

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

HECK FAMILY PARTNERSHIP,	:	November Term 2004
Et. Al.,	:	
	:	
Plaintiffs,	:	No. 0007
	:	
v.	:	
ACCUPAC ACQUISITION, INC., C/O	:	COMMERCE PROGRAM
H.I.G. CAPITAL LLC,	:	
	:	
Defendant.	:	Control Number 010400

**ORDER and MEMORANDUM OPINION**

**AND NOW**, this 23<sup>rd</sup> day of May 2005, upon consideration of the Preliminary Objections of Plaintiffs to Defendant's Counterclaim and the Cross Petition to Stay Arbitration Proceedings of Defendant, all responses in Opposition, Memoranda, all matters of record and in accord with the contemporaneous Memorandum Opinion to be filed of record, it hereby is **ORDERED** and **DECREED** that Plaintiffs' Preliminary Objections are **SUSTAINED**.

It is further **ORDERED** and **DECREED** that Defendant's Counterclaim is remanded to Arbitration and this matter is stayed pending completion of the Arbitration Proceeding. All other Petitions are Denied.

**BY THE COURT,**

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**C. DARNELL JONES, II, J.**

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Defendant.	:	Control Number 010400

**MEMORANDUM OPINION**

*JONES, II, J.*

This dispute arises from the sale of a business and certain related assets. As part of the sale the parties executed various agreements including a Purchase Agreement and an Escrow Agreement. The Escrow Agreement contains an arbitration provision and the Purchasing Agreement does not. Plaintiffs have filed the instant preliminary objections seeking to compel Defendant’s Counterclaim to arbitration pursuant to the terms of the Escrow Agreement. In response, Defendant has filed a Cross Petition to Stay Arbitration. For the reasons discussed below, Plaintiffs’ Preliminary Objections are sustained and Defendant’s Counterclaim is remanded to arbitration. Defendant’s Cross Petition to Stay Arbitration is Denied.

**BACKGROUND**

Plaintiffs are the former owners of Accupac, Inc. (“Accupac”) a now dissolved Pennsylvania Corporation that provided outsourced material purchasing, manufacturing and packaging services to the pharmaceutical and personnel care industries in the United States. Plaintiffs entered into a Purchase Agreement with Defendant Acquisition.

Pursuant to the terms of the Purchase Agreement, Plaintiffs agreed to sell their business and certain related assets to Defendant for approximately \$30,000,000.00.

In addition to the Purchase Agreement, the parties also entered into an Indemnity Fund Escrow Account Agreement (“Escrow Agreement”). Pursuant to the terms of the Escrow Agreement, Defendant deposited \$3 million in an escrow account. Absent timely receipt of a claim notice by Defendant the escrow funds were to be released to Plaintiffs eighteen (18) months following the closing. The Escrow Agreement contains an arbitration provision.

On or about October 4, 2004, Defendant submitted a claim notice to the Escrow Agent alleging Plaintiffs breached certain representations and warranties made in connection with the sale of Accupac and that Defendant’s damages exceeded the available amounts in the escrow agreement and demanded release of the funds. In response, Plaintiffs denied the allegations and objected to the release of the funds.

Plaintiffs subsequently filed a Statement of Claim with the AAA seeking a declaration of entitlement to the release of the escrow money. Plaintiffs also commenced this action in equity seeking injunctive relief to prevent Acquisition from canceling Plaintiffs’ shares of common stock and terminate Plaintiffs entitlement to an appointed representative on Acquisition’s Board of Directors.<sup>1</sup> On November 4, 2004, the court entered a Stipulated Order that protected Plaintiffs’ interest as stockholders pending resolution of the parties’ disputes.

In response to the equity action, Defendant filed a Counterclaim against Plaintiffs based on Plaintiffs alleged misrepresentations and breaches contained within the Purchase Agreement. Thereafter, Plaintiffs filed Preliminary Objections to Defendant’s

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<sup>1</sup> Plaintiffs instituted the instant proceeding pursuant to paragraph 22 (c) of the Escrow Agreement.

Counterclaim on the ground that the parties' claims and disputes are subject to a mandatory agreement to arbitrate.

### **DISCUSSION**

The issue presented is whether the arbitration clause embodied in the Escrow Agreement should be enforced. Pennsylvania law "favors settlement of disputes by arbitration as a means of promoting swift and orderly disposition of claims." School Dist. of Philadelphia v. Livingston-Rosenwinkel, P.C., 690 A.2d 1321, 1322-23 (Pa. Commw. 1997)(*citing* Flightways Corp. v. Keystone Helicopter Corp., 331 A.2d 184, 185 (1975)).

A court's analysis of whether a claim is required to be arbitrated is limited. Our Superior Court has held:

When one party to an agreement seeks to prevent another from proceeding to arbitration, judicial inquiry is limited to determining (1) whether a valid agreement to arbitrate exists between the parties and, if so, (2) whether the dispute involved is within the scope of the arbitration provision.

University Mechanical & Engineering Contractors, Inc. v. Insurance Co. of No. America, November Term 2000 No. 1554 (October 28, 2002) (Sheppard, J.) (*citing* Midomo Co., Inc. v. Presbyterian Hous. Dev. Co., 739 A.2d 180, 186 (Pa. Super. 1999)(*quoting* Smith v. Cumberland Group, 687 A.2d 1167 (Pa. Super. 1997)). Thus, some determinations relating to whether a case should be arbitrated are to be made by the court, but others are to be resolved by an arbitrator. "The question of whether the parties agreed to arbitrate, commonly referred to as 'substantive arbitrability,' is generally one for the courts and not for the arbitrators...On the other hand, resolution of procedural questions, including whether the invocation of arbitration was proper or timely is left to the arbitrator." Ross Dev. Co. v. Advanced Bldg. Dev., Inc., 803 A.2d 194, 196 (Pa. Super. 2002).

For matters of substantive arbitrability, a court must apply two principles: (1) arbitration agreements are to be strictly construed and not extended by implication; and (2) when parties have agreed to arbitrate in a clear and unmistakable manner, every reasonable effort should be made to favor the agreement unless it may be said with positive assurance that the arbitration clause involved is not susceptible to an interpretation that covers the asserted dispute. Midomo, 739 A.2d at 190. To apply both rules the court should employ the rules of contractual construction, “adopting an interpretation that gives paramount importance to the intent of the parties and ascribes the most reasonable, probable, and natural conduct to the parties.” Midomo, at 190-91.

Here, there are two agreements at issue- the Purchasing Agreement and the Escrow Agreement- but only the Escrow Agreement contains an arbitration clause. After reviewing the Purchase Agreement and the Escrow Agreement as well as taking into consideration the parties’ respective positions, this court finds that the Defendant’s Counterclaim should be remanded to arbitration.

The first issue that must be resolved in determining whether Defendant’s Counterclaim is subject to arbitration is whether the Purchase Agreement and the Escrow Agreement are interrelated and interdependent or independent agreements.<sup>2</sup> It is a general rule of contract law that where two writings are executed at the same time and are intertwined by the same subject matter that they should be construed together and interpreted as a whole. There is not "any requirement that a contract be evidenced by a single instrument" and "if contracting parties choose, they may express their agreement in

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<sup>2</sup> This inquiry is necessary since the Purchase Agreement does not contain an arbitration provision. Thus, it is necessary to resolve the question of whether the Agreements are interdependent and interrelated in order to determine whether any breaches resulting from the Purchase Agreement are subject to Arbitration.

one or more writings and, in such circumstances, the several documents are to be interpreted together, each one contributing (to the extent of its worth) to the ascertainment of the true intent of the parties." International Milling Co. v. Hachmeister, Inc., 110 A.2d 186, 191 (Pa. 1955) (citation omitted).

A review of the two contractual instruments here, the Purchase Agreement and the Escrow Agreement, illustrates that the two agreements form a single unified expression of the dealings between the parties. The Escrow Agreement specifically refers back to the Purchase Agreement. (See Escrow Agreement Recital and ¶ 4). The Recital to the Escrow Agreement also specifically provides that terms used but not defined in the agreement (Escrow) shall have the meanings given them in the Purchase Agreement. (Escrow Agreement ¶ 1, Recital). Additionally, the terms of the Escrow Agreement also provide that the Purchase Agreement shall govern and control in the event of any inconsistency or conflict with the Escrow Agreement. (Escrow Agreement, p. 2, ¶ 1).<sup>3</sup> Notably Section 11 (c) of the Purchase Agreement states that the Purchase Agreement and the Escrow Agreement constitute the entire agreement among the Parties. (Purchase Agreement ¶ 65 par. 11 (c)).

The interdependence and interrelation between the two Agreements can also be illustrated by the fact that the Escrow Agreement exists solely because of the Purchase Agreement. Indeed a form of the Escrow Agreement to be adopted by the contracting parties was attached as an exhibit to the Purchase Agreement. All these factors lead this court to conclude that the two agreements concern a single transaction and that they must

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<sup>3</sup> The court does not find any inconsistency or conflict between the Purchase Agreement and the Escrow Agreement.

be read together in determining the intention of the parties. As such the court concludes that a valid agreement to arbitrate exists between the parties.

The court is now left to decide whether the instant dispute falls within the scope of the arbitration provision. The Escrow Agreement's Arbitration clause provides:

Any controversy or claim arising out of or relating to this Agreement, or the breach hereof, or any unilateral Disbursement Request or Claim Notice, shall be settled by arbitration in accordance with commercial rules of the American Arbitration Association ("AAA"). Arbitration proceedings conducted pursuant to this Section 22 shall be held in Philadelphia.

(Escrow Agreement ¶ 22 ).

Defendant's Counterclaim purports to allege claims for fraud and breach of contract and seeks declaratory relief since Plaintiffs breached representations and warranties contained within the Purchase Agreement.<sup>4</sup> The parties anticipated the likelihood of a breach and executed the Escrow Agreement which required Defendant to place in escrow the sum of \$3,000,000.00 of the purchase price for the purpose of securing Plaintiffs obligations under Section 9(b) of the Purchase Agreement. (Escrow Agreement Recitals (a)). Section 9 of the Purchase Agreement provides the remedies available for breaches arising from the Purchase Agreement. Section 9(b) obligates the shareholders, HFP and MPLP to indemnify Defendant for any breach, violation or misrepresentation of any shareholders, HFP and MPLP contained within the Purchase Agreement, schedule or exhibit or in any document to be delivered at closing. (Purchase Agreement ¶ 9 (b) p. 60).

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<sup>4</sup> Specifically, Defendant's allege that Plaintiffs made misrepresentations concerning wage and hour compliance with immigration laws, concerning title to certain personal property, concerning the condition of certain machinery, concerning the ability to fulfill customer orders, concerning the shareholders' role in management of the company, and that plaintiffs have failed to honor their indemnification obligations regarding third party claims.

The Escrow Agreement sets forth the procedure to be followed in the event a dispute arises as to whether a disbursement should be made from the escrow fund. (Escrow Agreement ¶ 4 (b)). According to the Escrow Agreement, in the event of a dispute a disbursement shall not occur until (1) the representative accepts such disbursement or (2) until there has been a delivery of a written notice of Final determination of the amount of such Adverse Consequences. *Id.*<sup>5</sup> Final Determination is defined as an award determined by the Arbitrator pursuant to Section 23 (sic) which sets forth the amount of the Adverse Consequence to be satisfied by the disbursement from the Escrow Fund as finally determined in accordance with Section 9(b) of the Purchase Agreement. (Escrow Agreement ¶ 4(f)). Section 9(b) also sets out in detail the remedies available to the parties including limitations on liability depending upon the nature of the claim. Section 9(g) of the Purchase Agreement also sets out in detail the method in which the indemnity claim should be satisfied; the escrow funds inability to fully satisfy any indemnity sum was also taken into consideration.

The Escrow Agreement's Arbitration clause provides that any controversy or claim arising out of or relating to this Agreement, or the breach hereof, or any unilateral Disbursement Request or Claim Notice, shall be settled by arbitration in accordance with commercial rules of the American Arbitration Association ("AAA"). Defendant's Counterclaim pertains directly to alleged misrepresentations made by the shareholders, HFP or MPLP which are contained in Section 3 and 4 of the Purchase Agreement. The

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<sup>5</sup> Adverse Consequences is defined in the Purchasing Agreement as all actions, suits, proceedings, hearings, investigations, charges, complaints, claims, demands, injunctions, judgments, orders, decrees, rulings, damages, dues, penalties, fines, costs, amounts paid in settlement, Liabilities, obligations, Taxes, liens, losses, expenses, and fees, including court costs and reasonable attorneys' fees and expenses and any other cost of enforcing a party's rights under this Agreement. (Purchase Agreement, Definitions p. 2).



Escrow Fund was created purposefully to secure Plaintiffs' indemnification obligations arising as a result of misrepresentations made by Plaintiffs. (See Purchase Agreement ¶ 9 (b)). Since Defendant's Counterclaim involves a controversy or claim arising from a unilateral disbursement request and claim notice, since the disbursement request arises from transactional misrepresentations for which a remedy is provided by Section 9(b), and since the escrow fund was created to secure obligations pursuant to Section 9(b), the court finds that Defendant's Counterclaim falls within the scope of the arbitration provision contained within the Escrow Agreement.

In reaching this conclusion the court does not find Defendant's reliance upon paragraph 11(o), Submission of Jurisdiction, which gives exclusive jurisdiction to decide disputes to state or federal courts in Philadelphia, Pennsylvania persuasive. The court finds this provision to be jurisdictional in nature which does not foreclose the use of arbitration as alternative dispute mechanism.

Defendant also argues that the arbitrator has no authority to determine Defendant's claims or Plaintiffs' claims since it is possible that the claims could have been asserted after the escrow account had been liquidated and since the escrow funds are not the sole source of recovery. The court does not agree. Paragraph 17 of the Escrow Agreement states that the Agreement (Escrow) shall terminate the earlier of the date that no funds remain in the escrow account, the distribution of the entire escrow account pursuant to section 4 of the escrow agreement and the mutual written consent of the parties. (Escrow Agreement ¶ 17 p. 7) Excluded from this provision is paragraph 22, the Arbitration provision. Thus, the Arbitration provision of the Escrow Agreement will

survive even if no funds remain in the escrow account. This provision lends further support to the court's conclusion that Defendant's Counterclaim is subject to Arbitration.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs' Preliminary Objections are Sustained. Defendant's Counterclaims are remanded to Arbitration and this matter is stayed pending the completion of Arbitration. Defendant's Cross Petition to Stay Arbitration is Denied. An order consistent with this Opinion will follow.

**BY THE COURT,**

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**C. DARNELL JONES, II, J.**