SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

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RE: ***Tekmen & Co. v. Southern Builders, Inc.***
C.A. No. 04C-03-007 RFS

Date Submitted: February 28, 2004
Date Decided: May 25, 2005

Dear Counsel:

This is my decision regarding Southern Builders, Inc.'s Motion to Dismiss. For the reasons set forth herein, the Motion is granted and the case is dismissed without prejudice.

STATEMENT OF THE CASE

On May 25, 1999, Tekmen & Company ("Tekmen") contracted with Southern Builders, Inc. ("SBI") to have a hotel built on its property in Rehoboth Beach. The contract contained a clause requiring the arbitration of claims arising under it. The hotel was allegedly substantially completed in June of 2000; however, SBI did not report final completion until the spring of 2001. Both after the date of substantial completion and the date of final completion, Tekmen observed leaks and other defects in the structure and reported them in writing and verbally to SBI. Apparently, SBI has returned to the site on many occasions between June of 2000 and the fall of

2003 to attempt to repair the defects. Tekmen claims there is no dispute that final payment was made years ago.

On March 5, 2004, Tekmen filed a complaint in this Court, arguing that SBI's repairs were inadequate, and laying out in detail all of the defects still existing in the hotel. It is seeking compensatory and punitive damages for breach of contract, negligence and breach of warranty. In response, SBI has filed a motion to dismiss, claiming the Court has no subject matter jurisdiction because, pursuant to the terms of the contract, all claims and disputes should first be submitted to the architect. Then, any claims may only be resolved through binding arbitration. Tekmen has neither submitted the claims to the architect, nor has it initiated an action for arbitration.

DISCUSSION

Both the United States Supreme Court and Delaware Courts have stated that there is a presumption in favor of arbitration. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-84 (1959); *SBC Interactive, Inc. v. Corp. Media Partners*, 714 A.2d 758, 761 (Del. 1998); *Worthy v. Payne*, 1998 WL 82992, at *1 (Del. Ch.). This presumption arises, "unless 'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Worthy* at * 1, *citing*, *United Steelworkers of America*, 363 U.S. at 582-3. "Since arbitration is a contractual matter, however, a party cannot be required to submit to arbitration absent a contractual duty to do so, and the Court is not permitted to rewrite the agreement to provide for the arbitrability of subject matter not otherwise covered." *Pettinaro Constr. Co. v. Harry C. Partridge, Jr. & Sons, Inc.*, 408 A.2d 957, 963 (Del. Ch. 1979).

Because an agreement to arbitrate is a contractual issue, a court must necessarily begin its analysis with the language of the contract. *See SBC Interactive, Inc. v. Corp. Media Partners*, 1997 WL 810008, at *2 (Del. Ch.), *aff'd*, 714 A.2d 758 (Del. 1998). The contract involved in this case is a standard form American Institute of Architects, or AIA, document. It is subject to the Delaware Uniform Arbitration Act, 10 *Del. C.* Ch. 57.[1]

Section 4.6.1 of the contract provides:

> Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5[2], shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5.

Section 4.4.1 of the contract states:

> Claims, including those alleging an error or omission by the Architect but excluding those arising under Paragraphs 10.3 through 10.5, shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect. . . .

In Section 4.2.1, the architect's duties are described as follows:

> The Architect will provide administration of the Contract as described in the Contract Documents, and will be an Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the one-year period for correction of Work described in Paragraph 12.2.

In addition, a claim is defined in the contract as:

> a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and

> Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the claim.

Tekmen argues that all of these sections of the contract should be read together to mean that submission of the dispute to the architect is a condition precedent to any arbitration or litigation undertaken. Since, pursuant to the contract, this condition ends upon the date of final payment, at that point there is no longer a duty to submit the claim to the architect or to pursue arbitration. Tekmen bases its argument on the reasoning of two cases, *Westmoreland Hosp. Ass'n v. Westmoreland Contr. Co.*, 223 A.2d 681 (Pa. Supr.1966) and *Blount Int'l, Ltd. v. James River-Pennington, Inc.*, 618 So. 1344 (Ala. Supr. 1993).

In *Westmoreland Hosp. Ass'n*, the Pennsylvania Court of Common Please enjoined a contractor from pursuing arbitration against a hospital over a dispute for money owed after final payment had been made. The Supreme Court affirmed the decision of the lower court. Although the agreement contained an arbitration clause, the Court found it was not applicable, because, "by its very terms, it obviously was not meant to apply where the contract was completed and there could be no need for a speedy resolution of a dispute." *Westmoreland Hosp. Ass'n*, 223 A.2d at 682.

That case is distinguishable from this one, however, for the very reason that the language in the *Westmoreland* contract specifically ended the duty to arbitrate once final payment had been made. The operative clause stated: "Any demand for arbitration shall be made within thirty days after arisen if practicable, but, in any event, no demand for arbitration shall be made after the date of final payment except in the case of a dispute arising in connection with any guarantee provisions of Contract Documents." *Id*. In contrast, the language in the contract between

Tekmen and SBI ("the Tekmen-SBI contract") provides: "An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due." This clause can be reasonably interpreted to mean that only with claims arising before final payment is due must a party seeking to arbitrate first submit the claim to the architect.

Blount Int'l, Ltd. can also be distinguished from the case at bar for the very same reason. In that case the Choctaw County Circuit Court denied a stay pending arbitration in a dispute over a contract to assemble and install heavy machinery in a paper mill. The Alabama Supreme Court upheld the lower court's decision because the arbitration clause clearly provided that claims were subject to arbitration only during construction or before final payment. *Blount Int'l, Ltd.*, 618 So.2d at 1346. The contract in that case stated: "Notice of the demand for arbitration of a dispute shall be filed in writing with the Owner and the other party to the agreement . . . . In no case, however, shall the demand be made later than the time of final payment, except as otherwise expressly stipulated in the Agreement." *Id*. at 1345. Again, no similar clause can be found in the contract before this Court.

In this regard, the Tekmen-SBI contract requires that any claims arising out of or related to the contract, except for those waived, "shall after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration." The contract further specifies that submission of the claim to the architect is a condition precedent to arbitration or litigation for those claims arising before the date of final payment is due. This language in the contract leaves room for an interpretation that once final payment is made, the claim need not be submitted to the architect, but there still remains a duty to arbitrate.

Other courts, when construing similar language, have acknowledged that the architect's role as decision-maker could be limited in time, while the duty to arbitrate might continue for a reasonable time afterwards to cover any claims arising under the contract. Generally, it is accepted that the architect's role as mediator under the contract is terminated when he is no longer responsible for representing the owner and for supervising the contractor's performance. *See, e.g., Liebhafsky v. Comstruct Assoc., Inc.*, 466 N.E.2d 844 (N.Y. Ct. App. 1984) (finding the architect's role as mediator was terminated when the contractor had substantially violated the terms of the contract and he not longer had a duty to supervise the contractor's performance). *See also* 6 Bruner & O'Connor Construction Law § 20:82 (May 2002).[3]

The Tekmen-SBI contract can reasonably be understood to contain a limitation on the architect's role as mediator. This limitation cannot also be read definitively to terminate the duty to arbitrate. The contract states specifically that the architect's role is a condition precedent to any action either party must take up until the time when final payment is due. Moreover, the architect is the owner's representative only "(1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the one-year period for correction of Work." The contract requires that a party seeking to arbitrate or litigate under the contract must, up until final payment has been made, first submit the claim to the architect. After final payment has been made, and during the one year for correction of work, whether or not the party has to submit the claim first to the architect is a question which must be decided in arbitration.

Several cases from other jurisdictions support the interpretation that submission of the claim to the architect as condition precedent may bar a party from compelling arbitration, but

does not extinguish the duty to arbitrate. In *Liebhafsky*, 466 N.E. 2d at 844-45, for example, the New York Court of Appeals held that the role of the architect terminated once he was no longer responsible for supervising the contractor's performance. It cited a previous New York Court of Appeals decision in which the Court had decided, "'the authority of the architect is centered on the operational phases of construction' and thus a 'claim . . . for delay damages, asserted some two years after substantial completion of the project . . .' need not be submitted to the architect as a condition precedent to arbitration." *Id*. at 845, *citing*, *Rockland County v. Primiano Constr. Co.*, 409 N.E.2d 951, 956 (N.Y. 1980). That Court affirmed the order of the lower court denying the motion to stay arbitration.

