[Cite as *Dispatch Printing Co. v. Recovery Ltd. Partnership*, 2011-Ohio-80.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Dispatch Printing Company et al.,	:	
Plaintiffs-Appellees,	:	No. 10AP-353
		(C.P.C. No. 05CVH04-4220)
v.	:	
		(REGULAR CALENDAR)
Recovery Limited Partnership et al.,	:	
Defendants-Appellants.	:	
	:	
The Dispatch Printing Company et al.,	:	
Plaintiffs-Appellees,	:	
	:	No. 10AP-354
v.		(C.P.C. No. 05CV10-11795)
	:	
Gilman D. Kirk et al.,		(REGULAR CALENDAR)
	:	
Defendants-Appellees,	:	
[Recovery Limited Partnership and Columbus Exploration, LLC],	:	
Defendants-Appellants.	:	
	:	
Michael Williamson et al.,	:	
Plaintiffs-Appellees,	:	
	:	No. 10AP-355
v.		(C.P.C. No. 06CVH03-4469)
	:	
Recovery Limited Partnership et al.,		(REGULAR CALENDAR)
	:	
Defendants-Appellants,	:	
Thomas G. Thompson et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on January 13, 2011

Zeiger, Tigges & Little, LLP, Steven W. Tigges, and *Bradley T. Ferrell*, for appellees The Dispatch Printing Company and Donald C. Fanta.

Robol Law Office, LLC, Richard T. Robol, and *Rachel Chodera*, for appellants Recovery Limited Partnership and Columbus Exploration LLC.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Defendants-appellants, Recovery Limited Partnership ("RLP") and Columbus Exploration, LLC ("CX" or collectively, "appellants"), appeal from a judgment of the Franklin County Court of Common Pleas, in which the court ruled it had jurisdiction to appoint a receiver and determine a claim for breach of a partnership agreement, and that appellants had waived the defense of arbitration.

{¶2} In 1977, Thomas G. Thompson began researching deep ocean shipwrecks and the methods and technologies for locating them. In particular, Thompson was interested in the United States Mail Steamship Central America, *S.S. Central America* ("S.S. Central America"), which sank off the coast of South Carolina during a hurricane on September 12, 1857. The S.S. Central America was carrying several tons of gold when it sank.

{¶3} Thompson, along with a team, found and recovered the S.S. Central America. He organized RLP as an Ohio limited partnership to fund the project.

Thompson filed an action in the Federal District Court for the Eastern District of Virginia to establish ownership of the shipwreck and all of its contents. The federal court held that RLP owned 92.5 percent of the salvage rights to the S.S. Central America; the court awarded 7.5 percent of the salvage rights to a group of insurance companies whose predecessors insured portions of the gold that was lost when the ship sank.

{¶4} On April 13, 2005, plaintiffs-appellees, Donald Fanta and the Dispatch Printing Company, filed a complaint against appellants and two other defendants, Econ Engineering Associates, Inc. ("Econ") and Thompson, alleging breach of a limited partnership agreement against Econ and Thompson, breach of an operating agreement against Thompson, and breach of fiduciary duty against Econ and Thompson; appellees also sought an accounting of the finances of RLP and CX. Appellants filed an answer on May 11, 2005. Appellants' answer included as a defense that "[o]ne or more of the claims asserted in Plaintiff's complaint is or may be covered by an arbitration agreement." On October 25, 2005, appellees filed a second complaint, naming as defendants Gilman Kirk, Michael Ford, James Turner, and Arthur Cullman (as directors of CX), alleging breach of fiduciary duty, and seeking injunctive relief and compensatory damages. The trial court subsequently granted a motion to consolidate the two cases.

{¶5} On March 31, 2006, another group of individuals (hereafter "the Williamson plaintiffs") filed an action against RLP, CX, Thompson, Econ, Economic Zone Resource Associates, Kirk, Turner, Ford, and Cullman, alleging a right to a portion of the proceeds from the sale of the treasure. The trial court consolidated appellees' two cases and the action filed by the Williamson plaintiffs. The Williamson plaintiffs were granted intervention of right in the two previously consolidated cases.

{¶6} The claims asserted by the Williamson plaintiffs involved federal maritime claims, and fell within the federal district court's original subject-matter jurisdiction. The entire action was removed to the federal court pursuant to 28 U.S.C. 1441.

{¶7} After removal, appellees moved for an injunction to compel the production of financial and business records of CX and RLP. See *Williamson v. Recovery Limited Partnership* (S.D.Ohio 2009), No. C2-06-292. On July 20, 2006, the parties agreed to a consent order resolving appellees' claims for access to financial information, and dismissing appellees' damages claims without prejudice. The consent order required appellants to provide appellees' accountant, KPMG, full access to the companies' records to prepare a report of the financial affairs and condition of appellants.

{¶8} The district court exercised continuing jurisdiction to administer and enforce the parties' settlement agreement as set forth in the consent order. The district court subsequently found a lack of good faith by appellants in complying with the court's consent order, ordering them to pay to appellees $193,892 for accounting fees and $41,090 in attorney fees.

{¶9} On December 22, 2008, appellees filed an amended complaint. Appellants filed an answer and counterclaim January 22, 2009. The federal district court subsequently remanded appellees' two cases to the state trial court while retaining subject-matter jurisdiction over the Williamson plaintiffs.

{¶10} Following remand, appellants filed a memorandum arguing that the trial court lacked subject-matter jurisdiction to dissolve CX, and that the claims for breach of the RLP partnership agreement and to dissolve RLP must be stayed pending arbitration. The trial court issued a decision March 23, 2010, finding that appellants

waived their right to arbitrate claims within the scope of the arbitration clause in the RLP partnership agreement by actively participating in the lawsuit.

{¶11} On appeal, appellants set forth the following two assignments of error for this court's review:

> ASSIGNMENT OF ERROR #1: THE DECISION BELOW COMMITTED REVERSIBLE ERROR IN HOLDING THAT THE ANSWER OF DEFENDANTS-APPELLANTS TO THE ORIGINAL COMPLAINT HAD NOT RAISED ARBITRATION AS AN AFFIRMATIVE DEFENSE.
>
> ASSIGNMENT OF ERROR #2: THE DECISION BELOW COMMITTED REVERSIBLE ERROR IN FAILING TO CONSIDER WHETHER THE AMENDED COMPLAINT ALTERED THE SCOPE OR THEORY OF THE CASE SUCH THAT IT CREATED NEW AND DIFFERENT ISSUES.

{¶12} By the first assignment of error, appellants contend that the trial court erred in finding that appellants' answer to the original complaint did not raise arbitration as an affirmative defense. Appellants argue that the trial court erroneously accepted appellees' assertion that the answers filed by appellants contained no reference to arbitration.

{¶13} In support, appellants cite to language of the trial court's March 23, 2010 decision. Appellants' argument, however, mischaracterizes the trial court's decision, as a review of that portion of the decision indicates that the court was merely setting forth appellees' arguments. Specifically, the trial court's decision provides in part:

> Plaintiffs argue the following in support of their contention that any claim for arbitration has been waived. First, the answers filed to the original complaints contained no reference to arbitration, nor were any motions filed to compel it. Second, Defendants CX and RLP filed a counterclaim, which alleged a breach of the "same RLP Partnership Agreement that Defendants now…want to arbitrate. (Memorandum of Plaintiffs, at 15).

{¶14} Upon review, we find no error with the trial court's re-statement of appellants' arguments. We also find no merit to appellants' contention that the trial court based its finding of waiver on the failure to include arbitration as an affirmative defense. While the trial court's decision cites case law for the general proposition that the failure to raise an affirmative defense may constitute waiver, the basis for the trial court's finding of waiver, as will be discussed more fully infra, was the litigation strategy that appellants utilized over four years after the case was originally filed. Specifically, the court found that appellants "did not merely passively sit by as the case developed," and that appellants' "constant attention to what was unfolding makes the choice of proceeding with litigation their obvious strategy." Accordingly, appellants have not shown error based upon language in the trial court's decision discussing the effect of a party's failure to raise arbitration as an affirmative defense.

{¶15} Appellant's first assignment of error is without merit and is overruled.

