

[Cite as *Huber v. Lincoln Benefit Life Co.*, 2015-Ohio-3390.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

CHARLES L. HUBER, et al.	:	
	:	Appellate Case No. 26570
Plaintiffs-Appellants	:	
	:	Trial Court Case No. 2014-CV-90
v.	:	
	:	(Civil Appeal from
LINCOLN BENEFIT LIFE	:	Common Pleas Court)
COMPANY, et al.	:	
	:	
Defendants-Appellees	:	

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**OPINION**

Rendered on the 21st day of August, 2015.

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FAIN, J.

{¶ 1} Plaintiff-appellants Charles and Annamarie Huber appeal from an order of the trial court staying the litigation pending arbitration of a dispute between the Hubers and two non-parties to the action, and ordering the Hubers to pay costs of the litigation. We conclude that the court erred by basing its decision on the erroneous assumption that an arbitration proceeding with the non-parties had already commenced or would be commenced in the near future. Therefore, we remand this cause for the trial court to reconsider its decision, based on the current facts. We also conclude that it was premature for the court to award costs to the defendants-appellees.

### **I. The Course of Proceedings**

{¶ 2} In January 2014, the Hubers filed a civil action against twelve defendants, alleging civil conspiracy and RICO claims, as well as fraud, violations of the state consumer protection laws, breach of fiduciary duty, misrepresentation, professional negligence, negligent supervision, unjust enrichment, and breach of implied covenant of good faith and fair dealing, seeking damages in excess of \$1,000,000. In May 2014, an amended complaint was filed, adding two more defendants. From July to November, several voluntary dismissals were filed to drop seven of the defendants, including Dennis Tubbergen and USA Wealth Management. Several of the remaining defendants-appellees filed motions to stay the entire proceedings, based on a contractual agreement mandating that disputes be resolved through arbitration. Only Tubbergen and

USA Wealth Management, who are no longer named defendants in the civil action, were parties to the contract mandating arbitration. Therefore, the Hubers argued that the arbitration agreement with non-parties should have no effect on the pending action. The defendants-appellees argued that the stay should be granted because the claims against the non-parties bound by the arbitration agreement and the existing defendants are so intertwined that the action cannot proceed without first resolving the claims against the non-parties. It was acknowledged that there is no arbitration proceeding currently pending between the Hubers and the dismissed parties, Tubbergen and USA Wealth Management. The Hubers asserted that they may never initiate arbitration with Tubbergen and USA Wealth Management, because of concerns about the collectability of any resulting judgment. In their appellate reply brief, the Hubers assert that “arbitration is not pending nor will arbitration be commenced.”

{¶ 3} The trial court granted the motion to stay the entire action, pending the arbitration between the Hubers and the dismissed parties, Tubbergen and USA Wealth Management, because proceeding with the civil action before the arbitration “would place the other defendants, including the moving Defendants at risk of inconsistent factual determination[s], duplicative litigation expenses and prejudice.” Dkt #3, at page 5. The court made no specific factual findings to explain this conclusion, but acknowledged that arbitration had not been commenced because of the Hubers’ concerns about whether any award against Tubbergen and USA Wealth Management would be collectable. The order granting the stay also ordered the Plaintiffs to pay Defendants’ costs of the action. From this order, the Hubers appeal.

## II. Standard of Review

{¶ 4} A trial court has broad discretion to issue procedural orders to regulate the litigation process, including staying an action in the interest of administering efficient justice. Generally, a discretionary action of the trial court is reviewed by the appellate court using an abuse of discretion standard. However, we have held that when an action is stayed pending arbitration, it may necessarily involve both legal and factual determinations. *Gustavus, L.L.C. v. Eagle Invests.*, 2d Dist. Montgomery No. 24899, 2012-Ohio-1433, ¶ 12. Legal issues arise when the trial court must interpret the contract terms, or interpret an applicable statute to reach a determination whether a binding arbitration agreement should be enforced. *Id.*, citing *Eagle v. Fred Martin Motor Company*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161 (9th Dist.), ¶ 11. “When addressing whether a trial court properly granted a motion to stay proceedings and compel arbitration on a finding that the issues are referable to arbitration, our standard of review is the abuse of discretion standard.” *Id.*, citing *Carter Steel & Fabricating Company v. Danis Building Construction Company*, 126 Ohio App.3d [251], 710 N.E.2d 299 (3d Dist.1998).

{¶ 5} Since the trial court’s decision to stay the action was based on the potential for prejudice to the defendants-appellees if the action was not stayed, we view this as a factual question whether the record supports the court’s factual finding that defendants were “at risk of inconsistent factual determination[s], duplicative litigation expenses and prejudice.” As a factual issue, we apply an abuse-of-discretion standard of review. An abuse of discretion connotes a decision that is unreasonable, arbitrary or

unconscionable. *State ex rel. Askew v. Goldhart*, 75 Ohio St.3d 608, 610, 665 N.E.2d 200 (1996). Decisions are unreasonable if they are not supported by a sound reasoning process. *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶ 6} With regard to the issue of costs, we review the awarding of costs using an abuse-of-discretion standard. *Dotson v. Freight Rite, Inc.*, 2d Dist. Montgomery No. 25495, 2013-Ohio-3272, ¶ 86.

### **III. The Record Does Not Support a Factual Finding of Undue Prejudice**

{¶ 7} In their second assignment of error, the Hubers allege as follows:

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT STAYED THE ENTIRE PROCEEDINGS PENDING THE CONCLUSION OF A POTENTIAL ARBITRATION BETWEEN PLAINTIFFS-APPELLANTS AND NON-PARTY FORMER DEFENDANTS TUBBERGEN AND USA WEALTH.

{¶ 8} The basis for the trial court's decision was a factual finding that the claims against the existing defendants, who are not parties to the arbitration agreement, are so factually intertwined with the claims subject to arbitration that a stay is appropriate to reduce the risk of undue prejudice. In their respective briefs, the Hubers and the defendants-appellees present completely opposite portrayals of the effect the possible arbitration would have on the trial proceedings, if the stay was not granted, or what effect the stay would have on the trial proceedings, if the litigation was stayed until the arbitration was completed. The Hubers claim that there would be no effect on pending

litigation, if they were allowed to move forward without regard to the claims they could present against the non-parties in arbitration. The Hubers assert that their claims against the existing defendants are not derivative of the actions of Tubbergen or USA Wealth. Whereas, the defendants-appellees assert that all of the claims made in the amended complaint are either based on the actions of Tubbergen, or depend on factual proof that Tubbergen acted in concert with the existing defendants. While the defendants-appellees suggest that the end result of the arbitration could result in inconsistent decisions about liability, neither party has presented any support for the proposition that findings of an arbitrator are in any way admissible in the civil litigation, or that the arbitrator's decision regarding the liability of Tubbergen or USA Wealth will have any binding effect on the claims not before the arbitrator.

{¶ 9} The defendants-appellees also make unsupported claims that they will incur duplicative costs for discovery and litigation expenses if the stay is not granted and they are forced to move forward with the litigation before the arbitration is finished. Although the individual defendants may be called as witnesses in the arbitration hearing, they are not a party to the arbitration agreement, and would therefore not be presenting any defense to claims that are not pending against them. The defendants-appellees' assertion that they will incur duplicative discovery costs is pure conjecture without a discovery plan, and in light of the option of stipulating to using depositions or discovery answers in both proceedings for common witnesses. The record does not support any factual basis for resolving these opposing viewpoints on the effect of the stay. The court provides no reasoning for its conclusion that the stay is needed because defendants were "at risk of inconsistent factual determination[s], duplicative litigation expenses and

prejudice.” The potential prejudice to the plaintiffs in delaying the trial or forcing the plaintiffs to pursue arbitration against judgment-proof defendants was not weighed or discussed by the trial court.

{¶ 10} We agree that granting a stay of litigation that effectively delays litigation between parties who are not subject to the arbitration agreement, and will not participate as parties in the arbitration process, requires a finding of undue prejudice. When a court is called upon to exercise discretion to regulate the proceedings, it is often guided by the civil rules. For example, Civ. Rule 15 requires the court to grant leave to amend a complaint “when justice so requires,” and requires the non-movant to prove prejudice when objecting to a party’s request for leave to amend the pleadings to conform to the evidence. Also, Civ. R. 19 requires the court to determine how the parties will be prejudiced if a case must proceed without indispensable parties by making several findings including whether the court will be prevented from rendering an effective judgment and whether the interests of the absent party will be adversely affected or jeopardized. Civ. R. 42 gives the court discretion to consolidate cases involving common questions of law or fact, or to order separate trials to avoid prejudice and “[t]he purpose of the rule is ‘to avoid unnecessary costs or delay’ in the interests of judicial efficiency.” *Director of Highways v. Kleines*, 38 Ohio St.2d 317, 319, 313 N.E.2d 370 (1974). These rules provide guidance to a court’s determination of prejudice in granting a stay by addressing what justice requires, whether an effective judgment can still be rendered, and whether the stay is necessary to avoid unnecessary costs or delay.

{¶ 11} Inherent within a court’s jurisdiction, and essential to the orderly and efficient administration of justice, is the power to grant or deny stays. *State v. Hochhausler*, 76

Ohio St.3d 455, 464, 668 N.E.2d 457 (1996), referring to *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936); *State v. Smith*, 42 Ohio St.3d 60, 61, 537 N.E.2d 198 (1989). In *Landis, supra*, the Supreme Court of the United States framed the issue by commencing the decision with a comment that, “the controversy hinges upon the power of a court to stay proceedings in one suit until the decision of another, and upon the propriety of using such a power in a given situation.” *Id.* at 249. While the *Landis* court was reluctant to establish any definitive rule on when cases should be stayed, leaving courts with wide discretion depending on the facts and circumstances, the court did agree “that discretion was abused by a stay of indefinite duration in the absence of a pressing need.” *Id.* at 255. Recognizing that the status of the other suit had changed from the time the stay was granted, the *Landis* court found it appropriate to remand the case “for a new appraisal of the facts by the court whose function it is to exercise discretion, and an appraisal in the light of the situation existing and developed at the time of the rehearing. Benefit and hardship will be set off, the one against the other, and upon an ascertainment of the balance discretionary judgment will be exercised anew.” (Internal citations omitted). *Id.* at 259. Likewise, in the case before us a remand is necessary for the trial court to make factual findings, weighing the benefits and hardships, based on the actual status of the arbitration proceeding at the time of the rehearing. There would not be an appropriate factual basis for delaying the trial if an arbitration proceeding is not, in fact, going to be commenced. A stay that would remain indefinitely is inconsistent with the court’s authority to use its discretion for the orderly administration of justice.

{¶ 12} The Hubers’ Second Assignment of Error is sustained. The stay order is Reversed, and this cause is Remanded for reconsideration of the stay motion based on



the actual facts regarding the status of any arbitration proceedings.

#### **IV. The Alleged Legal Error Applying Arbitration Law to Defendants**

##### **Not Subject to the Arbitration Agreement is Moot**

{¶ 13} In their First Assignment of Error, the Hubers assert:

THE TRIAL COURT ERRED AS A MATTER OF LAW BY SUSTAINING THE MOTIONS TO STAY FILED BY DEFENDANTS-APPELLEES WHO ARE NOT PARTIES TO THE SUBJECT ARBITRATION AGREEMENTS.

{¶ 14} The Hubers argue that as a matter of law, neither the arbitration agreement nor the Ohio arbitration statute, R.C. 2711.02, applies to the dispute pending against the existing defendants, who are not parties to that arbitration agreement. In light of our disposition of the Hubers' Second Assignment of Error, the Hubers' First Assignment of Error is moot.

{¶ 15} Accordingly, the Hubers' First Assignment of Error is overruled as moot.

#### **V. The Issue of Awarding Costs to the Prevailing Party Is Premature**

{¶ 16} In their Third Assignment of Error, the Hubers assert:

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED THAT DEFENDANTS' COSTS ARE TO BE PAID BY PLAINTIFFS.

{¶ 17} Civ. R. 54(D) provides that "[e]xcept when express provision therefor is made either in the statute or in these rules, costs shall be allowed to the prevailing party

unless the court otherwise directs.” In *Dotson v. Freight Rite, Inc.*, 2d Dist. Montgomery No. 25495, 2013-Ohio-3272, ¶ 83, a case involving the application of Civ. R. 54(D), we utilized the Black’s Law Dictionary definition of “prevailing party” as follows:

The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered. \* \* \* This may be the party prevailing in interest, and not necessarily the prevailing person. To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who had made a claim against the other, has successfully maintained it.

{¶ 18} The case before us is not “at the end of the suit or other proceeding”, so any determination of the prevailing party is premature. Therefore, the Hubers’ Third Assignment of Error is sustained. The trial court’s award of costs is Reversed.

## **VI. Conclusion**

{¶ 19} The Hubers’ First Assignment of Error having been overruled as moot, and their Second and Third Assignments of Error having been sustained, the orders of the trial court staying proceedings pending arbitration and awarding costs are Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

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FROELICH, P.J., and HALL, J., concur.

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