[Cite as *EMCC Invest. Ventures v. Rowe*, 2012-Ohio-4462.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

EMCC INVESTMENT VENTURES, LLC,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0053**
- vs -	:	
CLARENCE ROWE,	:	
Defendant/ Third Party Plaintiff-Appellant,	:	
LAW OFFICE OF CURTIS O. BARNES, et al.,	:	
Third Party Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 00062.

Judgment: Reversed and remanded.

Jeffrey C. Turner and *John P. Langenderfer*, Surdyk, Dowd & Turner Co., L.P.A., One Prestige Place, Suite 700, Miamisburg, OH 45342 (For Plaintiff-Appellee and Third Party Defendant-Appellee).

Kesha D. Kinsey, Law Offices of Curtis E. Barnes, P.O. Box 340, Brice, OH 43109 (For Plaintiff-Appellee).

Robert S. Belovich, 9100 South Hills Blvd., Suite 300, Broadview Heights, OH 44147; and *Anand N. Misra*, The Misra Law Firm, L.L.C., 3659 Green Road, Suite 100, Beachwood, OH 44122 (For Defendant/Third Party Plaintiff-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Clarence Rowe, appeals the judgment of the Portage County Court of Common Pleas requiring arbitration and dismissing, with prejudice, his claims

against appellees, EMCC Investment Ventures, LLC ("EMCC") and the Law Offices of Curtis O. Barnes ("Barnes"). At issue is whether EMCC and Barnes waived their right to arbitration. For the following reasons, we reverse the judgment of the trial court.

{¶2} On October 30, 2008, EMCC filed a complaint in the Portage County Municipal Court against Rowe alleging that Rowe owed the sum of $2,517.67 for money lent to him via his use of a credit card issued by Sam Ash Music ("Sam Ash"), which was financed through Household Bank (SA), N.B. ("HSBC"). EMCC stated it was the assignee of Sam Ash, citing the specific account number, and that Rowe failed to make payments on the credit card.

{¶3} Rowe filed an answer and counterclaim for violations of the Fair Debt Collection Practices Act, the Ohio Consumer Sales Practices Act, the Ohio Deceptive Trade Practices Act, common law fraud, and civil conspiracy. Rowe asserted class-action allegations and added Barnes as a counterclaim defendant. Rowe alleged that it was improper for Barnes to send a collection form letter that sought collection of attorney fees. Rowe brought these claims on behalf of himself and a class of consumers, similarly situated.

{¶4} On January 7, 2009, Barnes and EMCC filed an answer to the counterclaim. Although Barnes and EMCC asserted defenses, neither of them asserted a right of arbitration. The case was transferred to the Portage County Court of Common Pleas.

{¶5} On March 9, 2009, Rowe filed a motion to compel discovery noting that the first discovery requests were sent to EMCC and Barnes on January 29, 2009.

EMCC and Barnes provided responses to Rowe's first set of interrogatories and request for production of documents on March 19, 2009.

{¶6} EMCC and Barnes deposed Rowe on May 21, 2009. On July 22, 2009, Barnes filed a motion for judgment on the pleadings, to which Rowe filed a response on August 21, 2009. Barnes filed a reply.

{¶7} On August 6, 2009, and October 22, 2009, EMCC and Barnes, respectively, filed a motion for summary judgment as to the counterclaim. Rowe filed responses to both motions for summary judgment on August 24, 2009, and November 4, 2009, respectively. EMCC filed a reply in support of its motion for summary judgment on September 14, 2009.

{¶8} On December 3, 2009, EMCC moved to withdraw its motion for summary judgment, which was granted by the trial court. That same day, EMCC filed a notice of dismissal of its claim against Rowe.

{¶9} Rowe filed a motion for class certification on February 5, 2010, which was opposed by EMCC and Barnes. The trial court scheduled mediation and a hearing on the class certification motion. The mediation was unsuccessful.

{¶10} On February 4, 2011, EMCC and Barnes filed a motion to compel arbitration. The trial court granted the motion to compel arbitration and dismissed Rowe's counterclaims.

{¶11} Rowe filed a timely notice of appeal and asserts the following assignments of error:

{¶12} [1.] The trial court committed prejudicial error in finding that the appellees had not waived any right to arbitration by electing to litigate the claims.

