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

4701 CONCORD, L.L.C.,	:	April Term, 2001
Plaintiff	:	
	:	No. 1481
v.	:	
	:	Commerce Case Program
FIDELITY NATIONAL TITLE	:	
INSURANCE CO. OF NEW YORK,	:	Control No. 061331
Defendant	:	

OPINION

Defendant Fidelity National Title Insurance Co. of New York has filed preliminary objections ("Objections") to the complaint ("Complaint") of Plaintiff 4701 Concord, L.L.C. For the reasons set forth in this Opinion, the Objections will be held under advisement for 30 days, allowing the Defendant to decide whether this dispute will be resolved by arbitration or by the Court.

BACKGROUND

Prior to August 18, 1987, the property located at 4701 Concord Pike, Brandywine Hundred, Delaware ("Property") consisted of a total of 0.733 acres. On that day, approximately 0.069 acres of the Property was conveyed to the State of Delaware,[1] and the instrument memorializing the conveyance was recorded. The remaining portion of the Property totaled 0.664 acres.

On January 30, 1998, the Plaintiff entered into an agreement ("Agreement") to purchase the Property, with the Agreement describing the Property as consisting of 0.733 acres and including the portion of the Property sold in 1987. This description was consistent with a title report ("Title Report")

[1] This transfer is referred to as the "1987 Conveyance."

produced by the Defendant and a survey ("Survey") prepared by Brandywine Valley Engineers. The Parties to the Agreement completed settlement on the Agreement on April 9, 1998 and recorded the transfer deed ("Deed") accordingly. None of the Agreement, Title Report, Survey or Deed made reference to the 1987 Conveyance or the portion of the Property conveyed at that time. In addition, the Plaintiff asserts that it had no knowledge of the 1987 Conveyance when the 1998 transaction was consummated.

In conjunction with the Agreement, the Defendant issued the Plaintiff a $700,000 policy ("Policy") of title insurance, which insured the Deed and the Survey without an exception for the 1987 Conveyance and the portion of the Property transferred at that time. Paragraph 14 of the Policy includes a provision ("Arbitration Provision") allowing arbitration under certain circumstances:

> Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured.

Complaint Ex. F at ¶ 14.

At some point after April 9, 1998, the Plaintiff became aware of the 1987 Conveyance. Because of the reduction in acreage, the Plaintiff allegedly was forced to redesign the structure to be built on the Property, resulting in substantial delays and additional expenses amounting to $205,500.00. On the basis of these allegations, the Plaintiff has initiated the instant action, which includes claims for breach of contract, negligence and bad faith.

In response to the Complaint, the Defendant argues that the Arbitration Provision allows it to request that this matter be submitted to arbitration, although it has yet to initiate an arbitration proceeding and does not request that the Court refer the issues in dispute to arbitration. The Plaintiff counters that the Defendant has waived the right to invoke the Arbitration Provision and that a letter ("Letter") exchanged and agreed to by the Parties precludes the Defendant from filing preliminary objections.[2]

DISCUSSION

Each of the Parties wants to have its cake and eat it too. The Plaintiff seeks to have the Objections overruled on procedural grounds, even though its own procedural errors make its arguments untenable, thus allowing the Court to review the Objections' substance. Similarly, the Defendant asks that this matter be dismissed by virtue of the Arbitration Provision but, at the same time, does not appear to want this matter sent to arbitration. Because the consequences of simply sustaining the Objections are unreasonable, the Defendant is granted 30 days to choose between having this matter resolved by the Court or by arbitration. If the Defendant fails to select one course or the other, the Objections will be overruled.

[2] The Letter was sent from Defendant's counsel to Plaintiff's counsel and sets forth the Parties' agreement "to extend the time within which Fidelity National Title Insurance Company of New York may file an answer to May 17, 2001." Plaintiff's Response ("Response") Ex. D. Plaintiff's counsel has countersigned the Letter.

I. By Failing to File Preliminary Objections to the Objections, the Plaintiff Has Waived the Right to Have Any Defects in the Objections Considered

Flaws in the procedural course charted by the Plaintiff preclude the Court from addressing the Plaintiff's assertion that the Letter bars the Defendant from filing the Objections. Accordingly, the Court may consider the points raised in the Objections.

