Opinion issued May 19, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00517-CV

PRSI TRADING COMPANY LP, Appellant

V.

ASTRA OIL TRADING NV AND ASTRA OIL COMPANY LLC, Appellees

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Case No. 2009-25450

MEMORANDUM OPINION

In this interlocutory appeal, PRSI Trading Company LP appeals the trial court's order denying its motion to compel arbitration and stay litigation pending arbitration. In two issues, PRSI Trading contends that the trial court erred by

denying its motion to compel and to stay because the claims at issue were subject to arbitration agreements and because PRSI Trading did not waive its right to compel arbitration. We conclude that the trial court did not err by determining that PRSI Trading waived its right to compel arbitration. We affirm.

I. Background

Astra Oil Trading NV and Astra Oil Company LLC (collectively "Astra") acquired Pasadena Refinery Systems, Inc., which owned a refinery in Pasadena, Texas. In 2006, Astra Oil Trading sold 50% of Pasadena Refinery Systems, Inc. to Petrobras America Inc. A few months later, two Astra affiliates (the "Astra partners") and two Petrobras America affiliates (the "Petrobras partners") executed a limited partnership agreement creating PRSI Trading Company LP. PRSI Trading was formed to supply the refinery with crude oil and materials for its operation. The Partnership Agreement contained a clause requiring disputes arising out of the Partnership Agreement to be resolved in an arbitration to be completed within 60 days of the initial demand. The Partnership Agreement also provided that partners or their affiliates could loan money to PRSI Trading and that, if made with the approval of PRSI Trading, the loans would be repaid and would not be treated as capital contributions.

In 2008, Petrobras America and the Petrobras partners initiated arbitration against Astra Oil Trading and the Astra partners. In April 2009, the arbitrators

issued an award. In compliance with the award, the Astra partners transferred their interests in PRSI Trading to the Petrobras partners.

Also in April 2009, just a few days after the arbitration award was entered, Astra filed this suit against PRSI Trading asserting various causes of action. The two claims at issue in this appeal relate to two alleged loans, one for $10 million in 2007 and another for $15.5 million in 2008. PRSI Trading answered and asserted its own claims against Astra and its affiliates. PRSI Trading also asserted as an affirmative defense that the controversy over the two loans had been raised in and decided by the prior arbitration.

In September 2009, PRSI Trading served its first requests for production on Astra. The next month, Astra moved for partial summary judgment. Included in its summary judgment evidence was an unsigned copy of a November 2007 $10 million loan agreement that contained an arbitration clause. PRSI Trading moved for a continuance of the summary judgment hearing and intensified its discovery efforts over the next several months, including noticing two depositions of Astra corporate representatives, serving a letter rogatory for the oral deposition of a third party, serving requests for production on a third party, filing two motions to compel production, agreeing to the appointment of a special master to hear discovery disputes, and serving additional requests for production. In January

2010, PRSI Trading filed its own motion for summary judgment asserting its affirmative defenses based on the prior arbitration.

In March 2010, PRSI Trading filed a motion seeking to compel arbitration of the dispute and to stay court proceedings pending arbitration. PRSI Trading made this motion conditional, informing the trial court it need not rule on the motion unless it denied PRSI Trading's motion for summary judgment. The trial court denied PRSI Trading's motion for summary judgment and then denied the motion to compel arbitration and to stay proceedings.

II. Waiver of arbitration

PRSI Trading asserts that the trial court erred by denying its motion to compel arbitration of the $10 million loan claim because it was subject to a valid arbitration agreement. Specifically, PRSI Trading contends that the $10 million loan claim is subject to the arbitration clause in the unsigned November 2007 loan agreement and that it did not waive its right to arbitrate. We do not address whether the $10 million loan claim is subject to an agreement to arbitrate because we conclude that PRSI Trading waived its right, if any, to arbitrate that claim.

