

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DE HAVILAND LIMITED : CIVIL ACTION
 :
 v. :
 :
 ERICO PRODUCTS, INC. : 99-5548

MEMORANDUM AND ORDER

J. M. KELLY, J. **MAY** , **2000**

Presently before the Court is a Motion to Dismiss filed by the Defendant, Erico Products, Inc. (“Erico”). The Plaintiff, De Haviland Limited (“De Haviland”) filed suit in this Court for breach of contract/breach of good fair dealings. Erico now seeks to have the Complaint dismissed for lack of subject matter jurisdiction. For the following reasons, Erico’s motion is denied.

I. BACKGROUND

On approximately July 26, 1994 and again on July 5, 1995, Erico contracted with De Haviland to purchase copper scale. The July 5, 1995 agreement provided that De Haviland would supply Erico with 1,500,000 to 2,100,000 pounds of copper scale for a period of eighteen months, from April 1, 1996 to September 30, 1997. The agreement further stated with regard to the renewal of the contract that “Six months prior to the expiration of this contract period and subsequent contract periods, the succeeding contract will be renewed subject to such terms and conditions as agreed to by Erico and De Haviland as necessary to continue the contract.” Pl.’s Compl. Ex. A. Erico did not contact De Haviland six months prior to the expiration of the July 5, 1995 contract, therefore De Haviland deemed the agreement to have renewed for an additional eighteen month period. In accordance with this belief, De Haviland continued to provide copper

scale to Erico from September 1997 to April 30, 1999. When De Haviland again did not hear from Erico in September 1998, six months prior to the end of the renewed contract, it deemed the agreement to have renewed for an additional term, binding the parties from April 1999 to the present.

Erico contends, on the other hand, that the July 5, 1995 agreement was never renewed because the parties never signed another contract. Rather, from the expiration of the July 5, 1995 agreement on, the transactions between the parties were governed by purchase order invoices sent by Erico to De Haviland. According to the Terms and Conditions stated on the back of the purchase orders, “Any and all disputes of whatsoever nature arising out of, relating to, or in any way connected with this agreement, or any breach thereof, shall be submitted for determination in accordance with the then obtaining construction industry rules of the American Arbitration Association. Any hearings shall be held at Cleveland, Ohio.” Def.’s Answer Ex. A.

In early 1999, Erico notified De Haviland that, due to changes in their manufacturing process, it would no longer need to purchase copper scale, except for on a month to month basis. De Haviland alleges that in doing so, Erico breached their agreement.

Erico seeks to have this dispute arbitrated according to the mandatory arbitration provision of the purchase orders, what it contents are the controlling agreements in this case. De Haviland, on the other hand, maintains that Erico is bound by their original agreement and that such agreement does not include an arbitration clause. Accordingly, it is not obligated to arbitrate the breach of contract claim.

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(1) challenges a federal court's authority to hear the case. Therefore, the party asserting jurisdiction bears the burden of showing that the case is properly before the Court at all stages of the litigation. See Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3d Cir. 1993). Motions pursuant to Rule 12(b)(1) take one of two forms: those that attack the complaint on its face and those that attack the existence of subject matter jurisdiction in fact. See Yuksel v. Northern Am. Power Tech., Inc., 805 F. Supp. 310, 311 (E.D. Pa. 1992); Kelly v. Blake, No. CIV. A. 93-CV-0365, 1993 WL 131518, at *1 (E.D. Pa. Apr. 26, 1993). A facial attack requires the district court to take the allegations of the complaint as true in deciding whether there is subject matter jurisdiction. See Mortenson v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977); Garcia v. United States, 896 F. Supp. 467, 471 (E.D. Pa. 1995). In considering a factual attack, however, the court is free to weigh the evidence in determining its power to hear the case. See Mortenson, 549 F.2d at 891; Garcia, 896 F. Supp. at 471.

III. DISCUSSION

Erico contends that this Court lacks subject matter jurisdiction because, through the purchase orders, the parties are bound to arbitrate any and all disputes arising out of or relating to the purchase orders. Relying on Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-307 (1994), Erico argues that the Court is divested of jurisdiction until this matter is

arbitrated.¹ See id. § 3. In determining whether an issue is subject to arbitration, the Court must consider two questions: whether the parties have entered into a valid arbitration agreement and if so, whether the present dispute falls within the ambit of the arbitration agreement language. See John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 137 (3d Cir. 1998).

Turning to the first issue, the Court finds that there is no valid arbitration agreement between the parties. The July 5, 1995 agreement stated that it would renew six months prior to its expiration, with such terms and conditions as agreed upon by De Haviland and Erico. Because Erico never informed De Haviland that it did not wish to renew the July 5, 1995 agreement, the parties were bound under the provisions of that agreement for an additional term. Similarly, in September 1998, when Erico again failed to timely inform De Haviland that did not wish to renew the renewed contract, the parties were bound yet again. Accordingly, the controlling agreement between De Haviland and Erico is the twice renewed July 5, 1995 agreement. No where in that agreement does there appear a provision calling for arbitration, mandatory or otherwise. Therefore, De Haviland is not obligated to arbitrate this dispute.

This is the case notwithstanding the mandatory arbitration provision in the purchase

¹ Section 3 of the FAA states:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties dismiss the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

orders. As discussed above, the controlling agreement was the renewed July 5, 1995 agreement. That Erico began utilizing purchase order invoices in December 1997 is of no moment because the July 5, 1995 agreement had by that time renewed and therefore still represented the agreement between the parties. Further, there is no basis upon which the Court could find De Haviland and Erico modified the renewals of the July 5, 1995 agreement so as to include a mandatory arbitration provision. Under federal law, “arbitration . . . is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” Willow Valley Manor v. Trouvailles, Inc., 977 F. Supp. 700, 702 (E.D. Pa. 1997). Because there is no evidence that De Haviland assented to submit its disputes with Erico to arbitration, the Court finds that there is no valid arbitration agreement. Accordingly, Erico’s motion to dismiss for lack of subject matter jurisdiction is denied.

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ORDER

AND NOW, this day of May, 2000, in consideration of the Motion to Dismiss for Lack of Subject Matter Jurisdiction filed by the Defendant, Erico Products, Inc. (Doc. No. 5) and the response of the Plaintiff, De Haviland Limited, thereto, it is **ORDERED** that the motion to dismiss is **DENIED**.

BY THE COURT:

JAMES McGIRR KELLY, J.