STATE OF MICHIGAN

COURT OF APPEALS

GERALD COON and MARY COON,

Plaintiffs-Appellees,

v

RICHARD E. GILBERT and MICHIGAN SECURITIES, INC.,

Defendants-Appellees,

and

SECURITIES AMERICA, INC.,

Defendant-Appellant.

UNPUBLISHED
February 23, 2010

No. 290164
Wayne Circuit Court
LC No. 08-119449-CK

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Defendant Securities America, Inc. ("SAI"), appeals as of right from a circuit court order granting defendant Michigan Securities, Inc.'s ("MSI's"), motion to dismiss and compel arbitration of plaintiffs' claims. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

SAI argues that plaintiffs waived their right to arbitration. "We review de novo the question of law whether the relevant circumstances establish a waiver of the right to arbitration[.]" *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001).

Under Rule 12200 of the Financial Industry Regulatory Authority, Inc. ("FINRA"),[1] a customer may compel a registered member of the FINRA to arbitrate a dispute even if no written

[1] The FINRA is the successor to the National Association of Securities Dealers, Inc. ("NASD"). *Valentine Capital Asset Mgt, Inc v Agahi*, 174 Cal App 4th 606, 608; 94 Cal Rptr 3d 526 (2009). FINRA Rule 12200 was formerly known as NASD Rule 12200. *Herbert J Sims & Co, Inc v* (continued…)

arbitration agreement exists. *Herbert J Sims & Co, Inc v Roven*, 548 F Supp 2d 759, 762-763 (ND Cal, 2008). The FINRA Rules, without more, serve as a sufficient written agreement to arbitrate. *Multi-Financial Securities Corp v King*, 386 F3d 1364, 1367 (CA 11, 2004); *Kidder, Peabody & Co, Inc v Zinsmeyer Trusts Partnership*, 41 F3d 861, 863 (CA 2, 1994). SAI acknowledges that plaintiffs had a right under the FINRA to arbitrate their claims, but contends that they waived that right by filing this action in circuit court and proceeding against it in a manner inconsistent with their right to arbitration.

"Whether one has waived his right to arbitration depends on the particular facts and circumstances of each case." *Madison Dist Pub Schools*, *supra* at 588. Both state and federal public policy "favor[s] arbitration as an inexpensive and expeditious alternative to litigation." *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 123; 596 NW2d 208 (1999). Accordingly, "[w]aiver of a contractual right to arbitrate is disfavored." *Madison Dist Pub Schools*, *supra* at 588. "The party arguing there has been a waiver of this right bears a heavy burden of proof and must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts." *Id.* (internal quotation marks and citations omitted). Types of conduct that have been recognized as waiving the right to arbitrate include defending an action or proceeding to trial, filing an answer to a complaint without asserting the right to arbitration, filing a motion for summary disposition, and utilizing discovery procedures. *Id.* at 589.

Having reviewed the record, we are not persuaded that plaintiffs waived their right to arbitration. Plaintiffs were undoubtedly aware of their right to compel arbitration as evidenced by their attorney's indication that they had "changed their position" after being apprised of the time and costs involved if their claims proceeded in two different forums. It is also undisputed that plaintiffs took action inconsistent with their right to arbitrate their claims, such as filing their complaint in the circuit court, opposing MSI's motion to dismiss and compel arbitration, and objecting to MSI's proposed order dismissing their claims against all three defendants. However, SAI has failed to demonstrate prejudice resulting from plaintiffs' acts inconsistent with their right to arbitration.

SAI contends that it has expended significant time and expense and that its litigation efforts are now moot as a result of the dismissal of plaintiffs' claims against it. But the record shows that SAI's litigation efforts were not extensive. SAI answered plaintiffs' complaint, filed a motion for summary disposition arguing that plaintiffs' complaint failed to state a claim against SAI and alleged claims that were time-barred, filed a reply brief to plaintiffs' response to its motion, and objected to MSI's proposed order dismissing plaintiffs' claims against it. Plaintiffs filed their complaint on August 1, 2008, and the trial court entered its order of dismissal on January 9, 2009, just over five months later. No discovery was conducted during this time.

This case is thus distinguishable from other cases in which the parties conducted extensive discovery or the case proceeded for a significant period of time before one of the parties sought arbitration. See, e.g., *Madison Dist Pub Schools*, *supra* at 599-600 (plaintiff waived right to arbitrate by litigating matter in circuit court for more than 18 months and

(…continued)

Roven, 548 F Supp 2d 759, 762-763 (ND Cal, 2008).

asserting right to arbitrate after the court granted summary disposition in defendant's favor); *Joba Constr Co, Inc v Monroe Co Drain Comm'r*, 150 Mich App 173, 179; 388 NW2d 251 (1986) (plaintiff waived right to arbitration by filing a complaint in circuit court, answering a counterclaim without asserting right to arbitrate, and engaging in discovery); and *Ryan v Kellogg Partners Institutional Services*, 58 AD3d 481; 871 NYS2d 108 (2009) (defendant waived right to arbitration by failing to raise arbitration as a defense in its answer to complaint, asserting counterclaims, making a dispositive motion, and actively participating in litigation for three years). Accordingly, SAI has failed to demonstrate prejudice resulting from plaintiffs' delay in asserting their right to arbitration as required for waiver of the right. *Madison Dist Pub Schools*, *supra* at 588. The trial court properly determined that no waiver occurred, and it did not err in dismissing plaintiffs' claims in their entirety.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Alton T. Davis