NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

EDWARD H. ARNOLD AND JEANNE D. ARNOLD,

Appellees

v.

CHENERY MANAGEMENT, INC.; ROY E. HAHN; LARRY J. AUSTIN; HARRIS MYCFO, INC.; PHIL GROVES; ART SHAW; FRANK TIRELLI; STARS HOLDING COMPANY, INC. F/K/A MYCFO, INC.; HOULIHAN CAPITAL, LLC; HOULIHAN CAPITAL HOLDINGS, INC. F/K/A HOULIHAN VALUATION ADVISORS, INC.; COGENT CAPITAL F/K/A HOULIHAN VALUATION ADVISORS, INC.; LEBOEUF LAMB GREENE & MACRAE LLP N/K/A DEWEY & LEBOEUF, LLP; GRAHAM R. TAYLOR; SIDLEY AUSTIN LLP; R.J. RUBLE; GRANT THORNTON LLP; HILLWOOD INVESTMENT FUND LLC; AND EPPING INVESTMENT FUND LLC,

Appellants

IN THE SUPERIOR COURT OF PENNSYLVANIA

1830 EDA 2011

APPEAL OF: LEBOEUF LAMB GREENE & MACRAE LLP N/K/A DEWEY & LEBOEUF, LLP, GRAHAM R. TAYLOR, CHENERY MANAGEMENT, INC., AND ROY E. HAHN,

Appeal from the Order entered June 14, 2011,
in the Court of Common Pleas of Philadelphia County,
Civil Division, at No(s): December Term, 2010, No. 001099

EDWARD H. ARNOLD AND JEANNE D. ARNOLD,

Appellees

v.

IN THE SUPERIOR COURT OF PENNSYLVANIA

CHENERY MANAGEMENT, INC.; ROY E. HAHN; LARRY J. AUSTIN; HARRIS MYCFO, INC.; PHIL GROVES; ART SHAW; FRANK TIRELLI; STARS HOLDING COMPANY, INC. F/K/A MYCFO, INC.; HOULIHAN CAPITAL, LLC; HOULIHAN CAPITAL HOLDINGS, INC. F/K/A HOULIHAN VALUATION ADVISORS, INC.; COGENT CAPITAL F/K/A HOULIHAN VALUATION ADVISORS, INC.; LEBOEUF LAMB GREENE & MACRAE LLP N/K/A DEWEY & LEBOEUF, LLP; GRAHAM R. TAYLOR; SIDLEY AUSTIN LLP; R.J. RUBLE; GRANT THORNTON LLP; HILLWOOD INVESTMENT FUND LLC; AND EPPING INVESTMENT FUND LLC,

Appellants

APPEAL OF: HARRIS MYCFO, INC.

1831 EDA 2011

Appeal from the Order entered June 14, 2011,
in the Court of Common Pleas of Philadelphia County,
Civil Division, at No(s): December Term, 2010, No. 001099

EDWARD H. ARNOLD AND JEANNE D. ARNOLD,

Appellees

v.

CHENERY MANAGEMENT, INC.; ROY E. HAHN; LARRY J. AUSTIN; HARRIS MYCFO, INC.; PHIL GROVES; ART SHAW; FRANK TIRELLI; STARS HOLDING COMPANY, INC. F/K/A MYCFO, INC.; HOULIHAN CAPITAL, LLC; HOULIHAN CAPITAL HOLDINGS, INC. F/K/A HOULIHAN VALUATION ADVISORS, INC.; COGENT CAPITAL F/K/A HOULIHAN VALUATION ADVISORS, INC.; LEBOEUF LAMB GREENE & MACRAE LLP N/K/A DEWEY & LEBOEUF, LLP; GRAHAM R.

IN THE SUPERIOR COURT OF PENNSYLVANIA

TAYLOR; SIDLEY AUSTIN LLP; R.J. RUBLE; GRANT THORNTON LLP; HILLWOOD INVESTMENT FUND LLC; AND EPPING INVESTMENT FUND LLC,

Appellants

1832 EDA 2011

APPEAL OF: SIDLEY AUSTIN BROWN & WOOD LLP, N/K/A SIDLEY AUSTIN LLP

Appeal from the Order entered June 14, 2011,
in the Court of Common Pleas of Philadelphia County,
Civil Division, at No(s): December Term, 2010, No. 001099

EDWARD H. ARNOLD AND JEANNE D. ARNOLD,

Appellees

v.

