MODERN MYTHS

MYTH #1: The disease of alcoholism is caused by drinking alcohol.

MYTH #2: Alcoholism is caused by stress.

MYTH #3: Alcoholism is the symptom of an underlying psychological disorder.

MYTH #4: Alcoholics must drink to excess on a daily basis.

MYTH #5: Alcoholism is cured by not drinking.

Alcoholism is:

a primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by continuous or periodic impaired control over drinking, preoccupation with drug/alcohol, use of alcohol despite adverse consequences, and distortions in thinking, most notably denial.

There is no cure for alcoholism; however, with proper treatment the disease can be placed in remission.

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MILTON S. AUGENBLICK, A.I.A.,PLAINTIFF -VS- GERALD J. VIGDOR, INDIVIDUALLY and DOMINICK J. PERINI, INDIVIDUALLY AND AS GENERAL PARTNERS and PENN HALL LIMITED PARTNERSHIP, DEFENDANTS
Franklin County Branch, Civil Action - Law No. A.D. 1991-335

ARBITRATION - WAIVER - JURISDICTION

Petitioner sought confirmation of an arbitration award which had been entered jointly and severally against respondents. One of the respondents objected to the jurisdictions of the arbitrator to enter an award against him in his individual capacity, claiming that he was not a party to the agreement to arbitrate. The Court concluded that the attempted challenge to the arbitrator's jurisdiction was not timely raised and therefore the defense had been waived.

1. The proper form for the application made by a party to an arbitration award under 42 Pa.C.S. §7341 is by petition and shall be heard in the manner an upon the notice provided or prescribed by law for the making and hearing of petitions in civil matters.

2. A petition filed under 42 Pa.C.S. §7317 in which a party seeks confirmation of a common law arbitration award may serve as original process.

3. It is inconsistent for a party to argue on the one hand that a complaint and motion filed by the opposing party were procedurally defective, while at the same time contending that prejudice will result if those defective pleadings are now withdrawn.

4. Petitions do not constitute a form of pleading under Rule 1017(a) and, thus, are not subject to the dictates of Rule 1019.

5. Where a party wishes to raise the argument that he is not a party, in his individual capacity, to the agreement to arbitrate disputes, that challenge must be made within thirty days of the entry of the arbitrator's award or it will be deemed to have been waived.

6. Issues regarding the existence of an arbitration agreement and the power of the arbitrator to hear a particular dispute, are subject to the thirty day time limit for challenges to an award.

7. Where a party objects to the jurisdiction of the arbitrator at an arbitration hearing on the ground that he was not a party to the agreement he has two options available to seek a judicial determination of jurisdiction: 1/seek a stay of arbitration pursuant to Pa.C.S. §7304; 2/challenge the existence of an arbitration agreement within the thirty day period following entry of the arbitration award, pursuant to 42 Pa.C.S. §7342(b).

John J. Sylvanus, Esq., Counsel for Augenblick
Jack Sharpe, Esq., Counsel for Penn Hall
Paul B. Bech, Esq., Counsel for Perini

OPINION

William H. Kaye, J.

This proceeding was initiated in order to seek the Court's confirmation of an arbitration award, entered over three years ago

on June 5, 1991, regarding a dispute over certain architectural fees which were sought to be recovered by Milton S. Augenblick ("petitioner") for services rendered pursuant to a contract with Penn Hall Limited Partnership. The award was entered jointly and severally against respondents Gerald F. Vigdor,[1] Dominick J. Perini and Penn Hall Limited Partnership. Mr. Perini has objected to the request for confirmation. The primary basis for his objection is his claim that he was not individually a party to the agreement to arbitrate disputes with petitioner. Oral argument was initially conducted on March 4, 1993, on the application for confirmation and Mr. Perini's objection thereto. Due to procedural irregularities which will be detailed *infra*, the undersigned contacted counsel on March 11, 1993 in an effort to resolve the procedural dilemma, either by stipulation of the parties or by unilateral action of petitioner to place the proceeding in a proper procedural posture. Although the Court's intention was to thereby facilitate an expeditious resolution of the matter on the merits, the failure of the parties to reach an agreement regarding these procedural matters has resulted in the additional lengthy delay leading up to the current time. Recently, oral argument was conducted on the merits of the petition to confirm filed by petitioner on November 23, 1993, as well as respondent's motion to strike both the petition and an ancillary praecipe to withdraw a motion and complaint filed earlier in the proceedings.

