[Cite as *Vining v. Logan Clutch Corp.*, 2020-Ohio-675.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MICHAEL VINING, :

Plaintiff-Appellee, :

No. 108563

v. :

LOGAN CLUTCH CORPORATION, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: February 27, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-905492

Appearances:

Kohrman Jackson & Krantz, L.L.P., Scott A. Norcross, and Paige M. Rabatin, *for appellee*.

Ross, Brittain & Schonberg Co., L.P.A., Evelyn P. Schonberg, and Sean S. Kelly, *for appellant*.

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Defendant-appellant, Logan Clutch, Corp. ("Logan Clutch"), appeals from the order of the trial court that determined it waived its right to arbitrate an employment-related dispute with plaintiff-appellee, Michael Vining, and

alternatively found that the parties' dispute is outside of the scope of their arbitration agreement. Logan Clutch assigns the following errors for our review:

> I. The trial court erred when it held that Logan Clutch waived its right to arbitration based on the totality of the circumstances and pursuant to *Kellogg v. Griffiths Health Care Group*, 3rd. Dist. Marion No. 9-10-59[, 2011-Ohio-1733].
>
> II. The trial court erred when it held that Michael Vining's claims fit within exceptions to the binding arbitration policy contained in Section 1.22 of the Logan Clutch November, 2014, Policy & Procedure Manual and incorporating documents.

{¶ 2} Having reviewed the record and the controlling case law, we affirm the decision of the trial court.

{¶ 3} Vining was first hired by Logan Clutch in 1997. He subsequently left employment and was rehired in 2009. During this second period of employment, Vining signed a Business Protection Agreement. In relevant part, this agreement bars Vining from competing with Logan Clutch for four years after leaving employment and contains no geographic limitations. The Business Protection Agreement also included the following binding arbitration provisions:

> I have read and understand the binding arbitration clause in this Manual. I understand that by agreeing to arbitrate any claims I may have against Logan [Clutch], or that Logan [Clutch] may have against me, Logan [Clutch] and I agree to voluntarily submit to a change in the method and means for resolution of any identified legal dispute under Sections 1.21 and 1.22 of this Manual. * * *
>
> Employees and Logan [Clutch] will arbitrate any and all disputes, controversies, or claims based on legally protected rights (i.e. statutory, contractual or common law rights), except for any * * * claims involving the protection of Logan [Clutch]'s proprietary business information or assets (i.e. misappropriation of trade secrets, disclosure of confidential information, breach of confidentiality, breach of noncompetition agreement, breach of non-solicitation agreement, breach of Business

> Protection Agreement, and patent or trademark infringement) arising between the employee and Logan [Clutch] and/or against any employee, officer, alleged agent, director or affiliate of Logan [Clutch]. * * * Examples of disputed matters include, but are not limited to, claims for violation of any state or federal statute, breach of covenant, breach of implied covenant of good faith and fair dealing, wrongful termination, breach of contract, intentional infliction of emotional distress, defamation, breach of right of privacy, interference with the advantageous or contractual relations, conspiracy, or tort claims of any kind. * * * No party or legal authority shall construe this provision to prevent either party from seeking any type of injunctive relief, including specific performance and temporary injunction, against the other from any judicial authority prior to the commencement of arbitration hereunder.

{¶ 4} In July 2018, Vining left Logan Clutch and accepted a position with another employer, Altra Industrial Motion ("ALM"). Two months later, Logan Clutch sent Vining a cease and desist letter, asserting that he was in breach of the terms of the Business Protection Agreement, and notified him that it intended to bring suit. On October 16, 2018, Vining filed a declaratory judgment action against Logan Clutch, claiming that the noncompete agreement is unenforceable. He also alleged that ALM terminated his employment due to Logan Clutch's invocation of the noncompete, and he sought damages and injunctive relief for Logan Clutch's alleged interference in his new employment and for unpaid wages. Logan Clutch filed its answer on November 19, 2018.

{¶ 5} The preliminary injunction hearing was set for November 30, 2018, and Logan Clutch filed a motion to continue. At the subsequent hearing, according to the court's journal entry, the "case [was] called for preliminary injunction hearing. The parties discussed a settlement, but none was reached. The parties agree to

consolidate the trial on the merits [scheduled for June 24, 2019] with the preliminary injunction hearing."

{¶ 6} On November 19, 2018, Logan Clutch filed its answer. It filed an amended answer on March 4, 2019. Neither the answer nor the amended answer contained a demand for arbitration. In February 2019, Logan Clutch propounded discovery to Vining. It also responded to Vining's discovery requests, and filed a motion for leave to file an amended answer. In March 2019, Logan Clutch answered the complaint and issued an out-of-state subpoena. Two months after that, on April 12, 2019, Logan Clutch invoked the provisions of the Business Protection Agreement, filing a motion to stay and compel arbitration, and motion for leave to file a second amended answer that asserted its right to arbitration. The trial court permitted Logan Clutch to file the second amended answer, and the parties extensively briefed the issues of whether Logan Clutch had waived its right to binding arbitration and whether the instant dispute was excluded from the arbitration clause.

{¶ 7} On May 9, the trial court granted Logan Clutch's motion to file its second amended answer, but denied Logan Clutch's motion to stay and compel arbitration. The court held that Logan Clutch waived arbitration of this matter by "elevat[ing] the dispute," waiting six months to file its motion for a stay, and participating in the litigation. The court further concluded that even if Logan Clutch had not waived its right to arbitration, "this lawsuit clearly constitutes 'claims

involving the protection of Logan [Clutch]'s proprietary business information or assets,' which are specifically exceptions to arbitration."

Waiver of Right to Arbitrate Dispute

{¶ 8} In the first assigned error, Logan Clutch asserts that the trial court erred in determining that it waived its right to arbitration under the Business Protection Agreement. In opposition, Vining argues that waiver occurred because Logan Clutch extensively participated in the litigation.

{¶ 9} Arbitration is a matter of contract and can be enforced unless explicitly waived or implicitly waived. *Bass Energy, Inc. v. Highland Hts.*, 193 Ohio App.3d 725, 2010-Ohio-2102, 954 N.E.2d 130, ¶ 33 (8th Dist.). Implicit waiver occurs where the party fails to assert its right or participates in litigation "to such an extent that its actions are 'completely inconsistent with any reliance' on this right, resulting in prejudice to the opposing party." *Id.*, quoting *Gen. Star Natl. Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438 (6th Cir. 2002), and *Gordon v. OM Fin. Life Ins. Co.*, 10th Dist. Franklin No. 08AP-480, 2009-Ohio-814. However, the strong public policy favoring arbitration of disputes means that the courts do not lightly infer that a party who has initiated litigation on a matter has waived the right to arbitration. *Id.*, citing *Harsco Corp. v. Crane Carrier Co.*, 122 Ohio App.3d 406, 414, 701 N.E.2d 1040 (3d Dist.1997). The party claiming that waiver occurred carries the "heavy burden" of showing that the party demanding arbitration acted inconsistently with the right to arbitrate. *Harsco Corp.*; *U.S. Bank v. Wilkens*, 8th Dist. Cuyahoga No. 93088, 2010-Ohio-262, ¶ 32.

{¶ 10} The question of waiver is usually a fact-driven issue and an appellate court will not reverse the trial court's decision absent a showing of abuse of discretion. *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 Ohio App.3d 27, 2004-Ohio-5953, 822 N.E.2d 841, ¶ 10 (9th Dist.); *Phillips v. Lee Homes*, 8th Dist. Cuyahoga No. 64353, 1994 Ohio App. LEXIS 596 (Feb. 17, 1994).

{¶ 11} With regard to whether Logan Clutch waived its right to arbitration, we note that:

> [a]mong the factors a court may consider in determining whether the totality of circumstances supports a finding of waiver are: (1) whether the party seeking arbitration invoked the jurisdiction of the trial court by filing a complaint, counterclaim or third-party complaint without asking for a stay of proceedings; (2) the delay, if any, by the party seeking arbitration in requesting a stay of proceedings or an order compelling arbitration; (3) the extent to which the party seeking arbitration participated in the litigation, including the status of discovery, dispositive motions and the trial date; and (4) any prejudice to the nonmoving party due to the moving party's prior inconsistent actions. * * *

Academic Support Servs., L.L.C. v. Cleveland Metro. School Dist., 8th Dist. Cuyahoga No. 99054, 2013-Ohio-1458, ¶ 8.

{¶ 12} In the instant case, regarding the first factor to be considered in considering whether waiver occurred, Logan Clutch did not invoke the jurisdiction of the trial court by filing a counterclaim or third-party complaint.

{¶ 13} As to the second factor, the delay, Logan Clutch asserted that it first became aware of the arbitration provision relevant to the instant matter during preparation of discovery responses. This reason was deemed sufficient by this court in *Wilkens*, 8th Dist. Cuyahoga No. 93088, 2010-Ohio-262, at ¶ 40.

{¶ 14} There was a delay of approximately six months before Logan Clutch filed the motion for a stay. We recognize that this general time period has been deemed both sufficient to show waiver, and insufficient to show waiver, depending upon the degree of participation in the litigation during this time period. *Compare Wilkens*; *Bass Energy*, 193 Ohio App.3d 725, 2010-Ohio-2102, 954 N.E.2d 130 (no waiver occurred where bank delayed for just under six months in seeking arbitration, engaged in discovery prior to locating the arbitration agreement, and moved for summary judgment, but the opposing party did not demonstrate prejudice); *Chrysler Fin. Servs. Ams., L.L.C. v. Henderson*, 4th Dist. Athens No. 11CA4, 2011-Ohio-6813, ¶ 17 (six-month delay before seeking arbitration established waiver where party also filed discovery request, discussed defenses with the court, and also filed dispositive motion). *Accord Montecalvo Elec., Inc. v. Cluster Homes, Inc.*, 9th Dist. Summit No. 21157, 2003-Ohio-355 (waiver occurred where there was extensive discovery over a seven month period, and demand for arbitration occurred on eve of scheduled trial); *Cantie v. Hillside Plaza*, 8th Dist. Cuyahoga No. 99850, 2014-Ohio-822 (waiver found where party first sought enforcement of the arbitration provision nearly six months after the case was filed, filed answer without raising arbitration, sought dismissal on grounds other than arbitration, assisted court in establishing litigation schedule, then waited almost three months before filing motion for arbitration stay); *but see Bass Energy* (delay of seven months did not constitute waiver where its conduct was "not necessarily inconsistent with its arbitration rights."); *Household Realty Corp. v. Rutherford*, 2d Dist. Montgomery