CHENERY MANAGEMENT, INC.; ROY E. HAHN; LARRY J. AUSTIN; HARRIS MYCFO, INC.; PHIL GROVES; ART SHAW; FRANK TIRELLI; STARS HOLDING COMPANY, INC. F/K/A MYCFO, INC.; HOULIHAN CAPITAL, LLC; HOULIHAN CAPITAL HOLDINGS, INC. F/K/A HOULIHAN VALUATION ADVISORS, INC.; COGENT CAPITAL F/K/A HOULIHAN VALUATION ADVISORS, INC.; LEBOEUF LAMB GREENE & MACRAE LLP N/K/A DEWEY & LEBOEUF, LLP; GRAHAM R. TAYLOR; SIDLEY AUSTIN LLP; R.J. RUBLE; GRANT THORNTON LLP; HILLWOOD INVESTMENT FUND LLC; AND EPPING INVESTMENT FUND LLC,

Appellants

IN THE SUPERIOR COURT OF PENNSYLVANIA

1833 EDA 2011

APPEAL OF: GRANT THORNTON, LLP

Appeal from the Order entered June 14, 2011,
in the Court of Common Pleas of Philadelphia County,
Civil Division, at No(s): December Term, 2010, No. 001099

EDWARD H. ARNOLD AND JEANNE D. ARNOLD, Appellees v. CHENERY MANAGEMENT, INC, INC.; ROY E. HAHN; LARRY J. AUSTIN; HARRIS MYCFO, INC.; PHIL GROVES; ART SHAW; FRANK TIRELLI; STARS HOLDING COMPANY, INC. F/K/A MYCFO, INC.; HOULIHAN CAPITAL, LLC; HOULIHAN CAPITAL HOLDINGS, INC. F/K/A HOULIHAN VALUATION ADVISORS, INC.; COGENT CAPITAL F/K/A HOULIHAN VALUATION ADVISORS, INC.; LEBOEUF LAMB GREENE & MACRAE LLP N/K/A DEWEY & LEBOEUF, LLP; GRAHAM R. TAYLOR; SIDLEY AUSTIN LLP; R.J. RUBLE; GRANT THORNTON LLP; HILLWOOD INVESTMENT FUND LLC; AND EPPING INVESTMENT FUND LLC, Appellants	IN THE SUPERIOR COURT OF PENNSYLVANIA 1834 EDA 2011

APPEAL OF: PHIL GROVES

Appeal from the Order entered June 14, 2011,
in the Court of Common Pleas of Philadelphia County,
Civil Division, at No(s): December Term, 2010, No. 001099

EDWARD H. ARNOLD AND JEANNE D. ARNOLD, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA

v.

CHENERY MANAGEMENT, INC, INC.; ROY E. HAHN; LARRY J. AUSTIN; HARRIS MYCFO, INC.; PHIL GROVES; ART SHAW; FRANK TIRELLI; STARS HOLDING COMPANY, INC. F/K/A MYCFO, INC.; HOULIHAN CAPITAL, LLC; HOULIHAN CAPITAL HOLDINGS, INC. F/K/A HOULIHAN VALUATION ADVISORS, INC.; COGENT CAPITAL F/K/A HOULIHAN VALUATION ADVISORS, INC.; LEBOEUF LAMB GREENE & MACRAE LLP N/K/A DEWEY & LEBOEUF, LLP; GRAHAM R. TAYLOR; SIDLEY AUSTIN LLP; R.J. RUBLE; GRANT THORNTON LLP; HILLWOOD INVESTMENT FUND LLC; AND EPPING INVESTMENT FUND LLC,

Appellants

2133 EDA 2011

APPEAL OF: ART SHAW

Appeal from the Order entered June 30, 2011,
in the Court of Common Pleas of Philadelphia County,
Civil Division, at No(s): December Term, 2010, No. 001099

EDWARD H. ARNOLD AND JEANNE D. ARNOLD,

IN THE SUPERIOR COURT OF PENNSYLVANIA

Appellees

v.

CHENERY MANAGEMENT, INC, INC.; ROY E. HAHN; LARRY J. AUSTIN; HARRIS MYCFO, INC.; PHIL GROVES; ART SHAW; FRANK TIRELLI; STARS HOLDING COMPANY, INC. F/K/A MYCFO, INC.; HOULIHAN CAPITAL, LLC; HOULIHAN CAPITAL HOLDINGS, INC. F/K/A

HOULIHAN VALUATION ADVISORS, INC.; COGENT CAPITAL F/K/A HOULIHAN VALUATION ADVISORS, INC.; LEBOEUF LAMB GREENE & MACRAE LLP N/K/A DEWEY & LEBOEUF, LLP; GRAHAM R. TAYLOR; SIDLEY AUSTIN LLP; R.J. RUBLE; GRANT THORNTON LLP; HILLWOOD INVESTMENT FUND LLC; AND EPPING INVESTMENT FUND LLC, Appellants	2154 EDA 2011

APPEAL OF: ART SHAW

Appeal from the Order entered June 30, 2011,
in the Court of Common Pleas of Philadelphia County,
Civil Division, at No(s): December Term, 2010, No. 001099

BEFORE: ALLEN, JENKINS, and FITZGERALD*, JJ.

