UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PIOTR NOWAK, Plaintiff, v. PENNSYLVANIA PROFESSIONAL SOCCER, LLC and KEYSTONE SPORTS AND ENTERTAINMENT, LLC, Defendants.	)	Civil Action No. 2:12-cv-04165-MAM

MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND COMPEL ARBITRATION

This contract action filed by Piotr Nowak ("Nowak"), former manager of the Philadelphia Union soccer team, against Pennsylvania Professional Soccer, LLC (the "Club") and Keystone Sports and Entertainment, LLC ("Keystone") should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and the Federal Arbitration Act, 9 U.S.C. § 1, et seq. because the claims are subject to a mandatory arbitration provision in the contract between the parties.

At the inception of his employment with Defendants, Nowak signed an Employment Agreement (the "Agreement") providing, among other things, that the Club could terminate his employment with written notice upon the occurrence of certain for-cause events. On June 13, 2012, the Club exercised its right to terminate Nowak for cause, providing him with a termination letter detailing the many ways in which he had committed cause. Nowak, in turn, initiated this lawsuit seeking an "expedited declaratory judgment" that Defendants failed to satisfy a condition precedent to terminating him and lacked the contractual right to effectuate the discharge.

The Agreement, however, explicitly provides that any claim arising out of or related to the Agreement or the breach thereof, including claims for wrongful termination or disputes regarding Nowak's right to severance, "shall be settled by arbitration" before the American Arbitration Association. Because Nowak's claim seeks to adjudicate the propriety of the termination decision and whether Defendants' actions breached the Agreement, it falls squarely within this proviso and can be pursued only in the arbitral forum. As such, the Court should dismiss the pending action and compel arbitration instead.

Background

On June 1, 2009, Nowak and the Club entered into an Agreement for Nowak to serve as Manager of the Philadelphia Union (the "Team"), a professional soccer team owned by Keystone in the Major Soccer League (the "League"). (Compl. ¶¶ 2, 13.) In addition to numerous other terms and conditions of employment, the Agreement permitted the Club to terminate Nowak's employment immediately upon written notice for several specified for-cause reasons, including a material breach of the Agreement, a failure to comply with Team or League rules, acts of gross negligence or willful misconduct in performing his duties, and statements or conduct materially detrimental to the League's or Team's interests or public image. (Compl. Ex. A, ¶ III(A).)

In addition, the Agreement contained a provision titled "Governing Law, Arbitration and Attorneys' Fees" (Article XIII), which stated:

> Any controversy or claim arising out of or relating to this Agreement or the breach hereof, including, without limitation, any claims for wrongful termination . . . shall be settled by arbitration in accordance with the rules of the American Arbitration Association and under the laws of the State of Pennsylvania . . . provided however, that nothing herein shall prevent either party from seeking equitable relief from a court of competent jurisdiction. (Compl. Ex. A, ¶ XIII.)

The Agreement also referenced arbitration in the Termination provision (Paragraph III(C)), which stated:

> Whether Club has terminated this Agreement pursuant to Paragraph III(A) [for cause and without severance] or (B) [not for cause and with severance] shall be determined in good faith by Club at its reasonable discretion; provided that (i) prior to terminating Manager pursuant to Paragraph III(A), Club shall specify in reasonable detail the reason Manager is being so terminated and give Manager an opportunity to respond thereto, (ii) <u>such determination shall be subject to Paragraph XIII [Governing Law, Arbitration and Attorneys' Fees]</u> and (iii) prior to terminating Manager pursuant to clause (2), (3), or (7) of Paragraph III(A), Club shall allow Manager fifteen (15) days to cure the occurrence, except that Club shall have no obligation to provide Manager such opportunity to cure if Club determines, in its good faith judgment, that the occurrence is of a nature that is not curable or that Manager's continued employment during a cure period could be reasonably be expected to result in material harm to Club. (Compl. Ex. A, ¶ III(C) (emphasis added).)

On June 13, 2012, the Club invoked its right to terminate Nowak immediately for cause and issued written notice of its intent to do so. (Compl. Ex E.) In the termination letter, the Club described how Nowak had committed acts constituting cause, such as: (i) materially breaching Team rules by orally berating and physically intimidating fellow employees; (ii) materially breaching League rules by subjecting Team players to inappropriate hazing activities and engaging in physical confrontations with players and officials during a Team game; and (iii) demonstrating gross negligence by ignoring the advice of the head athletic trainer regarding player health. (Compl. Ex. E.)

On July 20, 2012, Nowak filed this suit seeking an "expedited declaratory judgment" that Defendants did not have cause to terminate him, did not satisfy conditions precedent to the discharge, and breached the Agreement. (Compl.) Because Nowak's claim arises out of and relates to the Agreement and an alleged breach thereof, however, it is precisely the type of claim that must be arbitrated under the Agreement. As such, this Court should dismiss Nowak's claim and compel arbitration.

<u>Argument</u>

The Federal Arbitration Act ("FAA") governs arbitration clauses contained in contracts

involving interstate commerce, including arbitration clauses in employment agreements. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 119 (2001) (FAA applies to arbitration provisions in employment agreements). Section 2 of the FAA provides:

> A written provision [in any contract involving interstate commerce] to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Under the FAA and Pennsylvania law, courts must compel an issue to arbitration if: (1) a valid agreement to arbitrate exists; and (2) the dispute at issue falls within the scope of the arbitration agreement. *Miron v. BDO Seidman, LLP*, 342 F. Supp. 2d 324, 328 (E.D. Pa. 2004) (applying federal law); *Metcalf v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 768 F. Supp. 2d 762, 767 (M.D. Pa. 2011) (applying federal law); *Apollo Metals, Ltd. v. Electroplating Tech., Ltd.*, Civil Action No. 06-5245, 2009 WL 4043305, *3 (E.D. Pa. Nov. 23, 2009) (applying Pennsylvania state law). The Supreme Court has repeatedly made clear that courts are to review arbitration provisions in light of "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). Indeed, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. Arbitration should not be denied "unless it can be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." *AT&T Tech. Inc. v. Commc'n. Workers of Am.*, 475 U.S. 643, 650 (1986). Where, as here, a valid agreement to arbitrate exists and the dispute at issue falls within the scope of the agreement, arbitration must be compelled and the case should be dismissed. *See Halide Group, Inc. v. Hyosung Corp.*, Civil Action No. 10-02392, 2010 WL

4456928, *3 n.4 (E.D. Pa. Nov. 8, 2010) (noting that the Third Circuit "has held that where all of the issues raised in a suit are subject to binding arbitration the court may dismiss rather than stay the action").

A. Nowak's Claim Falls Within the Arbitration Provision.

Given the clarity and breadth of the arbitration provision at issue here, there can be no serious dispute but that it covers Nowak's claims. The pertinent language in Article XIII (Governing Law, Arbitration and Attorneys' Fees) specifically states that arbitration "shall be" the manner in which to settle disputes "arising out of or related to the Agreement" including claims for "wrongful termination" and "disputes regarding Manager's right to severance payments." Moreover, Article III (Termination) explicitly provides that any question about whether the Club decided in good faith at its reasonable discretion to terminate Nowak with cause under Paragraph III(A) "shall be subject to Paragraph XIII" (Governing Law, Arbitration and Attorneys' Fees).

The relief sought by Nowak's declaratory judgment action requires precisely the analysis reserved for arbitration under the Agreement. Nowak asks this Court to find that the Club did not act in good faith in discharging him, that it lacked the contractual right to terminate him and that it breached the Agreement by failing to provide him with notice and an opportunity to cure the misconduct underlying the for-cause determination. Under Articles III and XIII, the parties have agreed that these issues must be resolved through arbitration.

Indeed, the prevailing case law provides ample authority for compelling arbitration under similar circumstances. In *Halide Group, Inc.*, for example, the plaintiff sought a declaration that it had not breached an agreement with the defendant. 2010 WL 4456928, at *1. The court held that the claim clearly fell within the scope of an arbitration clause in the agreement mandating

the arbitration of "any dispute or claim arising out of or in connection with" the agreement. Id. at **2-3. Likewise, in *Apollo Metals, Ltd.*, the plaintiff sought a declaratory judgment that the defendant breached an agreement between the parties. 2009 WL 4043305, at *1. The court found that the declaratory judgment action fell within a mandatory arbitration provision requiring arbitration of "any dispute arising under" the agreement. *Id.* at **4-5. The court dismissed the claim for declaratory judgment and instructed the parties to proceed to arbitration.

This case requires the same relief. The Agreement provides that claims "arising out of or relating to [the] Agreement or [a] breach hereof" shall be resolved through arbitration. As Nowak's declaratory judgment action clearly arises out of the Agreement and relates to a breach thereof, his case must be dismissed in favor of arbitration.

B. Nowak Cannot Avoid Arbitration By Claiming This Action Seeks Equitable Relief.

In attempting to avoid arbitration, Nowak will no doubt point to the proviso in Article XIII providing that "nothing herein shall prevent either party from seeking equitable relief from a court of competent jurisdiction." Indeed, Nowak presumably styled what is clearly a breach of contract action as a declaratory judgment action for the sole purpose of trying to exploit this caveat. The mere styling of his dispute as a declaratory judgment action, however, does not render it a claim for equitable relief nor does it allow him to circumvent the parties' agreement to arbitrate.

"It is well settled that an action for declaratory judgment is inherently neither legal nor equitable." *The Bachman Co. v. Anthony Pinho, Inc.*, Civ. A. No. 91-5679, 1993 WL 64620, *2 (E.D. Pa. March 3, 1993). In determining whether a claim for declaratory judgment is equitable or legal in nature, the Third Circuit instructs courts to determine what kind of suit the claim would have been if no declaratory judgment remedy existed. *AstenJohnson, Inc. v. Columbia*

Cas. Co., 562 F.3d 213, 223-24 (3rd Cir. 2009); *Patten Sec. Corp., Inc. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 405 (3rd Cir. 1987), *abrogated on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 286 (1988). Courts making this determination have repeatedly held that an action seeking a declaration of party rights relating to an alleged breach of contract is akin to an action at law, not in equity. *See AstenJohnson, Inc.*, 562 F.3d at 224 (finding declaratory judgment claim based on a breach of contract was not equitable in nature); *Patten Sec. Corp., Inc.*, 819 F.2d at 405 (finding that the declaratory judgment action raised only "damages oriented" contract questions and did not seek equitable relief).

Indeed, in *AstenJohnson, Inc.*, the plaintiff brought a declaratory judgment action seeking, among other things, a declaration that the defendants had failed to honor their obligations under insurance contracts. 562 F.3d at 218. In determining whether the declaratory judgment action rested in law or equity, the Third Circuit held that it was clear plaintiff would have brought an action in assumpit for damages had no declaratory judgment remedy existed. *Id.* at 224. The Court rejected the possibility that the plaintiff would have brought a claim for specific performance since assumpsit was an available and adequate remedy at law, and noted that "in the federal courts equity has always only acted when legal remedies were inadequate." *Id.* (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509 (1959)).

Here, Nowak's claim for declaratory judgment seeks a determination that Defendants breached their obligations under the Agreement, which is fundamentally an action at law. Indeed, if the declaratory judgment remedy did not exist, Nowak would have had no choice but to bring a claim for breach of contract – a claim unquestionably sounding in law. Nowak's

declaratory judgment claim, therefore, does not sound in equity and must be compelled to arbitration.

C. The Claims Do Not Fall Within the Scope of the Declaratory Judgment Act.

The propriety of dismissal in favor of arbitration is particularly strong given that Nowak's Complaint is not an appropriate declaratory judgment action. The purpose of the Declaratory Judgment Act is to "minimize the danger of unavoidable loss and the unnecessary accrual of damages." *Crown Cork & Seal Co., Inc. v. Borden, Inc.*, 779 F. Supp. 33, 35 (E.D. Pa. 1991). The Act "was meant to settle legal rights 'without awaiting a violation of the rights or a disturbance of relationships.' It was not meant . . . to prevent the cost of litigating where such violations or disturbances have already occurred." *Id.* at 36 (citation omitted).

The Declaratory Judgment Act confers discretionary jurisdiction on courts "and contemplates that district courts will exercise discretion in determining whether to entertain" actions for declaratory relief. *State Auto Ins. Co. v. Summy*, 234 F.3d 131, 133 (3rd Cir. 2000). In deciding whether to dismiss a declaratory judgment action, courts are to consider a number of factors, including: (1) whether declaratory relief would clarify and settle the disputes; (2) the convenience of the parties; (3) the public's interest in settling the uncertainty of an obligation; (4) the availability and relative convenience of other remedies; and (5) whether declaratory judgment is being sought as a method of "procedural fencing." *Terra Nova Ins. Co., Ltd. v. 900 Bar, Inc.*, 887 F.2d 1213, 1224-25 (3rd Cir. 1989) (noting that courts "look with disapproval upon any attempt to circumvent the laudable purposes of the Act, and seek to prevent the use of the declaratory judgment action as a method of procedural fencing" (citation omitted)); *Priority Healthcare Corp. v. AETNA Specialty Pharmacy, LLC*, 590 F. Supp. 2d 663, 667 (D. Del. 2008).

The disputes set forth in the Complaint are not appropriate for resolution by declaratory judgment. Because Defendants have already terminated Nowak there is no "unavoidable loss" or "unnecessary accrual of damages" to minimize. Moreover, a declaratory judgment would not settle the disputes between the parties. If the Court declared Defendants to be in breach of the Agreement, the question of damages would still be outstanding. That issue would need to be handled in arbitration, rendering this lawsuit an unnecessary and inefficient precursor to a second action. *See Smith v. Metro. Prop. & Liab. Ins. Co.*, 629 F.2d 757, 759 (2nd Cir. 1980) (dismissing declaratory judgment action where arbitration was available and plaintiff intended to submit issue of damages to arbitration, noting that "[g]iven that both the extent of coverage and the amount of damages are arbitrable, the arbitration proceeding is a fully adequate alternative remedy which would be substantially duplicative of any proceeding in this court"). *See also Priority Healthcare Corp.*, 590 F. Supp. 2d at 669 (declining to exercise jurisdiction over contract-based declaratory judgment claim where agreement provided for arbitration over the types of disputes raised by the action). Because Nowak's claim can and should be styled as a breach of contract claim (to be addressed in arbitration), his declaratory judgment action is inappropriate and should be dismissed.

Conclusion

Nowak's filing of this declaratory judgment action represents an obvious and inappropriate form of procedural fencing. The issues raised by Nowak's Complaint – whether the Club breached the Agreement or acted without good faith in making the discharge decision – is fundamentally a legal claim for breach of contract that falls squarely within the Agreement's arbitration provision. As such, the Court should dismiss Nowak's Complaint in favor of arbitration.

Respectfully Submitted,

/s/ David E. Landau

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CERTIFICATE OF SERVICE

I hereby certify that August 23, 2012, I electronically filed the foregoing **Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's Complaint and Compel Arbitration** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record for Plaintiff at their e-mail address on file with the Court:

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