

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

GLOBE INDEMNITY COMPANY,)	CIVIL ACTION
)	
)	NO. 95-5436
Plaintiff)	
)	
vs.)	
)	
NICHOLAS DEREVJANIK,)	
)	
)	
Defendant)	

TROUTMAN, S.J.

M E M O R A N D U M

In this declaratory judgment action the parties are seeking the Court's interpretation of an insurance policy issued by plaintiff, Globe Indemnity, Inc., to Canada Dry Bottling of Lehigh/Davis Beverage Group. The defendant, Derevjanik, was injured in an automobile accident at a time when the Globe policy provided coverage to his employer for motor vehicle claims. Since the underlying facts are not in dispute, the parties have submitted cross-motions for summary judgment to obtain resolution of the legal issues that are at the heart of this matter, i.e., whether defendant is an "insured" under the policy and whether this issue should be determined through arbitration pursuant to the insurance contract rather than in the instant action.

Factual Background and Legal Contentions

On December 18, 1994, defendant was riding a motorcycle when he was involved in an apparently serious accident with another vehicle. Derevjanik sought and received first-party benefits in the amount of \$100,000, the policy limits of the insurance covering the other driver. Defendant also claimed and was granted underinsured motorist benefits in the amount of \$100,000 from Erie Insurance Company, the carrier that had issued a motor vehicle policy to Derevjanik's wife. Defendant then made a claim for underinsured motorist benefits of \$1,000,000, the policy limits of a motor vehicle policy issued by plaintiff to Canada Dry Bottling of Lehigh/Davis Beverage Group.

The policy in issue includes various endorsements for commercial and/or leased vehicles used in several businesses which are named insureds on the original policy or on the endorsements. Also included as named insureds are a number of individuals, all of whom share the name "Davis", and are apparently related to the owners of the insured businesses.

There is no dispute that at the time of the accident defendant was an employee of Davis Beverage, Inc., one of the named insureds on the Globe policy. Derevjanik, however, is not a named insured under the policy, and he admits that he was driving his personal vehicle, not a vehicle specifically described in the Globe policy. Derevjanik further admits that he was not acting within the course and scope of his employment at the time of the accident. Nevertheless, he contends that he is an "insured" as that term is defined in the Globe policy, and,

therefore, that he is entitled to underinsured motorist benefits under his employer's motor vehicle insurance policy.

Plaintiff Globe contends that because defendant is clearly not an "insured" and his vehicle is clearly not a "covered vehicle" under the Davis Beverage Group policy, Derevjanik has no right to payment from Globe. Plaintiff, therefore, brought this action to obtain a declaration that Globe is not required to pay the underinsured motorist benefits demanded by Derevjanik.

In his answer to plaintiff's complaint for declaratory judgment, defendant Derevjanik asserted that the terms of the policy upon which Globe is relying to deny coverage are ambiguous and must be construed against the insurance company. Defendant also claimed that this controversy is subject to arbitration in accordance with a clause in the underinsured motorist portion of the policy.

Pursuant to an agreement reached by the parties, the Court entered a schedule for filing and responding to motions for summary judgment, which are now ready for disposition.¹

1. Part of the agreed schedule included consultation between the parties for the purpose of preparing a stipulation of facts upon which the legal issues could be determined. Although both parties refer to having agreed upon a stipulation of facts, no written stipulation was separately filed or included with either party's summary judgment motion. Nevertheless, as noted, there is no conflict in the parties' respective recitations of the facts.

Cross-Motions for Summary Judgment

Defendant's motion for summary judgment does not refer at all to the substance of the coverage dispute. Rather, defendant seeks dismissal of this case in order to permit the dispute to proceed to arbitration under ¶E.4. of Endorsement CA 21 93 07 90, entitled "Pennsylvania Underinsured Motorists Coverage - Nonstacked." (See, Exh. A to Defendant's Motion for Summary Judgment, Doc. #7).

The arbitration clause provides that, "If we and an 'insured' disagree whether the 'insured' is legally entitled to recover damages from the owner or driver of an 'underinsured motor vehicle' or do not agree as to the amount of damages, either party may make a written demand for arbitration." Defendant argues that he invoked the arbitration clause in his affirmative defenses to the complaint and that pursuant thereto, the Court lacks jurisdiction to decide the substantive issues involved in this insurance coverage dispute. Defendant, therefore, requests that we dismiss the complaint in order to permit the parties to proceed in the forum selected by the Globe insurance contract.

Globe's motion for summary judgment, on the other hand, focuses entirely on the substantive coverage issues. Globe asserts that because Derevjanik is not a named insured under the policy issued to his employer, and was not an occupant of an insured vehicle, he is barred from collecting benefits under the Globe policy by both the insurance contract and by a provision of

the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. Cons. Stat. Ann. §1733, which sets forth the priority order of sources for payment of underinsured motorist benefits.

In response to defendant's contention that this dispute should be resolved by arbitration pursuant to the policy in issue, Globe contends that by taking discovery, reaching a stipulation of facts, agreeing to submit cross-motions for summary judgment and failing to earlier demand dismissal of this action to pursue arbitration, defendant has waived his right to arbitrate this dispute. Significantly, however, Globe does not deny that the arbitration clause invoked by Derevjanik is otherwise applicable to the coverage issue which Globe asks the Court to resolve.²

Clearly, therefore, we must first resolve the waiver issue in order to determine whether we may proceed to an adjudication of the substantive dispute or must dismiss this

2. The Court's own inquiry into arbitrability confirms the positions of the parties that the instant dispute, concerning whether Derevjanik is an "insured" under the policy, is subject to the arbitration clause in the policy.

In Brennan v. General Accident, Fire & Life, 574 A.2d 580 (Pa. 1990), the Supreme Court of Pennsylvania determined that an identical arbitration clause conferred unlimited jurisdiction on the arbitrators to determine any issue in a dispute over when a party is legally entitled to recover damages. See, also, Marino v. General Accident Insurance Co., 610 A.2d 477 (Pa. Super.1992); Foster v. Rockwood Holding Co., 632 A.2d 335 (Pa. Cmmwlth. 1993). Since this action involves the question whether Derevjanik is an "insured" under the policy, and, therefore whether he is legally entitled to underinsured motrist benefits under the Globe policy, the issue appears to fall within the broad scope of the arbitration clause.

action pursuant to the arbitration clause in the underinsured motorist endorsement of the Globe policy.

Waiver of Arbitration

As noted, plaintiff contends that Derevjanik's conduct in this litigation prior to filing his motion for summary judgment was inconsistent with an intention to pursue arbitration of this dispute pursuant to the insurance policy.

Under clearly established Pennsylvania law, the right to enforce an arbitration clause may be waived, either expressly or by implication. Goral v. Fox Ridge, Inc., 683 A.2d 931 (Pa. Super. 1996). Nevertheless, since an effective waiver under Pennsylvania law involves a conscious and deliberate choice to relinquish a known right, waiver by implication or inference requires conduct "so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary." Marranca v. Amerimar, 610 A.2d 499, 501 (Pa. Super. 1992).

In the cited cases, the Pennsylvania courts concluded that the parties had waived their contractual rights by belatedly seeking to enforce arbitration clauses after unfavorable decisions in the court proceedings that they had first pursued. The Superior Court concluded, in both instances, that the parties moving for dismissal of the court proceedings in favor of arbitration were likely seeking a different forum primarily

because preliminary matters had been resolved against them in the court action. The court declined to permit the parties to belatedly attempt to enforce arbitration clauses after "testing the waters" in a forum to which they had not objected until receiving adverse decisions.

Since the instant motions represent the first opportunity for a court decision in this case, defendant has obviously not consented to this proceeding until he received an unfavorable ruling. Moreover, although there may have been an unfortunate lack of communication between counsel for the parties in this case which led plaintiff to believe that defendant agreed to a court adjudication of the substantive issue in this action, we cannot conclude that defendant's actions were so inconsistent with an intention to pursue arbitration that waiver of his right to arbitrate is the only reasonable inference which may be drawn from his conduct. Indeed, neither plaintiff nor defendant were particularly diligent in seeking adjudication of their dispute.

Review of the docket entries and the Court's records in this matter reveals that the answer to the complaint was entered on October 2, 1995, followed on October 5, 1995, by a letter to counsel directing them to confer and submit a proposed schedule for discovery and other proceedings. Nevertheless, the Court heard nothing more from either party until an order setting a pretrial conference was issued on May 5, 1996. At that time, the Court was told that the parties, who had been negotiating in the interim, felt reasonably hopeful that the case could be amicably

resolved, and, therefore, had not submitted a proposed scheduling order.

Since counsel for the defendant was unable to attend the scheduled conference on July 18, 1996, and the parties had by then concluded that settlement was not likely, the attorneys proposed a schedule for submission of summary judgment motions following a brief period of discovery and consultation on producing a stipulation of facts. In preparation for the conference, however, and pursuant to the Court's May 5, 1996 order, defendant's counsel had submitted a confidential status report in which he reiterated defendant's position that this matter was subject to arbitration.³

It appears to the Court, therefore, that defendant did not earlier move to compel arbitration for the same reason that the parties did not submit a proposed schedule as directed by the Court, i.e., the hope that the matter could be resolved without

3. Defendant notes that reference to this letter was omitted from plaintiff's chronology of events leading to submission of the pending summary judgment motions and implies that the omission was intentional, designed to strengthen plaintiff's waiver argument. We note, however, that the Court specifically directed counsel to submit confidential status/settlement reports directly to the Court. This procedure is designed to provide the Court with a more candid exposition of each party's settlement position than would be possible if the reports became part of the public record of the case or were revealed to opposing counsel. We further note that defendant's counsel apparently understood this purpose, since there is no indication on the letter that a copy thereof had been sent to plaintiff's counsel. We conclude, therefore, that plaintiff's omission of any reference to defendant's letter of July 10, 1996 is more likely due to lack of knowledge of the contents of the letter, or even of its existence, than to a deliberate attempt to present a more favorable record.

any further proceedings. When it appeared that settlement negotiations had failed and a schedule for putting this action into a posture for final disposition was thereafter entered, defendant may well have concluded that it was reasonable and appropriate to raise the arbitration in the context of the agreed motion schedule. In any event, we do not find in the procedural history of this case an egregious attempt at belated forum switching such as found sufficient by the Pennsylvania courts to support the conclusion that contractual arbitration rights were waived by the prior inconsistent conduct of the party seeking arbitration.

Undoubtedly, it would have been preferable for defendant to seek plaintiff's agreement to proceed to arbitration when it appeared that settlement of the entire controversy could not be achieved. Since plaintiff clearly agrees that the substantive issues in this case are arbitrable in accordance with the insurance contract at issue, such procedure might have avoided the need for submitting the pending motions to the Court for disposition, and at the least, would certainly have clarified plaintiff's expectations and understanding of defendant's likely summary judgment position. Nevertheless, although plaintiff may have been surprised and disappointed by defendant's efforts to have this matter arbitrated rather than decided by the Court, we do not discern the kind of prejudice to plaintiff that might otherwise support a conclusion that defendant has waived his right to pursue arbitration. The factual basis for the parties

differing legal positions is not complicated and must undoubtedly be presented to the arbitrators as well as to the Court. Consequently, we do not understand plaintiff's position that it was misled into engaging in more difficult or protracted proceedings as a result of defendant's failure to earlier seek arbitration. As noted, little or nothing directed toward preparation of the substantive issues for disposition was done for nearly a year after this action was commenced by plaintiff, and only three months elapsed between entry of a very limited scheduling order and service of defendant's motion for summary judgment in which he requests that the action be dismissed in order to submit the substantive issues to arbitration.

Conclusion

In light of the record of this case, we find no reason to deny defendant's motion for summary judgment. Accordingly, expressing no opinion on the substantive issues involved herein, we will dismiss this action to permit the parties to submit their dispute to arbitration pursuant to the insurance contract here in issue. An appropriate order will be entered, granting defendant's motion for summary judgment, and denying plaintiff's motion without prejudice to plaintiff's ability to raise the substantive issues included therein in the appropriate forum.

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TROUTMAN, S.J.

O R D E R

AND NOW, this day of July, 1997, upon consideration of plaintiff's Motion for Summary Judgment, (Doc. #8), defendant's Motion for Summary Judgment, (Doc. #7), and the parties' respective responses thereto, **IT IS HEREBY ORDERED** that plaintiff's motion is **DENIED** and defendant's motion is **GRANTED**.

IT IS FURTHER ORDERED that the above-captioned action is **DISMISSED** in order for the parties to pursue arbitration of their underlying dispute in accordance with the terms of the insurance policy under which defendant is seeking underinsured motorist benefits, and in accordance with the accompanying memorandum of law.

IT IS FURTHER ORDERED that the Clerk is directed to mark the above-captioned action **CLOSED** for statistical purposes.

S.J.