

STATE OF MICHIGAN
COURT OF APPEALS

FLINT AUTO AUCTION, INC.,

Plaintiff/Counter Defendant-
Appellant,

v

THE WILLIAM B. WILLIAMS SR TRUST, and
Estate of WILLIAM B. WILLIAMS SR,

Defendants/Counter Plaintiffs-
Appellees.

UNPUBLISHED
November 22, 2011

No. 299552
Genesee Probate Court
LC No. 09-186541-CZ

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's grant of summary disposition in favor of defendants. We affirm.

The underlying facts in this matter are largely not relevant to this appeal. At the time of William B. Williams Sr's death, he was a party to a "Deferred Compensation Agreement" with plaintiff Flint Auto Auction, Inc (FAA). FAA was a family-owned business that had originally been founded in part by Williams Sr's father and, at the time of Williams Sr's death, his biological son was one of the principals of FAA. The Deferred Compensation Agreement had been part of a plan to transition ownership and operation of FAA from one generation to the next. Williams Sr was cared for toward the end of his life by Lisa LeClair, the daughter of his then-deceased wife. LeClair was named trustee of Williams Sr.'s trust and Williams, Sr's personal representative; she also received a significant portion of his estate. Two separate but related lawsuits were commenced against Williams Sr's estate: the instant action in circuit court, and a probate action.

The instant action was initiated seeking a declaratory judgment that FAA had made all of the payments it was required to make under the Deferred Compensation Agreement. It appears that no action was taken in this matter for some time after the filing of the complaint, pursuant to an informal agreement worked out between the attorneys. The matter was eventually transferred to probate court and "informally abeyed." Defendants filed an answer and counterclaim almost a year after the complaint was filed, and at the same time, they raised the affirmative defense of an arbitration clause in the Deferred Compensation Agreement. Defendants served plaintiff with

several discovery requests, including a mix of requests for admission, requests for production of documents, and interrogatories. Plaintiffs contended that defendants had waived their right to arbitrate by filing the counterclaim, engaging in discovery, and otherwise engaging in behavior inconsistent with the right to arbitrate despite being aware of the arbitration clause. Plaintiffs responded to discovery, and defendants made use of the court's subpoena power. No depositions were conducted.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), under which a claim may be barred by the existence of an arbitration agreement. There is no dispute as to the existence of the arbitration agreement; rather, the issue is whether defendants waived their rights under that agreement. The trial court concluded that defendants did not waive their rights. We agree.

We review a grant of summary disposition de novo. *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 591; NW2d 364 (1998). When determining whether a party has waived its right to arbitrate, the trial court's factual findings are reviewed for clear error, but its decision whether those facts constituted a waiver is reviewed de novo. *Madison Dist Pub Schs v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). Waiver is disfavored, and the party asserting a waiver must prove (1) the waiving party had knowledge of an existing right to compel arbitration, (2) that party engaged in acts inconsistent with the right to arbitrate, and (3) prejudice to the party asserting waiver resulted from the inconsistent acts. *Id.* Waiver may be express or it may be implied by active participation in litigation or other acts inconsistent with the right to arbitrate. *Id.* at 589; *Joba Constr Co v Monroe Co Drain Comm'r*, 150 Mich App 173, 178; 388 NW2d 251 (1986). The first element is undisputedly established.

The existence of a waiver depends on the particular facts of the case. *Madison Dist Pub Schs*, 247 Mich App at 588. Filing a counterclaim without demanding arbitration may constitute a waiver of arbitration. *SCA Servs, Inc v Gen Mill Supply Co*, 129 Mich App 224, 230; 341 NW2d 480 (1983). Additionally, “[p]ursuing discovery in a court may be viewed as being inconsistent with demanding arbitration since discovery is not generally available in arbitration.” *Id.* at 231. However, the mere fact that a party conducts discovery is not proof positive that a party has waived its right to arbitrate, especially if discovery was conducted for the purposes of defending an action. *Id.* at 231. Conversely, the fact that a party has properly pleaded a right to arbitrate does not mean that it cannot waive the right through inconsistent acts. See *North West Michigan Const, Inc v Stroud*, 185 Mich App 649, 652; 462 NW2d 804 (1990). Likewise, an anti-waiver clause in a contract does not preclude a finding that a party waived a contractual right, although the party asserting a waiver must show that the parties to the contract mutually intended to waive or modify it. *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 365, 372-374; 666 NW2d 251 (2003).

Although this case was pending for some considerable time before defendants sought arbitration, much of that time was pursuant to some kind of mutual understanding between the parties. Defendants did engage in some discovery. Typically, however, the kind of discovery that will trigger a waiver is much more extensive than the document requests and subpoenas here, and is accompanied by other actions inconsistent with arbitration. In *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 596-597; 637 NW2d 526 (2001), the plaintiff carried on twenty months of litigation and extensive discovery that included depositions before demanding

arbitration. In *Joba Const Co, Inc*, 150 Mich App at 179, the plaintiff not only engaged in discovery, but also filed a complaint after having requested arbitration and failed to raise arbitration as a defense to a counterclaim. A party's participation in discovery is not *per se* a waiver of that party's right to arbitration. Rather, the fact and extent of participation in discovery are facts to consider when evaluating whether a party's behavior has, as a whole, been inconsistent with arbitration. We agree with the trial court that defendants' acts were not sufficiently inconsistent with arbitration to constitute a waiver.

A party is prejudiced by inconsistent acts of the other party when it has "expended resources to litigate the merits of [its] case in the trial court." *Salesin v State Farm Fire & Cas Co*, 229 Mich App 346, 357; 581 NW2d 781 (1998). Plaintiff argues that it expended tremendous resources on this matter due to defendants' discovery requests; defendants argue that plaintiff's burden was minimal. It appears that a party must expend more than just some time and resources in litigation to constitute *sufficient* prejudice. *Madison Dist Pub Schools*, 247 Mich App at 599-600. For most of the pendency of this case, it appears that nothing happened; while plaintiff clearly expended some effort responding to defendants' discovery requests, they have not exerted the level of effort this Court has previously found to require a waiver. In light of our public policy favoring arbitration, we do not believe plaintiff has satisfied its burden of establishing a waiver.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause