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

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| GE SUPPLY, a Div. of General Electric Co., | : | February Term 2005 |
| Plaintiff, | : | No. 1683 |
| v. | : | |
| KVAERNER PHILADELPHIA SHIPYARD, INC., | : | COMMERCE PROGRAM |
| Defendant. | : | Control Number 102889 |
| v. | : | |
| SKANSKA USA BUILDING, INC. Successor in Interest to BARCLAY WHITE SKANSKA, INC., | : | |
| Additional Defendant. | : | |

**ORDER**

**AND NOW**, this 4th day of January 2006, upon consideration of Defendant Skanska USA Building, Inc.'s Preliminary Objections to Defendant Kvaerner's Joinder Complaint, Defendant Kvaerner's response in opposition, Memoranda, all matters of record and in accord with the contemporaneous Memorandum Opinion to be filed forthwith, it hereby is **ORDERED** and **DECREED** that said objections are **OVERRULED**. Defendant Skanska USA Building, Inc. is directed to file an answer to the joinder complaint within twenty (20) days from the date of this **ORDER.**

**BY THE COURT,**

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

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| SKANSKA USA BUILDING, INC. Successor in Interest to BARCLAY WHITE SKANSKA, INC., | : | |
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**MEMORANDUM OPINION**

***JONES, J.***

Presently before the court are the Preliminary Objections of Defendant Skanska USA Building, Inc. Successor in Interest to Barclay White Skanska, Inc. ("Barclay White") to the joinder complaint of Kvaerner Philadelphia Shipyard, Inc. ("Kvaerner").[1] [2] For the reasons discussed below, the Preliminary Objections are overruled.

**Background**

According to the allegations in the complaint, Kvaerner entered into an agreement with the Philadelphia Shipyard Development Corporation to rebuild, renovate and operate the former Philadelphia Naval Shipyard. Kvaerner entered into a contract with Barclay White to act as the Construction Manager for the construction work performed at

[1] Also pending before the court is Kvaener's Motion in Support of Praecipe to Overrule the Preliminary Objections of Skanksa (cn 10282) based on the untimely filing of Skanksa's motion package. Said motion will be the subject of a separate.

[2] Also pending before the court is Kvaerner's Motion in Support of Praecipe to Overrule the Preliminary Objections of Skanksa (cn 102182) based on the untimely filing of Skanksa's motion package. Said motion will be the subject of a separate order.

the naval shipyard. The contract between Kvaerner and Barclay White contained an arbitration provision.

In May 2002, Kvaerner hired Garney Morris Electrical Contractor, Inc. to perform certain repairs to existing lighting and to install additional lighting. Garney Morris Electrical Contractor, Inc. subcontracted with GE Supply a division of General Electric Company ("GE Supply") to obtain certain electrical and lighting materials. GE never received payment for the work performed under its contract with Garney Morris.

In February 2005, GE filed a complaint against Kvaerner alleging unjust enrichment. Specifically, GE alleged that Barclay White orally represented that Kvaerner would pay GE for the materials if GE supplied the materials to the Shipyard.

Thereafter, Kvaerner filed a joinder complaint against Barclay White alleging it had no permission or authority to make any representations that Kvaerner would pay GE for the materials.

Presently, Baclay White filed preliminary objections in the nature of a motion to dismiss pursuant to Pa. R. Civ. P. 1028 (a)(6) and legal insufficiency Pa. R. Civ. P. 1028 (a)(4).

## Discussion

### I. The arbitration clause contained in the agreement between Kvaerner and Barclay White is not enforceable as it pertains to this matter.

Barclay White argues that Kvaerner's claims are subject to the arbitration provision contained within the contract between Barclay White and Kvaerner and therefore the claims against them must be dismissed. In response, Kvaerner argues that the dispute at bar does not fall within the arbitration provision.

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., 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)).

A court must apply two principles in interpreting arbitration agreements: (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.

In order to determine the intent of the parties to a contract, a court should look to the four corners of the document and its express language. Midomo Co. Inc. v. Presbyterian Housing Development Co., 739 A.2d 180, 186 (Pa. Super. 1999). The law favors settlement of disputes by arbitration and seeks to promote swift and orderly disposition of claims. Id. At the same time, a court must be careful not to extend an arbitration agreement by implication beyond the clear, express and unequivocal intent of

the parties as manifested by the writing itself. Id. To resolve this tension, courts should apply 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. Id. All parts of the contract should be interpreted together, with the goal of giving effect to each of its provisions. Id. at 191.

The contract between Kvaerner and Barclay White contains the following arbitration provision:

> ARTICLE 9. ARBITRATION
>
> Any claims or controversy arising out of or related to this Agreement, or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of the American Arbitration Association, and judgment upon the award may be entered in any court having jurisdiction.

The nature of the dispute as alleged in the joinder complaint by Kvaerner falls outside the parameters of the arbitration provision contained within the contract. The claim alleged within the joinder complaint is not related to nor does it arise from the contract between Kvaerner and Barclay White. Rather the dispute arises from a separate agreement between Kvaerner and GE. Accordingly, Barclay White's preliminary objection is overruled.

Moreover, the goal of swift orderly resolution would not be served if this matter were transferred to arbitration. "It is a well established principle of law that a contract cannot impose obligations upon one who is not a party to the contract." Manchel v. Hockberg, 2000 WL 33711078, * 3 (Pa. Com. Pl. 2000) (J. Sheppard) (*quoting* Juniata Valley Bank v. Martin Oil Co., 736 A.2d 650, 663 (Pa. Super. 1999)). GE is not a party to the contract between Kvaerner and Barclay White and therefore cannot be compelled

to submit its dispute to arbitration. *See* Hatboro Manor, Inc. v. Local Joint Executive Bd. of Philadelphia, 426 Pa. 53, 231 A.2d 160, 164 (1967)( holding "that arbitration, a matter of contract, should not be compelled of a party unless such party, by contract, has agreed to such arbitration…").

Enforcement of the arbitration provision would frustrate the public policy interest in efficient dispute resolution and create two cases, one in court against Kvaerner and the other in arbitration against Barclay White. This would create the potential of repetitive and piecemeal litigation. Thus, in this case the arbitration's goal of "swift and orderly disposition of claims" would not be served by sending the case to arbitration. *See* School Dist. of Philadelphia v. Livingston-Rosenwinkel, P.C., 690 A.2d 1321, 1322 (Pa. Cmmw. 1997); *see also*, University Mechanical & Engineering Contractors Inc. v. Insurance Co. of North America, 2002 WL 31428913 (Pa. Com. Pl. 2002) (J. Sheppard). Accordingly, Barclay White's preliminary objection is Overruled.

**II. Barclay White's preliminary objection regarding the legal sufficiency of the complaint is overruled.**

Barclay White maintains that Kvaerner's complaint should be dismissed since it fails to comply with the requirements of the Statute of Frauds, 33 P.S. section 3. The court finds that Barclay White's reliance upon the statute of frauds is not appropriate at this stage in the litigation. Pa. R. Civ. P. 1030(a) specifically states that the statute of frauds defense should be raised as New Matter and not by Preliminary Objection. Accordingly, Barclay White's preliminary objection is overruled.

## CONCLUSION

For the foregoing reasons Barclay White's Preliminary Objections are overruled. Barclay White is directed to file an answer within twenty (20) days from the date of the order to be issued contemporaneously with this opinion.

**BY THE COURT,**

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