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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000027-MR

CONSECO FINANCE SERVICING CORP.
(FORMERLY GREEN TREE FINANCIAL
SERVICING CORP.) APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 98-CI-01152

LANCE PATTON;
DAVID PLUNKETT; AND
AMERICAN MOBILE HOMES, INC. APPELLEES

AND NO. 2000-CA-000028-MR

AMERICAN MOBILE HOMES, INC. AND
DAVID PLUNKETT APPELLANTS

APPEAL FROM BOONE CIRCUIT COURT
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ACTION NO. 98-CI-01152

LANCE PATTON AND
CONSECO FINANCE SERVICING CORP.
(FORMERLY GREEN TREE FINANCIAL
SERVICING CORP.) APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; BARBER; AND KNOPF, JUDGES.

KNOPF, JUDGE: In the spring and summer of 1998, Lance Patton agreed to purchase a mobile home from American Mobile Homes, Inc. and to finance the purchase with a loan from Conseco Finance Servicing Corp. (formerly known as Green Tree Financial Servicing Corp.). Problems developed and in November 1998, Patton sued, among several others, Conseco; American; and David Plunkett, American's owner. Against American and Plunkett (collectively American) Patton alleged fraud and other torts, breach of warranty, violation of the Kentucky Consumer Protection Act (KRS Chapter 367), and breach of the sales contract. Against Conseco Patton alleged breach of the financing contract. Typical litigation ensued. Conseco and American answered Patton's complaint; the parties engaged in discovery; Conseco moved unsuccessfully for summary judgment; Patton amended his complaint; Conseco and American answered the amendments. After all this and approximately a year after Patton filed this initial complaint, Conseco and American moved to compel arbitration pursuant both to the sales and financing contracts and to the Kentucky and Federal Arbitration Acts (KRS 417.045-240 and 9 U.S.C. § 1 *et seq.*).[1] Patton responded by denying that an

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[1] The federal act applies to

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, . . .

9 U.S.C. § 2.

Kentucky's applies to

> [a] written agreement to submit any existing controversy to arbitration or a provision in [a] written contract to submit to arbitration any controversy thereafter

(continued...)

arbitration agreement existed between himself and American and by asserting that Conseco had waived its arbitration rights. The trial court apparently agreed with Patton, for by order entered December 13, 1999, it denied both motions to compel arbitration.[2] Thereupon Conseco and American brought separate appeals pursuant to KRS 417.050, which allows for interlocutory appeals from denials of such motions.[3] Because of their common provenance, the two appeals have been consolidated for review. In both appeals we affirm. We agree with the trial court that Conseco waived its right to compel arbitration, and we further agree that American had no such right.

2000-CA-000027: CONSECO

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[1](...continued)
arising between the parties . . .
KRS 417.050. Conseco is a Delaware Corporation with its principal place of business in Minnesota. Patton is a Kentucky resident. The parties do not dispute, and we have no reason to doubt, that the written financing agreement was a "transaction involving commerce" to which both the Kentucky and Federal Arbitration Acts apply. American, on the other hand, is a Kentucky corporation. The sales contract between it and Patton, therefore, does not come within the provisions of the FAA. To the extent that American asserts an independent right to have arbitration compelled, its assertion must be predicated on the UAA. As discussed in the text below, however, American also claims that it derives a right to arbitrate from the Conseco/Patton agreement. To that extent, its claim, too, invokes both arbitration acts.

[2]The trial court did not declare its summary order final and appealable pursuant to CR 54.02.

[3]Neither Conseco nor American rely expressly on this provision. Indeed, both appellants rely primarily on the Federal Arbitration Act. Both do cite the Kentucky Act, however, and inasmuch as our authority to entertain these appeals is premised on the Kentucky Act, *see* Bridgstone/Firestone v. McQueen, Ky. App., 3 S.W.3d 366 (1999); *and cf.* In re Conseco Finance Servicing Corp., 19 S.W.3d 562 (Tex. App. 2000) (discussing different channels for seeking review in state court of decisions construing state as opposed to federal arbitration rights), we shall infer from the fact that they have brought appeals that American and Conseco are asserting their Kentucky-based rights as well as their federal rights.

The financing contract between Conseco and Patton includes an arbitration clause, which provides in part that

> [a]ll disputes, claims, or controversies arising from or relating to this contract . . . shall be resolved by binding arbitration . . . .

Patton does not dispute the validity of this clause or its applicability to the claims he has asserted. He maintains, however, that Conseco has waived its rights thereunder.

Both Congress and the General Assembly have insisted that private arbitration agreements be enforced no less readily than other contractual provisions and that their effect be determined by reference to ordinary principles of contract law.[4] This policy is embodied in the Federal Arbitration Act (FAA) and Kentucky's version of the Uniform Arbitration Act (UAA), both of which provide, in essence, that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2.[5] As the saving clause indicates, courts may refuse to enforce arbitration agreements on a number of grounds. "[A]mong those grounds is waiver of the right to arbitrate."[6]

Waiver is commonly defined as

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[4]Green Tree Financial Corp.-Alabama v. Randolph, ___ U.S. ___, 148 L. Ed. 2d 373, 121 S. Ct. 513 (2000); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 134 L. Ed. 2d 902, 116 S. Ct. 1652 (1996); Valley Construction Company, Inc. v. Perry Host Management Company, Inc., Ky. App., 796 S.W.2d 365 (1990).

[5]*Cf.* KRS 417.050, which provides in part that a written arbitration agreement "is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract."

[6]St. Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Products Company, Inc., 969 F.2d 585, 587 (7th Cir. 1992) (citations omitted).

> a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his option might have demanded or insisted upon.[7]

A waiver may be either express or implied, although waiver will not be inferred lightly.[8] Because Conseco did not expressly waive its right to arbitrate, the issue here is whether the trial court could infer waiver from Conseco's actions. Traditionally, waiver, unlike estoppel or laches, has not required a showing of prejudice to the party asserting it.[9] For this reason, among others, some of the courts addressing claims that an arbitration right has been waived have not required that the party asserting the claim prove that it would be prejudiced were arbitration to be ordered.[10]

The Seventh Circuit, for example, applying the more strictly traditional meaning of waiver, has held that "an election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate."[11] As the Court explained,

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[7]Greathouse v. Shreve, Ky., 891 S.W.2d 387, 390 (1995) (quoting Barker v. Stearns Coal & Lumber Co., 291 Ky. 184, 163 S.W.2d 466, 470 (1942)).

[8]Valley Construction Company, Inc. v. Perry Host Management Company, Inc., *supra.*

[9]Greathouse v. Shreve, *supra.*

[10]St. Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Products Company, Inc., *supra;* Worldsource Coil Coating, Inc. v. McGraw Construction Company, Inc., 946 F.2d 473 (6th Cir. 1991); National Foundation for Cancer Research v. A. G. Edwards & Sons, Inc., 821 F.2d 772 (D.C. Cir. 1987).

[11]Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir. 1995).

[a]n arbitration clause gives either party the choice of an alternative, nonjudicial forum in which to seek a resolution of a dispute arising out of the contract. But the intention behind such clauses, and the reason for judicial enforcement of them, are not to allow or encourage the parties to proceed, either simultaneously or sequentially, in multiple forums. Cabinetree, which initiated this litigation, could, instead of filing suit in a Wisconsin state court, have demanded arbitration under the contract. It did not, thus signifying its election not to submit its dispute with Kraftmaid to arbitration. Kraftmaid if it wanted arbitration could have moved for a stay of Cabinetree's suit in the Wisconsin state court. It did not. Instead it removed the case to federal district court. By doing so without at the same time asking the district court for an order to arbitrate, it manifested an intention to resolve the dispute through the processes of the federal court. To resolve the dispute thus is not to resolve it through the processes of the American Arbitration Association.

. . . .

There is no plausible interpretation of the reason for the delay except that Kraftmaid initially decided to litigate its dispute with Cabinetree in the federal district court, and that later, for reasons unknown and with no shadow of justification, Kraftmaid changed its mind and decided it would be better off in arbitration. Neither in its briefs nor at oral argument did Kraftmaid give any reason for its delay in filing the stay besides needing time "to weigh its options." That is the worst possible reason for delay. It amounts to saying that Kraftmaid wanted to see how the case was going in federal district court before deciding whether it would be better off there or in arbitration. It wanted to play heads I win, tails you lose. Selection of a forum in which to resolve a legal dispute should be made at the earliest possible opportunity in order to economize on the resources, both public and private, consumed in dispute resolution. This policy is reflected in the thirty-day deadline for removing a suit from state to federal court. Parties know how important it is to settle on a forum at the earliest possible opportunity,

> and the failure of either of them to move promptly for arbitration is powerful evidence that they made their election--against arbitration. Except in extraordinary circumstances not here presented, they should be bound by their election.[12]

Other courts have treated the question of "waiver" in this context as involving an amalgam of waiver, estoppel, and laches principles and have required a showing of prejudice.[13] These courts have inferred the waiver of arbitration rights where a belated assertion of such rights prejudiced the opposition, either by imposing undue delay and expense or by conferring an unfair tactical advantage such as pre-trial discovery not available in arbitration.

While we certainly agree with the dissent that Kentucky law favors arbitration agreements, it is no more the purpose of the UAA than of the FAA to encourage multiple proceedings in alternative forums. On the contrary, both acts lend support to arbitration agreements as means whereby parties can try to streamline and expedite the resolution of their disputes. That goal is undermined, however, if the arbitral forum is not chosen with reasonable promptness, and substantive litigation is pursued in the trial court. Kentucky law, furthermore, as noted above,

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[12] *Id.* at 390-91. *See also* Baltimore and Ohio Chicago Terminal Railroad Company v. Wisconsin Central Limited, 154 F.3d 404, 408 (1998) ("The general rule is that a demand for arbitration, like the invocation of a forum selection clause or any other claim of improper venue, . . . must be made as early as possible so that the other party can know in what forum he has to proceed.").

[13] S & R Company of Kingston v. Latona Trucking, Inc., 159 F.3d 80 (2nd Cir. 1998); S & H Contractors, Inc. v. A. J. Taft Coal Company, Inc., 906 F.2d 1507 (11th Cir. 1990); Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc., 817 F.2d 250 (4th Cir. 1987); Miller Brewing Co. v. Fort Worth Distrib. Co., 781 F.2d 494 (5th Cir. 1986).

recognizes waiver as a principle of contract law distinct from either estoppel or prejudicial delay. Howard v. Motorists Mutual Insurance Company, Ky., 956 S.W.2d 525 (1997). Under the UAA therefore, and under the FAA until the Supreme Court or the Sixth Circuit declares otherwise,[14] we agree with the Seventh Circuit that a party's indifference to an arbitration agreement, as evidenced by undue delay in demanding arbitration or by active participation in litigation, creates a rebuttable presumption that the party has waived the right to arbitrate. The presumption may be overcome by a showing that the delay or the participation was justified. The fact that the party resisting arbitration will suffer no prejudice if ordered to arbitrate is not, by itself, sufficient to overcome the presumption, although it is certainly a factor to be considered, as is the contrary fact that prejudice is apt to result. Because these determinations must be based on the circumstances of each particular case, appellate review will often be limited to ensuring that the trial court's decision was not clearly erroneous and was supported by substantial evidence. To the extent, however, that the trial court construes the contract or makes other purely legal determinations, our review is *de novo*.[15]

We are not persuaded that the trial court's decision in this case was erroneous. Conseco waited a year before asserting

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[14]*See* Southern Systems, Inc. v. Torrid Oven Limited, 105 F. Supp. 2d 848, 853 (W.D. Tenn. 2000) ("In light of the Sixth Circuit's emphasis on inconsistent conduct and no mention of prejudice, this court will treat prejudice as a significant factor but not a dispositive one.").

[15]Hibbitts v. Cumberland Valley National Bank & Trust Company, Ky. App., 977 S.W.2d 252 (1998).

its right to arbitrate and during that year participated actively in the litigation. It twice answered Patton's complaints without mentioning arbitration; it sought discovery from Patton; and it litigated what it hoped would be a dispositive summary judgment motion against Patton.[16] These facts are more than sufficient to invoke the presumption that Conseco waived its contractual right to arbitrate. Conseco offers no justification at all for its delay and attempts to justify its participation in the litigation by asserting that it was obliged to make some response to Patton's complaint and that its summary judgment motion was a device by means of which it hoped merely to simplify and to clarify the issues. Neither assertion provides an explanation, much less a justification, for Conseco's participating in the litigation instead of promptly demanding arbitration. The fact that Conseco was obliged to respond to Patton's complaint does not explain why that response could not at the outset have included a demand for arbitration. And could not an arbitrator have "clarified" the issues? In short, Conseco has failed to rebut the presumption of waiver.

Conseco contends that it should not be found to have waived its right to arbitrate unless its delay in demanding

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[16]Despite Conseco's discovery requests and summary judgment motion, the dissent would characterize Conseco's role in the litigation as essentially that of a passive observer until Patton's amended complaint clarified the fact that he was asserting direct and not merely derivative liability against the finance company. Patton's original complaint alleged that Conseco had wrongfully released funds to the seller, American, contrary to his request that it not do so and with full knowledge of the alleged defects to the mobile home. This wrongful release of funds, Patton asserted, constituted Conseco's own breach of contract. This complaint should have put Conseco on notice that it was being sued for its own alleged wrongdoing and that a prompt decision regarding its choice of forum was therefore in order.

arbitration prejudiced Patton. There is some merit to this contention. KRS 417.240 provides that

> This chapter [the UAA] shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Although we have not attempted an exhaustive survey of our sister states, many of them, if not most, have held that prejudice is an element of "waiver" in this context.[17] KRS 417.240 lends to such holdings a considerable persuasive weight. Nevertheless, for the reasons discussed above, we believe the better rule is the one we have stated. It gives no less effect to the UAA and comports better with ordinary contract and forum-selection principles. This variation on the prejudice requirement, moreover, although different from the rule in some other states, is only a minor aspect of the UAA's overall scheme. This small difference does not mark a genuine disunity between us and our sister states.

Furthermore, even if prejudice to Patton were required, that requirement would be met. The disclosures Patton has made in responding to Conseco's discovery requests and in defending Conseco's summary judgment motion and the expense Patton bore in responding to that motion, not to mention the twelve month delay itself, are precisely the detriments, tactical and practical, most often cited as prejudicing a party confronted with a belated motion to compel arbitration.[18]

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[17]*See* J. Wise Smith and Associates, Inc. v. Nationwide Mutual Insurance Co., 925 F. Supp. 528 (W.D. Tenn. 1995) (collecting cases).

[18]PPG Industries, Inc. v. Webster Auto Parts, Inc., 128 F.3d 103, 108 (2d Cir. 1997); S & (continued...)

Conseco next contends that the issue of waiver should have been submitted to arbitration. It has been held, however, that the question of waiver is one for the trial court once the party seeking arbitration has engaged in the litigation.[19] It would seem, moreover, that, where a presumption of waiver has arisen, a trial court could not relinquish jurisdiction to an arbitrator without first determining that the presumption is not to be given effect.[20] The trial court therefore did not err by declining to submit the issue of waiver to arbitration.

The arbitration clause itself, Conseco contends, precludes a finding of waiver. This contention is apparently based on the following portion of that clause:

> Notwithstanding anything hereunto [*sic*] the contrary, you [Conseco] retain an option to use judicial or non-judicial relief to enforce a mortgage, deed of trust, or other security agreement relating to the real property secured in a transaction underlying this arbitration agreement, or to enforce the monetary obligation secured by the real property, or to foreclose on the real property. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral, to obtain a monetary judgment or to enforce the mortgage or deed of trust, shall not constitute a waiver of the right of any party

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[18](...continued)
R Company of Kingston v. Latona Trucking, Inc., *supra;* S & H Contractors, Inc. v. A.J. Taft Coal Co., *supra.*

[19]S & R Company of Kingston v. Latona Trucking, Inc., *supra.*

[20]*Cf.* Baltimore and Ohio Chicago Terminal Railroad Company v. Wisconsin Central Limited, 154 F.3d at 409 ("But like other rules of venue it [the rule of presumptive waiver] is not a rule limiting the subject-matter jurisdiction of the court, so if there is a good reason for delay [in demanding arbitration] the district judge can excuse noncompliance with the rule.") (emphasis added).

> to compel arbitration regarding any other dispute or remedy subject to arbitration in this contract, including the filing of a counterclaim in a suit brought by you pursuant to this provision.

Conseco claims that under this provision its participation in the judicial forum can not be construed as a waiver of its right to arbitrate. The clause plainly, however, does not give Conseco the right both to litigate and to arbitrate the same matter.[21] Even assuming that this non-waiver provision applies to a claim brought against Conseco (a doubtful assumption), it would mean only that Conseco could acquiesce in litigation of that claim without waiving its right to demand arbitration of "any other dispute or remedy," not the matter litigated. The non-waiver provision of the arbitration clause, therefore, does not preclude a finding that Conseco waived its right to demand arbitration of Patton's already-much-litigated complaint.

Conseco alleges that it "informally" requested arbitration in February 1999. This informal request, it contends, relieved it of the duty to make a "formal" demand of arbitration in a timely manner. The contention is without merit. Assuming that the February request was timely, Patton's repudiation of that request should have been immediately apparent; he did not, after all, discontinue the litigation. It behooved Conseco at that point, therefore, for all the reasons

[21] *Cf.* S & R Company of Kingston v. Latona Trucking, Inc., 159 F.3d at 85 (finding that a non-waiver clause was not to be construed "to allow a party to seek solely judicial relief of its controversy and later to switch course and demand arbitration.").

discussed above, promptly to assert it rights "formally" or risk the very result that has occurred.

Finally, Conseco complains that it was denied a fair opportunity to present its case on the arbitration issue. This complaint, too, is without merit. It seems that the trial court issued its denial of Conseco's motion to compel before Conseco had had a chance to file a brief replying to Patton's response. Rather than call the matter to the trial court's attention, however, and request reconsideration in light of its reply, Conseco simply proceeded with its appeal. Conseco waived the issue by failing to call it to the trial court's attention.[22] The trial court's error, furthermore, was harmless. Conseco's reply, which was entered in the record after the trial court issued its order, does no more than supplement the memorandum Conseco filed with its motion. The memorandum presents Conseco's case fully and ably. Neither the initial memorandum nor the reply, moreover, can change the fact that Conseco actively litigated this case for a year. The trial court did not err by ruling that it thereby waived its right to demand arbitration.

2000-CA-000028: AMERICAN

Much of what we have said regarding the waiver of Conseco's right to demand arbitration would apply with equal force to American's similar demand. Although prior to its motion to compel arbitration American had not made discovery requests of its own or advanced any substantive motions, it nevertheless had sat by for twelve months as the litigation proceeded, giving no

[22]CR 52.

indication during that period that it preferred to arbitrate. In the meantime, it gained access to Patton's disclosures to Conseco, and put Patton to the expense of obtaining an order compelling discovery. As did Conseco's, American's year-long acquiescence in the litigation raises a presumption that American waived whatever right it had to demand arbitration. And, like Conseco, American has failed to offer any convincing justification for its tardiness.

American, moreover, had no right to demand arbitration to begin with. It bases its claim to such a right on the arbitration clause in Conseco's contract with Patton and on a forum selection clause in its own contract with him. Neither contract gives American the right it claims.

The clause upon which American relies in its sales contract with Patton provides in its entirety as follows:

> CONTROLLING LAW AND PLACE OF SUIT. The law of the State, in which I [Patton] sign this contract, is the law which is to be used in interpreting the terms of the contract. You and I agree that if any dispute between us is submitted to a court for resolution, such legal proceeding shall take place in the county in which your principle offices are located. If under state law a special dispute resolution procedure or complaint process is available, I agree to the extent permitted by law that procedure shall be the only method of resolution and source of remedies available to me.[23]

Although American's argument is anything but clear, it seems to contend either that the UAA is itself a "special dispute

[23]Patton asserts that this clause does not appear in the contract he executed; American asserts that it appears on the back of the two-sided form. We need not address the factual dispute, however, because, as explained in the text below, even if American's assertion is correct the quoted clause does not entitle American to the relief it seeks on appeal.

resolution procedure or complaint process" available under state law, or that the arbitration provision in the Conseco/Patton contract is such a procedure, which is somehow made available to American under the UAA. Plainly, however, the UAA itself does not provide a dispute resolution procedure. It provides rather a means for the enforcement of private agreements adopting such procedures. Nor, for the following reasons, is the Conseco/Patton arbitration agreement available to American, under the UAA or otherwise, at least with respect to Patton's complaint.

Ordinarily, of course, a stranger to a contract acquires no rights thereunder.[24] A broad exception to this very general rule has been recognized with respect to so called third-party beneficiaries, non-parties for whose actual and direct benefit the contract is made.[25] There are two types of such beneficiaries, donees and creditors, both of which are to be distinguished from mere incidental beneficiaries: strangers to the agreement who benefit from it, but whose benefit is not a principle objective of any party.[26] A person is a donee beneficiary

> if the purpose of the promisee in buying the promise is to make a gift to the beneficiary. A person is a creditor beneficiary if the promisee's expressed intent is that the third party is to receive the performance of the contract in satisfaction of any actual or

[24]Sexton v. Taylor County, Kentucky, Ky. App., 692 S.W.2d 808 (1985).

[25]*Id.*

[26]King v. National Industries, Inc., 512 F.2d 29, 33 (6th Cir. 1975).

> supposed duty or liability of the promisee to the beneficiary.[27]

Finally, a third-party beneficiary is entitled to enforce duties bargained for on his behalf.[28]

American is a creditor beneficiary of Patton's financing agreement with Conseco. As such it is entitled to enforce Conseco's promise to lend money to Patton because Patton acquired that promise on its behalf. American's status as third-party beneficiary does not, however, give it rights against Patton under the Conseco/Patton agreement. Any such right would have to be derived from Conseco, but American is neither Conseco's creditor nor its donee. American's rights against Patton, therefore, are limited to those acquired under its own sales contract with him. That contract, we have seen, does not create a right to demand arbitration except under procedures provided by state law, and no such procedures have been identified.

American has referred us to two other situations in which strangers to arbitration agreements have been deemed entitled to assert rights thereunder. In McBro Planning and Development Co. v. Triangle Electrical Construction Co., 741 F.2d 342 (11th Cir. 1984), and Hughes Masonry Company, Inc. v. Greater Clark County School Building Corp., 659 F.2d 836 (7th Cir. 1981), the plaintiff sued a sub-contractor on the basis of a construction contract that referred to the sub-contractor but to

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[27] *Id.* at 33.

[28] *Id.* at 33 nt. 6; 17A Am Jur 2d, Contracts § 459 (1991).

which the sub-contractor was not a signatory. When the sub-contractor invoked arbitration rights under the construction contract, the plaintiff was deemed to be estopped from resisting arbitration on the ground that the sub-contractor was not a party to the arbitration agreement. Patton's claims against American, however, are not based on his agreement with Conseco. There is thus no ground to estop him from asserting the general rule that American, a stranger to that agreement, derives no rights thereunder.

The other situation American cites in which non-parties have been included in an arbitration agreement is represented by Napier v. Manning, 723 So.2d 49 (Ala. 1998); J.J. Ryan & Sons, Inc. v. Rhone Pulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988); and Sam Reisfeld & Son Import Company v. S.A. Eteco, 530 F.2d 679 (5th Cir. 1976). In these cases the claim against the non-party has been deemed so intertwined with the claim against the party as to necessitate that the two claims be addressed jointly. Arbitration of the claim against the party, therefore, has been held to entail arbitration of the claim against the non-party as well. As discussed above, however, Patton's claim against Conseco is to be litigated rather than arbitrated. This fact, of course, renders American's point in citing these cases moot.

Finally, as did Conseco, American complains that the trial court did not give it a chance to reply to Patton's response to the motion to compel arbitration. For the reasons we discussed in denying Conseco relief on this ground, no relief is due American either.

In sum, Conseco and American have both allowed active litigation of the claims against them to proceed for a year. There has been significant discovery and, in Conseco's case, resolution of a substantive summary judgment motion. So advanced is the litigation, indeed, that Patton has requested a trial date. Conseco and American's unjustified delay in calling for arbitration during these twelve months and their participation in the judicial proceedings adequately supports the trial court's apparent conclusion that they have waived their rights to demand arbitration, whether on the ground that the delay and participation raise a presumption of such waiver and that neither party rebutted the presumption, or on the ground that the delay and participation are unduly prejudicial to Patton. In American's case, moreover, we agree with the trial court that American enjoyed no independent right to demand arbitration, and any such right it may have derived from the Patton/Conseco agreement has been rendered null by Conseco's waiver.

For these reasons, we affirm, in both 2000-CA-000027 and 2000-CA-000028, the December 13, 1999, order of the Boone Circuit Court.

BARBER, JUDGE, CONCURS WITH RESULT.

GUDGEL, C.J., DISSENTS BY SEPARATE OPINION.

GUDGEL, CHIEF JUDGE, DISSENTING BY SEPARATE OPINION. I respectfully dissent because in my view the record before us does not support the court's finding that Conseco and American waived their right to compel arbitration. Further, I believe that the

majority opinion simply ignores longstanding Kentucky principles which favor arbitration and disfavor waiver of that right.

We noted in Valley Construction Co., Inc. v. Perry Host Management Co., Inc., Ky. App., 796 S.W.2d 365, 367 (1990), that although "[p]articipation in a judicial proceeding may act as a waiver of arbitration," the mere filing of pleadings does not serve to waive a contractual arbitration provision. In my opinion, the court abused its discretion by finding that Conseco and American participated in this litigation to such a significant degree that their right to compel arbitration was waived.

Other than filing appropriate responsive pleadings, Conseco merely served appellee Patton with a set of ten written interrogatories and made a motion for summary judgment. These latter pleadings were only filed because Conseco believed it was entitled to have the action dismissed on the ground that the complaint failed to state a claim for relief. Indeed, Patton subsequently addressed this argument by filing amended complaints asserting new and different claims against Conseco and American. Moreover, although Conseco and American participated in one discovery deposition noticed by Patton, they did not schedule any of their own.

Given the fact that this jurisdiction does not encourage the waiver of contractual arbitration provisions, and given the apparent insufficiencies in the allegations of the initial complaint, I perceive no basis for finding that a waiver occurred herein merely because Conseco, in addition to filing

responsive pleadings, served ten written interrogatories and a motion for summary judgment. This is especially true since Conseco's motion to compel arbitration was filed only thirty-seven days after Patton's last amended complaint was filed. Moreover, as it is clear that the one-year delay in the litigation proceedings stemmed from the number of parties and pleadings herein, rather than from any conduct on Conseco's part, no prejudice stemmed from Conseco's delay in seeking to enforce its right to compel arbitration. I would conclude, therefore, that Conseco's limited participation in this judicial proceeding prior to seeking arbitration was not significant enough to justify a finding that its right to arbitration was waived. I would reach a similar conclusion as to American, as its participation in the judicial proceedings evidently was even less than that of Conseco since American apparently only filed appropriate pleadings and attended the deposition noticed by Patton.

For the reasons stated I would hold, contrary to the majority, that the trial court abused its discretion by finding that Conseco and American waived their right to compel arbitration. Therefore, I dissent.

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