STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-2021-190

JOHN ERICKSEN and KATHRYN ERICKSEN,

Plaintiffs,

v.

MAINE COAST KITCHEN DESIGN, INC. and TINA RICHARDSON,

Defendants.

ORDER ON PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

This matter is before the Court on Plaintiffs John and Kathryn Ericksen's ("Plaintiffs") Motion for Leave to Amend Complaint. Defendants Maine Coast Kitchen Design, Inc. ("MCKD") and Tina Richardson oppose the motion. For the following reasons, the Court grants Plaintiffs' Motion for Leave to Amend Complaint.

M.R. Civ. P. 15(a) provides that leave to amend "shall be freely given when justice so requires." Undue delay, bad faith, undue prejudice, and futility of amendment are grounds for denial of a motion to amend. *Montgomery v. Eaton Peabody, LLP*, 2016 ME 44, ¶ 13, 135 A.3d 106.

The Court's scheduling order provides for a June 2, 2022 deadline for amendment of the pleadings. Plaintiffs filed the pending motion on June 2, 2022. Plaintiffs seek leave to add an eighth count for violation of the Unfair Trade Practices Act, 5 M.R.S. §§ 205-A to 213 ("UTPA"), to their Complaint. The existing counts of their Complaint concern a construction contract for renovations to be performed in Plaintiffs' home by MCKD, and alleged breaches of that contract.

Defendants contend that Plaintiffs have failed to offer adequate justification for the timing of the proposed amendment. (Defs.' Opp'n 1.) Plaintiffs need not necessarily provide an explicit justification for the timing, unless it would otherwise appear that they are acting in bad faith or for delay. Here, the timing is explained at least in part by the fact that Plaintiffs issued a settlement offer, as required by 5 M.R.S. § 213(1-A), on April 12, 2022. The pending motion was, therefore, filed shortly after the expiration of UTPA's thirty-day settlement period. *See* 5 M.R.S. § 213(1-A). Defendants have not informed the Court of any other facts suggesting bad faith, and none are apparent from the motion itself.

Defendants further argue that granting the motion would unduly prejudice them because "the Parties have engaged in significant discovery tailored to existing claims." (Defs.' Opp'n 2.) However, as Plaintiffs emphasize, the UTPA claim arises from the same set of operative facts as Plaintiffs' existing claims. Moreover, the current scheduling order sets a discovery deadline of October 2, 2022. Although Defendants suggest that they may need to reopen the deposition of Kathryn Ericksen and that additional written discovery requests may be served, this does not rise to undue prejudice. *See Montgomery*, 2016 ME 44, ¶ 14, 135 A.3d 106 (affirming denial of motion to amend on undue delay and undue prejudice grounds where the proposed third amended complaint was filed over three years after the original complaint and would have "completely change[d] the nature of the malpractice case"); *Drinkwater v. Patten Realty Corp.*, 563 A2d 772, 778 (Me. 1989) (affirming denial of motion to amend on undue prejudice grounds where the motion was filed more than three years after commencement of the action and only five days before scheduled trial date).

In sum, no grounds exist for denial of the pending motion. Accordingly, the Court grants Plaintiffs' Motion for Leave to Amend Complaint.

The entry is:

Plaintiffs John and Kathryn Ericksen's Motion for Leave to Amend Complaint is GRANTED. Plaintiffs' First Amended Complaint, attached as Exhibit A to the Motion for Leave to Amend Complaint, is hereby accepted. Defendants shall answer Plaintiffs' First Amended Complaint within 10 days of the date that this Order is docketed.

The Clerk is directed to incorporate this Order into the docket by reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: 7/28/2022

MaryGay Kennedy, Justice
Maine Superior Court

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-21-190

JOHN ERICKSEN and KATHRYN ERICKSEN,

Plaintiffs,

v.

MAINE COAST KITCHEN DESIGN, INC. and TINA RICHARDSON,

Defendants.

ORDER ON DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION AND/OR STAY PENDING ARBITRATION

This matter is before the court on Defendants, Maine Coast Kitchen Design, Inc. ("MCKD") and Tina Richardson's, Motion to Dismiss and Compel Arbitration and/or Stay Pending Arbitration. After due consideration, Defendants' Motion is denied.