{¶13} [2.] The trial court committed prejudicial error in finding that appellee as assignee of HSBC continued to have a right to demand arbitration when the assignor (HSBC) was itself foreclosed from arbitration by court order.

{¶14} [3.] The trial court committed prejudicial error in finding that the Shoemake affidavit provided evidence that Mr. Rowe had entered into an arbitration agreement.

{¶15} [4.] The trial court committed prejudicial error in finding that Mr. Rowe's debt collection violation claims were within the scope of the alleged arbitration clause.

{¶16} [5.] The trial court committed prejudicial error in granting appellees' motion to require arbitration without permitting Mr. Rowe the opportunity to obtain necessary discovery as to the very evidence upon which the trial court based its decision.

{¶17} We have held that a ruling on a motion to stay proceedings pending arbitration is a final, appealable order pursuant to R.C. 2711.02. *River Oaks Homes, Inc. v. Krann*, 11th Dist. No. 2008-L-166, 2009-Ohio-5208, ¶39. In this case, EMCC and Barnes moved for a stay pending arbitration pursuant to an arbitration provision in the contract. The trial court granted the motion. Hence, the order falls within the purview of

R.C. 2711.02, and the judgment is a final, appealable order which is properly before this court.

{¶18} Generally, the standard of review for a decision granting or denying a motion to stay proceedings pending arbitration is abuse of discretion. *Id*. at ¶41. For example, this court reviews a trial court's decision as to whether a party waived arbitration for an abuse of discretion.

{¶19} A trial court's grant or denial of a stay based solely upon questions of law, however, is reviewed under a de novo standard. *Buyer v. Long*, 6th Dist. No. F-05-012, 2006-Ohio-472, ¶6. Therefore, this court reviews de novo a trial court's legal conclusion as to whether a party is contractually bound by an arbitration clause.

{¶20} Initially, we must first address whether EMCC and Barnes have a right to assert arbitration. Thus, we first address Rowe's third assignment of error: whether the trial court committed prejudicial error in finding that an affidavit attached to EMCC and Barnes' motion to compel arbitration provided support that Rowe entered into an arbitration agreement.

{¶21} Attached to EMCC and Barnes' motion to compel arbitration was an affidavit of Mr. Charles Shoemake, the treasurer and secretary of EMCC Holdings, Inc. Mr. Shoemake averred that EMCC Holdings, Inc. is the sole member of EMCC. Further, the affidavit stated that "[o]n March 4, 2008, HSBC sold the account [at issue] to EMCC Investment Ventures, LLC, assigning all rights, title and interest on the account." Also attached to the motion to compel arbitration was a blank credit card application and the "Cardholder Agreement and Disclosure Statement," which contained an arbitration clause.

{¶22} In its judgment entry, the trial court stated:

{¶23} "Mr. Shoemake's affidavit provides the evidentiary foundation for the credit card agreement. The credit card agreement applies to the assignees and Rowe's claims fall within the scope of the arbitration clause."

{¶24} On appeal, Rowe maintains the following: Mr. Shoemake's affidavit is not supported by personal knowledge, as he does not hold a position with Sam Ash or HSBC; there is no evidence within the affidavit connecting EMCC to Rowe, Sam Ash, or HSBC; and the affidavit fails to prove the existence of an assignment by HSBC. Rowe states that in order to demonstrate an assignment, there must be evidence sufficient to establish a chain of title from the assignor regarding the existence of the assignment and its relevant terms.

{¶25} In their motion to compel, EMCC and Barnes rely upon the arbitration clause contained in the "Cardholder Agreement and Disclosure Statement" issued by HSBC.[1] EMCC and Barnes contend that by virtue of the assignment from HBSC to EMCC, EMCC has the right to arbitrate the instant claims, as EMCC acquired "all rights, title and interest on the account." They further argue that because all of Rowe's counterclaims related to EMCC's efforts to collect amounts due under the contract, Rowe's counterclaims against both EMCC and Barnes relate to the cardholder agreement and are subject to arbitration.

1. {**¶a**} The arbitration clause stated, in part:
   {**¶b**} "Any claim, dispute, or controversy * * * including initial claims, counter-claims, cross-claims and third party claims, arising from or relating to this Agreement or the relationships which result from this agreement, including the validity or enforceability of this arbitration clause, any party thereof or the entire Agreement * * * shall be resolved, upon the election of you or us, by binding arbitration."

{¶26} We agree with Rowe's argument that EMCC has not established a chain of title so as to establish EMCC's interest in the account at issue.

{¶27} In an action on an account, when an assignee is attempting to collect on an account in filing a complaint, the assignee must 'allege and prove the assignment.' *Zwick v. Zwick*, 103 Ohio App. 83, 84 (1986). In other words, in order to prevail, the assignee must prove that they are the real party in interest for purposes of bringing the action. *An assignee cannot prevail on the claims assigned by another holder without proving the existence of a valid assignment agreement*. (Emphasis added.) *H&S Fin., Inc. v. Davidson*, 2d Dist. No. 24291, 2011-Ohio-4290, ¶24.

{¶28} Here, EMCC and Barnes attached an affidavit of Mr. Shoemake averring that EMCC acquired "all rights, title and interest on the account." In the motion to compel, EMCC did not introduce a "Bill of Sale," or other similar document, demonstrating that EMCC had purchased the account at issue from HSBC or documenting the terms of the assignment. Consequently, EMCC, relying solely upon Mr. Shoemake's affidavit, did not meet its burden as assignee, and therefore, neither EMCC nor Barnes could rely upon the arbitration clause contained in the "Cardholder Agreement and Disclosure Statement."

{¶29} Therefore, Rowe's third assignment of error has merit to the extent indicated.

{¶30} This, however, does not conclude our analysis. On remand, it is possible that EMCC and Barnes could take further steps to demonstrate a contractual right to

demand arbitration. As a result, in the interest of judicial economy, we must address the first assignment of error to determine whether the trial court abused its discretion in finding that EMCC and Barnes had not waived any right to arbitration.

{¶31} In his first assignment of error, Rowe argues that while courts will regularly enforce a contract for arbitration, the right to arbitration under the contract may be waived when the party asserting the right engages in conduct inconsistent with the right to arbitrate. Rowe maintains that EMCC and Barnes waived their right to arbitrate the dispute involved herein, as both failed to assert it as an affirmative defense and actively participated in the litigation for over two years before raising the arbitration clause. Rowe notes that during this two-year period, EMCC, Barnes, and Rowe engaged in extensive discovery, including conducting a deposition, requesting production of documents, and propounding interrogatories. Further, Rowe maintains that before asserting the right to arbitrate, EMCC and Barnes filed a motion for judgment on the pleadings, motions for summary judgment as to the counterclaim, a response to Rowe's motion for class certification, and engaged in numerous hearings. Yet, during this period, EMCC and Barnes never asserted or included in their motions or responses a request for arbitration.

{¶32} To support his argument that EMCC and Barnes waived their right to arbitration, Rowe cites, inter alia, to this court's opinions in *Farrow Builders, Inc. v. Slodov*, 11th Dist. No. 2000-G-2288, 2001 Ohio App. LEXIS 2952 (June 29, 2001); *Hogan v. Cincinnati Fin. Corp*., 11th Dist. No. 2003-T-0034, 2004-Ohio-3331; *GMS Mgt. Co., Inc. v. Coulter*, 11th Dist. No. 2005-L-071, 2006-Ohio-1263; and *Marks v. Swartz*,

174 Ohio App.3d 450, 2007-Ohio-6009 (11th Dist.). With respect to waiving one's right to arbitration, this court, in *Hogan*, *supra*, at ¶22-25, stated:

> **{¶33}** It is well-established that the right to arbitration can be waived. * * * 'A party can waive his right to arbitrate under an arbitration clause by filing a complaint.' *Glenmoore Builders, Inc. v. Kennedy*, 11th Dist. No. 2001-P-0007, 2001 Ohio App. LEXIS 5449, 9 (Dec. 7, 2001), citing *Rock, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 79 Ohio App.3d 126, 128 (1992). '"'When the defendant [files] its answer in that suit without demanding arbitration, it, in effect, [agrees] to the waiver.'" *Hoffman v. Davidson*, 11th Dist. No. 3909, 1988 Ohio App. LEXIS 773, 5 (Mar. 11, 1988), quoting *Mills v. Jaguar-Cleveland Motors, Inc.*, 69 Ohio App.2d 111, 113 (1980).
>
> **{¶34}** To prove waiver, the opposing party merely needs to show: (1) that the party waiving the right knew of the existing right of arbitration and (2) that the party acted inconsistently with that right. * * *
>
> **{¶35}** 'Active participation in a lawsuit * * * evidencing an acquiescence to proceeding in a judicial rather than arbitration forum has been found to support a finding of waiver.' *Griffith* [*v. Linton*, 130 Ohio App.3d 746, 751 (1998)]. 'A motion for summary judgment, while not a trial, is a procedural equivalent of a trial: it is a procedural device designed to terminate litigation and to avoid a formal trial where no issues exist for a trial.' *Id.*, citing *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2 (1982).

{¶36} 'Filing a motion for summary judgment is inconsistent with the right to arbitrate because it places the dispute squarely before the court for resolution on the merits and demonstrates an election to proceed with litigation as opposed to arbitration. As a result, many courts hold that filing a motion for summary judgment constitutes waiver of the right to arbitrate.' *Griffith* at 753.

{¶37} In their brief, EMCC and Barnes maintain that Rowe improperly relies on Ohio law as the credit card agreement contains a choice of law provision, and based on this provision, federal and Nevada law apply. EMCC and Barnes further argue that they have not acted inconsistently with their right to arbitrate by participating in the litigation and that Rowe will not be prejudiced if the matter is arbitrated.

{¶38} For the purposes of this appeal, we must first determine whether Ohio law is applicable or whether this matter is to be governed by federal and Nevada law. Then, we must examine whether EMCC and Barnes have waived their right to arbitrate based upon the appropriate law.

{¶39} The credit card agreement at issue contains a section entitled, "APPLICABLE LAW." This section states:

{¶40} This Agreement and your Account shall be governed by, and interpreted under, federal law, including the Federal Arbitration Act, and the laws of the State of Nevada applicable to contracts made and to be performed therein without reference to principles of conflict of laws. The legality, enforceability and interpretation of this Agreement and the amounts contracted for, charged and received

> under this Agreement will be governed by such laws. This Agreement is entered into between you and us in Nevada. We made decision about granting credit to you from, and extend credit to you under this Agreement from, Nevada. *Federal and Nevada law shall also apply to any controversy, claim or dispute arising from or relating in any way to the subject matter of this Agreement and/or your Account, including statutory, equitable and tort claims*. (Emphasis added.)

{¶41} EMCC and Barnes are correct that Nevada and federal law apply based on the above-stated provision; however, this distinction is without difference. As observed by the Seventh Appellate District:

> **{¶42}** Nevada has essentially the same view of arbitration as Ohio; arbitration is encouraged as a means of dispute resolution and that arbitration clauses are to be liberally construed in favor of arbitration. Nevada law recognizes that an arbitration provision may be waived. Waiver may be shown if the party seeking to arbitrate knew of the right to arbitrate, acted inconsistently with that right, and prejudiced the other party. (Citations omitted.) *Durina v. Filtroil, Inc*., 7th Dist. No. 07 CO 24, 2008-Ohio-4803, ¶54.

{¶43} "Prejudice may be shown (1) when the parties use discovery not available in arbitration, (2) when they litigate substantial issues on the merits, or (3) when compelling arbitration would require a duplication of efforts." *Nevada Gold & Casino*, *Inc. v. Am. Heritage*, 121 Nev. 84, 110 P.3d 481, 485 (2005).

