IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

FRED WEINER, Plaintiff,	:	August Term, 2001
v.	:	No. 2846
RANDY PRITZKER and VALERIE DERUSSO,	:	Commerce Program
Defendants.	:	Control No. 101251

O R D E R

AND NOW, this 11th day of December 2001, upon consideration of the Preliminary Objections of defendants, Randy Pritzker ("Pritzker") and Valerie DeRusso ("DeRusso"), in opposition of plaintiff, Fred Weiner ("Weiner"), the respective memoranda, all matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** and **DECREED** that the Preliminary Objections are **Sustained**. The plaintiff must arbitrate his claim under the pertinent arbitration provision set forth in Section 15 of the Executive Management Plan ("EMP").

BY THE COURT

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... December 11, 2001

Defendants, Randy Pritzker ("Pritzker") and Valerie DeRusso ("DeRusso"), filed Preliminary Objections to the Complaint of plaintiff, Fred Weiner ("Weiner"), asserting an agreement for alternative dispute resolution. For the reasons discussed, this court sustains the Preliminary Objections and orders that Weiner arbitrate his claim in accordance with Section 15 of the Executive Management Plan ("EMP").

BACKGROUND

In 1987, Weiner began employment with PBR Consulting Inc. ("PBR"), now known as Omicron Consulting, Inc. ("Omicron"). Omicron is in the business of computer information technology consulting. In 1993, Weiner and Omicron executed the EMP which provided for the award of executive management shares as an incentive and reward for the service of certain employees. The EMP contained an arbitration provision which required that any dispute arising from the subject matter of the EMP be submitted to arbitration.

In 2001, Weiner ended his employment with Omicron. He alleges that Omicron has refused to pay him $375,000.00, the value of his shares pursuant to the EMP. In August 2001, Weiner commenced this action against Pritzker and DeRusso, only, asserting a violation of Pennsylvania's Wage Payment and Collection Law ("WPCL") and seeking to collect the amount he is allegedly owed. Pritzker and DeRusso timely filed Preliminary Objections.

DISCUSSION

I. There Exists a Valid Arbitration Agreement Between the Parties

Pritzker and DeRusso argue that there exists a valid arbitration agreement between the parties. Weiner disagrees, arguing that because the EMP was entered into between Omicron and Weiner, Pritzker and DeRusso, as non-signatories, have no right to enforce the arbitration provision. Pl's Response Mem. of Law at 9. This court disagrees.

The standard of review for a preliminary objection asserting an agreement for alternative dispute resolution is well established.[1] When there is a dispute whether arbitration should be compelled, "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 Company, Inc. v. Presbyterian Housing Development Co., 739 A.2d 180, 186 (Pa. Super. 1999). See also Santiago v. State Farm Insurance Co., 453 Pa. Super. 343, 683 A.2d 1216, 1217-18 (1996). Thus, when considering a preliminary objection asserting an agreement to arbitrate, a court may not consider the merits of the dispute. Mesa v. State Farm Insurance Co., 433 Pa. Super. 594, 641 A.2d 1167, 1168 (1994).

As our Pennsylvania Supreme Court observed, agreements to settle disputes by arbitration are not only valid but favored by state statute. Borough of Ambridge Water Authority v. Columbia, 458 Pa. 546, 328 A.2d 498, 500 (1974). Further, interpretation of an arbitration provision is controlled by rules of contractual construction. Thus, proper interpretation of a contract "is a question of law.... [T]he ultimate goal is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement." Liddle v. Scholze, 768 A.2d 1183, 1184 (Pa.Super 2001) (citations omitted).

Applying these standards this court submits, first, that a valid agreement to arbitrate exists between Weiner, Pritzker and DeRusso and, further, that the dispute involved is within the scope of that arbitration agreement. Although it is true that the parties to the EMP are Weiner and Omicron, by virtue of their

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[1]Although the instant case is in the form of preliminary objections asserting an agreement for alternative dispute resolution, this court applies the same standard as that for a petition to compel arbitration. Midomo Company, Inc. v. Presbyterian Housing Development Co., 739 A.2d 180 (Pa. Super. 1999) (holding that although appellants' preliminary objections are not precisely in the form of a petition to compel arbitration, nevertheless, "the court will not exalt form over substance." Id. at 186.)

relationship with Omicron, Pritzker and DeRusso are also parties to this arbitration agreement and can enforce the agreement. In other words, non-signatories to an arbitration agreement can enforce such an agreement where there is an obvious and close nexus between the non-signatories and the contract or the contracting parties. Dayhoff Inc. v. H.J. Heinz Inc., 86 F.3d 1287 (3d Cir.1996) cert denied, 519 U.S. 1028, 117 S.Ct. 583, 136 L.Ed.2d 513 (1996).[2]

One obvious and close nexus is the relationship created between a principal and an agent. The three basic elements of agency are the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking, and the understanding of the parties that the principal is to be in control of the undertaking. Restatement (Second) of Agency § 1. Moreover, agency "is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act." Restatement (Second) of Agency § 1 comment (a). Thus, agency law rationale has been used to bind non-signatories to arbitration agreements. Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3d Cir.1993). Specifically, "because a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements." Id. at 1121.

Applying agency principles to this case, this court finds that since Omicron is bound to the EMP, its employees, Pritzker and DeRusso, are also bound and therefore can enforce the arbitration agreement. Indeed, Weiner does not deny that Pritzker and DeRusso are agents of Omicron. In his Complaint, Weiner

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[2] Although decisions of federal courts construing Pennsylvania law are not binding on this court, they are persuasive. Hutchinson v. Luddy, 763 A.2d 826, 837 n.8 (Pa.Super.Ct. 2000); In re Insurance Stacking Litig., 754 A.2d 702, 705 (Pa.Super.Ct. 2000).

avers that Pritzker is "a director, the chief executive officer, president and active controlling shareholder." Pl's Complaint at ¶ 2. He avers that "DeRusso is the chief operating officer of Omicron." Id at ¶ 3. He also alleges that "at all relevant times, Pritzker and DeRusso, as officers and/or directors and shareholders of Omicron, actively controlled all aspects of Omicron's business operations." Id at ¶ 20. In fact, in asserting his cause of action for an alleged violation of the WPCL, Weiner avers that "Pritzker and DeRusso, together with Omicron, are each an 'employer' as defined under the WPCL."[3] Having described Pritzker and DeRusso as agents of Omicron, Weiner cannot now ignore the ramifications of agency theory and argue that Pritzker and DeRusso are not bound to the arbitration agreement, which their principal, Omicron, entered into with Weiner. Accordingly, this court finds that a valid arbitration agreement exists between Pritzker and DeRusso, as agents of Omicron, and Weiner.

Furthermore, this court finds that the current dispute is within the scope of the arbitration agreement. In the EMP, Weiner and Omicron agreed to arbitrate "matters which are the subject of" the EMP. Pl's Complaint, Exhibit A at 15. Here, the subject of the EMP is to "desig[n] a plan that will award performance shares" to participating employees. Id at 1. Since Weiner specifically alleges that Omicron has refused to pay him these performance shares, his current WPCL cause of action falls well within the "matters which are the subject of" the EMP arbitration agreement. In summary, having found that a valid arbitration agreement exists between the parties and that the dispute is within the scope of the arbitration agreement, this court must require Weiner to arbitrate his claim.

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[3]The WPCL defines "employer" as "every person, firm, partnership, association, corporation, receiver or other officer of a court of this Commonwealth and any agent or officer of any of the above-mentioned classes employing any person in this Commonwealth." 43 P.S. §260.2a.

II. The Arbitration Agreement is Valid Under the WPCL

Weiner urges that "[a]n agreement to arbitrate wage payment disputes is unenforceable as a matter of law under the WPCL." Pl's Reply Mem. of Law at 5. Specifically, Weiner argues that since the WPCL unambiguously guarantees an absolute right to pursue a wage claim in a court of law, and further that the WPCL expressly forbids the contravention by private agreement of any provision of the WPCL, the arbitration agreement involved here is invalid. Id at 6. This court disagrees.

Pennsylvania courts have determined that "the underlying purpose of the WPCL is to remove some of the obstacles employees face in litigation by providing them with a statutory remedy when an employer breaches its contractual obligation to pay wages". Hartman v. Baker, 766 A.2d 347, 352 (Pa. Super. 2000), reargument denied, appeal denied 764 A.2d 1070, 564 Pa. 712. Moreover, the WPCL "only establishes an employee's right to enforce payment of wages and compensation to which an employee is otherwise entitled by the terms of an agreement". Id.

Although the WPCL does forbid the contravention of a provision by private agreement, a plain reading of the pertinent provision (upon which Weiner specifically relies) reveals that the WPCL does not grant an absolute right to file an action in court. In fact, 43 P.S. § 260.9a (b) reads in pertinent part:

> Actions by an employee, labor organization, or party to whom any type of wages is payable to recover unpaid wages and liquidated damages **may** be maintained in any court of competent jurisdiction . . .

(emphasis added).[4] The legislature's reliance on the word "may" demonstrates that maintaining an action

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[4]Weiner also directs this court to 43 P.S. § 260.9a(f) which reads:
The court in any action brought under this section shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow costs for reasonable attorneys' fees of any nature to be paid by the defendant.

in a court of competent jurisdiction is permissive. Commonwealth v. Barniak, 350 Pa.Super. 459, 504 A.2d 931 (1986) (holding that "[a]lthough the word 'shall' might, in a proper setting, be interpreted as permissive, the word 'may' can never be given the imperative meaning."(citing Weiner v. Hospital Service Plan of the Lehigh Valley, 187 Pa.Super. 244, 144 A.2d 575, 577 (1958))). In fact, Weiner has not demonstrated where in the WPCL there exists language that supports his position that he has on absolute right to sue in a court.[5]

Thus, finding that the WPCL does not preclude application of the arbitration agreement the parties entered into, this court holds the arbitration agreement to be valid.

CONCLUSION

For these reasons, this court sustains the Preliminary Objections and requires that the plaintiff arbitrate his claim. A contemporaneous Order will be entered of record.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

However, this court finds this provision is not dispositive in determining whether the WPCL has an absolute right in maintaining an action in court, in that it merely directs the court to allow for reasonable attorney's fees for plaintiffs.

[5]In support of his argument, Weiner does, however, direct this court to Colorado and West Virginia case law interpreting their respective wage acts which are somewhat similar to that of Pennsylvania's WPCL. However, this court is unpersuaded by these decisions. Further, they are not binding on Pennsylvania courts construing Pennsylvania law. Hutchinson v. Luddy, 763 A.2d 826, 836 (Pa.Super.Ct. 2000).