IN THE
TENTH COURT OF APPEALS

No. 10-17-00124-CV

TOM WRIGHT CONSTRUCTION, LLC
DBA BUILT WRIGHT CONSTRUCTION,

Appellant

v.

JDM STEEL CONSTRUCTION, LLC,

Appellee

From the 369th District Court
Leon County, Texas
Trial Court No. 16-0449CV

MEMORANDUM OPINION

In one issue, appellant, Tom Wright Construction, L.L.C. d/b/a Built Wright Construction ("Tom Wright Construction"), argues that the trial court abused its discretion by refusing to compel arbitration and stay its own proceedings. Because we conclude that appellee, JDM Steel Construction, L.L.C. ("JDM"), did not establish that Tom Wright Construction substantially invoked the judicial process and thereby impliedly waived its right to arbitrate, we reverse and remand.

I. BACKGROUND

On November 25, 2015, Tom Wright Construction entered into a subcontract agreement with JDM covering construction work at a new elementary school in the Centerville Independent School District. During the course of performance, a dispute arose between JDM, the subcontractor, and Tom Wright Construction, the prime contractor. Specifically, the parties disagreed about the scope of JDM's subcontract, JDM's performance of subcontract work, and a lack of payment by Tom Wright Construction.

JDM made several demands upon Tom Wright Construction and Tom Wright Construction's surety, SureTec Insurance Company, for monies owed. According to JDM, Tom Wright Construction owed JDM $168,933.50, which was comprised of "$106,803.50-balance of contract with retainage included and $62,130.00-in additional work performed," plus interest. These demands constituted lien and bond claims against the project that resulted in the school district withholding payment from Tom Wright Construction. Moreover, the school district demanded that Tom Wright Construction take action to obtain a release of JDM's lien and bond claims against the project.

Subsequently, on December 2, 2016, counsel for Tom Wright Construction transmitted a letter to counsel for JDM explaining that JDM's lien and bond claims were unenforceable and demanding that JDM promptly release its lien and bond claims. Additionally, Tom Wright Construction's counsel expressed the following sentiments:

> If JDM Steel refuses to release its lien and bond claims against the project, the payment bond[,] and the surety, a declaratory[-]judgment lawsuit will be filed against JDM wherein Tom Wright Construction will have the court declare these lien and bond claims invalid and unenforceable.
>
> Hopefully, a lawsuit will not be required. I look forward to receiving the fully executed release. No further demands or warnings will be provided. If you have any questions, please do not hesitate to contact me to discuss the same.

Though the subcontract agreement contains various alternative-dispute-resolution provisions governing potential disputes, JDM construed Tom Wright Construction's December 2, 2016 letter as an irrevocable election to resolve this dispute in State District Court, rather than an attempt to invoke the alternative-dispute-resolution provisions of the subcontract agreement. Accordingly, on December 6, 2016, JDM filed its original petition in the 369th District Court of Leon County, Texas. In its original petition, JDM asserted claims for breach of contract, suit on a sworn account, and against the performance and payment bond on the project.

In response to JDM's original petition, Tom Wright Construction filed an original answer, verified denial, and a motion to stay proceedings and compel arbitration. Specifically, Tom Wright Construction asserted that the alternative-dispute-resolution provisions of the subcontract agreement are binding on the parties.

After a hearing, the trial court denied Tom Wright Construction's motion to stay proceedings and compel arbitration and set the case for trial. This accelerated,

interlocutory appeal followed. *See* TEX. R. APP. P. 28.1(a); TEX. CIV. PRAC. & REM. CODE ANN. § 51.016 (West 2015), § 171.098(a)(1) (West 2011).

II. APPLICABLE LAW

"Generally, we review a trial court's decision to grant or deny a motion to compel arbitration under an abuse of discretion standard." *Enter. Field Servs., LLC v. TOC-Rocky Mountain, Inc.*, 405 S.W.3d 767, 773 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). Under this standard, we defer to a trial court's factual determinations if they are supported by evidence; however, we review a trial court's legal determinations de novo. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding). Whether a valid arbitration agreement exists and whether the arbitration agreement is ambiguous are questions of law that we review de novo. *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 781 (Tex. 2006) (orig. proceeding).

A party seeking to compel arbitration must establish the existence of a valid, enforceable arbitration agreement and that the claims at issue fall within that agreement's scope. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding). If the movant establishes that an arbitration agreement governs the dispute, the burden shifts to the party opposing arbitration to establish a defense to the arbitration agreement. *In re Provine*, 312 S.W.3d 824, 829 (Tex. App.—Houston [1st Dist.] 2009, orig. proceeding) (citing *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999) (orig. proceeding)). Once the movant established a valid arbitration agreement covering the

claims at issue, a trial court has no discretion to deny the motion to compel arbitration unless the opposing party proves a defense to arbitration. *Id.* (citing *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753-54 (Tex. 2001) (orig. proceeding)).

