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

MARGOLIS EDELSTEIN, Plaintiff,	:	APRIL TERM 2007
	:	No. 1849
v.	:	
JEFFREY K. MARTIN, Defendant.	:	COMMERCE PROGRAM

OPINION

This Opinion is submitted relative to the appeal of defendant Jeffrey K. Martin ("Martin") from this Court's Order dated January 2, 2008, which denied Martin's preliminary objections to plaintiff Margolis Edelstein's ("ME") Second Amended Complaint in the nature of a motion to dismiss based upon the existence of an arbitration agreement.

Background

According to the allegations set forth in ME's Second Amended Complaint, Martin was a partner in ME starting on July 1, 2004 and worked at ME's Gilpin Avenue office in Delaware (the Gilpin Office). ME alleges that Martin owned the Gilpin Office and rented the Gilpin Office to ME beginning on July 1, 2004. Having outgrown the Gilpin Office, ME entered into a lease for a new office space at South Madison Street (the Madison Office) in Delaware. ME's move from the Gilpin Office to the Madison Office was scheduled for March 31, 2007. On the morning of March 31, 2007, as ME personnel and moving vans arrived at the Gilpin Office for the move to the Madison Office, Martin tendered a written resignation from ME dated March 30, 2007.

ME alleges that at some time prior to March 31, 2007, Martin ceased acting as a partner in ME and began acting instead solely for his own benefit and to the detriment of ME and it partners. Specifically, ME's Second Amended Complaint alleges five counts against Martin: conversion (Count I), tortious interference with ME client contracts (Count II), tortious interference with ME business contracts and operations (Count III), breach of fiduciary duties (Count IV), and trespass and breach of covenant of quiet enjoyment (Count V).

In Count I, ME alleges that starting several days before tendering his written resignation, and then continuing thereafter, Martin seized and converted ME property at the Gilpin Office, including, *inter alia*, physical client files, office furniture and artwork, office supplies, and proprietary data extracted from ME computers. In Count II of the Second Amended Complaint, ME claims that after tendering his written resignation, and then continuing thereafter, Martin refused to grant ME access to the Gilpin Office or to the physical client files seized by Martin at the Gilpin Office. ME further alleges in Count II that, after tendering his written resignation, and then continuing thereafter, Martin, without permission from, notice to, or copy to ME, contacted ME clients and solicited them to transfer their legal matters from ME to Martin.

In addition, ME alleges in Count III that starting several days before tendering his written resignation, and then continuing thereafter, Martin tortiously interfered with the operation of ME's business by repeatedly contacting Verizon to cancel or modify ME work orders concerning ME's business telephone and data lines, soliciting two ME associates to resign from ME to join Martin in starting a new business venture, and hiring a secretary for his own business who he was instructed to hire to work for ME. In Count

IV, ME alleges that starting several days before tendering his written resignation, and then continuing hereafter, Martin breached his fiduciary duties by intentionally engaging in conduct detrimental to ME and its partners, including changing the locks at the Gilpin Office, seizing ME property and client files, canceling or modifying ME's Verizon work orders, soliciting two ME associates to terminate their ME employment, hiring a secretary for his new business venture rather than for ME, using ME telephones, computers, and proprietary data for personal gain, and unilaterally contacting ME clients to persuade the clients to terminate ME and hire Martin. Finally, ME contends in Count V that Martin trespassed on ME property and denied ME access to and the quiet enjoyment of possession of the Gilpin Office when he changed the locks at the Gilpin Office during ME's tenancy without ME's knowledge or permission.

Martin filed preliminary objections to ME's Second Amended Complaint in the nature of a motion to dismiss pursuant to Pa. R.C.P. 1028(a)(6), based upon the existence of agreement for alternative dispute resolution. Specifically, Martin argued that the parties' relationship was governed by a Partnership Agreement entered into on April 1, 2006, which contained an arbitration provision. That provision states:

> Any controversy or claim arising out of or relating to the Partnership Agreement shall be resolved through arbitration under the Pennsylvania Uniform Arbitration Act.

