[Cite as *White v. Smith*, 2015-Ohio-1671.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

GORDON A. WHITE	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2014-CA-48
	:	
v.	:	Trial Court Case No. 2012-CV-1135
	:	
SEAN SMITH, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendants-Appellants	:	
	:	

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O P I N I O N

Rendered on the 1st day of May, 2015.

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WELBAUM, J.

{¶ 1} In this case, Defendants-Appellants, Sean Smith and Smith Construction Group, Inc. (collectively "the Smith Defendants") appeal from a judgment denying their motion to refer the trial court case to arbitration. In support of their appeal, the Smith Defendants contend that the trial court erred in concluding that they waived their right to arbitration when they failed to object to a mediator's recommendation. The Smith Defendants also contend that the trial court erred in finding that they waived their right to binding arbitration by participating in litigation.

{¶ 2} We conclude that the trial court did not abuse its discretion in finding that the Smith Defendants waived their right to binding arbitration by participating in litigation. The court's decision is supported by the record. Furthermore, the resolution of this assignment of error moots any issues concerning whether the contract between the parties required arbitration. Specifically, even if a contract requires arbitration, a contracting party can waive the right to arbitration. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 3} On April 28, 2006, Defendant-Appellant, Sean Smith, and Plaintiff-Appellee, Gordon White, entered into an Integrated Buy-Sell Agreement of Smith & White Construction Group, Inc., and Smith & White Development Group, LLC ("Buy-Sell Agreement."). Smith and White were each 50% shareholders in these companies.

{¶ 4} The Buy-Sell Agreement included a right to purchase or an obligation to sell shares upon the occurrence of a triggering event. This event included, among other

things, an owner's termination of employment. On May 26, 2010, White tendered his resignation, which triggered the sale of White's shares.

{¶ 5} The Buy-Sell Agreement contained an alternate dispute resolution provision in Section 11.07, which provided, in pertinent part, as follows:

> If a dispute relating to this Agreement arises among the parties, all parties agree to resolve the dispute in the manner provided in this Section. Except with respect to equitable relief as provided below, the dispute resolution procedures in this Section are a complete replacement of the rights either party may have to file a lawsuit in court against the other party. Both parties waive the right to file a lawsuit against each other, unless the other party fails or refuses to follow the dispute resolution procedures described below.
>
> (a) Mediation
>
> If the parties are not able to resolve a dispute through private negotiation, they will submit the issue to private mediation. As a precondition to mediation, a party must first serve on the other party a written notice declaring an impasse in negotiations and intent to seek arbitration. Within 30 days after the notice of impasse, the party must commence the mediation process by serving on the other party a written demand for mediation. All further rights of the aggrieved party are forever waived and barred if the written demand is not served within the 30-day period. Within 15 days after the demand for mediation, the parties will select a mutually agreeable professional private mediator to hear the case.

If they are not able to agree, each party will select a mediator, who will then select a reputable independent professional mediator to hear the case. All parties agree to follow the standard procedures established by the mediator. At the conclusion of the mediation, the mediator will render his or her recommendation for settlement of the dispute. All parties agree to consider the mediator's recommendation in good faith as a basis for settling the dispute in accordance with the recommendation.

(b) Arbitration

If a party rejects the mediator's recommendation, the rejecting party will have the right to submit to binding arbitration. Delivering a written demand for arbitration to the other party within 30 days after the date of the mediator's recommendation will commence arbitration. If the written demand is not served within the 30-day period, all further rights of the rejecting party are forever waived and barred, and the mediator's recommendation will stand as the final resolution of the dispute. Any arbitration must be instituted and heard in the county in which the Companies' principal office is then located, under the rules and procedures of the American Arbitration Association. The decision of the arbitrators will be final and binding on both parties, and may be entered in any court of competent jurisdiction for enforcement.

* * *

(d) Exception for Equitable Relief

The alternative dispute resolution procedures described in this

> Section do not apply to any equitable remedies to which a party may be entitled, if those remedies can only be issued and enforced by a court.

Complaint, Ex. A, Buy-Sell Agreement, pp. 24-25.

{¶ 6} Because the parties were not able to resolve the dispute, they engaged a private mediator, and came to terms regarding the sale on December 10, 2010.[1] They then entered into a Settlement and Release Agreement ("Settlement Agreement"), which was signed on December 14, 2010. Under the Settlement Agreement, the purchase price for White's interest was $509,190. Sean Smith was required to pay White $46,260 contemporaneously with the signing of the agreement. He was then obligated to pay the remaining amount in 20 semi-annual payments of $23,145, at zero percent interest. The companies were also required to pay White $75,000 contemporaneously with the signing of the agreement.

