IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

DONALD F. MANCHEL, ESQUIRE Individually and as a liquidating partner of MANCHEL, LUNDY & LESSIN	: DECEMBER TERM, 1999 : No. 1277
v.	:
ROBERT HOCHBERG, JOHN HAYMOND HAYMOND, NAPOLI & DIAMOND, P.C., and MARVIN LUNDY	: Superior Court Docket : No. 852EDA2000

……

O P I N I O N

SHEPPARD, JR., J. …… March 31, 2000

This Opinion is submitted in support of this court's Order of February 23, 2000, denying the Preliminary Objections of defendant, Marvin Lundy. For the reasons stated, this court's Order should be affirmed.

Factual and Procedural History

Plaintiff, Donald Manchel ("Manchel"), and defendant, Marvin Lundy ("Lundy"), were partners in the law firm of Manchel, Lundy and Lessin ("ML&L"). The firm dissolved. The distribution of files and apportionment of fees are governed by a written dissolution agreement ("Agreement"). The Agreement provided for an arbitrator, Judge Leon Katz (Ret.), and gave him jurisdiction over disputes concerning the files and fees.

After the ML&L dissolution, Lundy formed a new law firm (Haymond & Lundy) with defendants Haymond and Hochberg and took with him some of the ML&L files. Manchel retained a financial interest in those files. Subsequently, the Haymond & Lundy firm also dissolved. That dissolution is the subject matter of a federal lawsuit in the Eastern District of Pennsylvania, presided over by Judge Norma Shapiro. Manchel is not a party in that federal lawsuit.

When Haymond & Lundy dissolved, Haymond took some of Lundy's ML&L files with him to his new firm, defendant Haymond, Napoli & Diamond.[1] Those files that Haymond, Napoli & Diamond, Haymond, and/or Hochberg (together, the "Haymond defendants") control -- and over which the arbitrator has no jurisdiction -- are the subject matter of this injunction action.

Manchel filed a complaint in equity and a Petition for Preliminary Injunction on December 13, 1999. Because the Haymond defendants are not signatories of the Agreement, Manchel alleges that he has no adequate legal remedy for protecting his interest in the former ML&L files that the Haymond

[1]Apparently, defendant Hochberg is no longer practicing law or is practicing law in Connecticut.

defendants now control. Manchel requested the following relief:

1. An accounting by all defendants as to status of the former ML&L files now controlled by the Haymond defendants, including fees, costs and litigation status.
2. A declaration that the arbitrator has jurisdiction over disputes concerning those files.
3. The imposition of a lien in favor of Manchel on those files.
4. The establishment of an escrow account for the deposit of all fees and costs collected on those files.

Since the arbitrator, Katz, has jurisdiction to determine the rights of Manchel and Lundy, only, with respect to the ML&L files, and Judge Shapiro has jurisdiction to determine the rights between Lundy and (at least some of) the Haymond defendants but has no jurisdiction over Manchel, Manchel argues that he has no way of protecting his rights in any ML&L files now controlled by the Haymond defendants. Subjecting the Haymond defendants to the arbitrator's jurisdiction would purportedly protect Manchel's rights as to any prior ML&L files now under the control of the Haymond defendants.

This court has not yet acted upon Manchel's Petition for a Preliminary Injunction.

On January 4, 2000, Lundy filed preliminary objections, raising three issues: (1) the existence of the Agreement, (2) a lack of subject matter jurisdiction based on the pending federal action, and (3) insufficient specificity of the pleading. On February 23, 2000, this court overruled the preliminary objections. On March 9, 2000, Lundy filed this appeal.

Discussion

Lundy asserts two bases for the Superior Court's jurisdiction.[2] First, it is the court's understanding that Lundy claims that he appeals as of right from the court's order granting or

[2]See cover letter, dated March 9, 2000 and attached as Appendix "A".

denying an injunction. Pa.R.App.P. 311(a)(4). Because this court has not acted upon Manchel's Petition for a Preliminary Injunction, Lundy's appeal on this ground is premature and of no consequence.

Second, Lundy asserts that he appeals as of right from the court's Order denying Lundy's right to arbitration. Pa.R.App.P. 311(a)(8) (orders made appealable as of right by statute); 42 Pa.C.S.A. § 7320(a) (making orders denying arbitration appealable as of right); Midomo Co. v. Presbyterian Housing Development Co., 739 A.2d 180, 184 (Pa. Super. 1999) (holding that an order denying a preliminary objection alleging alternative dispute resolution is an interlocutory order appealable as of right pursuant to Pa.R.App.P. 311(a)(8)).

In his preliminary objections, Lundy moved to dismiss the complaint under Rule 1028(a)(6) based on the existence of the Agreement between Lundy and Manchel. "'An agreement to arbitrate a dispute is an agreement to submit oneself as well as one's dispute to the arbitrator's jurisdiction.'" Midomo, 739 A.2d at 186, quoting Smith v. Cumberland Group. Ltd., 455 Pa. Super. 276, 687 A.2d 1167, 1171 (1997). Whether an arbitrator has jurisdiction over a particular dispute is a question for the trial court, and not for the arbitrator. Gaslin, Inc. v. L.G.C. Exports, Inc., 334 Pa.Super. 132, 482 A.2d 1121 (Pa.Super. 1984) (stating that whether a party consented to arbitrate a particular dispute is a jurisdictional question that must be decided by the trial court, not the arbitrator). Therefore, "'[w]hen one party 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.'" Midomo Co., 739 A.2d at 186, quoting Smith, 455 A.2d at 1171. In Midomo, the Superior Court held that this inquiry applies to the consideration of a

preliminary objection under Rule 1028(a)(6) alleging the existence of an agreement for alternative dispute resolution. Midomo, 739 A.2d at 184, 187.

Applying Midomo, this court submits that Lundy has failed to satisfy either prong of the test.

Initially, the court notes that Lundy has not provided the court with a copy of the Agreement -- it was not attached to the Objections nor was it marked at the pertinent hearings. Rule 1019(h) states that:

> A pleading shall state specifically whether any claim or defense set forth therein is based upon a writing. If so, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

Pa.R.Civ.P. 1019(h).

Lundy based his primary objection on the "written dissolution agreement" between Lundy and Manchel. Preliminary Objections, ¶ 8. Lundy neither attached the Agreement, nor alleged that the Agreement is not accessible to him. Instead, Lundy quoted selected provisions from that Agreement in his pleadings, and his counsel read from or described selected provisions of the Agreement at the January 4, 2000 hearing. At the hearing, counsel for Lundy stated that the Agreement was not attached to the pleadings because it is "confidential." (1/4/00, N.T. 7). The failure to attach the Agreement, in and of itself, is a sufficient basis for overruling the preliminary objections. Cooke v. Equitable Life Assur. Soc., 723 A.2d 723, 727 (Pa.Super. 1999).[3]

---

[3]This court acknowledges that it did not insist upon the submission of a copy of the Agreement. Nonetheless, common sense and courtesy should dictate that if Lundy is relying on

However, this court need not rely on this prophylactic basis to justify its decision. The application of the Midomo test to the provisions of the Agreement, as described in the pleadings and at the hearings, demonstrates that Lundy has failed to satisfy either prong. First, there is no valid arbitration agreement between these parties as to these issues. "It is a well established principle of law that a contract cannot impose obligations upon one who is not a party to the contract." Juniata Valley Bank v. Martin Oil Co., 736 A.2d 650, 663 (Pa.Super. 1999); Marshall v. Port Authority of Allegheny County, 524 Pa. 1, 568 A.2d 931 (1990). The Haymond defendants have not agreed to submit themselves to arbitrator Katz's jurisdiction and cannot be made to do so. See Complaint, ¶ 8; Preliminary Objections, ¶ 9; Schoellhammer's 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 . . ."); Cumberland-Perry Area Vocational Technical School Authority v. Bogar & Bink, 261 Pa. Super. 350; 396 A.2d 433, 435 (1978) (stating that "persons cannot compel arbitration of a disagreement between or among parties who have not contracted to arbitrate that disagreement between or among themselves.").

Requiring Manchel to arbitrate matters pertaining to the files under control of the Haymond defendants with Lundy alone would be pointless. The arbitrator cannot make determinations affecting the Haymond defendants' rights and cannot compel the Haymond

---

the Agreement to put Manchel out of court, a copy of the Agreement should have been made a part of the record. Indeed, as the Cooke court noted, "we are severely hampered in our analysis, however, by appellant's failure to place anywhere in the record a single copy of the document they so heavily rely on". Cooke, 723 A.2d at 727.

As to the "confidentiality" of the Agreement, there are ways of maintaining that condition with respect to materials submitted to a court during litigation.

defendants to submit to an accounting or to distribute funds to anyone, including Manchel. It is the arbitrator's inability to require anything of the Haymond defendants and his inability to focus any ruling on the files held by the Hammond defendants that has led to this action. See Framlau Corp. v. Kling, 233 Pa. Super. 175, 334 A.2d 780, 782 (1975) (holding that a defendant who is not a party to an arbitration agreement cannot be compelled to arbitrate under that agreement, and that the only remedy against that defendant is a suit in a court of competent jurisdiction). See also School District of Philadelphia v. Livingston-Rosenwinkel, P.C., 690 A.2d 1321, 1323 (Pa.Cmwth. 1997) (overruling preliminary objections asserting the existence of an arbitration agreement where one of the three parties to the suit was not a party to the arbitration agreement, and the suit involved issues outside of the arbitration agreement).

Second, disputes between Manchel and the Haymond defendants with respect to files which Lundy originally controlled are not within the scope of the arbitration Agreement. Based on those excerpts from the Agreement that Lundy provided in his pleadings and at the hearings, the Agreement concerns only disputes between Manchel and Lundy. The Agreement does not extend to disputes between Manchel and the Haymond defendants or between Lundy and the Haymond defendants.

Counsel for Lundy acknowledged in court that the Agreement does not extend to the Haymond defendants or to any present or future disputes relative to the ML&L files that the Haymond defendants control. Discussions with this court at hearings on January 4 and January 18, 2000 centered on the arbitrator's lack of jurisdiction over the Haymond defendants, and what to do about that lack of jurisdiction. At the hearing on January 4, the parties discussed having the Haymond defendants sign onto the Agreement, such that the arbitrator would have jurisdiction over

the Haymond defendants with regard to disputes arising from the ML&L files that the Haymond defendants control. The court's discussions with counsel for Lundy make clear their acknowledgment that the arbitrator has no jurisdiction over the Haymond defendants and the files at issue:

> MR. THALL: I have no objection to these gentleman joining in front of the proceedings in front of Judge Katz . . . . We would be thrilled and delighted were Judge Katz to have the same powers over Haymond, Napoli and Diamond that he has over Mr. Manchel on the one hand and Mr. Lundy on the other hand with respect to those cases that each had on the dissolution of Manchel, Lundy and Lessin.
>
> THE COURT: And that are now with these Haymond people.
>
> MR. THALL: Sure. My only concern is the question of overlapping jurisdictions [of the federal and state courts], but that's not my problem. From a practical standpoint it matters not.
>
> THE COURT: And Haymond, Napoli and Diamond just want the right to ask for the same accounting; is that correct?
>
> MR. BERNSTEIN: Your Honor, here is the problem, if we can cut through all of this.
>
> THE COURT: I think you should just go to Judge Katz with an agreed upon order that says, all parties, and counsel representing all parties, agree Judge Katz may focus on[,] or has jurisdiction over[,] or his binding right to be an arbitrator extends to[,] those files which were at one time Manchel, Lundy and Lessin files that are now Haymond, Napoli and Diamond files and there's a mutuality of obligation of rights ---
>
> MR. THALL: And for the purposes of accounting. We're fine with that, Judge.

(1/4/00, N.T. 21, 26-28).

Two weeks later, however, counsel was unwilling to consent to extending the arbitrator's jurisdiction over the Haymond defendants:

> THE COURT: If the Manchel attorney and Manchel and Haymond, Napoli, Diamond people and Mr. Bernstein work something out to make less apprehensive their future right as to all this money, are you going to agree or not?

MR. THALL: It depends what the agreement is, sir. If it's just here are the cases; here is a list of the cases.

THE COURT: No, no. It's probably going to be under Judge Katz, if that's what they get.

MR. THALL: I don't know what that means, sir. I do not believe that we ever agreed or nor would we agree that Judge Katz can issue orders on their behalf with respect to the monies.

THE COURT: If it has to do with their money.

MR. THALL: No. That they can have an accounting, the same accounting rights.

THE COURT: Suppose that accounting makes clear that they're due some money.

MR. PICKER: It can't.

THE COURT: Then you're safe aren't you?

MR. THALL: No.

THE COURT: If something is impossible to agree to, what do you give away?

MR. THALL: We give away the fact that we're in two forums when all of this is in front of Judge Shapiro. And I don't want, nor would you, sir --

THE COURT: You wouldn't have a third forum if you agree. I'm going to go away and do other work.

MR. THALL: No, we're in front of Judge Katz.

THE COURT: What?

MR. THALL: Then we're in front of Judge Katz with an issue that is not in front of him which is solely in front of Judge Shapiro.

THE COURT: I thought you agreed last week that you just had to amend that one long paragraph [in the Agreement] so that he would be able to focus on those files also.

> MR. THALL: What I said was rights to an accounting, Your Honor. I did not say and I specifically refrained from saying or agreeing to any order from Judge Katz dealing with the distribution. What I said was, if you read the transcript I even quoted from the section of the agreement, Your Honor.

(1/18/00, N.T. 54-59).

Whatever the reason for counsel's change of heart, two basic understandings underlay both days' discussions: 1) that the arbitrator has no jurisdiction over the Haymond defendants and the ML&L files that they now control, and 2) that Lundy's consent is a prerequisite to the arbitrator's gaining that jurisdiction.

As acknowledged by counsel for Lundy, disputes involving the Haymond defendants and the ML&L files that they control are not within the scope of the arbitration agreement. And yet, this is the very subject matter of this lawsuit. This court questions the reasoning and motives implicated by Lundy's counsel when they acknowledge the arbitrator's lack of jurisdiction yet, at the same time, urge that the complaint be dismissed on the ground that a valid arbitration agreement exists.

Conclusion

In summary, based on the foregoing this court respectfully submits that its Order of February 23, 2000, denying Lundy's Preliminary Objections should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.