

BOROUGH OF KUTZTOWN,
Plaintiff,

v.

FIRST AMERICAN TITLE
INSURANCE COMPANY,
Defendant,

MAXATAWNY TOWNSHIP and
MAXATAWNY TOWNSHIP
MUNICIPAL AUTHORITY,
Intervenors.

IN THE COURT OF COMMON PLEAS OF
BERKS COUNTY, PENNSYLVANIA

Civil Action

No. 15-16511

Jury Trial Demanded

**BRIEF IN SUPPORT OF THE BOROUGH OF KUTZTOWN'S
PETITION TO RELEASE THE ESCROW DOCUMENTS HELD BY THE COURT**

AND NOW, comes the Plaintiff, Borough of Kutztown, through its attorneys, Barley Snyder, filing this Petition to obtain the release of escrow documents presently being held in the Court's custody pursuant to an Order entered December 18, 2015.

I. PROCEDURAL HISTORY

In this action, Plaintiff Borough of Kutztown ("Kutztown") seeks enforcement of an escrow agreement entered into between Kutztown, Township of Maxatawny and Maxatawny Township Municipal Authority (collectively referred to herein as "Maxatawny") and First American Title Insurance Company ("First American"). The specific provision sought to be enforced by Kutztown involves only the obligations of First American under the Escrow Agreement. Nevertheless, Maxatawny intervened and previously filed preliminary objections asserting that the decision on the escrow documents should be stayed until arbitration between Kutztown and Maxatawny occurred. On December 18, 2015, this Court issued an Order staying this case and directing the deed and escrow documents into the Court's custody, pending

arbitration of the underlying dispute. That arbitration proceeding occurred, and on July 1, 2016, the arbitration panel issued an Order and Opinion in favor of Kutztown, finding that it had not waived any claims to relief under an Intermunicipal Agreement or the Escrow Agreement.

II. STATEMENT OF FACTS

On August 25, 2010, Kutztown entered into an agreement entitled the Saucony Creek Regional Authority Project Escrow Agreement (“Escrow Agreement”) with First American. Maxatawny was also a party to the Escrow Agreement. Under Section 3 of the Escrow Agreement, certain documents were given to First American as escrow agent to hold pursuant to the terms and conditions of the Escrow Agreement. The documents provided to First American, referred to as the “Closing Documents,” were identified in Exhibit A to the Escrow Agreement and consisted, *inter alia*, of a Deed of land from Maxatawny to Kutztown, an assignment of Flow Splitter Lease and a Bill of Sale and Assignment Agreement. Under Sections 3, 4 and 5 of the Escrow Agreement, First American was to release the Closing Documents (except as noted otherwise) and record the Closing Documents (as are recordable) or deliver the documents to Kutztown if the Saucony Creek Regional Authority (“SCRA”) was not created or if Maxatawny had not transferred the Treatment Facility to SCRA by a certain date.

SCRA was never created and Maxatawny never conveyed the Treatment Facility to SCRA. Accordingly, under letter dated March 31, 2014, notice was given by counsel for Kutztown to First American that SCRA had not been created, and further that Maxatawny had not conveyed the Treatment Facility to SCRA (“Termination Notice”).

Under Paragraphs 4(a)(3) and 5(b) of the Escrow Agreement, upon the failure to create SCRA and/or upon the failure of Maxatawny to convey the Treatment Facility to SCRA, and upon notice to First American, then the Escrow Agreement was terminated and the Closing

Documents were to be delivered by First American to Kutztown within ten (10) days.

Notwithstanding receipt of the Termination Notice, and notwithstanding the obligation of the Escrow Agent under Section 5(b) to deliver the Closing Documents to Kutztown, First American has and continues to refuse to deliver the Closing Documents to Kutztown.

In addition to the Escrow Agreement, Kutztown and Maxatawny entered into an agreement, referred to in these proceedings as the SCRA Agreement, under which Kutztown and Maxatawny were to create the joint municipal authority (“SCRA Agreement”). First American is not and has never been a party to the SCRA Agreement. The SCRA Agreement contains an arbitration provision which states as follows:

“All disputes arising out of or concerning the interpretation or application of this Agreement...shall be resolved timely and exclusively by final and binding arbitration pursuant to the rules of the American Arbitration Association (the “AAA”).”

Despite the language in the Intermunicipal Agreement, Maxatawny initiated a court action on December 27, 2013 against Kutztown by filing a Complaint in the Court of Common Pleas for Berks County (the “SCRA Action”) seeking from the Court “a declaration ... concerning the respective rights of the parties under the Agreement, a determination whether the Agreement has been terminated as of the notice provided in 2012 and that Plaintiffs have no liability to Defendants.” After Maxatawny initiated litigation to have the trial court decide whether the Intermunicipal Agreement was enforceable, Kutztown filed an Answer, New Matter and Counterclaim on January 22, 2014, seeking, *inter alia*, enforcement of the SCRA Agreement. Despite seeking to have the Court of Common Pleas interpret the SCRA Agreement, Maxatawny nonetheless took the position in preliminary objections that Kutztown’s counterclaim must be arbitrated. Ultimately, the Commonwealth Court ordered the trial court to

“direct the parties to arbitration,” noting that “[t]o the extent Maxatawny wishes to contest the timeliness of Kutztown’s demand for arbitration, it should do so in the arbitration proceeding.”

In response to the Complaint in this action, Maxatawny filed preliminary objections in this matter seeking dismissal based on the pendency of the arbitration proceeding between it and Kutztown concerning the SCRA Agreement. Based on the arbitration provision in the SCRA Agreement, a different agreement than the Escrow Agreement involving different parties, Maxatawny sought to have the instant matter decided in arbitration. In its preliminary objections, Maxatawny argued that the instant dispute should be arbitrated, decided by the arbitration panel, or stayed until after the arbitration panel rendered its decision. In its brief in support of preliminary objections Maxatawny stated that **“the pending AAA arbitration will dictate the outcome of the instant action”** and that **“it is undeniable that the AAA arbitration involves the same issues and the ultimate outcome [of the Escrow Claim] will be resolved vis-à-vis arbitration.”** (Maxatawny Brief in Support of Prelim. Obj. at pp. 7, 9.)

An arbitration hearing was held on June 8, 2016 to decide the defense raised by Maxatawny (and the basis for its declaratory judgment action) that Kutztown failed to assert its claim(s) within a contractually agreed period of limitations. On July 1, an Opinion and Order was issued in the AAA arbitration rejected Maxatawny’s asserted defense and finding that Kutztown was not time barred. A true and correct copy of the Arbitration Opinion and Order is attached to the Petition as Exhibit A. The Arbitration Opinion and Order states in pertinent part that:

Maxatawny had made the point that the date of October 1, 2013, was identified in paragraph 4(a)(3) of the Escrow Agreement . . . as a date by which SCRA was to be incorporated and organized (including due appointment of all board members.) **That condition failed to occur when Maxatawny did not appoint board members.**

The arbitration Opinion and Order further found that “[g]iven the structure of the Agreement and the escrow provisions, Kutztown did not need arbitrable or court intervention to invoke the self-implementing remedies of the Escrow Agreement. In sum, the arbitration Opinion and Order dismissed Maxatawny’s affirmative defense and found that Kutztown’s claims for breach of the Agreement were not barred and that Kutztown could obtain the relief provided by the Escrow Agreement. The Arbitration Opinion and Order indicates that the only thing left to determine in the arbitration proceeding is what remedies or damages are to be awarded to Kutztown based on Maxatawny’s admitted breach of the SCRA Agreement and Escrow Agreement. As demonstrated by Kutztown’s Remedies and Damages Statement submitted to the AAA panel, the only issue not finally decided by the panel is the damages Kutztown is entitled to as a result of Maxatawny’s breach of the SCRA Agreement.

III. QUESTION PRESENTED

WHETHER THE COURT SHOULD LIFT THE STAY AND RELEASE THE ESCROWED DOCUMENTS IN ITS CUSTODY TO KUTZTOWN?

Suggested Answer: Yes.

IV. ARGUMENT

A. THE COURT SHOULD LIFT THE STAY AND RELEASE THE ESCROWED DOCUMENTS IN ITS CUSTODY TO KUTZTOWN BATED UPON THE ARBITRATION RESULTS

The legal issues and factual determinations made by the AAA panel are binding upon the parties and require that this Court release the Escrow Documents to Kutztown. The arbitration panel’s findings and conclusions as expressed in its Opinion and Order are entitled to preclusive effect and are determinative of the issues in this case. Moreover, Maxatawny’s admissions in this case estop it from contesting the preclusive effect of the arbitration panel’s legal and factual conclusions. As a result, this Court must release the escrow documents to Kutztown.

1. The Doctrine of Collateral Estoppel and Maxatawny's Admissions Render the Findings and Conclusions of the Arbitration Panel Applicable to this Case

The arbitration panel made findings and conclusions that are dispositive of this case. First, the arbitration opinion and order identified that the Escrow Agreement existed between Kutztown and Maxatawny. The panel determined that paragraph 5 of the Escrow Agreement authorized the Escrow Agent to release the escrowed documents – including the deed conveying the site back to Kutztown – if any of the four conditions described in paragraph 4 of the Escrow Agreement failed to occur.

Second, the arbitration opinion and order found that Maxatawny failed to comply with the conditions in the Escrow Agreement in that it failed to appoint board members for SCRA and failed to convey the plant to SCRA. Maxatawny's only defense to the breach of Escrow Agreement was its assertion that Kutztown was time-barred from seeking relief based on the SCRA agreement. Indeed, the arbitration Opinion and Order stated that "Maxatawny has not argued that it had cause to terminate all rights and obligations arising under the [SCRA] Agreement, nor offered a defense to Kutztown's claim of breach by Maxatawny, other than the assertion that Kutztown's claim has been brought "too late," under Section 11.02." Similarly, that limited issue was the thrust behind Maxatawny's preliminary objections in this matter. Further, the arbitration panel recognized that "Maxatawny's filing of its declaratory judgment action [the case that is being arbitrated] was certainly driven by the desire to forestall the escrow remedy that was imminently available to Kutztown." (Opinion p. 5.)

The doctrine of collateral estoppel requires that the determinations of law and fact made by the arbitration panel cannot be re-litigated in this case. "Collateral estoppel, or issue preclusion, is a doctrine which prevents re-litigation of an issue in a later action, despite the fact

that it is based on a cause of action different from the one previously litigated.” *Balent v. City of Wilkes-Barre*, 542 Pa. 555, 669 A.2d 309, 313 (1995). Collateral estoppel is applicable when: (1) An issue decided in a prior action is identical to one presented in a later action; (2) The prior action resulted in a final judgment on the merits; (3) The party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action; and (4) The party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. *Frederick v. Action Tire Company*, 744 A.2d 762, 765 (Pa.Super.1999), citing *Rue v. K-Mart Corp.*, 552 Pa. 13, 713 A.2d 82, 84 (1998).

The arbitration panel addressed all the issues relevant to this case such as whether any events occurred that would trigger the release of the escrowed documents to Kutztown, whether Maxatawny had any affirmative defenses to prevent the escrow remedy from occurring, and whether Kutztown was entitled to receive the documents based on the parties’ conduct. Those are the very same issues that the Court would have to decide in this matter in order to determine whether to release the escrowed documents to Kutztown. The arbitration panel’s opinion is a final judgment on the merits as to the issue of the Escrow Agreement because it concluded that **“Kutztown did not need arbitrable or court intervention to invoke the self-implementing remedies of the Escrow Agreement”** and found that several of the events necessary for the release of the escrow documents to Kutztown had occurred. Because both Kutztown and Maxatawny were parties to the arbitration and had a full and fair opportunity to litigate the issue in the prior action, the doctrine of collateral estoppel or issue preclusion renders the arbitration panel’s findings and conclusions binding on this Court. The arbitration panel’s findings and conclusions are dispositive of this case.

2. Maxatawny's Admissions Preclude it from Denying that the Arbitration Panel's Determination is Preclusive and Dispositive of this Case

Maxatawny has already admitted that the arbitration panel's decision would be dispositive of this case and would have preclusive effect. In its brief in support of preliminary objections Maxatawny stated that **"the pending AAA arbitration will dictate the outcome of the instant action"** and that **"it is undeniable that the AAA arbitration involves the same issues and the ultimate outcome [of the Escrow Claim] will be resolved vis-à-vis arbitration."** (Maxatawny Brief in Support of Prelim. Obj. at pp. 7, 9.) Maxatawny made such admissions in an attempt to have this Court stay the present action pending arbitration. Maxatawny admitted that the arbitration would have preclusive effect by admitting that the parties and issues in the arbitration were the same as this case and that the issues in this case would be resolved by the arbitration. The arbitration that Maxatawny acknowledged would "dictate the outcome of the instance action" has occurred and the decision requires this Court to distribute the escrow documents to Kutztown.

B. THE TERMS OF THE ESCROW AGREEMENT COMPEL DELIVERY OF THE DOCUMENTS TO KUTZTOWN, GIVEN THE FACTS

At its core, this case presents a simple case of enforcing contractual terms between contracting parties. Maxatawny and Kutztown agreed that, if SCRA was not created and if the treatment facility was not transferred to SCRA by a date certain, then the Closing Documents were to be delivered to Kutztown. Why SCRA was not created and why the treatment facility was not transferred to SCRA are not issues which need to be resolved prior to delivery of the Closing Documents to Kutztown. To the extent that the issue of "why" was in any way a requirement, the arbitration hearing has clearly established the "whys." Without legal justification, Maxatawny breached the SCRA agreement. Delivery of the Closing Documents to

Kutztown was intended as an incentive to prevent Maxatawny from breaching the Agreement. Now that Maxatawny has breached the Agreement, without legal justification, Kutztown is entitled (under the terms of the Escrow Agreement) to receive the escrow documents.

V. CONCLUSION

Based on the foregoing reasoning and authority, Kutztown respectfully requests that this Court grant its Petition to Release the Escrow Documents held by the Court.

Dated: 7-25-16

BARLEY SNYDER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been served this 25th day of July, 2016, by first class mail, postage prepaid, upon:

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