

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

COUNTY CONCRETE CORP.,

Plaintiff,

v.

THE BURNS & RUSSELL COMPANY
OF BALTIMORE CITY, INC.,

Defendant.

MEMORANDUM AND ORDER
02-C-254-S

Plaintiff County Concrete Corp. commenced this breach of contract action against defendant The Burns & Russell Company of Baltimore City, Inc. in March, 2002 in the Circuit Court for Marathon County, Wisconsin and was removed to this Court in May, 2002. on July 3, 2002 the matter was referred to arbitration pursuant to 9 U.S.C. § 3 to which the parties agreed in the contracts in suit. Accordingly, the Court dismissed the matter, "subject to reopening in the event further action is required at the conclusion of arbitration." The case is now before the Court on plaintiff's "motion to reopen for clarification of arbitration clauses."

MEMORANDUM

Plaintiff seeks two additional rulings concerning the arbitration of the parties' dispute. First, they wish to preclude

a third party, Premier Block Corporation, from participation in the arbitration. Second, they seek dismissal of certain claims presently before the arbitrators on the basis that the claims must be arbitrated in a different forum. Defendant opposes the motion arguing that it is procedurally improper and that both issues are properly resolved by the arbitrator. Defendant is correct that both matters are properly resolved by the arbitrator and the motion must therefore be denied.

The role of the Court in cases where a party asserts te contractual right to arbitrate is limited to "gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452 (2003). It is presumed that issues involving the interpretation of the rules of arbitration are to be resolved by the arbitrator, who is comparatively better able than the court to resolve such questions. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002). The present motion does not raise the issue of whether the parties have agreed to arbitrate their disputes. That issue was resolved more than three years ago and is presently conceded. Nor does it contest whether a particular controversy is subject to arbitration - it is conceded that the entire controversy is subject to arbitration.

The first issue, whether a third party should be permitted or

required to participate in the arbitration is certainly not properly resolved by the Court, having nothing to do with the questions of whether and what issues the parties before it agreed to arbitrate. Like the question of the availability of class arbitration in Green Tree, whether to permit a third party to intervene or be joined concerns contract interpretation and arbitration procedures which arbitrators are well suited to answer and which the contract commits to arbitration. 539 U.S. at 453. Whether others who are not parties to this action are permitted in the arbitration proceeding is not an issue for the Court.

The second issue, whether certain issues presented to the arbitrator should be resolved by this arbitrator or commenced before a different panel is also a question of contractual interpretation properly resolved by the arbitrator. The question of consolidation of actions before the arbitrator is surely a procedural question which grew out of the dispute and is for the arbitrator to resolve. Howsam, 537 U.S. at 84. It is particularly apparent that the parties expected the arbitrator to resolve the issue in light of the language of the patent agreement prescribing application of the rules of the American Arbitration Association, which rules in turn expressly empower the arbitrator to "rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Rule 7(a).

It would be contrary to the purpose and intent of arbitration to permit a party to invoke the Court to interrupt arbitration proceedings already underway and usurp the arbitrators' authority to resolve issues plainly within their authority. Accordingly,

ORDER

IT IS ORDERED that plaintiff's motion to reopen for clarification of arbitration is DENIED.

Entered this 17th day of August, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge