

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0441

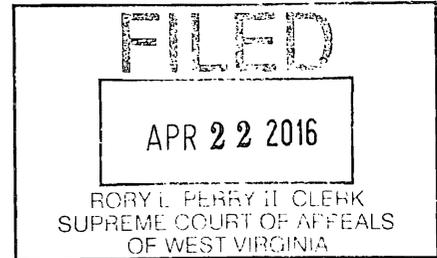
SCHUMACHER HOMES OF
CIRCLEVILLE, INC., a foreign
corporation,

Defendant Below,
Petitioner,

v.

JOHN SPENCER, AND
CAROLYN SPENCER,

Plaintiffs Below,
Respondents.



PETITIONER'S SUPPLEMENTAL BRIEF
REGARDING THE ISSUE OF WAIVER

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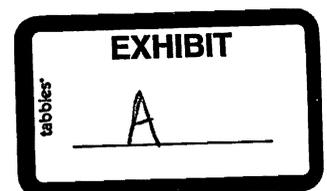


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I. INTRODUCTION

When this Court issued its original decision in this matter, it did not base its decision on the issue of waiver. However, this Court did express concern regarding the timing of Schumacher's argument to the trial court as to the delegation provision at issue in this case. See Schumacher Homes of Circleville v. Spencer, 235 W. Va. 335, 347, 774 S. E. 2d 1, 13 (2015). In footnote 12 of this Court's original decision, this Court cited a number of federal and state (but not West Virginia) cases that touch on the issue of waiver of arbitration rights. Id.

Respondents never argued the issue of waiver to the trial court, nor did they raise the issue of waiver in their original brief or at oral argument before this Court. This Court raised the issue *sua sponte* in its original decision. Waiver was not addressed by Respondents until their response to Schumacher's Petition for Writ of Certiorari to the United States Supreme Court. Their waiver argument did not prevail before that court, because the United States Supreme Court summarily vacated this Court's original decision and remanded it to this Court for further consideration in light of DIRECTV v. Imburgia, 577 U.S. ____, 136 S. Ct. 463, 193 L. Ed. 2d 365 (2015).

In their April 7, 2016 supplemental brief to this Court, Respondents addressed the issue of waiver, despite the fact that this Court gave clear instruction to the parties that their supplemental briefs in this matter must solely address how the United States Supreme Court's decision in DIRECTV v. Imburgia affects this Court's resolution of the issues in this case. Subsequently, this Court issued its decision in Parsons v. Halliburton Energy Services, Inc., (W. Va. Sup. Ct., No. 14-1288, April 11, 2016), which directly addresses the issue of waiver of arbitration rights.

In light of Respondents' arguments as to waiver, and this Court's recent decision in Parsons, Schumacher submits the instant brief in order to show that it did not waive its right to enforcement of the delegation provision at issue in this case.

II. ARGUMENT

A. Summary of Parsons v. Halliburton

Richard Parsons ("Parsons") had been an employee of Halliburton Energy Services, Inc. ("Halliburton"). A written employment agreement existed between Parsons and Halliburton, and their agreement included an arbitration provision. Parsons left Halliburton's employment. A dispute arose over the payment of his final wages. He therefore sued Halliburton in Circuit Court. Halliburton sought, and obtained from Parsons, several extensions to file a responsive pleading, and discussed informal discovery with Parsons in the interim. Seven months after Parsons filed his complaint, Halliburton filed its first court filing: a motion to compel arbitration of the dispute. The Circuit Court granted Halliburton's motion to compel arbitration. Parsons appealed to this Court, arguing that Halliburton's actions constituted a waiver of arbitration rights.

The principal concern of this Court on appeal was some inconsistency in its prior decisions as to the doctrine of waiver. Some prior decisions stated that a showing of prejudice must be made in order for the doctrine of waiver to apply (due to a "blending" of the doctrines of waiver and estoppel), whereas others stated that prejudice is irrelevant to the doctrine of waiver (as opposed to the doctrine of estoppel). This Court's decision in Parsons, which builds on its decision in Potesta v. U.S. Fid. & Guar. Co., 202 W. Va. 308, 504 S.E. 2d 135 (1998), fully clarifies the law in West Virginia on this issue: Prejudice is irrelevant to the doctrine of waiver. See Syllabus Point 2, Parsons, supra.

Because the Parsons case arose in the context of a dispute over the enforceability of an arbitration agreement, the facts of Parsons, along with Syllabus Points 2 and 6, provide guidance in the instant matter. Syllabus Points 2 and 6 of Parsons state:

2. The common-law doctrine of waiver focuses on the conduct of the party against whom waiver is sought, and requires that party to have intentionally relinquished a known right. A waiver may be express or may be inferred from actions or conduct, but all of the attendant facts, taken together, must amount to an intentional relinquishment of a known right. There is no requirement of prejudice or detrimental reliance by the party asserting waiver.
6. The right to arbitration, like any other contract right, can be waived. To establish waiver of a contractual right to arbitrate, the party asserting waiver must show that the waiving party knew of the right to arbitrate and either expressly waived the right, or, based on the totality of the circumstances, acted inconsistently with the right to arbitrate through acts or language. There is no requirement that the party asserting waiver show prejudice or detrimental reliance.

B. Schumacher's Assertion of the Delegation Provision

Respondents and Schumacher entered into their contract on June 6, 2011. A dispute arose between the parties. On July 11, 2013, Respondents filed a complaint against Schumacher (and other parties) in Circuit Court. (A.R. 16-29). On August 12, 2013, Schumacher filed its motion to dismiss/compel arbitration. (A.R. 30-244). In that motion, Schumacher sought enforcement of the entire arbitration agreement, which included the delegation provision at issue here. On November 8, 2013, Respondents opposed that motion, and by doing so, defined what challenges they chose to mount regarding the enforceability of the arbitration agreement in question. (A.R. 258-314). Those challenges did not include a specific and explicit challenge to the validity or enforceability of the delegation provision, as required by Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010), in order to challenge the arbitrability of this dispute in Circuit Court rather than before an arbitrator.

On February 7, 2014, the Circuit Court conducted a hearing on Schumacher's motion to dismiss/compel arbitration. Schumacher asked the Circuit Court to enforce the entire arbitration agreement, and specifically pointed out the existence and significance of the delegation provision to the Circuit Court. (A.R. 343-348). On March 6, 2014, the Circuit Court entered an order denying Schumacher's motion to dismiss/compel arbitration. (A.R. 3-10).

Schumacher appealed that decision to this Court, and has consistently asserted its right to enforce the delegation provision in all briefs filed with this Court, as well as those filed with the United States Supreme Court.

C. Application of Parsons

As the above-cited Syllabus Points from Parsons make clear, the central question regarding waiver is whether Schumacher intentionally relinquished the right to enforce the delegation provision at issue in this matter. Such a waiver can be explicit or inferred from actions or conduct.

There can be no credible argument that Schumacher has ever explicitly waived its right to enforce the delegation provision in question; it clearly has not. Therefore, according to Syllabus Point 2 of Parsons, the question is whether a review of all of the attendant facts, taken together, demonstrates an intentional relinquishment by Schumacher of its right to enforce the delegation provision at issue in this matter. In the words of Syllabus Point 6, the question is whether a review of the totality of the circumstances shows that Schumacher acted inconsistently with the right to arbitrate, either by its acts or its language, such that this Court should find that Schumacher intentionally relinquished the right to enforce the delegation provision at issue in this matter.

No such intent to waive can be inferred from the facts of this matter. Like the party asserting a right to arbitration in the Parsons case, Schumacher's first court filing in this matter was a motion to dismiss/compel arbitration. In that motion and accompanying memorandum, Schumacher sought enforcement of the entire arbitration agreement, including the delegation provision. When Respondents filed their opposition to Schumacher's motion, that opposition defined the specific challenges they chose to mount regarding the enforceability of the arbitration agreement in question. Respondents chose not to separately and explicitly challenge the delegation provision; however, they did challenge the arbitrability of their contract dispute.

Since replies to motions are not contemplated by the West Virginia Rules of Civil Procedure¹, Schumacher pointed out to the Circuit Court at the hearing on its motion to dismiss/compel arbitration that the arbitration agreement (the full text of which was included in Schumacher's motion) contained a delegation provision, and that, pursuant to the delegation provision, Respondents were contractually obligated to address their arbitrability arguments to the arbitrator, not to the Court. Respondents' opposition to Schumacher's motion was the first time Respondents had challenged the arbitrability of the contract dispute. The hearing on Schumacher's motion was therefore the logical time for Schumacher to seek enforcement of the delegation provision: In response to a misplaced (i.e., made to the Circuit Court, not to the arbitrator) challenge by Respondents to the arbitrability of the dispute.

Should this Court find that Schumacher waived its right to enforce the delegation provision by making this argument at the hearing instead of in the body of its motion (or supporting memorandum)? No. In order to do so, this Court would have to find that Schumacher had a duty, at the time it filed its motion to dismiss/compel arbitration, to anticipate

¹ Rule 6(d)(1) allows a motion to be served as late as 7 days prior to the hearing on that motion. Rule 6(d)(2) allows responses to a motion to be served as late as 2 days prior to the hearing on that motion. Rule 6 does not mention replies by the moving party.

all of the various challenges that Respondents might (or might not) choose to make to the arbitration agreement, and include its responses to all such anticipated challenges in its motion or memorandum. The unreasonableness of such a finding is self-evident. Schumacher should not be compelled to anticipate all of the various types of challenges Respondents might have made to the arbitration agreement, or the different parts thereof.

There was a logical sequence to this process, and Schumacher followed it. Respondents sued Schumacher in Circuit Court. Schumacher asked the Circuit Court to send the case to arbitration, pursuant to the arbitration agreement. Respondents challenged the arbitrability of the contract dispute, but chose not to separately and explicitly challenge the enforceability of the delegation provision contained in the arbitration agreement. Once that occurred, it then (and not before) became important for Schumacher to point out to the Circuit Court that, under the terms of the contract, the parties had agreed to submit arbitrability issues to the arbitrator. Choosing to follow that natural course, instead of anticipating every possible challenge to the arbitration agreement in its motion to dismiss/compel arbitration, cannot logically be seen as an intentional relinquishment by Schumacher of its right to enforce the delegation provision at issue in this matter.

D. Relevant United States Supreme Court Law

While Parsons makes it clear that waiver is a state law issue that applies to all contracts, federal law does play a role here, since the specific type of contract at issue is an agreement to arbitrate. In Moses H. Cone Memorial Hosp. v. Mercury Const., 460 U.S. 1, 103 S. Ct. 927, 74 L Ed. 765 (1983), the United States Supreme Court stated:

The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone, 460 U.S. at 24-25, 103 S. Ct. at 941.

As such, to the extent this Court has concerns about the timing of Schumacher's assertion of the delegation provision in this matter, federal law establishes that such concerns should be resolved in favor of arbitration.

E. Cases Cited by Respondents in their DIRECTV Brief

In their DIRECTV supplemental brief, Respondents cite several pre-Parsons West Virginia cases in support of their argument that Schumacher has waived its right to enforce the delegation provision at issue in this matter. Such authority has no bearing on this case, in light of Parsons.

Respondents also cite two federal cases for the proposition that Schumacher has waived its right to enforce the delegation provision at issue in this matter: Entrekin v. Internal Medicine Associates of Dothan, 689 F. 3d 1248 (11th Cir. 2012) and C.J. Mercadante v. XE Services, LLC, 864 F. Supp. 2d 54 (D.D.C. 2012). Neither case supports that proposition.

In Entrekin, the party seeking to enforce the delegation provision at issue had completely failed to assert that right at the trial court, choosing instead to assert it for the first time at the appellate level. This had a predictable result: The United States Court of Appeals for the Eleventh Circuit found that the issue had been waived, having never been raised at the trial court level.

In C.J. Mercadante, the party seeking to enforce the delegation provision at issue raised it for the first time in its reply memorandum regarding its motion to compel arbitration. However, the trial court in that case did not treat this as a waiver of the right to enforce the delegation provision. The court merely denied the motion to compel arbitration without prejudice and ordered the parties to re-brief the issues, including the delegation provision. In essence, the court

gave the plaintiff in that matter relief from the effects of the United States Supreme Court's Rent-A-Center decision. Everyone got a "do-over" from the trial court. There was no waiver.

F. Cases Cited by this Court in its Original Decision

This Court cited the United States Court of Appeals for the Ninth Circuit's decision in U.S. v. Park Place Associates, Ltd., 563 F.3d 907 (9th Cir. 2009) as authority for the proposition that arbitration rights can be waived through conduct. That Court outlined three requirements that must be proven by a party opposed to arbitration in order to establish such a waiver: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts. Id. at 921.

However, this Court left out an important part of the Ninth Circuit's analysis: "[W]aiver of the right to arbitration is disfavored because it is a contractual right and thus 'any party arguing waiver of arbitration bears a heavy burden of proof.'" Id. at 921.

The United States Court of Appeals for the Tenth Circuit has established a similarly daunting set of factors to be considered regarding waiver of arbitration, keeping in mind the strong federal policy favoring arbitration: (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the

opposing party. Peterson v. Shearson/American Express, Inc., 849 F.2d 464, 467-68 (10th Cir. 1988).

