REL:11/26/2014

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2014-2015

1130184

Ex parte Alaska Bush Adventures, LLC, et al.

PETITION FOR WRIT OF MANDAMUS

(In re: Guy R. Willis

v.

Alaska Bush Adventures, LLC, et al.)

1130231

Alaska Bush Adventures, LLC, et al.

v.

Guy R. Willis

Appellate Proceedings from Elmore Circuit Court (CV-12-900451)

PER CURIAM.

These consolidated cases arise out of an action brought in the Elmore Circuit Court by Guy R. Willis against three defendants: Alaska Bush Adventures, LLC ("Alaska Bush"), Hugh Les Krank, and Ryan L. Krank (Alaska Bush and the Kranks are hereinafter collectively referred to as "the defendants"); the Kranks are the owners and operators of Alaska Bush. In case no. 1130184, the defendants petition for a writ of mandamus directing the trial court to vacate its order denying their motions to dismiss the action for lack of personal jurisdiction. In case no. 1130231, the defendants appeal from the trial court's denial of their motion to compel arbitration. In case no. 1130184, we deny the petition; in case no. 1130231, we reverse and remand.

Facts and Procedural History

According to the record on appeal and the materials before us on the petition for the writ of mandamus, Alaska Bush, a business formed in Alaska, provides guided hunting trips in that state. In December 2011, Willis entered into a written contract with Alaska Bush pursuant to which Alaska

Bush would lead a guided hunting trip in Alaska. That contract is entitled "Guide/Outfitter Contract/Security Agreement between Alaska Bush Adventures LLC and: Guy Willis." Willis also claims that he entered into a separate oral contract to hunt black bears during that guided hunting trip. The guided hunting trip took place in September 2012.

On November 5, 2012, Willis sued the defendants in the Elmore Circuit Court, seeking damages for breach of contract, misrepresentation, and suppression.[1] Willis's claims against the defendants centered primarily on his allegations that the equipment Alaska Bush provided for the hunting expedition was inadequate in number, unsafe, and inoperable, and he also alleged that he lost hunting time because the defendants were providing services to other hunters who were apparently not included in the guided hunting trip. Willis claimed that he lost most of his personal hunting equipment and had to leave the trip early because he "was caused to be thrown from an improperly repaired, inspected, and/or working motorized boat ...." Willis further alleged that the defendants

[1]Willis also sought damages on a tort-of-outrage theory.

misrepresented the quantity of wild game that would be available on the hunt.

On December 19, 2012, Willis filed an application for the entry of a default judgment against Ryan, and, on the following day, he filed a similar application against Alaska Bush and Hugh. On December 21, 2012, the defendants filed an answer to Willis's complaint and an objection to Willis's applications for entry of a default judgment.

On January 2, 2013, the defendants filed a motion to compel Willis to arbitration pursuant to an arbitration agreement found in the written contract. On January 11, the defendants each filed an individual motion to dismiss Willis's complaint for lack of personal jurisdiction.

Subsequently, the trial court issued an order denying the defendants' respective motions to dismiss and their motion to compel arbitration. In case no. 1130184, the defendants petition this Court for a writ of mandamus challenging the denial of their motions to dismiss for lack of personal jurisdiction; in case no. 1130231, they appeal the trial court's denial of their motion to compel arbitration.

Case no. 1130184

Upon review of the materials submitted in support of this petition for a writ on mandamus, we deny the petition. Because we are denying the defendants' petition, we address the defendants' appeal from the order denying their motion to compel arbitration.

Case no. 1130231

In case no. 1130231, the defendants appeal from the denial of their motion to compel arbitration. We reverse and remand.

A. Standard of Review

> "Our standard of review of a ruling denying a motion to compel arbitration is well settled:
>
> > "'"This Court reviews de novo the denial of a motion to compel arbitration. Parkway Dodge, Inc. v. Yarbrough, 779 So. 2d 1205 (Ala. 2000). A motion to compel arbitration is analogous to a motion for a summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce. Id. '[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to

> present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.' Jim Burke Automotive, Inc. v. Beavers, 674 So. 2d 1260, 1265 n. 1 (Ala. 1995) (opinion on application for rehearing)."'
>
> "Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313, 315 (Ala. 2003) (quoting Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000))."

SSC Montgomery Cedar Crest Operating Co. v. Bolding, 130 So. 3d 1194, 1196 (Ala. 2013).

B. Analysis

In this case, the defendants supported their motion to compel arbitration with, among other evidence, the written contract between Willis and the defendants, which contains the following arbitration clause:

> "Alaska Bush Adventures, LLC agree that they will try to minimize risk to all customers, but due to unforeseen circumstances, the undersigned customer agrees to waive all liability claims against this company and their affiliates, agreeing that any and all disputes with Alaska Bush Adventures, LLC be settled by arbitration conducted in the state of Alaska where the Corporation's office is located. Please contact me if you have any questions. If you have carefully read this contract and are satisfied with these arrangements and with the terms and conditions, please sign and return it to me with your down payment."

(Emphasis added.) The defendants presented a properly supported motion to compel arbitration demonstrating "the existence of a contract calling for arbitration,"[2] see SSC Montgomery Cedar Crest, supra; thus, the burden then shifted to Willis to present evidence indicating that the arbitration clause was "not valid or does not apply to the dispute in question." Id.

Willis argued in the trial court and he now argues on appeal that the arbitration clause is not enforceable because, he says, "the arbitration agreement in the written contract between the parties was induced by fraud." Willis argues on appeal that the arbitration clause was induced by fraud because, he says, "as an examination of the written contract between the parties reveals, the arbitration clause in that contract was obscured in unhighlighted small print at the bottom of the document." Furthermore, Willis argued in the trial court and he now argues on appeal that there exists a separate oral contract to hunt black bears during the guided hunting trip, and, he says, the oral contract is not governed by the arbitration clause in the written contract.

[2]There is no dispute that "the contract evidences a transaction affecting interstate commerce."

First, as to Willis's claim that the arbitration clause was induced by fraud on the part of the defendants, the defendants correctly state that "[n]o evidentiary materials of record support Willis'[s] arguments." Indeed, the record on appeal is entirely devoid of any evidence supporting Willis's argument on this issue. Notably, Willis's brief provides no example of the allegedly fraudulent misrepresentations the defendants used to procure Willis's signature on the arbitration clause in the written contract. Rather, Willis generally recites that the arbitration clause was procured by fraud, recites that he raised that issue in the trial court, and then concludes that the trial court did not err in denying the defendants' motion to compel arbitration. None of the documents in the record to which he cites contains evidence supporting an allegation that the arbitration clause was induced by fraud on the part of the defendants.

Next, Willis argues that the arbitration clause was induced by fraud because the language of that clause was in "unhighlighted small print" at the bottom of the written contract. As the defendants correctly noted: "The arbitration clause is set forth in the same size print and the same font

as the rest of the contract terms, and is located in the body of the one-page contract." Therefore, this argument provides no basis for concluding that the arbitration clause was induced by fraud or was otherwise unenforceable. See Southern Energy Homes, Inc. v. Ard, 772 So. 2d 1131, 1135 (Ala. 2000) ("Because, in all other respects, the arbitration language is just as conspicuous as the other provisions of the warranty ..., we find that it is a binding part of the warranty."). See also Advance Tank & Constr. Co., v. Gulf Coast Asphalt Co., 968 So. 2d 520, 528 (Ala. 2006) (noting that no "special disclosure" is required to point out the existence of an arbitration provision in a contract).

Finally, we see no merit in Willis's argument that there exists a separate oral contract and that the existence of that oral contract supports a denial of the motion to compel arbitration. First, the arbitration clause provides that "any and all disputes" between the parties are to be settled by arbitration. This broad language alone indicates that the scope of the arbitration clause would encompass any "dispute" between the parties related to any subsequent oral contract between these parties as to this subject. Additionally, and

most importantly, the terms of the purported oral contract are actually found as part of the written contract. Specifically, the written contract between the parties states that Willis had "tentatively scheduled the following hunt: A one client to one guide hunt for Moose, Brown/Grizzly Bear and Fishing." The written contract also states that "Black Bear can be added to the hunt for an additional $800.00 each." After executing the written contract, the defendants sent Willis a document entitled "Important Contract Addendum & Information," which required Willis to complete and sign several forms and return the forms to the defendants. One of the forms Willis was required to complete, sign, and return to the defendants was a "Medical Information Form." On that form, Willis was asked to provide, among other things, "[a]ny information to make [his] trip more comfortable"; Willis completed that portion of the form by stating that he desired to "[g]et a Trophy Moose/Grizzly/Black Bear[,] Wolf/Wolverine, [and] catch Lots of fish." (Emphasis added.) The defendants did not object to Willis's statement on the "Medical Information Form" that he wanted to hunt black bear, and, in fact, the record on appeal shows that Willis paid an additional $800 fee to hunt "for a

Black Bear." Thus, in the addendum to the written contract, the parties evidenced their intention to add a hunt for black bear, wolf, and wolverine to the guided hunting trip for which the parties had originally contracted. As stated by the defendants: "Willis merely added another species to be hunted, which was an option set forth in the original contract." Accordingly, Willis's hunt for black bear was expressly governed by the provisions of the written contract containing the arbitration clause.

In sum, after the defendants presented a properly supported motion to compel arbitration, the burden then shifted to Willis to present evidence indicating that the arbitration clause is not valid or that it does not apply to the dispute in question; Willis failed to do either. Therefore, the trial court erred in denying the defendants' motion to compel arbitration.[3]

[3]The terms of the arbitration clause cover only disputes between Alaska Bush and Willis. However, the written contract containing the arbitration clause was signed on behalf of Alaska Bush by its agents, Hugh and Ryan. See Ex parte Carter, 66 So. 3d 231 (Ala. 2010) ("[T]his Court has stated that a 'corporation is a legal entity, an artificial person, and can only act through agents,' Townsend Ford, Inc. v. Auto-Owners Ins. Co., 656 So. 2d 360, 363 (Ala. 1995), and that agents 'stand in the shoes' of their principals and can enforce certain contractual agreements ...."(emphasis added)).

C. Conclusion

The trial court's order denying the motion to compel arbitration is reversed and the cause remanded for the trial court to enter an order granting the motion.

1130184--PETITION DENIED.

Moore, C.J., and Stuart, Parker, and Main, JJ., concur.

Shaw and Bryan, JJ., and Lyons, Special Justice,* concur specially.

Bolin and Murdock, JJ., dissent.

Wise, J., recuses herself.

1130231--REVERSED AND REMANDED.

Stuart, Parker, Shaw, Main, and Bryan, JJ., and Lyons, Special Justice,* concur.

Moore, C.J., and Bolin and Murdock, JJ., dissent.