Similarly, in *HIM Portland, LLC v. Devito Builders, Inc.*, 211 F.Supp.2d 230, 232 n. 2 (D. Me. 2002), *aff'd*, 317 F.3d 41 (1st Cir. 2003), the District Court interpreted a contract which contained an arbitration clause and which required that:

> Claims, disputes and other matters in question arising out of or relating to this Contract . . . shall be referred initially to the Architect for decision. Such matters . . . shall, after initial decision by the Architect or 30 days after submission of the matter to the Architect, be subject to mediation as a condition precedent to arbitration or the institution or legal or equitable proceedings by either party.

The Court refused to stay the action before it and to compel arbitration. Performance of the contract had been completed and it concluded that "any obligation to refer disputes to the Architect was operational only during performance of the Contract." *Id*. at 233. The Court did not compel arbitration, however. It refused to stay the action because neither party had endeavored to mediate their claim, although it was a condition precedent to any obligation to arbitrate or to litigate.

In *Ex Parte Williams*, 591 So.2d 71 (Ala. Supr. 1991), however, the Alabama Supreme Court granted a writ of mandamus to require a lower court to vacate its order compelling arbitration. There, the contractor, who had sought the order had never submitted the dispute to the architect. Although the Supreme Court agreed with the lower court's finding that the condition precedent to arbitration was only in effect during the time when the architect was the owner's representative, it instead found:

> There is no doubt that the conflict arose within one year following substantial completion of the contract and that Williams notified Russell of the alleged defects *well within* that year. Russell simply failed to submit the dispute to the architect as provided in the contract. Pursuant to the provisions of the contract, failure to submit the dispute to the architect constituted a failure to meet the contractual condition precedent to arbitration.

Id. at 73.

The *Williams* contract contained language similar to the Tekmen-SBI contract, although it did not state specifically that submission of the claim to the architect was a condition precedent to arbitration.[4] The Alabama Supreme Court, however, only addressed the issue of whether a party could compel arbitration[5], not whether it could litigate the claims. *Cf. Shook of West Virginia, Inc. v. York City Sewer Auth.*, 756 F. Supp. 848 (M.D. Pa. 1991) (finding contractor was not barred from bringing suit by contract provision requiring disputes to initially be referred to engineer; concluding instead that engineer played a mediator's role only during the work in progress; that contract did not require arbitration).

After having reviewed the relevant case law, the Court finds that the duty to submit the claim to arbitration did not end upon final payment. There is a distinction between the interpretation of clauses requiring that no demand for arbitration be made after the date of final payment and those requiring merely that the existing claim be submitted to the architect as a

condition precedent up until the date of final payment. This case falls into the latter category. Where submission of the claims to the architect is a condition precedent to arbitration, a party's duty to arbitrate is not extinguished merely because the condition precedent is finite in time.

The Court's analysis does not end here, however, because the Tekmen-SBI contract also contains a clause requiring mediation as a condition precedent to arbitration or litigation. Section 4.5.1 provides:

> Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5 shall, after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

Although this issue was not initially presented by either party, the *HIM Portland, LLC*, 211 F. Supp.2d 230, decision drew the Court's attention to its import.[6] Under the Federal Arbitration Act, the *HIM Portland* Court had no power to order the parties to mediate. Thus, even though mediation was also a condition precedent to litigation, it found instead, that both parties abdicated that condition when they proceeded to litigation. In this case, the contract provides that mediation is a condition precedent to arbitration or litigation and, it states in section 4.6.1 that "[p]rior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5."

If the Court were to follow the reasoning of the *HIM Portland* Court, it might still be able to hear this case based on the fact that through the Plaintiff's pursuit of the case and through the Defendant's failure to request the case be dismissed for failure to mediate, both parties have waived their right to mediate, which is a condition precedent to arbitration.[7] In other words, if

the duty to arbitrate does not arise until the parties have "endeavored" to mediate their claim, under the reasoning in *HIM Portland*, this Court could not, logically speaking, dismiss this case for failure to arbitrate.

Fortunately, for logic's sake, Delaware law governs, and Delaware Courts have found that "issues concerning the procedure for triggering arbitration . . . are matters for arbitration, not initial judicial determination." *SBC Interactive, Inc. v. Corp. Media Partners*, 714 A.2d 758, 759 (Del. 1998). *See also Pettinaro Constr. Co.*, 408 A.2d at 963 ("The proper method of initiating arbitration under the contract is a matter for the decision of the arbitrator."); *Falcon Steel Co. v. Weber Eng'g Co.*, 517 A.2d 281, 287 (Del. Ch. 1986) (finding that subcontractor's failure to give notice before filing for arbitration was a defense going to the merits of its claim and thus an issue for the arbitrator and not the court to resolve). As a result, this Court does not have subject matter jurisdiction to hear this case. The contract requires arbitration of the Plaintiff's claim. Whether or not Tekmen is barred from arbitrating its claim because it did not submit it to mediation or to the architect and exactly when it can be said the claims arose in the case are issues that must be decided during arbitration. This decision is consistent with the public policy in this State regarding arbitration:

> The Uniform Arbitration Act reflects a policy designed to discourage litigation, to permit parties to resolve their disputes in a specialized forum more likely to be conversant with the needs of the parties and the customs and usages of a specific industry than a court of general legal or equitable jurisdiction, and to provide for the speedy resolution of disputes in order that work may be completed without undue delay.

Pettinaro Constr. Co., 408 A.2d at 961.

CONCLUSION

Considering the foregoing, Defendant Southern Builders, Inc.'s Motion to Dismiss is granted and this case is dismissed without prejudice.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

ENDNOTES

1. Delaware law suggests that no Court has jurisdiction to hear cases involving contracts that must be submitted to arbitration, other than the Chancery Court, which has limited review and enforcement of those arbitration agreements and proceedings. 10 *Del. C.* § 5701 states:

> A written agreement to submit to arbitration any controversy existing at or arising after the effective date of the agreement is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract, without regard to the justiciable character of the controversy, and confers jurisdiction on the Chancery Court of the State to enforce it and to enter judgment on an award. In determining any matter arising under this chapter, 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. This chapter also applies to arbitration agreements between employers and employees or between their respective representatives, except as otherwise provided in § 5725 hereunder.

2. Section 4.3.10 provides for the mutual waiver of claims for consequential damages "arising out of or relating to this contract." Section 9.10.4 states:

> The making of final payment shall constitute a waiver of Claims by the Owner except those arising from:
> .1 liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;
> .2 failure of the Work to comply with the requirements of the Contract Documents; or
> .3. terms of special warranties required by the Contract Documents.

Section 9.10.5 provides: "Acceptance of final payment by the Contractor, or Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment."

3. A common contractual scheme in the construction industry is to require contracting parties to initially submit their disputes to the architect or engineer for

> resolution and then permit either party disappointed in the decision to demand arbitration of the dispute. . . .
> . . . .
> The precondition is merely that the claim be submitted to the design professional. It is not necessary for the architect or engineer to actually render a decision. Most contracts are drafted in such a way that a party is entitled to demand arbitration if, after a certain period of time after submitting the matter to the design professional, no opinion has been rendered. Even if no express provision exists in the contract, it would certainly be implied that the design professional has a reasonable period of time within which to render its decision so as not to preclude the parties from being able to arbitrate in a timely and efficient manner. The passage of time may, however, eliminate the design professional's decision making role.

4. The relevant contract provisions are as follows:

> 10.1 The Architect will provide administration of the Contract and will be the Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 18.1.
> ....
> 10.5 The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect will make initial decisions on all claims, disputes or other matters in question between the Owner and Contractor, but will not be liable for results of any interpretations or decisions rendered in good faith. The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance of final payment, shall be subject to arbitration upon the written demand of either party.
> ....
> 10.8 All claims or disputes between the Contractor and the Owner arising out of or relating to the Contract, or the breath [sic] thereof, 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 and subject to an initial presentation of the claim or dispute to the Architect as required under Paragraph 10.5. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen.

Ex Parte Williams, 591 So.2d at 72.

