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

RONALD F. BRATEK, et al.	:	CIVIL ACTION
v.	:	
BEYOND JUICE, LLC, et al.	:	NO. 04-4491

MEMORANDUM

Baylson, J. **May 25, 2005**

The issue presently before the Court is whether the parties in this litigation, or any of them, agreed to arbitrate disputes between them. In a prior Memorandum dated February 9, 2005, the Court reviewed the facts of the case in brief, and noted that the Defendants had moved to dismiss the Complaint pursuant to F. R. Civ. P. 12(b)(6) based on an arbitration provision which Defendants contend bars the present action, or at least requires the Court to stay the present action pending the arbitration. The Plaintiffs, an individual and a Pennsylvania limited liability company apparently controlled by the individual Plaintiff, disputed that they ever agreed to an arbitration provision.

In the prior Memorandum, the Court briefly reviewed the relevant law as to whether documents presented to the Court warranted the Court finding that the parties had agreed to the arbitration provision asserted by Defendants. The Court determined that it could not decide the issue as a matter of law and directed the parties to proceed with discovery to establish facts pertaining to the question of whether Plaintiffs Bratek and Philly Juice LLC did in fact agree to the License Agreement containing the arbitration clause.

Since that Memorandum, the Plaintiffs have filed an Amended Complaint in which they dropped the RICO claim that had been asserted in the original Complaint, but reasserted their other claims. Although Plaintiffs have not specifically included an allegation of jurisdiction in their Amended Complaint, it appears that jurisdiction in this case is based on federal securities law claims as well as diversity of citizenship.

In determining whether the parties have agreed to an arbitration clause, the court is guided by the relevant provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 2, 4. In an important precedential decision interpreting this statute, Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir. 1980), the Third Circuit held that "[a]rbitration is a matter of contract between the parties and a judicial mandate to arbitrate must be predicated upon an agreement to that effect." A court may not order arbitration unless it is "satisfied that the making of the agreement for arbitration . . . is not an issue." 9 U.S.C. § 4. The Third Circuit added:

> Before a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect. [FN8] If there is doubt as to whether such an agreement exists, the matter, upon a proper and timely demand, should be submitted to a jury. Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement. The district court, when considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate has been made between the parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may arise.
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> > FN8. Indeed, the Arbitration Act requires that an agreement to arbitrate be in writing if it is to be enforceable.

Par-Knit Mills, Inc., 636 F.2d at 54.

These principles were reaffirmed in the more recent case of Sandvik v. Advent International Corp., 220 F.3d 99, 108-09 (3d Cir. 2000), and applied in a detailed opinion in Bullick v. Sterling Inc., 2004 WL 2381544 (E.D. Pa. 2004), holding that an arbitration clause was valid and enforceable, albeit with facts very different from the present case.

In reviewing the facts that have been presented by the parties in supplemental memoranda, following the discovery ordered by this Court's February 9, 2005 Memorandum, the Court cannot conclude by the applicable legal standard that there "is not an issue" as to whether the Plaintiffs ever agreed to an arbitration. 9 U.S.C. § 4. In terms of the summary judgment standard, which has been used in this situation, Berkery v. Cross Country Bank, 256 F.Supp.2d 359, 364 n.3 (E.D. Pa. 2003)("Motions to compel arbitration are evaluated, in the first instance, under the well-settled summary judgment standard."), the Court finds that there is a genuine issue of fact as to whether Plaintiff Bratek, on behalf of himself and Plaintiff Philly Juice, LLC, ever agreed to the arbitration clause. As discussed below, the review of the depositions taken by the parties requires this conclusion.

As described in greater detail in the February 9, 2005 Memorandum, the issue before the Court is whether the Letter of Intent executed by the parties incorporates by reference the terms of an unexecuted License Agreement which contains an arbitration clause. The Amended Complaint states in regard to the unexecuted License Agreement that "[t]he parties considered executing a more detailed license agreement and Bratek was provided with partially completed drafts of proposed license agreements (containing blanks), but never was provided with a complete draft and was unwilling to accept many of the terms contained in the partially completed drafts that were provided to him." (Amended Complaint, ¶ 14). In the answer to

Defendants' first set of interrogatories, Plaintiffs stated that "Bratek specifically advised Friedman that he would not sign a contract that contained a mandatory arbitration clause." (Plaintiff's Response to Defendants' First Set of Interrogatories, Interrogatory Answer No. 4, p. 4).

In his deposition, Bratek stated unequivocally that he never agreed to the arbitration provisions of the License Agreement that had been provided to him by Defendants, and specifically that during a meeting with Defendant Morrie Friedman in Bratek's office, Bratek told Friedman that "I'm not signing the agreement as it stands with the Las Vegas arbitration," and that "I want an agreement that's tailored to me and our conversation. And he nodded, and I took that to mean that he agreed or else I wouldn't have moved on." (Oral Deposition of Ronald Bratek, April 21, 2005, p. 60-61). Bratek therefore contends that, not only did he never sign the License Agreement that was presented to him, but an oral agreement existed between himself and Morrie Friedman that (1) the proposed License Agreement would be changed – by the removal of the arbitration clause and the alteration of the provisions regarding license fees, and (2) that another License Agreement would be provided to reflect those changes sometime in the future. Bratek also emphasizes that, regardless of this alleged oral agreement with Morrie Friedman, it is undisputed, and Defendants' counsel has stipulated, that the License Agreement was never executed.[1]

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[1]Defendant Morrie Friedman stated in his deposition that he saw Bratek sign the License Agreement, along with other documents, but that Bratek told Friedman that he would not send the documents to Beyond Juice because he needed to discuss them with his wife. (Oral Deposition of Morrie Friedman, April 5, 2005, p. 42-44). Defendants brief, however, does not rely on Friedman's testimony to assert Bratek's agreement to the arbitration, but instead argues that the executed Letter of Intent, and other agreements entered into by the parties, incorporated the License Agreement, and therefore the License Agreement's arbitration clause is binding on

The Third Circuit has stated that in cases where there is "[a]n unequivocal denial that the agreement had been made, accompanied by supporting affidavits," this should "in most cases . . . be sufficient to require a jury determination on whether there had in fact been a 'meeting of the minds.'" Par-Knit Mills, Inc., 636 F.2d at 55 (3d Cir. 1980)("Having supported the threshold issue by sworn affidavit, Par-Knit is entitled to a trial to determine whether or not an agreement was reached and, if so, whether said agreement properly included an agreement to arbitrate."). The Court therefore finds that the deposition testimony, and other documents submitted to the Court, indicate that there is a genuine issue of fact as to whether Plaintiff Bratek, on behalf of himself and Plaintiff Philly Juice, LLC, ever agreed to the arbitration clause, and therefore an evidentiary hearing on the factual issues presented by the demand for arbitration will be held pursuant to §4 of the FAA.

An appropriate Order follows.

Bratek The absence of a signed agreement itself containing an arbitration clause prevents the Court from construing these documents as a matter of law, but presents a factual issue as to the intent of the parties.

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ORDER

AND NOW, this 25th day of May, 2005, it is hereby ORDERED that the Motion of Defendants to Dismiss the Complaint, or Alternatively, to Stay the Matter Pending Arbitration (Doc. No. 3) will be decided following an evidentiary hearing on the factual issues presented by the demand for arbitration, pursuant to the Federal Arbitration Act, for the reasons stated in the foregoing Memorandum.

In that neither party appears to have requested a jury trial on these issues, the matter will be heard by the Court without a jury. The trial will begin on Monday, June 13, 2005, subject to any ongoing trials held over from the prior week and to a criminal trial also listed on June 13, 2005. Counsel shall call Deputy Clerk Lynn Meyer as to the status of these matters during the week of June 6, 2005.

Proposed findings of fact and conclusions of law, and a copy of the trial exhibits, shall be filed no later than June 9, 2005. Any other pretrial motions shall be filed no later than June 6, 2005, and responses are due no later than June 10, 2005.

BY THE COURT:

/s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.

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