Under Pennsylvania Rule of Civil Procedure 1032(a), "a party waives all defenses and objections which are not presented either by preliminary objection, answer or reply," with certain limited exceptions. If a party "files an answer or reply without first having filed preliminary objections, the filing of such responsive pleading normally results in a waiver of those nonsubstantive defenses or objections which may only be raised in preliminary objections." Goodrich Amram 2d § 1032(a):3. See also, e.g., Washington v. Papa, 253 Pa. Super. 293, 384 A.2d 1350 (1978) (appellee lost opportunity to challenge jurisdiction when he filed an answer to the complaint and joined a third party defendant).

This admonition is not limited to objections to a complaint but rather applies to objections to all pleadings, including preliminary objections themselves. When a party fails to file preliminary objections to the procedural propriety of another party's preliminary objections, it waives its right to raise such objections. Goodrich Amram 2d § 1032(a):5.[3] There is no indication that there are any restrictions on the procedural arguments that may be lost by a failure to file preliminary objections to preliminary

[3] The logic behind this position is convincing: if defects in preliminary objections could be raised in a response to the preliminary objections, the objecting party would be deprived of the opportunity to formulate a response and defend the alleged defects. By forcing the respondent to file preliminary objections to preliminary objections, the original movant will be able to answer the respondent's arguments.

objections. Cf. DeMary v. Latrobe Printing & Publishing Co., 762 A.2d 758, 762 (Pa. Super. Ct. 2000) ("where a party erroneously asserts substantive defenses in preliminary objections . . . the failure of the opposing party to file preliminary objections to the defective preliminary objections . . . waives the procedural defect and allows the trial court to rule on whether the affirmative defense defeats the claim"); Hahnemann Med. College & Hosp. of Phila. v. Hubbard, 267 Pa. Super. 436, 441-42, 406 A.2d 1120, 1123 (1979) (failure of party opposing preliminary objections to file its own preliminary objections in a timely manner resulted in waiver of its argument that the original objections were late); Goodrich Amram 2d § 1032(a):5 ("[o]bjections to the untimeliness of preliminary objections are also waived by failing to file preliminary objections to the preliminary objections").

Here, the Plaintiff did not file preliminary objections to the Objections and instead raised its arguments in the Response. By doing so, the Plaintiff has not complied with the Pennsylvania Rules of Civil Procedure and has acted in a way that precludes the Defendant from responding to the assertions regarding the Letter and its effect. In short, the Plaintiff is asking the Court to ignore its own procedural error in failing to file preliminary objections to the Objections and to punish the Defendant for its procedural missteps.

It would be unfair and inappropriate to penalize the Defendant for failing to comply with civil procedure formalities when the Plaintiff failed to do so as well. Thus, the Plaintiff's failure to file preliminary objections to the Objections bars it from raising its argument that the Objections were improperly filed, and the Court will consider the Objections substantive arguments.

II. The Objections Shall Be Held under Advisement for 30 Days, Allowing the Defendant to Indicate its Preferred Forum

In the Objections, the Defendant asserts that the Parties are bound by the Arbitration Provision and that this matter is not properly heard by the Court. The Defendant has not waived the right to raise this argument. However, because the Defendant has not moved to initiate arbitration proceedings and because arbitration is optional and non-exclusive under the Arbitration Provision, the Objections cannot be sustained at this point, and the Defendant is given 30 days in which to choose either to proceed in court or to submit this matter to arbitration.

A. The Defendant Has Not Waived its Right to Raise the Arbitration Provision

In general, Pennsylvania favors the dispute settlement through arbitration as a way "to promote swift and orderly disposition of claims." Midomo Co. v. Presbyterian Hous. Dev. Co., 739 A.2d 180, 190 (Pa. Super. Ct. 1999) (quoting Hazleton Area School Dist. v. Bosak, 672 A.2d 277, 282 (Pa. Commw. Ct. 1996)). See also In re Fellman, 412 Pa. Super. 577, 582, 604 A.2d 263, 265 (1992) ("[a]rbitration agreements are generally encouraged as a prompt, economical and adequate solution of controversies"). However, a number of Pennsylvania cases hold that a party may waive the right to enforce an arbitration clause and to compel arbitration. See, e.g., Samuel J. Marranca Gen. Contracting Co. v. Amerimar Cherry Hill Assocs. Ltd. Partnership, 416 Pa. Super. 45, 49, 610 A.2d 499, 501 (1992) (concluding that the defendant "waived its right to enforce the arbitration clause"). Courts have looked at the following to evaluate a claim of waiver:

> The key to determining whether arbitration has been waived is whether the party, by virtue of its conduct, has accepted the judicial process. Acceptance of the judicial process is demonstrated when the party (1) fails to raise the issue of arbitration promptly, (2) engages in discovery, (3) files pretrial motions which do not raise the issue of arbitration, (4) waits

> for adverse rulings on pretrial motions before asserting arbitration, or (5) waits until the case is ready for trial before asserting arbitration.

St. Clair Area Sch. Dist. Bd. of Ed. v. E.I. Assocs., 733 A.2d 677, 682 n.6 (Pa. Commw. Ct. 1999) (citations omitted).

In this matter, the Defendant was served with the Complaint on April 19, 2001 and filed the Objections on May 17, 2001. This can be considered to be prompt action raising the issue of arbitration. Moreover, the Defendant has not engaged in discovery, filed pre-trial motions, waited for trial or suffered any adverse rulings. In response, the Plaintiff relies solely on the assertion that the Defendant has not filed a demand for arbitration. When viewed together, these facts militate heavily in favor of finding that the Defendant has not waived its arbitration argument.

The Plaintiff's reliance on Goral v. Fox Ridge, Inc., 453 Pa. Super. 316, 683 A.2d 931 (1996), and James J. Gory Mechanical Contracting, Inc. v. Philadelphia Housing Authority, February Term, 2000, No. 453 (C.P. Phila. Jul. 11, 2001) (Herron, J.),[4] is misplaced. In Goral, the defendants pleaded the affirmative defense of mandatory arbitration as a new matter and objected to a request for discovery on this basis ten months later. Nearly six months after the discovery dispute, the defendants filed a motion to compel arbitration, which the trial court denied. On appeal, the Superior Court affirmed the lower court's decision and found that the defendants had waived their right to force the plaintiff into arbitration.

Similarly, in Gory, the defendant asserted as a new matter that the Court did not have jurisdiction over the dispute because of the plaintiff's alleged failure to adhere to the mandatory

[4] Available at http://courts.phila.gov/cptcvcomp.htm.

arbitration provision in the relevant contract. The defendant took no action on this assertion, however, until the eve of trial nearly one year after being served, by which point it had engaged in discovery, demanded a jury trial and attended a court-sponsored settlement conference.

Gory and Goral are easily distinguishable from the instant matter. In each of those cases, the defendants waited over a year before raising the issue of arbitration in any substantive manner and engaged in conduct that demonstrated a clear acceptance of the judicial process. Had the disputes been referred to arbitration, their resolution undoubtedly would have been delayed, thus undermining the principal reason for promoting arbitration. Here, the Defendant raised the Arbitration Provision in the Objections, effectively its first opportunity to do so. Thus, neither Gory nor Goral is of any relevance, and the Defendant has not waived its right to raise the Arbitration Provision.

B. While this Matter Falls Within the Scope of the Arbitration Provision, the Fact That Arbitration Is Optional, Not Mandatory, Requires That the Objections Be Held under Advisement

Pennsylvania law holds that "[i]f a valid arbitration agreement exists between the parties and [the] claim is within the scope of the agreement, the controversy must be submitted to arbitration." Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276, 284, 687 A.2d 1167, 1171 (1997). However, "[a]greements to arbitrate are to be strictly construed and should not be extended by implication." PBS Coal, Inc. v. Hardhat Mining, Inc. 429 Pa. Super. 372, 377, 632 A.2d 903, 905 (1993). See also Midomo Co. v. Presbyterian Housing Dev. Co., 739 A.2d 180, 190 (Pa. Super. Ct. 1999) (arbitration agreements are to be confined to the "clear, express and unequivocal intent of the parties as manifested by the writing itself"); Brown v. D. & P. Willow Inc., 454 Pa Super. 539, 546-47, 686 A.2d 14, 18 (1996) (noting that forcing a party into arbitration without its consent is "violative

of common law and statutory principles" and a "curtailment of one's substantive and due process rights").

