IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ERNEST DISABATINO & SONS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 04-187-SLR
	)	
METROPOLITAN REGIONAL COUNCIL OF CARPENTERS and EDWARD CORYELL,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

I. INTRODUCTION

On March 29, 2004, plaintiff Ernest Disabatino & Sons, Inc. filed this action against defendants Metropolitan Regional Council of Carpenters ("MRC") and Edward Coryell ("Coryell") to vacate an arbitration award under the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and alleging fraudulent inducement, promissory estoppel, equitable estoppel and equitable fraud. (D.I. 1) Pending before the court is defendants' motion to dismiss for lack of jurisdiction. (D.I. 9)

II. BACKGROUND[1]

Plaintiff is a Delaware corporation with its principal place of business in Wilmington. (D.I. 10, Ex. 1 at ¶ 1) It has been in the construction business since 1908. (Id. at ¶ 7) It is currently owned by Crystal Holding Company ("Crystal"). (Id. at ¶ 9) Crystal and plaintiff own EDiS, a construction management company that does not perform onsite construction work. (Id. at ¶ 10) Plaintiff is the signatory on numerous labor agreements covering work in Delaware, including the Local 626.[2] (D.I. 16)

Defendant MRC is an unincorporated labor organization which has a collective bargaining agreement with the General Building Contractors Association (the "GBCA-MRC agreement"), a major multiemployer association in Philadelphia. (D.I. 16) Defendant Coryell is the Chief Executive Officer of MRC. (Id.)

EDiS entered the Philadelphia construction market in 2001 when it became construction manager for a project in Delaware County. (Id. at ¶ 11) Two of the carpentry contractors, First State and Doors and Drywall, both hired by EDiS, were nonunion contractors. (Id. at ¶ 12) In response to the nonunion workers,

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[1]Although defendants admit that, for the purposes of a motion to dismiss, the facts asserted in plaintiff's complaint are taken as true, they decline to admit the accuracy of the facts as pled. (D.I. 10 at 2 n.1)

[2]Plaintiff's employment bargaining rights within Delaware were assigned to the Delaware Regional Council of Carpenters ("DRC"). (D.I. 16 at 5)

defendant MRC established a picket line and a large inflatable rat at the project site. (Id. at ¶ 13)

Prior to September 2001, MRC requested that some of its multiemployer associations, including GCBA, expand the jurisdiction of their agreements with MRC into Delaware. (D.I. 16 at 4)

On September 14, 2001, the president of EDiS, Andy DiSabatino, met with Coryell. The two agreed that, in exchange for removing the picket line and the inflatable rat, future carpentry work at the Delaware County site would be contracted to companies who had entered into collective bargaining agreements with MRC (i.e., union companies). (Id. at ¶¶ 14-15) Pursuant to this agreement, plaintiff had to become a signatory on the GBCA-MRC agreement before EDiS could hire plaintiff to perform carpentry work at the Delaware County site. (Id. at 16) At the September 14 meeting, EDiS raised its concern that if plaintiff became a party to an GBCA-MRC agreement, it would be less competitive in the Delaware market; therefore, it was important to plaintiff that this agreement be limited to Pennsylvania. (Id.) Coryell did not mention MRC's recent request to have the GBCA-MRC agreement extended into Delaware. On September 28, 2001, EDiS sent a letter to Coryell expressing its concern regarding the Delaware market. (D.I. 16 at 4) To follow up on the letter, Andy DiSabatino and Rick DiSabatino, an employee of

Crystal Holdings and plaintiff's President, held a telephone conference with Mike Wells, a representative of MRC. (Id. at 5) During the conversation, Mr. Wells assured the DiSabatinos that there would be no interference with their work in Delaware, nor their agreement with Local 626 in Delaware. (Id.)

In order to enter into the GPCA-MRC agreement, plaintiff had to send a letter to GPCA granting it negotiation and bargaining rights. (Id. at 4) Then plaintiff, through its designation to the GPCA, entered into a labor agreement with MRC.

On December 4, 2001, plaintiff learned that MRC had requested that the GBCA-MRC agreement be expanded into Delaware. (Id. at 5) On January 4, 2002, plaintiff informed the GBCA by letter that plaintiff's bargaining rights in Delaware were already assigned to the DRC and that plaintiff would resign from the GBCA if the GBCA-MRC agreement were extended into Delaware. (Id.) On March 12, 2002, the GBCA-MRC agreement was amended to include Delaware. (Id. at 6) On March 13, 2002, plaintiff sent another letter to GBCA reiterating its concerns over the expansion of the GBCA-MRC contract. (Id.)