The procedural history of this matter may well render the term "convoluted" an understatement. We, nevertheless, are constrained to review that history in order to properly resolve the current motion to strike which has been filed by respondent. The action was commenced with the filing of a praecipe for a writ of summons on July 10, 1991. On August 29, 1991, a motion for a rule to show cause why judgment should not be entered on the arbitration award was filed by petitioner. Mr. Perini objected on procedural grounds to the use of a motion and rule to show cause to request confirmation and judgment on the arbitrator's award. As a result, petitioner subsequently filed a complaint in assumpsit on October 8, 1991.. An amended

[1] Michelle A. Davidove has been substituted as a respondent in place of Gerald J. Vigdor, by order of Court dated February 3, 1993. The praecipe for a rule to show cause regarding the substitution alleges that Mr. Vigdor died on or about October 21, 1992 and that Ms. Davidove has been appointed as executrix of his estate.

complaint was filed on December 9, 1991. The latter complaint differed from that initially filed only by the attachment of petitioner's verification and two exhibits which were referenced in the complaint. Mr. Perini filed preliminary objections in the nature of demurrers to both complaints. The record does not reflect that the preliminary objections were adjudicated. Instead, it appears that the preliminary objections were withdrawn pursuant to an agreement between the parties.[2]

On December 3, 1992, petitioner filed a second motion for a rule to show cause why the arbitrator's award should not be confirmed and judgment entered against Mr. Perini individually. On December 23, 1992, Mr. perini filed both an answer and new matter to the complaint of December 9, 1991, as well as a statment of opposition to the notion to confirm.

The parties appear to agree that the proceeding before the arbitrator constituted a common law arbitration, conducted pursuant to Sections 7341-7342 of the Judicial Code, 42 Pa. C.S. §§7341-7324. We are in agreement with the parties regarding the nature of the arbitration hearing.[3] Section 7342 (b) provides as follows regarding the appropriate procedure for confirmation of a common law arbitration award:

> On application of a party made more than 30 days after an award is made by an arbitrator under section 7341 (relating to common law arbitration) the court shall enter an order confirming the award and shall enter a judgment or decree in conformity with the order.

The proper form for the "application" referred to in this section is provided in Section 7317 of the Judicial Code, 42 Pa. C.S. §7317,[4] which provides, pertinently, as follows:

> [A]n application to the court under this subchapter *shall be by petition* and shall be heard in the manner

[2] Counsel for petitioner stated in correspondence to the Court, dated February 23, 1993, that the preliminary objections were withdrawn in December of 1992.

[3] Where no express or implied agreement to submit to statutory arbitration is evidenced by the parties, common law rules of arbitration are binding. *Elkins & Co. v. Suplee*, 371 Pa.Super. 570, 538 A.2d 883 (1998).

[4] Although Section 7317 specifically relates to statutory arbitration under the Uniform Arbitration Act, 42 Pa. C.S. §§7301-7320, its provisions have also been incorporated into the procedures for common law arbitration pursuant to 42 Pa. C.S. §7342(a).

and upon the notice provided or prescribed by law for the making and hearing of petitions in civil matters. (Emphasis added.)

Applicable procedural rules relating to petition practice appear at Pa.R.C.P. Nos. 206-209.

There has evidently been significant confusion among the parties regarding the proper procedure to be followed when seeking to confirm a common law arbitration award. This confusion may arise from the fact that a petition is not usually filed as original process, but rather, is used as an auxiliary means to obtain relief in an action over which jurisdiction has already been acquired by the Court. *Haegele v. Pennsylvania General Insurance Co.*, 330 Pa.Super 481, 479 A.2d 1005 (1984). The Superior Court recognized, however, in *Haegele* that Section 7317 of the Uniform Arbitration Act requires that an "application" be filed by petition in accord with petition rules and that the petition may, in suchinstances, serve as original process. Although *Haegele* dealt specifically with a petition to vacate or modify a statutory arbitration award, we conclude that its holding is equally applicable to a proceeding, as here, wherein confirmation of a common law arbitration award is sought.

As a result of correspondence between the parties and the Court following oral argument on March 4, 1993, petitioner has taken appropriate action to cure the procedural defects created by the filing of the motion to confirm, and subsequently, the complaint in assumpsit. On November 22, 1993, petitioner praeciped to have both the motion of August 29, 1991 and complaint of October 8, 1991, withdrawn. On the same date, petitioner also filed a petition to confirm the award of the arbitrator. In response to the rule to show cause which was issued in connection with the petition on November 23, 1993, respondent filed an answer and new matter asserting lack of personal and subject matter jurisdiction, lack of conformity to rule of court and a demurrer. Respondent has also filed a petition to strike both the praecipe to withdraw the complaint and motion, as well as the pending petition to confirm. The following bases for the petition to strike are asserted: 1/ that the action should have been dismissed by discontinuance, rather than praecipe; 2/ that the petition should have been filed as original process, rather

than to the pending action; 3/ that respondent would be prejudiced if the action were dismissed due to a pending praecipe to enter default judgment by respondent against co-respondent, Michelle Davidove, as well as alleged prejudice resulting from mounting litigation expenses; 4/ the petition fails to append writings on which it is based, as required by Pa.R.C.P. No. 1019(h); and 5/ that petitioner failed to withdraw an amended complaint filed on or about December 6, 1991 and a motion to confirm filed on December 3, 1992.

We conclude that respondent's petition to strike the petition and praecipe are without merit. As appropriately noted by petitioner, the praecipe to withdraw the complaint and motion filed earlier in these proceedings was not an effort to discontinue the action, which was originally initiated by writ of summons, but rather to withdraw the pleadings which failed to conform to the procedural dictates of seeking to confirm an arbitration award. Since discontinuance was not sought under Pa.R.C.P. No. 229(a), petitioner proceeded properly in moving to withdraw the defective pleadings alone.

We also find no error in petitioner's action in filing the pending petition to confirm as a part of the action originally commenced by writ of summons on July 10, 1991. Section 7317 of Judicial Code provides that the petition "be served in the manner provided or prescribed by law for the service of a writ of summons in a civil action." As noted previously, this matter was commenced by the filing of a praecipe for a writ of summons on July 10, 1991, with service thereof being effected on July 26, 1991. We believe the notice requirement of Section 7317 has been adequately satisfied in this case and that any error in commencing the action by writ of summons, rather than petition, may be regarded as harmless.

Respondent's contention that he would be prejudiced if the action were dismissed must also be rejected for the simple reason that the action, itself, has not been discontinued. Instead, only certain pleadings have been withdrawn by petitioner. Moreover, we consider it inconsistent for respondent to argue on the one hand that the complaint and motion earlier filed by petitioner were procedurally defective, while at the same time contending that

prejudice will result if those defective pleadings are now withdrawn. Having correctly argued that a petition is the required procedural means for seeking confirmation of the arbitration award in this case, respondent may not now prevail on the argument that petitioner's correction of his procedural error is prejudicial.

We are cognizant of respondent's assertion that a "conditional,, default judgment is pending against co-respondent Michelle Davidove as a result of respondent's counter-claim to the complaint filed in October, 1991. We consider any objection to the withdrawal of the complaint to have been waived by respondent's assiduous, and legally correct, argument that the complaint was procedurally defective. Thus, we conclude that withdrawal of the complaint does not constitute prejudice in this instance. with respect to the failure to append writings on which the petition is based, we do not believe that such is required by the rules applicable to petitions and answers, specifically, Pa.R.C.P. Nos. 206-209. We observe that petitions do not constitute a form of pleading under Rule 1017(a) and, thus, are not subject to the dictates of Rule 1019.

Finally, respondent contends that petitioner has failed to withdraw an amended complaint and motion to confirm, filed on December 3, 1992. While we do not consider the pendency of these filings to require that the petition to confirm be stricken as requested by respondent, we observe that petitioner has offered to take appropriate action to withdraw these remaining pending pleadings. Since the petition to confirm constitutes the proper form of application for a party seeking confirmation, we believe it would be appropriate for petitioner to withdraw any other procedurally defective pleadings so that only the petition remains pending. We will, accordingly, order that petitioner take action to

withdraw such filings. Having resolved each of the procedural issues presented by respondent in his petition to strike, we will order that the petition be denied.[5]

Turning to the merits of the case, we not that the primary substantive issue which respondent has raised is whether he was a proper party before the arbitrator in view of his contention that he was not a party, in his individual capacity, to the agreement to arbitrate disputes with petitioner. Petitioner contends that this issue has been waived by the failure of Mr. Perini to raise this challenge within thirty days after entry of the arbitrationaward. Mr. Perini concedes, as he must, that he did not challenge the arbitration award within thirty days of its entry. Nevertheless, Mr. Perini maintains that the issue of whether he was a proper party to the arbitration proceeding has not been waived since it is a question of subject matter jurisdiction.

As recited earlier in this opinion, Section 7342(b) of the Judicial Code provides that when an application is made by a party more than thirty days after an award, "the court *shall* enter an order conforming the award". (Emphasis added.) This provision, which became effective on February 18, 1983, has been interpreted as requiring that "*any* issues a party wishes to raise must be raised within thirty days from the date of the award, since after that time it is mandatory for the trial court to confirm an award upon application of either party." *Beriker v. permagrain Products, Inc.*, 347 Pa.Super 102, 104, 5500 A.2d 178, 179 (1985) (emphasis added). The issue which was sought to be raised in *Beriker* was whether an agreement to arbitrate has been entered into by the parties. The court concluded that the failure to raise this issue within thirty days of the award constituted a waiver. A similar result was reached in the case of *Elkins & Co. v. Suplee,* 371 Pa.Super. 570, 538 A.2d 883 (1988). Thus, the thirty day tiem period is both mandatory and applicable to all issues related to the arbitration. We, therefore,

[5] Respondent's counsel argues in his brief in support of the petition to strike that a judgment of non pros should be entered in this case due to the failure of petitioner to proceed in a proper procedural fashion since the commencement of the action in July, 1991. Since this basis for relief was not asserted in the petition to strike and has been asserted for the first time in respondent's brief, we consider the issue to have been waived. Moreover, the complex history of this case would belie any claim that petitioner has failed to proceed in prosecuting the matter.

conclude that the statutory limitation is not rendered inapplicable by the nature of the inquiry raised by Mr. perini in this proceed.

The specific issue presented is whether Mr. Perini was a party, in his individual capaity, to the arbitration agreement. Mr. Perini contends that, while he was a signatory to the contract with petitioner, he signed only as a representative of Penn Hall Limited Partnership. he further argues that a resolution of this matter is not waived by his failure to raise the issue within thirty days of entry of the arbitration award.

Mr. perini relies on the case of *Gaslin, Inc. v. L.G.C. Exports, In.*, 334 Pa.Super. 132, 482 A.2d 1117 (1984) to support his argument. The court in *Gaslin* stated the following with regard to the issue of the existence of an enforceable arbitration agreement:

> Whether *an agreement to arbitrate was entered into* and whether the dispute falls within the scope of an arbitration provision have traditionally been questions for the court to determine....Therefore, although the arbitrator is the final judge of law and fact, his power has not been extended to the degree that he may determine his own jurisdiction, that is, whether the arbitration tribunal has the requisite power to hear the particular case brought before it. Whether a party consented to arbitrate a dispute in the first instance is a jurisdictional question that must be decided by a court.

Id. at 139-140, 482 A.2d at 1121 (emphasis original; citations omitted). *Id.* at 139-140, 482 A.2d at 1121 (emphasis in original; citations omitted).

