

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

PANZICA CONSTRUCTION COMPANY)	CASE NO: CV 10 717571
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs)	
)	
ZAREMBA, INC., et al.)	<u>JOURNAL ENTRY</u>
)	
Defendants.)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Panzica Construction Company filed its complaint on February 4, 2010. Defendants Zaremba, Inc.; Zaremba Avenue, LLC; Avenue Condominium I Association; Nathan Zaremba; and Brian Blasinsky filed a joint answer with counterclaims on February 16. The counterclaim includes, pursuant to Civil Rule 13(H), the joinder of new parties S.A. Comunale Company, Inc. and the American Arbitration Association.¹

Other affirmative claims asserted by various parties to date include a counterclaim and crossclaims by defendant Key Community Development New Markets, LLC; a counterclaim and crossclaim of defendant Express Painting Corporation; and a crossclaim of defendant The City of Cleveland.

On March 8, the plaintiff filed a motion to stay proceedings and to compel arbitration. The Zaremba defendants; defendant KCDNM, LLC; defendant PNC Bank; and defendants Mark Evans, Ellen Evans, Javier A. Angulo, Steven S. Ball, and Deborshi Roy have all opposed the motion to compel arbitration.

¹ The American Arbitration Association has since been voluntarily dismissed.

The court has considered all filings supporting and opposing the motions and this entry follows.

STATEMENT OF THE FACTS

This case arises from a condominium construction project known as the Avenue District Phase I at 1211 St. Clair Avenue, Cleveland. Defendant Zaremba Avenue, LLC, is the owner/developer and plaintiff Panzica Construction Company is the construction manager. Those parties entered into a construction contract on November 2, 2006.

The contract is lengthy, but the basic agreement is that Zaremba would pay Panzica 25 million dollars to build a 58-unit condominium.

Construction began in May, 2007. During construction, a test of the sprinkler system resulted in significant water damage to some of the incomplete units. The cost to repair the water damage was covered by Zaremba's insurance policy, and Panzica did the repair work outside of its contractual obligations.

Panzica claims that it has performed substantially all of its obligations under the contract, and all of the agreed water damage repair work, and that Zaremba still has not paid \$2,732,111.10. Panzica therefore recorded an affidavit for mechanic's lien against the property on August 7, 2009.

Defendant PNC Bank also has a security interest in the property based upon a mortgage executed by Zaremba Avenue, LLC, in connection with a loan by PNC of about \$12,231,000.00. On December 7, 2009, defendant PNC Bank sent Panzica a notice to commence suit on its mechanic's lien pursuant to Section 1311.11 of the Ohio Revised Code. Under that section, Panzica would lose its lien if it did not file suit within 60 days of service of the notice. Therefore, this lawsuit was filed.

Panzica's only affirmative claims against Zaremba Avenue, LLC, are for a declaratory judgment that the mechanic's lien is valid, foreclosure on the mechanic's lien, and unjust enrichment. The bulk of the plaintiff's remaining affirmative claims are against defendants Nathan Zaremba and Brian Blasinsky individually.

Article 9 of the construction contract requires that the parties mediate any "claim, dispute or other matter in question arising out of or related to this agreement or breach thereof" unless they mutually agree not to mediate. If mediation is not undertaken or is not successful, Section 9.1.3 requires arbitration as follows:

Any claim, dispute or other matter in question not resolved by mediation shall be decided by arbitration in accordance with the construction industry arbitration rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise.

Simultaneous with its foreclosure complaint, Panzica served a demand for arbitration through the American Arbitration Association on Zaremba.² Because Panzica demanded arbitration of its contract claims, it did not include any of those claims in the complaint. However, Zaremba's counterclaim asserts claims against Panzica for, among other things, breach of contract, negligent installation of a sprinkler system, breach of the duty to construct the project in a workmanlike manner, and a "commercial bad faith" claim for a breach of the duty of good faith and fair dealing. In response to those counterclaims, Panzica filed its motion to stay these proceedings and to compel arbitration.

Section 2711.01 of the Ohio Revised Code provides, in pertinent part, as follows:

² Unless otherwise noted, reference in this entry to "Zaremba" is only to the contracting party, Zaremba Avenue, LLC.

