IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HOMESTEAD INSURANCE COMPANY,	:	
Plaintiff,	:	
	:	CIVIL ACTION NO.
v.	:	1:07-CV-2821-JOF
WACHOVIA BANK, N.A.,	:	
Defendant.	:	

OPINION AND ORDER

This matter is before the court on Defendant's motion for judgment on the pleadings [27]; Plaintiff's motion for leave to file amended complaint [29]; and Plaintiff's motion to supplement motion for leave to file amended complaint [30].

I. Background

A. Complaint

On November 21, 2006, Plaintiff, Homestead Insurance Company, filed suit against Defendant Wachovia Bank, in the Superior Court of New Jersey. Wachovia Bank is named as a Defendant in its role as successor to First National Bank of Atlanta. Defendant removed the suit to United States District Court for the District of New Jersey. On

September 17, 2007, the federal court in the District of New Jersey transferred the matter here.

In its verified complaint, Plaintiff states it "seeks an order compelling defendant, Wachovia Bank, to submit to arbitration in connection with any and all claims that Homestead has against Wachovia Bank arising from Wachovia Bank's conduct as trustee of a trust created for the benefit of Homestead." *See* Cmplt., ¶ 1.

On July 25, 1989, Homestead entered into a Reinsurance Agreement with Interstate Guaranty Insurance Company. *Id.*, ¶ 5. The Reinsurance Agreement contained an agreement to arbitrate any disputes arising out of it. *Id.*, ¶ 7 (citing Article XX of the Reinsurance Agreement). Under applicable reinsurance regulations, Interstate was required to place money into a trust for the benefit of Homestead as security for Interstate's obligations under the Reinsurance Agreement. *Id.*, ¶ 8. The purpose of this trust was to protect Homestead in the event that Interstate became insolvent. *Id.*, ¶ 9.

On December 6, 1989, Homestead, Interstate, and Wachovia entered into a Trust Agreement whereby Homestead was designated as the sole beneficiary of the Trust, Interstate was designated as the Grantor of the Trust, and Wachovia Bank was designated as the Custodian/Trustee of the Trust. *Id.*, ¶¶ 10-13. "It was the express and unambiguous intent of Homestead, Interstate and Wachovia Bank that the Trust Agreement was subject

AO 72A
(Rev.8/82)

to the terms and conditions of the Reinsurance Agreement, including the provision requiring that all disputes be subject to arbitration." *Id.*, ¶ 17.

The complaint then lists "issues to be submitted to arbitration." In that section of the complaint, Homestead avers that on four occasions starting in 1995, in accordance with the terms of the Trust Agreement, it requested a withdrawal of funds held in Trust, but that Wachovia refused to do so. *Id.*, ¶¶ 18-20. On July 13, 1995, the Fulton County Superior Court appointed John W. Oxendine, Commissioner of Insurance in the state of Georgia, to be Rehabilitator for Interstate. *Id.*, ¶ 21. Homestead claims that it only learned ten years later on August 31, 2005, that Wachovia Bank had closed the trust account in 1996 and distributed the $203,143.43 in the account to MC Consulting, LLC, who was working with the Rehabilitator. *Id.*, ¶ 22. Homestead argues that since it was the beneficiary of the Trust, Wachovia acted improperly in sending the monies to Interstate and not Homestead. *Id.*, ¶¶ 24-25.

In Count One of the complaint, Homestead recites the portions of the Trust Agreement and the Reinsurance Agreement it believes supports a claim for arbitration and alleges that as "a direct and proximate result of Wachovia's wrongful refusal to participate in arbitration, Homestead has suffered damages, including but not limited to, incurring legal fees and costs in bringing this action to compel arbitration." *Id.*, ¶ 38.

AO 72A
(Rev.8/82)

In its final recital, Homestead "demands judgment compelling Wachovia Bank to submit to arbitration regarding the within matter, together with attorneys' fees and such other and further relief that the Court deems just and proper." *Id.* at 7.

B. Relevant Legal Documents

Article XX of the Reinsurance Agreement governs arbitration:

> As a condition precedent to any right of action hereunder, any dispute or difference of opinion, whether arising before or after termination with reference to the interpretation of this Agreement or to the rights of either party with respect to any transactions under this Agreement, the dispute shall, upon the request of one of the parties, be submitted to arbitration.

See Reinsurance Agreement, Article XX. The company and the reinsurer each choose one arbitrator and those two arbitrators select the third. *Id.*

The recital in the Trust Agreement states:

> WHEREAS, the parties hereto desire to establish a trust account into which assets shall be deposited and held by the custodian at the Custodian's office in the United States ***to serve as security for the Reinsurance Agreement to which this trust instrument is attached and made a part***, and the assets of which trust account shall be used to secure payment and to pay any of Grantor's obligations arising under and specified in said Reinsurance Agreement . . . .

See Trust Agreement, at 1 (emphasis added).

Article I – Conditions of the Trust, section 3, states, "[t]his Agreement is not subject to any conditions or qualifications not otherwise stated within its terms." *Id.* Article III of the Trust Agreement is entitled, "Provisions Relating to the Reinsurance Agreement." *Id.*

AO 72A
(Rev.8/82)

at 3. "This Trust Agreement, and the trust account established hereby, has been drawn in conjunction with the attached Reinsurance Agreement executed by the Grantor and the Beneficiary." *Id.* The Trust Agreement specifies that it is to be interpreted in accordance to Georgia law. *Id.* at 4. The Trust Agreement provides that it shall terminate in the event that the Reinsurance Agreement has terminated. *Id.* at 6. There are no dispute resolution provisions in the Trust Agreement.

C. Contentions

Plaintiff argues that the arbitration agreement in the Reinsurance Agreement has been incorporated by reference into the Trust Agreement and therefore the court should grant its motion to compel arbitration.[1]

Defendant responds that language in the Trust Agreement is not sufficient to incorporate the terms of the Reinsurance Agreement. Defendant also contends that the Trust Agreement, itself, does not contain any agreement to arbitrate disputes, and even contains an indemnification clause that covers expenses of litigation. Finally, Defendant avers that the arbitration provisions found in the Reinsurance Agreement do not contemplate that the trustee would be involved in any arbitration because only Homestead and Interstate are permitted to select an arbitrator, with the two arbitrators selecting a third.

[1]Although Plaintiff asks the court to award it attorney's fees in bringing this action to compel arbitration, Plaintiff does not point to any provision of the contract or rule of law which would entitled it to attorney's fees, and the court does not address the issue further.

AO 72A
(Rev.8/82)

II. Discussion

A. Arbitration

"Federal law establishes the enforceability of arbitration agreements, while state law governs the interpretation and formation of such agreements." *Employers Insurance of Wausau v. Bright Metal Specialties, Inc.*, 251 F.3d 1316, 1322 (11th Cir. 2001). "Federal law counsels that questions of arbitrability, when in doubt, should be resolved in favor of arbitration." *Id.* "Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Id.* Under the Federal Arbitration Act, "no party can be compelled to arbitrate unless that party has entered into an agreement to do so." *Id.* (citing *AT&T Tech., Inc. v. Communication Workers*, 472 U.S. 643, 649 (1986)). "Courts, however, have recognized a number of theories under which non-signatories may be bound to the arbitration agreements of others. These theories arise out of common law principles of contract and agency law: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Id.* (citations omitted). *See also World Rentals & Sales, LLC v. Volvo Construction Equipment Rents, Inc.*, 517 F.3d 1240, 1244 (11th Cir. 2008).

In *World Rentals*, a franchisee sued its franchisor and the franchisor's lender for breach of contract. The franchise agreements contained an arbitration provision, which referred only to the franchisee and franchisor and excluded the lender from the definition

AO 72A
(Rev.8/82)

of franchisor. The franchisee had also signed a series of loan documents with the franchisor's lender, but those agreements did not contain any arbitration clauses. The loan documents, however, did have incorporation provisions which stated all other documents referred to in the loan documents, including the franchise agreement, "are hereby incorporated in this Agreement by this reference in their entirety as if fully restated in this Agreement." *Id.* at 1243. The franchisee and franchisor moved for arbitration while the lender moved to dismiss the claims against it. The district court determined that the dispute between the franchisee and franchisor could proceed to arbitration, but the claims concerning the lender could not.

On appeal, the *World Rentals* court considered the common law principle of incorporation by reference which is at issue in the instant case. The court rejected the argument that an incorporation had to specifically reference the arbitration provisions. *Id.* at 1245. The court noted that it was "clear" that "an arbitration clause can be incorporated even if the relevant incorporation language does not specifically refer to it." *Id.* (citing *J.S. & H. Construction Co. v. Richmond County Hospital Authority*, 473 F.2d 212 (5th Cir. 1973)). "Ordinarily," a court should "look to state law to determine the meaning of the incorporation language" in contract documents. *See id.* at 1245 n.4. As noted above, the *World Rental* contracts used the phrases "are hereby incorporated . . . in their entirety as if fully restated in this" contract. *Id.* at 1244-45. The contracts also referred to each other.

AO 72A
(Rev.8/82)

Id. The court found this language sufficient to incorporate the franchise agreement within the loan contracts and held that "the unambiguous language of the Loan Documents incorporates the arbitration clauses in the Franchise Agreements." *Id.* at 1245. The court went on however, to state, "that is not the end of the matter. We must still determine whether the dispute between the World Parties [franchisee] and Volvo Finance [lender] falls within the scope of that arbitration clause." *Id.*

"To determine what disputes the parties agreed to arbitrate, we begin, as we must, with the language of the applicable arbitration provision, keeping in mind 'that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Id.* (quoting *Klay v. All Defendants*, 389 F.3d 1191, 1201 (11th Cir. 2004)). The relevant arbitration provisions covered "[a]ll disputes, claims, controversies or causes of action arising between Franchisee and Franchisor." *Id.* at 1245-46. Based on the limitations in the contractual definition of "Franchisor," the court held that the arbitration clause reached only disputes between the World Parties (franchisee) and Volvo Rents (franchisor) and that a non-signatory such as Volvo Finance (lender) could not be compelled to arbitrate. *Id.* at 1246. *See also Progressive Casualty Insurance Co. v. C.A. Reasequradora Nacional De Venezuela*, 991 F.2d 42, 47 (2d Cir. 1993) ("An arbitration agreement restricted to the immediate parties does not bind a non-party, notwithstanding words of incorporation or reference in a separate contract by which that non-party is bound.").

AO 72A
(Rev.8/82)

The court concluded by noting:

> This is not to say that an arbitration agreement limited to the immediate parties can never be effectively incorporated by reference. For example, in *J.S. & H.*, in addition to typical incorporation language, the subcontract at issue provided that the subcontractor "agrees to be bound to the Contractor by all of the terms of the agreement between the Contractor and Owner . . . and to assume toward the Contractor all of the obligations and the responsibilities that the Contractor . . . assumes toward the Owner." 473 F.2d at 214 n.3. This language may be sufficient to compel a subcontractor to arbitrate with the contractor, because arbitration is surely one of the "obligations" that the contractor assumed toward the owner in the prime contract. But the incorporation provisions in the Loan Documents at issue here contain no similar language, and thus Volvo Finance cannot be compelled to arbitrate its dispute with the World Parties under an incorporation-by-reference theory.

Id. at 1247 n.6.

Based on these instructions, the first step in the instant case is to determine whether the arbitration clause in the Reinsurance Agreement is incorporated by reference into the Trust Agreement as this is the only theory upon which Homestead alleges that Wachovia Bank agreed to arbitration. Under Georgia law, as "a matter of contract law, incorporation by reference is generally effective to accomplish its intended purpose where . . . the provision to which reference is made has a reasonably clear and ascertainable meaning." *Binswanger Glass Co. v. Beers Construction Co.*, 141 Ga. App. 715, 717 (1977). No particular "magic" words are required the achieve incorporation. *See Consolidated Freightways Corp. v. Synchroflo, Inc.*, 164 Ga. App. 275, 277 (1982) (quoting 4 Williston on Contracts, 3d Ed. 136, § 581. "It is not important in what language reference is made;

AO 72A
(Rev.8/82)

it is certainly enough if a plain reference is made by a document signed by the party to be charged, whatever its nature, to any other writing."). Based on Georgia law, the court in *Transamerica Premier Ins. Co. v. Collins & Co.*, 735 F. Supp. 1050 (N.D. Ga. 1990) (Hall, J.), found that incorporation language that stated "which subcontract is hereby referred to and made a part hereof" was sufficient to constitute incorporation. *Id.* at 1051-52. *But cf. Crow v. Cook*, 215 Ga. App. 558 (1994) (language not sufficient where second contract only lists the name of first contract in a "descriptive" way with no indication of intent to incorporate).

The court finds that the incorporation provision in the Trust Agreement which states, "the parties hereto desire to establish a trust account into which assets shall be deposited and held by the custodian at the Custodian's office in the United States to serve as security for the Reinsurance Agreement to which this trust instrument is attached and made a part," is sufficient to incorporate the Reinsurance Agreement and its arbitration provision into the Trust Agreement. The court also notes that the Trust Agreement recognizes that "[t]his Trust Agreement, and the trust account established hereby, has been drawn in conjunction with the attached Reinsurance Agreement executed by the Grantor and the Beneficiary." *See* Trust Agreement, Article III Provisions Relating to the Reinsurance Agreement. For

AO 72A
(Rev.8/82)

the foregoing reasons, the court finds that the arbitration clause of the Reinsurance Agreement has been incorporated by reference into the Trust Agreement.[2]

Now that the court has determined that the Trust Agreement incorporated by reference the arbitration clause in the Reinsurance Agreement, the court turns to the question of whether the dispute between Wachovia Bank and Homestead falls within the scope of the arbitration clause. Here, the arbitration clause in the Reinsurance Agreement states:

> As a condition precedent to any right of action hereunder, any dispute or difference of opinion, whether arising before or after termination with reference to the interpretation of this Agreement or to the rights of either party with respect to any transactions under this Agreement, the dispute shall, upon the request of one of the parties, be submitted to arbitration.

See Reinsurance Agreement, Article XX. This clause is different than the one found in the *World Rentals* contract. The *World Rentals* contract limited the clause to certain parties, that

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[2]Wachovia argues that the first incorporation language is not sufficient because it is contained in the recital language of the Trust Agreement, and a more explicit statement in the Trust Agreement provides that the Agreement "is not subject to any conditions or qualifications not otherwise stated within its terms." While it is true that the recital clauses of a contract will not be read to control the operative portions of the contract, *see Rosenberg v. Rosenberg*, 232 Ga. 725 (1974), here, the recital clause is not in contradiction with an operative provision of the Trust Agreement which provides that any conditions or qualifications must be stated within the terms of the Agreement, as the incorporation is. Further, the court does not find it significant that the parties entered into the Reinsurance Agreement six months prior to the time the Trust Agreement was signed. The provisions of the Trust Agreement signify the parties' intent to incorporate the Reinsurance Agreement, not the timing of the signing of the documents. Finally, the fact that the indemnification clause in the Trust Agreement "includ[es] litigation" does not contradict an agreement to arbitration. The indemnification clause is broader than just litigation and further is not a dispute resolution agreement.

AO 72A
(Rev.8/82)

is, "[a]ll disputes, claims, controversies or causes of action arising between Franchisee and Franchisor." In contrast, the Reinsurance Agreement here requires arbitration of "any dispute or difference of opinion" whether before or after termination of the agreement (1) "with reference to the interpretation of this Agreement" or (2) "to the rights of either party with respect to any transactions under this Agreement." The first clause concerning the interpretation of the Agreement does not limit the parties. The second clause concerning transactions under the Agreement does limit the scope to the parties to the Reinsurance Agreement. Homestead alleges that the money held in Trust was for its benefit and should not have been paid out in the Interstate receivership. The court finds that this claim concerns at least the interpretation of the Trust Agreement and therefore falls into the scope of the arbitration clause. For this reason, the court finds that the scope of the arbitration clause in the Reinsurance Agreement covers the litigation raised here.

B. Remaining Matters

During the course of briefing the arbitration matters, Plaintiff made some reference to a "cross motion for summary judgment." *See* Docket Entry [31]. However, no separate motion was filed as would be expected. In a later pleading, Plaintiff claims that it was not attempting to file a separate cross-motion for summary judgment, but rather was attempting to make an argument that Defendant's motion for judgment on the pleadings was procedurally improper because Defendant made arguments concerning the "intent" of the

AO 72A
(Rev.8/82)

parties, an issue which Plaintiff believed could not be discerned solely on the basis of the contractual language. To the extent the court would consider the "intent" argument, Plaintiff asked for the court to convert Defendant's motion for judgment on the pleadings into a motion for summary judgment and then permit the parties to engage in discovery pursuant to Rule 56(f) on the issue of intent. Because the court finds that the Trust Agreement incorporates by reference the Reinsurance Agreement, however, the court need not consider Plaintiff's argument for additional discovery pursuant to Rule 56(f).

Plaintiff also filed a separate motion to amend its complaint. Defendant contends that the court should not permit Plaintiff to amend its complaint because to do so would be futile in light of the statute of limitations problems raised by Plaintiff's proposed amended complaint. As outlined above, Plaintiff's original complaint asked only that the court compel Wachovia Bank to arbitration under the terms of the Reinsurance Agreement as incorporated into the Trust Agreement. Plaintiff did not make reference to any particular cause of action it believed it could bring against Wachovia Bank. Although not used by the parties here, it appears that the distinction between the two is the difference between an "embedded" and an "independent" proceeding. "An 'embedded' proceeding is one that involves both a request for arbitration and other claims for relief. In an 'independent' proceeding, the issue of arbitration is the only issue before the court." *See Employers Insurance of Wausau*, 251 F.3d at 1321 n.4 (quoting *Green Tree Financial Corp. v.*

AO 72A
(Rev.8/82)

Randolph, 531 U.S. 79 (2000)). As filed, Plaintiff's complaint would be an "independent" proceeding. Its motion to amend seeks to add specific tort claims of relief as would constitute an "embedded" proceeding. Because the court agrees that Plaintiff's claim is encompassed within the arbitration agreement in the parties' contracts, the court need not rule on Plaintiff's motion to amend complaint.

III. Conclusion

The court DENIES Defendant's motion for judgment on the pleadings [27]; DENIES AS MOOT Plaintiff's motion for leave to file amended complaint [29]; and DENIES AS MOOT Plaintiff's motion to supplement motion for leave to file amended complaint [30].

The court DIRECTS the parties to arbitrate the claims in Plaintiff's complaint.

The Clerk of the Court is DIRECTED to ADMINISTRATIVELY CLOSE this case.

IT IS SO ORDERED this 23rd day of June 2008.

s/ J. Owen Forrester
J. OWEN FORRESTER
SENIOR UNITED STATES DISTRICT JUDGE