Mark H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SHOCKOE PLAZA ASSOCIATES, L.P.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. 3:90CV00627
	)	
VLASTIMIL KOUBEK, AIA,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on cross-motions for summary judgment. For the reason enumerated below, the Court will DENY Plaintiff's motion for summary judgment, GRANT Defendant's motion for summary judgment, and GRANT Defendant's cross-petition to compel arbitration.

DISCUSSION

This case involves a dispute over architectural fees incurred in the design of Shockoe Plaza in historic Shockoe Slip. Phase I of the project, which includes the parking garage, was commenced in the Spring of 1988. The parking garage opened in the Winter of 1990. Phase II, which includes the building above the garage, has not yet been funded. The Court will not endeavor to explain the precise fee agreement between the parties. This matter is more properly left to arbitration.

Although factual disputes surround several important issues

in this case, the Court FINDS that uncontested facts establish that the parties did business with each other pursuant to a written agreement which included an arbitration clause.

The first written communication between the parties in the record occurred on January 15, 1988, when Defendant Koubek sent Plaintiff Shockoe a standard American Institute of Architects ("AIA") form of agreement. This agreement set forth a fixed fee of $1.45 million for the Shockoe Plaza project. The agreement also contains a standard arbitration clause. See Article 7. This contract was signed by Koubek, but was not signed by Shockoe. Koubek commenced work on the project shortly thereafter.

On March 10, 1988, Koubek wrote a letter to John Lottimer, the president of Allegheny Warehouse Company, the general partner of Shockoe. The Count FINDS that this letter is properly considered an amendment to the January 15, 1988 contract. Indeed, the letter itself indicates that it should be considered as an amendment. The letter states that architectural fee for Phase I is to be $600,000.00. The letter also reflects that a sum of $19,250.00 had been received by Koubek as of March 10, 1988. Although the March letter was not signed by Shockoe, counsel for Shockoe admitted in open court that Shockoe felt it was making payments under this letter. Argument of Mr. Stephen Baril at hearing on March 8, 1991. See also Plaintiff's Memorandum in Opposition to Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion, filed January 19, 1991, p. 17.

On July 18, 1988, it appeared to Koubek that Phase II of the

project would be undertaken. Koubek therefore sent a letter and new contract to Shockoe. This contract also asked for a fixed fee of $1.45 million. The contract contains the same arbitration clause. See Article 7. This contract was not signed by Shockoe.

Over the next several months, Koubek was paid $600,000.00 in fees in connection with Phase I. There are factual disputes surrounding communications from Shockoe concerning the status of Phase II, and whether Koubek was directed to continue work on Phase II. These are left to the arbitrator to resolve. The only issue before this Court is whether there was a "written agreement" under Va. Code §8.01-581.01 (1990 Supp.), to submit controversies to arbitration.

The Virginia Uniform Arbitration Act does not define "written agreement," and the Court has found no prior cases which offer guidance. The Court HOLDS that this wording should be construed literally. The Court finds no requirement that the document be signed by both parties. A written agreement which is orally conceded to be binding, or which is ratified by performance, is sufficient to constitute a "written agreement" under §8.01-581.01.

Applying this test, the Court FINDS that either the January 15, 1988 or the July 18, 1988 contract governed the relation between the parties. The January agreement was submitted to Shockoe, work commenced, and Koubek received payment. It defies credulity to believe that the parties would enter into an agreement to preform hundreds of thousands of dollars of work, without any formal agreement to govern the relationship between the parties.

Shockoe received the standard form agreement, which is very thorough, and made no objection to it. At no time prior to this litigation did Shockoe contend that the agreement was not applicable. Shockoe never presented a written contract with alternative terms.

Therefore, the Court concludes that Koubek's submission of the standard form agreement on January 15, 1988 was an offer. Shockoe accepted this offer, and it became fully binding in all its terms, when Shockoe performed under the contract by making payments to Koubek for work done in connection with Phase I. The March 10, 1988 letter served as an offer to amend the original agreement.

The Court need not determine whether this amendment was accepted by Shockoe. Similarly, the Court will not consider whether the July 18, 1988 contract superseded the January 15, 1988 contract. Whether fees are owing under Phase I or Phase II, and whether the March 10 letter waives a claim for additional fees, are central issues in this controversy. Plaintiff cannot point to the March 10 letter and simply claim that no issues remain. Clearly, this controversy arises under the contract between the parties, and is therefore arbitrable.

Both contracts provide for mandatory arbitration at the insistence of either party. Since this clause constitutes a written agreement to arbitrate within the meaning of Va. Code § 8.01-581.01 (1990 Supp.), this Court will GRANT Defendant's cross-petition to compel arbitration, and Grant Defendant's motion for Summary Judgment.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SHOCKOE PLAZA ASSOCIATES, L.P.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. 3:90CV00627
	)	
VLASTIMIL KOUBEK, AIA,	)	
	)	
Defendant.	)	

FINAL ORDER

This matter is before the Court on cross-motions for summary judgment. For the reasons stated in the accompanying Memorandum Opinion, the Court DENIES Plaintiff's motion for summary judgment, GRANTS Defendant's motion for summary judgment, and GRANTS Defendant's cross-petition to compel arbitration.

