

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

<b>DAVID C. MARKS,</b>	:	<b>June Term, 2003</b>
<b>Plaintiff,</b>	:	
<b>v.</b>	:	<b>No. 003618</b>
	:	
<b>E. Franks Hopkins, Inc., Stephen L.</b>	:	<b>Commerce Program</b>
<b>Marmar, Hugh G. Buckley, Jr.,</b>	:	
<b>Albert A. Pappas,</b>	:	<b>Control Number: 071949</b>
<b>Defendants.</b>	:	

**O R D E R**

**And Now**, this 29TH day of September 2003, upon consideration of Defendants' E. Frank Hopkins, Inc., Stephen L. Marmar, Hugh G. Buckley, Jr. and Albert A. Pappas' Preliminary Objections to Plaintiff's complaint, any response thereto, and in accordance with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED and DECREED** that Defendants' Preliminary Objections are **Sustained in part and Overruled in part** as follows:

1. Defendants' Preliminary Objection regarding lack of subject matter jurisdiction is **Overruled**;
2. Defendants' Preliminary Objection asserting legal insufficiency is **Sustained**. In the event that plaintiff is able to plead sufficient facts in support of his claims against the Individual Defendants, plaintiff is granted leave to amend the complaint within twenty (20) days from the date of entry of this Order only as it pertains to the Individual Defendants.

BY THE COURT:

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C. DARNELL JONES II, J.



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<b>Defendants.</b>	:	

**C. DARNELL JONES, II, J.....**

**O P I N I O N**

Before this court are the Preliminary Objections of defendants E. Franks Hopkins, Inc., Stephen L. Marmar, Hugh G. Buckley, Jr. and Albert A. Pappas (hereinafter defendants) to plaintiff’s complaint. For the reasons set forth below, defendants’ Preliminary Objections are overruled in part and sustained in part.

**B A C K G R O U N D**

The instant action was filed by plaintiff to effectuate an inspection of E. Franks Hopkins, Inc.’s (hereinafter Hopkins) corporate records in accordance with 15 Pa. C.S. A. § 1508. Hopkins is a retail and wholesale seafood business which sells and distributes seafood. Compl. ¶ 9. Marks is a shareholder of Hopkins, owning ten percent of the total issued and outstanding shares of Hopkins. Id. ¶ 10. The individual defendants, Stephen L. Marmar, Hugh G. Buckley, Jr. and Albery Pappas, are the owners and officers of Hopkins and own issued and outstanding shares of Hopkins. Id. ¶ 11-14.

On April 17, 2003, plaintiff was informed that the defendants, majority shareholders in Hopkins, made a decision to discontinue plaintiff’s employment with Hopkins. Id. ¶ 16. Defendants provided plaintiff with an oral offer to purchase his shares

for \$300,000.00. Id. ¶ 18-19. Pappas, on behalf of the majority shareholders and at the request of plaintiff concerning a clarification of the oral offer to purchase the shares, made a written offer to purchase plaintiffs shares. Id. ¶ 20.

After receipt of the offer to purchase shares, plaintiff's counsel forwarded a letter to the majority shareholders requesting information to permit plaintiff to properly evaluate the offer to purchase shares. Id. ¶ 22. According to plaintiff, Hopkins failed to provide the requested information. Id. ¶ 27, 29. Thereafter, plaintiff's counsel made a request to inspect Hopkins' books and records pursuant to 15 P. C.S. A. § 1508. Plaintiff made several requests for the information. Plaintiff alleges that the information has not been provided by Hopkins. Id. ¶ 29. As a result of the dispute between the parties, this litigation ensued.

Plaintiff's complaint in this matter asserts a cause of action under 15 Pa. C. S. A. § 1508. Defendants filed preliminary objections on two grounds, (1) lack of subject matter jurisdiction due to the existence of a shareholders agreement containing an arbitration clause and (2) failure to state a cause of action against individual defendants.

## **DISCUSSION**

Defendants argue that plaintiff's complaint must be dismissed because this matter is subject to arbitration. In support of their argument, Defendants rely upon 42 Pa. C. S. A. § 7303 which states:

A written agreement to subject any existing controversy to arbitration or a provision in a written agreement to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exists at law or in equity relating to the validity, enforceability or revocation of any contracts.

42 Pa. C. S. A. § 7303. Defendants assert that the current dispute is subject to Section 5.1.2 of the Shareholders Agreement between the parties which states:

If the parties have not stipulated a value within thirty six (36) months prior to an event giving rise to a sale and purchase, and said parties cannot agree upon a value or method of valuation within forty five (45) days after the occurrence of an event giving rise to a sale or purchase...such value shall be determined by a business appraiser chosen by the American Arbitration Association in Philadelphia, Pennsylvania, and the decision of the appraiser shall be final and binding upon all parties hereto, their heirs, administrators, successors and assigns.”

Defendants also assert that Section 15.6 of the Shareholders Agreement is also applicable to the current dispute. Section 15.6 states:

#### 15.6 Arbitration

With the exception of emergency relief, injunctive or otherwise, any controversies or arguments arising out of or relating to this Agreement or breach thereof shall be settled by arbitration in accordance with the commercial arbitration rules then existing of the American Arbitration Association in Philadelphia, Pennsylvania, and judgment under the award rendered may be entered in any court having jurisdiction there under.

