

**DPAC Holdings, Inc. v DesignPac Co., Inc.**

2010 NY Slip Op 32356(U)

August 23, 2010

Sup Ct, Nassau County

Docket Number: 6881-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**DPAC HOLDINGS, INC.,**

**TRIAL/IAS PART: 22  
NASSAU COUNTY**

**Plaintiff,**

**Index No: 6881-10  
Motion Seq. Nos: 1 & 2  
Submission Date: 11/18/09**

**-against-**

**DESIGNPAC CO. INC.,**

**Defendant.**

-----X

**Papers Read on these Motions:**

- Notice of Motion.....X.**
- Memorandum of Law in Support.....X**
- Memorandum in Opposition.....X**
- Reply Memorandum in Support.....X**
  
- Notice of Motion, Affidavit in Support, Affidavits of  
S. Thompson and J. Taylor and Exhibits.....X**

This matter is before the court on 1) the motion filed by Defendant DesignPac Co., Inc. ("Defendant") on May 21, 2010, and 2) the motion filed by Plaintiff DPAC Holdings, Inc. on June 17, 2010, both of which were submitted on July 2, 2010. For the reasons set forth below, the Court 1) grants Defendant's motion for an Order staying this action and compelling arbitration of the dispute between the parties in the manner provided for in the parties' written Interest Purchase Agreement; and 2) grants the unopposed application of counsel for Plaintiff to be admitted *pro hac vice*.

## BACKGROUND

### A. Relief Sought

Defendant moves for an Order, pursuant to CPLR §§ 2201 and 7503(a), staying this action and compelling arbitration of the dispute between the parties in the manner provided for in the parties' written Interest Purchase Agreement. Plaintiff opposes Defendant's motion.

Plaintiff moves for an Order, pursuant to 22 NYCRR § 690.3(a), admitting Steven J. Thompson, Esq. and Jill C. Taylor, Esq., *pro hac vice*, in the above-captioned action.

### B. The Parties' History

The Complaint describes the Nature of the Action as follows:<sup>1</sup>

Plaintiff brings this action seeking a declaration of the parties' rights and obligations under an Interest Purchase Agreement executed with the Defendant in connection with the sale of membership interests in a specialty gift business.

In the Complaint, Plaintiff alleges that on April 30, 2008, Plaintiff sold all of the membership interests in DesignPac Gifts, LLC ("Company") to Defendant pursuant to an Interest Purchase Agreement ("Agreement"). In addition to the Base Purchase Price of \$36,250,000, the Agreement provided for a Contingent Payment to be distributed to either Plaintiff or Defendant, depending on the Company's net revenue ("Net Revenue") over the succeeding two years.

The Complaint further alleges that there is no dispute between the parties that, for the "First Earn-Out Period," the Net Revenues of the Company exceeded the threshold that would entitle Plaintiff to the Contingent Payment. The issue that the Court is asked to resolve is whether the Net Revenues should properly include revenues derived from the Company's gift baskets business. Plaintiff submits that this involves an interpretation of Section 2.4(a) of the Agreement, which provides that Plaintiff receives the Contingent Payment "[i]f during each of the First Earn-Out Period and the Second Earn-Out Period, the net revenue of the Company as calculated on a basis consistent with past practice of the Company exceeds \$47 million."

Plaintiff also alleges that it has properly filed this action, instead of submitting it to arbitration,

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<sup>1</sup> Although the Complaint is not an exhibit to the motion papers, the Court has obtained from counsel, and reviewed, a copy of the Complaint and its attachments.

submitting that the language in the arbitration provisions of the Agreement authorizes this action.

Section 10.7 of the Agreement, titled “Mandatory Binding Arbitration,” (“Arbitration Clause”) provides as follows:

If a dispute, controversy or claim, including without limitation a claim for indemnification pursuant to Section 8.1, 8.2 or 8.3 (“Dispute”), arises between or among the parties hereto as to any matter relating to, resulting from or arising out of, this Agreement or any of the Transaction Documents, except as provided in Section 2.3 [titled “Purchase Price Adjustment”] or with regard to any matter in which a party seeks injunctive relief, the parties hereto agree to use the following procedure in lieu of commencing litigation (excepting only litigation commenced for the purpose of seeking injunctive or other equitable relief from any court of competent jurisdiction in situations where damages would not adequately compensate for an alleged breach of this Agreement, or obtaining a temporary restraining order, a preliminary injunction or other provisional judicial relief):

Sections 10.7(a), b and c of the Agreement set forth the procedure the parties shall follow with respect to arbitration.

#### C. The Parties’ Positions

Defendant submits that the instant action, in which Plaintiff seeks a declaratory judgment regarding the interpretation of a contractual term, plainly falls within the Arbitration Clause. Thus, Defendant contends, this dispute must be adjudicated by an arbitrator.

Plaintiff opposes Defendant’s motion, submitting that the Arbitration Clause expressly excludes from arbitration claims for equitable relief, and the Complaint seeks equitable relief. Plaintiff also contends that, despite the policy favoring arbitration, it is not required when the agreed-upon arbitration provisions carve out an exception for claims involving equitable relief.

In its Reply, Defendant submits that Plaintiff’s argument is at odds with the well established principle that an arbitrator, not the Court, should determine the scope of the parties’ agreement to arbitrate. Defendant also disputes Plaintiff’s claim that this action is equitable, rather than legal, in nature.

