

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

ROWCOMM, L.L.C.,	:	September Term 2003
Plaintiff,	:	
v.	:	No. 000844
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORATION AUTHORITY,	:	Commerce Program
Defendant.	:	Control Number 120178

ORDER

AND NOW, this 20th day of February, 2004, upon consideration Defendant Southeastern Pennsylvania Transportation Authority's Preliminary Objections to Plaintiff's Complaint, Plaintiff's response in opposition, the respective memorandum, all matters of record and in accord with the contemporaneous Opinion filed of record, it is hereby **ORDERED** and **DECREED** that:

1. Defendant's Preliminary Objection pursuant to Pa. R. Civ. P. 1028 (a) (6) is **OVERRULED**.
2. Defendant's Preliminary Objection to Count II of the Complaint pursuant to Pa. R. Civ. P. 1028 (a) (4) is **SUSTAINED**. Plaintiff is granted leave to amend Count II of the Complaint within twenty days from the date of this order.

BY THE COURT,

C. DARNELL JONES, II, J.

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

ROWCOMM, L.L.C.,	:	September Term 2003
Plaintiff,	:	
v.	:	No. 000844
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORATION AUTHORITY,	:	Commerce Program
Defendant.	:	Control Number 120178

MEMORANDUM OPINION

C. Darnell Jones, II, J.....

Presently before the court are the Preliminary Objections of defendant Southeastern Pennsylvania Transportation Authority (“SEPTA”) pursuant Pa. R. Civ. P. 1028 (a) (6) – agreement for alternative dispute resolution and 1028 (a) (4) – demurrer to Count II. For the reasons discussed below, SEPTA’s Preliminary Objections are Overruled in part and Sustained in part.

BACKGROUND

The operative facts, as pled in the Complaint, can be summarized as follows: On April 16, 1998, Plaintiff ROWComm (“ROWComm”) and SEPTA entered into an Agreement. Compl. ¶ 3. Pursuant to the contract, SEPTA engaged ROWComm to originate, review, negotiate and process non exclusive license agreements between SEPTA and telecommunications carriers for the placement of telecommunications facilities on SEPTA properties and rights of way. Compl. ¶ 4. In return SEPTA was obligated to compensate ROWComm for its services. Compl. ¶ 5, 8.

In September 2003, ROWComm filed the instant complaint against SEPTA seeking recovery for past and future amounts due for services. ROWComm alleges

claims for breach of contract (failure to pay) (Count I), anticipatory breach of contract- (Count II), breach of contract (action and inaction relating to origination, review, negotiation, and processing of license agreements)(Count III), unjust enrichment (Count IV), Promissory Estoppel (Count V) and Conversion (Count VI.)¹

SEPTA filed preliminary objections to the complaint alleging (1) violation of the parties' agreed upon alternative dispute resolution procedure and (2) failure to state a cause of action for anticipatory beach of contract.²

DISCUSSION

I. Plaintiff's Complaint was not filed in Violation of the Parties Agreed Upon Dispute Resolution Procedure.

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. Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276, 687 A.2d 1167, 1171 (Pa. Super. 1997)(citing Messa v. State Farm Ins. Co., 433 Pa. Super. 594, 597, 641 A.2d 1167, 1168 (Pa. Super. 1994)). If a valid arbitration agreement exists between the parties and plaintiffs claim is within the scope of the agreement, the controversy must be submitted to arbitration. Id.

SEPTA maintains that ROWComm filed the instant complaint in violation of the parties' agreed upon alternative dispute resolution procedure. Specifically, SEPTA argues that the parties expressly agreed that any disputes arising in the performance of the

¹ Plaintiff voluntarily withdrew Count VI and therefore defendant's preliminary objection with respect to this count is moot.

² SEPTA also sought dismissal of the complaint based upon ROWComm's failure to attach a copy of the Agreement and failure to attach a verification to the complaint. Plaintiff has cured these defects and SEPTA no longer seeks dismissal on these grounds.

Agreement, that the parties could not mutually resolve, would be submitted to and decided by the authorized representative of SEPTA's Assistant General Manager- Materiel (sic)& Contracts. This decision would be final and conclusive unless appealed to the Assistant General Manager- Materiel (sic)& Contracts, whose decision would be binding. Dft's brief p. 3-4. In response, ROWComm argues that the Agreement does not contain a valid alternative dispute resolution provision since the ultimate arbiter of the dispute itself is one of the parties to the dispute. Plt's brief p. 5-6. For the reasons discussed below, the court finds that the dispute in question does not fall within the scope of the dispute resolution provision at issue.

In the usual case, the court would address the issue of whether an agreement to arbitrate exists before it addresses the scope of the agreement. In this case, however, the court chooses to address the second issue first because it is dispositive.

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.

Paragraph 32 of the Agreement between SEPTA and ROWComm provides:

Disputes. Disputes arising in the performance of the Agreement which are not resolved by agreement of the parties shall be decided in writing by the authorized representative of SEPTA'S Assistant General Manager Materiel (sic) & Contracts. This decision shall be final and conclusive, unless within ten (10) days from the date of receipt of its copy, Broker/Agent mails or otherwise furnishes a written appeal to the Assistant General Manager- Materiel (sic) & Contracts. In connection with any such appeal, Broker/Agent shall be afforded an opportunity to be heard and to offer evidence in support of its position. The decision of the Assistant General Manager- Materiel (sic) & Contractors shall be binding upon Broker/Agent to the extent provided by law and Broker/Agent shall abide by the decision.

Id.

The wording of Paragraph 32 read in conjunction with the other provisions in the Agreement makes it clear that a distinction exists as to the types of disputes that should be submitted to the alternative dispute resolution process described. Paragraph 32 specifically provides that "disputes arising in the performance of the Agreement" are to be submitted to the process described therein. Giving effect to each provision throughout the Agreement, the court finds that each time the term "performance" is used within the Agreement, it refers to the services to be rendered by ROWComm to SEPTA and or ROWComm's obligations. Agreement ¶¶ 1,2,3,4,5,12,13,14 and 15. Since the term "performance" is used to describe ROWComm's services and obligations within the agreement, the use of the term performance within paragraph 32 should be given the same effect. Thus, paragraph 32 becomes effective when a dispute arises concerning ROWComm's performance of its services and obligations under the Agreement.

Additionally, the Agreement specifically provides that paragraph 32 also becomes effective when a dispute arises concerning a question of overpayment and changes.

Paragraph 11, Overpayment, provides:

If at any point SEPTA determines that Broker/Agent had been overpaid, SEPTA'S contract Administrator shall notify Broker/ Agent in writing of the overpayment. Broker/Agent shall remit the amount of the overpayment to SEPTA within thirty (30) days of the said notification or notify SEPTA of its disagreement. If Broker/Agent does not agree with SEPTA's determination, it shall be a dispute within the meaning of Paragraph 32. Disputes. (emphasis added).

Paragraph 18 (b) provides:

b. Notwithstanding paragraph "a" above, SEPTA may at any time, by written order, make changes within the general scope of the Agreement to the services to be performed by Broker/Agent. If any such change causes an increase or decrease in the estimated price of, or the time required for, the performance of any portion of the services under the Agreement, SEPTA's Contract Administrator shall make equitable adjustment in any one or more of the following: price; completion schedule; or other affected terms; and shall modify the Agreement in writing accordingly. Any claim by Broker/Agent for adjustment under this paragraph must be asserted within thirty (30) days from the date this paragraph must be asserted within thirty days from the date of receipt by Broker/Agent of the notification of change; provided however that SEPTA's Contract Administrator, if he decides that the facts justify such actions, may receive and act upon such claim at any time prior to final payment under the Agreement. Failure to agree to any adjustment shall be a dispute within the meaning of Paragraph 32. Disputes. However, nothing in this paragraph shall excuse Broker/Agent from proceeding with the Agreement as changed. Id. (emphasis added).

Hence, Paragraph 32 becomes effective when an issue arises concerning ROWComm's performance under the Agreement, when an issue of overpayment arises or when ROWComm fails to agree to changes in the Agreement. Here, the instant dispute does not involve any of the above issues but rather involves SEPTA's failure to pay under the terms of the Agreement. Paragraph 7 and 8 of the Agreement address the issue of compensation to ROWComm for services under the Agreement. Unlike paragraphs 11 and 18(b), which specifically refer to the dispute resolution provision, paragraphs 7 and 8 are silent in this regard. In light of the fact that paragraph 7 and 8 are silent with respect to the application of paragraph 32 and that the term "performance" in the Agreement refers to ROWComm's services and obligations, the court finds that it was

not the intent of the parties to apply paragraph 32 to disputes regarding paragraphs 7 and 8. Accordingly, paragraph 32 of the Agreement is not susceptible to an interpretation that would mandate the instant claims against SEPTA to be subject to alternative dispute resolution. Defendant's preliminary objection pursuant to Pa. R. Civ. P. 1028 (a)(6) is Overruled.³

II. The Complaint Fails to State a Claim for Anticipatory Breach of Contract.

In Count II of the Complaint, ROWComm alleges a cause of action for anticipatory breach of contract. SEPTA argues that Count II must be dismissed since ROWComm fails to state a cause of action for anticipatory breach of contract. The court agrees.

Under Pennsylvania law to constitute an anticipatory breach of contract there must be "an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so." 2401 Pennsylvania Ave. Corp. v. Federation of Jewish Agencies of Greater Philadelphia, 507 Pa. 166, 489 A.2d 733, 736 (Pa. 1985)(quoting McClelland v. New Amsterdam Cas. Co., 322 Pa. 429, 185 A. 198 (Pa. 1936)). A statement by a party that he will not or cannot perform in accordance with the agreement creates such breach. Oak Ridge Const. Co. v. Tolley, 351 Pa. Super. 32, 38, 504 A.2d 1343, 1346 (Pa. Super. 1985).

Here, Count II fails to allege a statement or action which constitutes an absolute or unequivocal refusal to perform on the part of SEPTA. ROWComm alleges that

³ Plaintiff in its response to the preliminary objections argues that paragraph 32's alternative dispute resolution procedure is not valid since it fails to employ an impartial decision maker. Alternative dispute resolution procedures are important functions in the law which are cloaked with finality and merit an impartial decision maker. Since this court found that the subject matter of this lawsuit did not fall within the scope of paragraph 32 which is dispositive, the court will not address the question of impartial decision makers.

SEPTA has indicated that it “may” not fulfill its obligation to pay ROWComm Commissions based on an agreed upon percentage of the revenue generated for SEPTA by each License Agreement. Compl. ¶ 79. This allegation does not create an unequivocal refusal to pay. Accordingly, Defendant’s preliminary objection is Sustained. Plaintiff is granted leave to amend Count II of the complaint within twenty days from the date of this order.

CONCLUSION

For the reasons discussed this court finds that:

1. Defendant’s preliminary objection pursuant to 1028 (a) (6) is **Overruled**.
2. Defendant’s preliminary objection pursuant to 1028 (a) (4) to Count II of Plaintiff’s Complaint is **Sustained**. Plaintiff is granted leave to amend Count II of the Complaint within twenty days from the date of this Order.

This court will issue a contemporaneous Order consistent with this Opinion.

BY THE COURT:

C. DARNELL JONES, II, J.

Dated 2/20/04