{¶16} By the second assignment of error, appellants contend that the trial court erred in failing to consider whether the amended complaint altered the scope or theory of the case such that it created new and different issues. Appellants argue that the trial court: (1) failed to apply the proper standard for determining waiver in Ohio; (2) failed to consider the facts and issues inherent in the new claim in the amended complaint for dissolution of an Ohio limited partnership; and (3) failed to consider whether the amended complaint asserted a new claim for breach of the RLP limited partnership agreement.

{¶17} Typically, in considering an appeal from a decision granting or denying a motion to stay pending arbitration, appellate courts apply an abuse of discretion standard. See *Morris v. Morris*, 10th Dist. No. 10AP-15, 2010-Ohio-4750, ¶15, citing *Pyle v. Wells*

Fargo Financial, 10th Dist. No. 05AP-644, 2005-Ohio-6478, ¶11; *Cheney v. Sears, Roebuck & Co.*, 10th Dist. No. 04AP-1354, 2005-Ohio-3283, ¶7; *Cronin v. California Fitness*, 10th Dist. No. 04AP-1121, 2005-Ohio-3273, ¶7. However, the de novo standard of review is proper when the appeal presents a question of law. *Morris* at ¶15, citing *Peters v. Columbus Steel Castings Co.,* 10th Dist. No. 05AP-308, 2006-Ohio-382, ¶10, affirmed, 115 Ohio St.3d 134, 2007-Ohio 4787; citing *Von Arras v. Columbus Radiology Corp.*, 10th Dist. No. 04AP-934, 2005-Ohio-2562, ¶8, and *Dunkelman v. Cincinnati Bengals, Inc.,* 158 Ohio App.3d 604, 2004-Ohio-6425, ¶18-20. Therefore, " '[a] trial court's decision granting or denying a stay of proceedings pending arbitration is * * * subject to de novo review on appeal with respect to issues of law, which commonly will predominate because such cases generally turn on issues of contractual interpretation or statutory application.' " *Morris* at ¶15, quoting *Hudson v. John Hancock Financial Servs*., 10th Dist. No. 06AP-1284, 2007-Ohio-6997, ¶8, citing *Peters* at ¶10.

{¶18} Appellants assert a right to arbitration based upon the following provision of the RLP limited partnership agreement:

> **Disputes and Arbitration.** Any dispute or controversy arising under, out of, or in connection with or in relation to this Agreement, and any amendments hereof, or the breach thereof, or in connection with the dissolution of the Partnership, shall be determined and settled by arbitration to be held in Columbus, Ohio.

{¶19} An arbitration clause in a contract " 'is generally viewed as an expression that the parties agree to arbitrate disagreements within the scope of the arbitration clause, and, with limited exceptions, an arbitration clause is to be upheld just as any other provision in a contract should be respected.' " *Morris* at ¶16, quoting *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 1998-Ohio-294. The right to arbitration may be

waived just like any other contractual right. *Murtha v. Ravines of McNaughton Condominium Assn.*, 10th Dist. No. 09AP-709, 2010-Ohio-1325, ¶20.

{¶20} In *Mills v. Jaguar-Cleveland Motors, Inc.* (1980), 69 Ohio App.2d 111, 113, the court explained as follows:

> [A] plaintiff's waiver may be effected by filing suit. When the opposite party, the potential defendant, is confronted with a filed lawsuit, the right to arbitrate can be saved by seeking enforcement of the arbitration clause. This is done under R.C. 2711.02 by application to stay the legal proceedings pending the arbitration. Failure to move for a stay, coupled with responsive pleadings, will constitute a defendant's waiver.

{¶21} A party asserting waiver must prove that the waiving party knew of the existing right to arbitrate and, based on the totality of the circumstances, acted inconsistently with that known right. *Murtha* at ¶21. " ' "The essential question is whether, based on the totality of the circumstances, the party seeking arbitration has acted inconsistently with the right to arbitrate." ' " *Morris* at ¶18, quoting *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 414, quoting *Phillips v. Lee Homes, Inc.* (Feb. 17, 1994), 8th Dist. No. 64353. In determining whether the totality of the circumstances supports a finding of waiver, a court may consider such factors as: (1) whether the party seeking arbitration invoked the court's jurisdiction by filing a complaint or claim without first requesting a stay; (2) the delay, if any, by the party seeking arbitration to request a stay; (3) the extent to which the party seeking arbitration has participated in the litigation; and (4) whether prior inconsistent acts by the party seeking arbitration would prejudice the non-moving party. *Tinker v. Oldaker*, 10th Dist. No. 03AP-671, 2004-Ohio-3316, ¶20, citing *Baker-Henning Prods., Inc. v. Jaffe* (Nov. 7, 2000), 10th Dist. No. 00AP-36.

