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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2174

Bruce Bissonnette,
Respondent,

vs.

Truman Howell, et al.,
Appellants.

Filed November 18, 2013
Affirmed; motion granted
Rodenberg, Judge

Hennepin County District Court
File No. 27-CV-11-12611

John J. Steffenhagen, Hellmuth & Johnson, Edina, Minnesota (for respondent)

Charles J. Schoenwetter, Bowman and Brooke LLP, Minneapolis, Minnesota (for appellants)

Considered and decided by Smith, Presiding Judge; Worke, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellants challenge the district court's denial of their motion to dismiss based upon its finding that they had waived any contractual right they may have had to demand arbitration under a consulting agreement between respondent and a corporation owned by

the parties. We affirm and grant respondent's motion to strike section II.E.3 of appellants' brief.

FACTS

Respondent Bruce Bissonnette and appellants Charles Goracke, David Harchanko, Truman Howell, and Joseph Goracke (collectively appellants)[1] formed Bissonnette, Howell & Harchanko, Inc. (BHH), with each of the five owning an equal equity stake in the corporation. On February 22, 2008, respondent resigned his employment at BHH and entered into a consulting agreement with the company. The consulting agreement was signed by respondent and by appellant Truman Howell as president of BHH. The agreement required BHH to pay respondent $250,000 in monthly installments of $10,000. The consulting agreement contained an arbitration clause stating: "Any controversy which arises under this agreement shall be settled by arbitration, according to the rules of the American Arbitration Association, with one arbitrator."

BHH made payments to respondent through November 2008. BHH made no further payments under the agreement and respondent sued BHH for breach of contract. BHH asserted the arbitration clause as an affirmative defense in its answer but did not move to compel arbitration. In November 2009, BHH withdrew its answer and consented to the entry of judgment, and the district court entered judgment for $160,000 in favor of respondent and against BHH.

[1] Diamond General Contracting, LLC, is an additional named appellant but was not a moving party with respect to the appealed-from order. As discussed below, issues remain for determination by the district court concerning Diamond General, which was formed by the individual appellants after BHH ceased operations.

On June 9, 2011, and with the judgment unsatisfied, respondent started this action, alleging that appellants had made fraudulent transfers of BHH assets to themselves to the prejudice of respondent. Appellants answered and filed a motion to dismiss. Neither the answer nor the motion raised the issue of the arbitrability of the dispute. The district court granted the motion to dismiss in part, dismissing three of the counts in the complaint for failure to state a claim upon which relief can be granted, and also dismissing respondent's claim for punitive damages as noncompliant with Minn. Stat. § 549.191 (2012).[2] The district court denied the motion to dismiss the remaining counts for failure to state a claim and denied appellants' motion for a more definite pleading and other relief. The parties conducted discovery. Appellants then moved for summary judgment. In May 2012, the district court denied appellants' motion for summary judgment. It simultaneously granted respondent's motion for leave to amend his complaint to assert a claim for punitive damages.

In response to respondent's amended complaint, appellants served an amended answer asserting 18 new defenses. Among other defenses, appellants asserted that respondent's claims were barred and that the district court did not have subject matter jurisdiction because respondent's claims were "subject to an arbitration clause in the underlying Consulting Agreement that required arbitration of the parties' disputes." Appellants also filed a second motion to dismiss, arguing that the district court lacked

[2] To plead a claim for punitive damages, a party must move the district court and make a showing that a sufficient basis exists to assert a claim. Minn. Stat. § 549.191. Because respondent did not move to amend his pleadings under section 549.191 but instead claimed punitive damages in his initial complaint, the district court dismissed respondent's original count seeking punitive damages.

subject matter jurisdiction to hear the case because respondent's claims against the individual appellants fell within the scope of the arbitration agreement between respondent and BHH.

On November 6, 2012, the district court denied appellants' motion to dismiss. The district court was not persuaded by appellants' claims that they had earlier lacked knowledge of the arbitration clause and concluded that the appellants had not "expeditiously asserted their right to arbitration in this matter." The court further stated:

> More than a year passed between [respondent] filing his Summons and Complaint and [appellants] moving to dismiss on jurisdictional grounds. The parties ought to have gone to trial during that time. [Appellants] filed an Answer, a Motion to Dismiss, and a Motion for Summary Judgment—and none of these pleadings referred to arbitration. Based on these circumstances, [appellants] are deemed to have waived their right to arbitration.

This appeal followed.

DECISION

Appellants argue that the district court erred in determining that they waived their right to demand arbitration. Appellants contend that we must first determine whether the district court had subject matter jurisdiction over the case before addressing the issue of waiver. We disagree. *See Leiendecker v. Asian Women United of Minn.*, 834 N.W.2d 741, 755-56 (Minn. App. 2013) (addressing the issue of waiver before discussing the scope of the arbitration agreement), *review granted* (Minn. Aug. 20, 2013). The Minnesota Supreme Court has also made a waiver determination "[b]efore addressing

whether any or all of the disputed claims must be arbitrated." *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 798 (Minn. 2004).