5. There is one very important distinction between the cases listed above and the one before this Court, however. Every one involved a motion to compel arbitration. In this regard, SBI argues that this Court does not have subject matter jurisdiction to hear this case. It bases this argument on the reasoning in the case *Blank Rome Comisky & McCauley LLP v. Vendel*, 2002 WL 32072577 (Del. Super. Ct.).

There, the Court originally dismissed the case when the parties agreed to submit it to binding arbitration. The Defendants withdrew from the arbitration, alleging the arbitrator failed to enter an award within the time frame required by the arbitration agreement. The arbitrator signed a proposed Final Arbitration Award and on the same day, the Defendants filed a motion to vacate in Superior Court pursuant to Superior Court Civil Rule 60(b)(6). Because the arbitration agreement signed by the parties, was created pursuant to Delaware's Uniform Arbitration Act, 10 *Del. C.* Ch. 57, which gives the Chancery Court jurisdiction over arbitration controversies, the Superior Court dismissed the case for lack of subject matter jurisdiction.

Here, the Plaintiff is claiming that there is no duty to arbitrate since it argues that duty was extinguished upon final payment. The Court does have jurisdiction to decide whether at some point the duty to arbitrate ends, as that would determine whether the Court has subject matter jurisdiction over this claim. While it is true that this Court cannot make an order compelling arbitration, as that is within the province of the Chancery Court, it can certainly decide whether it lacks subject matter jurisdiction. The Court does not have jurisdiction, however, to decide any issues that must be subject to arbitration.

6. The Court did request that the parties address this issue. In response, Tekmen argued that

mediation is a condition precedent to arbitration or litigation, but that neither method of alternative dispute resolution is required once final payment has been made. It also claimed that before final payment, the duty to mediate is not triggered until the dispute has been submitted to the architect. Tekmen distinguishes the language in the contract at issue in *HIM Portland, LLC* from the provisions of the Tekmen-SBI contract. SBI maintains that this Court has no subject matter jurisdiction to decide the issues surrounding arbitration in this case.

7. Here, the language of the Tekmen-SBI contract clearly states that mediation is a condition precedent to arbitration. When the First Circuit affirmed the District Court's decision in *HIM Portland LLC*, 317 F.3d 41, 44 (1st Cir. 2003), it noted that although the contract contained the language, "the parties shall endeavor . . . ," it also contained language specifically requiring mediation as a condition precedent to litigation or arbitration. The Court stated:

> HIM selectively concentrates on language in the contract that, taken out of context, might "merely make[ ] mediation a suggested, [but] not a required precursor to arbitration." For instance, the contract states that the parties "shall endeavor" to resolve their disputes by mediation. Whether or not this language is, as HIM contends, merely "precatory" and was inserted merely to urge the parties to make an "earnest attempt" to resolve their differences through mediation is irrelevant; other provisions of the contract state in the plainest possible language that mediation is a condition precedent to arbitration. Section 9.10.1 bears repeating because of its remarkable clarity: "Claims, disputes and other matters in question arising out of or relating to this Contract ... shall ... be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party."

Id. More importantly, the First Circuit went on to say:

> Under the plain language of the contract, the arbitration provision of the agreement is not triggered until one of the parties requests mediation. *See Kemiron Atl., Inc. v. Aguakem Int'l Inc.*, 290 F.3d 1287, 1291 (11th Cir.2002). In *Kemiron*, the Eleventh Circuit faced a similar issue and held: "the parties agreed to conditions precedent before arbitration can take place and, by placing those

conditions in the contract, the parties clearly intended to make arbitration a dispute resolution mechanism of last resort." *Id.* at 1291. Further, "[b]ecause neither party requested mediation, the arbitration provision has not been activated and the FAA does not apply." *Id.* Congress did not enact the FAA to "operate without regard to the wishes of the contracting parties" *Mastrobuono*, 514 U.S. at 57, 115 S.Ct. 1212. Where contracting parties condition an arbitration agreement upon the satisfaction of some condition precedent, the failure to satisfy the specified condition will preclude the parties from compelling arbitration and staying proceedings under the FAA. Because neither HIM nor DeVito ever attempted to mediate this dispute, neither party can be compelled to submit to arbitration.