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

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

Plaintiff Piotr Nowak's ("Nowak") response to Defendants' Motion to Dismiss advances no fact or argument that should preclude dismissal of this action pursuant to the arbitration clause contained in the Employment Agreement. In their initial brief, Defendants presented extensive analysis and authority establishing that: (1) courts must compel arbitration if a valid agreement to arbitrate exists and the matter falls within the scope of that agreement; (2) courts should review arbitration clauses in light of a liberal federal policy favoring arbitration and resolve any doubts in favor of arbitration; (3) the Employment Agreement contains numerous provisions explicitly requiring arbitration for any issue of wrongful termination, eligibility for severance, or whether the Club exercised reasonable discretion in terminating Nowak for cause; and (4) Nowak's claim is neither equitable in nature nor appropriate for declaratory judgment relief and therefore must be arbitrated.

In response, Nowak glosses over this analysis in favor of inapposite legal argument and inappropriate "factual" presentation. As anticipated, Nowak contends that the arbitration provision's exception for "equitable relief" entitles him to pursue what is fundamentally a breach

of contract claim as a declaratory judgment action in court. In making this assertion, Nowak entirely ignores the many cases cited in Defendants' opening brief where the Third Circuit Court of Appeals expressly recognized that a declaratory judgment action relating to a breach of contract is legal, not equitable, in nature and should be treated as such. This binding authority, coupled with a plain reading of the Employment Agreement and a common sense interpretation of Nowak's claims, reveals clearly that Defendants' Motion to Dismiss should be granted.[1/]

I. Nowak's Declaratory Judgment Action Is Not Equitable In Nature and Must be Dismissed in Favor of Arbitration.

Nowak's argument against enforcement of the arbitration provision rests on the false premise that "there is not a clear and unmistakable provision [in the Employment Agreement] that states that arbitration is the only avenue of redress."[2/] Pl. Br. p. 6. Nowak contends that the contract proviso stating that "nothing herein shall prevent either party from seeking equitable relief from a court of competent jurisdiction" permits him to proceed with his claims the Club breached the Employment Agreement when it terminated him with cause so long as he styles his claim as a declaratory judgment action.

1/ Nowak attempts to distract from the preliminary procedural issue pending before this Court with incendiary and misleading allegations about the conduct of Defendants and their attorneys, gratuitously attaching to their brief communications between opposing counsel that have no bearing on the matter at hand and no place in the public record. This tactic, which reveals much about Plaintiff's motivation for trying to avoid arbitration with a contrived "declaratory judgment" claim, underscores the need to honor the parties' prior agreement to arbitrate matters relating to his termination from employment.

2/ As a preliminary matter, Plaintiff misleadingly cites cases evaluating motions to dismiss under Rule 12(b)(6) as providing the standard of review here. *See* Pl. Br. 4. In fact, *Bell Atlantic Corp. v. Twombly*, *Phillips v. County of Allegheny,* and *Ashcroft v. Iqbal*, however, did not involve the application of an arbitration provision. Where, as here, the Court is deciding a motion to dismiss *and* compel to arbitration, the relevant standards come from analogous cases such as *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). Such cases provide that the court must compel arbitration where a valid agreement to arbitrate exists and the dispute at issue falls within the scope of the agreement.

This argument fails from every point of analysis. First, Nowak ignores extensive language in the Agreement dictating that matters involving his termination must go to arbitration. Both Article III (Termination) and Article XIII (Governing Law, Arbitration and Attorneys' Fees) specifically provide that arbitration "*shall be*" the manner in which to settle disputes relating to wrongful termination, Nowak's right to severance payments, and any other disputes arising out of or related to the Agreement. Nowak neglects to mention these provisions at all, much less to explain how they fall short of constituting an "express, unequivocal agreement" to arbitrate. Moreover, Nowak fails to articulate how his lawsuit – which raises *exactly* these issues – can be legitimately interpreted as outside these provisions regardless of how it is styled. As held in both *Halide Group, Inc.* and *Apollo Metals*, declaratory judgments actions are subject to arbitration where, as here, the arbitration provision broadly covers disputes arising under the agreement. *Halide*, 2010 WL 4456928, *3 n.4 (E.D. Pa. Nov. 8, 2010); *Apollo Metals, Ltd*, 2009 WL 4043305, *3 (E.D. Pa. Nov. 23, 2009).[3/] Given the extensive contract language providing for arbitration of contract disputes involving questions of wrongful termination and severance, it is clear this case belongs in the arbitral forum.