MEMORANDUM BY ALLEN, J.: **FILED MAY 23, 2014**

This action was filed by Edward H. and Jeanne D. Arnold, husband and wife ("the Arnolds"). At consolidated dockets 1830 EDA 2011, 1831 EDA 2011, 1833 EDA 2011, 1834 EDA 2011, and 2133 EDA 2011, Appellants, LeBoeuf Lamb Greene & Macrae, LLP, n/k/a Dewey & LeBoeuf, LLP, and former partner Graham R. Taylor, ("collectively "Attorneys"), Chenery Management, Inc., ("Chenery"), Roy E. Hahn ("Hahn"), Harris myCFO, ("Harris"), Grant Thornton, LLP, ("Thornton"), Phil Groves, ("Groves"), and Art Shaw, ("Shaw"), challenge the trial court's order denying their petition to

*Former Justice specially assigned to the Superior Court.

compel this action to arbitration. At docket 2154 EDA 2011, Shaw further appeals the trial court's order denying his preliminary objection regarding the trial court's personal jurisdiction over him. After careful consideration, we affirm the trial court's orders denying arbitration and Shaw's preliminary objection.

The trial court presents the posture and factual history of this case as follows:

> [Harris] appeals the order of this court dated June 1[4], 2011, denying its petition to compel [the Arnolds] to arbitrate their claims against [Harris] and to stay proceedings in this suit pending that arbitration. On July 14, 2010, [the Arnolds] filed this suit in the Federal District Court for the [Middle] District of Pennsylvania, alleging [Harris] and its codefendants defrauded [the Arnolds] by marketing an illegal tax shelter as a legitimate investment. The [Middle] District Court dismissed [the Arnolds'] complaint for lack of diversity jurisdiction. [The Arnolds] refiled their amended complaint in state court on December 13, 2010.
>
> [The Arnolds'] amended complaint alleged that [Harris] in concert with codefendants, developed and marketed an investment vehicle based on buying distressed debt in South Korea. The amended complaint alleges that defendants claimed this would lead to substantial tax savings for [the Arnolds]. [The Arnolds] claim that, on the contrary, as a result of their investment in this scheme they were the subject of an IRS audit which disallowed their claimed deductions and required [the Arnolds] to pay substantial penalties and back taxes.
>
> [The Arnolds] contracted with [Harris] for "investment and estate planning services by means of an Engagement Letter executed December 21, 2001. The Engagement Letter engaged myCFO to provide consulting services concerning an investment in "distressed Asian securities." [The Arnolds] engaged [Chenery] to identify the specific securities and to structure the proposed investment. The Engagement Letter identifies defendants Sidley, Austin, Brown & Wood and [Attorneys], as law firms which would provide legal advice to [the Arnolds]. The

Engagement Letter then outlines the structure of the investment and how specially created partnerships will trade the underlying debt. The Engagement Letter contains extensive disclosures and disclaimers limiting the scope of defendant's advice and declaring [the Arnolds'] responsibility for all penalties.

[The Arnolds] and [Harris] extensively negotiated several issues concerning the Engagement Letter prior to its execution. [The Arnolds] rejected Engagement Letter drafts which contained an arbitration provision. [The Arnolds] negotiated out of their agreement any arbitration provision. The Engagement Letter drafted by [Harris] which was finally signed by [the Arnolds] was devoid of any arbitration provision. However, the last paragraph of The Engagement Letter, entitled "Additional Provisions" reads:

> The terms and conditions set forth in the Professional Services Agreement governing tax planning/compliance, indemnity, liability limitations, arbitration and governing law shall be deemed incorporated herein in full and made a material part hereof.

[Harris] claims that even though the Engagement Letter had no arbitration provision and despite the fact that this had been specifically negotiated out of the agreement, this provision incorporates a detailed arbitration provision in a separate Professional Services Agreement ("PSA") through the back door. In support of this claim, [Harris] offers a form PSA which does not contain [the Arnolds'] signatures. Presumably, the form supplied by [Harris] had been signed by someone else because there is a redaction on the signature line. This form, which [the Arnolds] had never seen before it was supplied to the Court, contains a four-paragraph section titled "Arbitration of Disputes." These paragraphs provide extensive scope, manner, conduct, finality and cost of arbitrating disputes. These paragraphs further include a California choice of law provision. The full text of the section reads:

> If you are, at any time, dissatisfied with any aspect of our engagement, this Agreement, or our Service, you should bring it to our attention immediately so that we can take steps to address your concerns promptly. In the unlikely event that we cannot resolve any such issues together, you and myCFO agree to submit and resolve by binding arbitration any claims or disputes between us and arising

> out of our agreement or services. Any such arbitration will be subject to the auspices of the American Arbitration Association and its commercial arbitration rules then in effect, and will be conducted by a neutral retired judge, practicing attorney, CPA or other professional of good standing with experience in the accounting, securities or financial services industries.
>
> The arbitrator shall have authority to award direct and compensatory damages only, and may not award punitive or exemplary damages unless (but only to the extent that) such damages are expressly required by law to be an available remedy for any of the specific claims asserted. Any such arbitration award shall be final, binding and non-appealable. Please understand that discovery, standards of evidence, procedural rules and rights of appeal differ in binding arbitration than in a civil trial or proceeding. Please also understand that in agreeing to submit all claims or disputes to binding arbitration, you and myCFO are agreeing to waive and forego, to the fullest extent permitted by law, any right to a civil trial or adjudication of the claim or dispute, whether by a judge or a jury.
>
> California law will govern any claims or disputes between us, including any arbitration. We both also agree that that appropriate and exclusive jurisdiction and venue of any arbitration or proceeding between us to resolve any cause, claim or action arising from our engagement, this Agreement or our services, or our respective rights or obligations, shall be either (a) Santa Clara County, California or (b) the county and state in which is located the principal myCFO office providing the services which are the bases of cause, claim or actions. We shall share equally the fees and costs of the arbitrator.
>
> You should consider and weigh carefully the benefit to you of agreeing to this arbitration provision before signing this Services Agreement, and consult with your attorney if that would be helpful to you.

This form was never signed by [the Arnolds], never agreed to by [the Arnolds], and never seen by [the Arnolds] before they learned that the investment vehicle did not provide any tax benefits.

Trial Court Opinion, 10/11/12, at 1-4 (footnotes and citations to the record omitted).

On February 4, 2011, Harris, Attorneys, and Thornton filed a petition to compel arbitration, which Chenery and Hahn joined on February 7, 2011. Additionally, on February 4, 2011, Shaw filed preliminary objections to the Arnolds' complaint, asserting that the trial court lacked personal jurisdiction over Shaw, but also asking in the alternative for the trial court to compel the matter to arbitration. On February 8, 2011, Groves petitioned to compel arbitration. On February 24, 2011, the Arnolds filed an amended complaint. On March 11, 2011, Shaw filed preliminary objections to the Arnolds' amended complaint, essentially reiterating his prior preliminary objections regarding personal jurisdiction and arbitration. On March 31, 2011, the Arnolds filed answers in opposition to the petitions to compel arbitration. On June 14, 2011, the trial court denied the petitions to compel arbitration. On June 17, 2011, the trial court amended its order to reflect, *inter alia*, that it had not ruled on Shaw's preliminary objections. On June 30, 2011, Harris, Attorneys, Chenery, Hahn, and Thornton filed notices of appeal. On the same date, the trial court overruled Shaw's preliminary objections. All of the appellants filed timely notices of appeal. The trial court and all of the appellants complied with Pa.R.A.P. 1925. On September 18, 2012, Attorneys filed a notice of bankruptcy. On September 20, 2012, we stayed this consolidated appeal pending the resolution of Attorneys' bankruptcy.

On May 1, 2013, Harris filed a motion to lift the stay. On May 24, 2013, we lifted the stay by *per curiam* order.

In their appeal at 1830 EDA 2011, Attorneys, Chenery, and Hahn "incorporate[d] by reference [Harris'] brief" under 1831 EDA 2011, including Harris' "[s]tatement of [q]uestions [i]nvolved." Therefore, we begin by setting forth Harris' issues:

> 1. Whether the trial court abused its discretion by denying [Harris'] Petition to Compel Arbitration, where its fact findings were not supported by substantial evidence?
>
> 2. Was the arbitration clause in the Professional Services Agreement incorporated by reference into the executed December 21, 2001 myCFO Engagement Agreement?
>
> 3. Do the parties have a valid and enforceable arbitration agreement?
>
> 4. Whether remand instructions are appropriate, namely: that the Arnolds' claims are within the scope of an enforceable arbitration agreement and the litigation of [the Arnolds'] claim against [Harris] should be stayed pending arbitration?

