

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

EAGLE TELECOM, INC.,

Plaintiff,

v.

BILLING CONCEPTS SYSTEMS, INC.,

Defendant.

:
:
:
:
:
:
:
:
:
:
:

Civil Action No. 99-2981

MEMORANDUM

R.F. KELLY, J.

AUGUST 5, 1999

Before this Court is Defendant's Motion to Dismiss Complaint and to Compel Alternative Dispute Resolution and, if necessary, Arbitration. The instant action arises from an agreement entered into by the parties by which Defendant Billing Concepts Systems, Inc. ("BCSI"), agreed to provide certain data processing and related information technology services to Plaintiff Eagle Telecom, Inc. ("Eagle"). On or about May 26, 1999, Eagle filed a complaint against BCSI alleging, inter alia, that BCSI fraudulently induced Eagle to enter into the agreement. For the following reasons, Defendant's Motion to Dismiss Complaint and to Compel Alternative Dispute Resolution and, if necessary, Arbitration will be granted.

DISCUSSION

Article XII of the agreement entered into by the parties is entitled "Alternative Dispute Resolution." Under this

section of the agreement is sub-heading 12.1 called "Informal Dispute Resolution." According to this part of the agreement: "The parties agree to resolve any dispute, controversy or difference arising out of this Agreement informally by submitting it to a panel composed of an officer or other authorized representative appointed by each of the parties." (Ex. A to Def.'s Mot.) The sub-section that follows, 12.2 Arbitration, provides in pertinent part: "Failing resolution pursuant to Section 12.1 above, all disputes, controversies, or differences arising out of this Agreement or any breach thereof shall be finally settled under the Commercial Arbitration Rules established by the American Arbitration Association then in effect" Id.

Despite the above, Eagle contends that "since the agreement was materially breached by BCSI, Eagle is now entitled to contractual termination or cancellation, and the arbitration clause, a clause that BCSI has in the past materially breached, is no longer applicable." Pl.'s Mem. at 2. In this regard, Eagle first argues that because BCSI previously sought relief alternative to that provided under the agreement, more specifically, self-help by unilaterally discontinuing Eagle's services under the agreement, BCSI waived its right to proceed under the arbitration provision. Id. at 2-3.

In support of its position, Eagle cites to Goral v. Fox

Ridge, Inc., 683 A.2d 931 (Pa. Super. Ct. 1996). In Goral, the Pennsylvania Superior Court held that the defendants waived their contractual right to compel arbitration. However, Plaintiff's reliance on Goral is misplaced. In that case, the court determined that the defendants had initially sought relief from the trial court and only after failing success in that forum did they seek to proceed to the alternative forum of arbitration. Moreover, as BCSI notes, the plaintiff in Goral had been prejudiced by defendants' delay in seeking to invoke arbitration until 19 months after the lawsuit had been filed.¹ Goral, 683 A.2d at 934. Here, "[u]nlike the defendant in Goral, the defendant in this action immediately filed the motion to dismiss and, indeed, plaintiff does not even claim prejudice." Def.'s Supp. Mem. at 2 n.2. Thus, because BCSI's conduct has not resulted in an undue advantage or prejudice to Plaintiff in the instant case, this Court finds that BCSI has not relinquished its right to proceed to arbitration. See Goral, 683 A.2d at 933 (quoting Kwalick v. Bosacco, 478 A.2d 50, 52 (Pa. Super. Ct. 1984)).

Next, Eagle contends that it is not bound by the terms

¹ In addition to the costs already incurred, the plaintiffs in Goral would have been required to re-initiate legal proceedings before the American Arbitration Association, thus, incurring additional costs; and the defendants would then have been able to assert that any claims were barred by the statute of limitations. Goral, 683 A.2d at 934.

of an agreement compelling "Alternative Dispute Resolution" because it was induced by BCSI to enter into the agreement by fraud, deceit and misrepresentation. In other words, Eagle argues that it is entitled to contractual termination, rendering the "Alternative Dispute Resolution" clause inoperable, because it is the victim of the tort of fraudulent inducement to contract. However, BCSI correctly points out that, "as a matter of law, arbitration is not barred by the assertion that the entire contract is induced by fraud, but only by the specific claim and showing that the arbitration clause, itself, was fraudulently procured." Def.'s Supp. Mem. at 3 (citing cases); see also Coleman v. Nat'l Movie-Dine, Inc., 449 F. Supp. 945, 948 (E.D. Pa. 1978) ("A claim of fraud in the inducement of the contract is insufficient to prevent the invocation of the arbitration provision of the contract."); Ferro v. Corp. Garrison Indus., 142 F.3d 926, 933 (6th Cir. 1998) ("[T]he arbitration agreement is effectively considered as a separate agreement which can be valid despite being contained in a fraudulently induced contract.").

BCSI is also correct in its contention that "Plaintiff has improperly converted a breach of contract claim into a tort claim." Def.'s Mem. at 3. The Complaint in this case alleges that BCSI failed to provide services to Eagle as identified in the agreement between the parties. Under Pennsylvania law,

however, a plaintiff, without more, cannot convert a contract claim into a tort claim. See Glazer v. Chandler, 200 A.2d 416 (Pa. 1964) (holding that a plaintiff may not sue in tort for breaches of contract); Phico Ins. Co. v. Presbyterian Medical Servs. Corp., 663 A.2d 753, 757 (Pa. Super. Ct. 1995) (“[A] contract action may not be converted into a tort action simply by alleging that the conduct was done wantonly.”); see also USX Corp. v. Prime Leasing, Inc., 988 F.2d 433, 440 (3d Cir. 1993) (affirming district court’s rejection of impermissible attempt by plaintiff to convert a contract claim into a tort claim); Factory Market, Inc. v. Schuller Int’l, Inc., 987 F. Supp. 387, 394 (E.D. Pa. 1997) (dismissing plaintiff’s fraud claim after concluding that it more properly sounded in contract than tort).

Based on the above, Defendant’s Motion to Dismiss and to Compel Alternative Dispute Resolution and, if necessary, Arbitration is granted. An appropriate order will be entered.

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

EAGLE TELECOM, INC.,	:	
	:	
	:	
Plaintiff,	:	
v.	:	Civil Action No. 99-2981
	:	
BILLING CONCEPTS SYSTEMS, INC.,	:	
	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 5th day of August, 1999, upon consideration of Defendant's Motion to Dismiss and to Compel Alternative Dispute Resolution and, if necessary, Arbitration, and all responses thereto, it is hereby ORDERED the Defendant's Motion to Dismiss is GRANTED, and the Complaint is DISMISSED.

BY THE COURT:

ROBERT F. KELLY, J.