed a claim of lien on property (the "Lien") on 8 September 2022. (Compl. ¶ 30; Compl. Ex. D.)

19. Prior to filing this action, on or about 19 October 2022, Kearey alleges that it "sent a letter to the members and managers of Galleries urging them to file a civil action in the nature of a derivative action" for Galleries's "failure to pay Kearey the $650,000.00 due to Kearey since at least July 18, 2022." (Compl. ¶ 32 (citing Compl. Ex. E).)

20. While Kearey alleges that it continued to complete corrective work on the Project, Galleries allegedly terminated the Contract with Kearey in January 2023.

(Compl. ¶ 35.) Kearey alleges that on 10 January 2023 it received a "Unanimous Written Consent of the Members to Action Without a Meeting", signed only by Mr. Nixon and Mr. Zhang. (Compl. ¶ 35.) That document purports to terminate the Contract, but Kearey alleges that it did not receive a copy prior to Mr. Nixon and Mr. Zhang signing that document. (Compl. ¶ 35.)

21. On the filing of this action, through service of the Complaint, Kearey alleges that it notified Galleries of its intent to enforce the Lien and to seek interest on unpaid balances at the annual rate of 9.0%. (Compl. ¶ 36.)

D. Procedural History

22. The Court sets forth herein only those portions of the procedural history relevant to its determination of the Motions.

23. This action was initiated on 3 March 2023 on the filing of the Complaint. (*See* Compl.) It was thereafter designated to the North Carolina Business Court on 7 March 2023 and assigned to the undersigned on 8 March 2023. (ECF Nos. 1–2.)

24. The Complaint alleges nine claims for relief. Against Galleries, Plaintiff brings claims for (1) breach of construction contract ("Count One"), (Compl. ¶¶ 39–44); (2) in the alternative, unjust enrichment ("Count Two"), (Compl. ¶¶ 46–52); (3) enforcement of lien pursuant to N.C.G.S. §§ 44A-13, 44A-16 ("Count Three"), (Compl. ¶¶ 54–57); (4) declaratory judgment pursuant to N.C.G.S. § 1-253, *et seq.* ("Count Four"), (Compl. ¶ 59); (5) breach of deferral contract ("Count Five"), (Compl. ¶¶ 60–65); (6) fraud ("Count Six"), (Compl. ¶¶ 67–70); and (7) violation of the Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1, *et seq.* (the "UDTPA"), ("Count

Seven"), (Compl. ¶¶ 72–74). Plaintiff also alleges claims in the nature of a derivative action on behalf of Galleries against Mr. Nixon and Mr. Zhang ("Count Eight"), (Compl. ¶¶ 76–81), and tortious interference with contract against Studio Fusion ("Count Nine"), (Compl. ¶¶ 83–87).

25. After the filing of the Complaint, Studio Fusion filed the Motion to Dismiss on 30 May 2023, (*see* Mot. Dismiss), and Plaintiff filed the Motion to Stay on 6 June 2023, (*see* Mot. Stay). Following full briefing on the Motions, the Court held a hearing on 9 August 2023 (the "Hearing") at which all parties were present and represented through counsel. (*See* ECF No. 32.)

26. The Motions are ripe for resolution.

III. ANALYSIS

A. Plaintiff's Motion to Stay Proceedings in Favor of Arbitration

27. The Motion to Stay asks the Court to stay this proceeding pursuant to N.C.G.S. § 1-569.7 in favor of arbitration and to enter an order compelling Plaintiff and Galleries to arbitrate the breach of contract dispute alleged in Count One. (Compl. 2; Pl.'s Br. Supp. Mot. Stay 1, ECF No. 21 ["Br. Supp. Stay"].) Plaintiff contends that a single arbitrable claim is sufficient to permit the Court to order the parties to arbitrate and to stay this action pending a final result at arbitration. (Br. Supp. Stay 1–2.) Plaintiff also represents that Counts Two, Three, and part of Count Nine may be resolved through arbitration. (Br. Supp. Stay 6.)

28. Defendants Galleries, Mr. Nixon, and Mr. Zhang contend in their response to the Motion to Stay that all claims against them, Counts One through Eight, must

be compelled to arbitration. (Defs.' Br. Resp. Pl.'s Mot. Stay 1, ECF No. 25 ["Br. Opp. Stay"].) Mr. Nixon and Mr. Zhang were the only members of Galleries at the time it executed the Contract with Plaintiff. (Br. Opp. Stay 3.) Notwithstanding that fact, Galleries, Mr. Nixon, and Mr. Zhang argue that "Plaintiff has not briefed the issue of substantive arbitrability, and therefore it is unclear what position [it] take[s] as to the individual Defendants being able to enforce the arbitration agreement." (Br. Opp. Stay 10.)

29. Studio Fusion contends that the Court should first decide its pending Motion to Dismiss, but, if not, the Court should deny the Motion to Stay as to Count Nine because it would prejudice Studio Fusion to delay ruling on the Motion to Dismiss. (Def.'s Resp. Br. Opp. Pl.'s Mot. Stay 1, 3–5, ECF No. 30 ["Fusion Br. Opp."].) Plaintiff did not file a reply brief.

30. North Carolina General Statutes § 1-569.7 provides that "[i]f a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section." N.C.G.S. § 1-569.7(f). Since Plaintiff contends that part of Count Nine may be subject to arbitration, the Court begins its analysis of the Motions by first addressing the Motion to Stay.

1. Findings of Fact

31. The Court is required to make findings of fact and conclusions of law when determining whether to compel arbitration. *Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 634–35 (2005) ("Without findings of fact, the appellate court

cannot conduct a meaningful review of the conclusions of law and test the correctness of the lower court's judgment." (cleaned up)). The Court makes these findings without prejudice to different or inconsistent findings in any subsequent proceeding.

32. Kearey is a North Carolina corporation engaged in commercial building projects, and at all times relevant to this matter it was licensed as a general contractor by the State of North Carolina. (Compl. ¶¶ 1, 9.)

33. Galleries is a North Carolina limited liability company, and it is the owner of the Property located in Charlotte, North Carolina. (Compl. ¶¶ 2, 10.)

34. Mr. Nixon and Mr. Zhang are the managing members of Galleries, each having a 44% membership interest in it. (Compl. ¶ 11.)

35. Studio Fusion is a North Carolina corporation engaged in architectural and interior design work. (Compl. ¶¶ 3, 12.)

36. On 26 June 2020, Kearey and Galleries entered into the Contract, whereby Kearey agreed to construct a building consisting of 39 residential condominiums, a retail space, and a common space on the Property in exchange for payment from Galleries. (Compl. ¶ 13; *see* Form Contract; Gen. Conditions.) Studio Fusion is not a party to the Contract, but it was engaged by Galleries to serve as the architect on the Project. (*See* Compl. ¶ 14.)

37. The Contract contains an arbitration provision. (Form Contract 12; Gen. Conditions 38.) Section 15.4.1 of the Contract provides that arbitration "shall be administered by the American Arbitration Association in accordance with its

Construction Industry Arbitration Rules in effect on the date of the Agreement." (Gen. Conditions 38.)

38. On 18 February 2021, Kearey, Galleries, Mr. Nixon, and Mr. Zhang entered into the Deferral Agreement, which permitted Galleries to defer payment of $650,000.00 in construction costs then owed to Kearey until the payment in full of the Loan. (Deferral Agt. at 1.)

39. Mr. Nixon and Mr. Zhang each transferred 6% of their membership interest in Galleries to Kearey, as contemplated by the Deferral Agreement. (Compl. ¶ 22.) Kearey is now a member of Galleries, owning a 12% membership interest in it. (Compl. ¶ 9.)

40. While the Deferral Agreement does not have an arbitration clause, it provides that "[a]ll understandings and agreements of the parties are merged into this Agreement and the instruments and agreements specifically referred to herein." (Deferral Agt. 3.)

2. Conclusions of Law

41. Defendants do not dispute the validity of the Contract or the Deferral Agreement. (*See* Br. Opp. Stay 5–6.) Further, Plaintiff and Defendants Galleries, Mr. Nixon, and Mr. Zhang agree that at least Counts One, Two, and Three may be, and should be, resolved through arbitration. (Br. Supp. Stay 1, 6; Br. Opp. Stay 1.)

42. The Court must initially determine whether the arbitration clause at issue is governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), or the North Carolina Revised Uniform Arbitration Act, N.C.G.S. § 1-569.1 *et seq.* ("NCRUAA").

Epic Games, Inc. v. Murphy-Johnson, 247 N.C. App. 54, 60–61 (2016). Both sides contend that the NCRUAA applies. (Br. Supp. Stay 3 (citing the NCRUAA); Br. Opp. Stay 5 (arguing that the NCRUAA applies because the dispute is local).)

