[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-12575

Non-Argument Calendar

BRAD WARRINGTON,

Plaintiff-Appellee

versus

ROCKY PATEL PREMIUM CIGARS, INC.,
RAKESH PATEL,

Defendant-Appellants

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 2:22-cv-00077-JES-KCD

Before NEWSOM, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

Rocky Patel Premium Cigars, Inc. and Rakesh Patel[1] appeal the district court's denial of their motion to stay and compel arbitration. We affirm. *See* 9 U.S.C. § 16(a)(1)(A); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 627 (2009) (Under 9 U.S.C. section 16(a)(1)(A), "any litigant who asks for a stay under § 3 [of the Federal Arbitration Act] is entitled to an immediate appeal from denial of that motion—regardless of whether the litigant is in fact eligible for a stay.").

This case is about a shareholder dispute. Brad Warrington, the minority shareholder in Rocky Patel Premium Cigars, wants to divest from his holdings in the company. To do so, he must comply with the terms of the buy–sell agreement governing ownership in the company, under which the company has the right of first refusal. The agreement also includes a provision under which "any controversy or claim arising out of this [a]greement [that] cannot be settled by the parties . . . shall be settled by arbitration."

In 2015, when Warrington told Patel he wanted out, Patel decided to purchase Warrington's shares and made an offer based on a valuation he'd commissioned. Warrington thought the offer was too low and counteroffered. A dispute ensued. Patel accused

[1] We will refer to them together as Patel.

Warrington of failing to make a bona fide offer, and Warrington accused Patel of various bookkeeping and disclosure improprieties.

Six years later, Warrington found a private buyer and notified Patel that he intended to sell. Patel refused to acknowledge the notice and facilitate the sale, claiming the notice was inadequate. When Patel didn't respond within the thirty-day period required under the agreement, Warrington tried to proceed with the sale. In July 2021, Patel sued Warrington in Florida state court seeking a declaratory judgment that he'd complied with the requirements governing the information Warrington requested in the process of selling his shares under the agreement. A few months later, Patel amended his complaint to include claims for breach of contract and breach of good faith and fair dealing, seeking specific performance of the agreement's purchase option provision. Warrington moved to dismiss, and Patel later filed for voluntary dismissal.

While the state action was pending, Warrington sued Patel in federal court in February 2022, bringing seven counts: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) tortious interference; (4) breach of fiduciary duty (direct action); (5) breach of fiduciary duty (shareholder derivative action); (6) securities fraud; and (7) punitive damages. In light of Patel's still-pending state court lawsuit, Patel moved to dismiss, remand, abate, or stay, which the district court denied. In June 2022, Patel moved to stay and compel arbitration under the agreement. The district court denied that motion, too, finding that Patel had waived

his right to arbitrate because he'd both filed (and amended) the initial action in state court and moved to dismiss or remand Warrington's action in the district court. Patel appealed the district court's denial.

We review de novo a district court's denial of a motion to compel arbitration on the ground that the movant waived its right to arbitrate. *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1316 (11th Cir. 2002). Like any other right or obligation under a contract, an agreement to arbitrate may be waived. *Id.* at 1315. "A party has waived its right to arbitrate if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right . . . ." *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990) (cleaned up), *abrogated on other grounds by Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022).

There's no set rule as to what constitutes waiver of an arbitration agreement, so we review whether a waiver has occurred based on the facts of each case. *Burton–Dixie Corp. v. Timothy McCarthy Constr. Co.*, 436 F.2d 405, 408 (5th Cir. 1971). "A key factor in deciding this is whether a party has substantially invoked the litigation machinery prior to demanding arbitration." *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1236 (11th Cir. 2018) (cleaned up). "[T]he purpose of the waiver doctrine is to prevent litigants from abusing the judicial process." *Id.* "Acting in a manner inconsistent with one's arbitration rights and then changing course mid-journey smacks of outcome-oriented gamesmanship played on the court and the opposing party's dime." *Id.*

"[T]he key ingredient in the waiver analysis is fair notice to the opposing party and the [d]istrict [c]ourt of a party's arbitration rights and its intent to exercise them." *Id.*

We agree with the district court that Patel has waived his right to arbitration. As the district court explained, Patel initially filed suit in state court to enforce his rights under the agreement, then he attempted to force Warrington's federal action down to the state court to be joined with his action there—all before seeking to compel arbitration.

Patel argues that he hasn't "substantially invoked the litigation machinery" and therefore never waived his right to arbitrate. Patel points to the district court's finding, in its order denying his motion to dismiss or remand, that both actions were in the "beginning stages" and that "discovery ha[d] yet to commence in either action" at that point.

True, neither case on its own had made it very far. But viewing the facts "under the totality of the circumstances," as we must, we conclude (as the district court did) that Patel evinced a clear intent to litigate this matter prior to asserting his right to arbitrate and thus "has acted inconsistently with [his] arbitration right." *S & H Contractors*, 906 F.2d at 1514.

Patel initially sued Warrington in state court and even amended his complaint to expand the scope of rights under the agreement he sought to assert in that forum. Once Warrington brought the matter to federal court, Patel participated in the district

court's case management proceedings. He then moved to dismiss, abate, stay, or remand Warrington's federal complaint, arguing that the case should be remanded to state court because it contained "the exact same issues" as Patel's state suit. Patel then filed for multiple extensions in the district court, forcing Warrington to file a motion to compel discovery. Only after nearly a year of trying to get this dispute into state court did Patel attempt to invoke his right to arbitrate.

Taken together, Patel substantially invoked the litigation machinery prior to demanding arbitration. Accordingly, the district court's order denying Patel's motion to stay and compel arbitration is affirmed.

AFFIRMED.