IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

UNIVERSITY MECHANICAL & ENGINEERING CONTRACTORS INCORPORATED	: NOVEMBER TERM, 2000
	: No. 1554
v.	:
INSURANCE COMPANY OF NORTH AMERICA, MERCY HEALTHCARE VENTURA COUNTY, BATESON-GOLDEN, ZURICH INSURANCE CO., INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, and	: (Commerce Program)
ACE PROPERTY AND CASUALTY INSURANCE CO.	: **Superior Court Docket No. 2811 EDA 2002**

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O P I N I O N

ALBERT W. SHEPPARD, JR., J. ..... October 28, 2002

I. Introduction

By an Order docketed on August 8, 2002, this court overruled the Preliminary Objections of defendants, Insurance Company of North America ("INA"), Indemnity Insurance Company of North America, and Ace Property and Casualty Insurance Company (collectively, the "INA defendants") to the Second Amended Complaint of plaintiffs, University Mechanical & Engineering Contractors, Inc. ("UMEC") and Emcor Group, Inc. ("EMCOR"). On September 5, 2002, the INA defendants appealed the Order, and, on September 19, 2002, they filed a statement of matters complained of on appeal pursuant to Pa. R. App. P. 1925(b).

This Opinion is submitted in support of the court's Order.

II. Background

This case involves an insurance dispute relating to underlying litigation over a hospital construction project. Mercy Healthcare Ventura County ("Mercy Healthcare"), a California non-profit public benefit corporation, had contracted in 1989 with Bateson-Golden, a California joint venture, for the construction of a hospital. In February 1996, Mercy Healthcare filed a lawsuit against Bateson-Golden and other defendants alleging significant defects in the hospital construction (the "underlying litigation").[1] Bateson-Golden, in turn, filed claims against UMEC which had performed work on the hospital construction as Bateson-Golden's subcontractor.

In the instant matter, plaintiffs UMEC and EMCOR assert that they were both insured by defendant INA's comprehensive liability insurance policy HDO G1 658789-8 (the "Policy"), INA's Casualty Insurance Program Agreement ("CIPA"), and Amendment #3 to the CIPA (the "Finite Agreement").[2] Second Amended Compl., ¶¶ 11- 14, 16; Exs. A, B and C.

Pursuant to the terms of the Policy, INA defended UMEC in the underlying litigation. Ultimately, Mercy Healthcare agreed to settle its claims for $21.5 million, and INA paid UMEC's share of that settlement which totaled $637,500. Second Amended Compl., ¶¶ 22-23.[3]

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[1] This action was docketed as Mercy Healthcare Ventura County v. Bateson-Golden, Civil No. 168140 in the California Superior Court of Ventura County. Second Amended Compl., ¶ 18.

[2] Plaintiffs assert that JWP, Inc. changed its name to EMCOR in 1994. Second Amended Compl., ¶ 26. JWP, Inc. is listed as a named insured under the Policy and as a signatory to the CIPA. Id. at Exs. A, B. EMCOR is a signatory to the Finite Agreement. Id. at Ex. C.

[3] Plaintiffs report that the settlement of the underlying litigation is now complete and that the case has been dismissed. Pltfs' Memorandum of Law In Opposition to Preliminary Objections, p. 3, n.2.

On November 15, 2000, plaintiff UMEC commenced this action, pursuant to the Declaratory Judgments Act, 42 Pa. C. S. § 7531, *et seq*., requesting the court to declare that INA is not entitled to reimbursement for monies it paid on behalf of UMEC in the defense and settlement of the underlying litigation.[4]

Although this case is still in its initial stages, the procedural history is already lengthy. First, in response to UMEC's original complaint, the INA defendants filed a notice to remove the case to the United States District Court of the Eastern District of Pennsylvania. On February 27, 2001, however, the federal district court remanded the case. On March 23, 2001, INA filed preliminary objections. In response, UMEC filed an Amended Complaint. On June 8, 2001, the INA defendants filed an Answer.

