**[Cite as *U.S. Bank, N.A. v. Wilkens*, 2010-Ohio-262.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION
**No. 93088**

---

## U.S. BANK, N.A.

PLAINTIFF-APPELLANT

vs.

## JOHN C. WILKENS, ET AL.

DEFENDANTS-APPELLEES

---

**JUDGMENT:**
REVERSED AND REMANDED

---

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-632289

**BEFORE:** Boyle, J., Kilbane, P.J., and McMonagle, J.

**RELEASED:** January 28, 2010

**JOURNALIZED:**

## ATTORNEYS FOR APPELLANT

Martha Van Hoy Asseff
Charles E. Ticknor III
Dinsmore & Shohl, LLP
191 West Nationwide Boulevard
Suite 300
Columbus, Ohio 43215

## ATTORNEY FOR APPELLEES

Jonathan N. Garver
4403 St. Clair Avenue
The Brownhoist Building
Cleveland, Ohio 44103-1125

MARY J. BOYLE, J.:

**{¶ 1}** Plaintiff-appellant U.S. Bank, N.A. ("U.S. Bank") and third-party defendant-appellant Ocwen Loan Servicing, L.L.C. ("Ocwen") appeal from an entry denying U.S. Bank's motion to compel arbitration of defendants-appellees John and Ruth Wilkenses' counterclaims and stay further proceedings pending arbitration.[1] Finding merit to their appeal, we reverse and remand.

Procedural History

**{¶ 2}** Defendant-appellee, John Wilkens, executed a note and mortgage in December 2002, agreeing to pay Metro Center Mortgage, Inc. ("Metro Center") the amount of $85,000 for property located in Garfield Heights, Ohio. John Wilkens also executed a separate arbitration rider with Metro Center that was incorporated into the loan agreement by reference.

**{¶ 3}** In August 2007, U.S. Bank filed a complaint for a money judgment, foreclosure, and relief against the Wilkenses. In the complaint, U.S. Bank alleged that John Wilkens defaulted in the payment of his loan and owed U.S. Bank $83,681.71 plus interest from August 23, 2004. The complaint further alleged that Ruth Wilkens claimed to have or had an interest in the property.

**{¶ 4}** In their answer filed on October 15, 2007, the Wilkenses denied the allegations and asserted several counterclaim**s** against U.S. Bank, including fraud,

[1]Throughout this appeal, we will only refer to U.S. Bank as the appellant unless we specifically discuss issues relating to Ocwen.

breach of contract, intentional infliction of emotional distress, and loss of consortium. The Wilkenses further brought a third-party complaint against Ocwen, alleging that Ocwen was an agent of U.S. Bank and advancing similar claims against it.

**{¶ 5}** On April 3, 2008, U.S. Bank moved the trial court to amend its answer to the Wilkenses' counterclaims to include the defense of arbitration, which the trial court granted. On April 15, U.S. Bank filed its amended answer, asserting arbitration as an affirmative defense. And then on April 29, U.S. Bank moved the trial court to compel arbitration of the Wilkenses' counterclaims and stay further proceedings pending arbitration.

**{¶ 6}** A magistrate denied U.S. Bank's motion to compel arbitration of the Wilkenses' counterclaims and stay the proceedings on July 30, 2008. U.S. Bank objected to the magistrate's decision; but the trial court overruled its objections, fully adopted the magistrate's decision, and ordered the case to proceed. U.S. Bank appealed from this decision, assigning the following errors for our review:

**{¶ 7}** "[1.] The trial court abused its discretion by denying U.S. Bank's motion to stay and compel arbitration of the Wilkenses' counterclaims.

**{¶ 8}** "[2.] The trial court abused its discretion by refusing to stay the litigation and compel arbitration of the Wilkenses' third party claims against Ocwen."

## Standard of Review

**{¶ 9}** In determining whether the trial court properly denied or granted a motion to stay the proceedings and compel arbitration, the standard of review is whether the order constituted an abuse of discretion. *Strasser v. Fortney & Weygandt, Inc.* (Dec. 20, 2001), 8th Dist. No. 79621. "The term 'abuse of discretion' connotes more than an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

Waiver of Right to Arbitrate by Filing an Action

**{¶ 10}** The trial court's journal entry denying U.S. Bank's motion to compel arbitration of the Wilkenses' counterclaims and stay the proceedings simply states that it denied it because U.S. Bank had filed the foreclosure action, thereby waiving its right to arbitrate. In its first assignment of error, U.S. Bank maintains that it did not waive its right to arbitrate the Wilkenses' counterclaims by filing the foreclosure action, and we agree.

**{¶ 11}** The trial court relied on *Mills v. Jaquar-Cleveland Motors, Inc.* (1980), 69 Ohio App.2d 111, in support of its decision. U.S. Bank argues that *Mills* is not applicable to this case because under Ohio law, specifically R.C. 2711.01(B)(1), controversies "involving the title to or the possession of real estate" are not arbitrable.

**{¶ 12}** In *Mills*, this court held:

**{¶ 13}** "A party to a contract to arbitrate waives its right when it files a lawsuit rather than requesting arbitration. When the other contracting party files an

answer and does not demand arbitration, it, in effect, agrees to the waiver and a referral to arbitration under R.C. 2711.02 is inappropriate." *Mills* at 111.

**{¶ 14}** In relevant part, R.C. 2711.01(B)(1) provides:

**{¶ 15}** "(B)(1) Sections 2711.01 to 2711.16 of the Revised Code do not apply to controversies involving the title to or the possession of real estate, with the following exceptions:

**{¶ 16}** "(a) Controversies involving the amount of increased or decreased valuation of the property at the termination of certain periods, as provided in a lease;

**{¶ 17}** "(b) Controversies involving the amount of rentals due under any lease;"(c) Controversies involving the determination of the value of improvements at the termination of any lease;

**{¶ 18}** "(d) Controversies involving the appraisal of property values in connection with making or renewing any lease;

**{¶ 19}** "(e) Controversies involving the boundaries of real estate."

**{¶ 20}** Here, the foreclosure action involves title to real estate and thus, is not an arbitrable matter. See *Keybank v. MRN Ltd. Partnership*, 8th Dist. No. 88868, 2007-Ohio-5709 (this court reversed a trial court's order referring a dispute to arbitration when it involved title to real estate in violation of R.C. 2711.01(B)(1)). Therefore, U.S. Bank did not waive its right to arbitrate matters that fell within the arbitration rider (i.e., the Wilkenses' counterclaims of fraud, breach of contract,

intentional infliction of emotional distress, and loss of consortium) by filing the nonarbitrable foreclosure action.

**{¶ 21}** Moreover, the arbitration rider in this case explicitly provided that the filing of a foreclosure action did not amount to a waiver of arbitrable claims. Specifically, the arbitration rider stated: "[n]o provision of, nor the exercise of any rights under this arbitration rider shall limit the right of any party during the pendency of any claim, to seek and use ancillary or preliminary remedies, judicial or otherwise, *for the purposes of realizing upon, preserving, protecting or foreclosing upon any property involved in any claim or subject to the loan documents*. The use of the courts shall *not constitute a waiver* of the right of any party, including the plaintiff, to submit any claim to arbitration nor render inapplicable the compulsory arbitration provisions contained in this arbitration rider." (Emphasis added.)

**{¶ 22}** Accordingly, we agree with U.S. Bank that it did not waive its right to arbitrate the Wilkenses' counterclaims by filing the foreclosure action.

**{¶ 23}** The Wilkenses argue, without citation to any authority, that because U.S. Bank also filed a claim for money damages — in addition to the nonarbitrable claim of foreclosure — the holding in *Mills* still applies. We disagree.

**{¶ 24}** First, the Wilkenses did not raise this issue below and thus, this court need not address it. But even if they had, their argument is without merit. See *Household Realty Corp. v. Rutherford*, 2d Dist. No. 20183, 2004-Ohio-2422 (addressing the *exact* issue with an identical arbitration rider, the court held that a

bank did not waive its right to arbitrate counterclaims by filing an action for money damages as well as an action in foreclosure); see, also, *Deutsche Natl. Bank Trust Co. v. Brown*, 6th Dist. No. WD-09-035, 2009-Ohio-6499 (bank does not waive its right to arbitrate claims that are arbitrable when it files action in foreclosure *and* money damages).

**{¶ 25}** Thus, we agree with U.S. Bank that *Mills* is not applicable, and that the trial court abused its discretion when it denied its motion to compel arbitration of the Wilkenses' counterclaims because it filed the foreclosure action.

Waiver of Right to Arbitrate by Inconsistent Acts

**{¶ 26}** The Wilkenses also maintain that U.S. Bank waived its right to demand arbitration of their counterclaims because it failed to assert the affirmative defense of arbitration in its original answer. They further claim that U.S. Bank failed to timely file a motion to compel arbitration of the counterclaims. We find their arguments to be unfounded.

**{¶ 27}** Ohio and federal courts recognize that there is a strong presumption in favor of arbitration and they encourage arbitration to settle disputes. *Wishnosky v. Star-Lite Bldg. & Dev. Co.* (Sept. 7, 2000), 8th Dist. No. 77245; see, also, *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, 500, 692 N.E.2d 574; *Gerig v. Kahn* (2002), 95 Ohio St.3d 478, 482, 769 N.E.2d 381. However, the conduct of a party that is inconsistent with arbitration may act as waiver of the right to arbitrate. See *Wishnosky*, supra; *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 413. "Thus, a trial court may deny a stay if it is not

satisfied that the issue involved in the action is referable to arbitration or if the trial court determines that the party has waived arbitration under the agreement." *Wishnosky*, supra.

**{¶ 28}** Because of the strong presumption in favor of arbitration, courts will not lightly infer waiver of the right to arbitrate. *Harsco* at 415; *Wishnosky*, supra. In *Wishnosky*, this court rearticulated the test to be used in determining whether a party's conduct constitutes a waiver to its right to arbitrate:

**{¶ 29}** "To prove that the defending party waived its right to arbitration, the complainant is required to demonstrate that the defending party 'knew of an existing right to arbitration, see *List & Son Co. v. Chase* (1909), 80 Ohio St. 42, and acted inconsistently with that right to arbitrate.' Id.; see *Central Trust Co. v. Anemostat Prods. Div.* (S.D.Ohio 1985), 621 F.Supp. 44; *Rock v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1992), 79 Ohio App.3d 126. 'The essential question is whether, based on the totality of the circumstances, the party seeking arbitration has acted inconsistently with the right to arbitrate.'" *Wishnosky*, supra, quoting *Phillips*, supra, and citing *Harsco* at 413-414.

**{¶ 30}** With regard to whether a party has acted inconsistently with the right to arbitrate, this court set forth a list of factors to consider:

**{¶ 31}** "Circumstances which may be considered by the court as pertinent to the issue are: 1) any delay in the requesting party's demand to arbitrate via a motion to stay the judicial proceeding and an order compelling arbitration; 2) the extent of the requesting party's participation in the litigation prior to its filing a

motion to stay the judicial proceeding, including a determination of the status of discovery, dispositive motions, and the trial date; 3) whether the requesting party invoked the jurisdiction of the court by filing a counterclaim or third-party complaint without asking for a stay of the proceedings; and 4) whether the non-requesting party has been prejudiced by the requesting party's inconsistent acts." (Citations omitted.) *Phillips*, supra.

**{¶ 32}** Further, "[b]ecause of the strong public policy in favor of arbitration, the heavy burden of proving waiver of the right to arbitration is on the party asserting waiver." *Griffith v. Linton* (1998), 130 Ohio App.3d 746, 751.

**{¶ 33}** After reviewing the record, we find that U.S. Bank did not act inconsistently with arbitration.

**{¶ 34}** It is apparent from the record that U.S. Bank did not initially know of the arbitration rider. It learned of it through the process of responding to the Wilkenses' discovery requests. U.S. Bank's attorney then immediately notified the Wilkenses' attorney via letter on January 21, 2008 that it discovered the arbitration rider and that "in light of" it, he would be moving to amend U.S. Bank's answer to assert arbitration as a defense. This was only two months after it originally answered the Wilkenses' counterclaims (November 13, 2007).

**{¶ 35}** The Wilkenses contend that U.S. Bank did not seek leave to amend its answer until "April 3, 2008 — some eleven (11) weeks later," and did not move to compel arbitration of their counterclaims until "over three (3) months after [U.S. Bank's attorney] announced the *discovery* of the arbitration rider." (Emphasis sic.)

But the trial court permitted U.S. Bank to amend its original answer. And notably, the Wilkenses do not claim that the trial court erred by doing so. Then, approximately three weeks after U.S. Bank filed its amended answer, it moved to compel arbitration of the Wilkenses' counterclaims and stay the proceedings. Unlike the delay in *Phillips* (which was "nearly three years" after the inception of the lawsuit), we do not find this was an "inordinate delay" as the Wilkenses claim.

**{¶ 36}** In *Harsco*, 122 Ohio App.3d 406, the court found that a party who moved to compel arbitration three months after it filed its answer did not waive its right to arbitrate. The Wilkenses argue that *Harsco* is distinguishable because "the party demanding arbitration had included the defense of arbitration in its original answer." We find this to be a distinction without a difference.

**{¶ 37}** As we stated earlier, the trial court permitted U.S. Bank to amend its answer, which under Civ.R. 15(A), "[l]eave of court shall be freely given when justice so requires," and "should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party." *L.E. Sommer Kidron, Inc. v. Kohler*, 9th Dist. No. 06CA0044, 2007-Ohio-885, at ¶35, citing *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 6. Leave to amend should not be granted when "[a] party may be prejudiced when an opposing party seeks to assert defenses at a time when the party could not adequately prepare to litigate them." Id. at ¶36, citing *St. Mary's v. Dayton Power & Light Co.* (1992), 79 Ohio App.3d 526. There is nothing in the record to indicate that the Wilkenses could not adequately prepare to litigate against U.S. Bank's amended answer — nor do the Wilkenses

contend they were prejudiced in any way (discussed more thoroughly later in this opinion).

**{¶ 38}** We further find it significant that U.S. Bank's attorney notified the Wilkenses' attorney via letter in January 2008 of its intent to amend its answer to include the defense of arbitration. Although U.S. Bank did not move to amend its answer or compel arbitration until April, the Wilkenses were put on notice in January and, therefore, could prepare an adequate defense. See *Supervalu Holdings, Inc. v. Schear's Food Centers, Inc.* (June 26, 1998), 2d Dist. No. 16881 (relevant the question of waiver is whether the party seeking to compel arbitration has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion).

**{¶ 39}** The Wilkenses claim — albeit meekly — that the trial court had already issued a *scheduling order* prior to U.S. Bank filing its motion to compel. The trial court granted U.S. Bank leave to amend its answer on April 10, 2008, giving them until April 21st to do so. Then on April 11th, the trial court issued an order requiring U.S. Bank to "file a motion for default judgment, [or] any other dispositive motions, current title work, military affidavit" no later than May 12, 2008. But notably, U.S. Bank moved to amend the trial court's scheduling order in light of its motion to compel *on the same day* it filed the motion to compel. The trial court then granted U.S. Bank's motion to amend the scheduling order.

**{¶ 40}** The Wilkenses also argue that before U.S. Bank moved to compel arbitration of their counterclaims, "[U.S. Bank] engaged in the discovery process,

answering [the Wilkenses'] interrogatories and responding to [the Wilkenses'] request for production of documents and requests for admissions, even supplementing their responses!" Although participation in discovery is a factor relevant to waiver, we disagree that it amounted to waiver under the facts of this case. It was through the initial discovery process that U.S. Bank found the arbitration rider — and when it did, it notified the Wilkenses' attorney *immediately*. If it had not done so, and continued to participate in discovery and litigation, it would be more of a factor.

**{¶ 41}** The Wilkenses further argue that U.S. Bank moved for summary judgment, which also evidences that it waived its right to arbitrate their counterclaims. Again, we agree that moving for summary judgment can be a factor indicating that a party waived its right to arbitrate because it means the party recognizes the trial court's authority to decide the matter before it. *Harsco* at 416 (another factor that the Wilkenses claim makes this case distinguishable from *Harsco* because in *Harsco*, the party demanding arbitration had not moved for summary judgment).

**{¶ 42}** But a cursory review of the docket here indicates that U.S. Bank only filed a motion for summary judgment because the trial court explicitly ordered it to file a motion for summary judgment on July 31, 2008; if it failed to do so, the trial court warned that it would "result in this case being dismissed without prejudice." This was *one day* after the magistrate denied U.S. Bank's motion to compel (on July 30, 2008). U.S. Bank complied with the trial court's July 31st order and filed

a motion for summary judgment, rather than risk the case being dismissed. But notably, U.S. Bank also filed objections to the magistrate's decision denying its motion to compel arbitration of the Wilkenses' counterclaims — thereby not acting inconsistent with its right to arbitrate.

**{¶ 43}** Finally, the Wilkenses do not assert that they were prejudiced by the supposed delay. Indeed, they claim that in Ohio, prejudice is not required to find waiver. While we agree with their statement of law that waiver can be found without prejudice, prejudice is still a *factor* courts should consider when reviewing the totality of the circumstances. See *Phillips*, supra (this court found that a three-year delay prejudiced the Phillips). Reviewing the record here, we cannot find that the Wilkenses were prejudiced in any way by the brief delay in this case. A case management conference was not held until June 25, 2008. At it, the trial court ordered that "an attorney conference will take place on 9/9/08." But notably, the trial court had not yet set a date for trial. And even by the time U.S. Bank filed its notice of appeal in this case (April 2, 2009), no trial date had yet been set.

**{¶ 44}** Accordingly, mindful that a waiver of arbitration is not to be lightly inferred, and that a party opposing a motion to stay arbitration on that ground bears a heavy burden, this court can only conclude that U.S. Bank did not act inconsistent with its right to arbitrate the Wilkenses' counterclaims and thus, did not waive that right.

**{¶ 45}** As for the Wilkenses' alternative arguments to affirm the trial court's judgment — all which attack the enforceability of the arbitration rider[2] — we agree with U.S. Bank that these issues are not yet ripe for review. Because the trial court found U.S. Bank waived its right to arbitrate, it did not review the enforceability of the arbitration rider. Some of the issues raised by the Wilkenses may require factual findings that are more appropriate for the trial court. See *Murray v. David Moore Builders*, 177 Ohio App.3d 62, 2008-Ohio-2960, ¶1 (reversing a trial court's order denying a motion to compel arbitration because third parties were involved; held that alternative arguments advanced were not ripe for review since they attacked the enforceability of the arbitration clause).

**{¶ 46}** U.S. Bank's first assignment of error is sustained.

Third-Party Defendant's Right to Arbitrate

**{¶ 47}** In their second assignment of error, U.S. Bank and Ocwen contend that the trial court erred when it denied Ocwen the right to arbitrate because Ocwen was an agent of U.S. Bank. In U.S. Bank's motion to compel arbitration of the Wilkenses' counterclaims and stay further proceedings, however, U.S. Bank requested the trial court *to stay the proceedings against Ocwen* because the claims against Ocwen were "inextricably intertwined with Defendants' [Wilkenses]

[2]The Wilkenses' other arguments that attack the enforceability of the arbitration rider include (1) U.S. Bank was not a party to the arbitration rider; (2) U.S. Bank failed to prove it was an assignee of the original lender; (3) the original lender did not sign arbitration rider; (4) Ruth Wilkens did not sign the arbitration rider; (5) arbitration rider is narrow in scope and does not reach dispute raised here; and (6) arbitration rider is unconscionable.

arbitrable claim against Plaintiff [U.S. Bank]." U.S. Bank *did not request* that the Wilkenses' claims against Ocwen be referred to arbitration and notably, neither did Ocwen.

**{¶ 48}** Thus, the trial court could not have erred in denying Ocwen the right to arbitrate when neither Ocwen nor U.S. Bank requested the trial court to refer the Wilkenses' third-party claims against Ocwen to arbitration.

**{¶ 49}** Appellants' second assignment of error is overruled.

Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants recover of appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

MARY J. BOYLE, JUDGE

CHRISTINE T. McMONAGLE, J., CONCURS;
MARY EILEEN KILBANE, P.J., DISSENTS WITH SEPARATE OPINION

MARY EILEEN KILBANE, P.J., DISSENTING:

**{¶ 50}** I respectfully dissent from the majority's opinion that concluded the trial court abused its discretion in denying U.S. Bank's motion to compel arbitration. I would conclude that U.S. Bank failed to timely assert its right to arbitration, thereby waiving it. Consequently, I would affirm.

**{¶ 51}** A trial court's decision on a motion to compel arbitration is reviewed only for an abuse of discretion. *Sikes v. Ganley Pontiac Honda* (Sept. 13, 2001), Cuyahoga App. No. 79015, citing *Harsco v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 410, 701 N.E.2d 1040. In order for a trial court to have abused its discretion, there must be "more than an error of law or judgment." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. Abuse of discretion "implies that the court's attitude is unreasonable arbitrary or unconscionable." Id.

**{¶ 52}** This court has previously acknowledged that the abuse of discretion standard is a very high standard and "evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof * * *." *Aponte v. Aponte* (Feb. 15, 2001), Cuyahoga App. Nos. 77394 and 78090, citing *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264. "[W]hen applying the abuse of discretion standard an appellate court may not substitute its judgment for that of the trial court." *State v. Bruce*, Cuyahoga

App. No. 92016, 2009-Ohio-6214, citing *State v. Murray*, Lake App. No. 2007-L-098, 2007-Ohio-6733.

**{¶ 53}** A party may waive its right to arbitrate if it does not immediately raise the issue with the court. *Phillips v. Lee Homes* (Feb. 17, 1994), Cuyahoga App. No. 64353, citing *Gibbons-Grable Co. v. Gilbane Bldg. Co.* (1986), 34 Ohio App.3d 170, 176, 517 N.E.2d 559. This court has previously held that whether a party waived their right to arbitration is dependent upon the facts of that particular case. *Phillips*, supra. As the trial court is more familiar with the proceedings, it is in the best position to determine whether a party's actions constituted a waiver of its right to arbitration. Id.

**{¶ 54}** On August 9, 2007, U.S. Bank initiated the instant foreclosure action against the Wilkenses based upon the note and mortgage John Wilkens executed in December 2002. The arbitration rider was incorporated into the note by reference. On October 15, 2007, the Wilkenses filed their answer and counterclaims. Although U.S. Bank alleges that it was unaware of the arbitration rider until January 2008, U.S. Bank should have been aware of the arbitration rider at the inception of the foreclosure action. Even accepting U.S. Bank's contention that it first learned of the arbitration rider in January 2008, U.S. Bank failed to file a motion to compel arbitration until April 2008, nearly three months later.

**{¶ 55}** It is well established that a party can waive its right to arbitration by failing to timely file the appropriate motion. U.S. Bank waited nearly six months after the Wilkenses filed their answer, and nearly three months after admitting to learning of the arbitration rider, before it filed the motion to compel arbitration. The trial court is in the best position to assess the parties' progress in discovery and determine whether U.S. Bank waited too long to assert its right to arbitration.

**{¶ 56}** In light of these facts, I cannot conclude that the trial court abused its discretion in denying U.S. Bank's motion to compel arbitration. Therefore, I would affirm.