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

JOHN M. CLARK, ESQUIRE	:	January Term, 2006
	:	
Plaintiff,	:	No. 4118
	:	
v.	:	Commerce Program
	:	
WEBER, GALLAGHER, SIMPSON, STAPLETON, FIRES & NEWBY, LLP	:	
	:	Control No. 060617
Defendant.	:	
	:	

ORDER and OPINION

AND NOW, this 17th day of October 2006, upon consideration of Defendant's Preliminary Objections, the response in opposition, the respective memoranda, all matters of record and in accordance with the Memorandum Opinion being contemporaneously filed with this Order, it hereby is **ORDERED** that said Preliminary Objections are **SUSTAINED.** Plaintiff's complaint is dismissed without prejudice, as this matter is subject to arbitration pursuant to the agreement between the parties.

BY THE COURT:

_____
HOWLAND W. ABRAMSON, J.

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OPINION

HOWLAND W. ABRAMSON, J.

Before the court are defendant's Preliminary Objections to plaintiff's complaint. For the reasons fully set forth below, said Preliminary Objections are sustained.

DISCUSSION

This action was brought by a withdrawing partner against his former law firm seeking the return of the value of his equity shares of the partnership, which he claims he is entitled to pursuant to the parties' Partnership Agreement. Plaintiff also claims that defendant wrongfully contacted certain of his clients in an attempt to have those clients remain with defendant's law firm, rather than follow plaintiff to his subsequent firm. Plaintiff further contends that the non-competition provision of the Partnership Agreement constitutes an "unreasonable restraint on trade" and is therefore unenforceable. Plaintiff asserts claims against his former law firm for breach of contract, breach of fiduciary duty, breach of duty of good faith and fair dealing and

tortious interference with business relations.

Defendant has filed Preliminary Objections to plaintiff's complaint arguing, *inter alia*, that this court lacks jurisdiction over the matter as the parties agreed to submit the instant dispute to arbitration. 42 Pa.C.S.A. § 7303, which governs such matters, states:

> A written agreement to subject any existing controversy to arbitration or a provision in a written agreement to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity relating to the validity, enforceability or revocation of any contract.

42 Pa.C.S.A. § 7303. Judicial inquiry in determining whether a suit must proceed to arbitration requires a determination as to whether: (1) 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. Smith v. Cumberland Group Ltd., 455 Pa. Super. 276, 284, 687 A.2d 1167, 1171 (1997); Messa v. State Farm Insurance Company, 433 Pa. Super. 594, 597, 641 A.2d 1167, 1168 (1994); PBS Coal, Inc. v. Hardhat Mining, Inc., 429 Pa. Super. 372, 376-77, 632 A.2d 903, 905 (1993).

The Partnership Agreement contains a valid agreement for alternative dispute resolution in ¶ 18, which states:

> Any person executing this Partnership Agreement who intends to make any claim of any type or kind whatsoever against the Partnership, any Equity Partner, any Non-Equity Partner, or any associate or employee of the Partnership, may pursue such claim only in accordance with the terms of this Paragraph 18.
>
> 18.1.1. This claim shall first be presented to the Managing Partner for review by the person making such claim (the "Claimant"). The claim shall be presented in writing and shall set forth the factual and legal basis for such claim. The Managing Partner shall have no less than sixty (60) days to review any claim presented and to make his claim to the Equity Partners.
>
> 18.1.2 Only after the expiration of the sixty (60) day period provided in 18.1.1 above, but

> no more than one hundred eighty (180) days after presenting such claim to the Managing Partner, the Claim may present the claim in writing only to binding common law arbitration pursuant to 42 Pa.C.S.A. § 7341, *et seq.* and this Agreement, and shall promptly notify the Managing Partner in writing that the claim has been submitted to arbitration. In the event the Claimant does not present the claim to binding common law arbitration pursuant to this paragraph within the time frame set forth herein, such Claimant shall have no further right to bring such a claim and hereby releases the Partnership, Equity Partners, Non-Equity Partners, all agents, associates, employees of the Partnership and their respective successors and assigns from and against any and all debts, obligation, actions, causes of action, suits, claims and liabilities whatsoever arising in connection with such claim.

