[Cite as *Dixon v. Residential Fin. Corp.*, 2010-Ohio-4409.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

JACK DIXON, et al.	:	
Plaintiffs-Appellees,	:	CASE NO. CA2009-11-024
	:	O P I N I O N
- vs -		9/20/2010
	:	
RESIDENTIAL FINANCE CORP., et al.,	:	
Defendant-Appellants.	:	

APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. 2006CV-03-110

Stanley L. Myers, LLC, Stan L. Myers, 633 Eagle Ridge, Powell, Ohio 43065, for plaintiffs-appellees

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YOUNG, J.

{¶1} Defendants-appellants, Residential Finance Corporation and its former

employee, Jacob Shumaker (collectively, Residential Finance), appeal from the Madison County Court of Common Pleas decision denying their motion to stay proceedings pending arbitration in a suit brought by plaintiffs-appellees, Jack and Cheryl Dixon. For the reasons outlined below, we affirm.

{¶2} In October of 2002, the Dixons, an elderly couple who receive a fixed income from pension benefits and Social Security disability, purchased a home located in London, Madison County, Ohio for $115,000.

{¶3} In April 2004, after discovering a water leak in their basement, the Dixons were referred to Jacob Shumaker, a "loan originator" with Residential Finance, a mortgage brokerage firm, to obtain a loan in order to pay for the necessary home repairs. According to the Dixons, Shumaker assured them that any loan he obtained for them would not increase their $578 monthly mortgage payment.

{¶4} On April 30, 2004, the Dixons entered into a loan agreement with Interval Mortgage Corporation. The loan documents, which the Dixons admittedly signed, and which contained an arbitration agreement and adjustable rate rider, increased the Dixons monthly mortgage payment from $578 to $682.07. Residential Finance, besides being listed as a recipient of a mortgage broker fee and broker processing fee, was otherwise not a party to this loan agreement.

{¶5} On July 21, 2004, after asking Shumaker to "fix" their increased monthly mortgage payments, the Dixons entered into a new loan agreement with Residential Finance as the lender. However, this new loan agreement further increased the Dixons' total monthly mortgage payment to $932.50. Not being able to make their ever increasing monthly mortgage payments due to their limited fixed income, the Dixons defaulted on the loan.

{¶6} On March 28, 2006, the Dixons filed suit against Residential Finance in the Madison County Court of Common Pleas alleging, among other things, violations of the Ohio Consumer Sales Practices Act, the Ohio Mortgage Brokers Act, breach of its fiduciary duties, and fraud.

{¶7} On October 28, 2009, over three-and-a-half years later, and after Residential Finance had already filed an answer, a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment, a renewed motion for summary judgment, a motion to reconsider the denial of its renewed motion for summary judgment, a motion for protective order, a motion to bifurcate, four motions in limine, numerous trial briefs, which included its proposed jury instructions and interrogatories, a variety of discovery requests, and well after it deposed the Dixons and their expert witness, Deborah DuPilka, Residential Finance filed a motion to stay proceedings pending arbitration. At that time, a jury trial was scheduled to begin on November 10, 2009, a mere 13 days later.

{¶8} On November 4, 2009, the trial court, which had already set the matter for jury trial on seven separate occasions, denied Residential Finance's motion. Residential Finance now appeals from the trial court's decision denying its motion to stay proceedings, raising one assignment of error.

{¶9} "THE TRIAL COURT ERRED IN DENYING RESIDENTIAL FINANCE'S MOTION TO STAY PROCEEDINGS PENDING ARBITRATION."

{¶10} In its single assignment of error, Residential Finance argues that the trial court erred by denying its motion to stay proceedings pending arbitration. In support of its argument, Residential Finance claims that even though it was a nonsignatory to the arbitration agreement contained in the April 30, 2004 loan

documents, it should, nonetheless, still be entitled to compel arbitration "under a variety of ordinary contract and agency-related legal theories, including[,] but not limited to[,] equitable estoppel and third-party beneficiary law." However, even if we were to agree with these claims, under the facts and circumstances of this case, we find Residential Finance implicitly waived the enforcement of the arbitration agreement by repeatedly failing to assert its alleged rights under this agreement over the pendency of this litigation.[1]

{¶11} While there exists a strong public policy in favor of arbitration, it is well-settled that a party's right to pursue arbitration may be waived by implication. *Middletown Innkeepers, Inc. v. Spectrum Interiors*, Butler App. No. CA2004-01-020, 2004-Ohio-5649, ¶14; *Georgetowne Condominium Owners Assn. v. Georgetowne Ltd. Partnership*, Warren App. No. CA2002-02-010, 2002-Ohio-6683, ¶12; citing *Griffith v. Linton* (1998), 130 Ohio App.3d 746, 751. To establish an implicit waiver, "the complainant is required to demonstrate, based on the totality of the circumstances, that the defending party knew of an existing right to arbitration and acted inconsistently with that right to arbitrate." *Georgetowne* at ¶11.

{¶12} When considering whether a party acted so inconsistent with its right to arbitrate that an implied waiver may be found, courts must undertake a case-by-case review of all relevant facts and circumstances to examine the nature and extent of a party's participation in the litigation. Id. at ¶12; *Middletown Innkeepers* at ¶15. In turn, although "[t]here are no talismanic formulas for determining the existence of an

1. In its November 4, 2009 decision denying Residential Finance's motion to stay proceedings, the trial court found Residential Finance "has no standing to invoke the protections of the Arbitration Agreement for which it was not a party." While we may question such a finding, as this court has stated previously, "[a] judgment will be affirmed if it achieves the right result for the wrong reason." *Current Electrical & Lighting Supplies v. Whitaker* (Dec. 4, 2000), Clermont App. No. CA2000-01-006, 8, citing *Perry v. General Motors Corp.* (1996), 113 Ohio App.3d 318.

implicit waiver, and no one factor can be isolated or singled out to achieve controlling weight," relevant facts and circumstances to consider include: "(1) any delay in the requesting party's demand to arbitrate via a motion to stay judicial proceedings and an order compelling arbitration; (2) the extent of the requesting party's participation in the litigation prior to its filing a motion to stay the judicial proceedings, including a determination of the status of discovery, dispositive motions, and the trial date; (3) whether the requesting party invoked the jurisdiction of the court by filing a counterclaim or third-party complaint without asking for a stay of the proceedings; and (4) whether the nonrequesting party has been prejudiced by the requesting party's inconsistent acts." *Georgetowne* at ¶12, citing *Atkinson v. Dick Masheter Leasing, Inc.*, Franklin App. No. 01AP-1016, 2002-Ohio-4299; *Land v. J.D. Byrider, Inc.*, Butler App. No. CA2006-02-038, 2007-Ohio-1222; *Middletown Innkeepers* at ¶15; *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 414.

{¶13} After a thorough review of the record, and based on the totality of the circumstances, we find Residential Finance obtained the April 30, 2004 loan documents, which included the arbitration agreement now at issue, no later than June 5, 2007, the same day it deposed the Dixons.[2] Due to Residential Finance's intimate knowledge of these documents, which is evidenced by its reference to specific pages and paragraphs contained in the 101 pages making up the loan agreement, we have no doubt that Residential Finance knew of its alleged rights under the arbitration agreement well before filing its October 28, 2009 motion to stay

2. We note, however, that Residential Finance likely had access to these documents well before this date as the record contains two "Notice of Service" filings dated June 9, 2006 and November 7, 2006 wherein the Dixons certified they "mailed by regular mail and email" Residential Finance's requested discovery.

proceedings pending arbitration.

{¶14} Furthermore, we find Residential Finance litigated this matter to such a significant degree that any claims it may make alleging such acts were somehow consistent with its supposed right to arbitrate are simply implausible. As noted above, Residential Finance did not file its motion to stay proceedings until three-and-a-half years after the Dixons had filed their original complaint. During this time, Residential Finance filed, among other things, an answer, a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment, a renewed motion for summary judgment, a motion to reconsider the denial of its renewed motion for summary judgment, a motion for protective order, a motion to bifurcate, four motions in limine, numerous trial briefs, which included its proposed jury instructions and interrogatories, a variety of discovery requests, and took depositions from the Dixons, as well as their expert witness, Deborah DuPilka.[3] It is certainly reasonable to conclude that at least some of these actions prejudiced the Dixons, particularly insofar as they had to spend time and money defending against Residential Finance's litany of motions. See *Middletown Innkeepers* at ¶16. Therefore, based on the totality of the circumstances, we find Residential Finance acted in such a matter that was so inconsistent with their alleged right to arbitrate that it undoubtedly, albeit implicitly, waived such right.

{¶15} Despite this, Residential Finance claims that any finding of waiver "turn[s] a blind eye to the very terms of the agreement at issue regarding waiver."

3. Among Residential Finance's various motions is its "Response to [the Dixons'] Motion to Set Case for Trial and for a Discovery Date" filed on August 12, 2009, or just over two months prior to the filing of its motion to stay, in which it states that it has "no objection to [the] case being placed on the trial calendar."

However, while the arbitration agreement does state that "[t]he use of the courts shall not constitute waiver of the right of any party * * * to submit any [c]laim to arbitration," interpreting such a clause to allow a party to engage in such extensive litigation over a period of several years only to file a motion to stay proceedings on the eve of trial, which, in this case, was scheduled to begin a mere 13 days later, would result in nothing short of a manifest absurdity.[4] *Fultz & Thatcher v. Burrows Group Corp.*, Warren App. No. CA2005-11-126, 2006-Ohio-7041, ¶26 ("[c]ommon words appearing in a contract will be given their ordinary meaning unless manifest absurdity results").

{¶16} As this court has recognized, "[i]t is incumbent upon the party seeking arbitration to immediately move for a stay of proceedings." *Middletown Innkeepers* at ¶17; *Georgetowne* at ¶17. Residential Finance failed to do so in this case. Therefore, because we find Residential Finance acted so inconsistently with its alleged right to arbitrate that it effectively, albeit implicitly, waived such a right, we find no error in the trial court's decision denying its motion to stay proceedings pending arbitration. Accordingly, Residential Finance's sole assignment of error is overruled.

{¶17} Judgment affirmed.

POWELL and RINGLAND, JJ., concur.

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4. Residential Finance argues that this case is similar to that of *Household Realty Corp. v. Rutherford*, Montgomery App. No. 20183, 2004-Ohio-2422; and *U.S. Bank v. Wilkens*, Cuyahoga App. No. 93088, 2010-Ohio-262. We disagree. While both of those cases dealt with a substantially similar waiver provision contained within an arbitration agreement, the issue before those courts was not whether that clause precludes a court from ever finding waiver occurred, but instead, whether the act of filing a lawsuit waived that party's right to later compel arbitration. See *Household Realty* at ¶20; *U.S. Bank* at ¶10. In fact, even after finding the waiver provision "explicitly provided the filing of a foreclosure action did not amount to a waiver of arbitrable claims," the Eighth District Court of Appeals in *U.S. Bank* went on to analyze whether the bank waived its right to arbitrate by engaging in inconsistent acts. See Id. at ¶10-45.