No. 20183, 2004-Ohio-2422 (no waiver where neither party initiated discovery); *Milling Away, L.L.C. v. Infinity Retail Environments, Inc.*, 9th Dist. Summit No. 24168, 2008-Ohio-4691, ¶ 14 (a six-month delay before seeking arbitration was insufficient to establish waiver where the party engaged in "minimal discovery," there has been "very little in the way of proceedings," and "no trial date was set").

{¶ 15} In evaluating Logan Clutch's conduct during the delay period, we note that Logan Clutch engaged in lengthy in-court settlement negotiations and propounded discovery to Vining. It also responded to Vining's discovery requests, and filed a motion for leave to file an amended answer, answered the complaint and issued an out-of-state subpoena. It also appears to have participated in the scheduling of a trial date nine months after the complaint was filed. During this time period, Vining was unemployed. For all of the foregoing reasons, we agree with the trial court's determination that waiver occurred herein. The six-month delay, coupled with Logan Clutch's participation in the court proceedings and use of court time and resources, together with the prejudice to Vining, constitutes a waiver of the arbitration provision.

{¶ 16} The first assigned error is without merit.

Exceptions to Binding Arbitration

{¶ 17} In the second assigned error, Logan Clutch argues that the trial court erred in concluding that Vining's claims for tortious interference, declaratory judgment, and injunctive relief come within Logan Clutch's "business information or assets" exception to arbitration.

{¶ 18} An action shall be stayed pending arbitration if the action "is brought upon any issues referable to arbitration under any agreement in writing for arbitration[.]" R.C. 2711.02(B). We review a trial court's decision regarding whether a party has agreed to submit an issue to arbitration de novo, so we give no deference to the trial court's decision. *See Scott Fetzer Co. v. Miley*, 8th Dist. Cuyahoga No. 108090, 2019-Ohio-4578, ¶ 20, citing *Natale v. Frantz Ward, L.L.P.*, 2018-Ohio-1412, 110 N.E.3d 829, ¶ 9 (8th Dist.); *Brownlee v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 97707, 2012-Ohio-2212, ¶ 8; *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, ¶ 7.

{¶ 19} "A 'presumption favoring arbitration' arises when a claim in dispute 'falls within the scope of an arbitration provision.'" *Scott Fetzer Co.* at ¶ 19, quoting *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 1998-Ohio 294, 700 N.E.2d 859; *Natale* at ¶ 9.

{¶ 20} The *Scott Fetzer Co.* court explained as follows:

> Although a party cannot be compelled to arbitrate a dispute the party has not agreed to submit to arbitration, *Council of Smaller Ents. v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 665, 1998-Ohio-172, 687 N.E.2d 1352 (1998), "[a]ny doubts regarding arbitrability should be resolved in favor of arbitration," *Natale* at ¶ 9, citing *Academy of Med. of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶ 14. An arbitration provision should not be denied effect "'"unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."'" *Council of Smaller Ents.* at 666, quoting *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986), quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

Id. at ¶ 18.

{¶ 21} Further, our inquiry is not limited to the form in which the claims are alleged in the complaint but extends to the underlying factual allegations in the case. *Scott Fetzer Co*., 2019-Ohio-4578, at ¶ 25.

{¶ 22} In this case, the trial court concluded:

> Even if Logan Clutch had not waived arbitration, this lawsuit clearly constitutes "claims involving the protection of Logan [Clutch]'s proprietary business information or assets," which are specifically exceptions to arbitration. Those claims, by the language of the contract, do not need to be a breach of contract or misappropriation of trade secrets claim solely for the benefit of the corporation, that clause also serves to protect the individual.

{¶ 23} We agree with this reasoning. Without restricting our inquiry to the form of the claims, the underlying factual allegations in dispute with reference to this matter involve the noncompetition agreement and whether Logan Clutch interfered with Vining's current employment. The claims relate to Vining's prior employment relationship with Logan Clutch and the proprietary information and assets to which he allegedly obtained access by virtue of that relationship. Therefore, under the plain language of the arbitration clause, it is not referable to arbitration that plainly excludes "claims involving the protection of Logan [Clutch]'s proprietary business information or assets" from arbitration.

{¶ 24} The second assigned error is without merit.

{¶ 25} Judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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PATRICIA ANN BLACKMON, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
EILEEN A. GALLAGHER, J., CONCUR