### **I. This Court Has Subject Matter Jurisdiction Over Plaintiffs Claim**

Where one party to an agreement seeks to prevent another from proceeding to arbitration, judicial inquiry 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. Odyssey Capital, L.P. et. al. v. Sashi Reddi et. al., June Term 2002 No 2893 (November 14, 2002) (Cohen) (citing Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276, 284, 687 A.2d 1167, 1171 (Pa. Super. 1997); Messa v. State Farm Ins. Co., 433 Pa. Super. 594, 597, 641 A.2d 1167, 1168 (Pa. Super. 1994); PBS Coal, Inc. v. Hardhat Min. Inc., 429 Pa. Super. 372, 376-77, 632 A.2d 903, 905 (Pa.

Super. 1993). In the instant matter, the parties possess a valid agreement to arbitrate, which is contained in the Shareholder Agreement. Thus, the pertinent inquiry is whether the instant dispute falls within the scope of section 5.1.2 and 15.6 of the shareholders' Agreement. A review of the factual allegations within the complaint and the pertinent sections of the Shareholder Agreement, the court finds that the instant dispute does not fall within the scope of the arbitration provisions.

It is well settled that the issue of whether a particular dispute falls within a contractual arbitration provision is a matter of law for the court to decide. Odyssey, supra. (citing Shaddock v. Christopher J. Kaclik, Inc., 713 A.2d 635, 637 (Pa. Super. 1998)). Pennsylvania law advocates strict construction of arbitration agreements and dictates that any doubts or ambiguity as to arbitrability be resolved in favor of arbitration. Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276, 687 A.2d 1167, 1171 (Pa. Super. 1997). The fundamental rule in construction of a contract is to ascertain and give effect to the intention of the parties. Lower Frederick Tp. v. Clemmer, 518 Pa. 313, 543 A.2d 502, 510 (Pa. 1988) (plurality opinion). In order to determine the meaning of the agreement, the court must examine the entire contract, 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." Odyssey (citing Huegal v. Mifflin Const. Co., Inc., 796 A.2d 350 (Pa. Super. 2002) quoting In re Mather's Estate, 410 Pa. 361, 189 A.2d 586, 589 (1963)).

Defendants take the position that plaintiff's request to inspect Hopkins' books and records falls within the ambit of the arbitration provision contained within the shareholder agreement. The court does not agree.

The Shareholder Agreement contains two provisions which discuss arbitration, 5.1.2 and 15.6. Section 5.1.2 requires arbitration when disputes arise concerning the value to be placed on the shares of stock held by the shareholders. Section 15.6 requires arbitration when “controversies or arguments arising out of or relating to this Agreement or breach thereof” arise. Defendants are correct that if plaintiff was disputing stock value or stock value calculation, this court would not have jurisdiction. However, at the present time, plaintiff is seeking to inspect Hopkins’ corporate books and records. 15 Pa. C.S.A. §1508 permits a shareholder 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 account and records of the proceedings of the shareholders and directors and make copies and extracts there from. *Id.* Section 1508 (c) specifically allows a shareholder to apply to the court of common pleas of the county in which the registered office of the corporation is located for an order to compel such an inspection. This statute also vests the court of common pleas with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought. Based on the forgoing, this court has jurisdiction over this dispute. Defendants’ preliminary objection is overruled.<sup>1</sup>

**II. Plaintiff’s Complaint Fails to Set Forth a Cause of Action Against the Individual Defendants.**

Defendants argue that plaintiff’s complaint fails to set forth a cause of action against the individual defendants under 15 Pa. C. S. A. § 1508. When considering preliminary objections, all material facts set forth in the complaint, as well as all inferences reasonably deducible there from are accepted as true. While conclusions of

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<sup>1</sup> Although the court has jurisdiction, plaintiff has the obligation to prove that the requirements set forth within 15 Pa. C. S. A § 1508 are met before an inspection can occur.

law, unwarranted inferences from facts, argumentative allegations or expressions of opinion need not be regarded as such. Wagner v. Waitlevertch, 774 A2d 1247, 1250 (Pa. Super. 2001). Preliminary objections may only be granted in cases where it is clear and free from doubt that the facts alleged are legally insufficient to establish a right to relief. Stair v. Turtzo, Spry, Sbrocchi, Faul & LaBarre, 564 Pa. 305, 309, 768 A.2d 299, 301 (Pa. 2001).

Taking the facts set forth in the complaint and all reasonable inferences deducible there from as true, the complaint fails to set forth a claim against the individual defendants. The complaint fails to allege any facts that the individual defendants failed to provide the requested information in accordance with 15 Pa. C. S. A. § 1508. The complaint solely alleges that Hopkins refused to provide the requested information in accordance with its statutory obligation under § 1508. Compl. ¶¶ 29, 33. The complaint does not contain any allegations as to the individual defendants actions regarding their statutory obligation under § 1508.

Based on the foregoing, the individual defendants' preliminary objections are sustained and the claim made against them within the complaint is dismissed. In the event that plaintiff is able to plead sufficient facts in support of his claims against the Individual Defendants, plaintiff is granted leave to amend the complaint within twenty (20) days from the date of entry of this Order only as it pertains to the Individual Defendants.

### **Conclusion**

For these reasons, this court finds that Defendants' Preliminary Objections are **Sustained in part and Overruled in part** as follows:

1. Defendants' Preliminary Objection regarding lack of subject matter jurisdiction is **Overruled**;
2. Defendants' Preliminary Objections asserting legal insufficiency is **Sustained**. In the event that plaintiff is able to plead sufficient facts in support of his claims against the Individual Defendants, plaintiff is granted leave to amend the complaint within twenty (20) days from the date of entry of this Order only as it pertains to the Individual Defendants.

BY THE COURT:

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C. DARNELL JONES II, J.

Dated 9/29/03