2711.01 Provision in contract for arbitration of controversies valid – exceptions.

(A) A provision in any written contract, except as provided in division (B) of this section, to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, . . . shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.

However, an action for foreclosure may not be submitted to arbitration since O.R.C. Section 2711.01(B)(1) provides that the arbitration statute does not apply to “controversies involving the title to or the possession of real estate” and a foreclosure lawsuit necessarily involves both of those issues. For that reason, Panzica filed the lawsuit for foreclosure at the same time it demanded arbitration on its contract claims.

Zaremba argues that Panzica has waived the enforceability of the arbitration provision by filing the lawsuit. A party to a contract to arbitrate waives its right when it files a lawsuit rather than requesting arbitration.³ However, a party does not waive its right to arbitrate matters that fall within the arbitration provision by filing a non-arbitrable foreclosure action.⁴ Nor did Panzica waive arbitration by the claim for unjust enrichment. That claim was asserted in the event that, for some reason, the contract is not enforceable at all and equity supports a judgment in Panzica’s favor. By definition, the unjust enrichment claim is a claim that may be decided without reference to the contract because it requires that there be no enforceable contract.

Because Panzica did not waive its right to arbitrate, it may avail itself of O.R.C. Section 2711.02. That statute provides, in pertinent part:

2711.02 Court may stay trial.

³ *Mills v. Jaguar-Cleveland Motors, Inc.* (1980), 69 Ohio App. 2nd 111.

⁴ *U.S. Bank N.A. v. Wilkins*, 2010-Ohio-262, Cuyahoga App. No. 93088, at ¶20.

(B) If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration . . . , shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, . . .

If the court finds that a stay pending arbitration is appropriate, then the court may compel the parties to arbitrate by issuing “an order directing that the arbitration proceed in the manner provided for in the written agreement.”⁵

The first question here is whether Zaremba’s counterclaims present issues referable to arbitration under the agreement. The contracting parties have agreed to arbitrate any “claim, dispute or other matter in question arising out of or related to this agreement or breach thereof.” To determine whether the claims asserted in the counterclaim fall within the scope of this arbitration clause, the court must classify the particular clause as either broad or narrow.⁶ An arbitration clause that contains the phrase “any claim or controversy arising out of or relating to the agreement” is considered the paradigm of a broad clause.⁷ Since the arbitration provision here covers any “dispute or other matter in question arising out of or related to this agreement” it is a broad clause. Therefore, the agreement must be enforced unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.⁸ Doubts should be resolved in favor of coverage.

The Ohio Supreme Court has held that Ohio courts may determine whether a cause of action is within the scope of an arbitration agreement by using the federal standard found in

⁵ O.R.C. § 2711.03(A).

⁶ *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St. 3d 185, 2006-Ohio-657, at ¶18.

⁷ *Id.*

⁸ *Alexander v. Wells Fargo Financial Ohio 1, Inc.*, 122 Ohio St. 3d 341, 2009-Ohio-2962, at ¶13.

Fazio v. Lehman Bros., Inc. (C.A. 6, 2003), 340F.3d 386.⁹ The *Fazio* court held that a trial court should determine whether “an action could be maintained without reference to the contract or relationship at issue.”¹⁰ Each count of Zaremba’s counterclaim will be examined with that standard in mind.

Count I claims that Panzica and S.A. Comunale negligently installed and tested the sprinkler system, thereby causing damages to Zaremba. Even real torts can be covered by arbitration clauses if the allegations underlying the tort claims “touch matters” covered by the contract.¹¹ There is no doubt that a claim that Panzica negligently performed a duty it owed Zaremba under the contract cannot be decided without reference to the contract. Therefore, Count I of the counterclaim against Panzica is appropriate for arbitration.

However, the negligence claim against S.A. Comunale is not.¹² Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which it did not agree to so submit.¹³ No arbitration agreement or contract between S.A. Comunale and Zaremba is alleged. Therefore, Count I of Zaremba’s counterclaim against S.A. Comunale is not appropriate for arbitration.

Count II of the counterclaim by Zaremba is for Panzica’s breach of contract. This claim is obviously referable to arbitration.