43. "The FAA applies only to transactions involving interstate commerce." *Cherokee S. End, LLC v. PAP Invs. Scaleybark, LLC*, 2018 NCBC LEXIS 106, at *7 (N.C. Super. Ct. Oct. 12, 2018). This matter is between North Carolina companies and individuals who reside in this State, and it concerns the construction of a commercial building in North Carolina. *See Cherokee S. End*, 2018 NCBC LEXIS 106, at *7 (finding that the NCRUAA applied where plaintiff and defendant were North Carolina companies and the relevant contracts concerned operations in this State). Therefore, the Court concludes that the NCRUAA applies to the arbitration clause at issue here.

44. Next, "the Court must determine . . . whether there is a valid arbitration agreement and, second, whether the dispute falls within the scope of that agreement." *Id.* at *7; *see also Ellison v. Alexander*, 207 N.C. App. 401, 404 (2010).

45. In *Cherokee South End*, the Court found that, where the parties to the contract incorporated the American Arbitration Association's ("AAA") Commercial Arbitration Rules in the contract at issue, the parties "clearly delegated [the issue of] arbitrability to the arbitrator." 2018 NCBC LEXIS 106, at *8. In fact, when the agreement incorporates the AAA rules in the arbitration clause, it is an *explicit* delegation of "the threshold issue of arbitrability to the arbitrator" as it constitutes "unmistakable evidence . . . that the parties agreed to arbitrate issues of substantive

arbitrability." *Epic Games*, 247 N.C. App. at 63 (citing *Bailey v. Ford Motor Co.*, 244 N.C. App. 346, 356 (2015)) (addressing the issue of arbitrability where the parties to the contract clearly incorporated the AAA Employment Rules in the arbitration clause). "Questions such as . . . whether an arbitration clause in a concededly binding contract applies to a particular type of controversy are those of substantive arbitrability." *Rickenbaugh v. Power Home Solar, LLC*, 2019 NCBC LEXIS 109, at *10–11 (N.C. Super. Ct. Dec. 20, 2019) (cleaned up).

46. Applying the same principles to this case, the AAA Construction Industry Arbitration Rules (the "AAA Construction Arbitration Rules") were specifically referenced in the arbitration provision at section 15.4.1 of the Contract. Rule 9 of the AAA Construction Arbitration Rules provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." AAA, Construction Industry Arbitration Rules, R. 9(a) (Oct. 1, 2009).

47. While "there may be circumstances in which it is so clear that a claim is not arbitrable that it would seem pointless to compel arbitration," that exception applies where issues of arbitrability would be "frivolous" or "wholly groundless[.]" *Cherokee S. End*, 2018 NCBC LEXIS 106, at *9–10 (citations omitted).

48. In short, the parties to the Contract chose to delegate questions of substantive arbitrability to the arbitrator by agreeing that any claim subject to arbitration shall be administered in accordance with the AAA Construction Arbitration Rules. (Gen. Conditions 38.) Thus, whether Counts One, Two, and Three

may be appropriately resolved through arbitration is a question best answered by the arbitrator.

49. Defendants Galleries, Mr. Nixon, and Mr. Zhang's argument that Counts Four through Eight of Plaintiff's Complaint should be compelled to arbitration is similarly resolved. In fact, as the Court noted in *Cherokee*, the denial of a request to send certain claims to arbitration is reserved only for those situations where a demand for arbitration of a claim is wholly groundless. Here, the Deferral Agreement internally references all "understandings and agreements of the parties," which may plausibly include the Contract. The Court concludes it is not wholly groundless for Defendants to contend that Counts Four through Eight arise in connection with the Contract. Thus, whether Counts Four through Eight may be appropriately resolved through arbitration is also a question best answered by the arbitrator.

50. Based on the plain language of the Contract and incorporation of the AAA Construction Arbitration Rules, the Court finds and concludes that the arbitration clause at issue constitutes a valid agreement to arbitrate and to delegate issues of substantive arbitrability to the arbitrator. Therefore, the Court hereby **ORDERS** Counts One through Eight of this matter to arbitration for the arbitrator to determine the scope of the claims they will decide. Having reached this conclusion, the Court elects, in its discretion, to **STAY** Counts One through Eight of this action pending completion of the arbitration. *See* N.C.G.S. § 1-569.7(g) ("If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration.").

51. As to Count Nine, Plaintiff contends that "a portion of it" may be resolved by arbitration, (Br. Supp. Stay 6), but Studio Fusion contends that it is severable, (Fusion Br. Opp. 2). Studio Fusion argues that Count Nine is not subject to arbitration because it fails the two-pronged test set forth in *Ellison v. Alexander*, 207 N.C. App. 401 (2010), since Studio Fusion and Plaintiff do not have a valid agreement to arbitrate. (Fusion Br. Opp. 2–3.) "As the moving party, [Plaintiff] bear[s] the burden of demonstrating that the parties mutually agreed to arbitrate their dispute." *Sciolino v. TD Waterhouse Inv'r Servs.*, 149 N.C. App. 642, 645 (2002).

52. Here, the Contract is between Plaintiff and Galleries. (Form Contract 1 ("The Owner and Contractor agree as follows.").) While Studio Fusion is listed on the first page of the document as the architect, it was not a signatory to the Contract and there was no line for the architect to sign. (*See* Form Contract.) Further, Count Nine is a claim for tortious interference with contract, which requires proof of a valid contract between plaintiff and a third person but not between Plaintiff and Studio Fusion. *See United Labs., Inc v. Kuykendall*, 322 N.C. 643, 661 (1988) (citation omitted).

53. Plaintiff does not dispute the fact that Studio Fusion is not a party to the Contract. In fact, at the Hearing, Plaintiff agreed that it and Studio Fusion have no agreement to arbitrate.

54. All the evidence, considered together, supports the Court's conclusion that Plaintiff and Studio Fusion did not have a valid agreement to arbitrate because Studio Fusion was not a party to the Contract. Therefore, Plaintiff's Motion to Stay

as to Count Nine is **DENIED**, and the Court turns next to Studio Fusion's Motion to Dismiss.

B. Defendant Studio Fusion's Motion to Dismiss

55. The Court does not make findings of fact when ruling on a motion to dismiss because it "does not present the merits, but only whether the merits may be reached." *Concrete Serv. Corp v. Inv'rs Grp., Inc.*, 79 N.C. App. 678, 681 (1986) (citation omitted).

1. Legal Standard

56. In ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the Court reviews the allegations in the Complaint in the light most favorable to Plaintiff. *See Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017). The Court's inquiry is "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670 (1987). The Court accepts all well-pleaded factual allegations in the relevant pleading as true, *see Krawiec v. Manly*, 370 N.C. 602, 606 (2018), but is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences", *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274 (2005) (citation omitted).

57. Furthermore, the Court "can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint." *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206 (2016)

(citation omitted). The Court may consider these attached or incorporated documents without converting the Rule 12(b)(6) motion into a motion for summary judgment. *Id.* (citation omitted). Moreover, the Court "may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001) (citation omitted).

58. Our Supreme Court has noted that "[i]t is well-established that dismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166 (2002)). This standard of review for Rule 12(b)(6) is the standard our Supreme Court "uses routinely . . . in assessing the sufficiency of complaints in the context of complex commercial litigation." *Id.* at 615 n.7 (citations omitted).

2. Analysis

59. To state a claim for tortious interference with contract, Plaintiff must allege that:

> (1) a valid contract [exists] between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

Kuykendall, 322 N.C. at 661 (citing *Childress v. Abeles*, 240 N.C. 67 (1954)). "This Court has interpreted 'induce' to mean purposeful conduct, active persuasion, request, or petition." *Charah, LLC v. Sequoia Servs. LLC*, 2019 NCBC LEXIS 18, at *18 (N.C. Super. Ct. Mar. 11, 2019) (cleaned up). This element of the claim requires "active persuasion". *Inland Am. Winston Hotels, Inc. v. Crockett*, 212 N.C. App. 349, 354 (2011); *accord, Charah*, 2019 NCBC LEXIS 18, at *18–19; *KRG New Hill Place, LLC v. Springs Invs., LLC*, 2015 NCBC LEXIS 20, at *16 (N.C. Super. Ct. Feb. 27, 2015).

