IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

AQUILA OF DELAWARE, INC.,	)	
	)	
Plaintiff,	)	C.A. No. N10C-07-260 JAP
	)	
v.	)	Jury Trial Demanded
	)	
WILMINGTON TRUST COMPANY,	)	
	)	
	)	
Defendant.	)	

Submitted: January 18, 2011
Decided: April 19, 2011

Upon Defendant's Motion to Dismiss
GRANTED

MEMORANDUM OPINION

Appearances:

Neil J. Levitsky, Esquire, Wilmington, Delaware
Attorney for Plaintiff Aquila of Delaware, Inc.

Seth J. Reidenberg, Esquire, Wilmington Delaware
Attorney for Defendant Wilmington Trust Company

JOHN A. PARKINS, JR., JUDGE

Before the Court is Wilmington Trust Company's motion to dismiss on the ground that the claims contained in Aquila's complaint are subject to binding arbitration.

Factual and Procedural Background

Aquila operates drug and alcohol rehabilitation centers in the area. Between 2003 and 2010 Aquila's billing manager, Karen Hunt, stole roughly $400,000 from Aquila by taking checks intended for Aquila and depositing them in her personal account at Wilmington Trust. Aquila, whose business account is also with Wilmington Trust, has brought suit against the bank alleging various theories to conversion, negligence, breach of fiduciary duty and tortuous interference. Wilmington Trust has moved to dismiss, claiming that the documents forming the basis of the relationship between it and Aquila requires the parties to arbitrate the present dispute.

Analysis

Arbitration as a method for resolving disputes is a creature of contract, and, as such, can only be used for resolving those disputes that are connected to the obligations in the contract.[1] Consequently, an arbitration clause applies only to claims that are connected to the obligations contained in the underlying contract and not to "every possible breach of duty that could occur between the

[1] *Parfi Holding AB v. Mirror Image Internet, Inc.,* 817 A.2d 149, 155-56 (Del. 2002).

parties."[2] Basic principles of contract interpretation, therefore, come into play in determining the arbitrability of a particular claim.[3] Under such principles, Delaware courts attempt "to honor the reasonable expectations of the parties and ordinarily resolve any doubt as to arbitrability in favor of arbitration."[4] Such a question of whether the scope of an arbitration provision is applicable to a particular claim is considered an issue of substantive arbitrability.[5]

The threshold question here is who decides whether the instant claims must be arbitrated: the court or the arbitrator? For the reasons which follow, the court finds that under the facts of this case, that role properly lies with the arbitrator.

Typically courts begin their analyses of this issue with the presumption that parties did not agree to have arbitrators determine arbitrability, or their own jurisdiction, unless clear and unmistakable evidence exists that the parties did so agree.[6] In *James & Jackson, LLC v. Willie Gary, LLC,* the Delaware Supreme Court articulated a two-pronged test to determine whether there is such evidence of the parties' intentions to "arbitrate arbitrability."[7] Clear and

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[2] *Parfi Holding AB,* 817 A.2d at 155-56 (determining as arbitrable only those "matters that touch on the rights and performance related to the contract").
[3] *Parfi Holding AB,* 817 A.2d at 155-56.
[4] *Parfi Holding AB,* 817 A.2d at 155-56.
[5] *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006).
[6] *Willie Gary, LLC*, 906 A.2d at 79 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) and *DMS Properties-First, Inc. v. P.W. Scott Associates, Inc.*, 748 A.2d 389, 391-92 (Del. 2000)); *Brown v. T-Ink, LLC*, 2007 WL 4302594, *10, Parsons, V.C. (Del. Ch. Dec. 4, 2007); *see Julian*, 2009 WL 2937121 at *8.
[7] *Julian*, 2009 WL 2937121 at *5.

unmistakable evidence exists where (1) the parties incorporate into the arbitration clause rules that empower the arbitrator to determine substantive arbitrability, such as the AAA rules, and (2) "the arbitration clause generally provides for arbitration of all disputes . . . ."[8] If the arbitration clause does not generally provide for arbitration of all disputes, "something other than the incorporation of the AAA rules would be needed to establish that the parties intended to submit arbitrability questions to an arbitrator."[9]

The Court of Chancery later distinguished *Willie Gary* in a way that is important here. In *GTSI Corp. v. Eyak Technology, LLC*,[10] the court found that the *Willie Gary* standard applies to arbitration agreements that are silent regarding who determines arbitrability, but not apply to agreements that contain provisions specifically assigning the arbitrator the task of determining arbitrability.[11] The Court there stated that where parties have particularly agreed to arbitrate "any dispute . . . including the validity, scope and enforceability of [the] arbitration provisions" the arbitrator must determine arbitrability, and the two-pronged test of *Willie Gary* does not come into play.[12] The *GTSI* court cautioned, however, the court will make that determination in

[8] *Willie Gary, LLC*, 906 A.2d at 79-80; *Brown*, 2007 WL 4302594 at *10.
[9] *Willie Gary, LLC*, 906 A.2d at 80-81; *Brown*, 2007 WL 4302594 at *10.
[10] 10 A.3d 1116 (Del. Ch. 2010) *appeal refused*, 762, 2010, 2011 WL 65972 (Del. Jan. 10, 2011).
[11] *GTSI Corp.*, 10 A.3d at 1119-20.
[12] *GTSI Corp.*, 10 A.3d at 1120.

cases in which it finds the claim of arbitrability "wholly groundless."[13] A claim of arbitrability is not "wholly groundless" where a rational basis for doubt about substantive arbitrability exists.[14]

The underlying agreement here unequivocally provides that the issue of arbitrability is to be decided by the arbitrator. The account agreement provides that all "claims" shall be submitted to arbitration if one of the parties to the agreement demands arbitration. The term "claim" is defined to include the issue of arbitrability:

> "Claim" means any legal claim, dispute or controversy between you and us that: (1) cannot be resolved without a judicial or arbitration proceeding, and (2) arises from or relates in any way to any Deposit Account or Consumer Credit Transaction or the relationships resulting from any Deposit Account or Consumer Credit Transaction, including any dispute concerning the validity or enforceability of this Arbitration Agreement, any Deposit Account or any Consumer Credit Transaction *or concerning whether a dispute is arbitrable*.[15]

Having concluded that Aquila and Wilmington Trust agreed that an arbitrator should decide whether a dispute is arbitrable, the sole remaining question is whether the claim of arbitrability is not wholly groundless.

The court finds here that the arbitrability claim is not wholly groundless. The term "claim" is broadly defined in the agreements:

> "Claim" is to be given the broadest possible meaning and includes claims of every kind and nature, including . . . claims based

[13] *GTSI Corp*., 10 A.3d at 1122 (quoting *McLaughlin v. McCann*, 942 A.2d 616, 626-27 (Del. Ch. 2008)).
[14] *GTSI Corp*., 10 A.3d at 1122.
[15] Agreement at 33 (emphasis added).

> upon contract, tort, fraud and other intentional torts, constitution, statute, regulation, ordinance, common law and equity.[16]

The term applies to virtually any dispute arising out of or relating to a customer relationship. It covers anything which "arises from or relates in any way to any Deposit Account . . . or the relationships resulting from any Deposit Account." Aquila's claims—conversion, negligence, breach of fiduciary duty and tortuous interference—all seem to presuppose the existence of a customer relationship between Wilmington Trust and Aquila. At the very least, there is a rational basis for concluding these claims are subject to the arbitration clause.

The court will therefore grant the motion to dismiss. Dismissal is without prejudice. If Wilmington Trust fails to demand arbitration or timely prosecute the arbitration, or if the arbitrator determines that the matter is not subject to arbitration, Aquila shall have leave to re-file. Finally nothing in this opinion is intended to express a view on the underlying merits or on what determination the arbitrator should make about arbitrability.

SO ORDERED.

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John A. Parkins, Jr.

oc: Prothonotary

[16] Agreement at 33.