The matters in dispute here are clearly within the scope of the Arbitration Provision, which allows arbitration for "any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation." Complaint Ex. F at ¶ 14. In addition, the Arbitration Provision states that "[a]ll arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured." Id. Because the Complaint raises a breach of the Policy and the amount in dispute is less than $1,000,000.00, either the Plaintiff or the Defendant may request that the dispute be arbitrated, although neither Party is compelled to do so.

At the same time, however, the Court cannot help but find the Defendant's argument that the Arbitration Provision requires the dismissal of this matter disingenuous. While invoking the Arbitration Provision in its own defense, the Defendant has failed to file a demand for arbitration, as permitted, but not required, under that Provision. Indeed, the Defendant has little incentive to initiate an arbitration proceeding, as the claims arising from the supposed Policy violations accrue to the benefit of the Plaintiff and have the potential only to harm to Defendant if addressed. It is therefore logical to conclude that the Defendant will not act to demand arbitration in the absence of an external motivating force.

Without an accompanying arbitration demand by the Defendant, sustaining the Objections would foreclose the Plaintiff's right to proceed in court, a possibility contemplated and permitted by the discretionary language of the Arbitration Provision. This would put the Plaintiff in the incredibly difficult

position of either prosecuting its claims through arbitration, a vehicle not of its choosing and not mandated by the Arbitration Provision, or watching its claims languish in legal limbo. Simply put, this result is unfair and wrong.[5]

Given this dilemma, the Court believes it most appropriate to hold the Objections under advisement for 30 days. If the Defendant desires to have this matter referred to arbitration, it may either indicate to the Court that it so wishes or initiate an arbitration proceeding, allowing the Court to draft an appropriate order. In the event that the Defendant does not undertake either action, the Court will overrule the Objections, and the Plaintiff will be permitted to proceed on its claims before the Court. This will effect the apparent intent behind the Arbitration Provision by allowing the Defendant to select the method by which the claims against it will be resolved and not whether the such claims will be addressed.[6]

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[5] In addition, such action may be in violation of Pennsylvania law. Cf. Riboldi v. Vito, 31 D. & C.2d 437, 442-43 (C.P. Monroe 1963) (a precondition for an order transferring a dispute to arbitration is "timely affirmative action by the applicant to set the arbitration proceedings in motion").

[6] This conclusion is similar to that reached in Butchko v. Urmson, 65 D. & C.2d 395, 396 (C.P. Mercer 1973). The Butchko court considered a defendant's preliminary objections based on an arbitration provision that permitted a party to request arbitration but did not require that the dispute be submitted to arbitration. As in this matter, the defendant wanted the matter dismissed but did not appear to want a resolution by arbitration. The court ultimately overruled the objections and suggested that the defendant submit a petition to compel arbitration. Here, the procedural complications and added expense of requiring the Defendant to file a petition to compel arbitration is unnecessary: the Arbitration Provision clearly allows the Defendant to force the arbitration of this matter, and the Order being issued in conjunction with this Opinion permits the Defendant to do so in a straightforward fashion, if it so desires. Cf. Jefferies v. Tucker, 7 Pa. D. & C.2d 172 (C.P. Phila. 1956), aff'd per curiam, 387 Pa. 234, 127 A.2d 657 (1956) (sustaining preliminary objections and staying matter until arbitration was completed where the relevant arbitration provision was mandatory and the defendant affirmatively requested that the matter be submitted to arbitration).

CONCLUSION

Although the Defendant has not waived its right to invoke the Arbitration Provision, its failure to take steps to request or to initiate arbitration require that the Court defer ruling on the Objections for 30 days.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: August 28, 2001

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

4701 CONCORD, L.L.C.,	:	April Term, 2001
Plaintiff	:	
	:	No. 1481
v.	:	
	:	Commerce Case Program
FIDELITY NATIONAL TITLE	:	
INSURANCE CO. OF NEW YORK,	:	Control No. 061331
Defendant	:	

ORDER

AND NOW, this 28th day of August, 2001, upon consideration of the Preliminary Objections of Defendant Fidelity National Title Insurance Co. of New York to the Complaint of Plaintiff 4701 Concord, L.L.C. and the Plaintiff's response thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Preliminary Objections will be held under advisement for thirty days, during which time the Defendant may either initiate an arbitration proceeding or indicate to the Court that it wishes to compel the arbitration of the issues in dispute in this matter.

BY THE COURT:

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JOHN W. HERRON, J.