Opinion issued June 7, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00222-CV

ARCHIMEDES, INC. D/B/A VILLAGE PLUMBING, Appellant

V.

LORRIE RUSSELL, Appellee

On Appeal from the 189th District Court
Harris County, Texas
Trial Court Case No. 2019-50948

MEMORANDUM OPINION

In this interlocutory appeal, Archimedes, Inc. d/b/a Village Plumbing appeals the trial court's order denying its motion to compel arbitration. Village Plumbing contends that the trial court erred in denying its motion to compel based on waiver. We affirm.

BACKGROUND

According to appellee Lorrie Russell's petition, she hired Village Plumbing to replace the pipes under a house she owned and rented out, but the company performed substandard work that caused additional damage to the house. Russell filed suit in July 2019 when the company became nonresponsive to her requests to fix the problems it had caused. Her petition included claims for breach of contract, negligent misrepresentation, fraud, DTPA violations, and breach of warranty. Village Plumbing answered and generally denied all of Russell's claims; Village Plumbing also requested a jury trial.

The parties filed two agreed motions for continuance in part "due to general scheduling and logistical issues accompanying the COVID-19 shutdown." The trial court granted both motions, and eventually reset the case for trial on June 7, 2021. In March of that year, about three months before the scheduled trial date, Russell filed a motion to quash Village Plumbing's jury trial demand. Subsequently, Village Plumbing—for the first time—filed a motion to compel arbitration. Village Plumbing filed the motion just 33 days before trial. After a hearing, the trial court denied Village Plumbing's motion, finding that Village Plumbing had waived its right to arbitration by engaging in the litigation process for an extended period of time before asserting that right. Village Plumbing then filed this interlocutory appeal.

DISCUSSION

Village Plumbing contends that the trial court erred in denying its motion to compel arbitration based on waiver and in denying its request to stay the proceedings pending arbitration.

Waiver of Arbitration Right

Village Plumbing argues there is a valid arbitration agreement between the parties and that Russell did not meet her burden to prove Village Plumbing had waived its arbitration right. Russell contends that Village Plumbing waived its right to compel arbitration by waiting nearly two years after she filed suit and until about a month before trial to assert that right. Both parties agree that their dispute is subject to a valid arbitration agreement, so we only need to determine whether Village Plumbing waived its right to arbitration.

1. Standard of review and applicable law

A party may appeal from an order denying a motion to compel arbitration. TEX. CIV. PRAC. & REM. CODE § 171.098(a)(1); *Valerus Compression Servs. v. Austin*, 417 S.W.3d 202, 207 (Tex. App.—Houston [1st Dist.] 2013, no pet.). Whether a party has waived its right to arbitrate is a question of law that we review de novo. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018).

A party who opposes the enforcement of a valid arbitration agreement based on the defense of waiver bears the burden of proving the defense. *See Royston,*

Rayzor, Vickery, & Williams, LLP v. Lopez, 467 S.W.3d 494, 499–500 (Tex. 2015). Because the law favors arbitration, this burden is a heavy one. *See G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 512 (Tex. 2015). A court thus must enforce the arbitration agreement in close cases. *See Perry Homes v. Cull*, 258 S.W.3d 580, 593 (Tex. 2008).

A party may waive its right to arbitration expressly or impliedly. *See G.T. Leach Builders*, 458 S.W.3d at 511–12. When, as here, implied waiver is at issue, the party trying to establish the defense must show that:

> (1) the other party has substantially invoked the judicial process in a manner inconsistent with the right to compel arbitration; and
>
> (2) this inconsistent conduct has caused it to suffer detriment or prejudice.

Id.

The first element—substantially invoking the judicial process—turns on the totality of the circumstances. *Id.* at 512. Courts consider a multitude of factors, including:

> (1) how long the movant waited to try to compel arbitration;
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> (2) any explanation that the movant may offer for delay;
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> (3) if and when the movant knew of the arbitration agreement during the period of delay;
>
> (4) how much discovery the movant conducted before trying to compel arbitration and whether that discovery related to the merits;
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> (5) whether the movant tried to dispose of the claims on the merits;
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> (6) whether the movant asserted affirmative claims for relief;

(7) the extent of the movant's pretrial activities relating to the merits;

(8) the amount of time and money the parties have spent in litigation;

(9) if discovery conducted would be unavailable or useful in arbitration;

(10) whether litigation activity would be duplicated in arbitration; and

(11) whether and when the case had been set for trial.