Harris' Brief at 1831 EDA 2011 at 3.

At 1833 EDA 2011, Thornton raises the following issues:

> 1. Did the trial court abuse its discretion in deciding that [the Arnolds] are not parties to a valid and enforceable agreement to arbitrate applicable to the claims asserted in this Complaint?
>
> 2. Did the trial court err in failing to reach the issue of whether the claims asserted in [the Arnolds'] Complaint(s) fall within the scope of the Agreement to Arbitrate?
>
> 3. Did the trial court err in failing to reach the issue of whether [the Arnolds] are required to submit their claims against [Thornton] to arbitration?

> 4. Did the trial court err in failing to reach the issue of whether [the Arnolds'] defense of unconscionability fails under the facts and applicable law?
>
> 5. Did the trial court err in failing to reach the issue of whether, alternatively, this action should be stayed while the claims between the parties to the arbitration agreement are arbitrated?

Thornton's Brief at 3-4.[1]

Shaw's brief jointly addresses his appeals at 2133 EDA 2011 and 2154 EDA 2011, and sets forth that "[t]he issues on appeal include the following":

> 1. Whether [Shaw] is subject to personal jurisdiction in Pennsylvania, where [the Arnolds] have not alleged any specific actions that [Shaw] is alleged to have taken that create contacts with Pennsylvania.
> 2. Whether [the Arnolds'] claims against [Shaw] are subject to mandatory arbitration.

Shaw's Brief at 5.

All of the appellants[2] challenge the trial court's order declining to compel this action to arbitration. We recognize the following standard of review relative to the petitions/motions to compel arbitration which were filed by Harris, Attorneys, Thornton, Chenery, Hahn, Groves, and Shaw:

> We review a trial court's denial of a motion to compel arbitration for an abuse of discretion and to determine whether the trial court's findings are supported by substantial evidence.

---

[1] Based on our determination, as discussed more fully below, that the trial court did not err in declining to compel arbitration, we decline to reach Thornton's second, fourth, and fifth issue. We examine Thornton's third issue *infra.*

[2] Appellant Groves did not file a brief.

> In doing so, we employ a two-part test to determine whether the trial court should have compelled arbitration. The first determination is whether a valid agreement to arbitrate exists. The second determination is whether the dispute is within the scope of the agreement.

Elwyn v. DeLuca, 48 A.3d 457, 460 n.4, 461 (Pa. Super. 2012) (internal citations omitted).

As to Shaw's appeal, we recognize:

> "As a general rule, an order denying a party's preliminary objections is interlocutory and, thus, not appealable as of right. There exists, however, a narrow exception to this oft-stated rule for cases in which the appeal is taken from an order denying a petition to compel arbitration." *Shadduck v. Christopher J. Kaclik, Inc.,* 713 A.2d 635, 636 (Pa. Super. 1998) (citations omitted). *See also* 42 Pa.C.S. § 7320(a)(1) (stating appeal may be taken from court order denying application to compel arbitration); Pa.R.A.P. 311(a)(8) (stating appeal may be taken as of right and without reference to Pa.R.A.P. 341(c) from order "which is made appealable by statute or general rule.").

Id.

In determining that there was no agreement to arbitrate between the Arnolds and Harris, the trial court explained:

> [Harris] presents affidavits from Harvey Armstrong, Managing Director of [Harris], and Stephen M. Debenham, General Counsel of [Harris]. These affidavits say nothing specific to [the Arnolds] but attest only to company policy. These witnesses state that [Harris'] policy was to have new clients "execute" a standard engagement agreement which included an arbitration clause and they are not aware of any exceptions. However, this standard policy was not followed in this case. [Harris] has not produced any PSA signed by [the Arnolds]. An attorney for [Harris], Hannah Blumenstiel, affirms that her law firm searched myCF0 client files held by Sherwood Partners, LLC. Ms. Blumenstiel found 275 PSAs signed by myCFO clients but failed to find any form signed by [the Arnolds]. [Harris] does

> not claim that the PSA purportedly signed by [the Arnolds] was lost or destroyed. [The Arnolds] never signed any arbitration agreement.
>
> [The Arnolds] present an affidavit by Edward H. Arnold. Mr. Arnold states he never discussed any "Professional Services Agreement." He says he did discuss arbitration of disputes and refused to sign until [Harris] agreed to eliminate any arbitration provision. Mr. Arnold further states that he did not sign, nor was he even shown, any arbitration agreement. Mr. Arnold states that he had specifically rejected several drafts of the Engagement Letter which contained an arbitration requirement. He states he explicitly objected to the language requiring him to arbitrate disputes. Mr. Arnold further says he would not have accepted any arbitration provision.
>
> [Harris] offers only an unexecuted form contract, repudiated by [the Arnolds], and affidavits that state that its policy is to get a signed agreement. The Court finds that after refusing any arbitration provision, [the Arnolds] entered into an engagement agreement that did not require arbitration.

Trial Court Opinion, 10/11/12, at 4-5 (footnotes and citations to the record omitted). Based on our careful scrutiny of the record, we agree with the trial court. ***See Schoellhammer's Hatboro Manor, Inc. v. Local Joint Executive Board of Philadelphia***, 231 A.2d 160, 164 (Pa. 1967) ("Arbitration, a matter of contract, should not be compelled of a party unless such party, by contract, has agreed to such arbitration.").

Consonant with ***Schoellhammer's,*** we recently reiterated:

> Arbitration is a matter of contract, and parties to a contract cannot be compelled to arbitrate a given issue absent an agreement between them to arbitrate that issue. Even though it is now the policy of the law to favor settlement of disputes by arbitration and to promote the swift and orderly disposition of claims, arbitration agreements are to be strictly construed and such agreements should not be extended by implication. In general, only parties to an arbitration agreement are subject to arbitration.

Pisano v. Extendicare Homes, Inc., et al., 77 A.3d 651, 654 (Pa. Super. 2013) (internal citations omitted).

Additionally, we emphasized that "when addressing the specific issue of whether there is a valid agreement to arbitrate, courts generally should apply ordinary state-law principles that govern the formation of contracts[.]" ***Id.*** at 661. Here, in applying well-settled Pennsylvania contract principles, the trial court disagreed with Harris' exhortation to incorporate by reference the arbitration provision found in the PSA.

Specifically, the trial court observed:

> The Federal Arbitration Act establishes a strong federal policy in favor of arbitrating disputes. That policy requires that state law treat arbitration agreements no differently from other contracts. Nonetheless, agreements to arbitrate are governed by state contract law. Pennsylvania contract law is in accord with Federal law and does not present any conflict. In fact, Pennsylvania law reflects the same policy of favoring arbitration as Federal law.
>
> In Highmark, Inc., v. Hospital Service Association of Northeastern Pennsylvania, [FN28: 785 A.2d 93, 98 (Pa. Super. 2001)] the Pennsylvania Superior Court held that the focus of a court's inquiry in a contract dispute must be on enforcing the parties' intent as manifested by their agreement. The Superior Court stated:
>
> > in determining whether parties have agreed to arbitrate, courts should apply the rules of contractual construction, adopting an interpretation that gives paramount importance to the intent of the parties and ascribes the most reasonable, probable, and natural conduct of the parties.
>
> Of course parties may incorporate arbitration provisions found in a separate document by reference. However, where there has been no meeting of the minds, no arbitration agreement has been created. To compel arbitration in this case, there must

> have been a contract that incorporated the PSA's arbitration provision into the engagement letter. The evidence presented demonstrates there was never any agreement to arbitrate at all, certainly without question there could not possibly have been any agreement to the extent of detail contained in the exemplar form never signed by [the Arnolds].
>
> The claim that [Harris] had an unalterable policy requiring an arbitration agreement is contradicted by clear and specific factual evidence. In the face of factual, specific testimony that arbitration requirements were specifically negotiated out of any agreement, generalized incorporation policy is inadequate rebuttal. [Harris'] policy is an internal expectation. This policy does not demonstrate any actual assent in the face of clear, unambiguous and detailed testimony to the contrary. Edward Arnold's affidavit contradicts that the parties acted in conformity with the policy as described in [Harris'] affidavits. There was no agreement to arbitrate disputes.
>
> [Harris'] own affidavits belie its claim to have incorporated any arbitration requirement into the Engagement Letter. The affidavits of [Harris'] general counsel and managing director declare an unalterable policy that all new clients separately execute a PSA document. The company did not rely on incorporation of an unsigned PSA.
>
> [Harris] presented no proof that [the Arnolds] ever agreed to arbitrate in any form. [The Arnolds] offered a clear and direct repudiation of arbitration under oath. The court finds as fact that [the Arnolds] never agreed to arbitrate any dispute which might arise with [Harris].

Trial Court Opinion, 10/11/12, at 6-7 (some footnotes and some record citations omitted).

