

OPINION

No. 04-12-00783-CV

CITY OF SAN ANTONIO,
Appellant

v.

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 624,
Appellee

From the 45th Judicial District Court, Bexar County, Texas
Trial Court No. 2012CI16015
Honorable Martha Tanner, Judge Presiding

CONCURRING AND DISSENTING OPINION TO THE ORDER ON MOTION TO STAY

Concurring and Dissenting Opinion by: Marialyn Barnard, Justice

Sitting: Sandee Bryan Marion, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice

Delivered and Filed: January 16, 2013

I agree with the majority's order to stay any trial on the merits in this lawsuit, pending this court's decision on the arbitrability of this case. However, I do not agree with the majority's decision to permit the parties to continue with discovery. I have found no case law where an appellate court has expressly allowed parties to continue discovery while granting a stay of all other judicial proceedings in this arbitration context. I find that allowing discovery to proceed in this case would put one of the parties, the City, at risk of waiving its right to arbitration if they substantially invoke the judicial process by engaging in discovery. *See Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008) (noting courts decide how much discovery constitutes party's substantial invocation of judicial process, waiving its right to compel arbitration); *see also In re Champion Technologies, Inc.*, 173 S.W.3d 595, 599 (Tex. App.—Eastland 2005, no pet.) (noting

courts should not force parties to litigate their dispute in trial court, through means such as discovery, when claims may ultimately be subject to arbitration).

Even if such issue came to our court, I recognize this court may not be the court of last resort in determining whether the City has waived its right to arbitrate by engaging in “too much” discovery. *See Perry Homes*, 258 S.W.3d at 590–91 (noting waiver of arbitration is decided on case-by-case basis). Therefore, I disagree with the majority and believe a stay of all trial proceedings, including discovery, is the most appropriate and efficient way to prevent any of these issues from arising before this court’s determination on the arbitrability of this case.

Marialyn Barnard, Justice