{¶22} In the present case, the trial court found "no acceptable reason" as to why appellants failed to claim arbitration "for so many years." As noted in addressing the first assignment of error, the trial court held that appellants "did not merely passively sit by as the case developed"; rather, the court determined that appellants' "constant attention to what was unfolding makes the choice of proceeding with litigation their obvious strategy, thus clearly meeting the second prong of the test involving waiver of the defense of arbitration." Further, the court found the first prong (i.e., awareness of the arbitration clause) to be beyond dispute as appellants had repeatedly cited over the years portions of the agreement.

{¶23} Upon review, the record supports the trial court's finding that appellants actively litigated this action for over four years. While the original complaint was filed April 13, 2005, appellants did not request their stay until January 2009. Further, even after requesting the stay, appellants filed a counterclaim to the amended complaint, demanded a trial by jury, served written document requests, and noticed depositions, i.e., actions consistent with a trial strategy. We note that, while the case was in the federal district court, the court found appellants in willful contempt, citing "years of contentious litigation caused in major part by the refusal of the Defendants to tender documents required to be disclosed to the Accountants by the Consent Order." *Williamson*. That court also noted that "Defendants' conduct caused significant delay and expense," that the accounting "was sandbagged by the Defendants through a variety of means," and that "[w]hat should have taken several months has taken several years." Id. Given appellants' active participation in litigation for more than four years, and, in light of the time and money invested as a result of their litigation strategy, we

find no error with the trial court's determination that appellants' delay in asserting the right to arbitrate justified a finding of waiver. See *Tinker* at ¶22 (where appellant participated in discovery, trial depositions, pre-trials, and settlement discussions, and because appellees had likewise been preparing for trial and would be prejudiced if it stayed the proceedings, the trial court did not abuse its discretion in denying appellant's motion to compel arbitration).

{¶24} Appellants contend that all of the grounds for waiver of arbitration asserted by appellees occurred before the filing of the amended complaint, and that the amended complaint revived their right to arbitration because it altered the scope or theory of the case. More specifically, appellants argue that appellees' amended complaint, which sought appointment of a receiver to dissolve RLP, created new and different issues not raised in the original complaint.

{¶25} In its decision, the trial court relied in part upon a federal decision, *Manasher v. NECC Telecom* (C.A.6, 2009), 310 Fed.Appx. 804. In *Manasher*, the plaintiffs' first amended complaint was premised on the same facts and transactions as the original complaint, but added two new claims. After the amended complaint was filed, and a year after the original complaint was filed, the defendant filed a motion to compel arbitration, which the federal district court denied. In *Manasher,* the Sixth Circuit affirmed, finding that the defendant waived its right to arbitrate by failing to plead arbitration as an affirmative defense and by actively participating in litigation for almost a year without asserting that it had a right to arbitration. On appeal, the defendant in *Manasher* argued, as appellants do here, that the amended complaint sufficiently changed the facts and claims asserted by the plaintiffs in their original complaint such

that defendant's right to compel arbitration was revived. The federal court, however, in considering the allegations in the original and amended complaints, found that the additional claims in the amended complaint "did not substantially alter the scope or theory of the case such that it created new and different issues." Id. at 806.

{¶26} In the present case, the original complaint in case No. 05-CVH04-4220 alleged causes of action for (1) breach of the limited partnership agreement as to Econ and Thompson; (2) breach of the operating agreement regarding Thompson; (3) a violation of R.C. 1782.21 (disclosure of certain information from the general partner to the limited partners, regarding Econ and Thompson); (4) breach of fiduciary duty by Thompson regarding CX; (5) breach of fiduciary duty by Thompson and Econ regarding RLP; (6) an accounting for RLP; and (7) an accounting for CX. The original complaint in case No. 05-CVH10-11795 involved the same plaintiffs and named as defendants the same four individuals, as well as up to ten John Doe defendants.