Second, while Nowak invokes the exception in the arbitration provision allowing a party to seek equitable relief in court, he fails to acknowledge that declaratory judgment actions are neither inherently equitable nor legal in nature, or to demonstrate how his claim falls into the equitable category. Nowak concedes, as he must, that "if the declaratory judgment remedy did

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3/ In each of these cases, the arbitration provision contained an exception to the arbitration mandate that the court found inapplicable. *Halide*, 2010 WL 4456928, *3 (exclusion permitting preliminary injunctive relief to proceed in court inapplicable); *Apollo Metals, Ltd*, 2009 WL 4043305, *3 (carve out relating to patent claims inapplicable). Although the exception in these cases is distinguishable from the proviso here, the decisions support the proposition that (1) arbitration is appropriate for a declaratory judgment action, and (2) the potential application of an exception in the arbitration clause does not create an issue of fact or render the arbitration provision not "clear and unmistakable."

not exist, Nowak would have had no choice but to bring a claim for breach of contract." Pl. Br. p. 7. Despite this admission regarding the true nature of his claim, Nowak fails to address the significant authority cited in Defendants' initial brief holding that a declaratory judgment action relating to an alleged breach of contract constitutes an action at law, not in equity. *See 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); *The Bachman Co. v. Anthony Pinho, Inc.*, 1993 WL 64620, *2 (E.D. Pa. March 3, 1993).

Indeed, in rebuttal Nowak merely cites two Supreme Court cases that he claims stand for the proposition that declaratory judgment actions are necessarily equitable in nature.[4/] But these cases contain no such blanket ruling. In the cited portion of *Samuels v. Mackell* (which quotes a 1943 Supreme Court case), the Supreme Court recognized that a statutory declaratory judgment action brought pursuant to the Tax Injunction Act of 1937 was "essentially equitable" because it was "analogous to the equity injunction in suits . . . for a decree quieting title." 401 U.S. 66, 70 (1971). As for *Green v. Mansour*, while the Supreme Court acknowledged that issuing a declaratory judgment may depend on equitable considerations (as Nowak cited), it said nothing to suggest that declaratory actions are inherently and inevitably equitable in nature. Indeed, the Court recognized that the Declaratory Judgment Act does not confer "an absolute right upon the litigant" for declaratory relief and "may not be available in a number of instances." 474 U.S. 64, 72-73 (1985). The Court went on to hold that a declaratory judgment action was inappropriate under the circumstances because "[t]here is no claimed continuing violation of federal law, and

4/ Nowak's reference to F.R.C.P. 57, which states that "the existence of another adequate remedy does not preclude a declaratory judgment action that is otherwise appropriate," is irrelevant to this analysis. Here, the point is that the Court must look to the essence of the declaratory judgment claim in deciding whether it is legal or equitable in nature. Because Nowak's claims assert breach of contract, they are fundamentally legal in nature and therefore outside the arbitration provision's exception for equitable relief.

therefore no occasion to issue an injunction" and because the declaratory action appeared to be "a partial 'end-run'" around a prior Court decision that barred injunctions in similar situations. The teaching of these cases is precisely what Defendants urge here – that the Court look behind the "declaratory judgment" label to determine the true nature of suit and not allow Nowak to use the declaratory judgment procedure as an end-run around the arbitration provision.

Nowak also misses the mark in asserting that principles of contract interpretation warrant allowing him to proceed in court. Nowak is simply wrong in his assertion that the Employment Agreement "specifically provides that a declaratory judgment remedy *does* exist." Pl. Br. p. 7. The Agreement speaks only to the availability of equitable relief, which (as explained above) is entirely distinct from a declaratory judgment action that may be either equitable or, as here, legal in nature. Moreover, contrary to Nowak's contention, Defendants do not "ask this Court to declare that the proviso permitting equitable relief in court is "meaningless and void." Pl. Br. p. 7. The proviso remains valid and relevant for actions truly seeking equitable relief. Indeed, Article VIII of the Employment Agreement, entitled "Equitable Relief," specifically identifies what such actions may be – any action by the Club to "obtain a decree enjoining Manager from any further breach" of his restrictive covenants in Article IX or certain representations in Article XIX. Because Nowak's action does not implicate the Equitable Relief provision of the Agreement and does not truly seek equitable relief at all, the proviso allowing equitable claims to be pursued in court does not apply.

In short, other than wrongly insisting that "declaratory judgment" is synonymous with "equitable relief," Nowak has provided no precedent or analysis to support his contention that this case is not subject to the arbitration provision. The Agreement explicitly states that claims regarding "wrongful termination," severance payments, and whether the Club "decided in good

faith at its reasonable discretion to terminate Nowak with cause" must be decided in an arbitral forum. Because Nowak's declaratory judgment action is nothing but a legal breach of contract claim in thin disguise, his case must be dismissed in favor of arbitration as the parties previously agreed.

II. Nowak's Claim Is Not Appropriate For Declaratory Judgment.

Not only has Nowak failed to account for the fundamentally legal nature of his claim, but he has failed to explain why he can pursue it as a declaratory judgment action instead of the breach of contract claim that it is. Nowak seems to suggest that the Club's presentment of a choice between an outright termination for cause or a negotiated separation package somehow "lacked good faith" and precipitated his march to court. Be that as it may, at initiation of the claim and ever since, Nowak has been a former employee seeking severance under the Employment Agreement based on his contention that the Club terminated him without cause. Accordingly, this action represents a classic breach of contract claim resting on past events, not a means of "settling legal rights 'without a violation of the rights or a disturbance of relationships'" that falls within the ambit of the Declaratory Judgment Act. *Crown Cork & Seal Co., Inc. v. Borden, Inc.*, 779 F. Supp. 33, 35 (E.D. Pa. 1991). As such, even putting aside the arbitration provision, the Court should exercise its discretion to refuse to entertain Nowak's claim.

Nor should the Court be influenced by Nowak's resort to irrelevant and unsupported argument on the purported "merits" of his claim. Nowak waxes indignant about how the Club allegedly provided no notice or cure period and offered Nowak the choice of a exiting with a

severance package.[5/] To the extent this improper factual aside relates to the instant Motion at all, it highlights the necessity of referring Nowak's claim to arbitration. As Article III(C) provides, whether the Club "terminated this Agreement pursuant to Paragraph III(A) or (B) [with or without cause] shall be determined in good faith by the Club at its reasonable discretion; provided that . . . such determination shall be subject to Paragraph XIII [arbitration] . . ." Because Nowak is clearly seeking a determination on good faith, arbitration must apply.[6/]

III. Nowak Is Incorrect That Section 4 of the Federal Arbitration Act Applies Here.

In a last ditch effort to forestall dismissal in favor of arbitration as clearly required by the contract, Nowak throws out a procedural argument under the FAA, contending that Defendants were required but failed to follow the procedure set forth in Section 4 for invoking arbitration. Here too, Nowak gets it wrong. As has been recognized in this district, Section 4 of the FAA "is not applicable to a case such as this, where the plaintiff has already brought an action in court. Section 4 applies only when a party brings an independent action 'whose sole purpose is to compel arbitration.'" *Weinstein v. Equitable Life Assurance Soc. of U.S.*, No. CIV. A. 96-CV-3614, 1966 WL 557321 * 3 (E.D. Pa. Sept. 26, 1996) (citation omitted). Where as here, a party

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5/ This point has a certain "Alice in Wonderland" quality to it. The Club presented the option of a separation package to Nowak as a benefit to him – an opportunity to avoid public harm to his reputation and give him some financial security as he sought new employment. That Nowak has tried to pervert this good faith gesture into a "threat" is ironic in the extreme.

6/ Notably, Nowak's brief reveals an eagerness to take potshots at Defendants in a manner that he could not do were the case in a confidential arbitration proceeding. Nowak takes a commonplace termination scenario and spins it into a tale of "threatening letters," bad faith, and "an outrageous display of unethical conduct." Nothing could be farther from the truth. The Club offered Nowak the opportunity to enter into a separation agreement instead of facing a public for-cause termination. To provide Nowak with full information in considering this deal, a lawyer for the Club advised Nowak's attorney that additional allegations of misconduct had come to light since the termination meeting, so the separation agreement may be even more attractive to Nowak. Nothing about this course of conduct is "threatening," "unethical," or even extraordinary, and Nowak's attempt to cast it as such can only be viewed as posturing.

has already initiated litigation in court, Section 3 of the FAA applies. Unlike Section 4, Section 3 has no notice requirement, and therefore no procedural deficiency exists. *Id*. at *4 (finding "no procedural deficiency" where defendants did not provide notice to plaintiff of motion to compel under Section 3 of the FAA). As with Nowak's other positions, this argument should be rejected.

Conclusion

The governing contract, relevant case law, and common sense all mandate dismissing this case in favor of arbitration. Nowak's response presents nothing to overcome the reality that 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, Defendants' motion should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that September 13, 2012, I electronically filed the foregoing **Reply Memorandum in Support of Defendants' Motion to Dismiss 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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