STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0338

Stern 1011 First Street South, LLC, et al.,
Respondents,

vs.

Kenneth A Gere, et al.,
Appellants.

Filed January 6, 2020
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CV-17-19465

Francis J. Rondoni, Christopher P. Renz, Chestnut Cambronne PA, Minneapolis, Minnesota (for respondents)

Scott G. Knudson, Maren M. Forde, Briggs and Morgan, P.A., Minneapolis, Minnesota (for appellants)

Considered and decided by Ross, Presiding Judge; Rodenberg, Judge; and Jesson, Judge.

S Y L L A B U S

Defendants in a civil suit may waive their contractual right to compel arbitration by filing a motion to dismiss even if they purport to reserve the right to later seek arbitration.

O P I N I O N

ROSS, Judge

This case arises from a dispute among multiple commercial property owners over the allegedly fraudulent behavior of one of them. This interlocutory appeal requires us to

decide the propriety of the district court's decision denying the accused property owner's motion to compel arbitration. We affirm the decision on one of the rationales provided by the district court, holding that the record supports the district court's conclusion that the accused owner and its principal's motion to dismiss the suit on the merits waived their right to compel arbitration. We therefore do not reach the district court's alternative conclusion that the parties' arbitration clause is not binding because it unreasonably failed to include a tolling provision in its short limitations period covering claims that allege concealed fraud.

FACTS

This lawsuit involves an office building at 1011 First Street South in Hopkins. In particular, it involves a dispute among the building's current owners over alleged financial irregularities occurring during the building's refinancing in 2007. The events leading up to the refinancing help frame the dispute.

The building has changed hands between different entities several times since 1997, but those entities have been owned mostly by the same people. In late 1997, the Buffalo Associates Limited Partnership acquired the building, and the partners were Kenneth Gere, Wayne Stern, and Jean Hosterman. The partners, joined by Wayne Johnson, Hyacinth Haberman, and Richard Hosterman, formed a new corporation in 1999—Planned Investments 97-1—and Buffalo Associates conveyed ownership of the building to that new corporation. The six individuals owned the Planned Investments corporation in these shares: Gere 30%, Stern 30%, Johnson 22.23%, Haberman 5.83%, J. Hosterman 5.97%,

and R. Hosterman 5.97%. They entered into an agreement that named Gere as the corporation's governor and chief manager and that entitled Gere to $1,000 in monthly compensation, a 5% commission on any sale of the building, and a 1% commission on any refinancing of it. The partners dissolved Buffalo Associates in 1999.

Planned Investments listed the building for sale for $7.5 million in 2007 but turned down an offer to purchase it for $6.5 million. The owners again restructured the building's ownership that same year. Each of the corporate shareholders formed his or her own separate limited liability company (Gere 1011, Stern 1011, Haberman 1011, Johnson 1011, and Hosterman 1011), and the LLCs entered into a tenancy-in-common agreement that apportioned ownership of the building precisely mirroring the ownership shares in Planned Investments (except that the single Hosterman 1011 LLC would own 11.94%, exactly double the 5.97% share that each of the two Hostermans owned separately in Planned Investments).

Planned Investments contemporaneously transferred ownership of the building to the five LLCs as tenants in common in December 2007, and the tenancy in common refinanced the building. The circumstances related to these 2007 transactions lie at the heart of this litigation. According to Stern 1011 and Haberman 1011, Gere chiefly directed all the arrangements. He alone retained ownership in Planned Investments. To refinance the building, the tenancy in common borrowed $4.26 million from Bank Mutual, secured by a mortgage in the property. Gere, as chief manager of Planned Investments, was the tenancy in common's representative in the refinancing. The loan closing statement indicates that,

after applying the loan proceeds to satisfy prior mortgages, pay city assessments, and cover loan-related and filing-related fees and costs, about $1.5 million remained for disbursement. Of that $1.5 million, the two LLCs that filed the current lawsuit—Stern 1011 and Haberman 1011—received $60,000 and $11,660, respectively. Similarly, Johnson 1011 received $44,460 and Hosterman 1011 got $23,880. By contrast, the Gere 1011 LLC received $60,000, Gere received $367,600 personally, and Planned Investments, which by then was owned entirely by Gere, received about $927,000.

Seven years later, one of the co-tenants began asking for an explanation about the Gere disbursements by comparison to the much lesser disbursements to the others. After learning the details about the disbursements, respondents Stern 1011 and Haberman 1011 (the Stern faction) sued Gere, Gere 1011, and Planned Investments (the Gere defendants). The Stern faction claimed that nearly $1.29 million was improperly disbursed to the Gere defendants without the other co-tenants' knowledge or authorization. The nine-count complaint alleged that Gere did not fully inform the co-tenants of the details of the refinancing transaction and that he fraudulently signed the loan closing statement on behalf of all co-tenants. It includes claims of fraud, civil theft, fraudulent inducement, and breaches of two of the agreements between the parties and of fiduciary duties.