Because state and federal policies favor arbitration, courts must resolve any doubts about an arbitration agreement's scope in favor of arbitration. *In re FirstMerit Bank, N.A.*, 52 S.W.3d at 753. To be subject to arbitration, the "allegations need only be factually intertwined with arbitrable claims or otherwise touch upon the subject matter of the agreement containing the arbitration provision." *In re B.P. Am. Prod. Co.*, 97 S.W.3d 366, 371 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

III. THE SUBCONTRACT AGREEMENT

In its sole issue on appeal, Tom Wright Construction argues that the trial court abused its discretion by refusing to compel arbitration and stay its own proceedings. Specifically, Tom Wright Construction asserts that it did not waive its right to arbitrate this dispute by sending a demand letter to JDM to release its lien and bond claims.

In analyzing this issue, we first examine the contents of the parties' subcontract agreement. In particular, the "Dispute Resolution" portion of the subcontract agreement provides as follows:

> a) Dispute Resolution Procedure: In the event of any dispute arising between Wright and the Subcontractor regarding the Contract Documents, or the Parties' obligations or performance thereunder, either Party may institute the Disputes Resolution Procedures set forth herein. The Parties shall continue performance of their respective obligations hereunder notwithstanding the existence of a dispute. This Disputes Resolution

Procedure shall be binding on the parties. The request for an Architect's final decision pursuant to AIA 201 is NOT a condition precedent to invoking the Disputes Resolution Procedure set forth herein.

b) Initial Meeting to Resolve Disputes: Not later than thirty (30) days after one of the Parties has notified the other of a potential dispute, Subcontractor must either (1) notify Wright that Subcontractor has accepted Wrights' position(s) with respect to the dispute and the dispute is therefore resolved, or (2) request in writing a special meeting for resolution of the dispute(s). Such meeting shall be held at Wrights' offices within a reasonable time of written request therefore. The meeting shall be attended by Wright's Authorized Representative, the Subcontractor's Authorized Representative and any other person who may be affected in any material respect by the resolution of such dispute. Such Authorized Representative shall have authority to settle the dispute and shall attempt in good faith to resolve the dispute. If the dispute is not settled at the special meeting, then the authorized representatives shall continue to attempt in good faith to resolve the dispute, for a minimum negotiating period of 30 days.

c) Mediation: If the dispute has not been resolved within thirty (30) days after the special meeting has been held, then the Subcontractor must either (1) notify Wright that Subcontractor has accepted Wrights' position(s) with respect to the dispute and the dispute is therefore resolved or (2) request in writing that a mediator, mutually acceptable to the parties and experienced in construction law, be appointed. The cost of the mediator shall be shared by the Parties. The mediator shall be given any written statements by the Parties and may review the Site and any relevant documents. The mediator shall call one or more meetings of the Parties during the sixty (60) day period that follows his/her appointment, which meeting(s) shall be attended by Wright's Authorized Representative, the Subcontractor's Authorized Representative and any other person who may be affected in any material respect by the resolution of such dispute. Such Authorized Representatives shall have authority to settle the dispute and shall attempt in good faith to resolve the dispute. During such sixty (60) day period, the mediator may meet with the Parties separately. The mediation shall be subject to and conducted in accordance with Chapter 154 of the Texas Civil Practice and Remedies Code. No minutes shall be kept with respect to any mediation proceedings, and the comments and/or recommendations of the mediator, together with any written statements prepared, shall be non-binding, confidential and without prejudice to the rights and remedies of

any Party. The mediation process shall continue for the entire sixty (60) day period, at a minimum, unless the Parties agree otherwise in writing. If the dispute is settled through the mediation process, the decision will be implemented by written agreement signed by the Parties.

d) Arbitration or Litigation: Any controversy or dispute not resolved through non-binding mediation shall be settled by binding arbitration or litigation. Within thirty (30) working days of the conclusion of the mediation, Wright shall notify the Subcontractor of its election to enter into binding arbitration of the dispute. If Wright, in its sole discretion, elects to enter into binding arbitration (1) it may not withdraw said election and (2) the parties agree to submit the dispute to binding arbitration pursuant to the following provisions. If Wright, in its sole discretion, fails to notify the Subcontractor of its election to enter into binding arbitration or declines to arbitrate the dispute, the Parties shall be left with their remedies at law. WRIGHT AND SUBCONTRACTOR WAIVE THEIR RIGHT TO A TRIAL BY JURY AND REQUIRE THAT ANY DISPUTE BE HEARD BY TRIAL TO THE BENCH BY A COURT OF COMPETENT JURSIDICTION IN MCLENNAN COUNTY, TEXAS.

At no point has JDM contended that the alternative-dispute-resolution clauses in the subcontract agreement are invalid or that the alleged dispute falls outside the scope of these clauses. Rather, the sole basis of JDM's contention that this dispute should not be arbitrated is the December 2, 2016 demand letter sent by counsel for Tom Wright Construction. In any event, given the absence of a challenge to the validity or scope of the alternative-dispute-resolution provisions and our review of the record, we conclude that Tom Wright Construction satisfied its burden to prove the existence of a valid arbitration agreement and that the dispute fell within the scope of the same. *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d at 737. Accordingly, the sole issue for us to examine is whether JDM established a defense to the arbitration agreement—that Tom Wright

Construction substantially invoked the judicial process by purportedly making an election to litigate the dispute in its December 2, 2016 demand letter and, thus, impliedly waived its right to arbitrate. *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d at 573; *see also In re Provine*, 312 S.W.3d at 829.

