

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

TOWN & COUNTRY CO-OP, INC.

C.A. No. 09CA0072

Appellee

v.

SABOL FARMS, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 09-CV-0044

Appellants

DECISION AND JOURNAL ENTRY

Dated: November 1, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Town & Country Co-op Inc. entered into a contract to buy wheat from Kenneth Sabol and Sabol Farms Inc. The contract provided that the parties’ sole remedy for disputes arising under it would be arbitration proceedings before the National Grain and Feed Association. According to Town & Country, it performed its obligations under the contract, but Mr. Sabol and Sabol Farms failed to deliver the wheat. It sued Mr. Sabol and Sabol Farms in the Wayne County Common Pleas Court. Mr. Sabol and Sabol Farms filed an answer and served Town & Country with discovery requests. A few months later, Mr. Sabol and Sabol Farms moved the trial court to stay the proceedings and order Town & Country to commence arbitration. The trial court denied their motion, concluding that they had waived their right to arbitration. This Court affirms because the trial court exercised proper discretion when it denied the motion to compel arbitration.

ARBITRATION WAIVER

{¶2} Mr. Sabol and Sabol Farms’s assignment of error is that the trial court incorrectly denied their motion to stay the proceedings and compel arbitration. Under Section 2711.01(A) of the Ohio Revised Code, “[a] provision in any written contract . . . to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract . . . shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.” On application of one of the parties, the trial court can stay the proceeding and refer the matter to arbitration. R.C. 2711.02(B). A party can waive its right to arbitration, however, if it fails to properly raise the arbitration provision to the trial court. *Austin v. Squire*, 118 Ohio App. 3d 35, 37 (1997).

{¶3} The parties’ contract provided that Town & Country, Mr. Sabol, and Sabol Farms “agree that the sole remedy for resolution of all disagreements or disputes arising . . . under this agreement shall be arbitration proceedings before [the National Grain and Feed Association]” Mr. Sabol and Sabol Farms have argued that the trial court should have enforced the arbitration provision. Town & Country has argued that the trial court correctly concluded that Sabol Farms waived its right to enforce the arbitration provision.

{¶4} “[W]aiver is usually a fact-driven issue.” *Manos v. Vizar*, 9th Dist. No. 96CA2581-M, 1997 WL 416402 at *2 (July 9, 1997). Because the trial judge is more familiar with the proceedings in his court and is in a better position to assess whether what a party did in that court was inconsistent with its right to arbitration, we generally review the question of whether a party has waived its right to arbitration for an abuse of discretion. *Phillips v. Lee Homes Inc.*, 8th Dist. No. 64353, 1994 WL 50696 at *4 (Feb. 17, 1994).

{¶5} Mr. Sabol and Sabol Farms have noted that they filed an answer, responded to Town & Country’s discovery requests, and filed their own request for production of documents. They also participated in a couple of status conferences and told the trial court that they were trying to settle the case. It was only after negotiations failed that they moved to stay the proceeding. They have argued that, at the time of their motion, Town & Country had not responded to their discovery requests, there had been no discussions regarding a briefing schedule, and the trial court had not set a trial date. According to them, the facts of this case resemble *Milling Away L.L.C. v. Infinity Retail Environments Inc.*, 9th Dist. No. 24168, 2008-Ohio-4691.

{¶6} In *Milling Away*, Milling Away sued Infinity for breach of contract. Infinity answered the complaint and counterclaimed. Four months later, Infinity moved to stay the proceedings and enforce the contract’s arbitration provision. The trial court ordered a stay, reasoning that “the policy of the law is to settle disputes by arbitration, . . . there has been very little in the way of proceedings, . . . there is no interruption in discovery or other proceedings by engaging in arbitration, and . . . no trial date has been set[.]” *Milling Away L.L.C. v. Infinity Retail Env’ts Inc.*, 9th Dist. No. 24168, 2008-Ohio-4691, at ¶11. Milling Away appealed, arguing that Infinity had waived the arbitration by participating in the case for six months. This Court concluded that the trial court did not abuse its discretion when it ordered the stay. *Id.* at ¶14.

{¶7} Unlike in *Milling Away*, the trial court in this case determined that Mr. Sabol and Sabol Farms “have actively participated in this lawsuit since the court allowed them to file their late answer. They have known of the arbitration provision for months and have just now attempted to enforce it.” It found that their “conduct . . . [has] caused [Town & Country] to rely

to its detriment by having to incur the costs of litigation up to this point.” It noted that requiring Town & Country to incur litigation costs was contrary to the purpose of arbitration, which is intended to “reduce[] or even eliminate[] the costs of litigation.”

{¶8} Trial courts have broad discretion to decide whether a party has waived its right to enforce an arbitration provision. We have recognized that the mere filing of a responsive pleading without moving for a stay can be sufficient to constitute waiver of a right to arbitration. *Chef Italiano v. Crucible Dev. Corp.*, 9th Dist. No. 22415, 2005-Ohio-4254, at ¶53 (quoting *Mills v. Jaguar-Cleveland Motors Inc.*, 69 Ohio App. 2d 111, 113 (1980)). Accordingly, even though the trial court in *Milling Away* came to a different conclusion on somewhat similar facts, we can not say that the trial court exercised improper discretion in this case. Mr. Sabol and Sabol Farms’s assignment of error is overruled.

CONCLUSION

{¶9} The trial court exercised proper discretion when it determined that Mr. Sabol and Sabol Farms waived their right to enforce an arbitration provision. The judgment of the Wayne County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellants.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

GINO PULITO, attorney at law, for appellants.

DAVID J. WIGHAM and LUCAS K. PALMER, attorneys at law, for appellee.