IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JAMES V. HEALY and, SYLVIA T. HEALY, Plaintiffs,	)	C.A. No. 06-03-030
vs.	)	
SILVERHILL CONSTRUCTION, COMPANY, Defendant.	)	

Richard E. Berl, Jr., Esquire, Attorney for Plaintiff
Dean A. Campbell, Esquire, Attorney for Defendant

DECISION ON MOTION TO ENFORCE SETTLEMENT AGREEMENT

At the commencement of trial in this matter Defendant-Appellee Silverhill Construction Company for the first time moved to dismiss this breach of contract action, on the ground that the terms of the contract expressly provided for mandatory arbitration to resolve disputes between the parties. The Court ordered briefing of the issue. The Court denies the motion to dismiss, for the reasons set forth below.

FACTS AND PROCEDURAL HISTORY

This is an appeal *de novo* from the Justice of the Peace Court. The matter was fully litigated and tried below, and judgment was entered in favor of Defendant Silverhill. Plaintiffs the Healys appealed to this Court.

On February 14, 2002 Plaintiffs and Defendant entered into a "fill in the blank" pre-printed "Standard Form of Agreement between Owner and Contractor" (the "Standard Form"), for the construction by Defendant of a single-family home and garage, which was completed in November, 2002. The Standard form is published by

the American Institute of Architects ("AIA") and is designated as an "A101/CMa" form. In addition to the pre-printed terms, on page six of the Standard Form the contract contains space for listing "Supplementary and other Conditions of the Contract," under which is typed, *inter alia,* "AIA General Conditions A201/CMa 1992." The actual language of these referenced "general conditions" apparently were not physically attached to the contract, but were incorporated by reference.

On November 9, 2005 Plaintiffs filed suit against Defendant in Justice of the Peace Court alleging defective construction under the contract. The matter proceeded to trial, and Defendant was represented therein by the same counsel as in this appeal *de novo*. Judgment was entered in favor of Defendant, and Plaintiffs appealed to this Court. In response to Plaintiffs' complaint on appeal, Defendant filed an answer which, *inter alia,* states several one-phrase, apparently boilerplate affirmative defenses, including "lack of subject matter jurisdiction." A review of the docket reveals that the parties have engaged in both pretrial motion and discovery practice. Defendant filed, and subsequently withdrew, a motion to dismiss on grounds other than those in the present motion. In the pretrial stipulation, Defendant asserted that at trial it would prove the affirmative defenses of statute of limitations and estoppel.

On the day of trial, Defendant for the first time claimed that the contract between the parties provided for mandatory arbitration, citing the provisions of the incorporated-by-reference AIA General Conditions A201/CMa, which do so provide. Plaintiffs claim that Defendant has waived his right to demand arbitration. Defendant claims it was not aware of the arbitration provision in the contract until provided a copy of the A201/CMa shortly before trial.

DISCUSSION

Public policy favors the resolution of disputes through arbitration.[1] However, a party may waive a contractual right to arbitrate by actively participating in a lawsuit or taking other action inconsistent with the right to arbitrate.[2] Waiver of the right to arbitrate requires intentional relinquishment of a right with both knowledge of its existence and manifested intention to relinquish it.[3] Since this waiver cannot be lightly inferred, the party seeking to prove waiver of arbitration must do so by clear and convincing evidence.[4]

Defendant claims it was unaware of its contractual right to mandatory arbitration because it was not provided a copy of the incorporated AIA General conditions by the Plaintiff until shortly before trial. However, Defendant is a corporation in the business of construction, and such a sophisticated party to a construction contract at the least should have read the contract and sought out the incorporated terms. Failing to read a contract does not justify avoidance of the contractual terms. [5] In *Rose Heart v. Ramesh C. Batta Associates, P.A.*,[6] the parties entered into contract that incorporated by reference a mandatory arbitration provision.[7] Rose Heart argued that the provision requiring arbitration was not properly incorporated and therefore it was not bound by its terms. However, the Superior Court held that "Rose Heart is presumed to have read the . . . agreement and, by signing it, agreed to be bound by the terms set forth in the agreement and those incorporated by reference."[8] This Court therefore will determine Silverhill's motion as if it had full knowledge of the mandatory arbitration provision at

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[1] *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908 (Del., 1989).
[2] *Falcon Steel Co. v. Weber Eng'g Co.*, 517 A.2d 281 (Del.
[3] *James Julian, Inc. v. Raytheon Serv. Co.*, 424 A.2d 665, 668 (Del. Ch., 1980)
[4] *Id.*
[5] *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 913 (Del., 1989).
[6] 1994 WL 164581 (Del. Super.)
[7] *Id*.
[8] *Id.* at *4.

the time of execution of the agreement. Thus, the primary issue presented is whether Silverhill's actions in the course of litigating this agreement clearly evidence an intent to waive the right to arbitration. In making this determination, other courts have focused on three factors: The amount of non-arbitration action that a party (either plaintiff or defendant) takes to prosecute or defend a claim;[9] whether the party has asserted they will or will not be moving to enforce an arbitration provision;[10] and whether the non-moving party would be prejudiced by an untimely demand for arbitration.[11]

It is patently clear from the lower court's docket and this Court's docket that both parties have engaged in extensive litigation to both prosecute and defend this claim. Plaintiffs took this matter to trial in the Justice of the Peace Court. Defendant was fully represented throughout the litigation and at trial below by counsel. The record below reflects no claim by Defendant that it had a right to arbitrate the claim filed against it. When Plaintiffs appealed the judgment in Defendant's favor to this Court, Defendant answered the complaint, filed a motion to dismiss on other grounds, subsequently withdrew said motion, participated in a pretrial conference and drafting of a pretrial stipulation, and both responded to and also served written discovery requests. Defendant's litigation actions inconsistent with arbitration were substantial, and clearly and convincingly evidence Defendant's intent to waive, or not to engage in arbitration to resolve this dispute.

