

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

MATTHEW KELLMER SHERMAN,	:	November Term 2007
Plaintiff,	:	
v.	:	No. 2473
JACK KELLMER COMPANY, JACK	:	
KELLMER CO. OF NEW JERSEY, L.P.,	:	COMMERCE PROGRAM
JACDOR REALTY CORPORATION, J&	:	
W REALTY CO., L.P., KELLMER	:	Control Number 120749
ASSOCIATES, L.P.,	:	
Defendants.	:	

ORDER

AND NOW, this 27TH day of March 2008, upon consideration of Defendants Jack Kellmer Company, Jack Kellmer Co. of New Jersey, L.P., Jacdor Realty Corporation, J.&W Realty Co., L.P. and Kellmer Associates, L.P.'s Preliminary Objections, Plaintiff's response in opposition, Memoranda, all matters of record and in accord with attached Opinion, it hereby is **ORDERED** that the Objection for lack of subject matter jurisdiction is **Sustained**. This matter is remanded to Arbitration and this matter is stayed pending completion of the Arbitration Proceeding.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

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J&W REALTY CO., L.P., KELLMER	:	Control Number 120749
ASSOCIATES, L.P.,	:	
Defendants.	:	

OPINION

The instant action was filed by Plaintiff Matthew Kellmer Sherman (hereinafter “Sherman”) to effectuate an inspection of corporate records in Jack Kellmer Company, Jack Kellmer Company of New Jersey, J&W Realty Company, L.P., Jack Kellmer Associates, L.P. and Jacdor Realty Corp. (hereinafter Defendants).

On September 19, 2006, Sherman requested copies of defendants’ financial records. Defendants’ counsel informed Sherman that in order to view the documents he would have to travel to defendants’ accountant office in New Jersey. Sherman was informed that he could only view the documents and not copy or take them away. Sherman was also informed that he would be personally responsible for any charges or expenses of the accountant for his time spent showing the records.

On August 31, 2007, Sherman made another request for copies of defendants’ financial documents to defendants’ counsel. On September 12, 2007, defendants’ counsel informed Sherman that financial statements would not be released to him but that he could view them at the accountant’s office in New Jersey. On October 17, 2007, Sherman’s counsel met with the accountant and was not permitted to make any copies or

take any financial reports into his possession. Additionally, Sherman alleges that defendants failed to mail or allow shareholders to hold copies of the annual financial statements of the various companies.

On November 20, 2007, Sherman instituted this action against defendants alleging breach of fiduciary duty (Count I), denial of minority shareholder's rights (Count II), and bad faith (Count III). Sherman also requested an injunction seeking judicial intervention to allow inspection and study of corporate records and books at the corporate office in Philadelphia to determine the fair and full value of the Sherman's shareholdings and a court ordered judicial involuntary dissolution. On the same date, Sherman also filed a Motion for Injunctive Relief. The injunction sought an order allowing access to the defendants financial statements, financial records, stockholder's/partner's list, corporate/partners' minutes and financial statements. After a conference with the court, an agreement was reached wherein Sherman would be permitted to inspect defendants' records.

Presently before the court are defendants' preliminary objections asserting the following: (1) lack of subject matter jurisdiction over Sherman's claims for an injunction to determine the value of Sherman's interest and a court ordered and judicially supervised involuntary dissolution, (2) lack of the minimum required legal and factual specificity as to Kellmer Associates Limited Partnership, (3) lack of jurisdiction over Jack Kellmer & Co. of New Jersey, (4) lack of factual specificity; (5) failure to conform to a rule of law and (6) failure to plead and exhaust statutory remedies.

The right of a shareholder in a corporation to inspect corporate records has long been established in Pennsylvania common law.¹ This right is now codified at 15 Pa. C.

S. § 1508 (b) which provides:

“Every shareholder shall, upon written verified demand stating the purpose thereof, have a right to examine, in person or by agent or attorney, during the usual hours for business for any proper purpose, the share register, books or records of account, and records of the proceedings of the shareholders and directors, and to make copies or extracts there from. A proper purpose shall mean a purpose reasonably related to the interest of the person as a shareholder . . .”

Pennsylvania statutes also require limited partnerships to keep basic corporate records and recent financial information available at the corporate office and to allow shareholders access to “true and full information regarding the state of the business and financial condition of the limited partnership.”²

Authority to institute a legal proceeding to enforce this right of inspection is conferred upon a shareholder (or attorney or agent acting on behalf of a shareholder) in § 1508 (c).³ Prior to instituting such a proceeding, the shareholder first must establish that the purpose for which inspection is sought is proper and that he or she has complied with the requirements in § 1508 (b) for making an inspection demand. Thereafter, the burden of proving that the inspection was for an improper purpose falls on the corporation.⁴

¹ Simms v. Exter Architectural Products, Inc., 868 F. Supp. 668, 674 (M.D. Pa. 1994)(citing Zerbey v. J.H. Zerby Newspapers, 385 Pa. Super. 109, 560 A.2d 191 (Pa. Super.1989); Klein v. Scranton Life Ins. Co., 139 Pa. Super. 369, 11 A. 2d 770 (1940)).

² See 15 Pa. C. S. §§ 8507, 8525 (a)(1).

³ Tyler v. O'Neill, 994 F. Supp. 603, 608 (E.D.Pa. 1998).

⁴Id. See also, 15 Pa. C.S. § 1508 (c); Goldman v. Trans-United Industries, Inc., 404 Pa. 288, 171 A.2d 788 (Pa. 1961).

At issue is whether this court has jurisdiction over this matter since various agreements, specifically, the Jack Kellmer & Co. Shareholder's Agreement, the J&W Realty Co. Limited Partnership Agreement and the Kellmer Associates Limited Partnership Agreement, all contain an arbitration provision mandating that any dispute or controversy arising under or in connection with the agreements be settled exclusively by Arbitration.⁵ Judicial inquiry into whether an issue is subject to arbitration is limited to determining (1) whether a valid agreement to arbitrate exists between the parties and if so (2) whether the dispute involved is within the scope of the arbitration provision.⁶

Applying these standards to the case at hand, it is clear that valid agreements to arbitrate exist between Sherman and the defendants. Although, Sherman may not have affixed his signature to all the applicable Agreements per se⁷, someone signed the Agreements on his behalf thereby giving him rights and obligations under the Agreements, including the obligation to submit disputes to arbitration.⁸ Hence, valid arbitration agreements exists among the parties.

Having determined that a valid agreement to arbitrate exists, the court must now determine whether the instant dispute falls within the scope of the Arbitration Agreements. It is well settled that in order to determine whether a particular dispute falls within a contractual arbitration provision, the court must examine the entire contract,

⁵ The Jack Kellmer of New Jersey Limited Partnership and Jaccor Realty Co. do not contain arbitration provisions.

⁶ Smith v. Cumberland Group, Ltd., 455 Pa. Super. 476, 285, 687 A.2d 1167, 1171 (Pa. Super. 1997).

⁷ Sherman did agree to arbitrate disputes in the Agreement of Limited Partnership for the Kellmer Family Limited Partnership.

⁸ Dayhoff Inc. v. H.J. Heinz Inc., 86 F.3d 1287 (3d Cir.1996) cert denied, 519 U.S. 1028, 117 S.Ct. 583, 136 L.Ed.2d 513 (1996). See also, Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3d Cir.1993). See also, Jack Kellmer Co. Shareholder Agreement paragraph 25 B. (This Agreement shall inure to the benefit of and be legally binding upon the heirs, personal representatives, successors, and permitted assigns of them and each of them.).

taking into consideration “...the surrounding circumstances, the situation of the parties when the contract was made, the objects they apparently had in view and the nature of the subject matter.”⁹ Here the subject matter of the dispute is inspection of corporate and partnership records, determination of Sherman’s value in the corporations and partnerships and dissolution. As it pertains to the two later issues it is clear that the Jack Kellmer Co., J&W Realty Co. & Kellmer Associates Limited Partnership mandate that these issues be arbitrated.¹⁰

As for the issue regarding the inspection of corporate records, the court finds that this too is a matter for arbitration. The J&W Realty Co. Limited Partnership Agreement Article IX (Financial Matters and Books) and the Kellmer Family Limited Partnership Agreement Article 21 (Books Accounts) specifically discuss who may inspect the records of the Partnerships and therefore the arbitration is mandated. Although the Jack Kellmer of New Jersey Limited Partnership and Jacdor Realty Company do not contain arbitration provisions and some of the other agreements at issue do not contain specific provisions regarding books and records, the court finds that the arbitration’s goal of “swift and orderly disposition of claims” would be better served by sending the entire matter to arbitration. As alleged in the complaint, all the defendant business entities are essentially the successors to a single family business which share the same or similar holder of

⁹ Huegel v. Mifflin Constr. Co. Inc., 796 A.2d 350 (Pa. Super. 2002).

¹⁰ See Shareholder Agreement for Jack Kellmer Co. ¶ 8 Agreed Value and ¶ 21 Termination, ¶ 24 Arbitration (“Any claim or controversy arising out of or relating to this Agreement or any breach thereof shall be settled by arbitration.). J&W Realty Co. L. P. Limited Partnership Agreement Article VII Dissolution and Termination and Article XI Arbitration ¶ 11.1 (“If any disagreement shall arise between the Partners in respect to any matter, cause or thing whatsoever, arising out of this Agreement or the operation of the Partnership...the same shall be decided and determined by an arbitrator”). Agreement of Limited Partnership Kellmer Family Limited Partnership ¶ Dissolution of Partnership and ¶ 27 Miscellaneous ((e) (1) Any dispute or controversy arising under or in connection with this Agreement shall be settled exclusively by arbitration in Montgomery County...).

interest, management, legal and accounting staff.¹¹ Since Sherman desires to liquidate his shares in the corporations and interest in the partnerships, the interest of all the parties would be better served if the matter was remanded to arbitration. The parties would not be forced to litigate the issue in two separate forums before two separate fact finders and risk inconsistent results.

CONCLUSION

For the foregoing reasons, Defendants' Preliminary Objection for lack of subject matter jurisdiction is **Sustained**. This matter is remanded to Arbitration and this matter is stayed pending completion of the Arbitration Proceeding.¹² An order consistent with this Opinion will be filed of record.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

¹¹ Complaint's Introductory paragraph.

¹² Based on this conclusion, the court need not address the remaining preliminary objections.