The Court FINDS that a valid written agreement to arbitrate exists, and therefore ORDERS the parties to proceed with arbitration. See Va. Code § 8.01-581.02 (1990 Supp.). This action is DISMISSED WITH PREJUDICE.

It is SO ORDERED.

Let the Clerk send a copy of this Final Order and the accompanying Memorandum Opinion to all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE

B E N C H M E M O

TO: Judge Williams
FROM: Mark Henriques
DATE: March 6, 1991

RE: SHOCKOE PLAZA V. KOUBEK
File No. 3:90CV00627

HEARING: Cross-Motions for Summary Judgment
Friday, March 8, 1991

COUNSEL:	Plaintiff	Defendant
	Stephen Baril Williams, Mullen	Philip Baxa Mays & Valentine

Judge, this case involves a dispute over architectural fees. Both parties now seek summary judgment. The central issue is whether the parties are bound to submit their dispute to arbitration. For the reasons stated, you should DENY both motions for summary judgment, but schedule an evidentiary hearing on the single issue of what contract, if any, governed the relationship between the parties. I believe the result of that hearing will be that you grant Defendant's cross-petition to compel arbitration.

CHRONOLOGY

January 15, 1988 - A standard form of agreement between owner and architect is drafted. It contains a mandatory arbitration clause. This form was signed by Koubek, but not by Shockoe.

Jan. 15 - March 10, 1988 - Work performed by Koubek. Shockoe paid $19,250. No written agreement other than one dated Jan. 15.

March 10, 1988 - Koubek sends Shockoe letter. Divides up the project into two parts. Refers to Jan. 15 agreement as one to "revert" to. Asks for execution of letter and form. Shockoe executes neither.

March 10 - July 18, 1988 - Koubek continues to work and is paid several hundred thousand dollars.

July 18, 1988 - Koubek executes and forwards a new AIA standard from contract, which still contains an arbitration clause. Suggests reversion to original payment schedule. Asks for signature and two copies. Shockoe does not sign.

September 26, 1988 - John Lottimer, president of Allegheny Warehouse, a part of Shockoe, writes Koubek to tell him of financial difficulties and to ask him to stop work on Phase II of the project. States with respect to billing, "we had pretty much relied on [Koubek's] letter of March 10, 1988."

September 29, 1988 - Koubek responds. Admits he has no signed response. Assumes that previous agreement were OK. Wants to revert to original one price billing.

October 20, 1988 - Lottimer responds. States they are over budget. Does not mention contracts.

Late 1988 - Early 1989 - Phase two of project falls apart. Goes unfunded.

May 1990 - Shockoe decides to assign the architect's contract to Dominion Bank for financing.

July 11, 1990 - Williams, Mullen corporate attorney Philip Rome forwards a copy of the July 18, 1988 contract to counsel for Dominion Bank. The cover letter refers to copies of the architect's agreement.

July 25, 1990 - As one of a set of closing documents, John Lottimer executes an Assignment of Architect's Contract which references a "certain contract dated July 18, 1988 between Assignor and Koubek ..."

October 18, 1990 - In a letter which may be inadmissible, Williams, Mullen responds to the possibility of a lawsuit by referencing the July 18, 1988 contract and noting that arbitration is the exclusive remedy.

November 13, 1990 - Shockoe filed a motion to stay arbitration in Richmond Circuit court.

November 21, 1990 - Koubek filed a notice of removal.

January 22, 1991 - You denied Shockoe's motion to remand.

DISCUSSION

The critical issue before you is whether there is a "written agreement" to submit controversies to arbitration under VA CODE §8.01-581.01. The Virginia Uniform Arbitration Act requires a written agreement, but it does not state the agreement must be signed. I am unclear about the application of the statute of frauds to this contract, and this issue has not been briefed.

It seems to me that the key question is what contract was de facto in place during the time that Koubek worked. It seems likely that Koubek's January and July agreement were offers that were accepted by Shockoe by performance. Shockoe arguably took affirmative acts which demonstrate that they considered themselves bound by the agreement of July 18, 1988.

Nonetheless, I think that there are material facts in dispute surrounding the legitimacy of the July contract. I would want to hear testimony from Koubek and Lottimer about what contract they thought they were operating under. The story about how the July 18, 1988 contract ended up in the assignment to Dominion Bank is also in dispute.

Because this seems like a very fact specific inquiry, I really don't think that summary judgment is the appropriate vehicle. However, a full trial clearly will not be necessary. Therefore I suggest that you schedule an evidentiary hearing for the limited purpose of hearing evidence as to what contract, if any, governed the business relationship between the parties.