On September 19, 2001, INA filed a motion to dismiss based on *forum non conveniens* which this court denied. Next, on October 26, 2001, INA filed a motion to dismiss based on lack of subject matter jurisdiction for failure to join indispensable parties. In an Opinion dated May 1, 2002, this court granted INA's motion to dismiss without prejudice, and a Second Amended Complaint was subsequently filed.

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[4] Soon after the commencement of this case, the INA defendants brought an insurance coverage action against UMEC and EMCOR in New York state court based on reimbursement of UMEC and EMCOR's defense costs in the underlying litigation. The New York action was docketed as Insurance Company of North America, Indemnity Insurance Company of North America, and ACE Property & Casualty Insurance Company v. EMCOR Group, Inc., University Mechanical & Engineering Contractors, Inc. and Continental Casualty Company, No. 00-605478 (New York Supreme Court, New York County, December 2000). See Affirmation In Support of INA's Motion to Dismiss, Ex. A.

The Second Amended Complaint names parties deemed to be indispensable, including plaintiff EMCOR, and defendants Mercy Healthcare, Bateson-Golden, Zurich Insurance Company ("Zurich"), Indemnity Insurance Company of North America ("IINA"), and Ace Property and Casualty Insurance Company ("ACE P&C"). In addition, the Second Amended Complaint states that a declaratory judgment is necessary and appropriate to determine the rights and duties of the parties pursuant to the Policy, CIPA and Finite Agreement, and asks this court to find that defendant INA has no right to reimbursement from either UMEC or EMCOR for any amount that INA paid on UMEC's behalf in the underlying litigation. Second Amended Compl., pp. 7-9.

On June 27, 2002, the INA defendants filed Preliminary Objections to the Second Amended Complaint. In one of the objections pursuant to Pa. R. Civ. P. 1028(6), the INA defendants argued that the plaintiffs should be compelled to arbitrate their claims because the CIPA, the agreement under which the INA defendants assert plaintiffs' claims arise, requires all disputes to be arbitrated.[5]

This court overruled those Preliminary Objections by Order docketed on August 8, 2002. The INA defendants now appeal, contending that this court erred when it refused to compel arbitration.

[5] The INA defendants also argued in their preliminary objections that all claims should be dismissed pursuant to Pa. R. Civ. P. 1028(a) because UMEC lacks the capacity to assert claims under the CIPA, and that all claims should be dismissed pursuant to Pa. R. Civ. P. 1028(a)(2) and 1019(h) because plaintiffs failed to attach writings to the Second Amended Complaint. These objections, however, are not pertinent to the INA defendants' appeal. See Defs' Statement of Matters Complained of on Appeal Pursuant to Pa. R. App. P. 1925(b).

III. Discussion

Pennsylvania law "favors settlement of disputes by arbitration as a means of promoting swift and orderly disposition of claims." School Dist. of Philadelphia v. Livingston-Rosenwinkel, P.C., 690 A.2d 1321, 1322-23 (Pa. Commw. 1997), citing Flightways Corp. v. Keystone Helicopter Corp., 459 Pa. 660, 662-63, 331 A.2d 184, 185 (1975); Hazleton Area School Dist. v. Bosak, 671 A.2d 277, 282 (Pa. Commw. 1996).

To promote arbitration, a court's analysis of whether an action is required to be arbitrated is limited. Our Superior Court has held:

> 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.

Midomo Co., Inc. v. Presbyterian Housing Development Co., 739 A.2d 180, 186 (Pa. Super. 1999), quoting Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276, 283, 687 A.2d 1167, 1171 (1997). Therefore, some determinations relating to whether a case should be arbitrated are to be made by the court, but others are to be resolved by an arbitrator. "The question of whether the parties agreed to arbitrate, commonly referred to as 'substantive arbitrability,' is generally one for the courts and not for the arbitrators . . . On the other hand, resolution of procedural questions, including whether the invocation of arbitration was proper or timely is left to the arbitrator." Ross Development Co. v. Advanced Building Development, Inc., 803 A.2d 194, 196 (Pa. Super. 2002) (citations omitted).

For matters of substantive arbitrability, a court must apply two principles:

> (1) arbitration agreements are to be strictly construed and not extended by implication; and (2) when parties have agreed to arbitrate in a clear and unmistakable manner, every

> reasonable effort should be made to favor the agreement unless it may be said with positive assurance that the arbitration clause involved is not susceptible to an interpretation that covers the asserted dispute.

Midomo, 739 A.2d at 190, citing Emlenton Area Mun. Auth. v. Miles, 378 Pa. Super. 303, 307-08, 548 A.2d 623, 625 (1988), *appeal denied*, 522 Pa. 613, 563 A.2d 498 (Pa. 1989). To apply both principles, a court should employ 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." Midomo, 739 A.2d at 190-91, citing Emlenton Area Mun. Auth., 548 A.2d at 626.

Here, there are three agreements at issue -- the Policy, the CIPA and the Finite Agreement -- but only the CIPA contains an arbitration clause.[6] The CIPA's arbitration clause requires that "[a]s a condition precedent to any right of action [under the CIPA], any disputes between the COMPANY [Insurance Company of North America] and the REINSURER [Defender Indemnity Limited] or between the COMPANY [Insurance Company of North America] and the INSURED [JWP, Inc., now EMCOR, Inc.] arising out of this Agreement shall be submitted to the decision of a board of arbitration . . . ." Second Amended Compl., Ex. B, § 6.01.

Significantly, not all of the parties in this litigation are parties to the CIPA. The signatories to the CIPA include JWP, Inc. (the predecessor of EMCOR), Defendant Indemnity Limited and INA. As plaintiffs admit, UMEC is not a signatory to the CIPA, and did not contract to arbitrate disputes with the defendants. Pltfs' Memorandum in Opposition to Defs' Preliminary Objections, p. 4. In addition, the Finite Agreement, which amends the CIPA, does not add UMEC as a party to the CIPA. Id. at 4; Second

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[6] Neither the Policy nor the Finite Agreement address arbitration. Second Amended Compl., Exs. A and C.

Amended Compl., Ex. C.

The INA defendants asserted that by the terms of the CIPA, EMCOR is bound by that agreement's arbitration clause. The INA defendants further asserted that if UMEC were deemed to be a third party beneficiary of the CIPA[7], UMEC would also be bound by the CIPA's arbitration clause. Defs' Memorandum in Support of Preliminary Objections to Pltfs' Second Amended Complaint, pp. 7, 9.

In response, plaintiffs argued, in part, that the INA defendants waived their right to invoke the CIPA's arbitration clause by not raising arbitration earlier in this litigation. Pltfs' Memorandum in Opposition to Defs' Preliminary Objections, pp. 5-6. Plaintiffs asserted that INA did not raise arbitration in their New Matter to the Amended Complaint, in its motion to dismiss based on *forum non conveniens*, in discovery, in its motion to dismiss for failure to join indispensable parties, or in the action that INA filed in a New York state court against UMEC and EMCOR based on the CIPA. Id. at 6. Plaintiffs argued that the New York litigation, as well as the numerous motions in this case, evidence INA's relinquishment of its right to arbitrate. Id. at 6.

In its appeal, the INA defendants surmised that this court overruled their Preliminary Objection because it believed that the INA defendants had waived their right to invoke arbitration. Based on this premise, the INA defendants assert that the denial of their Preliminary Objection should be reversed because the issue of waiver is a matter to be determined by an arbitrator, rather than by the court. Defs'

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[7] The INA defendants deny that UMEC is a third party beneficiary of the CIPA, but that assertion does not constitute the basis for their appeal. See Defs' Statement of Matters Complained of on Appeal Pursuant to Pa. R. App. P. 1925(b).

Statement of Matters Complained of on Appeal Pursuant to Pa. R. App. P. 1925(b), p. 3. This court recognizes that our Superior Court has distinguished between matters of substantive arbitrability to be determined by a trial court, and matters of procedural arbitrability to be determined by an arbitrator. Ross, 803 A.2d at 199; Highmark Inc. v. Hospital Service Ass'n of Northeastern Pennsylvania, 785 A.2d 93, 98 (Pa. Super. 2001), *appeal denied,* 568 Pa. 720, 797 A.2d 914 (Pa. 2002). In fact, our Superior Court has held that the issue of whether a party has timely invoked an arbitration clause is a matter of procedural arbitrability because it is a matter "of interpretation of the agreement and not one of the existence or scope of the arbitration provision."[8] Ross, 803 A.2d at 199; Highmark Inc., 785 A.2d at 98, quoting Lincoln Univ. of Commonwealth Systems of Higher Educ. v. Lincoln Univ. Chapter of American Ass'n of Univ. Professors, 467 Pa. 112, 354 A.2d 576, 582 n. 11 (1976) (quoting Muhlenberg Township School Dist. Auth. v. Pennsylvania Fortunato Construction Co., 460 Pa. 260, 265, 333 A.2d 184, 187 (1975)).

The INA defendants' Preliminary Objection was overruled, however, not because of the plaintiffs' defense of waiver, but because arbitration's goal of "swift and orderly disposition of claims" would not be served by sending the case to arbitration. The Commonwealth Court in School Dist. of Philadelphia v.

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[8] The distinction between substantive arbitrability and procedural arbitrability can cause a curious result. If the court were to determine the INA defendants' preliminary objection alone (i.e., that a valid arbitration agreement exists and the dispute falls within the scope of that agreement), it would be a matter of substantive arbitrability to determined by the court. If the court were to rely on the plaintiffs' defense that the INA defendants failed to timely invoke the arbitration clause, the matter would be transformed to one of procedural arbitrability to be resolved by an arbitrator. Ross, 803 A.2d at 199; Highmark Inc., 785 A.2d at 98 (citations omitted). Such a transformation is curious because generally, a court's scope of review is not determined by what type of defense a party promotes or rejects.

Livingston-Rosenwinkel, P.C., 690 A.2d 1321, 1322 (Pa. Commw. 1997), overruled preliminary objections based on an arbitration provision for that very reason. In that case, the plaintiff school district had contracted with the defendant Livingston-Rosenwinkel ("L-R") for architectural services to build a high school. L-R, in turn, entered into an agreement with Furlow Associates to provide mechanical and engineering services for the school district's project. The agreement between L-R and Furlow contained an arbitration provision which required all claims and disputes between L-R and Furlow arising from the agreement to be arbitrated. The school district sued L-R for breach of contract and negligence based on deficiencies in the project design and contract administration. L-R then filed a Joinder Complaint against additional defendants Heery Program Management, Inc., Ang Associates, Furlow Associates, Richard Glaser & Associates, Harry E. Purnell, P.C. and David Sonnenthal, AIA. Additional defendant Furlow filed preliminary objections arguing that the arbitration provision in its agreement with L-R required the case to be dismissed and sent to arbitration.

There, the Commonwealth Court affirmed the trial court's overruling of the preliminary objections and determined that the arbitration provision was not enforceable because it would "frustrate the public policy interest in efficient dispute resolution." Id. at 1322. First, enforcement of the arbitration provision would create repetitive, piecemeal litigation. The Court explained that the plaintiff school district and the five additional defendants, other than Furlow, were not subject to the arbitration provision in the agreement between L-R and Furlow. Therefore, enforcement of the arbitration provision against Furlow alone would create two cases, one in court against the five additional defendants and one in arbitration against Furlow.

The Court explained:

> Requiring L-R to arbitrate its claims against Furlow would force L-R to relitigate the same liability and damages issues in two separate forums, before two different fact-finders; such repetitious litigation would be uneconomical for the court as well as the parties involved. Thus, in this case, arbitration would not promote the swift and orderly resolution of claims; instead it would engender a protracted, piecemeal disposition of the dispute. Under these circumstances, public policy interests are best served by joinder, which would allow for resolution of the involved disputes at one time with all parties present.

Id. at 1323.

Moreover, the Commonwealth Court noted that if Furlow's preliminary objection to send the case to arbitration had been granted, Furlow would, in essence, "compel arbitration in place of joinder." Id. at 1323. In other words, had the objection been granted, Furlow would force arbitration on the other additional defendants that had been joined by defendant L-R, even though those additional defendants were not party to the arbitration agreement. The Court noted that Rule 2252 of the Pennsylvania Rules of Civil Procedure, which permits joinder, does not make an exception for arbitration at the expense of the right to join an additional party. Id. at 1323. Therefore, the Commonwealth Court affirmed the trial court's decision not to compel arbitration.

Similar to School Dist. of Philadelphia v. Livingston-Rosenwinkel, P.C., *infra*, the instant case presents uncommon circumstances. Here, many of the parties never agreed to and could not be compelled to arbitrate the claims at issue. The CIPA's arbitration clause requires arbitration of all disputes between INA and EMCOR arising out of the CIPA. However, even assuming, *arguendo*, that UMEC is a third party beneficiary of the CIPA and would be subject to its arbitration clause, defendants Mercy Healthcare, Bateson-Golden, Zurich, IINA and ACE P&C would not be subject to the CIPA's arbitration clause. These defendants were named in the Second Amended Complaint at the insistence of INA when it filed

its motion to dismiss based on lack of subject matter jurisdiction for failure to join indispensable parties, but the agreements at issue reveal that they never entered into an arbitration agreement with plaintiffs. See Motion to Dismiss, filed October 26, 2001. If this court were to enforce the arbitration clause against EMCOR and UMEC, EMCOR and UMEC would be forced to litigate against INA in arbitration, while simultaneously constrained to litigate against Mercy Healthcare, Bateson-Golden, Zurich, IINA and ACE P&C in court. Enforcement of the arbitration clause would engender repetitive, piecemeal litigation rather than an efficient resolution of claims. Thus, despite Pennsylvania caselaw's preference for arbitration, the grant of INA's Preliminary Objection would serve only to frustrate arbitration's goal of swift and orderly dispute resolution.

Moreover, arbitration would foil the underlying premise of why defendants Mercy Healthcare, Bateson-Golden, Zurich, IINA and ACE P&C were previously deemed to be indispensable parties in this declaratory judgment action. The premise of joinder of indispensable parties is set forth in the Pennsylvania statute: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration and no declaration shall prejudice the rights of persons not parties to the proceeding." 42 Pa. C. S. §7540(a). If the plaintiffs were forced to arbitrate their claims against INA, then Mercy Healthcare, Bateson-Golden, Zurich, IINA and ACE P&C would be separated from the arbitration where their interests could be affected, and perhaps, prejudiced. Thus, arbitration under these circumstances would contravene the premise of joinder of indispensable parties. Just as the Commonwealth Court in School Dist. of Philadelphia v. Livingston-Rosenwinkel, P.C., *infra*, held that the defendant could not compel arbitration at the expense of joinder, INA cannot compel arbitration at the expense of joining indispensable parties in the declaratory action, especially when it was INA's own motion

which caused the parties to be named in the Second Amended Complaint.

Thus, to avoid repetitive, piecemeal litigation, to achieve as an efficient and orderly disposition of claims as is possible, and to fulfill the goals underlying both arbitration and the joinder of indispensable parties, this court declined to enforce the CIPA's arbitration provision.

IV. Conclusion

For these reasons, the INA defendants' Preliminary Objection requesting that plaintiffs be compelled to arbitrate their claims was overruled.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.