{¶44} The Nevada Supreme Court, in *Nevada Gold & Casino*, *supra*, addressed whether a casino developer had waived any right to demand arbitration by vigorously litigating a dispute in Texas. In concluding that the casino developer had waived its right to arbitration as a matter of law, the Court noted that the casino developer had known of its right to arbitration and acted inconsistently with such a right when it litigated the matter for 18 months before moving that court to compel arbitration, on the eve of trial. The Nevada Supreme Court determined that the opposing party, a casino operator, had suffered prejudice because the casino developer litigated substantial issues on the merits and because compelling arbitration would require the parties to duplicate their efforts. The Nevada Supreme Court cited to the Ohio federal district court's opinion in *Uwaydah v. Van Wert Cty. Hosp.*, 246 F.Supp.2d 808, 814 (N.D.Ohio 2002), stating:

> **{¶45}** If plaintiff's demand for arbitration were to be upheld, there would be nothing to keep any litigant with an arbitration clause from testing the judicial waters, and to do so for as long as he liked, even to the point where the case has arrived on the brink of resolution, and then nullifying all that has gone before by demanding arbitration.

{¶46} Similarly, federal law recognizes the concept of waiver with respect to arbitration. The Second Circuit has set forth several factors to consider when examining waiver, such as the following:

> **{¶47}** (1) [T]he time elapsed from the commencement of litigation to the request for arbitration; (2) the amount of litigation, including any

> exchanges of pleadings, substantive motions, and discovery; and (3) proof of actual prejudice, including taking advantage of pretrial discovery not available in arbitration, meritorious motions against one's adversary, and undue delay. *Danny's Constr. Co. v. Birdair, Inc*., 136 F.Supp.2d 134, 143 (W.D.N.Y.2000), citing *Kingston v. Latona Trucking*, 153 F.3d 80, 83 (2d Cir.1998).

{¶48} Here, none of the parties suggest that EMCC and Barnes did not know of the right to arbitration. Therefore, we focus on whether EMCC and Barnes acted inconsistently with that right, and whether Rowe is prejudiced by compelled arbitration.

{¶49} Both EMCC and Barnes actively participated in instant litigation for nearly 28 months before filing a motion to compel arbitration. Their actions manifest a preference clearly inconsistent with arbitration and demonstrate that they elected to litigate rather than arbitrate.

{¶50} EMCC, rather than seeking arbitration, filed suit against Rowe. When answering Rowe's counterclaim, neither EMCC nor Barnes asserted a right of arbitration. Furthermore, after a motion to compel filed by Rowe and a response filed by EMCC and Barnes, Barnes and EMCC responded to Rowe's request for discovery, including interrogatories and request for production of documents. EMCC and Barnes then chose to depose Rowe.

{¶51} During the next four months, the parties continually engaged in the practice of filing motions and replies, including motions for summary judgment. Although the parties were continually engaged in motion practice, neither Barnes nor EMCC asserted a right to arbitration.

{¶52} Rowe sought class certification on February 5, 2010. Again, for the next three months, the parties continually filed motions with respect to the class certification, but neither party requested arbitration. The parties then engaged in mediation, which was unsuccessful.

{¶53} On February 4, 2011, nearly 28 months after filing its initial claim against Rowe, EMCC and Barnes filed a motion to compel arbitration based on the cardholder agreement of HSBC.

{¶54} Our review of the record clearly demonstrates that EMCC and Barnes acted inconsistently with the right to arbitrate. As such, we must now determine whether Rowe would suffer prejudice by arbitration.

{¶55} Rowe has filed numerous pleadings in the instant case and has expended considerable resources to do so. The parties have litigated this case for over two years. Further, Rowe, EMCC, and Barnes have litigated the issue of class certification; Rowe has spent considerable resources in filing his motions and responses with respect to this issue. Both EMCC and Barnes have made dispositive motions against Rowe, which have required responses. Much of the expended effort would be duplicated if this matter was now sent to arbitration. EMCC and Barnes have apparently concluded, after all this effort, that forum shopping would be in their best interests. They should not be unilaterally permitted to do so after engaging in the litigation to this extent.

{¶56} Consequently, we find that EMCC and Barnes' participation in the instant action involving a dispute which could have been subject to arbitration, coupled with the delay in asserting the right to arbitration and the prejudice to Rowe, constitute a waiver. Rowe's first assignment of error is with merit.

{¶57} Based on the disposition of the first assigned error, Rowe's second, fourth, and fifth assignments of error are moot. For the foregoing reasons, the judgment of the Portage County Court of Common Pleas is hereby reversed and remanded for proceedings consistent with this opinion.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.