A party may waive its right to compel arbitration by substantially invoking the litigation process to its opponent's detriment. *In re Bank One, N.A.*, 216 S.W.3d 825, 827 (Tex. 2007) (orig. proceeding). There is a strong presumption against finding that a party has waived its right to arbitration; the burden to prove

waiver is thus a heavy one. *Id.*; *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 783 (Tex. 2006). Any doubts regarding waiver are resolved in favor of arbitration. *In re Bruce Terminix Co.*, 988 S.W.2d 702, 705 (Tex. 1998).

Waiver may be express or implied, but it must be intentional. *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89 (Tex. 1996). Waiver is a question of law based on the totality of the circumstances. The test for waiver is whether the party moving for arbitration "has substantially invoked the judicial process to an opponent's detriment, the latter term meaning inherent unfairness caused by 'a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage.'" *In re Citigroup Global Mkts., Inc.*, 258 S.W.3d 623, 625 (Tex. 2008) (orig. proceeding) (quoting *Perry Homes v. Cull*, 258 S.W.3d 580, 597 (Tex. 2008), *cert. denied*, 129 S. Ct. 952 (2009)).

Review of a denial of a motion to compel arbitration is conducted under the abuse of discretion standard. *Okorafor v. Uncle Sam & Assocs., Inc.*, 295 S.W.3d 27, 38 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The trial court's ultimate conclusion concerning waiver is a legal question that we review de novo. *Id.* However, when the trial court must first resolve underlying facts, we defer to the trial court's factual resolutions and any credibility determinations that may have affected those resolutions, and we may not substitute our judgment on these matters. *Id.*

a. Substantial invocation of litigation process

In determining whether a party waived the right to arbitrate, courts may consider, among other factors: (1) whether the movant for arbitration was the plaintiff (who chose to file in court) or the defendant (who merely responded), (2) when the movant learned of the arbitration clause and how long the movant delayed before seeking arbitration, (3) the amount of pretrial activity related to the merits rather than arbitrability or jurisdiction, (4) the amount of discovery conducted and by whom, (5) whether the discovery went to the merits rather than arbitrability or jurisdiction, (6) whether the movant sought judgment on the merits, and (7) what discovery is available in arbitration. *See Perry Homes*, 258 S.W.3d at 590–92; *In re Hawthorne Townhomes, L.P.*, 282 S.W.3d 131, 141 (Tex. App.—Dallas 2009, no pet.).

In this case, PRSI Trading was the defendant and, thus, did not choose to file this litigation in the trial court. Therefore, this factor weighs against a finding of waiver. However, Astra's original petition filed in April 2009 alleged that Astra and PRSI entered into a loan agreement for the $10 million loan. PRSI Trading did not file its motion to compel arbitration until March 2010, eleven months after the petition was filed. Further, in its second amended answer filed in July 2009, PRSI Trading asserted the affirmative defenses of arbitration and award, res judicata, and collateral estoppel, indicating that it was aware of facts that might

support an argument that the $10 million loan claim was subject to arbitration. Although delay alone is not enough to find waiver, these facts support a conclusion that PRSI Trading knew early in this litigation that an arbitration clause arguably covered the dispute.

Nevertheless, PRSI Trading conducted discovery relating to the merits of the $10 million loan claim, taking advantage of the broad discovery available under the rules of civil procedure. PRSI Trading served requests for disclosure, requests for production, and deposition notices. PRSI Trading also served a letter rogatory, requiring Astra's corporate representative to travel from overseas to be deposed. As a result of this discovery activity, PRSI Trading obtained over 17,000 pages of documents, deposed Astra Oil Trading's most senior financial officer, who flew from Europe to New York for a deposition, and deposed Astra Oil's chief financial officer.

PRSI Trading also agreed to the appointment of a special discovery master to hear discovery disputes between the parties. It filed motions to compel discovery and contested Astra's assertions of the attorney-client communications privilege in response to the requests for production. The special discovery master held hearings on this motion to compel, with the result that PRSI Trading was partially successful and obtained production of additional documents. PRSI Trading served subpoenas and obtained production of documents from third

parties. PRSI Trading also moved for summary judgment on its affirmative defenses relating to the $10 million loan claim, even though it now contends these defenses should have been submitted to the arbitrators.

Only after pursuing all of the above actions did PRSI Trading file a motion to compel arbitration, expressly conditioned on the possibility of an unfavorable decision on its motion for summary judgment in the pending litigation. All of these factors relating to PRSI Trading's litigation conduct weigh strongly in favor of the trial court's waiver finding.

PRSI Trading attempts to distinguish a number of these factors. First, with respect to the length of time that elapsed before it moved to compel arbitration, PRSI Trading asserts that it did not learn of the arbitration clause relating to the $10 million loan until Astra filed its motion for summary judgment in October 2009, because that is the first time Astra identified a written loan agreement containing an arbitration clause. However, as noted above, Astra mentioned the loan agreement in its original petition in April 2009, and PRSI Trading asserted affirmative defenses based on the prior arbitration in July 2009, indicating that it was aware that the $10 million loan claim was at least arguably subject to arbitration. More importantly, the loan agreement in question was produced by PRSI Trading's owner, Petrobras America Inc., during the prior arbitration. Based on this evidence, we defer to the trial court's implied finding

that PRSI Trading was aware of the factual basis for legal arguments in favor of arbitration since at least April 2009, if not before. This factor weighs in favor of the trial court's waiver finding.

PRSI Trading also asserts that it did not waive arbitration by moving for summary judgment because that motion was based on procedural affirmative defenses and not on the substantive basis of Astra's $10 million loan claim. PRSI Trading relies upon a number of cases that it asserts are analogous situations, in which a party sought relief from the trial court without thereby waiving arbitration. These cases are all distinguishable. They involve a party seeking to have a case dismissed either for want of jurisdiction, *see In re Vesta Group, Inc.*, 192 S.W.3d 759, 764 (Tex. 2006) (orig. proceeding) (standing), *In re Hawthorne Townhomes, L.P.*, 282 S.W.3d at 142 (failure to exhaust administrative remedies), or because it was brought in the wrong forum, *see In re Frost Nat'l Bank*, No. 13-07-00748-CV, 2008 WL 4889836, at *3 (Tex. App.—Corpus Christi Nov. 7, 2008, orig. proceeding) (forum-selection clause), *In re Cingular Wireless, L.L.C.*, No. 09-03-00090-CV, 2003 WL 1884184, at *1 (Tex. App.—Beaumont Apr. 14, 2003, orig. proceeding) (removal to federal court to determine whether federal law preempted plaintiff's state law claims). Thus, by asserting the case could not go forward at all or was in an improper forum, the prior litigation conduct of the parties in these

cases sought "to *avoid* litigation activity rather than *duplicate* it." *In re Citigroup Global Mkts.*, 258 S.W.3d at 626 (emphasis in original).

PRSI Trading contends that *In re Bison Building Materials, Ltd.*, No. 01-07-00003-CV, 2008 WL 2548568 (Tex. App.—Houston [1st Dist.] June 26, 2008, orig. proceeding), is "strikingly similar" to the issues presented by this appeal. In *Bison Building Materials*, the defendant moved for summary judgment on the basis that the injured employee plaintiff had signed a post-injury waiver of litigation. 2008 WL 2548568, at *15. Thus, like the cases cited above, the defendant sought to avoid litigation by asserting that the plaintiff had no right to bring the litigation. Here, PRSI Trading sought summary judgment on its substantive affirmative defenses to the $10 million loan claim. Having received an adverse ruling on that motion which, if granted, would have been dispositive of the substantive merits of the adverse claim, PRSI Trading now desires to change venue and submit the dispute to arbitration where it presumably will re-assert its affirmative defenses.

Rather than seeking to avoid litigation, PRSI Trading chose to litigate the merits of its defenses to the $10 million loan claim in the trial court. This type of litigation behavior—unsuccessfully attempting to obtain a favorable result in court before requesting a referral to arbitration—is yet another factor supporting the trial court's waiver finding. *See Nw. Constr. Co. v. Oak Partners, L.P.*, 248 S.W.3d 837, 848 (Tex. App.—Fort Worth 2008, pet. denied); *Williams Indus., Inc. v. Earth*

Dev. Sys. Corp., 110 S.W.3d 131, 135 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *see also Haddock v. Quinn*, 287 S.W.3d 158, 180 (Tex. App.—Fort Worth 2009, pet. denied) (stating that failure to seek arbitration until after proceeding to adverse result in litigation "is the clearest form of inconsistent litigation conduct and is inevitably found to constitute substantial invocation of the litigation process resulting in waiver").

b. Prejudice to nonmovant

Finally, PRSI Trading contends that Astra failed to show prejudice from a substantial invocation of the judicial process. On this subject, the Texas Supreme Court has quoted the federal Fifth Circuit court of appeals with approval, noting that:

> While the mere failure to assert the right to demand arbitration does not alone translate into a waiver of that right, such failure does bear on the question of prejudice, and may, along with other considerations, require a court to conclude that waiver has occurred. The failure to demand arbitration affects the burden placed upon the party opposing waiver. When a timely demand for arbitration was made, the burden of proving waiver falls even more heavily on the shoulders of the party seeking to prove waiver. A demand for arbitration puts a party on notice that arbitration may be forthcoming, and therefore, affords that party the opportunity to avoid compromising its position with respect to arbitrable and nonarbitrable claims. In contrast, where a party fails to demand arbitration . . . and in the meantime engages in pretrial activity inconsistent with an intent to arbitrate, the party later opposing a motion to compel arbitration may more easily show that its position has been compromised, i.e., prejudiced.

Perry Homes, 258 S.W.3d at 600 (quoting *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 346–47 (5th Cir. 2004)). One "particularly relevant" factor for determining prejudice is the amount of discovery and pretrial activity relating to all claims, including the arbitrable claims. *Republic Ins. Co.*, 383 F.3d at 346 (citing *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1161–62 (5th Cir. 1986)). Another factor is the time and expense of defending against a motion for summary judgment. *See id.* A party's failure to timely assert its right to arbitration can also be relevant to evaluating whether the nonmovant has been prejudiced. *See id.*

Amount of discovery and other pretrial activity. With respect to the first of these factors, it is undisputed that PRSI Trading sought discovery relating to all of Astra's claims, including the $10 million loan claim it now seeks to arbitrate. This factor supports the trial court's implied finding of prejudice. *See id.* Additionally, PRSI Trading sought discovery that would not be available under the parties' agreed arbitration rules. *See Tenneco Resins, Inc. v. Davy Int'l, AG*, 770 F.2d 416, 421 (5th Cir. 1985) (noting that taking unfair advantage of discovery proceedings not available in arbitration may constitute sufficient prejudice to infer waiver). Under the rules of the Netherlands Arbitration Institute, the arbitral tribunal specified in the loan agreement, the parties exchange documents that they "will rely upon" during the arbitration. In addition, the tribunal may order the

production of additional specific documents "it deems relevant to the dispute." The NAI rules do not contain a procedure for obtaining third-party discovery, but PRSI Trading took advantage of the opportunity for third-party discovery under the auspices of the Texas state court proceeding. The NAI rules provide for examination of witnesses by the tribunal, but not for depositions as allowed under the Texas Rules of Civil Procedure. PRSI Trading asserts that the NAI rules do not preclude depositions and, thus, a deposition may be possible, but "[p]resuming . . . that broad discovery is generally available in arbitration simply ignores one of its most distinctive features." *Perry Homes*, 258 S.W.3d at 599.

Additionally, PRSI Trading argues that Astra failed to prove that the amount and extent of discovery PRSI Trading engaged in reached the level required to find a waiver of arbitration. Specifically, PRSI Trading contends that Astra did not "specify what was requested [in discovery] or how much of the request was related to the arbitrable claims." However it is undisputed that the discovery related at least in part to the merits of the $10 million loan claim and not just questions of arbitrability. The Texas Supreme Court has stated that it is the "fact of prejudice" rather than its extent that matters. *Id.* "[T]he Defendants had to show substantial invocation that prejudiced them, not precisely how much it all was." *Id.* Because the trial court was presented with evidence that PRSI Trading engaged in discovery

relating to the arbitrable claim, this factor weighs in favor of the trial court's implied finding that Astra was prejudiced.

Time and expense of defending against a motion for summary judgment. Concerning the second factor, PRSI Trading sought summary judgment. After conducting discovery and filing its motion, PRSI Trading filed a "conditional" motion to compel arbitration, expressly asking for the trial court to rule on the merits of its affirmative defenses before considering the motion to compel arbitration. The conditional nature of the motion to compel arbitration vividly illustrates PRSI Trading's strategy of using the litigation process as long as it was favorable and then attempting to switch to arbitration when that seemed more advantageous. *See id.* at 597 (defining prejudice in waiver of arbitration context as "a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage").

Untimeliness. Finally, concerning the third factor, although its owner Petrobras produced the loan agreement during the prior arbitration, PRSI Trading waited eleven months from the filing of this suit to seek arbitration. Even crediting the contention that it was unaware of the arbitration clause in October 2009, PRSI Trading still sought discovery relating to the merits of $10 million loan claim and its affirmative defenses, filed motions to compel discovery responses, asked for a continuance of the summary judgment hearing, and filed its own motion for

summary judgment before asking for arbitration. We conclude this is sufficient evidence of prejudice. *See Price*, 791 F.2d at 1158–60 (finding prejudice when party seeking to compel arbitration "initiated extensive discovery," filed a motion for summary judgment, and waited sixteen months from filing of suit before seeking to compel arbitration); *see also Perry Homes*, 258 S.W.3d at 600 (citing *Republic Ins. Co.*, 383 F.3d at 346).

We conclude that the record supports a conclusion that PRSI Trading waived its right, if any, to seek arbitration of the $10 million loan claim. Accordingly we overrule PRSI Trading's second issue.

Motion to Stay Litigation of the $15.5 Million Loan Claim

As part of its first issue, PRSI Trading also asserts that it is entitled to a stay of the litigation concerning both the $10 million and the $15.5 million loan claims under section 3 of the Federal Arbitration Act. Specifically, PRSI Trading contends that these loan claims are subject to arbitration between the Petrobras partners and Astra partners pursuant to the Partnership Agreement.

Section 3 of the Federal Arbitration Act provides,

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the

> agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (2008). PRSI Trading asserts that the claims are "referable to arbitration" based on the Partnership Agreement. However, PRSI Trading is not a party to the Partnership Agreement. The United States Supreme Court has held that section 3 may be invoked by non-parties to an agreement if "the relevant state contract law allows [the non-parties] to enforce the agreement." *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1903 (2009). In this appeal, PRSI Trading does not assert any grounds under state contract law to show that it is entitled to enforce the Partnership Agreement. PRSI Trading did not raise any such grounds before the trial court either. Therefore, we cannot conclude that the trial court erred in denying the motion to stay.

We overrule that portion of PRSI Trading's first issue concerning the motion to stay.

Conclusion

We affirm the trial court's order denying PRSI Trading's motion to compel arbitration and to stay litigation pending arbitration.

Michael Massengale
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Matthews.[*]

[*] The Honorable Sylvia Matthews, Judge of the 281st District Court of Harris County, participating by assignment.