On July 17, 2003, an arbitration hearing was held to determine whether plaintiff was bound by the expanded GBCA-MRC agreement. (Id.) The parties agreed to bifurcate the arbitration and hold separate hearings for liability and for damages. (Id.) After the first hearing, the arbitrator ruled

that plaintiff was bound by the expanded agreement. (Id.) Plaintiff argues that the arbitrator's decision was incorrect because it was never a party to the amendment that expanded the GBCA-MRC agreement, as GBCA had notice that it had no bargaining authority for plaintiff with respect to Delaware. Therefore, plaintiff argues, the arbitrator had no jurisdiction over the dispute. Plaintiff further argues that even if the arbitrator had jurisdiction, the GBCA-MRC agreement is governed by 29 U.S.C. § 158(f),[3] and plaintiff's letters served as a timely withdrawal from the agreement extending the GBCA-MRC agreement. (Id. at 7)

III. MOTION TO DISMISS

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[3] It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged in the building and construction industry with a labor organization of which building and construction employees are members because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area . . . . 29 U.S.C. § 158(f) (2002).

Under Rule 12(b)(1), the court's jurisdiction may be challenged either facially (based on the legal sufficiency of the claim) or factually (based on the sufficiency of jurisdictional fact). See 2 James W. Moore, Moore's Federal Practice § 12.30[4] (3d ed. 1997). Under a factual attack the court is not "confine[d] to allegations in the . . . complaint, but [can] consider affidavits, depositions, and testimony to resolve factual issues bearing on jurisdiction." Gotha v. United States, 115 F.3d 176, 179 (3d Cir. 1997). See also Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891-892 (3d Cir. 1977). In such a situation, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Carpet Group, 227 F.3d at 69 (quoting Mortensen, 549 F.2d at 891). Although the court should determine subject matter jurisdiction at the outset of a case, "the truth of jurisdictional allegations need not always be determined with finality at the threshold of litigation." Moore at § 12.30[1]. Rather, a party may first establish jurisdiction "by means of a nonfrivolous assertion of jurisdictional elements and any litigation of a contested subject-matter jurisdictional fact issue occurs in comparatively summary procedure before a judge alone (as distinct from litigation of the same fact issue as an element of the cause of

action, if the claim survives the jurisdictional objection)." Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 537-38 (1995) (citations omitted).

Defendants argue this court does not have jurisdiction over plaintiff's complaint because the arbitrator's decision is not final, as he has not determined the appropriate damages, if any. Plaintiff asserts that the arbitrator's decision with respect to liability is final, as evidenced by his failure to schedule or direct the parties with respect to a hearing on damages. Plaintiff also argues that this court has jurisdiction to evaluate the merits of its claims because the arbitration was bifurcated.

The Supreme Court has held that federal courts can only entertain an action under § 301 of the LMRA to vacate a grievance determination when it is "final and binding under the collective bargaining agreement." Gen. Drivers v. Riss and Co., Inc., 372 U.S. 517 (1963). In Public Service Electric and Gas Co. v. System Council U-2, 703 F.2d 68 (3d Cir. 1983), the Third Circuit found that a liability determination by an arbitration panel was not "final and binding" even though the parties had agreed to bifurcate their liability and damages claims into two separate hearings. The arbitrators in Public Service Electric and Gas made a liability determination and then instructed the parties to

return to the bargaining table in an attempt to agree on "an amiable solution and adjustment of the dispute." Id. at 70.

In this case, it is undisputed that the parties agreed to bifurcate the arbitration and hold separate hearings for liability and damages. The arbitrator concluded his opinion by stating, "[b]y agreement of the parties, the arbitration of this matter was bifurcated to first address the substantive issue and secondly to address the remedy, if any. This decision addresses only the underlying substantive issue." (D.I. 10 at ex. 3) This court concludes that the arbitration decision is not a final and binding order under the collective bargaining agreement because the arbitrator has yet to consider the issue of damages. To find otherwise would "disrupt and delay the arbitration process and could result in piecemeal litigation. If this court should reverse the [arbitrator's] determination . . . and the parties did not thereafter agree upon a remedy, the [arbitrator] would be required to impose one. [Plaintiff] could then repetition [a] district court to review that remedy." Pub. Serv. Elec. and Gas Co., 703 F.2d at 70; see also Union Switch & Signal Div. Am. Standard Inc. v. United Elec., Radio and Machine Workers of Am., 900 F.2d 608, 614 (3d Cir. 1990). But see Hart Surgical, Inc. v. Ultracision, Inc., 244 F.3d 231 (1st Cir. 2001) (finding that a arbitration decision with respect to liability, in a bifurcated arbitration proceeding, was final and binding); Providence

Journal Co. v. Providence Newspaper Guild, 271 F.3d 16 (1st Cir. 2001) (same). This court sees no reason to condone this piecemeal litigation. Therefore, defendants' motion to dismiss is granted.

IV. CONCLUSION

Therefore, at Wilmington this 28th day of February, 2005;

IT IS ORDERED that defendants' motion to dismiss (D.I. 9) is granted.

Sue L. Robinson
United States District Judge