

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

AXCAN SCANDIPHARM, INC.,	:	OCTOBER TERM, 2000
	:	
Plaintiff,	:	NO. 03827
	:	
v.	:	COMMERCE PROGRAM
	:	
REED SMITH, LLP,	:	Control No. 031762
	:	
Defendant.	:	

ORDER

AND NOW, this 15TH day of May, 2006, upon consideration of defendant's Preliminary Objections to plaintiff's Response to defendant's Preliminary Objections, the response thereto, and all other matters of record, and in accordance with the Opinion being issued contemporaneously, it is hereby **ORDERED** that said Preliminary Objections to the Response are **SUSTAINED**.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

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OPINION

In its Complaint against Reed Smith, LLP (“Reed Smith”), Axcan Scandipharm, Inc. (“Axcan”) alleges that Reed Smith represented Axcan in certain federal court litigation brought against Axcan by McNeilab, Inc. Subsequently, Reed Smith undertook the representation of American Home Products Corporation (“AHPC”) and Eurand International, S.p.A. (“Eurand”) in a Philadelphia Court of Common Pleas case where AHPC and Eurand are adverse to Axcan (the “AHP Action”).¹ As a result, Axcan asserts claims in this action against Reed Smith for: 1) a declaratory judgment that Reed Smith be precluded from representing AHPC and Eurand in the AHP Action; and 2) damages for breach of fiduciary duty.

Reed Smith filed Preliminary Objections² to Axcan’s Complaint in which Reed Smith claimed that it was for the arbitrator in the AHP Action to decide whether Reed Smith should be disqualified as counsel for AHPC and Eurand in that action. Specifically, Reed Smith stated that “the Arbitration Agreement clearly gives Judge Gafni the power to decide the issues raised in [Axcan’s] Complaint” and “the issues raised in [Axcan’s] Complaint arise out of, and are

¹ By agreement of the parties to the AHP Action, the claims in that action were arbitrated before former Judge Gafni.

² Reed Smith apparently prepared Amended Preliminary Objections, but the docket does not reflect that they were ever filed with the court. At any rate, the relevant language is the same.

inextricably intertwined with, the matters that already are at issue in the [AHP Action].” *See* Preliminary Objections, ¶¶ 21, 32. Axcan did not respond to the Preliminary Objections. Instead, the parties entered into a stipulation staying this action in light of the fact that Judge Gafni found “that it was within his jurisdiction to rule on the Motion to disqualify Reed Smith.” *See* Stipulated Order dated December 19, 2000.

Judge Gafni apparently ruled on Reed Smith’s disqualification, as well as the merits of the AHP Action. As a result, Reed Smith moved to have this case returned to active status. In granting the motion to return this case to active status, the court noted that “it would appear that there are preliminary objections to be answered and decided upon motion” and directed that “the answer, if any, shall be filed within twenty (20) days.” *See* Order dated February 2, 2006. As a result, Axcan filed a Response to the Preliminary Objections. In its Response, Axcan argues that its remaining claim for damages for Reed Smith’s alleged breach of fiduciary duty must be sent to Judge Gafni for resolution because Reed Smith requested such relief in its Preliminary Objections, and it is now precluded from arguing otherwise. Reed Smith filed Preliminary Objections to Axcan’s Response, which are presently before the court. Reed Smith also filed an Answer to Axcan’s Complaint.

There appear to be procedural problems with Axcan’s Response. It is certainly arguable that no response to the Preliminary Objections was required because the Preliminary Objections were addressed by way of the Stipulated Order. In the alternative, to the extent that any Preliminary Objections remained unresolved, they were withdrawn by Reed Smith when it filed its Answer to Axcan’s Complaint. Furthermore, the legal basis for the Response lacks merit.

The gist of Axcan’s argument is that “having previously requested that this entire matter be referred to arbitration, and having successfully had a portion of this case referred to

arbitration, [Reed Smith] should not now be permitted to contradict [itself] and disavow [its] earlier prior verified statements arguing that this matter should be referred to arbitration.” *See* Axcan’s Memorandum of Law, p. 9. However, Reed Smith’s claim in its Preliminary Objections, that this entire dispute should be arbitrated, does not estop Reed Smith from arguing otherwise, nor is it a judicial admission.

“A party to an action is estopped from assuming a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained.” Trowbridge v. Scranton Artificial Limb Co., 560 Pa. 640, 644, 747 A.2d 862, 864 (2000). Reed Smith’s claim, that Axcan’s claims must be arbitrated, was not made in prior litigation; it was made in this litigation. It also was not successfully maintained, at least with respect to the claim for damages for breach of fiduciary duty. Therefore, Reed Smith is not estopped from arguing that the damages claim should be litigated.

“For an averment to qualify as a judicial admission, it must be a clear and unequivocal admission of fact. Judicial admissions are limited in scope to factual matters otherwise requiring evidentiary proof, and are exclusive of legal theories and conclusions of law.” John B. Conomos, Inc. v. Sun Co., 831 A.2d 696, 712 (Pa. Super. 2003). Reed Smith’s claim in its Preliminary Objections, that this case is subject to arbitration, is not an admission of fact; it is legal argument. *See* Warwick Twp. Water & Sewer Auth. v. Boucher & James, Inc., 851 A.2d 953, 955 (Pa. Super. 2004) (“The existence of an [arbitration] agreement and whether a dispute is within the scope of the agreement are questions of law . . .”) Likewise, it is irrelevant that the Preliminary Objections containing this argument were verified because verification relates only to “written statement of fact.” Pa. R. Civ. P. 76. Therefore, Reed Smith is not precluded from withdrawing its argument that Axcan’s fiduciary duty claim should be arbitrated. Since Reed

Smith no longer advocates arbitrating the fiduciary duty claim, there is no basis for sending the parties to arbitration.

CONCLUSION

For all the foregoing reasons, Reed Smith's Preliminary Objections to Axcan's Response to Reed Smith's Preliminary Objections are sustained.

BY THE COURT,

HOWLAND W. ABRAMSON, J.