Our review of the record and applicable case law supports the trial court's refusal to incorporate by reference the arbitration provision found in the Professional Service Agreement. We have expressed that "[t]he interpretation of a contract is a question of law and [our] scope of review is plenary." ***Southwestern Energy Production Company v. Forest***

Resources, LLC, et al., 83 A.3d 177, 187 (Pa. Super. 2013) (citation omitted). We observed that "[i]t is a general rule of law in the Commonwealth that where a contract refers to and incorporates the provisions of another [contract], both shall be construed together." ***Id. citing Trombetta v. Raymond James Financial Services,*** 907 A.2d 550, 560 (Pa. Super. 2006). Here, the unsigned PSA weighs against a finding that it was a valid contract executed between the parties evincing the Arnolds' knowledge of the PSA terms, and a meeting of the minds regarding the arbitration issue within the PSA, such that the Arnolds should be compelled to arbitrate. ***Compare Emerman v. Baldwin,*** 142 A.2d 440, 445 (Pa. Super. 1958) (provisions of a standard lease form which were "known to the plaintiffs" were deemed incorporated by reference into a subsequent agreement where "the minds of the parties had met and reached an accord as to the essential provisions of the lease").

We further recognize that "[w]here several instruments are made as part of one transaction they will be read together, and each will be construed with reference to the other; and this is so although the instruments may have been executed at different times and do not in terms refer to each other." ***Southwestern Energy,*** 83 A.3d at 187 ***citing Huegel v. Mifflin Const. Co., Inc.,*** 796 A.2d 350, 354-355 (Pa. Super. 2002) (other citation omitted). However, in this case, there is no evidence that the Arnolds ever executed the PSA and agreed to its terms, including the arbitration provision. ***Compare Potts v. Dow Chemical Company,*** 415 A.2d 1220,

1224 (Pa. Super. 1979) (J. Spaeth dissenting) ***citing*** 1 Corbin on Contracts s 31 at 117 (1950) ("However, '(a)n unsigned agreement all the terms of which are embodied in a writing, unconditionally assented to by both parties, is a written contract.'").

Moreover, in ***Pisano*** we expressed the importance of safeguarding a claimant's right to a jury trial, and explained:

> [C]ompelling arbitration upon individuals who did not waive their right to a jury trial would infringe upon [a] claimants' constitutional rights. This right, as preserved in the Seventh Amendment of the United States Constitution, "is enshrined in the Pennsylvania Constitution," and "the constitutional right to a jury trial, as set forth in PA. CONST. art. 1, § 6, does not differentiate between civil cases and criminal cases." *Bruckshaw v. Frankford Hospital of City of Philadelphia,* 58 A.3d 102, 108–109 (Pa. 2012). Denying [a] claiman[t] this right where they did not waive it of their own accord would amount to this Court placing contract law above that of both the United States and Pennsylvania Constitutions. *Commonwealth v. Gamble,* 62 Pa. 343, 349 (1869) ("But that the legislature must act in subordination to the Constitution needs no argument to prove....").

Pisano, 77 A.3d at 661-662. The record in this case reflects that the Arnolds never "waived of their own accord" their right to a jury trial, such that they should be compelled to arbitration. ***See id***.

At 1830 EDA 2011, Attorneys present the following additional issue:

> 1. Does the arbitration clause between [the Arnolds] and myCFO extend to nonsignatories, such as [Attorneys], who assertedly acting in concert with myCFO, provided services integral to the tax planning services that are at the heart of [the Arnolds'] Complaint?

Attorneys' Brief at 2.

Similarly, at 1833 EDA 2011, Thornton queries:

> 3. Did the trial court err in failing to reach the issue of whether [the Arnolds] are required to submit their claims against [Thornton] to arbitration?

Thornton's Brief at 3.

The trial court disagreed and reasoned:

> Defendants who are non-parties to any agreements between [the Arnolds] and [Harris] also claim their disputes should be referred to arbitration as third party beneficiaries. This court need not determine whether Pennsylvania law permits a "third party beneficiary" to piggyback onto a different party's agreement because in this case there was no primary agreement to arbitrate.

Trial Court Opinion, 10/11/12, at 8. Based on our discussion above, we agree with the trial court.

At 2154 EDA 2011, Shaw additionally challenges the trial court's order overruling his preliminary objections regarding the trial court's personal jurisdiction over him. We review this challenge to "determine whether the trial court committed an error of law." ***De Lage Landen Financial Services, Inc. v. Urban Partnership, LLC,*** 903 A.2d 586, 589 (Pa. Super. 2006). Further, "[w]hen considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom." ***Feingold v. Hendrzak, et al.***, 15 A.3d 937, 941 (Pa. Super. 2011) (internal citation omitted).

