IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

A.T. CHADWICK COMPANY, INC.	:	
	:	
Plaintiff,	:	September Term 2003
v.	:	
	:	No.: 01998
PFI CONSTRUCTION CORP. and	:	
PROCESS FACILITIES, INC.	:	Commerce Program
	:	
Defendants and	:	Control Nos.: 011431, 031986
Third-Party Plaintiffs,	:	
	:	
v.	:	
	:	
JOHNSON MATTHEY INC.	:	
	:	
Additional	:	
Defendant.	:	

O R D E R

AND NOW, this 27TH day of July, 2004, upon consideration of Additional Defendant's Preliminary Objections to the Third-Party Plaintiffs' Complaint, Third-Party Plaintiffs' Response, Additional Defendant's Reply, Plaintiff's Response to Additional Defendant's Preliminary Objections and Third-Party Plaintiffs' Response, and Third-Party Plaintiffs' Sur-Reply to Plaintiff's Response (Control No. 011431); and of Defendants' Petition to Dismiss Plaintiff's Complaint, Plaintiff's Response, and Defendants' Reply (Control No. 031986); it is hereby **ORDERED** and **DECREED** that Additional Defendant's Preliminary Objections (Control No. 011431) are **OVERRULED** and Defendants' Petition to Dismiss (Control No. 031986) is **GRANTED**.

Third-Party Plaintiffs PFI Construction Corp. and Process Facilities, Inc. shall have days to conduct discovery, limited to determining whether there is venue in Philadelphia County for Additional Defendant Johnson Matthey Inc.

The complaint of Plaintiff A.T. Chadwick Company, Inc. is **DISMISSED**. Plaintiff A.T. Chadwick Company, Inc. and Defendants PFI Construction Corp. and Process Facilities, Inc. shall proceed to mediation to resolve their claims, disputes, and other matters in question.

BY THE COURT,

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C. DARNELL JONES, J.

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	:	
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MEMORANDUM OPINION

JONES, J.

Presently before the court are the Preliminary Objections of Additional Defendant Johnson Matthey Inc. ("JM") to the Complaint of Third-Party Plaintiffs PFI Construction Corp. and Process Facilities, Inc. (collectively, "PFI") and the Petition of Defendants PFI to Dismiss the Complaint of Plaintiff A.T. Chadwick Company, Inc. ("ATC"). For the reasons that follow, the court overrules JM's preliminary objections and grants PFI's petition.

BACKGROUND

This matter arises out of a troubled construction project in West Deptford, New Jersey. JM hired PFI to design and build a bulk pharmaceutical manufacturing facility.

In its role as general contractor, PFI hired ATC as the subcontractor responsible for HVAC and a thermal oxidizer/scrubber.

ATC was hired for each job under a separate contract. The contracts are identical for purposes of resolving the Preliminary Objections and the Petition to Dismiss. In both contracts, there is a choice of law provision that dictates the application of Massachusetts law, a mediation provision, and the identification of JM as a third-party beneficiary.

ATC originally brought claims against both PFI and JM. Following the filing of preliminary objections by JM, ATC filed an amended complaint.

ATC's amended complaint names only PFI as a defendant and brings claims for breach of contract (Counts I and II) and fraud and conversion (Count III). PFI filed an answer, new matter, and new matter counterclaim to ATC's complaint. PFI filed a petition to dismiss the complaint, asserting mediation as a condition precedent and forum non conveniens. JM also filed a petition to dismiss the complaint, relying on forum non conveniens.[1]

PFI filed a third-party complaint naming JM and bringing claims of breach of contract (Count I), quantum meruit (Count II), account stated (Count III), and breach of covenant of good faith and fair dealing (Count IV). JM filed preliminary objections to PFI's third-party complaint, asserting improper venue and an agreement to mediate.

DISCUSSION

Preliminary Objections of Johnson Matthey Inc.

[1] Due to the resolution of the preliminary objections, the court will not rule on JM's petition to dismiss.