Compl. at Exh. A at ¶ 18.

In opposition, plaintiff argues that the arbitration provision is invalid because the Partnership Agreement contains a non-competition provision which constitutes an "unreasonable restraint on trade." However, the Partnership Agreement contains a severability clause, which states, "[t]he invalidity of any provisions of this Agreement because of any law shall not be deemed to affect or nullify any other provision of this Agreement." Compl., Exh. A at ¶ 19.6. Thus, even if the non-competition provision did prove to be invalid, it would not invalidate the Partnership Agreement as a whole. Accordingly, this court finds the parties' agreement to arbitrate to be valid and enforceable.

The court then turns its inquiry to whether the instant dispute falls within the scope of the arbitration provision. This court finds that it does. It is well-settled that the issue of whether a particular dispute falls within a contractual arbitration provision is a matter of law for the court to decide. Shadduck v. Christopher J. Kaclik, Inc., 1998 Pa. Super. LEXIS 830, 713 A.2d 635, 637 (1998). Pennsylvania law advocates strict construction of arbitration agreements and dictates that any doubts or ambiguity as to arbitrability be resolved in favor of arbitration. Smith, 687 A.2d at 1171). The fundamental rule in construing a contract is to ascertain and give effect to the

intention of the parties. Lower Frederick Township v. Clemmer, 518 Pa. 313, 543 A.2d 502, 510 (1988). In order to determine the meaning of the agreement, the court must examine the entire contract, taking into consideration " . . . the surrounding circumstances, the situation of the parties when the contract was made, the objects they apparently had in view and the nature of the subject matter." Huegel v. Mifflin Const. Co., Inc., 2002 Pa. Super. 94, 796 A.2d 350 (2002).

Here, the dispute concern amounts allegedly due under the Partnership Agreement and also the validity of the non-competition provision contained therein. This dispute clearly falls within the scope of the arbitration clause, which covers "any claim of any kind against the Partnership…" Comp. Exh. A at ¶ 18.1. Accordingly, this matter is subject to arbitration pursuant to the agreement between the parties.

Defendant argues that plaintiff's claims are barred because he failed to satisfy certain prerequisites set forth in ¶18.1.1 of the Partnership Agreement. Under the law of contracts, such a requirement is denominated as a "condition precedent." *See* Restatement (Second) Contracts § 224 (1981) ("A condition is an event, not certain to occur, which must occur, unless its nonoccurrence is excused, before performance under a contract becomes due.") The question of whether a condition precedent to arbitration has been satisfied is a question of procedural arbitrability for the arbitrator to decide, not the court. *See* Ross Development Co. v. Advanced Building Development, Inc., 2002 Pa. Super. *219*, 803 A.2d 194 196 (2002) ("[R]esolution of procedural questions, including whether the invocation of arbitration was proper or timely is left to the arbitrator."); Muhlenberg Township School District Auth. v. Pennsylvania Fortunato Construction Co., 460 Pa. 260, 265, 333 A.2d 184, 187 (1975) ("[t]he question whether the contractor's demand for arbitration was timely is one of interpretation of the agreement . . . and

its resolution must be left to arbitration."). Having found that an agreement to arbitrate exists between the parties, it is not for this court to determine whether plaintiff properly invoked its right to demand arbitration in this matter. Rather, that decision is for the arbitrator to make.[1]

CONCLUSION

Based on the foregoing, defendants' Preliminary Objections are sustained and plaintiff's complaint is dismissed without prejudice**,** as this matter is subject to arbitration pursuant to the Partnership Agreement. The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

_____

HOWLAND W. ABRAMSON, J.

1 In ¶16, plaintiff states that he made "a demand from the defendant for the return of the value of his equity shares on the date of his departure." Compl. at ¶ 16. Whether the actions described in ¶ 16 satisfy the requirements of ¶ 18.1.1 of the Partnership Agreement is an issue for the arbitrator to decide.