The Gere defendants moved to dismiss the complaint. They argued that the fraud claims were not pleaded with sufficient particularity, that all the claims were barred by the one-year limitations provisions in the two agreements governing the parties' relationship, and that the claims were barred by the six-year statute of limitations. The motion to dismiss indicated that the Gere defendants were "submit[ting] [their] motion without waiver of or

prejudice to any of their claims, counterclaims, or defenses." A footnote in the supporting memorandum stated, "Defendants expressly reserve their right to move to compel arbitration in the event their motion to dismiss is denied."

The district court denied the Gere defendants' motion to dismiss. The Gere defendants then moved the district court to compel arbitration, citing the following arbitration clause in each of the two controlling agreements:

> [I]f a dispute arises out of or relates to this Agreement or the alleged breach thereof . . . , then any unresolved controversy or claim arising out of the dispute shall be settled by arbitration . . . . The parties agree that the arbitration shall be commenced within one (1) year from the date of the event giving rise to the dispute.

The district court denied the motion, concluding that the arbitration clause was unreasonable and unenforceable due to the brevity of its limitations period, which was only one year with no provision for tolling to compensate for delays in discovering concealed fraud. The district court concluded alternatively that the Gere defendants had waived the right to compel arbitration, having waited to move to compel arbitration until after they had submitted and lost their motion to dismiss on the merits. It reasoned that compelling arbitration would prejudice the Stern faction because they had already expended effort litigating the motion to dismiss.

This interlocutory appeal follows.

ISSUE

Did the Gere defendants waive their right to compel arbitration?

ANALYSIS

The Gere defendants challenge the district court's denial of their motion to compel arbitration. They argue that they did not waive their right to compel arbitration because they reserved the right while the motion to dismiss was pending. They argue also that the enforceability of the arbitration clause should have been decided by an arbitrator and that the one-year limitation period in the clause is reasonable and enforceable. We reach only the first of these arguments.

I

We must address the Gere defendants' contention that the district court incorrectly concluded that they waived their right to compel arbitration. Courts will not grant a motion to compel arbitration brought by a party who waived its contractual right to arbitration. *Bros. Jurewicz, Inc. v. Atari, Inc.*, 296 N.W.2d 422, 428 (Minn. 1980). A waiver occurs when a party who knows of a right voluntarily and intentionally relinquishes it. *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 798 (Minn. 2004). We generally review a district court's decision on a motion to compel arbitration de novo, but whether a party intended to waive a right is a question of fact. *Rodgers v. Silva*, 920 N.W.2d 664, 666 (Minn. App. 2018); *Fedie v. Mid-Century Ins. Co.*, 631 N.W.2d 815, 819 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). We therefore will not set aside the district court's finding that the Gere defendants waived their right to arbitration unless the finding is clearly erroneous. *See Fedie*, 631 N.W.2d at 819.

The record supports the district court's inference that the Gere defendants waived their right to arbitration. Intent to waive arbitration may be inferred from the circumstances. *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 603 (Minn. 1957). Courts will infer that a party has waived its right to arbitration if, after judicial proceedings have been initiated, the party fails to "expeditiously challenge[]" the proceedings on the ground that the dispute should instead be arbitrated. *Bros. Jurewicz*, 296 N.W.2d at 428 (holding that party waived arbitration by answering on the merits and participating in litigation for almost a year); *Anderson*, 84 N.W.2d at 602 (holding that party implicitly waived arbitration right by litigating rather than demanding arbitration). The Gere defendants substantially litigated the dispute by asking the district court to dismiss the suit rather than promptly demanding arbitration. Almost seven months passed, and an order denying the motion to dismiss was issued, before the Gere defendants moved to compel arbitration. We are satisfied that the district court correctly inferred the defendants' intent to waive.

We are not persuaded otherwise by the Gere defendants' reliance on *Illinois Farmers*, where the supreme court concluded that no waiver occurred when the party seeking arbitration first filed a declaratory-judgment action in district court. 683 N.W.2d at 799–800. Unlike in *Illinois Farmers*, where the party later seeking to compel arbitration first sought a declaratory judgment based only on preliminary, jurisdictional issues, *id.* at 800, here the parties seeking to compel arbitration had sought the district court's decision dismissing the suit based on the statute of limitations under a rule that results in dismissal on "the merits":

> Unless the court specifies otherwise in its order, . . . any dismissal . . . , other than a dismissal for lack of jurisdiction, for forum non conveniens, or for failure to join a party indispensable pursuant to Rule 19, operates as an adjudication upon the merits.