I. Factual Background

This action arises from a project to renovate Plaintiffs, John and Kathryn Ericksen's, home at 2 Gilman Road Extension, Standish, Maine ("the Project"). (Compl. ¶¶ 1, 2.) MCKD is a Maine corporation with its principal place of business at 17 Little Wing Lane, Gorham, Maine. (Compl. ¶ 10.) Defendant Richardson is the owner and president of MCKD. (Compl. ¶ 11.) In April 2019, Plaintiffs and MCKD entered into a contract for completion of the Project ("the Contract"). (Compl. ¶ 14.) Amid a payment dispute, MCKD walked off the Project prior to completion. (Compl. ¶¶ 59, 61-63, 71.)

Paragraph 10(e) of the Contract ("the Arbitration Clause") provides that:

> In the event that a dispute should subsequently arise between the Parties respecting this agreement, each of the Parties agrees to submit such dispute to mediation by a neutral in Cumberland County, Maine; and in the event that such dispute cannot be resolved during such mediation, each of the Parties agrees to submit the dispute to binding arbitration by a mutually agreeable arbitrator and heard and decided under the rules of the American Arbitration Association, and

> that the cost of such binding arbitration, including reasonable attorney's fees and the prevailing party's costs of the unsuccessful mediation, shall be borne by the non-prevailing party as determined by the arbitrator; and, in the event that the Parties cannot mutually agree on an arbitrator, each shall initially bear the expense to designate an arbitrator, and those two arbitrators shall designate the arbitrator who will hear and decide the dispute, the costs of which shall be reimbursed to the prevailing party as part of the costs of arbitration.

(Pl.'s Ex. A, at 5.) Pursuant to that provision, the parties engaged in mediation on July 12, 2020. (Compl. ¶ 73.) On September 10, 2020, Plaintiffs served a demand for arbitration on counsel for Defendants. (Compl. ¶ 74.) Defendants did not respond to the Demand for Arbitration. (Compl. ¶ 76.)

On September 23, 2020, Plaintiffs filed a Demand for Arbitration with the American Arbitration Association ("AAA") and paid the entire filing fee. (Compl. ¶ 77.) AAA opened an arbitration matter (case no. 01-20-0014-9981) and scheduled a case management conference for October 27, 2020. (Compl. ¶¶ 80, 81.) Defendants' counsel was served with the AAA Demand for Arbitration and provided with notice of the case management conference. (Compl. ¶¶ 79, 82.) Defendants did not appear at the case management conference. (Compl. ¶ 83.) On October 30, 2020, AAA sought Defendants' position on selection of an arbitrator. (Compl. ¶ 85.) Each party designated their preferred arbitrator, but the parties failed to agree on an arbitrator. (Compl. ¶ 86.)

Pursuant to the Arbitration Clause, Plaintiffs then designated Jerrol Crouter to work with Defendant's designated arbitrator to select the arbitrator who would ultimately resolve the dispute. (Compl. ¶ 87.) Despite AAA's attempts to reach Defendants on the matter, Defendants failed to designate an arbitrator as required by the Arbitration Clause. (Compl. ¶¶ 88, 89.)

After Defendants failed to respond to AAA's correspondence, Plaintiffs requested a stay of the Arbitration. (Compl. ¶ 91.) AAA contacted Defendants' counsel on May 10,

2021, regarding their position on the requested stay. (Compl. ¶ 92.) Defendants did not promptly respond. (Compl. ¶ 93.)

Plaintiffs then filed the Complaint in this action on May 17, 2021. Defendants have filed a Motion to Dismiss and Compel Arbitration and/or Stay Pending Arbitration. Plaintiffs argue in their Opposition that Defendants have waived their rights to arbitrate and that the court should deny Defendants' Motion on that basis. If the court compels the parties to arbitrate, then Plaintiffs request that the court stay this action and award Plaintiffs attorney fees in connection with filing the Complaint.

II. Motion to Compel Arbitration Standard

When a contract involving interstate commerce contains a mandatory arbitration provision, the Federal Arbitration Act governs, and ordinarily preempts state law. 9 U.S.C. § 2; *Stenzel v. Dell, Inc.*, 2005 ME 37, ¶ 7, 870 A.2d 133. "In deciding whether an arbitration clause is enforceable in the first place, however, courts apply state contract law principles." *Id.; see Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally").

