

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

DELTA/B.J.D.S.	:	September Term, 2004
	:	
Plaintiff,	:	No. 1521
	:	
v.	:	(Commerce Program)
	:	
ST. PAUL FIRE AND MARINE INSURANCE	:	
COMPANY, et al.	:	Control Nos. 041495 and 031355
Defendants.	:	
	:	

ORDER

AND NOW, this 10th day of June 2005, upon consideration of defendants' Preliminary Objections, the responses in opposition, the respective memoranda, all matters of record and in accord with the Opinion being contemporaneously filed with this Order, it is **ORDERED** that the Preliminary Objections pursuant to Pa.R.C.P. 1028 (a)(6) are **SUSTAINED** and Plaintiff's Complaint is **DISMISSED** without prejudice. The court holds that this matter is subject to alternative dispute resolution, as originally agreed by the parties.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

**THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
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Defendants.	:	
	:	

OPINION

ALBERT W. SHEPPARD, J. June 10, 2005

Before the Court are defendants' Preliminary Objections to Plaintiff's Complaint. For the reasons discussed, the Preliminary Objections are **sustained**.

DISCUSSION¹

Defendants have filed Preliminary Objections to Plaintiff's Complaint pursuant to **Pa.R.C.P. 1028 (a)(6) – Existence of Agreement for Alternative Dispute Resolution. 42** Pa.C.S.A. § 7303, which governs such matters, states:

A written agreement to subject any existing controversy to arbitration or a provision in a written agreement to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity relating to the validity, enforceability or revocation of any contract.

¹ While this court is mindful of plaintiff's argument that the instant Preliminary Objections were untimely, this court finds no prejudice and believes it appropriate to determine the Preliminary Objections on the merits. Gale v. Mercy Catholic Medical Center Eastwick, Inc., 698 A.2d 647, 649 (Pa. Super. 1997).

42 Pa.C.S.A. § 7303. Judicial inquiry to determine whether a suit should proceed to arbitration requires a determination whether: (1) 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, 284, 687 A.2d 1167, 1171 (1997); Messa v. State Farm Insurance Company, 433 Pa. Super. 594, 597, 641 A.2d 1167, 1168 (1994); PBS Coal, Inc. v. Hardhat Mining, Inc., 429 Pa. Super. 372, 376-77, 632 A.2d 903, 905 (1993).

According to the Complaint, plaintiff Delta/B.J.D.S. commenced this action against St. Paul Fire & Marine and St. Paul Travelers (collectively “St. Paul”) claiming breach of payment bond obligations. The genesis of the Complaint was a construction contract entered into between Turner Construction Company (“TKM”), as general contractor and Parker Inc./Willard (“Parker”) as subcontractor, with regard to the construction of the Lincoln Financial Field in Philadelphia, Pennsylvania (the “Contract”). The Contract contained a valid agreement for alternative dispute resolution in ¶ 40, which required disputes which “arise out of or relates to the Agreement or its breach” to be resolved by direct discussion or mediation and “...if mediation fails, the parties will settle the dispute by arbitration.” Def. Mem. Exh. 2 at ¶ 40. Thus, the pertinent inquiry becomes whether the instant dispute falls within the scope of this provision. This court finds that it does.

Whether a particular dispute falls within a contractual arbitration provision is a matter of law for the court to decide. Shaddock v. Christopher J. Kaclik, Inc., 713 A.2d 635, 637 (Pa. Super. 1998). Pennsylvania law advocates strict construction of arbitration agreements and dictates that any doubts or ambiguity as to arbitrability be resolved in favor of arbitration. Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276, 687 A.2d 1167, 1171 (1997). The fundamental

rule in construing a contract is to ascertain and give effect to the intention of the parties. Lower Frederick Township v. Clemmer, 518 Pa. 313, 543 A.2d 502, 510 (1988). In order to determine the meaning of the agreement, the court must examine the entire contract, taking into consideration “ . . . the surrounding circumstances, the situation of the parties when the contract was made, the objects they apparently had in view and the nature of the subject matter.” Huegel v. Mifflin Const. Co., Inc., 796 A.2d 350 (Pa. Super. 2002).

Here, the Bond specifically incorporates the Contract and otherwise integrates and incorporates its terms and conditions. Comp. Exh. D. It specifically provides:

Whereas, Principal [Parker] has by written agreement dated June 1, 2001 entered into a subcontract with TKM for the performance of HVAC piping work...which subcontract is by reference made a part thereof...

Id. Based on the foregoing, this court finds that the Contract defines the rights and obligations of the parties, including the requirement that the parties submit their disputes to alternative dispute resolution. As such, the instant dispute is beyond the jurisdiction of this court.

In opposition, plaintiff argues that the Bond itself contains express language which specifically contradicts that dispute resolution clause in the Contract. Specifically, plaintiff relies upon the following language, “..no suit or action shall be commenced hereunder by any Claimant...(c) other than in a state court of competent jurisdiction...and not elsewhere.” Compl. Exh. D. at 3. However, the court submits that plaintiff has misapplied this provision. What it actually says is that any “suit or action” must be commenced in state court. It does not speak to the issue of arbitration or mediation and certainly does not expressly preclude it, as plaintiff argues.

Based on the foregoing, defendants' Preliminary Objections are **sustained** and plaintiff's Complaint is **dismissed without prejudice**. The matter should be submitted to alternative dispute resolution, as originally agreed by the parties.

The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.