

[Cite as *84 Lumber Co. v. O.C.H. Constr., L.L.C.*, 2015-Ohio-4149.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

84 LUMBER COMPANY,

)

CASE NO. 14 MA 152

)

PLAINTIFF-APPELLEE,

)

)

VS.

)

OPINION

)

O.C.H. CONSTRUCTION, LLC,
AND TIMOTHY O'BRIEN,

)

)

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DEFENDANT-THIRD PARTY
PLAINTIFFS-APPELLANTS,

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)

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VS.

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RICHARD MARTIN, et al.,
THIRD PARTY DEFENDANTS-
APPELLEES.

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CHARACTER OF PROCEEDINGS:

Civil Appeal from the Court of Common
Pleas of Mahoning County, Ohio
Case No. 13CVF837

JUDGMENT:

Affirmed.

JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 28, 2015

[Cite as *84 Lumber Co. v. O.C.H. Constr., L.L.C.*, 2015-Ohio-4149.]

APPEARANCES:

For Plaintiff, Third Party Appellants:

Atty. Daniel G. Keating
Keating Law Office
170 Monroe Street, N.W.
Warren, Ohio, 44483

For Defendant, Third Party Appellees

Atty. Joseph C. Bishara
Atty. Christine Z. Papa
Roth, Blair, Roberts, Strasfeld &
Lodge, LPA
100 East Federal Street, Suite 600
Youngstown, Ohio 44503

ROBB, J.

{¶1} Third-party plaintiffs O.C.H. Construction, L.L.C. and Timothy A. O'Brien ("Appellants") appeal the decision of Mahoning County Court Number Four denying their motion for a stay pending arbitration. Third-party defendants Richard and Linda Martin ("Appellees") successfully argued to the trial court that Appellants waived the right to arbitrate by filing suit against them and by waiting until after they countersued to request arbitration. The trial court did not abuse its discretion in finding Appellants waived their right to arbitration under the contract. As such, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

{¶2} On December 1, 2011, Appellees entered into a contract with Appellant O.C.H. Construction, L.L.C. to build a home in Austintown, Ohio. Appellant Timothy A. O'Brien signed on behalf of the company. In addition to construction of the home, a garage was to be built under change orders of the original contract. Change orders entered January 18 and February 27, 2012 showed a balance due on the garage of \$11,231.40.

{¶3} The contract contains an arbitration clause at paragraph 13. This clause provides that binding arbitration under the rules of the American Arbitration Association applies to all acts, statements, omissions, disputes, claims, or controversies arising from or relating to, in any manner, the contract documents, the transaction, or other matters contemplated therein, including change agreements. The clause states that it applies whether a claim is based in contract, negligence or other tort, or a consumer protection statute or other law. Above the signature lines in the contract's concluding sentence, it was reiterated: "PARAGRAPH 13 OF THIS AGREEMENT REQUIRES ALL DISPUTES BE RESOLVED THROUGH BINDING ARBITRATION."

{¶4} On August 26, 2013, 84 Lumber Company filed a complaint against Appellants in Mahoning County Court Number Four. It alleged Appellants owed \$8,273.56 on an account for materials delivered to Appellants' construction project at

the Martins' property. On December 9, 2013, 84 Lumber Company filed a motion for summary judgment.

{¶15} Any response to the motion for summary judgment was due before the non-oral hearing date of January 24, 2014. On January 27, 2014, the trial court granted summary judgment in favor of 84 Lumber Company. Appellants did not respond to the summary judgment motion. Instead, they sought and were granted leave to file a third-party complaint against the Martins.

{¶16} Appellants' January 8, 2014 third-party complaint alleged the Martins owed \$11,231.40 for work completed on the garage. Appellants attached the contract and the change orders to the complaint. They also attached a document incorporated into 84 Lumber Company's complaint which showed \$8,273.56 was owed for materials.

{¶17} On February 10, 2014, the Martins filed an answer to the third-party complaint and a counterclaim against Appellants. They asserted claims for breach of contract and violation of the Consumer Sales Practices Act. The case was set for pretrial on March 14. Appellants were granted a continuance of the pretrial and leave to respond to the third-party counterclaim.

{¶18} On March 21, 2014, Appellants filed their reply to the counterclaim, denying the breach and stating that they were terminated from the job prior to completion. On that same day, Appellants filed a motion to dismiss or for a stay pending arbitration, citing to paragraph 13 of the parties' contract. The Martins responded that Appellants waived the arbitration clause by filing the third-party complaint against them.

{¶19} On August 1, 2014, the magistrate overruled Appellants' motion and set the case for trial. The magistrate found Appellants waived the right to arbitration, pointing out that they initiated suit against the Martins without making a demand for arbitration.

{¶10} Appellants filed timely objections to the magistrate's decision and argued: they were first sued by 84 Lumber Company, which did not involve an arbitrable matter; they invoked the right to arbitrate 73 days after filing the third-party

complaint (and 43 days after the Martins filed a counterclaim); and no discovery had been exchanged with the Martins. Appellants concluded that filing the third-party complaint did not waive the right to arbitrate.

{¶11} On September 17, 2014, the trial court affirmed the magistrate's decision and ordered the case to trial. Appellants filed this appeal from that final order. See R.C. 2711.02(C) ("an order * * * that grants or denies a stay of a trial of any action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order * * *"); *Mynes v. Brooks*, 124 Ohio St.3d 13, 2009-Ohio-5946, 918 N.E.2d 511, syllabus (statute permits appeal of a trial court order that grants or denies a stay of trial pending arbitration, even when the order makes no Civ.R. 54(B) determination).

ASSIGNMENT OF ERROR

{¶12} Appellants' sole assignment of error provides:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS IN OVERRULING THEIR MOTION TO ENFORCE THE CONTRACTUAL ARBITRATION CLAUSE."

{¶13} Appellants state that mere participation in a lawsuit is insufficient to show waiver of the right to arbitrate. Instead, there must be active participation evincing their acquiescence to proceed in a judicial rather than an arbitration forum. Appellants point to the strong public policy in favor of arbitration in this state and urge that all doubt should be resolved in favor of arbitration. See *Hayes v. The Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 15.

{¶14} Appellants urge that the factors used to ascertain waiver of the right to arbitrate weigh in their favor. Appellants note: they sought arbitration 73 days after a third-party complaint was filed; the underlying lawsuit was initiated against them by 84 Lumber Company, a plaintiff whose claim was not subject to an arbitration agreement; no discovery was exchanged with the Martins; no dispositive motions were filed under the third-party action; a trial date had not been set when they filed for a stay pending arbitration; and the Martins would not be prejudiced. Appellants

point out that Civ.R. 14 permits a defendant to file a complaint against a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. See Civ.R. 14(A). Appellants explain that they used this procedure hoping that 84 Lumber Company would assert claims against the Martins.

{¶15} The trial court's duty to issue a stay pending arbitration is found in R.C. 2711.02(B) which states:

"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.*" (Emphasis added.)

See also R.C. 2711.01(A) (an arbitration agreement "shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.")

{¶16} A party who waives their right to arbitrate is "in default in proceeding with arbitration." Moreover, waiver is an existing ground for revoking a contract. See *Medical Imaging Network, Inc. v. Medical Resources*, 7th Dist. 04MA220, 2005-Ohio-2783, ¶ 19-20. Waiver of the right to arbitrate can be found when a party knew of their right to arbitrate but acted inconsistently with that right. *Id.* at ¶ 23. The filing of a lawsuit by a plaintiff without invoking the known right to arbitration is often said to be an act of waiver. See *id.* at ¶ 30. See also *Finish Line, Inc. v. Patrone*, 7th Dist. No. 12MA92, 2013-Ohio-5527, ¶ 9-11; *Hoppel v. Feldman*, 7th Dist. No. 09CO34, 2011-Ohio-1183, ¶ 44.

{¶17} The trial court considers the totality of the circumstances in determining waiver, including, but not limited to, the following: whether the movant invoked the court's jurisdiction by filing a counterclaim or third-party complaint without seeking a stay; the movant's delay in filing the motion to stay; the extent of the movant's

participation in the litigation prior to filing the motion, including the status of discovery, dispositive motions, and the trial date; and whether the non-movant was prejudiced by the inconsistent acts of the movant. *Medical Imaging*, 7th Dist. 04MA220 at ¶ 28; *Hoppel*, 7th Dist. No. 09CO34 at ¶ 46.

{¶18} As the issue is fact-driven, the abuse of discretion standard of review applies. *Medical Imaging*, 7th Dist. 04MA220 at ¶ 23. This entails an evaluation of whether the trial court's decision was unreasonable, arbitrary, or unconscionable. *Finish Line*, 7th Dist. No. 12MA92 at ¶ 8, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983) (the appellate court does not substitute its judgment for that of the trial court).

{¶19} In the case at bar, Appellants drafted the contract with the Martins that contained the arbitration clause. Appellants attached the contract to their third-party complaint. The arbitration clause is contained in paragraph 13, and the right to arbitrate is boldly noted in the concluding sentence of the contract. Appellants do not argue lack of knowledge of their right to arbitrate.

{¶20} Appellants cite to the Tenth District's *Stoner* case and point out that arbitration was not waived where the stay was requested: within five months after the responsive pleading and before the discovery cut-off date; before any dispositive motions were filed; and over five months before the trial date. However, the movant for the stay in *Stoner* was not the party who invoked the court's jurisdiction. *Stoner v. Salon Lofts, L.L.C.*, 10th Dist. No. 13AP-437, 2014-Ohio-796, ¶ 19, distinguishing *Farrow Builders, Inc. v. Slodov*, 10th Dist. No. 2000-G-2288 (June 29, 2001).

{¶21} Additionally, the appellate court in *Stoner* was affirming the trial court's exercise of discretion, rather than setting forth a rule of law. *Id.* at ¶ 31-32. That is, a decision is not arbitrary, unreasonable, or unconscionable merely because another judge would have ruled a different way in exercising her discretion. See *Peterson v. Crockett Constr., Inc.*, 7th Dist. No. 99CO2 (Dec. 7, 1999).

{¶22} As Appellants emphasize, they did not initiate the originating suit. *However, they did initiate the portion of the suit that was subject to arbitration.* Instead of demanding arbitration with the Martins, Appellants sought leave to file a

third-party complaint against the Martins in the case filed by 84 Lumber Company. Appellants' January 8, 2014 third-party complaint invoked the trial court's jurisdiction against the Martins.

{¶23} Appellants attached the December 2011 contract to their third-party complaint, which contained an arbitration clause. While invoking the trial court's jurisdiction against the Martins, Appellants did not assert the right to arbitrate the construction contract nor ask the court to stay the case pending arbitration. See *Farrow Builders*, 10th Dist. No. 2000-G-2288 (filing a motion to stay contemporaneously with its complaint would have preserved the right to seek redress through arbitration). Summary judgment was granted in favor of 84 Lumber Company, and still, Appellants did not seek a stay of the third-party action pending arbitration.

{¶24} While prejudice is not a mandatory element of waiver, it is one factor a trial court considers to evaluate waiver under the totality of the circumstances. See *Medical Imaging*, 7th Dist. 04MA220 at ¶ 26. The Martins cite arbitration fees as prejudice if a stay had been granted. However, these fees would have existed in the absence of Appellants' waiver. Still, Appellees experienced prejudice when they were required to retain an attorney to file an answer to the third-party complaint and a counterclaim against Appellants. See *Farrow Builders*, 10th Dist. No. 2000-G-2288 (where movant did not seek arbitration until after non-movant filed counterclaim, the court stated: "At that point, appellant had already incurred the increased costs of filing a responsive pleading. Forcing such a response defeats one of the primary objectives of arbitration * * *").

{¶25} On March 12, 2014, Appellants sought leave to move or plead to the third-party counterclaim. They filed their reply and motion for stay pending arbitration on March 21, 2014, which was 73 days after the third-party complaint was filed against the Martins. Appellants invoked the judicial process, but when they were countersued, they decided arbitration would be their preferable venue. While this may be a litigation strategy, the trial court may consider the implications of any

“gamesmanship” in making its decision. See *Farrow Builders*, 10th Dist. No. 2000-G-2288 (“such gamesmanship should not be rewarded”).

{¶26} Considering the totality of the circumstances in this particular case, a finding that Appellants acted inconsistently with their right to arbitrate the contractual dispute with the Martins is not unreasonable, arbitrary, or unconscionable. We conclude that the court acted within its discretion in denying the stay pending arbitration based upon waiver, and we refuse to substitute our judgment for that of the trial court. The trial court’s decision is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.