Wise, J., recuses herself.

*Retired Associate Justice Champ Lyons, Jr., was appointed to serve as a Special Justice in regard to these appellate proceedings.

SHAW, Justice (concurring specially in case no. 1130184).

I concur in case no. 1130184 to deny the petition for a writ of mandamus filed by Alaska Bush Adventures, LLC, Hugh Les Krank, and Ryan L. Krank (hereinafter referred to collectively as "the defendants") challenging the trial court's denial of their motions to dismiss Guy R. Willis's action against them for lack of personal jurisdiction. The main opinion essentially denies the petition without an opinion; I write specially in that case to explain my rationale for agreeing to deny the petition.

If the trial court in this case did not initially possess personal jurisdiction over the defendants, then I believe that the defendants later consented to the trial court's jurisdiction. Specifically, the defense of lack of personal jurisdiction is subject to waiver or consent; when a defendant seeks "affirmative relief from [an Alabama] court," he may be deemed to have "purposely availed himself of conducting activities in Alabama ...." Owen v. Owen, 571 So. 2d 1200, 1201 (Ala. Civ. App. 1990). See also Bel-Ray Co. v. Chemrite (Pty) Ltd., 181 F.3d 435, 443 (3d Cir. 1999) ("[W]here a party seeks affirmative relief from a court, it normally submits

itself to the jurisdiction of the court with respect to the adjudication of claims arising from the same subject matter."). In the instant case, the defendants filed their motion to compel arbitration on January 2, 2013; their motions to dismiss for lack of personal jurisdiction were filed nine days later on January 11, 2013. Other courts have determined that a motion to compel arbitration seeks "affirmative relief" from a court:

> "A motion to compel arbitration is a request for affirmative relief, it is not merely a ministerial act seeking to preserve the status quo, such as filing a general denial or asserting affirmative defenses. See Quanto Int'l Co., Inc. v. Lloyd, 897 S.W.2d 482, 487 (Tex. App.-Houston [1st Dist.] 1995) (a 'request to compel arbitration is a claim for "affirmative relief"')(internal quotations omitted); Arnold v. Garlock Inc., 288 F.3d 234, 237 (5th Cir. 2002) (same); Tri-State Consumer Ins. Co. v. Prop. & Cas. Mgmt. Sys., Inc., [(No. 11-02-00125-CV, Jan. 23, 2003)(not reported in S.W.3d)] ('A motion to compel arbitration seeks affirmative relief and recognizes a trial court's jurisdiction.')."

Garcia v. SSP Partners (Civil Action No. C-06-385, Oct. 3, 2006) (S.D. Tex. 2006) (not reported in F. Supp. 2d). See also McKinnon v. Doctor's Assocs., Inc., 769 F. Supp. 216, 220 (E.D. Mich. 1991) ("The motion to compel arbitration ... sought the affirmative relief of compelling the plaintiffs to submit their claims to arbitration.") By asking the trial

court to compel arbitration, the defendants were seeking affirmative relief; they thus subjected themselves to the jurisdiction of the trial court. As one court has stated, it is contradictory for a party to argue that a court has no personal jurisdiction over it, while at the same time requesting the court to compel arbitration:

> "[G]iven that Defendants have filed a motion to compel arbitration in this Court, their position [that the court lacks] personal jurisdiction seems disingenuous. They cannot argue that they may consent to personal jurisdiction for purposes of their own motion to compel arbitration, but object to the exercise of personal jurisdiction for purposes of Plaintiff's request for declaratory and injunctive relief. Both requests raise the same issue ... and therefore, the Court has personal jurisdiction to consider either request."

Express Scripts, Inc. v. Apothecary Shoppe, Inc. (No. 4:12CV01035 AGF, Sept. 30, 2013)(E.D. Mo. 2013) (not reported in F. Supp. 2d).[4] Here, in one motion the defendants

[4]As another court has noted:

> "Here ... the court finds that Haas submitted to the jurisdiction of this court through its motion to compel arbitration, constituting a waiver of its due process right. First of all, the defendant's earlier motion asked this court to interpret the language of the contract at issue in this case and order relief in the form of compelling arbitration, an explicit request for this court to exercise its power to affect both the plaintiff and defendant. See Mississippi Valley Dev. Corp. v. Colonial

requested that the trial court act and grant them the affirmative relief of compelling arbitration but later argued

---

> Enterprises, Inc., 300 Minn. 66, 71-72, 217 N.W.2d 760 (1974) (holding that the defendant's filing of a motion to compel arbitration 'invok[ed] the power of the court' and waived the defense of lack of personal jurisdiction); see generally 1 Robert C. Casad & William B. Richman, Jurisdiction in Civil Actions § 3-1(iii) (3d ed. 1998) ('A demand for arbitration has been held to waive personal jurisdiction defenses'). When a defendant's conduct does not 'reflect a continuing objection to the power of the court to act,' the defense of lack of personal jurisdiction is waived. Yeldell v. Tutt, 913 F.2d 533, 539 (8th Cir. 1990); see also Echo, Inc. v. Whitson Co., 52 F.3d 702, 707 (7th Cir. 1995) ('The parties consented to personal jurisdiction simply by participating in the proceedings before the district court without protest'); see generally Restatement (Third) of Foreign Relations Law of the United States § 421(3) ('A defense of lack of jurisdiction is generally waived by any appearance ... for a purpose that does not include a challenge to the exercise of jurisdiction'); Restatement (Second) of Conflict of Laws § 33 ('A state has power to exercise judicial jurisdiction over an individual who enters an appearance as defendant in an action with respect to a claim that arose out of the transaction which is the subject of the action or is one that may in fairness be determined concurrently with that action.') While this case may be a 'closer call' than some of the cases cited by the plaintiff in its response brief, here, the defendant asked this court to use its power to influence the ultimate resolution of this matter, amounting to conduct that acknowledges the court's in personam jurisdiction."

Derse Inc. v. Haas Outdoors Inc. (No. 09-CV-97, Feb. 4, 2011) (E.D. Wis. 2011) (not reported in F. Supp. 2d).

on separate motions that the trial court had no jurisdiction to act in the first place.

"It is a fundamental rule that

> "'when a party invokes the jurisdiction of a court on an alleged state of facts which gives the court jurisdiction, and the court has proceeded to determine the controversy, the party or parties invoking its jurisdiction will not be permitted to assume an inconsistent position in the same proceedings or question the regularity thereof; and this principle applies on appeal as well as to the proceedings in the trial court.'"

Godwin v. Bogart, 674 So. 2d 606, 608 (Ala. Civ. App. 1995) (quoting Clark v. Holland, 274 Ala. 597, 599, 150 So. 2d 702, 704 (1963)). In this case, the defendants requested that the trial court decide the "controversy" whether arbitration should be compelled and thus consented to the trial court's exercise of jurisdiction to do so. Because they consented to the jurisdiction of the trial court, they cannot show "a clear legal right to the order [of dismissal] sought" or "an imperative duty upon the respondent to perform," which are necessary to be entitled to mandamus relief. Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001). I thus concur to deny the petition.

Bryan, J., concurs.

LYONS, Special Justice (concurring specially in case no. 1130184).

Rule 12(b), Ala. R. Civ. P., expressly authorizes a defendant to assert a defense of lack of jurisdiction over the person in its answer, as opposed to doing so by motion filed pursuant to Rule 12(b)(2), Ala. R. Civ. P. Although a subsequent motion under Rule 12(b)(2) is not the proper vehicle when the defense has previously been asserted in an answer, the command in Rule 1(c), Ala. R. Civ. P., for construction of the Rules of Civil Procedure to secure the just determination of every action requires treatment of a motion under Rule 12(b)(2) as a motion for a preliminary hearing pursuant to Rule 12(d), Ala. R. Civ. P. See 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1361 n. 8. (3d ed. 2004), for a similar construction of the applicable federal rule.

As Justice Murdock notes in his dissenting opinion, the defendants initially set forth the defense of lack of jurisdiction over the person in an answer filed on December 21, 2012, and the defense was referred to in the defendants' motion to compel arbitration filed on January 2, 2013. The defendants there stated that they intended to file a motion

seeking dismissal based on the absence of personal jurisdiction and that arbitration was being sought only in the event the court denied their forthcoming motions to dismiss. The motions to dismiss for want of personal jurisdiction filed pursuant to Rule 12(b)(2) were filed on January 11, 2013. A memorandum in support of the defendants' motion to compel arbitration and in response to Willis's opposition to the defendants' motion to compel was filed on February 12, 2014. In the opening paragraph of the response, the defendants again stated that arbitration was being sought only in the event the trial court denied their motions to dismiss. Rather than treat the potentially dispositive motions to dismiss separately, the trial court heard arguments on all the motions on April 3, 2013, and denied all the motions on October 16, 2013.

The proper procedure would have been for the defendants to defer presentation of their motion to compel arbitration until the trial court had ruled on the dispositive motions to dismiss. However, the defendants invited a ruling on an issue as to which the trial court lacked jurisdiction to decide if the motions to dismiss were well taken. I recognize that the defendants coupled their motion to compel arbitration with

language to the effect that the motion would not be ripe for a ruling if the court granted their motions to dismiss. However, the undeniable fact remains -- if the trial court had erroneously denied the motions to dismiss and this Court overturns that order by issuance of the writ of mandamus in response to the defendants' petition, the trial court will have decided a moot issue -- the issue of arbitrability.

In his dissenting opinion Justice Murdock supports his view that no waiver is here presented by citing Gerber v. Riordan, 649 F.3d 514 (6th Cir. 2011), in which the court stated:

> "Only those submissions, appearances and filings that give '[P]laintiff a reasonable expectation that [Defendants] will defend the suit on the merits or must cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking,' [Mobile Anesthesiologists Chicago, LLC v. Anesthesia Associates of Houston Metroplex, P.A., 623 F.3d 440, 443 (7th Cir. 2010)], result in waiver of a personal jurisdiction defense."

(Emphasis added.) Gerber therefore supports the view that the submission of a potentially moot issue for decision by the trial court along with a challenge to jurisdiction is a waiver

of the jurisdictional issue.[5] I find Justice Murdock's attempt to distinguish Gerber to be unpersuasive.

The defendants have tried to have their cake and eat it too. See Malsch v. Bell Helicopter Textron, Inc., 916 So. 2d 600, 609 (Ala. 2005) (Lyons, J., dissenting):

> "Such acrobatic posturing violates the following equitable principle: 'Thou shalt not have it both ways.' As the English Court of Exchequer in Cave v. Mills, 7 H. & W. 927, 31 L.J. Ex. 265 (1862), put it: 'A man shall not be allowed to blow hot and cold, to claim at one time and deny at another.'"

If the defendants have waived the defense of lack of jurisdiction over the person, the only issue for this Court to decide is whether the trial court erred in denying arbitration. I concur with the majority's analysis reversing the trial court's denial of the defendants' motion to compel arbitration.

---

[5]We are not here presented with a defendant who has unsuccessfully moved for dismissal for lack of personal jurisdiction and then, after the denial of its motion, defended the action rather than suffer the consequences of a default while continuing to assert its jurisdictional defense along with its defense of the merits. Under those circumstances, this Court has recognized a defendant's right to appeal the denial of the motion to dismiss for lack of personal jurisdiction after entry of final judgment against the defendant. See Ex parte United Ins. Cos., 936 So. 2d 1049, 1056 (Ala. 2006).

MURDOCK, Justice (dissenting).

As a preliminary matter, I respectfully must disagree with the suggestion in Justice Lyons's special concurrence that a motion asserting the defense of lack of in personam jurisdiction under Rule 12(b)(2), Ala. R. Civ. P., is not "proper" merely because that defense already has been asserted by a defendant in a previously filed answer. Rule 12(b)(2) provides that such a defense "may at the option of the pleader" be made in a separate motion. I do not read this permission to assert such a defense in a separate motion as conditioned upon the movant having withheld that defense from the text of a previously filed answer. See, e.g., Lechoslaw v. Bank of America, N.A., 618 F.3d 49 (1st Cir. 2010) (assertion of defense of lack of in personam jurisdiction in an answer followed by specific assertion of it in motion for relief under Rule 12, Fed. R. Civ. P.).

Similarly, I do not see that the rule of construction expressed in Rule 1(c), Ala. R. Civ. P. (for the just determination of every action) in some way "requires treatment of a motion under Rule 12(b)(2) as a motion for a preliminary hearing pursuant to Rule 12(d), Ala. R. Civ. P." ___ So. 3d at ___ (Lyons, Special Justice, concurring specially). As the

rule contemplates, an "application" for a pretrial hearing -- as opposed to waiting for a ruling at trial on the defense asserted in either an answer or a motion -- is a different matter than the motion itself.

That said, I write separately primarily to address the merits of the issue presented and, in that regard, to explain why I do not believe the defendants waived their defense of lack of in personam jurisdiction grounded, as it was, on the inability of the plaintiff to satisfy the so-called "minimum contacts" test.

Alaska Bush Adventures, LLC, Hugh Les Krank, and Ryan L. Krank (hereinafter referred to collectively as "the defendants") asserted their defense of a lack of in personam jurisdiction in their initial responsive pleading, an answer filed on December 21, 2012. On January 2, 2013, only a few days later (following two intervening holidays), the defendants, faced with a motion for a default judgment and pending discovery requests, filed a motion for a stay of the judicial proceedings and for arbitration; they included in this motion a statement pointing out that a separate motion to dismiss based on lack of in personam jurisdiction, as alleged in their December 21 answer, was about to be filed. Nine days

later, the defendants did, in fact, file separate motions asserting the same minimum-contacts in personam jurisdiction defense raised in their answer three weeks earlier and in the motion they had filed nine days earlier. Against this procedural backdrop, the trial court refrained from ruling on the defendants' motion regarding arbitration until it issued a combined order simultaneously denying the defendants' motions to dismiss for lack of in personam jurisdiction and the defendants' motion to compel arbitration.

Under these circumstances, I do not believe the defendants' actions constituted the legal submission to the jurisdiction of the court contemplated for the submission to constitute a waiver of the defense of lack of in personam jurisdiction. What is required -- but is not present in this case -- is a "failure to assert [the defense] seasonably." Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939). In this regard, federal courts have long since abandoned the notion that a so-called "general appearance" automatically constitutes a waiver of a defense of lack of personal jurisdiction. See generally 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1344 (3d ed. 2004). So too have our rules. See generally

Committee Comments to Rule 12, Ala. R. Civ. P., explaining the movement away from "special appearances" and the principle that "neither the filing of a general appearance, nor the taking of a position looking to the merits, prevents a party from attacking the jurisdiction of the court or the service of process."

Federal jurisprudence now widely accepts the notion that the question of waiver is not answered by the application of rigid default rules but lies in a "gray area" that must be examined on a case-by-case basis at the discretion of the trial court.[6] For example, in Lechoslaw, supra, the United States Court of Appeals for the First Circuit shed the following light on the issue:

> "It is clear that 'a defense of lack of jurisdiction over the person is waived if not timely raised in the answer or a responsive pleading.' Id. (quoting Fed. R. Civ. P. 12(h)) (internal quotations and marks omitted); see also Mass. R. Civ. P. 12(h)

[6]Because the issue of waiver calls for the exercise of discretion on the part of the trial court, and because in this case any decision by this Court that a waiver occurred must be made ex mero motu, to the extent the majority bases its decision on a finding of waiver I find that decision unsupportable. I do not believe we can make such a decision as a matter of law, which we would have to do in order to make the decision ex mero motu. Concomitantly, I do not believe we can make such a decision ex mero motu under the circumstances without implicating the due-process rights of the defendants.

(same). However, even if the issue of personal jurisdiction is raised in its answer or other responsive pleading, a party may nevertheless waive jurisdiction if it makes voluntary appearances and contests the case at all stages until judgment is rendered. Ingersoll v. Ingersoll, 348 Mass. 209, 202 N.E.2d 820, 821 (1964). Those are the two extremes; in between lies a wide gray gulf. ...

"....

"... Lechoslaw ... argues that Bank Handlowy is anyway precluded by its actions and by laches from raising the issue of personal jurisdiction because it propounded discovery requests, negotiated extensions to the time required to respond to the discovery requests, solicited a confidentiality agreement, and because it filed an assented-to motion to expand the tracking order before filing its Rule 12 motion [asserting lack of personal jurisdiction]. ...

"... A determination as to 'waiver [of personal jurisdiction is] within the discretion of the trial court, consistent with its broad duties in managing the conduct of cases pending before it.' United States v. Ziegler Bolt & Parts Co., 111 F.3d 878, 882 (Fed. Cir. 1997). Thus, '[o]n appeal, this court defers to the judgment of the trial court on such matters closely associated with the standard functions of the adjudicative process, so long as that judgment is not an abuse of the trial court's discretion. ...' Id. (internal citations omitted); see also Hamilton v. Atlas Turner, Inc., 197 F.3d 58, 60 (2d Cir. 1999). ...

"Bank Handlowy's answer to Lechoslaw's complaint included the affirmative defense of lack of personal jurisdiction. The language ... from Bank Handlowy's motion[] does not imply that Bank Handlowy had assented to jurisdiction. The quote makes clear that Bank Handlowy contested personal jurisdiction

> in its answer. It only clarifies the reason why Bank Handlowy chose to file an answer, its first responsive pleading in this case, before it filed a Rule 12 motion. There is nothing the matter with Bank Handlowy's chosen order of filings given that its answer included the personal jurisdiction defense. In addition, the fact that Bank Handlowy assented to a motion to extend the tracking order before it filed its Rule 12 motion is also not reason to find waiver, and the cases Lechoslaw cites are not to the contrary. The trial court did not abuse its discretion in finding Bank Handlowy did not waive its defense of lack of personal jurisdiction."

618 F.3d at 55-56 (footnotes omitted).

Consistent with the aforesaid analysis, the test to be applied in this case-by-case-examination basis has been framed aptly by one court as whether a defendant "substantially participates in the litigation without actively pursuing its Rule 12(b)(2) defense." Matthews v. Brookstone Stores, Inc., 431 F. Supp. 2d 1219, 1223 (S.D. Ala. 2006). Although it has been said that the examination should turn on "all relevant factors," the examination primarily turns on two factors: The length of time between an initial appearance and the assertion of the defense and the nature and extent of participation in the trial court proceedings before the assertion of the defense.

The United States District Court for the Southern District of Alabama has compiled the following well researched and instructive review of federal caselaw in this regard:

> "In the typical waiver scenario, a personal jurisdiction defense is abandoned when a defendant fails to raise the issue in either a responsive pleading or a Rule 12 motion. See Stubbs [v. Wyndham Nassau Resort & Crystal Palace Casino], 447 F.3d 1357, 1364 [(11th Cir. 2006)]; Palmer v. Braun, 376 F.3d 1254, 1259 (11th Cir. 2004) (explaining that defendant waives personal jurisdiction defense by not interposing it in responsive pleading or motion to dismiss); Posner v. Essex Ins. Co., 178 F.3d 1209, 1213, n. 4 (11th Cir. 1999) ('By omitting this defense from its motion, Essex waived any challenge it could have asserted to the court's exercise of personal jurisdiction over it.').[3] However, personal jurisdiction may also be waived, even if a defendant has nominally preserved the defense by reciting it in an answer, if that defendant substantially participates in the litigation without actively pursuing its Rule 12(b)(2) defense. See Rates Technology Inc. v. Nortel Networks Corp., 399 F.3d 1302, 1309 (Fed. Cir. 2005) (noting that 'a party may consent to personal jurisdiction by extensively participating in the litigation without timely seeking dismissal'); PaineWebber Inc. v. Chase Manhattan Private Bank (Switzerland), 260 F.3d 453, 459 (5th Cir. 2001) (acknowledging 'well-established rule that parties who choose to litigate actively on the merits thereby surrender any jurisdictional objections'); Hamilton v. Atlas Turner, Inc., 197 F.3d 58, 60 (2nd Cir. 1999) (observing that 'delay in challenging personal jurisdiction by motion to dismiss may result in waiver, even where ... the defense was asserted in a timely answer') (citations omitted); Peterson v. Highland Music, Inc., 140 F.3d 1313, 1318 (9th Cir. 1998) ('Most defenses, including the defense of lack of personal

jurisdiction, may be waived as a result of the course of conduct pursued by a party during litigation.'); Hunger U.S. Special Hydraulics Cylinders Corp. v. Hardie-Tynes Mfg. Co., 203 F.3d 835 (10th Cir. 2000) ('After its lengthy participation in this litigation, ... [defendant] may not pull its personal jurisdiction defense out of the hat like a rabbit.') (citations omitted).[4]

"Here, D & M mentioned personal jurisdiction amidst a laundry list of affirmative defenses in its answer, but failed to move forward with that defense for several months. The critical question, then, is whether that conduct gives rise to an implicit waiver of the personal jurisdiction defense, even after it has been properly raised in a responsive pleading. In synthesizing extant jurisprudence on this issue, one commentator has observed that 'the cases are far from uniform' and that 'the result seems to turn on the particular circumstances of an individual case.' Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 3d § 1391. Thus, '[w]hen considering whether a defendant has forfeited the defense of lack of personal jurisdiction, despite that defendant's technical compliance with Rule 12(h) ..., the court examines all of the relevant circumstances.' Epperson v. Entertainment Express, Inc., 338 F. Supp. 2d 328, 334 (D.Conn. 2004) (identifying factors such as whether objecting party had previously requested that court take action in its favor).

"Despite this rather nebulous framework and the paucity of Eleventh Circuit guidance, review of persuasive authority from other jurisdictions discloses two clear organizing principles for the 'waiver-by-conduct' analysis. First, courts pay close attention to the length of time that elapses between service of process and a defendant's pursuit of a personal jurisdiction defense via a Rule 12(b)(2) motion. The longer the time interval, the more likely it is that courts will find a waiver.

See Hamilton, 197 F.3d at 62 (determining that defendant forfeited personal jurisdiction defense by failing to raise it for four years after inclusion of defense in answer); Continental Bank, N.A. v. Meyer, 10 F.3d 1293, 1297 (7th Cir. 1993) (finding waiver where defendants did not actively contest personal jurisdiction for more than two and a half years after listing the defense in their answer); Hunger, [203 F.3d 835] (defendant waived personal jurisdiction defense by waiting more than three years to file motion to dismiss on that basis, after first timely raising the defense in its answer); Plunkett v. Valhalla Investment Services, Inc., 409 F. Supp. 2d 39, 41–42 (D. Mass. 2006) (finding that defendants abandoned personal jurisdiction defense by referencing it in their answer, then waiting 13 months before litigating the defense); Schwartz v. M/V GULF SUPPLIER, 116 F. Supp. 2d 831, 835 (S.D. Tex. 2000) (deeming waiver to have occurred where defendant listed personal jurisdiction defense in answer, then failed to file motion to dismiss until eve of trial, some nine months after action commenced). By contrast, the shorter the intervening time period, the more likely it is that no waiver will be construed. See Brokerwood Products Int'l (U.S.), Inc. v. Cuisine Crotone, Inc., [104 Fed. App'x 376] (5th Cir. 2004) (finding that district court erred in holding that defendant waived challenge to personal jurisdiction where seven months passed between defendant's answer raising defense and its motion to dismiss); Sunlight Saunas, Inc. v. Sundance Sauna, Inc., 427 F. Supp. 2d 1011, 1015 (D. Kan. 2006) (no waiver where defendant filed Rule 12(b)(2) motion less than two months after being joined as a party).[5]

"Second, in addition to the sheer passage of time, courts assessing whether there is a waiver by conduct look to the extent of the objecting defendant's involvement in the action.[6] The more active a defendant has been in litigating a case, the more likely it is that the defendant will be deemed to have waived defects in personal

jurisdiction and impliedly consented to a court's jurisdiction. See Hamilton, 197 F.3d at 62 (finding waiver where defendant had participated in extensive pretrial proceedings before filing motion to dismiss); Yeldell v. Tutt, 913 F.2d 533, 539 (8th Cir. 1990) (discerning waiver where defendant participated in discovery, filed motions, participated in five-day trial, and filed post-trial motions, all before seeking ruling on personal jurisdiction defense); Continental, 10 F.3d at 1297 (personal jurisdiction defense waived where defendants participated in lengthy discovery, filed various motions, and opposed a number of plaintiff's motions, before submitting Rule 12(b)(2) issue to court); Plunkett, 409 F. Supp. 2d at 41–42 (deeming personal jurisdiction defense abandoned where defendant participated in scheduling conference, conducted discovery, consented to ADR, entered into discovery-related stipulation and protective order, and petitioned for pro hac vice status for non-local counsel); but see Brokerwood, [104 Fed. App'x 376] (personal jurisdiction defense not waived where case was dormant during most of its pendency; where defendant's litigation conduct had been limited to participating in scheduling conference, filing initial disclosures, filing motion to strike jury demand, and filing interrogatories, document requests and witness list; and where defendant had neither filed counterclaims nor sought adjudication on merits of any claim); Sunlight Saunas, at 1015 (defendants did not actively participate in litigation to extent of waiving right to challenge personal jurisdiction where their activities were limited to serving initial disclosures, attending pretrial conference, and joining in motion to strike).

"[3]This result is dictated by Rule 12(h)(1), Fed. R. Civ. P., which provides that a personal jurisdiction defense is waived if it is neither consolidated with any other defenses presented in a

Rule 12 motion nor recited in a motion to dismiss or other responsive pleading.

"[4]In this respect, Rule 12(h) merely sets the outer limits of waiver, without precluding waiver by implication. Indeed, '[a]sserting a jurisdictional defect in the answer did not preserve the defense in perpetuity. This defense may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.' Yeldell v. Tutt, 913 F.2d 533, 539 (8th Cir. 1990) (internal citations and quotations omitted). On this point, it does not suffice to comport with the letter of Rule 12(h); rather, litigants must adhere to its spirit by pursuing a personal jurisdiction defense in a reasonably prompt fashion 'to expedite and simplify proceedings in the Federal Courts.' Id.; see also Continental Bank, N.A. v. Meyer, 10 F.3d 1293, 1297 (7th Cir. 1993) (similar). If a defendant fails to do so, then he may be found to have waived his personal jurisdiction defense, notwithstanding its inclusion in a responsive pleading.

"[5]One apparent aberration to this pattern is Datskow v. Teledyne, Inc., 899 F.2d 1298 (2nd Cir. 1990), wherein the Second Circuit classified a four[]-month delay in challenging personal jurisdiction as a waiver of the defense. In so ruling, however, the Datskow court took pains to point out that the motion to dismiss in that case contested personal jurisdiction on the basis of defective service, not lack of long-arm jurisdiction. An important caveat to the Datskow holding was that 'this is not a case where a defendant is contesting personal jurisdiction on the ground that longarm jurisdiction is not available.' Id. at 1303. Datskow strongly implied that a four-month delay would be insufficient to create a waiver in a long-arm circumstance, opining that it 'would be slower to find waiver by a defendant wishing to contest whether it was obliged to defend in a distant court.' Id.; see also Hamilton, 197 F.3d at 60 (indicating that Datskow contemplated

> 'enhanced caution' in treatment of waiver issue where defense challenges jurisdiction under state's long-arm statute). Thus, far from being an outlier, Datskow may be neatly harmonized with the foregoing spectrum of authorities on the temporal criterion.
>
> "[6]The two factors are, of course, logically intertwined. As one court explained, 'the time period provides the context in which to assess the significance of the defendant's conduct, both the litigation activity that occurred and the opportunities to litigate the jurisdictional issue that were forgone.' Hamilton, 197 F.3d at 61."

Matthews, 431 F. Supp. 2d at 1223-25 (S.D. Ala. 2006).

Applying the foregoing principles, and comparing the facts and results achieved in the many cases described above with the facts of this case, I simply cannot justify a conclusion that the defendants did not "seasonably" assert their Rule 12(b)(2) defense of lack of personal jurisdiction. I see no more "substantial participation" in the litigation process by the defendants in the steps taken by the defendants in this case, particularly in the compressed time frame in which they were take, than, for example, occurred in Matthews (rejecting the waiver argument where the defendant delayed four months in bringing motion to dismiss, after first raising defense in its answer, when in the interim it filed required documents and discovery responses and joined in plaintiff's request to extend time for its deposition).

In a recent case that is consistent with the foregoing authority, Gerber v. Riordan, 649 F.3d 514 (6th Cir. 2011), the United States Court of Appeals for the Sixth Circuit held as follows:

> "In deciding whether Defendants waived their personal jurisdiction defense, we must determine whether any of Defendants' appearances and filings in the district court constituted 'legal submission to the jurisdiction of the court.' Days Inns [Worldwide v. Patel], 445 F.3d [899] at 905 [(6th Cir. 2006)]. As an initial matter, we note that while 'the voluntary use of certain [district] court procedures' serve as 'constructive consent to the personal jurisdiction of the [district] court,' [Insurance Corp. of Ireland, Ltd. v.] Compagnie des Bauxites de Guinee, 456 U.S. [694] at 704, 102 S.Ct. 2099 [(1982)], not all do. See Mobile Anesthesiologists Chicago, LLC v. Anesthesia Associates of Houston Metroplex, P.A., 623 F.3d 440, 443 (7th Cir. 2010). Only those submissions, appearances and filings that give '[P]laintiff a reasonable expectation that [Defendants] will defend the suit on the merits or must cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking,' id. at 443, result in waiver of a personal jurisdiction defense."

649 F.3d at 519 (emphasis added). Given the timing and content of the filings made by the defendants in this case, I am clear to the conclusion that those filings do not satisfy the above-quoted standard.

In his special concurrence, however, Justice Lyons posits that Gerber actually supports the view that the defendants

waived their defense of lack of in personam jurisdiction. Gerber states two circumstances that could have such effect. The first is the filing by the defendants of a "submission[], appearance[] [or] filing[] that give[s] '[P]laintiff a reasonable expectation that [Defendants] will defend the suit on the merits." 649 F.3d at 519. From the outset, however, the defendants made it clear that it was their position that the trial court lacked in personam jurisdiction and that they would promptly pursue this defense (which they did). The defendants' filings could not reasonably have led the plaintiff to believe that the defendants acquiesced to the trial court as a proper forum for the litigation of the plaintiff's action.

The second circumstance stated in Gerber that can give rise to a waiver -- and the circumstance highlighted by Justice Lyons in his special concurrence -- also is not present. For the reasons stated above, the filings by the defendants did not put the trial court in a position where it became necessary for it to make a ruling that would be wasted in the event jurisdiction was later found lacking. Moreover, the second prong of Gerber specifically states that the filing of the defendant actually "'must cause the court to go to some

effort'" before a ruling on a motion to dismiss for lack of personal jurisdiction "'that would be wasted if personal jurisdiction is later found lacking.'" 649 F.3d at 519 (quoting Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston Metroplex, P.A., 623 F.3d 440, 443 (7th Cir. 2010) (emphasis added)). Here, it is undisputed that the defendants did not cause the court to go to any such effort, and, in point of fact, the trial court did not go to such effort. Again, from the very outset, the defendants advised the trial court that they promptly would pursue, and they promptly did pursue, a defense of lack of in personam jurisdiction. In accord with that "advisement," the trial court withheld going to any effort to rule on the defendants' motion to compel arbitration until it also ruled on the defendants' motions to dismiss for lack of jurisdiction. The requirement that the defendants actually cause the trial court to go to some effort prior to a later ruling on a motion to dismiss for lack of in personam jurisdiction simply is not met in this case. Thus, in addition to all the other cases cited above, Gerber supports the conclusion that the defendants did not waive their defense of lack of personal jurisdiction.

Because I do not believe the defense of lack of in personam jurisdiction was waived in this case, I respectfully dissent.

Bolin, J., concurs.