Further, at no time during any of this litigation does it appear from the record that Defendant asserted a request or desire to arbitrate the matter. The "boilerplate"

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[9] *Ballenger v. Applied Digital Solutions, Inc.* 2002 WL 749162 (Del. Ch.); *W.R. Ferguson, Inc. v. William A. Berbusse, Jr., Inc.* 9 Storey 229, 216 A.2d 876 (Del. Super., 1966); *Wilshire Restaurant Group, Inc. v. Ramada Inc.,* 1990 WL 195910 (Del. Ch.); *Zaret v. Warners Moving & Storage* 1995 WL 56708 (Del.Ch.)

[10] *Ballenger v. Applied Digital Solutions, Inc.* 2002 WL 749162 (Del. Ch.); *Rose Heart, Inc. V. Ramesh C. Batta Associates, P.A.,* 1994 WL 164581 (Del. Super.); *James Julian, Inc. v. Raytheon Serv. Co.*, 424 A.2d 665, 668 (Del. Ch., 1980); *The Town of Smyrna v. Kent County Levy Court,* 2004 WL 2671745 (Del. Ch.); *Action Drug Co. v. R. Baylin Co.,* 1989 WL 69394 (Del. Ch.)

[11] *Wilshire Restaurant Group, Inc. v. Ramada Inc.,* 1990 WL 195910 (Del. Ch.); *Ballenger v. Applied Digital Solutions, Inc.* 2002 WL 749162 (Del. Ch.); *Action Drug Co. v. R. Baylin Co.,* 1989 WL 69394 (Del. Ch.)

affirmative defenses Defendant filed along with its Answer included "lack of subject matter jurisdiction." However, unlike the litigant in *Rose Heart*[12], *supra,* who was found to have preserved his right to arbitrate by specifically asserting such in his pleading, here Defendant's boilerplate assertion of "lack of subject matter jurisdiction" did not explicitly assert the right to arbitrate as the grounds therefore.

Defendant's Answer also contained the boilerplate affirmative defense of "arbitration and award." However, the ground for such a defense is not that the matter *should* be resolved by arbitration; rather, it is that the matter *has been* so resolved.[13] That is not the case presented here. Also, as more fully addressed below, Defendant did not assert either of these affirmative defenses in the original action in the court below. In determining whether a party's acts evidence intent to waive arbitration, the Courts look at whether the party has explicitly waived or asserted the right to arbitrate.[14] I find the Defendant did not explicitly assert his right to arbitrate, and that its actions clearly evidenced an intent to waive the right.

Finally, Plaintiffs would be prejudiced by the granting of Defendant's motion at this stage of the proceedings. Plaintiffs have now twice been engaged in litigating their claim, the first time to adverse judgment and this time to the commencement of trial. They are represented by counsel and it is clear they have expended time and resources in preparing for trial. Further, the granting of such a motion, made for the first time on an appeal *de novo*, would have unique adverse consequences for the Plaintiffs. The basis for Defendant's motion is that, if the arbitration provision applies, this Court lacks subject matter jurisdiction to hear the case, since the only available forum for the

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[12] 1994 WL 164581 at 2.

[13] See *Ballentine's Law Dictionary 89 (3rd ed. 1969):* "**arbitration and award**: A plea raising the defense that the mater in suit *has been previously settled* by an arbitration." (*Emphasis added.)*

[14] *Ballenger v. Applied Digital Solutions, Inc.* 2002 WL 749162 (Del. Ch.); *Rose Heart, Inc. V. Ramesh C. Batta Associates, P.A.*, 1994 WL 164581 (Del. Super.); *James Julian, Inc. v. Raytheon Serv. Co.*, 424 A.2d 665, 668 (Del. Ch., 1980); *The Town of Smyrna v. Kent County Levy Court*, 2004 WL 2671745 (Del. Ch.); *Action Drug Co. v. R. Baylin Co.*, 1989 WL 69394 (Del. Ch.)

dispute is arbitration. If this Court lacks subject matter jurisdiction, then it can only dismiss the appeal *de novo*. If this appeal were dismissed, the judgment in favor of Defendants below would stand. It is clear that granting Defendant's untimely demand for arbitration, at this extremely late stage of the game would greatly prejudice Plaintiffs.

In addition, inasmuch as Defendant failed to assert its right to arbitrate in the Justice of the Peace Court, its demand for arbitration here raises an issue not raised below. To permit it to do so would violate the "Mirror Image Rule" now embodied in Civil Rule 72.3 (c). The Court may prevent such a loss of jurisdiction by refusing to allow Defendant to press the issue before this Court, thereby maintaining identity of issues with the matter below.[15]

CONCLUSION

Defendant is presumed with knowledge of the terms of the contract it executed, including those terms incorporated by reference, which included mandatory arbitration. Plaintiffs waived their contractual right to arbitration by filing suit in the court below. Defendant clearly and convincingly evidenced its intent to waive arbitration by its full participation in litigation in both the court below and this Court. To permit it to insist on arbitration at this late stage of the game would be both prejudicial to Plaintiff, and violate this Court's Mirror Image Rule and Civil Rule 72.3 (c). Defendant's motion is therefore **DENIED.** Trial will be rescheduled for the earliest available date.

IT IS SO ORDERED this _____ day of September, 2007.

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Kenneth S. Clark, Judge

[15] *See Silverview Farm, Inc. v. Laushey*, 2006 WL 1112911 (Del.Comm.Pl.).