The Partnership Agreement also had separate provisions regarding the voluntary withdrawal of a partner. Those provisions state, in relevant part:

> 4. The withdrawing partner may not take any files of present or former clients of the Partnership except upon specific written authorization from the client. In the event that the withdrawing partner, upon authorization of the client, takes any files from the firm, the withdrawing partner will immediately pay the Partnership for all outstanding expenses of the Partnership on the

> files and will pay the Partnership for all unpaid time, both billed and unbilled, on the files. With regard to files on a contingent fee basis, the Partnership has the option of obtaining payment from the withdrawing partner on a quantum meruit basis or on a percentage of the contingent fee, with the percentage set by agreement or by arbitration. The Partnership, at its option, may use any amounts otherwise due the withdrawing partner, including unpaid draw, bonus, expense reimbursement, or capital account reimbursement, to satisfy some or all of the obligations of the withdrawing partner under this paragraph.
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> 5. The withdrawing partner specifically agrees that for the twelve month period following withdrawal he or she will not, directly or indirectly, solicit any clients, former clients, or insurance companies for which the partnership has provided legal services at any time during the five year period preceding the date of withdrawal of that partner.

The Court denied Martin's preliminary objections in its Order dated January 2, 2008. This timely appeal followed.

Discussion

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.[1] Here, it is undisputed that an arbitration provision existed in the parties' Partnership Agreement. Thus, the pertinent inquiry is whether the instant dispute falls within the scope of the arbitration provision in the Partnership Agreement.

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.[2] The fundamental rule in construing a contract is to ascertain and give effect to the intention of

[1] Smith v. Cumberland Group Ltd., 455 Pa. Super. 276, 283, 687 A.2d 1167, 1171 (1997), citing 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).
[2] Shadduck v. Christopher J. Kaclik, Inc., 713 A.2d 635, 637 (Pa. Super. 1998).

the parties.[3] 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 and the objects they apparently had in view and the nature of the subject matter."[4] Despite the fact that the law favors settlement of disputes by arbitration, "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."[5] Indeed, "[b]ecause arbitration is a matter of contract, a particular issue cannot be arbitrated absent an agreement between the parties to arbitrate that issue."[6]

As set forth above, the Court denied Martin's preliminary objections and thus determined that the claims in ME's Second Amended Complaint were not subject to the arbitration provision in the Partnership Agreement. However, upon further review in preparing this Appeal Opinion, the Court discovered the "withdrawal" provisions, *supra*, in the Partnership Agreement. The Court notes that although Martin, the moving party, attached the Partnership Agreement to his Preliminary Objections, he failed to cite to the "withdrawal" provisions or argue that the "withdrawal" provisions within the Partnership Agreement applied to some of ME's claims. While the Court is reluctant to act as an advocate for the moving party, a thorough review of the "withdrawal" provisions compels the conclusion that ME's claims for misappropriation of client files would be governed by these provisions within the Partnership Agreement. Thus, any claims for misappropriation of client files in the Second Amended Complaint would be subject to

[3] Lower Frederick Township v. Clemmer, 518 Pa. 313, 329, 543 A.2d 502, 510 (1988).
[4] Huegel v. Mifflin Const. Co., Inc., 2002 Pa. Super. 94, 796 A.2d 350, 354 (2002) (citation omitted).
[5] Hazleton Area School Dist. v. Bosak, 671 A.2d 277, 282 (Pa. Commw. 1996).
[6] Id.

arbitration. However, the remaining wrongful acts alleged by ME in its Second Amended Complaint would not be governed by the Partnership Agreement since those acts do not "arise out of" or "relate to" the Partnership Agreement. Therefore, those claims would not be subject to arbitration.[7]

This Court suggests that the matter be remanded for further proceedings.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

Dated: March 18, 2008

[7] The Court also notes that ME has separately filed a Petition to Compel Arbitration in an action captioned Margolis Edelstein v. Jeffrey K. Martin, April Term 2007, No. 1706. ME alleges, under the "withdrawal" provisions in the Partnership Agreement, that Martin did not pay ME all amounts due to ME for files taken from the firm by Martin with eventual client authorization. ME further alleges that ME has unpaid time and outstanding expenses on some or all of the files taken from the firm by Martin. ME's claims for misappropriation of client files in the present case are clearly related to these claims in the arbitration complaint.