

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

EDWARD J. RUNNER and	:	CIVIL ACTION
NORMA RUNNER, husband and wife,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
FLEMING COMPANIES, INC.,	:	
	:	
Defendant.	:	NO. 01-274

Reed, S.J.

May 18, 2001

M E M O R A N D U M

Third-party defendants Transervice Logistics and Transervice Leasing Corp. (collectively, "Transervice") seek to dismiss the third-party complaint filed by defendant and third-party plaintiff, Fleming Companies, Inc. ("Fleming"), on the ground that the matters asserted by the third-party complaint are governed by an agreement between the parties to arbitrate. Upon consideration of the motion (Document No. 19), the reply of Transervice thereto, the pleadings, and the supplemental materials provided by the parties under Rule 12 (b) (6) of the Federal Rules of Civil Procedure, the motion will be granted.

This case began when plaintiff Edward J. Runner was injured while operating a pallet jack. At the time, Runner was an employee of Transervice, but was working at a warehouse owned by Fleming. Fleming and Transervice had entered into agreements under Transervice was to deliver food products for Fleming. The central agreement was a Transportation Services

Agreement ("Agreement"),¹ dated May 2, 1997, at Section 14, page 8, which contained an arbitration clause that provides: "All disputes between Transervice and Fleming, including any dispute relating to this Agreement, shall be resolved by arbitration as provided in this Section."

In the third-party complaint, Fleming claims that Transervice failed to purchase insurance that would protect Fleming in the event of an accident, as required under the Agreement. The third-party complaint quotes at length from the Agreement and seeks damages for breach of contract, as well as contribution and indemnity against Transervice. It is unquestionable that the dispute in this case relates directly to the Agreement. On the face of it, then, the arbitration clause governs the claims raised in this action.

Fleming does not seriously contend that this case falls outside the arbitration agreement. Nor is there any contention by Fleming that the arbitration agreement was invalid or unconscionable. Rather, Fleming makes three inapposite arguments: (1) Transervice has not raised the arbitration clause yet in this or any other related case; (2) plaintiff should have filed this motion under Rule 12 (b) (1) because it relates to subject matter jurisdiction; and (3) granting a motion to dismiss now would hinder discovery.

First, there is no laches here; this case is barely four months old, and Transervice filed the instant motion arguing the arbitration clause issue within five weeks of the filing of the third-party complaint. The failure of Transervice to raise this issue in another related case has no bearing on whether Transervice may raise the issue here. Second, the Court of Appeals for the Third Circuit has made it crystal clear that motions to dismiss based on arbitration agreements

¹ The parties also entered into a Personnel Service Agreement, which contains identical arbitration language and similar insurance language.

are to be filed under Rule 12 (b) (6) of the Federal Rules of Civil Procedure. See Nationwide Ins. Co. v. Patterson, 953 F.2d 44, 45 n.1 (3d Cir. 1991) (“Dismissal of declaratory judgment action because the dispute is covered by an arbitration provision is generally effected under Rule 12 (b) (6) covering dismissals for failure to state a claim upon which relief can be granted.”).²

Regardless of the ground, the distinction is immaterial to this case; the arbitration clause requires arbitration of this dispute and therefore, this Court cannot hear the case.

Third, the fact that a delay in deciding this motion would hinder discovery is not a valid reason to deny the motion to dismiss or delay its resolution. There can be no discovery if the complaint does not state a viable claim for relief, and the complaint does not do so because the arbitration clause prevents this Court from granting relief. Fleming’s arguments that dismissal would hinder Transervice’s access to discovery may be charitable, but I trust that Transervice is well aware of the discovery consequences of dismissal and is willing to take the risk.

Fleming suggests that if this Court concludes that the arbitration clause governs the dispute, this Court should stay the instant case and not dismiss it. Here again, the proper course of action has been clearly set forth by the Court of Appeals for the Third Circuit:

If a party to a binding arbitration agreement is sued in a federal court on a claim that plaintiff has agreed to arbitrate, it is entitled under the [Federal Arbitration Act] to a stay of the court proceeding pending arbitration, Section 3, and to an order compelling arbitration, Section 4. If all the claims involved in an action are arbitrable, a court may dismiss the action instead of staying it.

Seus v. John Nuveen & Co., Inc., 146 F.3d 175, 179 (3d Cir. 1998). A number of judges in this district recently have dismissed cases that involved disputes covered by binding arbitration agreements. See Zumpano v. Omnipoint Communications, No. 00-595, 2001 U.S. Dist. LEXIS

² I find no meaningful distinction between declaratory judgment actions and typical civil actions for the purpose of applying this holding of the court of appeals.

376, at * 34-35 (E.D. Pa. Jan. 8, 2001); Carver v. Global Sports, Inc., No. 00-139, 2000 U.S. Dist. LEXIS 4773, at *14 (E.D. Pa. Mar. 29, 2000); Liberty Mutual Ins. Co. v. Ventimiglia, 104 F. Supp. 2d 469, 471 (M.D. Pa. 2000).

I conclude that all the issues raised in the third-party complaint are covered by the arbitration agreement, and that no valid purpose would be served by staying this third-party action. Therefore, the third-party complaint will be dismissed without prejudice.

An appropriate Order follows.

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FLEMING COMPANIES, INC..	:	
	:	
Defendant.	:	NO. 01-274

ORDER

AND NOW, this 18th day of May, 2001, upon consideration of the motion of third-party defendants Transervice Logistics and Transervice Leasing Corp. (collectively, "Transervice") to dismiss the third-party complaint filed by defendant and third-party plaintiff, Fleming Companies, Inc. ("Fleming") pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure (Document No. 19), and having concluded that all the claims asserted in the third-party complaint are governed by a binding agreement between the parties to arbitrate such claims, **IT IS HEREBY ORDERED** that the motion of the third-party defendants is **GRANTED**, and the third-party complaint is **DISMISSED** without prejudice.

IT IS FURTHER ORDERED that to the extent Fleming Companies, Inc., wishes to pursue claims related to its Transportation Services or Personnel Agreement with Transervice Logistics and/or Transervice Leasing Corp., said claims shall be arbitrated pursuant to the terms of the contracts between the parties dated May 2, 1997.

LOWELL A. REED, JR., S.J.