

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

MICHAEL J. DONAHUE : CIVIL ACTION  
 :  
 v. :  
 : No. 05-2027  
 BEARINGPOINT, INC., :

**ORDER-MEMORANDUM**

AND NOW, this 17<sup>th</sup> day of January, 2006, the “Motion of Defendant BearingPoint, Inc. to Stay Civil Action and Compel Arbitration or, in the Alternative, to Enter Protective Order,” is granted. 9 U.S.C. §§ 3.<sup>1</sup> This action is stayed pending arbitration of the applicability of the “Special Termination Agreement.”<sup>2</sup>

On February 14, 2005, plaintiff Michael J. Donahue’s employment with defendant was terminated. On April 28, 2005, he commenced this action demanding payment of benefits under the parties’ Special Termination Agreement. Defendant contends that the action must be submitted to arbitration pursuant to the “Member Distribution Agreement,” which governs the employment relationship between the parties.<sup>3</sup> Plaintiff counters that his

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<sup>1</sup> “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 terms of the agreement.” 9 U.S.C. § 3.

<sup>2</sup> On October 6, 2005, defendant’s motion for protective order was granted.

<sup>3</sup> The MDA was executed by the parties on January 31, 2001 and it relevantly states:

Section 9.1 Arbitration. (a) To the extent permitted by law, all claims or disputes arising out of or relating to the construction, meaning, or effect of any provision of this Agreement, to the Employee’s employment relationship with Consulting . . . ,

claims fall under the Special Termination Agreement - and may be arbitrated or litigated at plaintiff's sole discretion.<sup>4</sup>

The parties concede that both agreements are valid and enforceable. The issue is whether plaintiff may invoke the provisions of the STA and choose to litigate his right to compensation, rather than arbitrate the dispute. He asserts that because his termination was made "in anticipation of a Change in Control," the STA governs, not the MDA.<sup>5</sup>

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or to the termination of this Agreement or cessation of such employment relationship:

(i) that the Employee may have against or with Consulting, any of its Affiliates, partnerships, other related entities, successors, or permitted assigns . . .

(collectively, "Disputes") shall be submitted for resolution by arbitration in accordance with the procedures set forth in this Section 9.1.

MDA, § 9.1, Exhibit "A" to defendant's memorandum.

<sup>4</sup> The STA was executed on November 21, 2001 and, relevantly, states:

14. Disputes. Any dispute or controversy arising under or in connection with this Agreement shall be resolved, at the sole option of the Executive [the employee], either by litigation or by arbitration in accordance with the Rules of the American Arbitration Association then in effect. Judgment may be entered."

STA, ¶ 14, Exhibit "B" to defendant's memorandum.

<sup>5</sup> Plaintiff points to Section 3(a)(2) of the STA, which states:

3. Rights of Executive Upon Change of Control.

(a) The Company shall provide the Executive, within 10 days following the Termination Date, Severance Compensation in lieu of compensation to the Executive for periods subsequent to the Termination Date, but without affecting any other rights of the Executive at law or in equity, if any of the following events occur:

Defendant’s position is that no “Change in Control,” as defined in the STA, has occurred and the STA, therefore, is not triggered and cannot be invoked.<sup>6</sup> The narrow question is whether a “Change in Control” must actually take place before a termination can be deemed “in anticipation of a Change in Control.” This question is suitable for arbitration under the broad language of the MDA arbitration clause.

The Federal Arbitration Act “leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). Deciding a motion to compel arbitration requires a two-part inquiry: (1) is there a valid arbitration agreement between the parties? and (2) does the dispute fall within the scope of the agreement? Trippe Mfg. Co. v. Niles Audio Corp., 401 F.3d 529, 532 (3d Cir. 2005). Here, there is no dispute as to the first inquiry. As to whether interpretation of the language of the STA is an issue that falls within the scope of the MDA’s arbitration clause, our Court of Appeals has stated that “[w]hen determining . . . the scope of an arbitration agreement, there is a presumption in favor of arbitrability.” Id. at 532. “[A]n order to arbitrate the particular grievance should not be denied unless it may be said

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(2) the Executive’s employment is involuntarily terminated by the Company (except for Cause) in anticipation of a Change of Control.

<sup>6</sup> Defendant notes that the rights of an Executive, as defined in Section 3 of the STA, explicitly arise “upon” a Change in Control. A “Change of Control” is defined at length at Section 2(d) of the STA as having occurred upon the occurrence of any one of a series of defined events, none of which, the parties agree, has occurred in these circumstances.

with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” AT&T Technologies, Inc. v. Communicaton Workers of America, 475 U.S. 643, 650 (1986).

The MDA requires arbitration of “all claims or disputes arising out of or relating to . . . the Employee’s employment relationship with Consulting . . . or cessation of such employment relationship.” MDA, § 9.1. Our Court of Appeals broadly construes the phrase “arising out of” in arbitration provisions. Battaglia v. McKendry, 233 F.3d 720, 727 (3d Cir. 2000). Whether the provisions of the STA were triggered by plaintiff’s termination “in anticipation of a Change in Control,” or whether a “Change of Control” is required, is an issue that “arises out of” the cessation of the employment relationship between the parties. As such, it is subject to arbitration, and, accordingly, this action must be stayed pending arbitration.

BY THE COURT:

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Edmund V. Ludwig, J.