

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

RICHARD A. PLINKE and TERRY A. : CIVIL ACTION  
PLINKE :  
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 :  
 v. :  
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 :  
 PNE MEDIA LLC, ET AL. : No. 00-1817

**MEMORANDUM**

**Ludwig, J.**

June 29, 2000

Defendants PNE Media LLC, James A. Eatrides, Ashola Varma, Thomas C. Parsons, Frank J. Nataro, PNE Media, Inc., PNE Media Holdings, LLC, Parsons Publicity, Inc., Able, Inc., ALTA/PNE Corp., PNE Investment Partnership, and BancBoston Ventures, Inc. move to stay proceedings on Counts V–IX pending arbitration. 9 U.S.C. § 3. Defendant PNE Media LLC moves to dismiss Count II for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).<sup>1</sup> Jurisdiction is diversity. 28 U.S.C. § 1332.

On January 5, 1998, defendant PNE Media purchased Outdoor Marketing Systems, LLC from plaintiff Richard A. Plinke and retained him as manager and his wife, plaintiff Terri A. Plinke, as an employee. Compl. at 3. On November 1, 1999, both plaintiffs were terminated, allegedly for having criticized

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<sup>1</sup> Under a Fed. R. Civ. P. 12(b)(1) challenge to subject matter jurisdiction, “no presumptive truthfulness attaches to plaintiff’s allegations” — “the trial court’s jurisdiction is at issue,” and plaintiff has the burden of proof. Mortenson v. First Federal Savings and Loan Ass’n, 549 F.2d 884, 891 (3d Cir. 1977); see Anjelino v. The New York Times Co., 200 F.3d 73, 87 (3d Cir. 1999).

defendant PNE Media’s hostile work environment and discriminatory practices.<sup>2</sup> On April 6, 2000, plaintiffs filed a nine-count complaint stating claims arising out of the two agreements — “Amended and Restated Limited Liability Company Agreement” and “Employment Agreement” — that had been entered into by plaintiff husband and defendant PNE Media LLC. The individual and corporate defendants<sup>3</sup> are alleged to have been involved in the purchase transaction with Outdoor Marketing Systems.

As to Count V-IX, defendants<sup>4</sup> move for a stay of proceedings citing an arbitration clause in the Amended and Restated Limited Liability Company Agreement of PNE Media Holdings, LLC.<sup>5</sup> Plaintiff Richard A. Plinke’s response is

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<sup>2</sup> Plaintiffs have charges pending against defendant before the EEOC and PHRC. Compl. at 5.

<sup>3</sup> In Count II, plaintiff wife sues defendant PNE Media LLC for violation of the Pennsylvania Wage Payment and Collection Law, 43 Pa. C.S. § 260.1.

<sup>4</sup> Defendant PNE Media LLC is the parent company of Outdoor Marketing Systems, formerly owned and operated by plaintiff Richard A. Plinke. Defendant Eatrides is the CEO of PNE Media; defendant Varma is co-CEO and CFO of PNE Media; defendant Parsons is an owner of PNE Media; defendant Nataro is the managing partner and COO of PNE Media; defendants PNE Media Inc., ABLE Inc., ALTA/PNE Corp., and PNE Investment Partnership are business entities “owned in whole or in part by the defendants”; and defendant BancBoston Ventures, Inc. is a party to the Amended and Restated Limited Liability Company Agreement. Compl. at ¶¶ 2-8.

<sup>5</sup> The arbitration clause states:

17.5 *Disputed Matters.* Except as otherwise provided in this Agreement, any controversy arising out of this Agreement, the interpretation of any of the provisions hereof, or the action or inaction of any Member hereunder shall be submitted to arbitration in Boston, Massachusetts before the American

(continued...)

that he was fraudulently misled into executing that agreement and was not aware of the arbitration clause, but that his signature page was later made part of it without his knowledge. Pl.'s mem. at 1-2. Specifically, the complaint alleges that on January 4, 1998, Plinke believed he was signing the Operating Agreement, only to discover thereafter that the page he signed had been attached to the Amended and Restated Limited Liability Company Agreement. It is the latter agreement that contains the arbitration clause. Compl. at 12-13.<sup>6</sup>

The Federal Arbitration Act, 9 U.S.C. § 3, provides for a stay of proceedings as follows:

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 stay the trial of the action until such arbitration has been had in accordance with the

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<sup>5</sup>(...continued)

Arbitration Association under the commercial arbitration rules then obtaining of said Association. . . . To the fullest extent permitted by law, no action at law or equity based upon any claim arising out of or related to this Agreement shall be instituted in any court by any Member, except (a) an action to compel arbitration pursuant to this Section 17.5 or (b) an action to enforce an award obtained in an arbitration proceeding in accordance with this Section 17.5.

Amended and Restated Limited Liability Company Agreement, complt. at ex. E.

<sup>6</sup> The signature page that purports to bear plaintiff's signature also was executed by or for all defendants, and states: "IN WITNESS WHEREOF, the parties have executed this Limited Liability Company Agreement as of the day and year first set forth above." Compl. at ex. E.

terms of the agreement, providing the applicant for the stay is not in default in proceeding with the arbitration.

The issue is whether the allegations of fraud in the factum defeat the operation of the arbitration clause in the Amended and Restated Limited Liability Company Agreement.

More than thirty years ago, in Merritt-Champion & Scott Corp. v. Pennsylvania Turnpike Commission, 387 F.2d 768, (3d Cir. 1967), our Court of Appeals held that fraudulent inducement is not a bar to enforcement of a contractual arbitration clause. However, if it is unclear that the parties have agreed to arbitration as an initial matter, the proceeding should not be stayed. Id. (applying the standard of Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 403-04, 87 S. Ct. 1801, 1806, 18 L. Ed.2d 1270 (1967)). In Prima Paint Corp., the Supreme Court found support to this effect in the statutory language of section 4 of the Federal Arbitration Act — motion to compel arbitration: “If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial itself.” 9 U.S.C. § 4.

As stated more recently in Gregory v. Interstate/Johnson Lane Corp., 188 F.3d 501, 1999 WL 674765 (4th Cir. Aug. 31, 1999)(unpublished table decision),<sup>7</sup> “[t]he first principle of arbitration law is that a party cannot be

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<sup>7</sup> The facts of the Gregory case are similar — the complaint alleged that plaintiff had not signed the agreement that contained an arbitration clause and that her signature was forged. Gregory v. Interstate/Johnson Lane, 188 (continued...)

compelled to arbitrate a dispute unless that party has agreed to arbitration.” Id. at \*4 (citing AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed.2d 648 (1986)).<sup>8</sup>

Here, it is alleged that plaintiff husband did not sign the agreement in question. Before plaintiff will be required to arbitrate the claims set forth in Counts V–IX, whether there was an agreement to arbitrate them must be resolved. If upon an evidentiary hearing it is found that the Amended and Restated Limited Liability Company Agreement as executed contained the arbitration clause, a stay as to the affected counts will be entered. 9 U.S.C. § 3.

Defendant PNE Media LLC also moves to dismiss Count II for lack of subject matter jurisdiction. Fed. R. Civ. P 12(b)(1). The reason given is that plaintiff wife’s claim under the Pennsylvania Wage Payment and Collection Law,

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<sup>7</sup>(...continued)  
F.3d 501, 1999 WL 674765, at \* 2 (4th Cir. Aug. 31, 1999)(table decision).

<sup>8</sup> The Court of Appeals for the Fourth Circuit compared two lines of Supreme Court authority — one in which courts are to construe arbitration agreements broadly “so that arbitrators may decide all issues encompassed by an arbitration provision,” Gregory v. Interstate/Johnson Lane Corp., 188 F.3d 501, 1999 WL 674765, at \*3 (4th Cir. Aug. 31, 1999)(citing Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 404, 87 S. Ct. 1801, 1806, 18 L. Ed.2d 1270 (1967)); and the other in which “the court, and not the arbitrator, must decide whether the parties have agreed that an issue is or is not subject to arbitration.” Gregory, 1999 WL 674765, at \*4 (citing AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed.2d 648 (1986)). Gregory also cited cases decided by the Courts of Appeals for the Eleventh and Ninth Circuits reaching similar results: Chastain v. Robinson-Humphrey Co., Inc., 957 F.2d 851 (11th Cir. 1992) and Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc., 925 F.2d 1136 (9th Cir. 1991).

43 Pa. C.S. § 260.1, is less than the threshold amount of \$75,000. 28 U.S.C. § 1332. However, the relief requested in the complaint is “commissions and/or salary,” “14 unused vacation days, unused sick days, bonuses and other emoluments of employment” in “an amount in excess of \$150,000.” Compl. at 6-7. Undercutting this allegation, a pre-litigation demand letter on behalf of this plaintiff only sought unpaid commissions of \$3,418.66.<sup>9</sup> Def.’s mem. at ex. 1.

A claim may be dismissed for lack of subject matter jurisdiction if it “appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount . . . .” Suber v. Chrysler Corp., 104 F.3d 578, 583 (3d Cir. 1997)(quoting St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89, 58 S. Ct. 586, 590, 82 L. Ed. 845 (1938)). “[W]here a defendant . . . challenges the plaintiff’s allegations regarding the amount in question, the plaintiff who seeks the assistance of the federal courts must produce sufficient evidence to justify its claims.” Suber v. Chrysler Corp., 104 F.3d at 583 (quoting Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 538, 541 (3d Cir. 1995)).

Here, plaintiff wife has not submitted an affidavit or other evidentiary information to support her jurisdictional allegations. She relies on the averments in the complaint. Pl.’s mem. at 3. The generalized statement that the claim, in its several parts, is in excess of twice the jurisdictional minimum — i.e., \$150,000

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<sup>9</sup> Defendant’s submission of the letter was not improper. Pl.’s mem. at 4. Evidence outside the pleadings may be considered on the issue of jurisdiction. See Mennen Co. v. Atlantic Mutual Ins. Co., 147 F.3d 287, 293-94 (3d Cir. 1998); Suber v. Chrysler Corp., 104 F.3d 578, 583-84 (3d Cir. 1997)(citing 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350, at 213-15 (2d ed. 1990)).

— is not sufficient to meet her burden. See Mennen Co. v. Atlantic Mutual Ins. Co., 147 F.3d 287, 293 (3d Cir. 1998)(“[I]t is axiomatic that a party may not confer or defeat jurisdiction by mere pleading.”)(citing Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099, 2104, 72 L. Ed.2d 492 (1982); Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 377 n.21, 98 S. Ct. 2396, 2404 n.21, 57 L. Ed.2d 274 (1978)). The statute allows recovery of attorney’s fees, 43 Pa. C.S. § 260.9a.(f), and liquidated damages up to \$500, 43 Pa. C.S. § 260.10. Together, the unpaid commissions, potential attorney’s fees, and liquidated damages do not appear to add up to the jurisdictional minimum. 28 U.S.C. § 1332. She will be granted until July 19, 2000 within which to amend, if she can do so within the constraints of Fed. R. Civ. P. 11; otherwise, Count II will be dismissed for want of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).

An order accompanies this memorandum.

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Edmund V. Ludwig, J.

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PLINKE :  
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 PNE MEDIA LLC, ET AL. : No. 00-1817

**ORDER**

AND NOW, this 29th day of June, 2000, the motion of defendants PNE Media LLC, James A. Eatrides, Ashola Varma, Thomas C. Parsons, Frank J. Nataro, PNE Media, Inc., PNE Media Holdings, LLC, Parsons Publicity, Inc., Able, Inc., ALTA/PNE Corp., PNE Investment Partnership, and BancBoston Ventures, Inc. to stay proceedings on Counts V–IX pending arbitration is denied. 9 U.S.C. § 3.

The motion of defendant PNE Media LLC to dismiss Count II for lack of subject matter jurisdiction is granted with leave to amend. Fed. R. Civ. P. 12(b)(1). Plaintiff is granted until July 19, 2000 in which to amend; otherwise, Count II will be dismissed.

A Rule 16 conference is scheduled on Thursday, July 13, 2000 at 2:30 p.m. in chambers, Room 12614.

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Edmund V. Ludwig, J.