

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

PETITION TO RELEASE THE ESCROW DOCUMENTS HELD BY THE COURT

AND NOW, comes the Plaintiff, Borough of Kutztown (“Kutztown”), through its attorney, Barley Snyder, filing this Petition to release the Escrow Documents presently being held in the Court’s custody pursuant to an Order entered December 18, 2015, there being no dispute that Kutztown is entitled to those documents.

FACTUAL BACKGROUND

1. 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 party to the Escrow Agreement.

2. 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.

3. 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.

4. 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”).

5. 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.

6. 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 refused to deliver the Closing Documents to Kutztown

7. 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 a joint municipal authority (“SCRA Agreement”).

8. 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

SCRA Agreement, a determination whether the Agreement has been terminated as of the notice provided in 2012 and that [Maxatawny] have no liability to [Kutztown].”

9. Ultimately, the Commonwealth Court ordered the trial court to direct the parties to arbitration of that dispute, 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.”

PROCEDURAL HISTORY

10. In this action, 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”).

11. The specific provision sought to be enforced by Kutztown in this matter involves only the obligations of First American under the Escrow Agreement. Nevertheless, Maxatawny intervened and filed preliminary objections arguing that an underlying dispute between Maxatawny and Kutztown should be arbitrated first and/or the current matter should be stayed until after the arbitration panel rendered its decision in the underlying matter.

12. 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.)

13. On December 18, 2015, this Court issued an Order staying this case and directing the deed and escrow documents to be placed into the Court’s custody.

14. 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.

15. 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 the SCRA Agreement or the Escrow Agreement. A true and correct copy of the Arbitration Opinion and Order is attached hereto as Exhibit A.

16. The Arbitration Opinion and Order effectively concludes that Maxatawny violated the SCRA Agreement, *inter alia*, by failing to incorporate SCRA and appoint board members, triggering Kutztown's right to proceed with obtaining the Closing Documents per the Escrow Agreement.

17. Specifically, the arbitration Opinion and Order dismissed Maxatawny's affirmative defense and found that Kutztown's claims for breach of the Agreement was not barred and that Kutztown could obtain the relief provided by the Escrow Agreement.

18. The Arbitration Opinion and Order indicates that the only thing left to determine in the arbitration proceeding is the remedies or damages afforded to Kutztown based on Maxatawny's admitted breach of the SCRA Agreement. See, Kutztown's Remedies and Damages Statement, submitted to the AAA Panel and attached as Exhibit B.

KUTZTOWN IS ENTITLED TO RELEASE OF THE ESCROW DOCUMENTS

19. The legal issues and factual determinations made by the AAA panel are binding upon the parties, are entitled to preclusive effect, and are determinative of the issues in this case.

20. 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.

21. 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).

22. 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.

23. The Arbitration Opinion and Order 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.

24. The Arbitration Opinion and Order found that Maxatawny failed to comply with the conditions set forth in the SCRA Agreement and the Escrow Agreement in that it failed to appoint board members for SCRA and failed to convey the plant to SCRA.

25. Maxatawny's only defense to the breach of the SCRA Agreement and the Escrow Agreement – that Kutztown was time-barred from seeking relief based on the SCRA Agreement – was rejected by the arbitration panel.

26. Maxatawny admitted in its filings in this matter that the arbitration would have preclusive effect and admitted in its brief seeking a stay 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.

27. The arbitration opinion 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.)

28. 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.

29. The arbitration that Maxatawny acknowledged would “dictate the outcome of the instance action” has occurred and the decision requires this Court to release the escrow documents to Kutztown.

30. At its core, this case presents a simple case of enforcing contractual terms between contracting parties.


31. 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.

32. 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.

33. 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.

WHEREFORE, Plaintiff Borough of Kutztown respectfully requests this Honorable Court enter an Order directing that the "Closing Documents" which have been held by the Court in escrow be released and delivered to the Borough of Kutztown.

Dated: 7-25-16

BARLEY SNYDER
By: 
George C. Werner, Esquire
Court ID No. 28757
Attorneys for Plaintiff
Borough of Kutztown
126 East King Street
Lancaster, PA 17602-2893
717-299-5201

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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:

Sean E. Summers, Esquire
Jill E. Nagy, Esquire
Summers Nagy Law Offices
200 Spring Ridge Drive, Suite 202
Wyomissing, PA 19610

BARLEY SNYDER

By: George C. Werner

George C. Werner, Esquire
Court ID No. 28757
Attorneys for Plaintiff
Borough of Kutztown
126 East King Street
Lancaster, PA 17602-2893
717-299-5201