

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

THE TOWN OF SMYRNA, a municipal )  
corporation of the State of Delaware, )  
DEE A. WATSON, JR., and D. WAT )  
L.L.C., a Delaware limited liability )  
company, and GOLDSBOROUGH ROAD )  
DEVELOPMENT, L.L.C., )

Petitioners, )

v. )

C.A. No. 244-K

KENT COUNTY LEVY COURT, the )  
governing body of Kent County, a )  
political subdivision of the State of )  
Delaware, and NEW CASTLE COUNTY, )  
a political subdivision of the State of )  
Delaware, )

Respondents. )

***MEMORANDUM OPINION***

**Submitted: October 19, 2004**

**Decided: November 9, 2004**

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LAMB, Vice Chancellor.

This is an action for specific performance of a contract that was entered into between a town and a county relating to sewage treatment services. The action also seeks a declaratory judgment against the county and a second, adjacent county relating to the enforceability of the contract. The respondent counties have moved to dismiss the complaint or to transfer it to the Superior Court on grounds that (i) the contract claim is properly the subject of an arbitration clause, and (ii) the remaining declaratory judgment action is not within the subject matter jurisdiction of this court. For the reasons set forth herein, the court concludes that the contract claim should be dismissed in favor of arbitration and that the remaining claims should be transferred to the Superior Court.

## I.

The Town of Smyrna, a municipal corporation of the State of Delaware; Dee A. Watson, Jr.; D. WAT, L.L.C., a Delaware limited liability company; and Goldsborough Road Development, L.L.C. bring this suit for declaratory judgment and specific performance of a contract for sewer service against respondents Kent County Levy Court, the governing body of Kent County, a political subdivision of the State of Delaware; and New Castle County, also a political subdivision of the State of Delaware.

In 1996, Smyrna and Kent County entered into an “Agreement for Services” whereby Kent County agreed to accept for transmission and treatment all sewage

generated by or through Smyrna's collection lines. The Agreement provides that Kent County is required to provide facilities sufficient to perform these functions,<sup>1</sup> and, should existing facilities become inadequate, to expand sewage treatment capacity.<sup>2</sup> In addition, the Agreement contains an arbitration provision which requires that any dispute arising out of, or related to, the Agreement be submitted to binding arbitration.<sup>3</sup>

On August 18, 2003, Smyrna annexed some 500 acres of land into its northern city limits. This land formerly had the status of unincorporated land within New Castle County and had been subject to the power of that county's government. The annexation was officially opposed by New Castle County, but there is no contention that the annexation was either illegal or improper. In response to the annexation, however, New Castle County publicly asserted that Smyrna and Kent County are prohibited from extending sewer services to the

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<sup>1</sup> Article IV of the Agreement states, in pertinent part: "[Kent County] shall provide and maintain facilities sufficient to carry out the services [transmission and treatment of sewage] . . . including but not limited to pumping facilities for all Transmission Lines and all other requisite transmission and treatment facilities."

<sup>2</sup> Article V(B) of the Agreement states, in pertinent part:  
[Kent County] shall contract to expand Transmission Line capacity if and when monthly capacity of any particular Transmission Line has reached ninety percent (90%) of its available transmission capacity. Similarly, [Kent County] shall contract to expand treatment capacity if and when Kent County Wastewater Treatment Facility reaches ninety percent (90%) of its average monthly capacity.

<sup>3</sup> Article X of the Agreement states, in pertinent part:  
Any controversy or claim arising out of or related to this Agreement, or any breach hereof, shall be settled by binding arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award render by the arbitrator(s) may be entered in any court having jurisdiction thereof.

annexed land under the terms of their contract without New Castle County's consent. Kent County acceded to this position and advised Smyrna that it would not accept sewage originating from the annexed land.

Watson and D. WAT own several parcels of land included in the 500 acre annexation. On or about December 17, 2003, Watson and D. WAT requested from Smyrna application forms and advice with respect to other requirements necessary to develop their property. On December 22, 2003, Smyrna responded that, until the issue of sewer service to the area was resolved, it would not entertain any applications for subdivision or site plan approval in that area.

The complaint demands two forms of relief. First, the petitioners request a declaratory judgment that Smyrna is authorized to extend its sanitary sewer services to the annexed land and that Kent County is contractually obligated to provide sewer transmission and treatment services for all the sanitary sewer collected by Smyrna from all lands located in the territorial limits of the town, including the annexed land, without the consent of New Castle County. Second, the petitioners seek specific performance of the Agreement.

On March 26, 2004, Goldsborough, another owner of portions of the annexed land, filed a complaint against Kent County and New Castle County seeking similar relief. By stipulation filed July 7, 2004, the two cases were consolidated.

## II.

Pursuant to 10 *Del. C.* § 341, this court has original jurisdiction “to hear and determine all matters and causes in equity.” Consistent with this statutory grant of jurisdiction, 10 *Del. C.* § 341 states that this court “shall not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of the State.”<sup>4</sup> Generally, the bases for invocation of this court’s jurisdiction fall into two broad categories: (1) actions involving equitable subjects, claims or rights (such as fiduciary relations) or (2) actions seeking equitable relief (such as injunctive relief or an award of specific performance of a contract).<sup>5</sup>

## III.

The first question to be addressed is whether the claim for specific performance of the contract between Smyrna and Kent County is arbitrable. If so, this court will stay or dismiss that claim in favor of arbitration.<sup>6</sup>

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<sup>4</sup> See also *El Paso Gas Co. v. Transamerican Gas Corp.*, 669 A.2d 36, 39 (1995) (“[The Court of Chancery] does not have jurisdiction over a controversy unless the plaintiff lacks an adequate remedy at law.”).

<sup>5</sup> *Bird v. Lida, Inc.*, 681 A.2d 399, 402 (Del. Ch. 1996).

<sup>6</sup> See *Del Pharm., Inc. v. Access Pharm., Inc.*, 2004 WL 1631355, at \*1 (Del. Ch. July 16, 2004) (enforcing a forum selection clause, which chose New York as the exclusive forum for adjudication, to dismiss suit); *Simon v. Navellier Series Fund*, 2000 WL 1597890, at \*6 (Del. Ch. Oct. 19, 2000) (“If a forum selection clause validly limits a plaintiff to a single forum, that clause operates to divest a court that otherwise has jurisdiction of its status as a proper venue for the plaintiff to sue.”); see also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (“An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause.”).

The petitioners contend the arbitration clause is not binding because, they say, the substantive issues of this case do not “arise out of” nor are they “connected with” the Agreement. In addition, they argue that the respondents waived their right to arbitrate by answering the complaint. Finally, they argue that petitioners Watson, D. WAT and Goldsborough are only incidental beneficiaries to the contract and are, therefore, not bound to its arbitration clause.

**A. The Contract Action Is Arbitrable.**

In *Parfi Holding AB v. Mirror Image Internet, Inc.*,<sup>7</sup> the Delaware Supreme Court restated that when the arbitrability of a claim is disputed, the court is faced with two issues. First, the court must determine whether the arbitration clause is broad or narrow in scope. Second, the court must determine whether the claim falls within the scope of the contractual provisions that require arbitration.

Applying that standard to this case, there is no question that the arbitration clause found in the Agreement is broad, as it covers all claims “arising out of” or “related to” the Agreement. Nevertheless, the petitioners argue that, although the action is one for specific performance of the contract, the dispute underlying the claim turns on the resolution of the naked legal question of governmental power allocation between and among Smyrna, Kent County and New Castle County. That question, they argue, neither “arises out of” nor “relate[s] to” the Agreement.

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<sup>7</sup> 817 A.2d 149, 152 (Del. 2002).

The court disagrees. While this court is at least as well equipped as an arbitrator to resolve the issues of statutory construction presented by the complaint, there is no avoiding the obvious conclusion that a claim seeking specific performance of the Agreement “relate[s] to” that contract and, thus, is within the scope of the arbitration clause. The arbitration clause might have been more narrowly drawn to exclude arbitration of purely legal issues. As it is, however, that clause is certainly broad enough to include a claim for specific performance.

**B. Respondents Have Not Waived Their Right To Arbitration.**

The petitioners contend that Kent County and New Castle County have waived their right to arbitration by filing an answer, agreeing to a briefing schedule and filing a cross-motion for summary judgment.

A waiver of a right to arbitrate a claim may be found if the party seeking arbitration has actively participated in a lawsuit or taken other action inconsistent with its right to arbitrate.<sup>8</sup> However, there is a strong public policy favoring arbitration and, therefore, there is a strong presumption against waiver.<sup>9</sup> This court has stated that “[w]aiver of arbitration is a matter of intention and to constitute a waiver there must be an intentional relinquishment of a right with both knowledge of its existence and intention to relinquish it.”<sup>10</sup>

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<sup>8</sup> *Falcon Steel Co. v. Weber Eng’g Co.*, 517 A.2d 281, 288 (Del. Ch. 1986).

<sup>9</sup> *James Julian, Inc. v. Raytheon Serv. Co.*, 424 A.2d 665, 668 (Del. Ch. 1980).

<sup>10</sup> *Id.* (internal citations omitted).



The actions of the respondents do not constitute a waiver of the right to arbitration. The cases cited by the petitioners demonstrate how difficult it is to waive arbitration. In *Wilshire Rest. Group, Inc. v. Ramada, Inc.* the party seeking to compel arbitration first brought suit in Superior Court embracing the issues that would have been subject to the arbitration.<sup>11</sup> In *Ballenger v. Applied Digital Solutions, Inc.*, the party seeking to enforce an arbitration clause earlier stated, in open court, that it was not seeking arbitration.<sup>12</sup> In *Parfi Holding AB v. Mirror Image Internet, Inc.*,<sup>13</sup> this court held that the party invoking the right to arbitration did *not* waive the right to arbitration, even though it had made arguments before the Court of Chancery and the Supreme Court that facially represented the party would not be seeking relief from the arbiter.

Here, the respondents properly and timely moved for dismissal based on a lack of subject matter jurisdiction. The respondents have never stated before this court or in their papers that they would not seek arbitration. In the circumstances, the actions of the respondents do not evidence an “intentional relinquishment” of their right to arbitration. Moreover, there is nothing in the record to suggest that the petitioners have been prejudiced by the respondents’ failure to raise the issue of arbitrability sooner. Therefore, given the strong presumption in favor of

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<sup>11</sup> 1990 WL 195910, at \*3 (Del. Ch. Dec. 5, 1990).

<sup>12</sup> 2002 WL 749162, at \*7 (Del. Ch. Apr. 24, 2002).

<sup>13</sup> 842 A.2d 1245, 1260 (Del. Ch. 2004).

arbitration, the petitioners have not shown that the respondents have waived their right to arbitrate.

**C. Watson, D. WAT And Goldsborough Cannot Avoid The Arbitration Clause.**

While they once claimed third-party beneficiary status under the Agreement, Watson, D. WAT and Goldsborough now argue that they are only incidental beneficiaries to the contract and are, therefore, not bound to its arbitration clause. Specifically, they say that, because the respondents have not proven that they are third-party beneficiaries under the test enunciated by the Third Circuit in *E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*,<sup>14</sup> they are not bound by the arbitration clause.

Watson, D. WAT and Goldsborough are trying to have it both ways. If they are not third-party beneficiaries to the Agreement, they have no standing to sue to enforce the Agreement. If they are third-party beneficiaries, they are bound to the arbitration clause. Equity will not allow a party to sue to enforce the provisions of a contract that it likes, while simultaneously disclaiming the provisions that it does not.<sup>15</sup> Whether these petitioners are characterized as “third-party” beneficiaries or

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<sup>14</sup> 269 F.3d 187, 196 (3d Cir. 2001).

<sup>15</sup> See, e.g., *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (“To allow [a plaintiff] to claim the benefit of a contract and simultaneously avoid its burdens would . . . disregard equity.”) (internal citations omitted); *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (3d Cir. 1999) (holding non-signatory bound by contract under which it received the direct benefits of lower insurance and the ability to sail under the French flag).

only “incidental” beneficiaries is immaterial. Their claims against the respondents must be dismissed in favor of arbitration.

#### IV.

The complaint also seeks a declaratory judgment that Smyrna has the right to extend its sewer lines to the annexed land and that New Castle County does not have any legal right to prevent Kent County from transporting and treating the sewage from the annexed land. In addition, the complaint seeks an injunction to enforce such a declaration.

It has long been recognized that the Declaratory Judgment Act<sup>16</sup> did not expand the jurisdiction of this court or alter the jurisdictional relationship between this court and the Superior Court.<sup>17</sup> Thus, a complaint for declaratory judgment does not fall within this court’s subject matter jurisdiction unless it concerns “equitable subjects, claims or rights” or properly contains a claim for equitable relief.<sup>18</sup> In this regard, merely adding a claim for an injunction to enforce a declaration of legal rights will not, ordinarily, invoke this court’s jurisdiction.<sup>19</sup> Here, the declaratory judgment action concerns only legal, as opposed to equitable, rights. Moreover, the demand for an injunction to enforce a declaratory judgment against either Kent County or New Castle County is insufficient to invoke the

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<sup>16</sup> 10 *Del. C.* §§ 6501-6513.

<sup>17</sup> *Suplee v. Eckert*, 120 A.2d 718, 720 (Del. Ch. 1956).

<sup>18</sup> *Bird*, 681 A.2d at 402.

<sup>19</sup> *See City of Wilmington v. Delaware Coach Co.*, 230 A.2d 762 (Del. Ch. 1968).

Court of Chancery's equity jurisdiction since "the court must presume that the County will respect any decision rendered by any competent court of this State."<sup>20</sup>

V.

For all of the above reasons, the contract claims will be dismissed without prejudice in favor of arbitration and the remaining declaratory judgment action is transferred to the Superior Court pursuant to 10 *Del. C.* § 1902.<sup>21</sup> An order implementing this decision is attached.

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<sup>20</sup> *Christiana Town Ctr., L.L.C. v. New Castle Ctr.*, 2003 WL 21314499, at \*4 (Del. Ch. June 6, 2003), *aff'd* 841 A.2d 307 (Table), 2004 WL 77868, at \*1 (Del. Jan. 16, 2004).

<sup>21</sup> 10 *Del. C.* § 1902 states, in pertinent part:

No civil action, suit or other proceeding brought in any court of this State shall be dismissed solely on the ground that such court is without jurisdiction of the subject matter, either in the original proceeding or on appeal. Such proceeding may be transferred to an appropriate court for hearing and determination[.]