IN THE COURT OF APPEALS OF IOWA

No. 8-710 / 07-1419
Filed October 15, 2008

HORSFIELD CONSTRUCTION, INC.,
Plaintiff-Appellant,

vs.

CITY OF DYERSVILLE,
Defendant-Appellee.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

Contractor appeals from the dismissal of its declaratory judgment action against city with whom it had contracted. **AFFIRMED.**

Todd J. Locher of Locher & Locher, Farley, for appellant.

Michael Coyle and William N. Toomey of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

POTTERFIELD, J.

Dissatisfied with work done by Horsfield Construction, Inc. (HCI), on a "Downtown Streetscape Project," the City of Dyersville withheld final payments amounting to $197,553.31. The City further voted to assess liquidated damages of $100 per day, beginning September 7, 2005. HCI responded by filing a petition for declaratory judgment seeking a declaration that (1) liquidated damages could not be assessed because the project was substantially completed, (2) the warranty period for the project begins when the work is placed into use, and (3) the contract was one of adhesion and, therefore, a mandatory arbitration clause contained therein was unenforceable.

The district court later granted the City's motion for summary judgment. It concluded the contract was not one of adhesion and that the parties must "follow the [arbitration] requirements as set forth in the contract entered into between the parties." HCI appeals from this ruling. It first maintains the court erred in rejecting its adhesion-contract claim. Moreover, it argues the City waived arbitration by threatening litigation and failing to make a timely motion to compel arbitration. Finally, it contends the proper procedure would have been to move to compel arbitration pursuant to Iowa Code section 679A.2(3) (2007), not to move for summary judgment.

Summary judgment rulings are reviewed for correction of errors of law. *Hallett Constr. Co. v. Meister*, 713 N.W.2d 225, 229 (Iowa 2006). "To obtain a grant of summary judgment on some issue in an action, the moving party must affirmatively establish the existence of undisputed facts entitling that party to a

particular result under controlling law." *Interstate Power Co. v. Ins. Co. of N. Am.*, 603 N.W.2d 751, 756 (Iowa 1999).

We first address whether the contract between the City and HCI was an adhesion contract, thus invalidating the arbitration clause. *See* Iowa Code § 679A.1(2)(a) (providing an arbitration contract is enforceable, unless it is contained in an adhesion contract).

> A contract of adhesion is described as one that is "drafted unilaterally by the dominant party and then presented on a take-it-or-leave-it basis to the weaker party who has no real opportunity to bargain about its terms."

Penn Life Ins. Co. v. Simoni, 641 N.W.2d 807, 813 (Iowa 2002) (quoting Restatement (Second) of Conflict of Laws § 187 cmt. b, at 135 (1988)). "The determination of whether a contract is a contract of adhesion involves the issue of unconscionability." *Hofmeyer v. Iowa Dist. Court*, 640 N.W.2d 225, 230 (Iowa 2001).

Our case law has long defined insurance contracts as adhesive. Insurance policies are considered contracts of adhesion "due to the inherently unequal bargaining power between the insurer and insured." *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790, 794 (Iowa 1988). Here, we have no such disparity and no dominant/weaker party distinction. As HCI admits, it has a "vast amount of experience in bidding public projects . . . ." It is an experienced contractor, "specializ[ing] in concrete paving, constructing underground utilities and excavation on both public and private projects . . . ." Nothing forced HCI to bid on or accept the terms of this contract. Furthermore, our law favors arbitration as an alternative to civil litigation. *Clinton Nat'l Bank v. Kirk Gross Co.*, 559 N.W.2d

282, 283 (Iowa 1997). In light of these considerations, we affirm the district court's conclusion that this case does not involve a contract of adhesion.

We next address HCI's claim that the City waived its contractual right to arbitration. The essential test for waiver of arbitration requires conduct or activity inconsistent with the right to arbitration *and* prejudice to the party claiming waiver. *Id. at* 284. Factors relevant to an assessment of prejudice include the delay in the moving party's request for arbitration and the extent of the moving party's trial-oriented activity. *See id.* Prejudice can be shown by "lost evidence, duplication of efforts, or the use of discovery methods unavailable in arbitration." *Id.* Our supreme court has stated that evidence of waiver must be compelling. *See id.*

In particular, HCI asserts the City waived arbitration by threatening litigation[1] and by participating in discovery. We first note the City did not initiate the lawsuit for which discovery was conducted. Moreover, HCI does not offer any facts or argument to support that it suffered any prejudice by the City's course of action. Without some factual dispute on this issue, HCI's claim of waiver was properly subject to summary adjudication.

Finally, we address HCI's claim that the City employed improper procedure in moving for summary judgment rather than in moving to compel arbitration. Iowa Code section 679A.2(3) provides that "[i]f an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a district court, [an application to compel discovery] shall be made to

[1] Before HCI initiated this lawsuit, the City's engineer for the project, John Wandsnider, sent a letter to HCI advising that if HCI did not comply with the requirements of the contract, the City reserved the option to, among other things, "initiate legal action."

that court." We find nothing indicating the procedure provided for in this section is the exclusive remedy for a party to an arbitration contract. Moving for summary judgment was an appropriate procedural response. Nothing now precludes HCI from attempting to assert its perceived rights in a future arbitration proceeding. Thus, HCI was not prejudiced in any fashion by the City's election to move for summary judgment rather than moving to compel arbitration under section 679A.2(3).

AFFIRMED.