{¶ 7} Paragraph 7 of the Settlement Agreement states that:

> Both parties acknowledge that this document modifies and amends the terms of the transaction as it relates to the express terms of the Buy-Sell Agreement. Both parties likewise affirm that the terms of the Buy-Sell Agreement shall remain in effect, as modified herein, and shall continue to govern the parties, as modified herein, until full and final payment of the Promissory Note is made, at which time the Buy-Sell Agreement shall be terminated and null and void as to all parties.

Settlement Agreement, p. 3.

{¶ 8} Neither party filed a request for arbitration after the Settlement Agreement

[1] It is unclear whether the agreement resulted from a specific "mediator's recommendation." No formal decision of a mediator is in the record.

was signed. Subsequently, in 2011, White filed a civil action against the Smith Defendants and others. He then dismissed the action in September 2012. White refiled his action on November 7, 2012, against the Smith Defendants, Kentner Sellers CPAs, and various employees of Kentner Sellers, including Jon Stangel, Greg Toman, and Michael Wardley.

{¶ 9} The complaint alleged that Smith and others had fraudulently induced White to enter into the Settlement Agreement. According to the complaint, White became aware that he had been defrauded within 45 days after signing the Settlement Agreement.[2] The complaint contained five causes of action, based on: (1) fraudulent inducement; (2) breach of fiduciary duty involving the work in progress at the White & Smith companies, the amount of income to be generated during the 2010 tax year, and the tax implications of the Settlement Agreement; (3) negligent or material misrepresentations of fact by Wardley, who provided accounting services to the White & Smith companies; (4) negligent preparation of a July 30, 2010 valuation analysis by Stangel and Toman; and (5) civil conspiracy of Sean Smith and others.

{¶ 10} On November 13, 2012, the Smith Defendants filed their answer to the complaint, and included various defenses, including failure to join parties, accord and satisfaction, and contributory negligence. However, they did not raise any issues or defenses relating to arbitration. After the action was filed, discovery proceeded, and there were various discovery issues, including motions to compel filed by White in January, July, and October 2013, as well as a motion for a protective order filed by Smith in October 2013. Some of these issues were resolved by the parties; others were

[2] Notably, by this time, White's ability to challenge a mediation recommendation would already have expired.

resolved by the court.

{¶ 11} In March 2013, the trial court referred the parties to the court's mediation program, and set a mediation hearing for July 30, 2013. In May 2013, the Smith Defendants filed a mediation statement, and did not mention arbitration. Subsequently, in June 2013, the parties agreed to extend discovery deadlines, and the trial court extended the deadline to September 30, 2013.

{¶ 12} Court mediation occurred as scheduled on July 30, 2013, and the mediator filed a status report, indicating that a subsequent mediation conference was scheduled for November 20, 2013, from 9:00 a.m. to 4:00 p.m. The status report was approved by counsel for all parties. In the meantime, discovery proceeded, with depositions being taken of various people, including Smith.

{¶ 13} In September 2013, the parties again filed a joint motion to extend discovery for another six months, and the request was signed by counsel for all parties. Discovery was then extended until April 1, 2014. In November 2013, the mediator filed an amended scheduling notice, informing the court that the mediation scheduled for November 20, 2013, had been converted into a telephone status conference. The outcome of this conference was that a subsequent mediation was scheduled for March 6, 2014, from 9:00 a.m. to 4:00 p.m. In December 2013, Sean Smith filed a motion asking to continue the March 6, 2014 mediation because he would be out of the country. The court denied the motion on December 19, 2013. At none of these points did Smith ever mention arbitration.

{¶ 14} On March 4, 2014, White filed a motion seeking permission to file an amended complaint. White indicated in the motion that the opposing parties had

authorized the amendment. The proposed amended complaint eliminated Stangel and Toman as parties, and added a sixth cause of action for unjust enrichment, alleging that Smith and Wardley had concocted a plan that would allow Smith to acquire White's shares for significantly less than the fair market value. This cause of action also alleged that Smith and Wardley had engaged in conduct that resulted in White incurring a tax liability in excess of the sales price received for his shares,

{¶ 15} The second mediation occurred on March 6, 2014, as scheduled, and a further mediation was set for April 1, 2014, from 1:00 to 5:00 p.m. This was subsequently rescheduled for June 17, 2014.

{¶ 16} On March 27, 2014, the court granted White permission to file the amended complaint, and the amended complaint was filed the next day. The previous day, on March 27, 2014, the Smith Defendants had filed an answer, asserting for the first time that the Buy-Sell Agreement required the parties to submit to binding arbitration. The Smith Defendants also filed a motion asking the court to dismiss the action based on White's failure to follow the remedies in Section 11.07. In the alternative, they asked the court to refer the matter to binding arbitration.

{¶ 17} After White responded to the motion and asked for a hearing, the trial court referred the matter to a magistrate. The court then rescheduled the mediation conference to August 1, 2014. Subsequently, the trial court filed a supplemental case management order, setting mediation for October 1, 2014, and a jury trial for October 27, 2014.

{¶ 18} On June 24, 2014, the magistrate issued a decision, concluding that Section 11.07 was inapplicable because the parties had reached an agreement and

neither had rejected the agreement. The magistrate also noted that White's claims of fraudulent inducement had been brought in connection with the Settlement Agreement, not the Buy-Sell Agreement. Finally, the magistrate discussed the history of the case, including extensive discovery proceedings and court intervention, and the fact that the Smith Defendants had failed to object to the litigation. The magistrate, therefore, concluded that the Smith Defendants had waived their right to binding arbitration.

{¶ 19} On July 1, 2014, the Smith Defendants filed objections to the magistrate's decision. The trial court then overruled the objections and adopted the magistrate's decision in late October 2014. This appeal followed.

II. Waiver

{¶ 20} For purposes of convenience, we will consider the assignments of error out of order. The Smith Defendants' Second Assignment of Error states that:

> The Trial Court Erred in Concluding that Appellant Waived Its Right to Binding Arbitration By Participation in Litigation.

{¶ 21} Under this assignment of error, the Smith Defendants contend that the trial court erred in concluding that they waived their right to arbitration. They concede that they participated in litigation, but argue that when the complaints were filed in 2011 and 2012, some discovery was necessary in order to understand why White would file a civil suit after having spent considerable time negotiating a settlement agreement. The Smith Defendants further contend that the Buy-Sell Agreement contains the proper methodology for resolving the parties' dispute, as it defines who the owners are, the date upon which the departing owner's equity interest is to be determined, and the

methodology for valuation.

{¶ 22} In the case before us, the parties stipulated in Section 12.01 of the Buy-Sell Agreement that Ohio law would govern all legal and equitable issues relating to the agreement. The Ohio arbitration law provides in R.C. 2711.02(B) that:

> If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

{¶ 23} We have previously observed that "[a]rbitration is encouraged as a method to settle disputes, and a presumption favoring arbitration arises when the claim in dispute falls within the scope of an arbitration provision." *Baker v. Schuler*, 2d Dist. Clark No. 02CA0020, 2002-Ohio-5386, ¶ 30, citing *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 700 N.E.2d 859 (1998). "The standard of review when considering whether a trial court has properly granted or denied a motion to stay the proceedings for arbitration is abuse of discretion." *Baker* at ¶ 26, citing *Harsco Corp. v.. Crane Carrier Co*., 122 Ohio App.3d 406, 701 N.E.2d 1040 (3d Dist.1997). With specific reference to waiver, " '[T]he 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 an abuse of discretion.' " *Murtha v. Ravines of McNaughton Condominium Assn.*, 10th Dist. Franklin No. 09AP-709, 2010-Ohio-1325, ¶ 20, quoting *ACRS, Inc. v. Blue Cross & Blue Shield of Minnesota*, 131 Ohio App.3d 450,

722 N.E.2d 1040 (8th Dist.1998). An abuse of discretion " 'implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " (Citations omitted.) *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 24} "Like any other contractual right, the right to arbitrate may be waived." *Murtha* at ¶ 20, citing *Rock v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 79 Ohio App.3d 126, 128, 606 N.E.2d 1054 (8th Dist.1992). "Due to Ohio's strong policy favoring arbitration, the party asserting a waiver has the burden of proving it." (Citations omitted.) *Id.*

{¶ 25} Concerning the application of the waiver doctrine, the Tenth District Court of Appeals recently stated that:

> "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." *Dispatch Printing Co*. [*v. Recovery Ltd. Partnership*, 10th Dist. Franklin No. 10AP-353, 2011-Ohio-80] at ¶ 21, citing *Murtha* at ¶ 21. "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." *Id.*, citing *Tinker v. Oldaker*, 10th Dist. No. 03AP-671, 2004-Ohio-3316, ¶ 20. "Waiver

> attaches where there is active participation in a lawsuit evincing an acquiescence to proceeding in a judicial forum." *Tinker* at ¶ 21.

Pinnell v. Cugini & Cappoccia Builders, Inc., 10th Dist. Franklin No. 13AP-579, 2014-Ohio-669, ¶ 18.

{¶ 26} Our own district has stated that:

> Waiver is, of course, a recognized ground for revocation of a contractual undertaking. Prejudice to the other party is a factor that may be considered in determining whether actions taken by the allegedly waiving party are so inconsistent with the exercise of the right of arbitration as to constitute an implicit waiver of that right; but prejudice is not something that must be proven, independently of waiver. *Medical Imaging Network, Inc. v. Medical Resources* (June 2, 2005), Mahoning App. No. 04 MA 220, ¶ 26; *Phillips v. Lee Homes, Inc.* (February 17, 1994), Cuyahoga App. No. 64353, pp. 17-18.