Count III of the counterclaim alleges a breach by Panzica and S.A. Comunale of their duty to construct the project in a workmanlike manner. Since this claim against Panzica cannot be decided without reference to the underlying contract, it is appropriate for arbitration.

⁹ *Aetna Health*, supra.

¹⁰ *Fazio*, at 395.

¹¹ *Alexander*, supra at ¶24.

¹² Although it does not appear that Zaremba and S.A. Comunale were in privity, thus calling into question whether S.A. Comunale owed Zaremba a duty, a consideration of the merits is inappropriate at this stage. In deciding whether parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. *Aetna Health*, supra at ¶13.

¹³ *Aetna Health*, supra at ¶11.

However, as noted above, there is no arbitration agreement between Zaremba and S.A. Comunale and that claim cannot be referred to arbitration.

Count IV seeks a declaratory judgment by the court that, because of its breach of contract, Panzica “is not entitled to any of the payment” under the contract. Although this count is captioned as being one for declaratory judgment, it will necessarily be resolved by a fact finder’s conclusions on the merits of the competing claims for breach of contract between Panzica and Zaremba. That fact finder is an arbitrator.¹⁴ Therefore, this count, insofar as it is separate from the claim for breach of contract, is referable to arbitration because it requests relief that the arbitrator is empowered to enter depending upon a decision on the facts.

Count V of the counterclaim is similar to Count IV. In Count V, Zaremba asserts that Panzica’s mechanic’s lien is void because, among other things, it breached the contract. As with Count IV, this court may not enter a declaratory judgment that the mechanic’s lien is invalid for breach of contract until a conclusion of fact has been made in an arbitration proceeding that Panzica breached the contract.

Count V also alleges that “furthermore . . . this affidavit for mechanic’s lien was not filed within the mandatory statutory time limitations.”¹⁵ This aspect of Count V may be considered as part of a defense to Panzica’s foreclosure cause of action in this court since the failure to properly perfect the lien may render it unenforceable without the need to examine whether Panzica breached the construction contract. Therefore, the portion of Count V alleging that the mechanics lien is unenforceable for breach of contract will, as a practical matter, be decided at arbitration and the portion of Count V raising the legal issue of whether Panzica properly perfected the lien will be resolved in the litigated foreclosure action.

¹⁴ Or arbitration panel, depending on which format the parties employ at arbitration.

¹⁵ Zaremba defendants’ counterclaim at Page 15, Paragraph 35.

Count VI by Zaremba alleges that Panzica tortiously interfered with its business relations with the individual unit owner defendants by improperly asserting its mechanic's lien against the individual unit owners. This is another tort claim that cannot be decided without reference to the contract between Panzica and Zaremba and it is therefore appropriate for arbitration.

Count VII of the counterclaim is for defamation. This count is not unambiguously asserted by Zaremba Avenue, LLC. To the extent that it is, it is suitable for arbitration consistent with the reasoning set forth above. To the extent that the defamation claims are asserted by individual defendants Nathan Zaremba and Brian Blasinsky, they are not subject to arbitration in the absence of an agreement.¹⁶

Count VIII is for abuse of process and Count IX¹⁷ is for commercial bad faith. Insofar as these claims are asserted by Zaremba Avenue, LLC, against Panzica, they are subject to arbitration because they cannot be decided without reference to the contract.

The essential relief requested in Counts X and XI of the counterclaim is for this court to declare that Panzica has waived the contract's arbitration provision, rendering it unenforceable. This court has already found that a waiver did not occur. Therefore, these claims are moot as having been decided in Panzica's favor.

As to the counterclaims of the Zaremba defendants other than Zaremba Avenue, LLC, those that are not subject to arbitration will be stayed pending the result of the arbitration.

However, the lawsuit contains affirmative claims of other parties that are clearly not subject to the arbitration agreement. These include:

¹⁶ The counterclaim for defamation also asserts that Panzica defamed the individual unit owner defendants. However, those defendants are not represented by counsel for the Zaremba defendants and the court does not consider that they have, through Count VII, asserted a defamation counterclaim against Panzica.

¹⁷ Incorrectly captioned as a second "Count VIII" in the counterclaim.

1. Express Painting Corporation's counterclaim and cross-claim;
2. The City of Cleveland's foreclosure cross-claim;
3. PNC Bank's counterclaim and cross-claim;
4. Key Community Development New Markets, LLC's foreclosure counterclaim and cross-claim;
5. The counterclaims of individual defendants Evans, Angulo, Ball and Roy;
6. Cleveland New Markets Investment Fund, LLC's counterclaim and cross-claim; and
7. S.A. Communale's cross-claims.

Most of these claims are for foreclosure and are not subject to arbitration. The resolution of these claims should not have to await arbitration between Panzica and Zaremba, and a stay of these claims is not appropriate.¹⁸ For example, the title insurance commitment filed by defendant PNC Bank on March 23, 2010, shows defendant KCDNM, LLC's \$11 million loan, defendant the City of Cleveland's \$6.75 million loan, PNC's \$12.2 million loan, and defendant Cleveland New Markets Investment Fund, LLC's \$2 million loan as liens that appear to have priority over Panzica's. It would be unfair to make these defendants wait for Panzica and Zaremba to conclude their differences with the collateral possibly losing value by the day. Additionally, the priority, if not the validity and amount, of Panzica's lien may be decided before or concurrent with the arbitration and an order of the distribution of proceeds from a sheriff's sale can be conditioned on the arbitration result on the validity and amount of Panzica's lien.

Other claims are not subject to the arbitration agreement but are appropriate for a stay since the arbitrator's decision would have a practical effect on the outcome. For example, if the

¹⁸ The court is open to staying a trial on claims that are shown to be appropriate for arbitration under separate arbitration agreements, most likely the claims between Panzica and Express and Panzica and S.A. Communale.

arbitrator finds that Panzica's claim for breach of contract has merit, and that the mechanic's lien was justified, the Zaremba defendants' defamation claims are likely to be impaired.

CONCLUSION

The court therefore orders the following:

1) That the plaintiff's motion to compel arbitration is granted as to the causes of action asserted by Zaremba Avenue, LLC in its counterclaim against the plaintiff, and labeled as counts I, II, III, VI, VII, VIII (abuse of process), and VIII (commercial bad faith), and those counts are ordered to arbitration in accordance with the contract between the parties;

2) The court, in ruling on the motion to compel arbitration, finds that the plaintiff did not waive its right to pursue arbitration by filing the foreclosure action against defendant Zaremba Avenue, LLC, and counts X and XI of the counterclaim are moot;

3) Counts IV and V of Zaremba Avenue, LLC's counterclaim are stayed pending the arbitration;

4) The plaintiff's complaint is stayed pending arbitration, except to the extent that the priority of the plaintiff's mechanic's lien will be determined in the non-arbitrable foreclosure claims (see paragraph 6 below), and Panzica is permitted to participate in the litigation, pending arbitration, as necessary to protect the priority of its lien;

5) All other causes of action asserted by the defendants Zaremba, Inc., Zaremba Avenue, LLC, Avenue Condominium I Association, Nathan Zaremba and Brian Blasinsky in their counterclaim against the plaintiff and their complaint against new party S.A. Communale Co., Inc., are stayed pending the arbitration; and

6) All other claims of all parties are bifurcated from the arbitrable claims set forth above and are not stayed. Discovery on those claims should be ongoing.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: _____

SERVICE

A copy of this Journal Entry was sent by E-mail, this _____ day of May, 2010, to the following:

Attorneys for Plaintiff:

Andrew J. Natale, Esq.
anatale@frantzward.com
Mark R. Kobena, Esq.
mark@sonkinkoberna.com

Attorneys for Defendants:

Daniel F. Lindner, Esq.
daniel@justuslawyers.com
Darrel Clay, Esq.
dclay@walterhav.com
Robert Lewis, Esq.
Robert.Lewis@ThompsonHine.com
Scott R. Sylkatis, Esq.
Ssylkatis@orourke-law.com
Gregory L. Hail, Esq.
hmlegal002@aol.com
Joseph Cavasinni, Esq.
jcavasinni@reminger.com

Judge John P. O'Donnell