Minn. R. Civ. P. 41.02(c); *see also Nitz v. Nitz*, 456 N.W.2d 450, 452 (Minn. App. 1990) ("A dismissal based on statute of limitations grounds is a decision on the merits . . . ."). This approach is consistent with federal caselaw applying the federal counterpart to Minnesota's rule 41.02(c), rule 41(b) of the Federal Rules of Civil Procedure, treating dismissals based on the statute of limitations as dismissals on the merits. *See, e.g.*, *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1180 (4th Cir. 1989); *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896–97 (2d Cir. 1983). By asking the district court to dismiss the suit based on the statute of limitations, the Gere defendants sought a dismissal on the merits.

That the Gere defendants included a footnote in their motion to dismiss purporting to "expressly reserve their right to move to compel arbitration in the event their motion to dismiss is denied" does not alter the conclusion that they sought, and obtained, the district court's consideration of their dispositive motion on the merits. A party's declarations of its right to arbitration and its indication that it will seek arbitration do not overcome the party's contrary litigation conduct of seeking dismissal on the merits. *Preferred Fin. Corp. v. Quality Homes, Inc.*, 439 N.W.2d 741, 743–44 (Minn. App. 1989) (holding that party who indicated intent to seek arbitration by raising the right as an affirmative defense waived its right to arbitration by proceeding with a summary-judgment motion). We have explained that the decision to rely on a motion for summary judgment "suggests a deliberate weighing of the possibilities and development of a strategy, and evinces an intent not to seek

arbitration." *Id.* The Gere defendants' decision to seek dismissal first, saving until later their fallback option to exercise their right to compel arbitration, was a tactical choice that supports the conclusion that they waived the right to arbitrate.

Our recent decision in *Rodgers v. Silva* also supports our conclusion. There we held that, when a party files both a motion to dismiss for failure to state a claim and a motion to compel arbitration, the district court must first decide the arbitration motion before ruling on the motion to dismiss. *Rodgers*, 920 N.W.2d at 666–67. Although we did not discuss the consequences of a failure to bring both motions simultaneously, our holding clarifies that a party can enforce its right to arbitration by bringing both motions at once. We do not read the caselaw as establishing a per se rule that a party's filing of a motion to dismiss before filing a motion to compel arbitration necessarily shows intent to waive the right to arbitration. We hold only that the circumstances here support the district court's inference that the Gere defendants intentionally waived the right to compel arbitration.

The record supports the district court's related conclusion that granting the motion to compel arbitration would prejudice the Stern faction. Even when parties seeking to compel arbitration have shown the intent to waive their right to arbitration, a finding of waiver also requires a showing of prejudice to the party opposing arbitration. *Fedie*, 631 N.W.2d at 820. Prejudice can include additional expense and delay. *Preferred Fin.*, 439 N.W.2d at 745. As the district court reasoned, there are multiple ways that ordering arbitration would prejudice the Stern faction. The faction had already expended resources in litigation. It filed a 25-page memorandum opposing the motion to dismiss and argued against the motion orally. After the district court denied the motion but before the Gere

defendants moved to compel arbitration, the Stern faction prepared and served discovery requests. And arbitration would require the Stern faction to litigate some of the same legal issues already decided. The Gere defendants stated in their memorandum supporting the motion to compel arbitration (and they argue on appeal) that the arbitrator should decide the enforceability of the contractual limitations period. And their counsel maintained during the district court hearing, "[W]e'll let the arbitrator decide whether or not the statute of limitations provision applies here." Not only would this duplication increase the cost of the litigation, it would allow the Gere defendants the opportunity to argue issues already decided after having seen the Stern faction's strategy and arguments. Although Minnesota caselaw has not yet established that rearguing issues is a ground for prejudice, the idea has been adopted in federal cases. *See, e.g.*, *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 923 (8th Cir. 2009) ("Compelling arbitration presumably would require a duplication of effort insofar as [Defendant] in arbitration would reargue issues upon which the district court ruled."). The district court correctly concluded that compelling arbitration would prejudice the Stern faction after having correctly concluded that the Gere defendants intentionally relinquished their right to arbitration.

II

The district court supported its decision denying the Gere defendants' motion to compel arbitration on alternative grounds. In addition to holding that the Gere defendants waived their right to arbitration, it concluded that the brevity of the arbitration clause's limitations period, which was only one year with no provision for tolling to compensate for delays in discovering concealed fraud, makes the clause unreasonable and

unenforceable. Because we affirm the district court on its waiver rationale, we need not address the Gere defendants' challenge concerning enforceability.

D E C I S I O N

The district court correctly concluded that the Gere defendants waived their right to arbitration. We affirm its denial of their motion to compel arbitration, and we remand.

Affirmed.