JM objects to PFI's third-party complaint, asserting that venue is improper in Philadelphia County. PFI argues that its third-party complaint correctly alleges venue before this court.

Venue for an action against a corporation is governed by Pa. R.C.P. 2179. Under subsection (a)(2) of this Rule, an action may be brought in a county where the corporation "regularly conducts" business. Whether a corporation "regularly conducts" business in a county is a question of fact. Under Pa. R.C.P. 1028(c)(2), the court shall resolve an issue of fact through "depositions or otherwise."

Guidance on the amount and quality of information needed to resolve the question of venue has been provided by the Superior Count. In Slota v. Moorings, Ltd., 343 Pa. Super. 96, 494 A.2d 1 (1985), the court below relied solely on an affidavit to determine jurisdiction. Noting that relying on such evidence was "not a recommended procedure," the appellate court nonetheless upheld the trial court because "the facts attested to in the affidavit are clear and specific" and because the opponents' factual support only consisted of a deposition containing "nothing more than rumor, surmise and conjecture." Id., at 100, 3. The opposite conclusion was reached in Schmitt v. Seaspray-Sharkline, Inc., 366 Pa. Super. 528, 531 A.2d 801 (1987). In this case, the only evidence was an affidavit attached to the preliminary objections by the defendant. The appellate court indicated that the affidavit, standing alone, was insufficient to determine jurisdiction because the plaintiff had no opportunity to present evidence. In particular, the court stated, "where an essential factual issue arises from the pleadings as to the scope of a defendant's activities within the Commonwealth, the plaintiff has the right to depose defendant as to his activities within the Commonwealth." Id., at 532, 803.

In the current matter, the sole evidence is an affidavit proffered by JM that states that JM does not conduct business in Philadelphia County (Firn Aff., ¶4). The affidavit states that JM has corporate offices and manufacturing facilities in Chester County and that JM "markets precious metals," but does not provide further information on this topic. (Id.). Since the affidavit is not "clear and specific" as to the full extent of JM's business in Pennsylvania, the evidence is insufficient to make a determination on whether venue is proper in this court. Therefore, JM's objection to venue is overruled. In accordance with Schmitt, the parties shall engage in discovery, limited in scope, to determine whether there is venue for JM in Philadelphia County.

In addition, JM asserts that the third-party complaint should be dismissed because the underlying action between ATC and PFI must be dismissed and sent to mediation. PFI agrees with JM on the mediation issue,[2] but states that the third-party complaint should remain before the court. ATC argues that PFI waived its right to request mediation, making JM's objection moot.

JM is a third-party beneficiary to the contracts between ATC and PFI. Each contract contains the following: "The Subcontractor understands and agrees that although the Owner is not a party to this Subcontract, it is a 3rd party beneficiary to all of the rights and benefits of the Contractor who is the Purchaser." (App. A, Art. 54.0). The term "Purchaser" appears undefined. Massachusetts law governs each contract. (Art. 8.0).

As set forth in Rae F. Gill, P.C. v. DiGiovanni, 612 N.E. 1205 (Mass. App. Ct. 1993), a party must establish that it is the beneficiary of a particular contractual provision

[2] As PFI filed the complaint to which JM is making preliminary objections and has already answered ATC's complaint, it cannot join the preliminary objections of JM.

in order to seek relief pursuant to the provision. JM asserts rights identical to those of PFI under the contract. This reading of the contract makes the "who is the Purchaser" language in the beneficiary provision superfluous; thus, JM's rights cannot be coextensive with PFI's. In addition, JM does not explain how it is the intended beneficiary of the mediation provision. This provision guides the resolution of disputes between ATC and PFI. JM has an interest in the resolution of disputes between its general contractor and the subcontractors, but it has no stake in the method they choose. Since JM cannot establish that it is the beneficiary of this particular provision, it cannot enforce the mediation clause between ATC and PFI. Therefore, JM's objection is overruled.

Petition to Dismiss of PFI Construction Corp. and Process Facilities, Inc.

PFI argues that ATC's complaint should be dismissed because ATC bypassed the contractual requirement that the parties utilize mediation prior to filing suit. ATC counters that it has complied with the mediation provisions of the contracts and that PFI waived the right to assert mediation as a barrier to this lawsuit.

Under both contracts between ATC and PFI, Appendix A, Article 46, governs the dispute resolution process.

> 46.1 Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by negotiation, mediation followed by litigation. Such mediation shall be conducted in accordance with Construction Industry Mediation currently in effect.
>
> 46.2 Prior to litigation, the parties shall endeavor to settle disputes by mediation. Demand for mediation shall be filed in writing with the other party to this Agreement. A demand for mediation shall be made within a reasonable time after claim, dispute, or other matter in question has arisen. In no event shall the demand for mediation be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes or repose or limitations.

46.3 Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof, shall be subject to and decided by the following conflict resolution approach: negotiation and mediation and only after all avenues of negotiation and mediation have been exhausted shall any party be entitled to initiate litigation.

The contractual language quoted above makes it clear that mediation must occur prior to instituting litigation.

ATC asserts that it has complied with Article 46 and points to its August 20, 2003 letter to PFI as support. The relevant portion of the letter reads: "I recognize that both contracts have mediation clauses. However, it does not seem that there are any issues that can be mediated. Chadwick performed all work required under both contract [sic] and PFI refuses to pay, despite being paid by Johnson Matthey." This passage cannot be construed into a request for mediation. A straightforward reading of the letter leads to the conclusion that ATC considers mediation useless. Under the terms of the contract, however, mediation must be pursued. ATC cannot bring this matter before the court at this time.

Alternatively, ATC argues that PFI has waived any objections to ATC's failure to comply with the mediation provision, placing this matter properly before the court. There are two ways in which a party can waive the right to assert mediation as a defense to a lawsuit. The first is rule-based and the second is judicially-crafted. Under the former, a party waives its right to assert mediation as a defense under Pa. R.C.P. 1032(a) if it does not present such defense in a preliminary objection, answer, or reply. PFI raised the defense in its answer, in accordance with Pa. R.C.P. 1032(a) and 1030(a). Therefore, PFI has not waived its right to assert the defense in this fashion.

In addition, a party may waive its right to have a dispute settled by nonjudicial means by availing itself of the judicial process to resolve the dispute. In Samuel J. Marranca General Contracting Co. v. Amerimar Cherry Hill Associates Limited Partnership, 416 Pa. Super. 45, 610 A.2d 499 (1992), the court noted that waiver of the right to alternative dispute resolution may be either expressly stated or inferred. To find an inferred waiver requires undisputed actions inconsistent with the contract's dispute resolution procedures that produce an advantage to the party or result in prejudice to the other party. Goral v. Fox Ridge, Inc., 453 Pa. Super. 316, 683 A.2d 931 (1996).

A brief look at these two cases distinguishes PFI from the defendants in Marranca and Goral. In Marranca, the defendants did not initially seek arbitration or assert it as an affirmative defense. Instead, the defendants waited until they had received adverse rulings on pretrial motions to assert arbitration as a defense. The Goral defendants did raise arbitration in their new matter. However, they indicated that arbitration should apply only to those claims that were not barred by the statute of limitations. According to the court, these tactics showed that the defendants originally sought relief in court and raised arbitration "only as an alternative to their preferred option of winning a favorable ruling from the trial court." Id. at 322, 933.

PFI exhibits none of the dilatory tactics of the defendants in Marranca and Goral. In accordance with the Rules, PFI promptly raised mediation as a defense in its first filing with the court. As of the date of the motions, no significant discovery, if any, had occurred. Furthermore, ATC can show no prejudice as a result of PFI's actions in the current matter. In fact, as ATC bypassed the mediation provisions in the contracts, it appears that any advantage or prejudice that may result is directly related to ATC's

actions. These facts create no waiver of the mediation provision and this case is dismissed and sent to mediation.

Due to the resolution of the mediation issue, the court finds it unnecessary to consider PFI's forum non conveniens argument.

BY THE COURT,

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C. DARNELL JONES, J.