{¶27} The amended complaint, which contained more factual allegations than the original complaint, named the same individuals as in the original complaint, and named the same business entities as were named in case No. 05-CVH04-4220. Count 1 of the amended complaint alleged breach of the CX operating agreement; Count 2 alleged breach of the implied duty of good faith and fair dealing; Count 3 alleged breach of fiduciary duty as to CX; Count 4 alleged breach of the RLP Partnership Agreement; Count 5 alleged breach of fiduciary duty regarding RLP; and Counts 6 and 7 requested the appointment of a receiver for CX and RLP.

{¶28} In arguing that the amended complaint revived the right to arbitrate, appellants assert that the trial court erred in failing to consider the grounds required for

the dissolution of a limited partnership under Ohio's limited partnership statute. Appellants' argument, however, ignores part of the trial court's decision. Here, as in *Manasher,* the trial court compared the complaints.

{¶29} In reviewing the two original complaints and the amended complaint, the trial court found in relevant part:

> The main differences are, first, that Plaintiffs now ask for the Appointment of a Receiver to dissolve CX and RLP, as opposed to obtaining an accounting from them. While the appointment of a receiver is clearly a different claim than asking for an accounting (claims which Defendants hold have now been abandoned), the underlying facts have not significantly changed.
>
> To obtain an accounting, a plaintiff would have to prove that a contract existed between plaintiff and defendant, that defendant breached the contract by not providing information which, under the contract, the plaintiff was entitled to receive, and that an accounting is therefore required to ascertain the current status of that defendant.
>
> * * *
>
> Although the remedy is different, the underlying basis for the seeking of either remedy is, in this instance, remarkably similar. Both actions imply misdeeds of the same nature (refusal to account for invested monies, for example), and both will, in this case, require similar, if not identical, evidence in order to prevail.

{¶30} Upon review, we agree with the trial court that the factual allegations do not substantially change the nature of the action. Appellees sought appointment of a receiver based upon allegations that the individual defendants, in holding themselves out as directors, fiduciaries, managers, and majority owners of RLP and CX, had failed to hold annual meetings, failed to report on the financial condition of the company, and failed to properly manage assets and operations. Those same facts and allegations

were reflected in the original complaints. We conclude that the trial court did not err in determining that the additional new remedy in the amended complaint did not revive the right or present a new right to compel arbitration where the claims were not based on new or different facts. Further, as noted by the trial court, the parties to this case invested a great deal of time and effort at all stages of this litigation, and the factual dispute remains the same, regardless of the remedy sought.

{¶31} We similarly find unpersuasive appellants' contention that the amended complaint, in adding RLP as a defendant in its claim for breach of the RLP partnership agreement, revived its right to seek arbitration. Count 5 of the original complaint alleged a breach of duty of the RLP partnership agreement by Thompson and Econ, while Count 6 of the amended complaint alleged a breach of the RLP partnership agreement by Thompson, Econ, and RLP. In considering the allegations, we agree with appellees that the basis for the claim in the amended complaint is the same as in the original. Further, RLP has been a defendant from the outset, and the individual defendants are the same principals involved in the partnership and LLC. As in *Manasher*, the new claims filed in the amended complaint "did not substantially alter the scope or theory of this matter in such a way as to revive the defendant's right to compel arbitration." *Manasher* at 807.

{¶32} Upon review, we find that the trial court applied the appropriate test for waiver in concluding that appellants were aware of the existing right to arbitrate and, based upon the totality of the circumstances, acted inconsistently with that right in actively pursuing litigation as a strategy over arbitration. Thus, the trial court did not err

in determining that appellants waived the right to arbitration. Accordingly, appellants' second assignment of error is without merit and is overruled.

{¶33} For the foregoing reasons, appellants' two assignments of error are overruled, and the judgment of the Franklin County Court of Common Peas is hereby affirmed.

Judgment affirmed.

SADLER and TYACK, JJ., concur.

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