"Waiver—the intentional relinquishment of a known right—can occur either expressly, through a clear repudiation of the right, or impliedly, through conduct inconsistent with a claim to the right." *G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 458 S.W.3d 502, 511 (Tex. 2015) (citing *Perry Homes v. Cull*, 258 S.W.3d 580, 590- 91, 594 (Tex. 2008); *Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 6 (Tex. 2014) (internal quotations omitted)). Whether a party has waived its right to arbitrate is a question of law. *Id.* (citing *Kennedy Hodges, L.L.P. v. Gobellan*, 433 S.W.3d 542, 545 (Tex. 2014) (per curiam); *Perry Homes*, 258 S.W.3d at 598 & n.102).

The instant case turns on whether Tom Wright Construction impliedly waived its right to arbitrate this dispute by sending the December 2, 2016 demand letter. The Texas Supreme Court has stated that a party asserting implied waiver as a defense to arbitration has the burden to prove that: (1) the other party has substantially invoked the judicial process, which is conduct inconsistent with a claimed right to compel arbitration; and (2) the inconsistent conduct has caused it to suffer detriment or prejudice. *Id.* at 511-12 (citing *Gobellan*, 433 S.W.3d at 545; *Perry Homes*, 258 S.W.3d at 593-94). "Because the law favors and encourages arbitration, 'this hurdle is a high one.'" *Id.* at 512 (quoting *Richmont*

Holdings, Inc. v. Superior Recharge Sys., L.L.C., 455 S.W.3d 573, 574 (Tex. 2014) (per curiam)); *see Perry Homes*, 258 S.W.3d at 589-90. However, "waiver must be decided on a case-by-case basis" and "courts should look to the totality of the circumstances." *Perry Homes*, 258 S.W.3d at 591.

In *Perry Homes*, the Texas Supreme Court specifically noted that it has never held that parties waived arbitration by filing suit; moving to dismiss a claim for lack of standing; moving to set aside a default judgment and requesting a new trial; opposing a trial setting and seeking to move the litigation to federal court; moving to strike an intervention and opposing discovery; sending 18 interrogatories and 19 requests for production; requesting an initial round of discovery, noticing (but not taking) a single deposition, and agreeing to a trial resetting; or seeking initial discovery, taking four depositions, and moving for dismissal based on standing. *Id.* at 590 (internal citations omitted). On the other hand, "'allowing a party to conduct full discovery, file motions going to the merits, and seek arbitration only on the eve of trial'" is sufficient to constitute a waiver of arbitration. *Id.* (quoting *In Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 764 (Tex. 2006)). Nevertheless, the following factors are often considered in determining whether a party waived arbitration:

1. Whether the movant was the plaintiff (who chose to file in court) or defendant (who merely responded);

2. How long the movant delayed before seeking arbitration;

3. Whether the movant knew of the arbitration clause all along;

4. How much pretrial activity related to the merits rather than arbitrability or jurisdiction;
5. How much time and expense has been incurred in litigation;
6. Whether the movant sought or opposed arbitration earlier in the case;
7. Whether the movant filed affirmative claims or dispositive motions;
8. What discovery would be unavailable in arbitration;
9. Whether activity in court would be duplicated in arbitration; and
10. When the case was to be tried.

Id. at 591.

Here, most of the aforementioned factors weigh against a finding that Tom Wright Construction substantially invoked the judicial process. Indeed, Tom Wright Construction is the defendant, not the plaintiff, in the lawsuit. *See id.* Furthermore, Tom Wright Construction invoked its right to arbitrate contemporaneously with the filing of its answer; it did not delay in obtaining a hearing on its motion to compel, nor did it file any counterclaims or conduct discovery, except for its efforts to compel arbitration. *See id.* Moreover, we are not persuaded by JDM's contention that by merely referencing an unfiled, potential lawsuit in its December 2, 2016 demand letter, Tom Wright Construction elected to litigate, rather than arbitrate, this dispute. Based on the totality of the circumstances, we cannot say that JDM met its burden of proving that Tom Wright Construction substantially invoked the litigation process so as to constitute an implied

waiver of arbitration. *See id.*; *see also G.T. Leach Builders, LLC*, 458 S.W.3d at 511; *Gobellan*, 433 S.W.3d at 545. Accordingly, we hold that the trial court abused its discretion by refusing to compel arbitration and stay its own proceedings. *See Enter. Field Servs., LLC*, 405 S.W.3d at 773. We sustain Tom Wright Construction's sole issue on appeal.

IV. CONCLUSION

Having sustained Tom Wright Construction's sole issue on appeal, we reverse the judgment of the trial court and remand for further proceedings.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Reversed and remanded
Opinion delivered and filed October 11, 2017
[CV06]