IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GRAY HOLDCO, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 09-1519
	)	
RANDY CASSADY, et al.,	)	
	)	
Defendants	)	

MEMORANDUM OPINION

Mitchell, M.J.

Presently before the Court are two motions: Defendant, Randy Cassady ("Cassady"), seeks to enjoin arbitration (Docket No. 73) and Plaintiff, Gray Holdco, Inc. ("Gray") requests to stay the current proceedings pending arbitration (Docket No. 76). As resolution of one dictates resolution of the other, the Court will decide the motions together.

I. Factual and Procedural History

On November 13, 2009, Gray filed an action against Cassady and RWLS, LLC ("RWLS") requesting money damages and injunctive relief. According to the complaint, Cassady, a former Gray employee, breached the terms of a New Hire Plan Option Agreement (the "Option Agreement") by soliciting current and prospective clients and employees of Gray, by misappropriating and using confidential and proprietary

information belonging to Gray, and, by engaging in a business in direct competition with Gray both during his employment and after his termination.

On the same date it lodged its complaint, Gray filed a motion for a preliminary injunction seeking to enjoin Cassady and RWLS from conducting business that Gray contended violated the restrictive covenants contained in the Option Agreement. The parties engaged in expedited discovery involving depositions of eight individuals, written discovery requests, interrogatories, and requests for admission.

On January 12-13, 2010, this Court conducted a hearing on the motion, concluded that Gray did not meet its burden entitling it to relief under Fed. R. Civ. P. 65, and denied the motion for a preliminary injunction (Docket No. 37).

On March 2, 2010, the parties filed a Rule 26(f) Report and a proposed discovery plan. A few days later, on March 9, 2010, the Court conducted a status conference where deadlines were set for mediation and for filing motions for judgment on the pleadings. In accordance with these deadlines, Cassady and RWLS filed Fed. R. Civ. P. 12 (c) Motions for Judgment on the Pleadings (Docket Nos. 49, 52 respectively) and the parties participated in an ultimately unsuccessful mediation.

On June 8, 2010, another status conference was

conducted that established discovery deadlines and on June 30, 2010, the Court denied the Defendants' Motions for Judgment on the Pleadings.[1] Other than a change in counsel for the Plaintiff, there was no significant activity in the case until a September 9, 2010 status conference when Gray's new counsel requested and was granted an extension of the discovery schedule.

On September 17, 2010, Gray filed a Demand for Arbitration against Cassady with the American Arbitration Association ("AAA") located in Delaware. The demand was based on an arbitration clause included in the Option Agreement executed by Cassady.[2]

On September 21, 2010, Cassady filed a Motion to Enjoin the Arbitration and for Sanctions under 28 U.S.C. § 1927. The following day, Gray filed a Motion to Stay the Proceedings as to Cassady Pending the Outcome of the Arbitration.

II. Discussion

Although there are two separate motions before the Court, they pose the same essential question: is arbitration appropriate in this case? Cassady contends that that Gray has

[1] The orders denying the motions were re-entered on August 30, 2010, to correct a clerical error.

[2] Gray did not file a demand for arbitration against RWLS, Inc. because it is not a party to the Option Agreement.

waived its right to arbitrate by participating in substantial litigation and discovery in this Court and by acting inconsistently with the right to arbitrate. Gray counters that the agreement to arbitrate is enforceable and that Cassady cannot demonstrate the necessary prejudice to justify a waiver of arbitration. The issue of whether a party has waived its right to arbitrate is for the court to decide. Zimmer v. CooperNeff Advisors, Inc., 523 F.3d 224, 231 (3d Cir. 2008).

There appears to be no disagreement that Cassady and Gray are parties to a contract which facially includes an agreement to arbitrate. Section 13 of the Option Agreement delineates the Parties' covenant to arbitrate disputes arising from a breach of the agreement:

> **SECTION 13. ARBITRATION.** Any dispute or controversy between [Gray] and a Participant, arising out of or relating to a breach of [the Option Agreement] shall be settled by arbitration in Wilmington, Delaware administered by the [AAA] . . . and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitrator shall have the authority to award any remedy or relief that a court of competent jurisdiction could order or grant, including, without limitation, the issuance of an injunction. However, either party may, without inconsistency with this arbitration provision, apply to any court having jurisdiction over such dispute or controversy and seek interim provisional, injunctive or other equitable relief until the arbitration award is rendered or the controversy is otherwise resolved.

Pl.'s Brief, Ex B. ¶ 13.

There is a strong preference for enforcement of arbitration clauses and waiver of same "is not to be lightly inferred." Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 223 (3d Cir. 2007). The arbitration preference, however, is not unconditional; courts will decline to enforce arbitration clauses if the requesting party has acted in contradiction with the right to arbitrate. Nino v. Jewelry Exchange, Inc., 609 F.3d 191, 208 (3d Cir. 2010). The right to arbitrate can be waived "where there is a sufficient showing of prejudice . . . by the party seeking to avoid arbitration." Ehleiter, 482 F.3d at 223. "[P]rejudice is the touchstone for determining whether the right to arbitrate has been waived by litigation conduct." Id. at 222.

In Hoxworth v. Blinder, Robinson & Company, Inc., 980 F.2d 912 (3d Cir. 1992), the Court of Appeals for the Third Circuit delineated six non-exclusive factors to guide the prejudice inquiry: 1) timeliness of the motion to arbitrate; 2) extent to which the party seeking arbitration has contested the merits of the opposing party's claims; 3) whether the party seeking arbitration informed its adversary of its intent to pursue arbitration prior to it seeking to enjoin the court proceedings; 4) the amount of the party's non-merits motion practice; 5) the party's acquiescence to the court's pretrial orders; and, 6) the extent to which the parties have engaged in

discovery. Id. at 926-27.

A. Timeliness

Gray filed its complaint and motion for preliminary relief against Cassady in this Court on November 13, 2009 and its demand for arbitration on September 17, 2010. This ten-month passage of time falls somewhere in the middle of cases which have discussed timeliness of the demand for arbitration. See *e.g.* Hoxworth, 980 F.2d at 925 (finding waiver after 11-month delay and party seeking waiver had participated in numerous pretrial proceedings and engaged in extensive discovery); Ehlieter, 482 F.3d at 223 (four-year delay characterized as egregious where parties had partaken in extensive discovery and motion practice); Nino, 609 F.3d at 210 (15-month delay weighs in favor of waiver); Peltz ex rel. Peltz v. Sears, Roebuck & Company, 367 F. Supp 2d 711, 722 (E.D. Pa. 2005) (no prejudice shown after seven months during which party seeking arbitration filed two motions to dismiss, answered interrogatories, requested production of documents and conducted a deposition); Bellevue Drug Co. v. Advance PCS, 333 F. Supp. 2d 318, 325-36 (E.D.Pa. 2004) (no waiver found when ten months had elapsed without significant activity in the lawsuit).

As these cases demonstrate, and, as the Third Circuit has instructed, "'the length of the time period involved is not determinative.'" Zimmer, 523 F.3d at 232 (quoting Palcko v.

Airborne Express, Inc., 372 F.3d 588, 598 (3d Cir. 2004)). Courts must analyze the amount and type of litigation activity that has transpired in the time between commencement of the suit and the demand for arbitration. As these considerations are discussed in detail below, the passage of 10 months standing alone, while questionable, neither weighs in favor nor against a finding of waiver.

B. Whether Gray Contested the Merits of Cassady's Claims

Gray urges that this factor cannot be weighed against it because Cassady does not have any claims against Gray. To affix such a literal interpretation to the term "claims" would permit Gray to avoid scrutiny of its litigation activity simply because it initiated the lawsuit. Instead, analysis of this factor considers the extent to which Gray has participated in the substantive legal proceedings and has pursued or challenged the legal positions and arguments advanced by the respective parties.

Gray initiated this lawsuit and requested the Court to conduct a hearing on its motion for injunctive relief. When Gray litigated the motion on January 12-13, 2010, it called four witnesses on its behalf, cross-examined five witnesses, and introduced numerous exhibits into evidence. Following denial of the motion for preliminary relief, on March 19, 2010, both

Cassady and RWLS filed Motions for Judgment on the Pleadings. Gray filed briefs in opposition the motions which were decided in Gray's favor on June 30, 2010. On August 19, 2010, Gray obtained new counsel. One month later, Gray filed its demand for arbitration.

While Gray is correct that its pursuit of injunctive relief cannot in and of itself constitute waiver, neither can the "no waiver" clause provide a shield against a finding of waiver. Thus, while Gray's pursuit of preliminary relief does not in and of itself weigh against it, the existence of the no waiver clause does not "alter the ordinary analysis undertaken to determine if a party has waived its right to arbitration." S & R Company of Kingston v. Latona Trucking, Inc., 159 F.3d 80, 85 (2d Cir. 1998). Accordingly, this factor weighs strongly in favor of waiver because Gray has participated in considerable legal action, no matter its context, related to the substantive merits of the underlying lawsuit.

C. Notice to Cassady of Intent to Arbitrate

Although the record is not precise on the time when Gray disclosed its intention to file a demand for arbitration, it appears that Cassady's counsel was notified of same on September 17, 2010, the same date Gray filed the demand. This almost simultaneous notification, then, basically equates to no notification. This factor weighs heavily in favor of a finding

of waiver.

D. Extent of Non-Merits Motion Practice

There has not been significant non-merits motion practice in these proceedings. Between the filing of the complaint and the two current motions related to the propriety of the demand for arbitration, the non-merits practice has been confined to discovery motions related to the preliminary injunction hearing and the addition of new counsel. This factor weighs against a finding a waiver.

E. Gray's Assent to the Court's Pretrial Orders

In addition to the conferences conducted in preparation for the preliminary injunction hearing, the following activity transpired after the motion for preliminary relief was denied:

On March 2, 2010, the parties filed a Rule 26(f) Report that included a proposed discovery plan and a stipulation selecting ADR process. A few days later, on March 9, 2010, the Court conducted a status conference where deadlines were set for mediation and for filing motions for judgment on the pleadings. In accordance with these deadlines, Cassady and RWLS filed Motions for Judgment on the Pleadings and the parties attended a mediation conference. On June 8, 2010, another status conference was conducted that established a discovery schedule.

On August 16, 2010, current counsel entered it appearance on behalf of Gray. At a September 9, 2010 status conference, new counsel requested and was granted an extension of the discovery schedule. No mention of the intent to file for arbitration was disclosed at this conference. Approximately a week later, Gray filed its demand for arbitration.

This factor solidly weighs in favor of waiver. Gray attended three status conferences, submitted a Rule 26(f) report and a proposed discovery plan, attended a court-ordered mediation, established discovery deadlines, including time limits for experts' reports and depositions, and then, eight days prior to filing for arbitration, requested and received extensions of time to complete the discovery. Gray's assent to and participation in these pre-trial proceedings strongly contraindicated an intention to arbitrate this dispute. See Expofrut S.A. v. M/V Aconcagua, 110 Fed. A'ppx. 224 (3d Cir. 2004) (finding waiver when plaintiff filed complaint without reference to arbitration, engaged in extensive discovery, submitted a discovery plan, and attended conference with no mention of intent to seek arbitration).

F. Extent to Which Both Parties Engaged in Discovery

While extensive discovery occurred in preparation for the preliminary injunction hearing, no subsequent discovery has

been conducted since that motion was decided. Because the discovery that did occur is closely related to the merits of the dispute, however, the Court does not agree that it can be completely discounted solely because the arbitration clause authorized the parties to seek preliminary relief without jeopardizing their arbitration rights. This factor will not be weighed against Gray's pursuit of arbitration nor will it be weighed in its favor.

To review, three of the Hoxworth factors weigh strongly in favor of waiver, one weighs against, and two are neutral. Cassady, therefore, has demonstrated sufficient prejudice to compel a finding of waiver sufficient to trump the preference for arbitration. The Court additionally considers as part of its prejudice analysis, as it may, the expense incurred to date in litigating this matter and the anticipated additional expenses attendant to defending this matter in another forum. See Nino, 609 F.3d at 209 (concept of prejudice also includes that resulting from unnecessary delay and expense incurred as result of belated invocation of right to arbitrate)(citing Hoxworth, 980 F. 2d at 224)).

III. Conclusion

For the reasons stated, Cassady's Motion to Enjoin Arbitration (Docket No. 73) will be Granted and Gray's Motion to Stay the Proceedings (Docket No. 76) will be Denied.

Additionally the Court will Deny Cassady's Motion for Sanctions.

Appropriate Orders will be entered.

Dated: November 10, 2010

s/Robert C. Mitchell
Robert C. Mitchell
U.S. Magistrate Judge