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May 8, 2018

Owner's Participation in Pretrial Litigation Does Not Amount to a Waiver of Arbitration

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Proving waiver of a party's contractual right to arbitrate has often been a laborious obligation of the party bearing such burden. Because the law strongly favors arbitration, the burden to prove the defense "is a high one." *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008), cert. denied, 555 U.S. 1103, 129 S.Ct. 952, 173 L.Ed.2d 116 (2009). So high, in fact, that appellate courts seldom find an implied waiver through litigation conduct. *See, e.g., RSL Funding, LLC v. Pippins*, 499 S.W.3d 423, 430–31 (Tex. 2016); *Richmont Holdings, Inc. v. Superior Recharge Sys., LLC,* 455 S.W.3d 573, 575 & n.1 (Tex. 2014); *see also Perry Homes*, 258 S.W.3d at 590 (in appeal finding waiver, stating court had "never" before found implied waiver through litigation conduct).

In *Legoland Discovery Centre (Dallas), LLC v. Superior Builders, LLC*, 531 S.W.3d 218 (Tex. App. – Fort Worth 2017, no pet.), the general contractor, Superior Builders was faced with the heavy burden of proving waiver of the arbitration agreement. The owner, Legoland, hired Superior Builders to be the general contractor for a water-feature addition to Legoland's entertainment center in Grapevine, Texas. The contract, drafted by Superior, included the following arbitration clause:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Legoland believed that Superior did not complete the work contracted for and damaged adjacent property and terminated the contract. Superior filed suit against Legoland in December 2014. Legoland answered and filed counterclaims for breach of contract and negligence, and included in its counterclaims a request for disclosure. Superior added subcontractors as defendants in April 2015 and the subcontractors filed cross claims and counterclaims against Superior and Legoland.

Legoland conducted discovery with several of the defendant subcontractors, and by October 2016, Legoland had resolved the subcontractors' claims. Also in October 2016, Legoland filed a motion to compel Superior's claims against it to arbitration based on the terms of the contract. Superior responded that Legoland had waived its right to arbitrate by substantially invoking the judicial process to Superior's detriment. The trial court agreed with Superior and denied Legoland's motion to compel arbitration. Legoland appealed this decision.

Superior had the burden to prove that (1) Legoland "substantially invoked the judicial process"—engaged in conduct inconsistent with a claimed right to compel arbitration and (2) the inconsistent conduct caused Superior to suffer a detriment or prejudice. The court determined whether Legoland impliedly waived its right to seek arbitration based on the totality of the circumstances and were guided by several factors, including:

Whether the party asserting the right to arbitrate was plaintiff or defendant in the lawsuit, how long the party waited before seeking arbitration, the reasons for any delay in seeking to arbitrate, how much discovery and other pretrial activity the party seeking to arbitrate conducted before seeking arbitration, whether the party seeking to arbitrate requested the court to dispose of claims on the merits, whether the party seeking to arbitrate asserted affirmative claims for relief in court, the amount of time and expense the parties have expended in litigation, and whether the discovery conducted would be unavailable or useful in arbitration.

No one factor was dispositive, and even in close cases, the presumption against waiver governs. *RSL Funding, LLC v. Pippins*, 499 S.W.3d 423, 430–31 (Tex. 2016); *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008), cert. denied, 555 U.S. 1103, 129 S.Ct. 952, 173 L.Ed.2d 116 (2009). The court of appeals noted that Legoland sought only routine disclosures under Rule 194 from Superior, which Superior also requested from Legoland and which would be available and useful during arbitration. Although Legoland sought affirmative relief from the trial court in its counterclaims, these claims were compulsory. Also, court of appeals found that the fact that Legoland agreed to the entry of the trial court's scheduling order does not equate to a waiver of the right to compel arbitration.

Legoland did not seek to compel arbitration until twenty-two months after Superior filed suit, which could point to substantial invocation according to the court. However, Superior added the subcontractors as defendants in its suit approximately four months after filing its initial petition, and Legoland sought to settle these subcontractors' liens against its property before moving to compel arbitration. *See Walker v. J.C. Bradford & Co*., 938 F.2d 575, 578 (5th Cir. 1991) ("Attempts at settlement ... are not inconsistent with an inclination to arbitrate and do not preclude the exercise of a right to arbitration."). The court noted that these subcontractors were not subject to Legoland and Superior's arbitration agreement and, therefore, could not have been forced to arbitration. Legoland sought arbitration within days of settling with the last subcontractor and participated in minimal discovery with Superior over the course of the litigation.

The court of appeals concluded that Legoland's actions in Superior's suit did not substantially invoke the judicial process; therefore, Superior failed to carry its heavy burden to show that Legoland waived its contractual right to arbitrate. See *G.T. Leach Builders, LLC v. Sapphire VP., LP*, 458 S.W.3d 502, 513 (Tex.2015); ("A party's litigation conduct aimed at defending itself and minimizing its litigation expenses, rather than at taking advantage of the judicial forum, does not amount to substantial invocation of the judicial process."). Accordingly, the court compelled the parties' dispute to arbitration pursuant to their arbitration agreement.