Id. In general, no single one of these factors is dispositive. *RSL Funding*, 499 S.W.3d at 430. Nor must all or most of these factors be present to support waiver. *See Perry Homes*, 258 S.W.3d at 591. The specifics of each case matter. *See Henry*, 551 S.W.3d at 116; *Perry Homes*, 258 S.W.3d at 591, 593. "Merely taking part in litigation is not enough unless a party 'has substantially invoked the judicial process to its opponent's detriment.'" *In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (per curiam) (quoting *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex. 2002)). But a party may not substantially invoke the litigation process and then switch to arbitration on the eve of trial. *Perry Homes*, 258 S.W.3d at 584. In determining implied waiver, the "precise question is not so much when waiver occurs as when a party can no longer take it back." *Id.* at 595.

Substantial invocation of the judicial process is not enough, though; there also must be prejudice. *See id.* at 593. In the context of waiver of the right to arbitrate, prejudice generally focuses on the inherent unfairness caused by a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage. *G.T. Leach Builders*, 458 S.W.3d at 515; *Perry Homes*, 258 S.W.3d at

597. Considerations like delay, expense, or damage to another party's legal position are relevant to the issue of prejudice. *Kennedy Hodges, L.L.P. v. Gobellan*, 433 S.W.3d 542, 545 (Tex. 2014) (per curiam); *Perry Homes*, 258 S.W.3d at 597.

2. Analysis

a. Substantially invoking the judicial process

Village Plumbing argues that it did not substantially invoke the judicial process because it: (1) only conducted limited discovery; (2) did not try to resolve any claims on the merits; and (3) did not assert any affirmative claims for relief. *See G.T. Leach Builders*, 458 S.W.3d at 512 (factor (4), how much discovery had been conducted; factor (5), whether movant tried to dispose of claims on merits; and factor (6), whether movant asserted affirmative claims for relief). Village Plumbing argues that it never engaged in any deliberate conduct inconsistent with its right to compel arbitration.

Russell concedes the second and third points, that Village Plumbing did not file any dispositive motions or affirmative claims for relief, but she argues in response to the first point that discovery in this case has been substantial and was all but completed when Village Plumbing moved to compel arbitration.

The amount of discovery that constitutes substantial litigation conduct depends on the context of each case. *See Perry Homes*, 258 S.W.3d at 590, 593. Here, Russell asserts that discovery was substantial because both parties had initiated

two sets of interrogatories and requests for production, responded, and supplemented those responses. She had retained experts for trial who had furnished their reports, and she had site inspections of the house conducted. Village Plumbing's deposition of Russell was scheduled for the day after the trial court's hearing on the motion. Further, all discovery that had occurred involved the merits of the case, not issues like arbitrability or jurisdiction. *See G.T. Leach Builders*, 458 S.W.3d at 512 (factor (4), how much discovery movant conducted and whether discovery related to merits of case). The substantial, merits-based discovery weighs in favor of substantial invocation. *See Tuscan Builders, LP v. 1437 SH6 L.L.C.*, 438 S.W.3d 717, 722–23 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (finding substantial invocation where, among other factors, movant waited to move for arbitration until written discovery was complete, experts were designated, building had been inspected, and trial was less than one month away).

Not only was discovery nearly complete, but the parties were also very close to trial when Village Plumbing moved to compel arbitration on April 27, 2021. Under the docket control order then in effect, the parties were to complete discovery by May 7 of that year, and the case was set for trial a month later, on June 7. Village Plumbing's motion to compel arbitration was filed just 10 days before the end of the discovery period and 33 days before trial. *See G.T. Leach Builders*, 458 S.W.3d at 512 (factor (11), whether and when case had been set for trial). This factor weighs

strongly in favor of substantial invocation. This case was on the "eve of trial" when Village Plumbing first asserted its right to arbitration. *See Perry Homes*, 258 S.W.3d at 596 (explaining rule that one cannot wait until "eve of trial" to request arbitration is not limited to evening before trial but is "a rule of proportion"); *see also Tuscan Builders*, 438 S.W.3d at 722–23 (concluding movant waived arbitration right by waiting to move for arbitration for one year after suit was filed and until trial was less than one month away); *Truly Nolen of Am., Inc. v. Martinez*, 597 S.W.3d 15, 24 (Tex. App.—El Paso 2020, pet. denied) (concluding movant waived arbitration right by waiting 18 months after suit was filed and until just over 1 month before trial date).

Additionally, Russell argues that Village Plumbing knew of the arbitration clause from the beginning of the suit and waited too long to pursue arbitration. *See G.T. Leach Builders*, 458 S.W.3d at 512 (factor (1), how long movant waited to compel arbitration; and factor (3), whether movant knew of arbitration agreement during period of delay); *see also Truly Nolen*, 597 S.W.3d at 24 (concluding movant waived arbitration right when, although it knew of arbitration agreement from outset of lawsuit, it waited 18 months after suit was filed and until just over 1 month before trial date to assert right). The arbitration clauses appear in the contracts for service drafted by Village Plumbing and signed by Russell when she hired it to perform plumbing work, so Village Plumbing knew or should have known of the arbitration

clause before Russell even filed suit. *See EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex. 1996) (stating presumption that party who has opportunity to read arbitration agreement and signs it knows its contents). Village Plumbing then waited 19 months after Russell filed suit to move to compel arbitration. Although both parties agreed to continue the trial setting twice due in part to delays caused by the COVID-19 pandemic, Village Plumbing's only explanation for delaying its right to assert arbitration was that lead counsel had recently changed and, after Russell's motion to quash the jury request, the new counsel chose to review the available options with his client. *See G.T. Leach Builders*, 458 S.W.3d at 512 (factor (2), explanation movant offers for delay); *cf. EZ Pawn*, 934 S.W.2d at 89 (finding no waiver in part because movant did not discover arbitration agreement in archived file until about ten months after suit was filed but immediately requested arbitration after discovering). Village Plumbing's delay, the explanation it offered, and the fact that it knew or should have known of the arbitration agreement during the delay all weigh in favor of substantial invocation.

Russell concedes that the discovery she has already conducted would likely be useful in arbitration, and she does not address whether the discovery would not have been available in arbitration. *See G.T. Leach Builders*, 458 S.W.3d at 512 (factor (9), whether discovery conducted would be unavailable or useful in arbitration). This factor weighs against substantial invocation. But she again points

out that the case was only 33 days from trial and there were only 10 days left in the discovery period when Village Plumbing moved for arbitration. She argues that switching to arbitration at that point would have required a duplication of efforts because she would have needed an entirely new presentation strategy for her case. *See id.* (factor (10), whether litigation activity would be duplicated in arbitration). After 19 months of pretrial activity, only 1 month before trial, and only 10 days before the end of the discovery period, we may reasonably presume that Russell's attorney was substantially preparing for trial when Village Plumbing moved to compel arbitration. This factor weighs in favor of substantial invocation.

Under a totality of the circumstances, we conclude that Village Plumbing substantially invoked the judicial process by engaging in the litigation process and delaying its request to arbitrate until the "eve of trial" when it knew or should have known of the arbitration clause from the beginning of the lawsuit.

This case is distinguishable from other cases in which the movant waited even longer to assert its arbitration right yet the reviewing court concluded there was no substantial invocation because in those cases, the movant did not wait until the "eve of trial." *See Vesta Ins. Grp.*, 192 S.W.3d at 763–64 (concluding there was no substantial invocation because, although movant participated in litigation for two years, movant did not "seek arbitration only on the eve of trial"); *Cooper Indus., LLC v. Pepsi-Cola Metro. Bottling Co., Inc.*, 475 S.W.3d 436, 452 (Tex. App.—

Houston [14th Dist.] 2015, no pet.) (concluding there was no substantial invocation despite movant's 28-month delay in moving for arbitration in part because "case was not on the eve of trial").

b. Prejudice

We next consider whether Russell suffered prejudice as a result of Village Plumbing's delay in moving to compel arbitration. Village Plumbing argues that Russell has not carried her heavy burden to demonstrate prejudice because: (1) she has not offered any evidence on the matter, such as attorney's fees that would not have been incurred in arbitration anyway; (2) she has not shown that the discovery she already conducted could not be used in arbitration; and (3) the case was delayed by the COVID-19 pandemic, not Village Plumbing's late request for arbitration.

Russell responds first by arguing that evidence of costs is not always necessary to prove prejudice. The Supreme Court in *Perry Homes* explained that a nonmovant need only prove substantial invocation of the judicial process that caused prejudice, not precisely how much it cost. 258 S.W.3d at 599–600. Thus, we agree that even without specific evidence of discovery costs or attorney's fees, Russell may demonstrate prejudice on the face of the record. Russell contends that she had already incurred significant expenses, through discovery, conducting a deposition, retaining experts, and conducting site inspections of the house. Even though she did not provide specific evidence of the costs she incurred, "we cannot deem such

discovery activity costless," although we may not give it as much prejudicial weight as we might if we had a specific accounting of costs. *Truly Nolen*, 597 S.W.3d at 25; *see also Perry Homes*, 258 S.W.3d at 599–600 (stating that extensive discovery was evidence of prejudice even absent proof of how much discovery cost).

Russell next concedes that the discovery she has already conducted could be useful in arbitration, but she argues that there would rarely be a case where discovery conducted under court rules would not also be useful in arbitration. She instead focuses on the fact that Village Plumbing participated in the litigation process and only asserted its right to arbitration 33 days before trial and 10 days before the end of the discovery period, which, she claims, appeared to be "more consistent with a late-game tactical decision than an intent to preserve the right to arbitrate." *Tuscan Builders*, 438 S.W.3d at 722. We agree that waiting until a month before trial to assert the right to arbitration demonstrates prejudice in this case—Russell's attorney had already conducted nearly all of the discovery she would need for trial and, we may reasonably presume, was already preparing for trial. Russell argues that switching to arbitration at that point would have required a different presentation strategy by her attorney. Thus, Russell has demonstrated damage to her legal position as a result of the delay.

Finally, while it is undisputed that both parties agreed to continue the trial in part because of the COVID-19 pandemic, Russell claims that Village Plumbing only

sought to further delay resolution of the suit by moving to compel arbitration. She contends that, by asking for a bench trial instead of a jury trial, she was trying to speed up resolution of the suit by avoiding the backlog of jury trials due to the COVID-19 pandemic, and only then did Village Plumbing move to compel arbitration, which Russell argues would require the parties to start over with new paperwork, additional fees, and a new presentation strategy. As we have already noted, Village Plumbing waited 19 months after Russell filed suit and until 33 days before trial to assert its arbitration right, even though it knew or should have known of the arbitration agreement from the beginning of the lawsuit. The parties' agreed motions for continuance both referred to the COVID-19 pandemic shutdowns as one of the reasons for continuing the trial setting, but this does not explain why Village Plumbing did not assert its arbitration right sooner.

In light of the apparent expenses incurred, potential damage to her legal position by switching to arbitration a month before trial, and unexplained 19-month delay, Russell has met her burden to show that she suffered prejudice as a result of Village Plumbing's delayed request for arbitration. *See Kennedy Hodges*, 433 S.W.3d at 545 (considerations like delay, expense, or damage to legal position relevant to issue of prejudice).

Because Village Plumbing substantially invoked the judicial process and Russell suffered prejudice as a result, we conclude that Village Plumbing waived its

right to arbitration. The trial court did not err in denying Village Plumbing's motion to compel arbitration. We therefore overrule Village Plumbing's first point of error, and we need not consider whether the trial court erred in not staying the proceedings pending arbitration. *See* TEX. R. APP. P. 47.1.

CONCLUSION

We affirm the trial court.

Gordon Goodman
Justice

Panel consists of Justices Kelly, Goodman, and Guerra.