The trial court rejected Shaw's jurisdictional claim, and explained:

[Shaw] claimed in his Preliminary Objections that the court lacks personal jurisdiction over him because he is a California resident who has conducted no activities in Pennsylvania. Clearly, [Shaw] is not subject to general jurisdiction in this Commonwealth. The question is whether he may be subject to specific jurisdiction here based on his and the other defendants' activities giving rise to [the Arnolds'] claims in this action.

> A tribunal of this Commonwealth may exercise personal jurisdiction over a person . . . who acts directly or by an agent, as to a cause of action or other matter arising from such person:
>
> * * *
>
> (4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth. [FN4: 42 Pa.C.S. § 5322.].

[The Arnolds] allege that [Shaw] is liable for committing the torts of breach of fiduciary duty, negligence, negligent misrepresentation, fraud, and conspiracy to commit fraud against [the Arnolds]. [Shaw] was the President and Chief Executive Officer of defendant myCFO and allegedly was actively involved in setting up and continuing myCFO's fraudulent tax scheme by which [the Arnolds] claim to have been harmed. His status as a corporate officer does not shield him from potential liability for tortious acts he committed in his corporate capacity, nor from this court's exercise of personal jurisdiction over him with respect to those acts.

> Pennsylvania law recognizes the participation theory as a basis of liability. [Under that theory,] an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor; but an officer of a corporation who takes no part in the commission of the tort committed by the corporation is not personally liable to third persons for such a tort, nor for the acts of other agents, officers or employees of the corporation in committing it, unless he specifically directed the particular act to be done or participated, or cooperated therein. [FN6: Wicks v. Milzoco Builders, Inc., 470 A.2d 86, 90 (Pa. 1983).]

It appears that all the acts [Shaw] personally committed in furtherance of the [asserted] fraudulent scheme occurred in

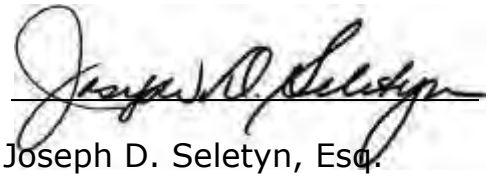
> California or otherwise outside of Pennsylvania. However, [the Arnolds] are residents of Pennsylvania, so they felt the economic harm caused by [Shaw's] alleged tortious acts in Pennsylvania. Furthermore, it is alleged that [Shaw] acted in concert with, and directed the activities of, several other defendants, including [Chenery], Sidley Austin LLP, [Thorton], and the Houlihan defendants, and of an employee of myCFO, [Groves], who actively promoted the fraudulent tax scheme to [the Arnolds] in Pennsylvania. "When co-conspirators have sufficient contacts with the forum, so that due process would not be violated, it is imputed against the 'foreign' co-conspirators who allege that there [are] not sufficient contacts; co-conspirators are agents for each other." [FN8: Ethanol Partners Accredited v. Wiener, Zuckerbrot, Weiss & Beicher, 635 F. Supp. 15, 18 (E.D. Pa. 1985) (in a securities fraud case, the court found it had personal jurisdiction over a Missouri attorney based on the forum activities of his alleged co-conspirators).].

Trial Court Opinion, 6/29/12, at 1-3 (some footnotes and record citations omitted). Again, we agree with the trial court. Shaw's actions as described by the Arnolds in their pleadings, as delineated by the trial court, and which we are required to accept as true based on our standard of review, provide a clear basis for the trial court's denial of Shaw's jurisdictional challenge. ***See Burger King Corp. v. Rudzewicz,*** 471 U.S. 462, 472-474 (1985) (citations omitted) (A non-resident defendant can be subject to the jurisdiction of a foreign forum state if the non-resident defendant has sufficient minimum contacts with the foreign forum, such that asserting *in personam* jurisdiction over the non-resident defendant is fair and reasonable.); ***see also Kubik v. Letteri,*** 614 A.2d 1110, 1113-1114 (Pa. 1992) ***quoting International Shoe Co. Washington,*** 362 U.S. 310, 316 (1945); ***Hall-Woolford Tank Co., Inc. v. R.F. Kilns, Inc.,*** 698 A.2d 80, 82-83 (Pa. Super. 1997) (A non-

resident defendant can reasonably foresee being haled into court in the foreign forum state if it has "purposefully directed its activities to the forum and conducted itself in a manner indicating that it has availed itself of the forum's privileges and benefits such that it should also be subject to the forum state's laws and regulations.").

Orders affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/27/2014