American Arbitration Association

Case No. 01-14-0000-0401

In the Matter of Arbitration Between

Borough of Kutztown and
Kutztown Municipal Authority

v.

Maxatawny Township Municipal Authority and
Township of Maxatawny

Arbitrators' Opinion and Order

I. Procedural History

The parties' litigation claims were first filed in the Common Pleas Court of Berks County, when Maxatawany Township and its Municipal Authority (hereafter collectively "Maxatawny") filed an action seeking declaratory judgment against the Borough of Kutztown and its Municipal Authority (hereafter collectively "Kutztown.") In that action, Kutztown filed counterclaims. By order of the Commonwealth Court on April 10, 2015, certain preliminary rulings of the Common Pleas Court were reversed and the matter remanded with direction to the Court to stay the civil action and to submit the parties' claims to arbitration. The undersigned have been duly selected to serve as arbitrators. Pursuant to our Preliminary Hearing Conference Report and Scheduling Order of February 16, 2016, an initial hearing was held on June 8, 2016. The subject matter of that hearing was limited to an affirmative defense asserted by Maxatawny, and described below. This Decision sets forth our ruling on that defense, and summarizes the reasoning which has led us to that ruling.

II. Issue Presented

Kutztown asserts that Maxatawny has breached obligations arising under the 2006 Intermunicipal Sanitary Sewage Service and Treatment Agreement between the parties, dated May 4, 2006, and materially amended on August 25, 2010 (hereafter the "Agreement"). Kutztown seeks relief of an equitable nature and, or, monetary damages. The issue presented in this initial hearing is the potentially dispositive defense raised by Maxatawny – that Kutztown failed to assert its claim(s) within a contractually agreed period of limitations. Stated formally, the issue presented is:

Does section 11.02 of the Agreement bar Kutztown's claim(s)?

Section 11.02 states:

Demand for Arbitration. Arbitration shall be demanded within ninety (90) calendar days from the time when the demanding party, either by one of the Municipalities party to this agreement or the SCRA, knows or should have known of the event or events giving rise to the claim. Failure to demand arbitration within this time limit shall forever foreclose the right of the demanding party to review its alleged claim.[1]

Kutztown's first assertion of its claim(s) appears in the pleading styled as its Answer, New Matter and Counterclaim, filed in the Court of Common Pleas of Berks County, on January 21, 2014. That filing was in response to the Complaint for Declaratory Judgment filed by Maxatawny some 25 days earlier, on December 27, 2013, asking the Court to determine that any such claim by Kutztown was time barred.[2] Maxatwany argues to us, as it did earlier to the Court, that Kutztown knew or should have known of the events giving rise to the claim on October 25, 2012, and certainly no later than its receipt of a letter dated November 30, 2012.

III. Discussion

On October 25, 2012, a meeting was held between Maxatawny's solicitor and Township Manager, and Kutztown's solicitor and Borough Manager. The arbitrators heard the testimony of each of those participants as to the substance of the session. The meeting was held at the request of Maxatawny, and each participant provided their recollections as to what was said:

According to Mr. Khalife, Borough Manager, the Township representatives said that the Township Commissioners were no longer interested in pursuing SACRA. Mr. Dietrich, Borough solicitor testified that the Township representatives said that the Township was not interested in closing on the deal; they wanted to know how much it would cost to negotiate out of the deal; and, they hoped it wouldn't cost too much. According to Mr. Dietrich, the Township representatives declined to explain the reasons for this position.

Mr. Yaich, then Township Manager, said that Solicitor Nagy told the Borough representatives that the Township and its Authority desired to exit the SACRA agreement. It was the Township's desire not to proceed and not to continue; the Township was not going to move forward.

Ms. Nagy, Township's solicitor, described her message to the Borough as – "we've been instructed to tell you we're no longer proceeding with SACRA." She believed the

---

[1] A corollary provision in Article XI of the Agreement, Section 11.07, calls for the arbitrators who are appointed to decide a matter arising under Section 11.02, to render their written opinion and award within 30 days of the conclusion of the proceedings, which shall be concluded within forty-five days of their commencement. The parties have filed a written stipulation that this provision "shall be of no effect or import in this case," and they "waive any claim or objection... arising out of that provision." This stipulation does not restrict or impair their rights or positions regarding Section 11.02.

[2] These pleadings, docketed to Civil Action No.13-27327, appear as exhibits 11 and 12 in our hearing.

message was clear and was understood – the Township was not proceeding. Nagy testified that she did provide some brief responses to Dietrich's request for an explanation of reasons for this position.

All four witnesses agree that the meeting was to be followed by a written communication from the Township to the Borough, setting forth the Township's position. A letter dated November 30, 2012 from Ms. Nagy to Mr. Dietrich (exhibit No. 9) was identified as that communication.

We find that the letter's account of the meeting is fairly consistent with the witnesses' descriptions. The letter opens with a disclaimer:

"This document is for settlement purposes only and cannot be used for any other purpose pursuant to the Rules protecting settlement discussions. Further, nothing in this settlement proposal should be construed as an admission that the Master SCRA agreement is a legally binding agreement on any of the parties."

Ms. Nagy's letter then described the October 25th meeting in the following words:

"As you will recall, on October 25, 2012, MTMA and the Township advised the Borough/KMS that it intended to withdraw from SCRA. In keeping with the discussions on that date, MTMA and the Township offer the following items as an effort to conclude all obligations set forth in the SCRA Agreement, including the need for the formation of SCRA and the transfer of Area "A" Treatment Facility Ownership to SCRA:" [Then followed 13 numbered paragraphs of specific and technical terms addressing various attributes of the sewer plant and related facilities, and the future rights and obligations of the parties. Those terms, if agreed to by Kutztown, apparently would have unwound the parties obligations under the Agreement.]

The evidence demonstrates that Kutztown did not respond to the Township regarding the substance of the meeting on October 25th or the letter dated November 30th, until Mr. Dietrich sent his letter of December 10, 2013 (exhibit No.10). During that year, the treatment plant construction proceded, the Township's Authority, among many other things, pursued necessary permits, and brought hook-up enforcement cases against non-compliant property owners in the Township. According to Ms. Nagy, Maxatawny believed that the Agreement was "dead," and that it was free to proceed without regard to obligations arising under the Agreement.[3]

---

[3] Ms. Nagy described an executive session meeting of the Township and Authority, in early fall, 2012, in which the members – some of whom were new to their positions, expressed the view that the Agreement terms were very unfavorable to Maxatawny, and they wanted to get out of it. She described one Supervisor as especially vocal about the matter. A straw poll was taken and each board representative indicated they were in favor of not going forward with the Agreement. Ms. Nagy and Manager Yaich were instructed to meet with the Borough representatives and deliver that message. No minutes exist with regard to the substance of the executive session meeting, nor to a second executive session meeting in late November, 2012, at which the board members reviewed and revised a draft of Ms. Nagy's letter – sent in final form on November 30, 2012. The existence of these executive session discussions was disclosed to the Borough for the first time in discovery depositions shortly before the arbitration hearing.

Maxatawny has not argued that it had cause to terminate all rights and obligations arising under the 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.

We do not accept Maxatawny's statute of limitations defense. The substance of the messages communicated by Maxatawny to Kutztown – first orally and then in writing - was one of Maxatawny's intention to withdraw from the Agreement. That is explicit in Ms. Nagy's letter – confirming that "it [the Township] intended to withdraw from SCRA." That statement of intention was wrapped up with a settlement proposal for unwinding certain of the parties existing obligations and re-setting others. The settlement proposal terms were covered by the classic invocation of settlement proposals – "this document is for settlement purposes and cannot be used for any other purpose." Maxatawny now wants to use its settlement letter for another purpose – as the basis for avoiding any further obligation or responsibility under the Agreement.

If Maxatawny wanted to terminate the Agreement by its unilateral action in breach, this letter and the conversation which preceded it stopped short of that goal. Having entered into the Agreement by Ordinance and Resolutions duly promulgated and adopted in 2006, then materially amended and reaffirmed in 2010, Maxatawny could not convene an executive session meeting, and by show of hands simply walk away. Saying to Kutztown "we intend to withdraw" and proposing terms for negotiating that withdrawal was just that – a proposal to negotiate withdrawal terms. It may or may not have forecast future breach of contractual obligation.

One of the significant terms addressed in Maxatawny's settlement proposal dealt with the real estate on which the treatment plant was being constructed. Maxatawny proposed to pay a total of $150,000 to Kutztown for its land, and for "use of the 20" main." The parties clearly knew that, although Maxatawny had received title to the sewer plant site from Kutztown, the 2010 amendment to the Agreement provided security to Kutztown that the plant would be constructed and thereafter conveyed to the SACRA. The security was in the form of an Escrow Agreement relating to four documents, including a deed conveying the property back to Kutztown and an Assignment of a Flow Splitter Lease.[4] Thus, Maxatawny needed to negotiate the withdrawal terms. A declaration of intent to withdraw from the Agreement's terms would not *sua sponte* dissolve the interrelated physical and operational connections that were created pursuant to that Agreement.

The declaration of intent to withdraw was not a breach of a contractual duty of immediate performance. It was a statement about future action. Obviously, that position was subject to reconsideration and revision. In this instance, the declaration was accompanied by a proffer of negotiation of terms on which that withdrawal might occur. Negotiations may lead to resolution – to agreement – or they may not. But in either event, a proffer of negotiations to end a contractual relationship is not a breach of obligations under that contract. Here, negotiations may have led the Township to conclude that the price of

[4] The Escrow Agreement provided that the occurrence of any one of four events might trigger release of the escrowed document to Kutztown. The fourth of those events was "failure of the Boards of the Township and MTMA to adopt on or before December 31, 2013, a resolution authorizing the conveyance of the Treatment Plant Facility to SCRA...."

withdrawal was too great. The point remains that a declaration of intent to withdraw from contractual relations, coupled with a proffer of terms for withdrawal, was not a breach in this case. Negotiations may precede litigation; they may avoid litigation. But a breach occurs when the duty of performance is current and immediate. See, Barnes v. McKeller, 644 A.2d 770 (Pa. Super. 1994).

We note that during 2013, Maxatawny moved forward with the construction of the sewer plant and related work to prepare for plant operations. Those actions appear to have been consistent with the Agreement – the plant had to be constructed and completed, so it could be turned over to SACRA (the Sacony Creek Regional Authority), by the end of the year. Although Maxatawny had declared an intent to withdraw from the creation of SACRA, that intent was subject to reconsideration or change. Maxatawny's continued construction and completion of the facilities did not foreclose it from choosing to meet its contractual obligation to move forward with SACRA, notwithstanding the posture it struck in late 2012.

Kutztown's brief analyzes the doctrine of anticipatory repudiation. In certain instances, the absolute and unequivocal refusal to perform obligations, or a distinct and positive statement of the inability to perform may be treated by the other party as a breach. See Boro Const., Inc. v. Ridley School Dist., 992 A.2d 208, 217 (Pa, Cmwlth. 2010). We need not consider whether Maxatawny's communications in this case might have risen to the level of an anticipatory repudiation. We think not. Maxatawny did not declare its inability to perform, and we find the statement of "intent to withdraw," coupled with proffered terms for settlement to have been equivocal. However, the question of anticipatory breach is moot, since Pennsylvania law clearly gives the other party the option to await further developments, i.e., an event of breach, before bringing suit. See McCormick v. Fidelity & Cas. Co. of New York, 161 A.2d 532, 533-34 (Pa. 1932).

Maxatawny had made the point that the date of October 1, 2013, was identified in paragraph 4(a)(3) of the Escrow Agreement (hearing exhibit No. 6), 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. We note 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 four conditions described in paragraph 4 failed to occur. Three of the four conditions had to be met no later than December 31, 2013. Under paragraph 5, however, Kutztown had to wait until January 1, 2014 before it could notify the Escrow Agent of the failure of any of the conditions named in paragraph 4, and demand release of the escrowed documents.

Given 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. Mr. Dietrich's December 10th letter clearly forecast to Maxatawny the problems that lay ahead if Maxatawny were to act on its "intent to withdraw." Maxatawny's filing of its declaratory judgment action was certainly driven by the desire to forestall the escrow remedy that was imminently available to Kutztown.

As between these parties, the Agreement, in its 2010 Amendment, called for the creation of the Escrow Agreement and the rights and obligations spelled out in it. The Agreement also provided that "the failure of any party hereto to insist on strict performance of this Agreement or any of the terms or conditions hereof shall not be construed as a

waiver of any of its rights hereunder." Kutztown retained its claim for breach by Maxatawny in its failure "to adopt on or before December 31, 2013, a resolution authorizing the conveyance of the Treatment Facility to SCRA...." as provided in paragraph 4(a)(4) of the Escrow Agreement. That claim accrued on January 1, 2014. That claim was fully stated in Kutztown's pleading filed in the court action on January 21, 2014, and we find it to have been timely filed.

Order

For reasons described above, we dismiss Maxatawny's affirmative defense and find that Kutztown's claim for breach of the Agreement is not time barred.

IV. Second Phase of this proceeding – Consideration of Remedies

Our Scheduling Order of February 16, 2016, gave initial guidance as to the remedies phase of this case, in the event that the affirmative defense was not sustained. We directed Kutztown to furnish to Maxatawny a statement of its claim for remedies, identifying the reliefs sought with some particularity. That information was to have been provided by April 8th. That statement was not provided to the arbitrators and has played no role in the foregoing decision.

Since pre-hearing discovery and hearing preparation were confined to the affirmative defense issue, the parties have noted that a period of time would be needed to prepare for further hearing on this phase of the case, were it required. That time may be needed for work with one or more expert witnesses, depending on the nature of the claims.

To permit the orderly scheduling of a hearing on the next phase of the matter, with reasonable time for preparation, we ask counsel for Kutztown to promptly submit to the panel Kutztown's specification of remedies and relief sought by Kutztown. That statement should note what witnesses, including expert witnesses, will likely testify. If experts have not yet been formally engaged, please indicate the date by which engagement will be confirmed, the field of specialization of the anticipated expert(s)' testimony, and also the date by which the expert report(s) will be available. We ask counsel for Maxatawny to provide, within 10 days after receipt of the Kutztown remedies statement, the counterpart responding information for Maxatawny: what witnesses do you anticipate calling in response to the Kutztown claims, what expert(s) witnesses are anticipated; the date by which the report(s) will be available.

We will schedule a conference call with counsel when those submissions are in hand. We'll address issues which are identified in the submissions and set deadlines for completion of this preparatory work, and for a hearing on the subject of remedies. It is the arbitrators' goal to hold that hearing within 120 days.

July 1, 2016

David E. Lehman, Chairman

J. Dwight Yoder

Arbitrator Stephen J. Alexander dissents from this Opinion and Order

AMERICAN ARBITRATION ASSOICATION

Case No. 01-14-0000-0401

In the Matter of Arbitration Between

Borough of Kutztown and
Kutztown Municipal Authority

v.

Maxatawny Township Municipal Authority and
Township of Maxatawny

ARBITRATOR'S DISSENTING OPINION

I. Procedural History

I concur with the arbitrators' description of the procedural history.

II. Procedural History and Issue Presented

I concur with the arbitrators' description of the issue presented for this case.

III. Discussion

The majority of arbitrators describe Maxatawny's October 25, 2012 meeting with Kutztown's representatives and Maxatawny's subsequent letter dated November 30, 2012, " . . . was one of Maxatawny's intention to withdraw from the Agreement . . . wrapped up with a settlement proposal for unwinding certain of the parties' existing obligations and re-setting others." The Arbitrators' accurately restate the language in the letter, but mis-categorize it. What is Maxatawny trying to settle if there was no breach.

Maxatawny wanted to settle the issue – its breach. This letter does not state Maxatawny wanted to restructure, revise, amend or change the Agreement. Mr. Dietrich, counsel for Kutztown, was very clear in his understanding of Maxatawny's intention from the October 25, 2015 meeting: (1) "The township had no interest in closing the deal" (2) "what would it cost the township"; and (3) "the township hoped it would not cost too much."

More importantly, the language in the second paragraph of the Township's letter dated November 30, 2012 ". . . offer the following items as an effort to *conclude all obligations* set forth in the SCRA, including the formation of SCRA . . ." clearly indicates Maxatawny was not moving forward with the formation of SCRA. Also, overlooked in Maxatawny's letter is enumerated paragraph 2: "*The formation of SCRA shall not occur* and no property shall be transferred to the entity."

There is no dispute that there was no communication, either verbally or in writing, from Kutztown, to the October 25, 2102 meeting, and the November 30, 2012 letter. Kutztown's first response was by way of letter dated December 10, 2013.

However, with no communications and no action by the parties to actually form SCRA after the October 25, 2012 meeting, Kutztown's December 10, 2013 letter certainly considered Maxatawny's November 30, 2012 letter, at a minimum, a breach. The letter of its face clearly states Maxatawny breached the Agreement:

(1) Paragraph 2: Thus far, the Township and MTMA have offered no justification – be it legal, practical or moral – *for the abrogation of the Agreements and their unwillingness to honor their commitments.*

(2) Paragraph 3: ". . . *for the failure of the Township and MTMA to honor their commitments* would be a great deal in excess of what you suggested in your letter."

(3) Paragraph 4: The Township has also *failed to fully share* with the Borough the current construction and permitting status of the Sewage Treatment Facility.

Worth noting, is the standard in the relevant provision of the Agreement, Section 11.02 as adequately noted in the majority of arbitrators' opinion ". . . knew or *should have known* of the event or events giving rise to the claim." Kutztown did not know this information sooner? It took over a year for Kutztown to figure out Maxatawny was not providing construction and permitting status reports to the Borough after receiving the November 30, 2012 letter. Kutztown provided no evidence or testimony that provided a plausible explanation as to why it took 13 months to figure out that Maxatawny was not providing construction and permitting status. Now, Kutztown claims it should not have known a claim existed. That simply is not credible under the "knew or should have known" standard.

(4) Paragraph 6: ". . . and it is the *Township and MTMA that have <u>disregarded</u> their obligations under the Agreement and <u>breached</u> the Agreements.*

Worth noting, if there was no communication between the parties, and no action by either party to form SCRA for over 13 months, it begs the question, when and what was the breach if not the October 25, 2012 meeting or the November 30, 2012 letter. Kutztown believed and/or conceded Maxatawny breached the Agreement prior to December 10, 2013.

For the reasons described above, I dissent from the majority of arbitrators' opinion and decision.

July 1, 2016.

Stephen J. Alexander
Dissenting