"Maine has a broad presumption favoring substantive arbitrability." *Roosa v. Tillotson*, 1997 ME 121, ¶ 3, 695 A.2d 1196. Accordingly, a court will generally compel arbitration "if (1) the parties have generally agreed to arbitrate disputes, and (2) the party seeking arbitration presents a claim that, on its face, is governed by the arbitration agreement." *Id.* However, Maine's Uniform Arbitration Act[1] provides that agreements

[1] Maine courts may use case law interpreting the Federal Arbitration Act to guide their interpretation of Maine's Uniform Arbitration Act's similar provisions. *See HL 1 LLC v. Riverwalk, LLC*, 2011 ME 29, ¶ 22, 15 A.3d 725.

to arbitrate may be nullified "upon such grounds as exist at law or in equity for the revocation of any contract." 14 M.R.S. § 5927 (2021); *Snow v. Bernstein*, 2017 ME 239, ¶ 10, 176 A.3d 729.

III. Discussion

A. Waiver of Arbitral Rights

Contractual rights to arbitrate may be waived expressly or impliedly. *Joca-Roca Real Estate, LLC v. Brennan*, 772 F.3d 945, 948 (1st Cir. 2014). A party may impliedly waive its contractual right to arbitrate by "undertaking a course of action inconsistent with its present insistence" on arbitration, if prejudice to an opposing party results. *Saga Commc'ns of New England, Inc. v. Voornas*, 2000 ME 156, ¶ 12, 756 A.2d 954. For example, a party who has litigated substantial issues going to the merits of arbitrable claims has likely waived its right to arbitrate. *See id.* Waiver is not to be lightly inferred and courts must resolve doubts in favor of arbitration. *Id.* ¶ 11.

In addition to conduct that implies waiver, a majority of courts require a showing of prejudice to find waiver. *See id.* ¶ 16. Prejudice exists when a party delays invoking the right to arbitrate and thereby causes unfair damage to an opposing party's legal position or causes an opposing party to incur unnecessary delay or expense. *Id.* ¶ 17. Neither delay alone nor expenses that would also have been incurred in the course of arbitration is sufficient to show prejudice. *Id.* However, prejudice may be found where a party's conduct suggests a "deliberate strategy unilaterally designed to delay the arbitration proceedings" and an opposing party has incurred any unnecessary expenses as a result. *Tyco Int'l (U.S.) Ltd. v. Swartz*, 422 F.3d 41, 46 (1st Cir. 2005).

The parties do not dispute the validity or applicability of the Arbitration Clause. Rather, Plaintiffs argue that this Court should not enforce the Arbitration Clause because Defendants have waived their right to arbitrate under the Contract. Defendants argue

that (1) they have not, by their conduct, waived the Arbitration Clause and (2) no prejudice has or will result to Plaintiffs if the parties are compelled to arbitrate this matter.

Unlike the majority of cases in which Maine and federal courts have found waiver, Defendants did not insist on engaging in litigation for a substantial period before invoking the right to arbitration. Nevertheless, Defendants have engaged in conduct inconsistent with their present insistence on arbitration by failing to meaningfully participate in the arbitration process prior to the filing of the Complaint. *See id.* at 46 ("Swartz should not be allowed to reject the Tyco demand for arbitration, stand idle, then submit a motion to compel arbitration after Tyco has been required to commence a court proceeding . . . .").

The delay endured by Plaintiffs, as well as the expenses incurred in filing the Complaint and in requesting a stay of arbitration, would not have been necessary but for Defendants' failure to participate in the arbitration process. In light of Defendants' dilatory conduct, the fact that compelling arbitration now would cause Plaintiffs to be "out" its expenses of filing the Complaint demonstrates prejudice. *See Stanley v. A Better Way Wholesale Autos, Inc.*, No. 17-1215, 2018 U.S. Dist. LEXIS 137645, at *18-19 (D. Conn. Aug. 15, 2018) ("Stanley has shown prejudice due to excessive cost and time delay based on those costs she incurred resulting from ABW's refusal to participate in the AAA arbitration." (quotations omitted)). Thus, Defendants have waived their arbitral rights.

IV. Conclusion

For the foregoing reasons, Defendants have waived their contractual rights to arbitrate. Accordingly, the Court denies Defendants' Motion.

The entry is:

Defendants' Motion to Dismiss and Compel Arbitration and/or Stay Pending Arbitration is DENIED.

The Clerk is directed to incorporate this Order into the docket by reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: 9/27/2021

MaryGay Kennedy, Justice
Maine Superior Court