G.A. White Ents. v. Black, 2d Dist. Greene No. 06-CA-95, 2007-Ohio-802, ¶ 18.

{¶ 27} In view of the express terms of the Buy-Sell Agreement, the Smith Defendants were aware of their right to arbitration. Although they did not initially invoke the trial court's jurisdiction, all the remaining factors weigh heavily in favor of waiver. Specifically, the Smith Defendants appeared in not just one, but two litigations, ranging over a period of almost three years, before they asserted a right to arbitrate. They conducted and participated in extensive discovery, involved the court in discovery matters, agreed to various extensions so that discovery could be concluded prior to trial, and participated in several court-ordered mediation sessions, all without raising the issue

of arbitration until nearly a year and a half after the second case was filed. In a similar situation, the Tenth District Court of Appeals concluded that the defendants had waived their right to arbitration. *Pinnell* at ¶ 23-24.

{¶ 28} As an additional matter, we note that the Smith Defendants do not really address the issue of waiver during their briefs, other than to note that the Settlement Agreement reaffirmed their commitment to the terms of the Buy-Sell Agreement, including arbitration, and to note that the Buy-Sell Agreement is pertinent to various issues involved in the case. These facts, however, are irrelevant to the issue of waiver. In *Pinnell*, the contract mandated arbitration, but the court of appeals stressed that "[t]he right to arbitration may be waived just like any other contractual right." (Citations omitted.) *Pinnell*, 10th Dist. Franklin No. 13AP-579, 2014-Ohio-669, at ¶ 17. The court also held that " 'a written waiver provision, just like any other provision in a contract, can be waived by actions of the parties.' " *Id.* at ¶ 19, quoting *Snowville Subdivision Joint Venture Phase I v. Home S. & L. of Youngstown, Ohio*, 8th Dist. Cuyahoga No. 96675, 2012-Ohio-1342, ¶ 17, which in turn, cites *Glenmoore Builders, Inc. v. Smith Family Trust*, 9th Dist. Summit No. 24299, 2009-Ohio-3174, ¶ 41.[3]

{¶ 29} Furthermore, contrary to the Smith Defendants' contention, the issues involved in this case relate to alleged fraud in the valuation of the business, as well as an alleged conspiracy between Smith and Wardley to impose tax consequences on White that would exceed the money he received from the sale of his interest. These situations appear to involve facts that have little connection to the contract terms.

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[3] The Buy-Sell Agreement in the case before us, like the agreement in *Pinnell,* contained a provision requiring that waivers of the agreement be in writing. *See* Complaint, Ex. A., p. 27 (Section 12.01).

{¶ 30} We also attribute little weight to the Smith Defendants' assertion that they needed to conduct some discovery in order to understand why White would file a civil suit after having spent considerable time negotiating a settlement agreement. The facts allegedly supporting the fraud claim were raised in the complaint that was filed on November 7, 2013. Kentner Sellers additionally noted in its February 14, 2013 response to a motion to compel discovery that the allegations of the current complaint were nearly identical to those in the complaint that had been previously filed in 2011. Memorandum in Opposition to Motion to Compel, Doc. #13, p. 1. Despite these facts, and the knowledge that the contract contained an arbitration clause, the Smith Defendants chose not to invoke the arbitration clause through nearly three years of litigation.

{¶ 31} In light of the totality of circumstances, we conclude that the trial court did not abuse its discretion by finding that the Smith Defendants waived their right to arbitration. Accordingly, the Second Assignment of Error is overruled.

III. Failure to Object to Mediator's Recommendation

{¶ 32} The Smith Defendants' First Assignment of Error states that:

> The Trial Court Erred in Finding that Appellant Had Waived Its Right to Arbitration By the Failure to Timely Object to the Mediator's Recommendation.

{¶ 33} Under this assignment of error, the Smith Defendants contend that the trial court erred in concluding that they had waived their right to arbitration by failing to timely object to the mediator's recommendation within 30 days. This assignment of error refers to the mediation that occurred in December 2010, prior to the lawsuit. In this regard, the

Smith Defendants argue that the Buy-Sell Agreement is controlling, and requires that this matter be submitted to arbitration.

{¶ 34} In view of our resolution of the Second Assignment of Error, this assignment of error is moot. Even if the Buy-Sell Agreement required the parties to submit their dispute to arbitration, the requirement could be waived. Accordingly, the First Assignment of Error is overruled, as moot.

IV. Conclusion

{¶ 35} The Second Assignment of Error having been overruled, and the First Assignment of Error having been overruled as moot, the judgment of the trial court is affirmed.

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FROELICH, P.J. and FAIN, J., concur.

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