The United States Court of Appeals for the Fourth Circuit, the Circuit within which West Virginia is located, views waiver of arbitration differently. In this context, waiver is more precisely defined by the Federal Arbitration Act (“FAA”) as a “default” under 9 U.S.C. § 3. Rota-McLarty v. Santander Consumer USA, Inc., 700 F.3d 690, 702 (4th Cir. 2012). “[T]he circumstances giving rise to such a default are limited, and in light of the federal policy favoring arbitration, are not to be lightly inferred.” Maxum Founds, Inc. v. Salus Corp., 779 F.2d 974, 981 (4th Cir. 1985). The party opposing arbitration bears a heavy burden to prove default. Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 95 (4th Cir. 1996). A default (i.e., waiver of the arbitration right under the FAA) occurs if a party “so substantially utilize[s] the litigation machinery that to subsequently permit arbitration would prejudice the [opposing] party” Forrester v. Penn Lyon Homes, Inc., 553 F.3d 340, 343 (4th Cir. 2009). The dispositive determination is whether the opposing party has suffered actual prejudice. MicroStrategy, Inc. v. Lauricia, 268 F.3d 244, 249 (4th Cir. 2001). Two factors inform the court’s inquiry into actual prejudice: (1) the amount of the delay; and (2) the extent of the moving party’s trial oriented activity. Id.

The high burden of establishing a waiver of arbitration is likewise shown by the very cases cited by this Court in footnote 12 of its original opinion in this matter. In In Re Checking Account Overdraft Litigation, 754 F.3d 1290 (11th Cir. 2014), the defendant raised the delegation provision issue for the first time on appeal, following an adverse ruling from the trial court. That was seen as a waiver. In In Re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation, 838 F. Supp. 2d 967 (C.D. Cal.

2012), the defendant sought arbitration after engaging in eleven months of multi-district litigation, including third-party discovery, discovery between parties, motions practice, and engaging experts. That was viewed as a waiver. In Katz v. Anheuser-Busch, 347 S.W.3d 533 (Mo. Ct. App. 2011), the delegation provision was not raised until after judgment was entered. That was seen as a waiver. In Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204 (11th Cir. 2011), the delegation provision was raised for the first time on appeal. That was seen as a waiver (as well as invited error). In M. Homes, LLC v. Southern Structural, Inc., 281 Ga. App. 380, 636 S.E.2d 99 (2006), the party in question failed to move to compel arbitration, filed an answer, participated in discovery, and agreed to extend the discovery period, all before raising the issue of arbitration. That was seen as a waiver.

Only two cases cited by this Court in footnote 12 of its original opinion bear even passing factual similarities to the instant matter. In Hartley v. Superior Court, 196 Ca. App. 4th 1249, 127 Ca. Rptr. 3d 174 (2011), the party seeking to enforce a delegation provision raised it for the first time in its reply brief regarding its motion to compel arbitration. However, the court was concerned with much more than the timing of the assertion of the delegation provision; there were ambiguities caused by internal inconsistencies in the arbitration agreement that were not resolved, which caused the court to find that the agreement to arbitrate was not clear and unmistakable. That is not the case here. While this Court's original decision came to a similar conclusion as that reached by the Hartley court, the United States Supreme Court has summarily vacated this Court's original decision.

Closer to the mark is C.J. Mercadante v. XE Services, LLC, *supra*. As stated above, the defendant in that case raised the delegation provision for the first time in its reply memorandum regarding its motion to compel arbitration. However, the court in that case did not treat this as a

waiver of the right to enforce the delegation provision. The court merely denied the motion to compel arbitration without prejudice and ordered the parties to re-brief the issues, including the delegation provision. The court gave the plaintiff in that matter relief from the effects of the United States Supreme Court's Rent-A-Center decision. There was no waiver in that case.

Spears v. Mid-America Waffles, Inc., No. 11-2273-CM, 2012 WL 2568157 (D. Kan. July 2, 2012), further demonstrates the high burden placed on a party attempting to prove that arbitration rights have been waived. The defendant in that matter filed a motion to compel arbitration, and nine months passed before the delegation provision was raised as an issue. The court found that the defendant had not waived enforcement of the delegation provision.

The above cases show that, under federal arbitration law, a party seeking to prove that a waiver of arbitration rights has occurred faces a high burden. This is consistent with this Court's recent decision in Parsons: A party seeking to prove that a waiver of arbitration rights has occurred must prove that all of the attendant facts, taken together, demonstrate an intentional relinquishment of a party's arbitration rights. No such showing can be made here. There was no waiver by Schumacher.

III. CONCLUSION

Based on the foregoing, Schumacher respectfully requests that this Honorable Court decide not to adhere to its prior view in this case, reverse the decision of the Circuit Court, direct the Circuit Court to refer this case to arbitration, and grant such other and further relief as this Court deems just and proper.

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CERTIFICATE OF SERVICE

I, Don C. A. Parker, hereby certify that service of the foregoing **Petitioner's Supplemental Brief Regarding the Issue of Waiver** has been made via U.S. Mail, on this 22nd day of April, 2016, addressed as follows:

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