

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-10-39

Xwave Solutions US Inc.,

Plaintiff

v.

DECISION AND ORDER
(Motion to Compel Arbitration)

CMTEK, Inc. and
Abilis Solutions, Inc.,

Defendants

This matter is before the Court on Defendants' Motion to Compel Arbitration and for Related Relief. In their motion, Defendants contend that pursuant to the plain language of the parties' written contract, the parties' current dispute must be decided by a third party designated by the parties in the contract. Conversely, Plaintiff argues that the contractual provision upon which Defendants rely applies to a narrow issue that is not implicated in this case.

Factual Background

In June 2009, Plaintiff sold all of the outstanding shares of stock in Xwave New England Corp. to Defendant CMTEK Inc. In accordance with the agreement by which the shares were sold, the purchase price for the transaction was subject to an adjustment based on the working capital of Xwave New England Corp. at the time of the sale. Working Capital is specifically defined in the parties' agreement as:

[T]he amount equal to the excess of (i) the Current Assets of the Company[xwave New England Corp.] as at Closing over (ii) the current liabilities including all deferred revenues of the Company as at Closing but excluding all amounts owed by the Company to Bell Aliant, the Seller and their Related Persons and all liabilities related to Bell Aliant Prime Business, all as determined pursuant to the Closing Statement ...

Agreement, § 2.3(b).

*Docketed
4/29/11*

The parties' agreement also provided for a process by which the working capital would be determined, including a means by which a party could object to the proposed amount. Upon the assertion of an objection to the amount, the parties were permitted ten days within which to resolve the dispute. Agreement, § 2.3(3). If the parties were unable to resolve the dispute, "those items or calculations in dispute shall be submitted for resolution to KPMG, or, if they are unwilling or unable to accept the mandate to resolve the dispute, to such other independent firm of chartered accountants as Bell Aliant and Buyer agree or, failing agreement, as appointed by the court ..." Agreement, § 2.3(e).

In this case, the parties were unable to agree as to the amount that Defendants were required to pay in accordance with § 2.3. In their Complaint, Plaintiff specifically alleged that the Defendants failed to pay the adjusted consideration as required by Section 2.3. (*See*, Complaint ¶ 50).

Defendants maintain that the parties' failure to agree as to the amount that Defendants are obligated to pay in accordance with § 2.3 constitutes an "item in dispute" that is subject to the arbitration provision of § 2.3. Plaintiff essentially argues that the arbitration provision is limited to disputes over mathematical computations, and because the parties' dispute involves the interpretation of certain terms of the parties' agreement, the arbitration provision is not applicable.

Discussion

Under Maine law, "a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable ..." 14 M.R.S. § 5927. Indeed, in Maine, a "broad presumption favoring substantive arbitrability" exists. *Doris Champagne v. Victory Homes, Inc.*, 2006 ME 58, ¶ 9 (citing *V.I.P., Inc., v. First Tree Dev. Ltd. Liab. Co.*, 2001 ME 73, ¶ 4, 770 A.2d 95, 96).

Here, the parties clearly entered into a valid agreement to arbitrate certain disputes. Consistent with the parties' intent to arbitrate, the parties identified the specific firm by which the

disputes would be decided (KMPG). The issue is whether the parties' current dispute is within the scope of the parties' agreement.

Contrary to Plaintiff's argument, the agreement does not suggest a narrow application of the arbitration provision. Instead, the plain language of the agreement provides that a dispute regarding the terms of the closing statement, which includes the determination of working capital, is to be decided by an independent third-party. The agreement does not include any language that narrows the scope of the arbitration provision's applicability. More specifically, the agreement does not limit the arbitrator's jurisdiction to disputes over mathematical calculations, nor does it prevent the arbitrator from interpreting and applying terms of the agreement. Indeed, arbitrators often are required to interpret and determine the applicability of contract terms. In this case, because the parties' dispute involves an "item" of the closing statement, and because disputes over such "items" are within the scope of the arbitration provision of § 2.3, the dispute must be submitted to the third-party contemplated by § 2.3 of the parties' agreement.

Conclusion

Based on the foregoing analysis,

1. The Court grants Defendants' Motion to Compel Arbitration. The dispute shall be submitted to an independent third-party as required by § 2.3 of the parties' agreement;
2. The Court grants Defendants' request to stay this action. This action is stayed until completion of the arbitration proceeding; and
3. The Court denies Defendants' request for attorneys' fees and costs incurred in connection with Defendants' Motion to Compel Arbitration.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 8/16/10



Justice, Maine Business & Consumer Docket