It is clear that a party may waive the right to invoke a valid arbitration agreement. *Fedie v. Mid-Century Ins. Co.*, 631 N.W.2d 815, 819 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). "Waiver of a contractual right to arbitration is ordinarily a question of fact and determination of this question, if supported by substantial evidence, is binding on an appellate court." *Id.* Findings of fact are not set aside unless clearly erroneous. *Id.* However, a reviewing court "should resolve any doubts concerning the scope of arbitrable issues in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Johnson v. Piper Jaffray, Inc.*, 530 N.W.2d 790, 795 (Minn. 1995) (quotation omitted).

"Waiver is the voluntary and intentional relinquishment of a known right." *Ill. Farmers Ins. Co.*, 683 N.W.2d at 798. Waiver requires "both knowledge of the right in question and the intent to waive that right." *Id.* "The burden of proving knowledge and intent rests with the party asserting waiver." *Frandsen v. Ford Motor Co.*, 801 N.W.2d 177, 182 (Minn. 2011). Some cases also require a showing of prejudice to the party asserting waiver. *Fedie*, 631 N.W.2d at 820. In general, a plaintiff waives the right to arbitration by bringing suit and a defendant waives the right to arbitration by answering on the merits or failing to demand arbitration. *Bros. Jurewicz, Inc. v. Atari, Inc.*, 296 N.W.2d 422, 428 (Minn. 1980); *Anderson v. Twin City Rapid Transit Co.*, 250 Minn. 167, 180, 84 N.W.2d 593, 602 (1957).

In *Bros. Jurewicz*, the Minnesota Supreme Court affirmed a finding of waiver of the right to arbitrate where the party claiming the right to arbitrate first "allowed [the] dispute to proceed through the judicial system to the point at which the issues raised were ripe for decision in that forum." 296 N.W.2d at 429. In *Ill. Farmers Ins. Co.*, the supreme court found it noteworthy that the *Bros. Jurewicz* court had been presented with a situation where "a party waived its right to arbitration by answering a claim on the merits and allowing the district court litigation over the contract to proceed for over one year without moving the court to stay the proceedings and compel arbitration." 683 N.W.2d at 799. In contrast, the respondent in *Ill. Farmers Ins. Co.* filed a declaratory-judgment action in order to determine whether arbitration was required. *Id.* at 800. The parties there were contesting a limited jurisdictional question. *Id.* The *Ill. Farmers Ins. Co.* court focused on the difference between asserting solely jurisdictional defenses and challenging the merits of a claim as relates to the waiver question. *Id.* The *Ill. Farmers Ins. Co.* court held that, unlike litigating the merits of a claim, litigating a jurisdictional defense in district court does not waive a party's right to demand arbitration. *Id.*

The knowledge required to support a finding of waiver may be actual or constructive. *Bros. Jurewicz*, 296 N.W.2d at 429. Parties are deemed to have constructive knowledge of the terms of agreements they execute. *Id.* Here, appellants argue that they did not have the knowledge sufficient to support a finding of waiver because, at the time of their original answer and during the period between commencement of the suit and their motion to dismiss for want of subject matter jurisdiction, they were unaware that, as nonsignatories of the consulting agreement in

their individual capacities, they could invoke the arbitration clause. This argument is unavailing. Appellants were, with respondent, the owners of all of the shares of BHH. Appellant Howell actually signed the consulting agreement. BHH invoked the arbitration clause in the first lawsuit. Respondent referred to the consulting agreement several times in his complaint in this case.[3]

The district court stated that it was not persuaded by appellants' argument that they lacked knowledge of their right to arbitrate. Appellants argue that this indicates a misallocation of the burden of proof by the district court. Appellants misread the district court's order. The district court was "hard-pressed to believe" that appellants were unaware of the arbitration clause. It did not indicate that appellants bore the burden of proving non-waiver. On the contrary, the district court set forth the facts showing that respondent had met his burden to prove that appellants had waived their right to arbitrate, stating that it found waiver to have been demonstrated "[b]ased on these circumstances." The district court thus determined that respondent met his burden of proof and stated that it was not persuaded by appellants' counterargument that they lacked knowledge of the arbitration clause. We construe the district court's statement that it was not persuaded

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[3] Appellants argue that respondent should have addressed the issue of waiver in his complaint and thus put appellants on notice regarding this issue. But appellants cite no authority for the proposition that respondent ought to have "affirmatively pleaded that appellants had waived their right to arbitrate in his Complaint," going on to argue that the present case is an appropriate vehicle for us to "send a clear message" that waiver should or must be pleaded in the complaint. Because this issue was not adequately briefed, we decline to address it. *State Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997). Moreover, and as discussed below, the waiver here was found by the district court to have occurred only after appellants answered and engaged in over one year of litigation and argued multiple dispositive motions, all without invoking their claimed right to arbitrate.

that appellants were unaware of the arbitration clause as a finding of fact that appellants had knowledge of their right. Findings of fact are not set aside unless clearly erroneous. *Fedie*, 631 N.W.2d at 819. And the district court's finding that appellants had knowledge of their right to arbitrate is not clearly erroneous. The record amply supports the finding that appellants, as owners of BHH (which had previously pleaded the arbitration clause in the first lawsuit), had knowledge of their potential right to arbitrate and chose not to seek arbitration until after they had unsuccessfully sought dismissal by the district court by way of two separate dispositive motions.

The intent required to find a waiver may be inferred from the facts and circumstances of a case. *Anderson*, 250 Minn. at 181-82, 84 N.W.2d at 603. However, it must be proven by some expression of intent, rather than by mere inaction. *Frandsen*, 801 N.W.2d at 182. Appellants argue that they could not have shown any intent to waive their right because they were unaware of the arbitration clause.[4] They claim that, like the defendants in *Cnty. Of Hennepin v. Ada-Bec Sys.*, they "at no time acted inconsistently with the notion that they considered the arbitration clause as still effective." 394 N.W.2d 611, 613 (Minn. App. 1986), *review denied* (Minn. Dec. 17, 1986). However, the defendants in *Ada-Bec* asserted arbitration as a defense in their original answer. Appellants here did not assert arbitration as a defense until over one year after respondent initiated his suit—after serving an answer and moving both to dismiss for failure to state a claim and for summary judgment. Because appellants twice sought dismissal of the

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[4] The individual appellants provided affidavits that stated: "I have not, at any time, intended to voluntarily relinquish any rights I possess to arbitrate the controversies and disputes presented by [respondent's] original or Amended Complaint filed in this case."

complaint in district court on nonjurisdictional grounds, the district court did not clearly err in finding that appellants demonstrated the necessary intent to waive their right to demand arbitration.

Although not expressly considered by the district court, some showing of prejudice is required of a party contending that there has been a waiver of the right to arbitration. *Fedie*, 631 N.W.2d at 820. "The passage of time alone does not constitute sufficient prejudice to require a finding of waiver of the right to arbitrate." *Id.* at 821. Here, respondent experienced prejudice beyond the one-year delay in asserting arbitrability. Respondent's claims survived two prior dispositive motions (this appealed-from motion being appellants' third dispositive motion to the district court). Appellants invoked the arbitration clause only after having twice previously failed to obtain the district court's dismissal of respondent's claims. Respondent has been prejudiced not only by the passage of time but also by virtue of appellants having deliberately and repeatedly sought dismissal of the action on the merits in district court. *Cf. Ill. Farmers Ins. Co.*, 683 N.W.2d at 799-800 (distinguishing the nonwaiver resulting from assertion of solely jurisdictional defenses in the district court from the waiver caused by challenging the merits of a claim).

Because waiver is a question of fact, a district court's decision will be affirmed unless it is clearly erroneous. *Fedie*, 631 N.W.2d at 819. The record amply supports the district court's finding that appellants knowingly and intentionally relinquished their right to arbitration. We therefore affirm.

Because we conclude that the record supports the district court's finding that appellants waived their right to demand arbitration, we do not address appellants' arguments regarding the scope of the arbitration clause and their ability to invoke that clause as nonsignatories of the agreement in which the clause is contained.[5]

Motion to Strike

When the district court denied appellants' motion to dismiss for lack of subject matter jurisdiction, it also granted respondent's motion to strike appellants' affirmative defenses. Appellants filed a petition with this court, seeking discretionary review of the district court's order striking their affirmative defenses. We denied appellants' petition for discretionary review. After appellants filed their brief in this appeal, respondent moved to strike section II.E.3, the part of appellants' brief addressing whether appellants may raise affirmative and other defenses in response to an amended complaint. Based on our prior denial of appellants' petition for discretionary review of the district court's order striking their affirmative defenses, we decline to address that same issue in this appeal. We therefore grant respondent's motion to strike section II.E.3 of appellants' brief.

Affirmed; motion granted.

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[5] The district court also allowed respondent to amend his complaint to add Diamond General Contracting Inc. (DGC) as a defendant. Appellants argue that DGC will be able to invoke the arbitration clause because, as a new party, it cannot yet have waived this right. That issue is not before us on this appeal and we decline to address it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." (quotation omitted)).