

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

TOTALLY EVERYTHING, INC., and	:	CIVIL ACTION
HI-TEK INTERNATIONAL, INC.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
ATX RESEARCH, INC./	:	
ATX TECHNOLOGIES, INC.,	:	
	:	
Defendant.	:	No. 97-6981

MEMORANDUM AND ORDER

AND NOW, this 5th day of December, upon consideration of the motion of defendant ATX Research, Inc./ATX Technologies, Inc. (“ATX”) to dismiss the complaint of plaintiffs Totally Everything, Inc. (“Totally Everything”) and Hi-Tek International, Inc. (“Hi-Tek”) for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6) and for failure to join an indispensable party whose joinder would divest this Court of subject matter jurisdiction under Rule 12(b)(7) (Document No. 11) and the response of the plaintiffs thereto (Document No. 16), and having found and concluded that:

1. Totally Everything and Hi-Tek filed a complaint in this Court on November 13, 1997 against ATX entitled Plaintiffs’ Complaint Requesting Temporary Restraining Order, Preliminary Injunction and Enforcement of Arbitration Under Federal Arbitration Act (“FAA”). The following day, November 14, 1997, plaintiffs filed a Petition for Temporary Restraining Order and Preliminary Injunction and To Enforce Arbitration. Totally Everything and Hi-Tek claimed that ATX breached its agreement with them to be exclusive distributors of ATX’s OnGuard product within the Philadelphia and Washington, D.C. areas when ATX sold the product to Pep Boys Automotive Supercenters

(“Pep Boys”) for resale to the public within plaintiffs’ exclusive areas;¹

2. In section 21 of the distributorship agreement signed by the parties, the plaintiffs and ATX agreed that “[a]ny controversy or claim arising out of the interpretation, application or enforcement of this Agreement which cannot be resolved by the parties shall be submitted to final, binding and confidential arbitration before three arbitrators. . . .” The day after the filing of the complaint, on November 14, 1997, ATX demanded arbitration with Totally Everything and Hi-Tek. (Def.’s Mem. Exs. A and B);

3. On November 20, 1997, ATX filed the motion to dismiss that is currently before the Court. ATX made the following arguments: (1) plaintiffs’ request in their complaint that this Court “designate and appoint three arbitrators to hear the controversy in accordance with Section 5 of the FAA” and “direct that the arbitration hearings and proceedings take place promptly within the Eastern District of Pennsylvania per Section 4 of the FAA,” (Pls.’ Complaint at 11), do not state a claim upon which relief may be granted because plaintiffs did not allege that ATX refused to arbitrate the underlying claim, and (2) the case should be dismissed for lack of subject matter jurisdiction because Pep Boys is an indispensable party under Rule 12(b)(7) of the Federal Rules of Civil Procedure whose presence would destroy diversity jurisdiction;

4. In support of their claim that this Court should appoint the arbitrators in this dispute, Totally Everything and Hi-Tek argue in their memorandum in response to ATX’s motion to dismiss that because ATX stated in its demand for arbitration that it would like each party to select the arbitrators and plaintiffs requested in their complaint that this Court to appoint the arbitrators, the parties are unable to agree upon the method for choosing arbitrators, and thus, this Court should do so under section 5 of the FAA;

5. In a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). However, in deciding whether to compel arbitration under the FAA, a court should consider the request under the standards for a motion for summary judgment. See Trott v. Paciolla, 748 F. Supp. 305, 308 (E.D. Pa. 1990) (citing Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 n.6 (3d Cir. 1980));

6. Section 4 of the FAA provides that “[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4. In section 5, the conditions under which a court may appoint an arbitrator are set forth. See 9 U.S.C. § 5;

7. Because ATX made a demand for arbitration on both plaintiffs the day after it received plaintiffs’ demand for arbitration made through their complaint,

¹ A hearing was held on plaintiffs’ petition for a temporary restraining order on November 14, 1997, at the conclusion of which the request for a temporary restraining order was denied by this Court. After a period of expedited discovery, the parties presented their arguments and evidence at a preliminary injunction hearing on December 1, 1997. This Court denied plaintiffs’ petition for a preliminary injunction on December 3, 1997.

there is no evidence to support plaintiffs allegation that ATX has refused to arbitrate the dispute. See PaineWebber Inc. v. Faragalli, 61 F.3d 1063, 1067 (3d Cir. 1995), (observing that “unless and until an adverse party has refused to arbitrate a dispute putatively governed by a contractual arbitration clause. . . no harm has befallen the petitioner -- hence, the petitioner cannot claim to be ‘aggrieved’ under the FAA”);

8. Indeed, as both parties have agreed to arbitrate all controversies or claims under the agreement, including the underlying dispute, the plaintiffs’ complaint before this Court must be dismissed as there is no longer a justiciable case or controversy between the parties. See id. at 1067 (“Moreover, it is doubtful that a petition to compel arbitration filed before the ‘adverse’ party has refused arbitration would present an Article III court with a justiciable case or controversy in the first instance.”);

9. Because this Court has no justiciable case or controversy before it, the parties are required to enforce and interpret their own agreement to arbitrate in such a way as to facilitate the arbitration they all have requested, including the choice of arbitrators;

10. As plaintiffs’ petition for a temporary restraining order and a preliminary injunction has been denied and all parties have demanded arbitration of the dispute, there is no need for this Court to consider ATX’s argument that Pep Boys is an indispensable party to this action divesting this Court of jurisdiction of this case because plaintiffs’ complaint will be dismissed for the reasons given above;

it is hereby **ORDERED** that the motion is **GRANTED**. The plaintiffs’ complaint is **DISMISSED**. This is a final Order.

LOWELL A. REED, JR., J.