

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**ANDERTON MACHINING, LLC,
Plaintiff,**

v.

**Case No. 15-149575-CB
Hon. James M. Alexander**

**PRODUCTION ENGINEERING, INC, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff’s motion for summary disposition. In October 2014, the parties began negotiating for Plaintiff’s purchase of certain of Defendants’ business assets. In preparation for the same, Plaintiff engaged Plante Moran to prepare a financial audit of Defendant Production Engineering.

After delays due to final inventory verification and negotiations, on March 21, 2015, the parties entered into an Asset Purchase Agreement. This Agreement provides that the purchase price would be \$739,701 “as adjusted pursuant to Section 3.3.”

The cited section provides that Defendants would prepare a Preliminary Balance Sheet that included a physical inventory of the assets to be sold. The same section then requires Plaintiff to prepare a Closing Audit and Closing Balance Sheet and calculate the Net Working Capital. Once Plaintiff delivered these items to Defendants, Defendants then had 30 days to deliver written objections to Plaintiff’s calculations.

On May 15, 2015, Plaintiff delivered a letter to Defendants claiming that certain preliminary calculations were incorrect – such that Plaintiff was entitled to a purchase-price adjustment of \$218,840. This letter reads, in relevant part (emphasis removed):

Pursuant to Section 3.3(d) and Section 3.3(e) of the [Purchase Agreement], Anderton is hereby sending you the Closing Audit and Closing Balance Sheet containing the Net Working Capital calculations, which were prepared for Anderton by Plante Moran LLP. As you will see from the attached report, the Net Working Capital of the company is \$218,840 below the target number set forth in Section 3.3(c) of the [Purchase Agreement]. Accordingly, Seller owes Anderton the amount of \$218,840.

Defendants promptly objected in a May 29, 2015 letter to Plaintiff, which begins: “The Seller objects and disagrees with the adjustments proposed by Anderton Machining, LLC to the Closing Balance Sheet and the Net Working Capital calculations as outlined in your letter dated May 15, 2015, and hereby states Seller’s positions in support of its objections.”

It is undisputed that (1) the parties disagree about the purchase-price adjustment, and (2) the Purchase Agreement contains alternative dispute resolution protocol in the event of disputes. But the parties disagree about which ADR provision governs the present dispute.

Plaintiff claims that the parties’ disagreement is governed by Section 3.3(3), which provides (in relevant part):

If Buyer and Seller cannot agree with respect to the Closing Balance Sheet or the calculation of the Net Working Capital within 30 days after the delivery of a notice of objections or such later date as may be agreed on by Buyer and Seller, the dispute shall be resolved by submission of the respective positions of each party to a mutually agreeable and qualified member of Grant Thornton, LLP (the “Independent Accounting Firm”), who shall make the determination. Any items not in dispute shall be deemed stipulated by Buyer and Seller and shall not be determined by the Independent Accounting Firm. The determination of the Independent Accounting Firm shall be binding and conclusive with regard to the matters it determines. All costs and expenses relating to the services provided by the Independent Accounting Firm shall be paid equally by Buyer and Seller, notwithstanding the provisions of Section 12.8(f).

Defendants, on the other hand, claim that Section 12.8(a) governs. This section is titled “Arbitration” and provides (in relevant part):

Any dispute, controversy, or claim arising out of or relating to this Agreement or relating to the breach, termination, or invalidity of this Agreement, whether arising in contract, tort, or otherwise (collectively, a “Dispute”) shall be subject to the provisions of this Section 12.8. If the parties are not able to resolve the Dispute between them, the parties shall attempt to resolve the Dispute by way of facilitative mediation. . . . If the Dispute is not resolved by mediation . . . within sixty (60) days after the aggrieved party provided written notice to the other party of the Dispute, then the Dispute shall at the request of any party be resolved in binding arbitration.

Because the parties disagreed about the proper dispute-resolution process, Plaintiff filed the present Complaint for Declaratory Relief – seeking an order compelling Defendants to comply with Section 3.3(e).

Defendants answered and filed a Counterclaim alleging breach of contract based on Plaintiff’s alleged failure to pay the full purchase price and other liabilities specified under the Purchase Agreement.

Plaintiff now seeks summary disposition under MCR 2.116(C)(7) or (C)(10). A (C)(7) motion tests whether a claim is barred, among other grounds, by an agreement to arbitrate, and a (C)(10) motion tests the factual support for Plaintiff’s claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). In response, Defendants seek summary under (I)(2) and request a declaratory judgment that Section 12.8(a) of the Purchase Agreement governs the parties’ dispute.

Both parties rely on the written Purchase Agreement to support their positions. Michigan law is well-established that “a court must construe and apply unambiguous contract provisions as written.” *Rory v Cont’l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich

App 575, 593; 760 NW2d 300 (2008). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court.” *Holmes v Holmes*, 291 Mich App at 594.

As often repeated by our Supreme Court, “courts must ... give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.” *Knight Enterprises v Fairlane Car Wash*, 482 Mich 1006; 756 NW2d 88 (2008); quoting *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

Further, in Michigan, “a ‘question of arbitrability’ is an issue for judicial determination unless the parties unequivocally indicate otherwise.” *Gregory J Schwartz & Co v Fagan*, 255 Mich App 229, 232 (2003). MCL 691.1686(1) provides that “[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.” And “[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.” MCL 691.1686(2).¹

As stated, Plaintiff argues that Section 3.3(e) governs this dispute because it involves “the proper calculation of the Closing Balance Sheet and Net Working Capital, which have a direct impact on the purchase price.” Under said section, “If Buyer and Seller cannot agree with respect to the Closing Balance Sheet or the calculation of the Net Working Capital,” then “the dispute shall be resolved by submission of the respective positions of each party to a mutually

¹ Michigan courts have consistently reasoned that “our Legislature and our courts have strongly endorsed arbitration as an inexpensive and expeditious alternative to litigation.” *Rembert v Ryan’s Family Steak Houses, Inc*, 235 Mich App 118,133; 596 NW2d 208 (1999). As a result, “any doubts about the arbitrability of an issue should be resolved in favor of arbitration.” *DeCaminada v Coopers & Lybrand*, 232 Mich App 492, 499; 591 NW2d 364 (1998).

agreeable and qualified member of Grant Thornton, LLP (the “Independent Accounting Firm”), who shall make the determination.”

Plaintiff argues that “[a]lthough not labeled as such, section 3.3(e) acts as a discrete and binding arbitration provision designed to ensure that disputes regarding the Net Working Capital and Closing Balance Sheet (which require the specialized expertise of a qualified accounting firm) could be quickly and efficiently determined by a mutually agreeable third-party.”

Further, Plaintiff claims that the second arbitration provision found in section 12.8(a) is more general and serves as “a catch-all for all other disputes that may arise under the [Purchase Agreement].” And, Plaintiff argues, Michigan law is clear that specific provisions control over general in both statutory construction and contract, citing *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367 n 22; 817 NW2d 504, 509 (2012) (citing *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006) and noting “The settled rule regarding statutory construction is that a specific statutory provision controls over a related but more general statutory provision. The same is true with regard to contract provisions.”).

Because Plaintiff believes that the parties’ dispute revolves around Net Working Capital and Closing Balance Sheet issues, it argues that Defendants’ interpretation renders section 3.3(e) “effectively meaningless” as contrary to Michigan law, citing *Klapp*, 468 Mich at 468.

Finally, Plaintiff argues that section 3.3(e) is a provision that requires the resolution of certain, discrete issues by a decision maker with specialized skill and experience – the Independent Accounting Firm. And, Plaintiff argues, an agreement to submit to a specialized decision maker has been enforced by the Court of Appeals in *Oakland-Macomb Interceptor Drain Drainage Dist v Ric-Man Const, Inc*, 304 Mich App 46, 50; 850 NW2d 498 (2014).

In *Oakland-Macomb*, the parties agreed that any dispute would be submitted to an AAA panel that contained only arbitrators with specialized construction experience. When the AAA ignored this requirement, the plaintiff filed suit seeking to compel the defendant and the AAA to follow the agreement.

The Court reasoned that a specialized panel's experience "would make it more likely that the panel would understand the complexity of the technical and legal issues presented, and thus render an informed decision." *Id.* at 49. In enforcing the agreement for a specialized panel, the Court held "it is abundantly clear that the agreement to arbitrate made the specialized qualifications of the panel central and key to the entire agreement." *Id.* at 50.

In response, Defendants argue that the parties' disputes are actually contractual in nature, and as a result, controlled by section 12.8(a), which provides that "Any dispute, controversy, or claim arising out of or relating to this Agreement or relating to the breach, termination, or invalidity of this Agreement, whether arising in contract, tort, or otherwise (collectively, a "Dispute") shall be subject to the provisions of this Section 12.8."

While these contractual disputes may ultimately impact the Closing Balance Sheet, Defendants argue, their objections sound in contract and "require not only contract interpretation but, in some circumstances, application of contract and business law, as well as fact-finding" to resolve. As a result, Defendants argue, section 3.3(e)'s "calculation review" provision is inapplicable, and Grant Thornton would be ill-equipped to resolve the parties' disputes.

Defendants further argue that their reading of section 3.3(e) is both logical and fair, and the Independent Accounting Firm does not have any specialized expertise in resolving factual and legal disputes.

It is apparent that, in order to resolve this question, the Court must look to the parties' written agreement and the nature of the parties' disputes. In their Response, Defendants identify several specific objections that they claim fall outside of section 3.3(e):

1. Plaintiff's reclassification of certain inventory as obsolete or slow-moving;
2. Plaintiff's classification of certain goods as non-conforming;
3. Plaintiff's post-closing adjustment to inventory count and value despite Plaintiff's pre-closing acceptance of Defendants' inventory count audited by Plante Moran on Plaintiff's behalf;
4. Plaintiff's reclassification of certain inventory as scrap;
5. Plaintiff's adjustment to accounts payable for liabilities specifically assumed by Plaintiff in the [Purchase Agreement];
6. Plaintiff's arbitrary accounts payable adjustment of \$30,000.00 without any factual basis therefor; and
7. Plaintiff's adjustment for fees/penalties incurred for the prepayment of leases that were not agreed upon prior to closing.

But each of these "objections" are also specifically identified in Defendants' May 29 letter that begins (emphasis added): "The Seller objects and disagrees with the adjustments proposed by Anderton Machining, LLC **to the Closing Balance Sheet and the Net Working Capital calculations** as outlined in your letter dated May 15, 2015."

In other words, the only reason that these items are disputed is **because** they are the source of Plaintiff's adjustments to the Closing Balance Sheet and Net Working Capital calculations. Even Defendants' May 29 letter identifies these disputes as "adjustments proposed by Anderton Machining, LLC **to the Closing Balance Sheet and the Net Working Capital calculations.**" But Defendants now oddly claim that section 3.3(e) has no application.

The cited section is specific and unambiguous. If the parties could not agree "with respect to the Closing Balance Sheet or the calculation of the Net Working Capital within 30

days after the delivery of a notice of objections or such later date as may be agreed on by Buyer and Seller, **the dispute shall be resolved** by submission of the respective positions of each party to a mutually agreeable and qualified member of Grant Thornton, LLP (the “Independent Accounting Firm”), **who shall make the determination.**” (emphasis added).

Under Section 3.3(d) of the Purchase Agreement, Plaintiff prepared a closing audit Closing Balance Sheet and delivered the same to Defendants on May 15, 2015. In direct response, Defendants then prepared and delivered their May 29, 2015 letter identifying their specific objections as to Plaintiff’s “adjustments . . . to the Closing Balance Sheet and the Net Working Capital calculations.”

The Court rejects Defendants’ argument that these disputes require “contract interpretation and application of law to facts,” such that section 3.3(e) is negated. Defendants’ odd argument that section 3.3(e) does not apply to these disputes is without merit and contrary to the parties’ unambiguous agreement.

Defendants negotiated and agreed to section 3.3(e)’s dispute-resolution process. If they were uneasy about Grant Thornton resolving disputes over the Closing Balance Sheet and the Net Working Capital calculations, they should have raised their concerns in negotiations.² But once Defendants executed the contract, their concerns became nothing more than second guessing their prior, express agreement.

And as argued by Plaintiff, application of section 3.3(e) to the parties’ current disputes is consistent with the general rule that specific provisions control over general, *DeFrain*, 491 Mich at 367 n 22, and the parties’ agreement to use a specialized decision-maker should be enforced, *Oakland-Macomb*, 304 Mich App at 50.

² Any section 3.3(e) dispute could foreseeably involve disputed facts and contract terms. Indeed, such disputes are the very reason for a dispute-resolution process.

Finally, enforcing section 3.3(e) does not render section 12.8's general arbitration clause meaningless. The Purchase Agreement contains many other representations and warranties that, if breached, would implicate section 12.8. For example, throughout sections 7 through 10, the parties make various warranties and representations to each other. An alleged breach of any of these representations would result in application of section 12.8's arbitration provision.

For all of the foregoing reasons, Plaintiff's motion for summary disposition is GRANTED under (C)(7) and (C)(10). Because all of the issues raised in Defendants' May 29, 2015 letter are disputes involving "the Closing Balance Sheet or the calculation of the Net Working Capital," the parties must comply with section 3.3(e)'s dispute-resolution process.

For the same reasons, Defendants' (I)(2) motion is DENIED.

IT IS SO ORDERED.

March 16, 2016
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge