

DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

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VIRGINIA MIRRO,

Appellant,

v.

FREEDOM BOAT CLUB, LLC, a Florida corporation; HIGHWATER  
MARINE, LLC, a foreign corporation; BEARCAT CORPORATION,  
INC., a foreign corporation,

Appellees.

No. 2D20-3132

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October 15, 2021

Appeal from the Circuit Court for Manatee County; Edward  
Nicholas, Judge.

Catherine Saylor and Jacob J. Munch of Munch & Munch, P.A.,  
Tampa, for Appellant.

Michael J. Dono and David N. Gambach of Hamilton, Miller &  
Birthisel, LLP, Miami, for Appellee Freedom Boat Club, LLC.

No appearance for remaining Appellees.

KHOUZAM, Judge.

This is Virginia Mirro's appeal of an order compelling arbitration of her personal injury claim under an agreement she entered into with Freedom Boat Club, LLC, for a boating club membership. We reverse because, given the totality of the circumstances of this case, Freedom waived its right to arbitration.

This lawsuit began on April 16, 2020, when Mirro filed a complaint against Freedom and others seeking damages for personal injuries allegedly sustained in an accident on Freedom's boat the *Mama's Bouy*, which she had rented as part of her boating club membership with Freedom. She alleged that on October 5, 2018, she was climbing down a ladder on the stern into the water when a rung suddenly broke, causing her injuries.

Freedom moved to dismiss the complaint or compel arbitration under the arbitration provision in the boating club membership agreement between Mirro and Freedom. Mirro filed a response, arguing that Freedom had waived its right to arbitrate by previously filing and participating in a limitation of liability action regarding arbitrable issues in federal court without invoking its right to arbitration.

Indeed, on October 4, 2019, Freedom had filed in the Middle District a Complaint for Exoneration from or Limitation of Liability under the Limitation of Shipowners' Liability Act, 46 U.S.C.A. §§ 30501-512 (2019). This complaint squarely addressed Mirro's claim that she sustained personal injuries while using a ladder on the *Mama's Bouy* and requested the court adjudge that Freedom was "not liable to any extent whatsoever" arising from the incident. In the alternative, Freedom requested that any liability be limited to the value of its interest in the vessel. Freedom asked the court to notice potential claimants and issue an injunction restraining the filing of any other actions against Freedom arising from the incident.

On December 11, 2019, Mirro answered the limitation complaint, filing her claim for personal injury damages, raising affirmative defenses, and reserving her right to a jury trial in the federal case. Shortly thereafter, Freedom filed an objection to Mirro's claim, denying all of her affirmative defenses, raising a number of substantive objections, and opposing her demand for a jury trial in favor of a nonjury trial. Within this objection, Freedom averred, among other things, that Mirro failed to state a cause of

action, that she had not actually been injured, and that any of her injuries were preexisting or were a result of her own negligence or other causes.

Freedom took all of these actions in its earlier federal action without mention of a right to arbitrate. It was not until Mirro filed her complaint in the instant state court case that Freedom asserted its right to arbitration for the first time.

After a hearing, the circuit court granted Freedom's motion to dismiss and compel arbitration, directing the parties to arbitrate their dispute. The circuit court reasoned that Freedom did not waive its right to arbitrate because its conduct in the limitation action, as a limited admiralty proceeding, was not inconsistent with the right to arbitration. We disagree.

Waiver is "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Wilson v. AmeriLife of E. Pasco, LLC*, 270 So. 3d 542, 545 (Fla. 2d DCA 2019) (quoting *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005)). "[T]he issue of whether an arbitration agreement has been waived 'should be analyzed in much the same way as in any other

contractual context,' and the focus is 'whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right.' " *Id.* (quoting *Raymond James Fin. Servs., Inc.*, 896 So. 2d at 711).

"Initiating a lawsuit . . . without first seeking arbitration, constitutes an affirmative selection of a course of action which runs counter to the purpose of arbitration." *Chaikin v. Parker Waichman LLP*, 253 So. 3d 640, 645 (Fla. 2d DCA 2017) (alteration in original) (quoting *Beverly Hills Dev. Corp. v. George Wimpey of Fla., Inc.*, 661 So. 2d 969, 971 (Fla. 5th DCA 1995)). Moreover, "[a] party acts inconsistently with the right to arbitration when the party actively participates in the lawsuit by either prosecuting or defending issues that are subject to arbitration." *Id.* (quoting *Gen. Elec. Cap. Corp. v. Bio-Mass Tech, Inc.*, 136 So. 3d 698, 701 (Fla. 2d DCA 2014)). "It follows that a party may waive his or her right to arbitration by filing a lawsuit without seeking arbitration, by filing an answer to a pleading seeking affirmative relief without raising the right to arbitration, and by moving for summary judgment." *Green Tree Serv., LLC v. McLeod*, 15 So. 3d 682, 687 (Fla. 2d DCA 2009) (citations omitted). And "once a party has waived the right to

arbitration by active participation in a lawsuit, the party may not reclaim the arbitration right without the consent of his or her adversary." *Id.*

Considering the totality of the circumstances in this case, it is apparent that Freedom acted inconsistently with—and thereby waived—its right to arbitration. Freedom's federal limitation action squarely addressed arbitrable issues regarding its liability to Mirro for her personal injuries sustained while using a ladder on the *Mama's Bouy*. The complaint sought an exoneration from liability, not just a limitation of it, as well as an injunction. Freedom initiated that litigation machinery to its benefit without invoking its right to arbitration. And when Mirro filed a claim in the limitation action, Freedom filed a substantive objection, again without invoking its right to arbitration. Freedom waited until Mirro brought suit in state court to assert its right to arbitration for the first time. But at that point, the right had already been waived and Freedom could not reclaim it without Mirro's consent.

Finally, we note that Freedom has provided some federal authority for the proposition that filing a limitation action does not, standing alone, constitute waiver of the right to arbitration, due to

the unique and limited nature of such proceedings. *See, e.g., Yang v. Majestic Blue Fisheries, LLC*, 2015 WL 5001190, at \*11, Civil Case No. 13-00015 (D. Guam Jan. 14, 2015) (recommending that no waiver of right to arbitrate be found based on limitation action at least in part because "a limitation action by its terms is a limited proceeding"), *adopted in part and rejected in part*, 2015 WL 5003606, at \*9 (D. Guam Aug. 24, 2015) (declining to decide whether conduct in limitation action precluded waiver and finding that no waiver occurred based on a lack of prejudice); *In re Bartin Deniz Nakliyatı*, Nos. 87 CV 455 (JMM), 88 CV 506 (JMM), 1989 WL 128581, at \*12 (E.D. N.Y. July 10, 1989) ("In the instant case, the authorities make clear that the ship owner's institution of this limitation proceeding by filing a complaint is not itself inconsistent with an intent to arbitrate."). We need not reach this issue. Even accepting that Freedom's filing of the limitation action did not by itself constitute waiver, the facts presented here still establish waiver. Freedom did more than just file the limitation action. Freedom sought exoneration from liability and raised substantive objections to the claim filed by Mirro without asserting its right to arbitration. Taken together, it is apparent that Freedom

affirmatively pursued a course of action inconsistent with an intent to arbitrate, thereby waiving its right to do so.

Accordingly, we reverse the circuit court's order compelling arbitration, and we remand for further proceedings consistent with this opinion.

Reversed and remanded with instructions.

NORTHCUTT and LaROSE, JJ., Concur.

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Opinion subject to revision prior to official publication.