60. Studio Fusion asks the Court to dismiss Plaintiff's Count Nine for tortious interference with contract pursuant to Rule 12(b)(6), contending in relevant part that the Complaint does not adequately plead the third required element of the claim. (Def.'s Br. Supp. Mot. Dismiss 6–8, ECF No. 20 ["Br. Supp. Mot. Dismiss"].) Specifically, Studio Fusion argues that Plaintiff's allegation that Studio Fusion "tortiously interfered with the Contract and Deferral Agreement by *failing to act*" is insufficient to plead inducement. (Br. Supp. Mot. Dismiss 8 (emphasis in original).)

61. There are two alleged contracts at issue in Count Nine: The Contract and the Deferral Agreement. (*See* Compl. ¶¶ 83–87.) Viewing the allegations of the Complaint in the light most favorable to Kearey, it appears that Kearey alleges that Studio Fusion induced Galleries to breach both the Contract and the Deferral Agreement by refusing to direct Galleries to pay Kearey sums that Kearey contends it was owed under the two agreements. (Compl. ¶ 85.) Plaintiff argues that the allegations demonstrate that "Studio Fusion intentionally induced Galleries to

breach the . . . Contract by *refusing* to approve payment applications and *failing* to issue the Certificate of Substantial Completion to Kearey as requested by Kearey." (Pl.'s Br. Opp. Mot. Dismiss 4, ECF No. 22 ["Br. Opp. Mot. Dismiss"] (emphasis added).) Plaintiff also argues that "Studio Fusion intentionally induced Galleries to breach the payment terms of the Deferral Agreement by *refusing* to approve payment applications for work that [had] been performed on the construction project in late 2020." (Br. Opp. Mot. Dismiss 7 (emphasis added).)

62. None of the conduct Plaintiff takes issue with supports the claim for tortious interference. In fact, the Complaint is devoid of specific allegations describing Studio Fusion's purposeful conduct which persuaded Galleries to allegedly breach the Contract or the Deferral Agreement by failing to make payments to Plaintiff. Rather, the conduct Kearey takes issue with is Studio Fusion's refusal or failure to act, which is not alleged to have been communicated to Galleries or to have somehow influenced or persuaded Galleries to allegedly breach the two agreements. (*See* Compl. ¶¶ 84–86.)

63. This Court has clearly explained that "[t]o equate 'induce' with 'caused' would mean that any type of conduct by a party that caused a third party to [breach] a contract with a claimant would be grounds for asserting the claim" for tortious interference with contract. *KRG New Hill*, 2015 NCBC LEXIS 20, at *16. It appears that this is the type of pleading standard that Kearey asks the Court to adopt in this case, which is untenable.

64. The Court agrees with Studio Fusion that the Complaint does not sufficiently plead element three of a claim for tortious interference with contract because it does not contain sufficient factual allegations that Studio Fusion intentionally induced Galleries to breach either the Contract or the Deferral Agreement. Therefore, Studio Fusion's Motion to Dismiss is **GRANTED** and Plaintiff's Count Nine for tortious interference with contract is hereby **DISMISSED** without prejudice.[2]

IV. CONCLUSION

65. **THEREFORE**, for the foregoing reasons, the Court hereby **GRANTS**, in part, and **DENIES**, in part, the Motions as follows:

a. Plaintiff's Motion to Stay is **GRANTED** as to Counts One through Eight of the Complaint, but the issue of the arbitrability of those claims is **DEFERRED** to a properly selected arbitrator. The litigation of these claims in this action is hereby **STAYED** pending the outcome of the arbitration proceeding. The Motion to Stay is **DENIED** as to Count Nine; and

b. Defendant Studio Fusion's Motion to Dismiss is **GRANTED** and Count Nine of the Complaint is **DISMISSED** without prejudice.

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[2] Notwithstanding the Court's conclusion that this claim should be dismissed, "[t]he decision to dismiss an action with or without prejudice is in the discretion of the trial court." *First Fed. Bank v. Aldridge*, 230 N.C. App. 187, 191 (2013). The Court concludes, in the exercise of its discretion, that dismissal of Plaintiff's Count Nine should be without prejudice to Plaintiff's right to attempt to reassert such claim through proper factual allegations by way of a motion to amend, if appropriate.

66. The parties shall notify the Court of the outcome of the arbitration proceedings within seven days after the arbitrator has issued his or her decision. Plaintiff shall submit to the Court a copy of the arbitrator's decision accompanied by the parties' recommendations concerning further proceedings, if any, in this Court.

IT IS SO ORDERED, this the 14th day of August, 2023.

/s/ Michael L. Robinson
Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases