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

FRANKLIN TOWNE CHARTER HIGH SCHOOL and FRANKLIN TOWNE CHARTER ELEMENTARY SCHOOL,	:	APRIL TERM, 2017
	:	NO. 01474
Plaintiffs,	:	COMMERCE PROGRAM
v.	:	2306 EDA 2017
ARSENAL ASSOCIATES, L.P., ARSENAL CONDOMINIUM ASSOCIATION and MARK HANKIN,	:	
Defendants.	:	

Djerassi, J. January 17, 2018

OPINION

Defendants, Arsenal Associates, L.P., Arsenal Condominium Association, and Mark Hankin appeal from this court's order docketed on July 5, 2017, in which the court granted in part defendants' Motion to Compel Arbitration and Application for Stay. The court granted the Motion with respect to all claims arising under the Arsenal Condominium's Declaration of Condominium, which contains an arbitration clause, but not with respect to the claims arising under a separate Real Estate Sale & Purchase Agreement ("RESPA"), which does not contain an arbitration provision. To avoid the parties having to litigate on two fronts, and because the RESPA claims were far more immediate and substantial than the claims under the Declaration of Condominium, the court stayed the arbitration of the latter pending the resolution of the former.

Plaintiff, Franklin Towne Charter High School (the "High School")[1] owns four condominium units at, and 24.5710% of the ownership interests in, The Arsenal Condominium (the "Condominium"), which is controlled by defendant Arsenal Condominium Association (the "Condo Association"). Defendant Arsenal Associates, L.P. (the "Limited Partnership") was the developer of the Condominium and the declarant under the Uniform Condominium Act.

The Limited Partnership still owns the majority of the units at the Condominium and thereby controls the Condo Association. Defendant Mark Hankin is President of the General Partner[2] of the Limited Partnership, so he controls the Limited Partnership which controls the Condo Association. As a result, Mr. Hankin is also President of the Condo Association.

In this action, the High School asserts claims against the defendants for injunctive relief, for breach of the Real Estate Purchase Agreement ("RESPA") for Unit 215, and for breach of fiduciary duty for allegedly failing to provide that Unit with the promised 600 amps of power, (the "Electrical Service"),[3] so that the Unit can be used for its intended purpose as a gymnasium for the High School and as additional classroom space for the Elementary School.

The High School also asserts claims for injunctive relief and breach of fiduciary duty against defendants for allegedly refusing to execute a proposed Amendment to the Declaration of Condominium regarding the High's School's responsibility to maintain the storm water

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[1] The High School intends to rent space in the Unit to the Franklin Towne Charter Elementary School, which it avers is a third party beneficiary of the RESPA between the High School and the Limited Partnership. *See* Amended Complaint, ¶ 20.

[2] *See* RESPA, p. 21 (Arsenal Inc. is the General Partner of the Limited Partnership.)

[3] The plaintiff schools also assert claims for Breach of the Covenant of Good Faith and Fair Dealing, for attorney's fees and costs, and for punitive damages based upon the alleged breaches of the RESPA. *See* Amended Complaint, Counts IV, VI, and VII. The court has not yet been asked to rule on the viability of any of the claims in the Amended Complaint by way of Preliminary Objection.

management system, so that the Schools may obtain a Certificate of Occupancy ("C of O") from the City and utilize the space for the 2016-2017, and now the 2017-2018, school year.

The High School further asserts a claim for breach of fiduciary duty, because Mr. Hankin allegedly insists that the High School employ, and pay outsized fees to, companies owned by Mr. Hankin to perform necessary work on the Units.

Finally, the High School asserts a claim for breach of fiduciary duty based on defendants' alleged failure, last year, to remove snow and to salt the sidewalks around the units as required under the Declaration of Condominium.

Defendants filed a Motion to Compel Arbitration because the Declaration of Condominium contains the following provision:

> Arbitration. Except as expressly set forth below, any and all controversies, claims or disputes of any kind or nature whatsoever arising out of or relating in any way to the Condominium, including controversies, disputes or claims involving performance under this Declaration or breach thereof, shall be settled by final and binding arbitration administered by the American Arbitration Association in Philadelphia, Pennsylvania under its Commercial Arbitration Rules as modified herein.[4]

The Condo Association and the Philadelphia Agency for Industrial Development are the only signatories to the Declaration of Condominium and its Amendments.

At most, the Declaration's arbitration provision applies to claims between a condominium owner and the Condo Association, such as the High School's relatively minor damage claim based on the Condo Association's alleged failure to keep the sidewalks clear last winter. However, the Declaration's arbitration provision does not cover disputes between the buyer and the seller of a condo unit, where their relationship is defined by a separate contract that

[4] Fourth Amendment to Declaration of Condominium of Arsenal Condominium, § 21.1.

does not call for arbitration of disputes, such as the High School's more sizeable claims for injunctive relief against the Limited Partnership arising out of the RESPA.

> Arbitration is a matter of contract, and parties to a contract cannot be compelled to arbitrate a given issue absent an agreement between them to arbitrate that issue. Even though it is now the policy of the law to favor settlement of disputes by arbitration and to promote the swift and orderly disposition of claims, arbitration agreements are to be strictly construed and such agreements should not be extended by implication.
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> In general, only parties to an arbitration agreement are subject to arbitration. However, a nonparty, such as a third-party beneficiary, may fall within the scope of an arbitration agreement if that is the parties' intent.[5]

In the Elwyn case, the individual defendant was not a party to the contract containing an arbitration provision, which was executed by the plaintiff corporation and another corporation of which the individual defendant was president. Therefore, the court found that no valid arbitration agreement existed between the plaintiff corporation and the individual defendant, and the individual defendant did not have a right under the contract between the plaintiff corporation and his corporation to compel arbitration of the plaintiff corporation's claims against him individually.[6] Similarly, in this case, the High School's claim against the Limited Partnership does not arise under the Declaration of Condominium containing the arbitration provision; instead the High School and the Limited Partnership's dispute is based on the RESPA between them, and this does not contain an arbitration provision.

Under the RESPA, the Limited Partnership promised to "vote to have the Association, at the Association's expense, install a second transformer in the substation adjoining the Building (the "Substation"), and cause the Association to guarantee to [the High School] at Closing

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[5] Elwyn v. DeLuca, 48 A.3d 457, 461 (Pa. Super. 2012).

[6] *See id.*, 48 A.3d at 462–63.

availability to the Unit of 600 amps (as measured without adjustment for start-up loads) at 440 or 480 volts."[7] According to the plaintiffs, this Electrical Service "is required for the heaters that supply the heat necessary to cure the concrete subfloor of the gymnasium and the power is necessary to renovate the three interior floors of the pre-existing building."[8]

Also under the RESPA, the Limited Partnership agreed "to cooperate, at no cost to [the Limited Partnership] and without imposition of obligations on the [the Limited Partnership], with [the High School's] prosecution of the Project Approvals, and to join in or execute any applications or other documents, which are prepared by [the High School] and required by any Governmental Authorities or the Association in order to obtain the Project Approvals."[9] The schools aver that, "[i]n order to obtain a Certificate of Occupancy for the preexisting building, the gymnasium, and the athletic field, the High School must meet the City of Philadelphia's storm water management requirements", which allegedly includes a requirement that the Condo Association execute "an amendment to the Condominium's Declaration designating the High School as responsible for the storm water management system."[10] The High School further claims that the Limited Partnership is required under the RESPA to cause the Condo Association to adopt that Amendment, since the Limited Partnership, through Mr. Hankin, currently controls the Condo Association.[11]

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[7] RESPA, ¶ 7(g)(ii).

[8] Amended Complaint, ¶ 28.

[9] RESPA, ¶ 7(f).

[10] Amended Complaint ¶ 38-39.

[11] *Id.*, ¶¶ 50, 54.

The High School also claims that defendants have insisted that the High School use a general contractor owned by Mr. Hankin to install the Electric Service. The High School avers that the Limited Partnership is therefore using its claim of "breach of [the RESPA] as leverage in an effort to compel [the High School] to enter into a separate power contract that will impermissibly line the pockets of [Mr. Hankin]."[12] This court at this point has no view on the accuracy of this claim but it is one that may go to breach of the Limited Partnership's fiduciary duty to offer condo units for sale to the High School with clean hands.

As the Electric Service and the Certificate of Occupancy were key to the ability of the schools to use the property that the High School purchased, the court was asked to apply equitable relief. We focused on the irreparable harm the dispute was costing hundreds of children who were unable to enjoy the benefits of a planned gymnasium.

Our injunctive analysis noted plaintiffs' claims for both the Electric Service and the Certificate of Occupancy arise under the RESPA, which does not contain an arbitration provision. We conclude the issue whether the Limited Partnership, through its control of the Condo Association, warranted necessary electrical power for the gymnasium is an interpretation of the RESPA itself. We note this question is not the same as whether the Condo Association also breached a more general fiduciary duty to protect the interests of its members under its Condo Declarations.

In summary, the plaintiff schools have twice asked this court to issue temporary, and ultimately permanent, injunctions to force the Limited Partnership, acting through Mr. Hankin, to cause the Association to install Electrical Service and assist with the issuance of a Certificate of Occupancy, as allegedly agreed by the Limited Partnership in the RESPA. Under the facts

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[12] *Id.*, ¶ 37.

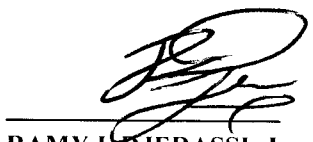
presented so far related to the Limited Partnership's alleged interference with use of High School property and opening of a school gymnasium, injunctive relief by this court was appropriate.[13]

For these reasons, we stayed arbitration of damage claims arising under the Declaration of Condominium until after resolution of the injunctive claims governed by the RESPA.[14]

CONCLUSION

For all the foregoing reasons, the court respectfully requests that its July 5th Order be affirmed on appeal.

BY THE COURT



RAMY I. DJERASSI, J.

[13] *See* Langston v. Nat'l Media Corp., 420 Pa. Super. 611, 618, 617 A.2d 354, 357–58 (1992) (While arbitrators have the ability to decide equitable as well as legal claims, it is still appropriate for the court to rule on injunctions even in cases where some claims may ultimately be sent to arbitration.) We note in this particular case that an arbitrator's decision in equity could only be enforced by this court, which would be petitioned to do so without the benefit of its own determination of public interest and irreparable harm.

[14] The injunctive claims regarding the C of O and the Electrical Service may have resolved while this appeal was pending, so the appellate court may wish to remand some or all of the remaining damages claims to this court to send to arbitration.