It is important to recognize, however, that the analysis of the court in *Gaslin* did not include a determination of the effect of the enactment of Section 7342(b) of the Judicial Code on the issue of waiver. This is so because the arbitration agreement in *Gaslin* was executed in 1979 rendering the subsequent enactment of Section 7324(b) inapplicable to that proceeding. In fact, the decision in *Beriker* recognizes that the procedure approved in *Gaslin* "has been changed by the current law which became effective as of February 18, 1983. ..."*Beriker*, *supra* at 104, 500 A.2d at 179. In the instant case, the arbitration agreement was

executed in August, 1987 and is clearly subject to the specified thirty day time limit for challenges to an award. Since the same issue was involved in *Beriker* as is in the instant case, to wit, whether the parties had agreed to arbitrate, we conclude that the *Beriker* opinion is binding.

Our conclusion that the time limit is fully applicable to the issue of the existence of an agreement to arbitrate is supported by a comparative analysis of Section 7314 of the Uniform Arbitration Act, 42 Pa. C.S. §7314. Section 7314 provides, *inter alia*, that the following issues must be raised within thirty days after receipt of the arbitration award:

> (iii) the arbitrators exceeded their powers;
>
> ....
>
> (v) there was no agreement to arbitrate and the issue of the existence of an agreement to arbitrate was not adversely determined in proceedings under section 7304 (relating to court proceedings to compel or stay arbitration) and the applicant-party raised the issue of the existence of an agreement to arbitrate at the hearing.
>
> 42 Pa. C.S. §7314(a).

These provisions demonstrate that issues regarding the existence of an arbitration agreement and the power of the arbitrator to hear a particular dispute may, indeed, be subject to the thirty-day time limit for challenges to an award. Given the mandatory and all-inclusive scope of the statutory language of Section 7342(b), we conclude that the issue of whether Mr. Perini was a party to the arbitration agreement in his individual capacity is similarly subject to the thirty-day time limit.

In the instant case, it is undisputed that Mr. Perini objected at the arbitration hearing to the jurisdiction of the arbitrator on the ground that he was not a party to the agreement. Mr. Perini had two options available to seek a judicial determination of his proper status as a party to the arbitration. First, he could have sought a stay of the arbitration pursuant to Section 7304 of the Uniform Arbitration Act, which has been incorporated into the law applicable to common law arbitrations. *See* 42 Pa.C.S. §7342(a). Section 7304(b) provides that:

> On application of a party to a court to stay an arbitration proceeding threatened or commenced the court may stay an arbitration on a showing that there is no agreement to arbitrate. When in substantial and bona fide dispute, such an issue shall be forthwith and summarily tried and determined and a stay of the arbitration proceedings shall be ordered if the court finds for the moving party. If the court finds for the opposing party, the court shall order the parties to proceed with arbitration.

Mr. Perini did not avail himself of this opportunity to challenge the existence of an arbitration agreement. A failure to seek injunctive relief, however, does not constitute a waiver of the right of an individual to later assert that he was not a party to an arbitration agreement. *Gaslin, supra.* The second opportunity to challenge the existence of an arbitration agreement would arise in the thirty-day period following entry of the arbitration award provided by Section 7342(b). Mr. Perini also declined to pursue this available avenue for challenge. We must conclude that Mr. Perini's present attempt to challenge the arbitrator's jurisdiction is time-barred and may not be used as a defense to the petition to confirm. Confirmation of the award is mandated following the expiration of the thirty-day period.

Based on our conclusion that the issue presented by Mr. Perini the existence of an arbitration agreement has been regarding the existence of an arbitration agreement has been waived, we will order that the petition for confirmation be granted and judgment entered.

ORDER OF COURT

NOW, this 17th day of August, 1994, the petition of Milton S. Augenblick, A.I.A., for confirmation of the arbitrator's award of June 5, 1991 is hereby GRANTED. Judgment is entered in favor of Milton S. Augenblick and against the above-named respondents, jointly and severally, in the amount of $62,255.36 plus interest in the amount of six percent (6%) per annum on the sum of $54,092.00 from June 15, 1991 until the date of payment of the award.