## RULING OF THE COURT

### A. Arbitration Agreements

CPLR § 7501, titled “**Effect of arbitration agreement**” provides:

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

Generally, it is for the courts to make the initial determination whether a particular dispute is arbitrable, that is whether the parties have agreed to arbitrate the particular dispute. *Nationwide General Insurance Company v. Investors Insurance Company of America*, 37 N.Y.2d 91, 95 (1975) quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-71 (1960). The ultimate disposition of the merits, however, is reserved for the arbitrator and the courts are expressly prohibited from considering whether the claim regarding which arbitration is sought is tenable, or otherwise passing on the merits of the dispute. *Nationwide General, supra*, at 75, citing CPLR § 7501.

With regard to the scope of an arbitration clause, a broad arbitration clause should be given the full effect of its wording in order to implement the intention of the parties. *Weinrott v. Carp*, 32 N.Y.2d 190 (1973). A court may exclude a substantive issue from issues that are submitted to an arbitrator only if the arbitration clause itself specifically enumerates the subjects intended to be put beyond the arbitrator’s reach. *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299 (1984).

### B. Declaratory judgment

CPLR § 3001 provides, in pertinent part:

The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

Declaratory relief is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action. *James v. Alderton Dock Yards*, 256 N.Y. 298,

305 (1931), *reh. den.*, 256 N.Y. 681 (1931). In *Kalisch-Jarcho, Inc. v. City of New York*, 72 N.Y.2d 727 (1988), the Court of Appeals reversed the Appellate Division's affirmance of the trial court's decision granting plaintiff-contractor's motion for summary judgment in its action seeking a declaratory judgment that it was not contractually obligated to perform the disputed work. *Id.* at 730-731. The defendant, the City of New York, opposed plaintiff's motion and cross moved for dismissal of the action contending that the work at issue was at least arguably within the contract, and citing the determinations of the project architect and the Commissioner of the New York City Department of Sanitation that the work at issue was plaintiff's contractual responsibility. *Id.* at 731. The contract at issue delineated the agreed procedure to be followed for resolving disputes arising during the project as to whether certain work was or was not within the contract. *Id.* at 732. The Court of Appeals concluded that, in view of the agreed procedure for resolving disputed work claims and the nature of the disputed work at issue, the Appellate Division abused its discretion by affirming the declaratory judgment. *Id.* In so concluding, the Court of Appeals held:

A declaratory judgment action may be an appropriate vehicle for settling justiciable disputes as to contract rights and obligations (*see, Matter of Public Serv. Commn. v Norton*, 304 NY 522, 529; *see also*, Restatement [Second] of Contracts § 345, comment d, at 107-108, 5 Corbin, Contracts § 991, at 4-5; 4 Williston, Contracts § 601, at 316-317 [3d ed]). But parties to an agreement may not seek a declaration of their contract rights when their agreement specifies a different, reasonable means for resolving such disputes (*see, e.g., Rifkin v Rifkin*, 118 NYS2d 322 [Sup Ct], *affd* 281 App Div 1035; 16 Williston, Contracts § 1919A, at 155-156). A declaratory judgment in such circumstances may be unnecessary (*see, Walsh v. Andorn*, 33 NY2d 503, 507; *James v Alderton Dock Yards*, 256 NY 298, 305), and could also enable parties to circumvent their contractual undertakings (*see, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3001:14, at 364-365*).

### C. Legal v. Equitable Claims

The declaratory judgment action, which was created in 1921, can be legal or equitable in nature, and to determine whether a party is entitled to a jury trial, it is necessary to examine which of the traditional actions would most likely have been used to present the instant claim had the declaratory judgment action not been created. *State Farm v. Sparacio*, 25 A.D.3d 777, 778-779 (2d Dept. 2006), quoting *Independent Church of Realization of Word of God v. Board of Assessors of Nassau County*, 72 A.D.2d 554, 555 (2d Dept. 1979). Concluding that the

underlying claim at issue, whether plaintiffs were obligated to provide motorist benefits to the defendants, was legal rather than equitable in nature, the Second Department in *State Farm, supra*, concluded that defendants were entitled to a jury trial. *Id.* at 779.

D. Application of these Principles to the Instant Action

Plaintiff submits that the Complaint is properly before the Court because it involves an action for a declaratory judgment, which is an equitable action excepted from arbitration in the applicable Arbitration Provision. The Court agrees with Defendant that Plaintiff's action is "the functional equivalent of (or a precursor to) a claim for breach of contract" (Reply Memorandum at p.4) and, therefore, more legal than equitable in nature. Moreover, under the reasoning of *Kalisch-Jarcho*, discussed *supra*, the Court concludes that a declaratory judgment is unnecessary because 1) the Agreement specifies a different, reasonable means for resolving the parties' disputes; and 2) permitting Plaintiff's action to go forward might enable Plaintiff to circumvent its contractual undertakings. In addition, the Court is not persuaded that damages would not adequately compensate for an alleged breach of the Agreement, and therefore concludes that Plaintiff has not satisfied this prong of the Arbitration Provision to entitle it to file this action. Accordingly, the Court concludes that the issues raised in the Complaint must be submitted to arbitration, and grants Defendant's motion for an Order staying this action and compelling arbitration of the dispute between the parties in the manner provided for in the parties' written Interest Purchase Agreement.

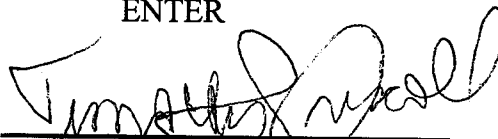
Finally, the Court grants the unopposed application of counsel for Plaintiff to be admitted *pro hac vice*, although the application may well be moot in light of the Court's decision compelling arbitration.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY  
August 23, 2010

ENTER

  
HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
AUG 27 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE