

[Cite as *Milling Away, L.L.C. v. UGP Properties, L.L.C.*, 2011-Ohio-1103.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95751

MILLING AWAY LLC

PLAINTIFF-APPELLANT

vs.

UGP PROPERTIES LLC, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART; REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-724855

BEFORE: Keough, J., Kilbane, A.J., and Sweeney, J.

RELEASED AND JOURNALIZED: March 10, 2011

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KATHLEEN ANN KEOUGH, J.:

{¶ 1} Plaintiff-appellant, Milling Away LLC, appeals from the trial court's judgment granting the motions of defendants-appellees, JERA Contractors, Inc., UGP Properties LLC, and Corvallis Development LLC, to dismiss or, in the alternative, to stay proceedings and compel arbitration. We affirm the referral to arbitration, but remand with instructions to the trial court to reinstate this matter on its docket and then stay the case pending arbitration.

I

{¶ 2} In April 2008, Milling Away entered into a written contract with UGP Properties whereby Milling Away was to provide countertop and cabinet work for an apartment/condominium project owned by UGP and Corvallis Development. A representative of JERA signed the contract as agent for the owners. The contract included a provision stating that, “[c]ontractor agrees that mediation and arbitration by the construction industry mediation rules of the American Arbitration Association will be used to settle disputes from this Agreement.”

{¶ 3} A dispute eventually arose regarding \$88,019.17 in unpaid labor, material, and services that Milling Away contended it provided to UGP pursuant to the agreement. The parties met in December 2009 to resolve the issue of the unpaid monies, but did not come to any agreement. Accordingly, on January 4, 2010, Milling Away filed an affidavit for mechanic's lien against appellees' property.

{¶ 4} The parties met again, unsuccessfully, on February 2, 2010 to try to resolve their differences. Then, on February 23, 2010, UGP and Corvallis served notice upon

Milling Away in accordance with R.C. 1311.11, which provides that “[t]he owner * * * [of] real property upon which a lien has been taken * * * may notify the lienholder to commence suit on the lien, by written notice delivered to the lienholder * * *. If the lienholder fails to commence suit upon the lien within sixty days after completion of service upon him of the notice to commence suit * * * the lien is void and the property wholly discharged from the lien.”

{¶ 5} Consequently, on April 22, 2010, Milling Away filed suit against appellees, asserting claims for breach of contract, unjust enrichment, and foreclosure on its mechanic’s lien. Because the parties continued to engage in settlement negotiations, defendants-appellees did not answer the complaint, but took two unopposed leaves to plead. On July 27, 2010, UGP and Corvallis filed a “motion to dismiss to compel mediation and/or arbitration or, in the alternative, stay proceedings and compel arbitration.” JERA filed a similar motion the next day; Milling Away then filed a brief opposing both motions.

{¶ 6} The trial court subsequently granted defendants-appellees’ motions,¹ and ordered the parties to mediation and arbitration under the construction industry rules of the American Arbitration Association. The court did not stay the matter pending

¹In its motion, JERA argued that the case should be stayed and referred to arbitration, or, alternatively, Milling Away’s claims against it should be dismissed under Civ.R. 12(B)(6) for failure to state a claim. JERA claims that the trial court did not expressly rule on its 12(B)(6) motion, but we note that once the trial court determined the arbitration clause should be enforced, it had no jurisdiction to rule on the motion to dismiss. *Zapor Architects Group, Inc. v. Riley*, 7th Dist. No. 03 JE 27, 2004-Ohio-3201, ¶48. The trial court was required to defer this issue to the arbitrator. *Id.*

arbitration, however; it dismissed the case with prejudice.

II

{¶ 7} In its single assignment of error, Milling Away contends that the trial court erred in compelling arbitration because defendants-appellees waived their right to arbitration.

{¶ 8} Like any other contractual right, the right to arbitration may be waived. *Rock v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1992), 79 Ohio App.3d 126, 128, 606 N.E.2d 1054. But in light of Ohio's strong policy in favor of arbitration, waiver of the right to arbitrate is not to be lightly inferred. *Griffith v. Linton* (1998), 130 Ohio App.3d 746, 751, 721 N.E.2d 146. A party asserting waiver must prove the waiving party (1) knew of the existing right to arbitrate; and (2) acted inconsistently with that right. *Checksmart v. Morgan*, 8th Dist. No. 80856, 2003-Ohio-163, ¶22. “The essential question is whether, based upon the totality of the circumstances, the party seeking arbitration has acted inconsistently with the right to arbitrate.” *Id.*, quoting *Wishnosky v. Star-Lite Bldg. & Dev. Co.* (Sept. 7, 2000), 8th Dist. No. 77245.

{¶ 9} Among the factors a court may consider in determining whether the totality of circumstances supports a finding of waiver are: (1) whether the party seeking arbitration invoked the jurisdiction of the trial court by filing a complaint, counterclaim, or third-party complaint without asking for a stay of proceedings; (2) the delay, if any, by the party seeking arbitration in requesting a stay of proceedings or an order compelling arbitration; (3) the extent to which the party seeking arbitration participated in the

litigation, including the status of discovery, dispositive motions, and the trial date; and (4) any prejudice to the non-moving party due to the moving party's prior inconsistent actions. *U.S. Bank, N.A. v. Wilkens*, 8th Dist. No. 93088, 2010-Ohio-262, ¶31, citing *Phillips v. Lee Homes, Inc.* (Feb. 17, 1994), 8th Dist. No. 64353.

{¶ 10} The 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 abuse of discretion. *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 Ohio App.3d 27, 2004-Ohio-5953, 822 N.E.2d 841, ¶10. A court abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 11} Here, the parties do not dispute that appellees knew of their right to arbitrate as contained in the contract. Instead, the disputed issue is whether, under the totality of the circumstances, appellees acted inconsistently with that right. Specifically, Milling Away contends that appellees waived the right to arbitration by: (1) terminating the contract and firing Milling Away; (2) demanding pursuant to R.C. 1311.11 that Milling Away file suit on its mechanic's lien; and (3) engaging in settlement discussions.

{¶ 12} We agree with appellees' assertion that Milling Away is precluded from arguing on appeal that appellees' termination of the contract resulted in waiver of the arbitration clause because Milling Away did not raise this issue in the trial court. Milling Away did not allege in its complaint that appellees terminated the contract, nor did it argue in its brief in opposition to appellees' motions to compel arbitration that appellees'

termination of the contract resulted in a rescission of the contract that voided the arbitration agreement, which is its argument on appeal. It is well settled that a party who fails to raise an argument in the court below waives his or her right to raise it on appeal. *State ex rel. Zollner v. Indus. Comm.* (1993), 66 Ohio St.3d 276, 611 N.E.2d 830. Accordingly, we do not consider this argument.

{¶ 13} We next consider Milling Away’s contention that appellees waived their right to seek arbitration by filing notice under R.C. 1311.11 that Milling Away was required to file suit to protect its mechanic’s lien. Despite appellees’ argument to the contrary, Milling Away raised this issue in its brief in opposition to appellees’ motions to compel arbitration and thus preserved it for appellate review. In its brief, Milling Away specifically argued that appellees had waived their right to arbitration because “[d]efendants demanded that the instant litigation be instituted.” Further, attached to Milling Away’s brief were the affidavits of two Milling Away representatives, both of whom averred that appellees had filed a notice to commence suit under R.C. 1311.11, as well as copies of the notice and filed affidavit indicating service of the notice by the sheriff’s department. Accordingly, this issue is properly before us.

{¶ 14} Nevertheless, we hold that the trial court did not abuse its discretion in finding that appellees did not waive their right to arbitration by serving notice under R.C. 1311.11 to Milling Away that it must file suit to protect its mechanic’s lien. The statute allows the owner of property upon which a lien has been filed to file notice that the lienholder must file suit within 60 days of such notice or lose the protection of its lien.

Upon receipt of such notice, the lienholder may file suit, but is not required to do so. Hence, we do not find that appellees' notice to Milling Away to file suit, as allowed by the statute, waived their right to seek arbitration.

{¶ 15} Further, with respect to the settlement discussions, we do not find that appellees' conduct in engaging in pre-litigation settlement negotiations constituted a waiver of arbitration. *Robbins v. Country Club Ret. Ctr. IV, Inc.*, 7th Dist. No. 04BE43, 2005-Ohio-1338, ¶70; *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 414, 701 N.E.2d 1040. Nor do we find that appellees' participation in post-suit discussions waived their right to arbitration. Milling Away contends that appellees waived their right to arbitration because they met with Milling Away five times about the dispute and asked it to produce voluminous documentation to support its claim. But Milling Away does not assert, nor do we find, that there was an agreement between the parties that the discussions or Milling Away's production of documents waived any party's right to file suit or seek arbitration. Hence, without more, we cannot find that the pre- or post-suit settlement discussions waived appellees' right to seek arbitration under the contract and, accordingly, the trial court did not abuse its discretion in referring the matter to arbitration. Appellant's assignment of error is therefore overruled.

{¶ 16} However, although the trial court did not abuse its discretion in referring the matter to arbitration, the court should have stayed the lawsuit instead of entering a dismissal.²

²Although appellees contend that the trial court stayed the case and ordered

{¶ 17} R.C. 2711.02 provides that “[i]f any suit or proceeding is brought upon any issue referable to arbitration under an agreement in writing for such arbitration, *the court in which such suit is pending*, upon being satisfied that the issue involved is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action* until such arbitration has been had in accordance with the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.” (Emphasis added.)

{¶ 18} In light of the statute, this court has held that when a dispute is subject to arbitration under R.C. 2711.02, the trial court should stay the lawsuit rather than dismiss it. *Cleveland Bldg. Corp. v. Boyd* (Nov. 10, 1998), 8th Dist. No. 54702; *Rock*, *supra*, citing *Gibbons-Grable Co. v. Gilbane Bldg. Co.* (1986), 34 Ohio App.3d 170, 173, 518 N.E.2d 559; *Mills v. Jaguar-Cleveland Motors, Inc.*, (1980), 69 Ohio App.2d 111, 112, 430 N.E.2d 965.

{¶ 19} Further, under R.C. 2711.01(B)(1), the arbitration provisions of Sections 2711.01 to 2711.16 of the Revised Code “do not apply to controversies involving the title to or possession of real estate,” with five exceptions not relevant here. Because Milling Away’s claim for foreclosure on its mechanic’s lien involves title to real estate, it is not an arbitrable matter. By dismissing the case, instead of staying the matter pending arbitration of Milling Away’s claims for breach of contract and unjust enrichment (which

the parties to litigation, the journal entry is clear that the trial court dismissed the case with prejudice while ordering the parties to arbitration.

arise out of the contract and therefore are properly subject to arbitration under the arbitration provision), the trial court deprived Milling Away of the protection of its mechanic's lien. Accordingly, although we hold that the trial court did not abuse its discretion in referring the matter to arbitration, we find that the trial court erred in dismissing the case.

Affirmed in part; remanded in part with instructions to the trial court to reinstate the matter on its docket and then stay the case pending arbitration.

It is ordered that the parties share equally the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

MARY EILEEN KILBANE, A.J., and
JAMES J. SWEENEY, J., CONCUR