STATE OF MICHIGAN

COURT OF APPEALS

FENTON MCKENZIE,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY, MILAN PLASTICS PLANT,

Defendant-Appellee.

UNPUBLISHED
May 16, 1997

No. 189688
Washtenaw Circuit Court
LC No. 93-535-CL

Before: Cavanagh, P.J., and Reilly, and C.D. Corwin*, JJ.

PER CURIAM.

Plaintiff appeals as of right a circuit court order granting summary disposition in favor of defendant. The court held that a provision in the collective bargaining agreement between defendant and the union representing plaintiff required arbitration of plaintiff's civil rights claims. We conclude that defendant waived any right to arbitrate these claims and reverse.

Plaintiff filed his complaint on April 27, 1993. In its answer filed July 9, 1993, defendant stated as an affirmative defense that plaintiff's claims are "pre-empted in whole or in part by the collective bargaining agreement."

The record indicates that for the next twenty months after the answer was filed, defendant took no action suggesting an assertion of a right to arbitrate plaintiff's claims. Defendant attempted to take plaintiff's deposition, and when he failed to appear, sought dismissal and costs.[1] The record also indicates that the parties exchanged interrogatories. A pre-trial summary statement prepared by defendant and submitted to the court does not mention arbitration. Rather, it states that the estimated length of trial was sixteen days and that the case would be a jury trial. Attached to the document was lengthy list of potential witnesses for defendant. According to a pre-trial summary statement signed by the circuit court judge on December 29, 1993, trial was originally scheduled for September 12, 1994. Mediation took place July 27, 1994. When plaintiff sought leave to amend the complaint in July, 1994, defendant opposed the motion, arguing, "Defendant cannot, in the short time prior to trial, investigate, take discovery, and otherwise prepare to defend against the proposed new claims." The final

---

* Circuit judge, sitting on the Court of Appeals by assignment.

settlement conference was held on September 12, 1994, immediately before jury selection was to take place. At that time, it was discovered that the complaint served on defendant did not contain the breach of contract claim that was included in the complaint filed with the court. On the basis of the breach of contract claim, defendant asserted that the federal court had jurisdiction pursuant to § 301 of the Labor Management Relations Act, 29 USC § 185, and removed the action to federal court on September 21, 1994. On November 30, 1994, the United States district court remanded the action to the circuit court. A scheduling order filed December 16, 1994, indicates that a jury trial was set for June 5, 1995. Then, on March 9, 1995, defendant filed its motion for summary disposition asserting its right to arbitration pursuant to the terms of the collective bargaining agreement.

A party may waive its contractual right to arbitration. *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531, 535; 369 NW2d 922 (1985). The waiver may be express or implied when a party actively participates in litigation or acts in a manner inconsistent with its right to proceed to arbitration. *Id.* Each case is to be decided on the basis of its particular facts. *North West Michigan Construction Co v Stroud*, 185 Mich App 649, 651; 462 NW2d 804 (1990).

In both *North West*, and *Hendrickson v Moghissi*, 158 Mich App 290; 404 NW2d 728 (1987), this Court quoted extensively from 98 ALR3d 767, § 2, pp 771-772, which states as follows:

> Various forms of participation by a defendant in an action have been considered by the courts in determining whether there has been a waiver of the defendant's right to compel arbitration or to rely on arbitration as a defense to the action. It has been generally held or recognized that by such conduct as defending the action or proceeding with the trial, a defendant waives the right to arbitration of the dispute involved. A waiver of the right to arbitration on the part of a defendant of a dispute sought to be litigated in court has also been found from particular acts of participation by a defendant, each act being considered independently as constituting a waiver. Thus, a defendant has been held to have waived the right to arbitration of the dispute involved by filing an answer without properly demanding or asserting the right to arbitration, by filing an answer containing a counterclaim against the plaintiff without demanding arbitration or by filing a counterclaim which was considered inconsistent with a previous demand for arbitration, by filing a third-party complaint or cross-claim, or by taking various other steps, including filing a notice of readiness for trial, filing a motion for summary judgment, or utilizing judicial discovery procedures.

Pursuing discovery is generally regarded as being inconsistent with demanding arbitration because discovery is not generally available in arbitration. *Joba Construction Co, Inc v Monroe Co Drain Comm'r*, 150 Mich App 173; 388 NW2d 251 (1986). Even in cases where a defendant properly pleaded arbitration as an affirmative defense, waiver may be still found. See *North West, supra; Campbell v St. John Hosp*, 434 Mich 608, 617; 455 NW2d 695 (1990) (defendant Gregory asserted arbitration as an affirmative defense, yet the Supreme Court remanded to the circuit for a determination whether his "participation in circuit court proceedings and his delay in raising a motion for summary disposition on the basis of the arbitration agreement waived his rights under the agreement and the [Malpractice Arbitration Act, MCL 600.5040 *et seq.*; MSA 27A.5040 *et seq.*]")[2]

Defendant does not dispute that its conduct for twenty months after the answer was filed was inconsistent with an assertion of the right to arbitrate. However, defendant contends that its motion for summary disposition was timely because it was brought within three months after this Court's decision in *Heurtebise v Reliable Business Computers, Inc.*, 207 Mich App 308; 523 NW2d 904 (1994), rev'd 452 Mich 405; 550 NW2d 243 (1996). In *Heurtebise,* this Court held that the trial court erred in denying the defendant employer's motion to compel arbitration of the plaintiff's civil rights claims pursuant to an arbitration provision contained in the employee handbook. Defendant relies on *Metz v Merrill Lynch Pierce Fenner & Smith, Inc*, 39 F3d 1482 (CA 10, 1994), which states in part that where a party "almost certainly" could not have obtained an order for arbitration before there was a change in controlling precedent, the party does not waive the right to arbitrate by not seeking arbitration. *Id.* at 1489.

In *Metz,* the defendant timely requested arbitration, and the district court denied the motion with respect to the Title VII claims. The defendant moved for reconsideration, which was denied. The defendant then timely began an interlocutory appeal of the district court decision, but dismissed it three months later. The Tenth Circuit Court of Appeals held that the defendant's dismissal of the appeal without more, did not constitute a waiver. *Id.* at 1489. The court noted that, while the arbitrability of Title VII claims was an "open question" in the Tenth Circuit at the time the defendant dismissed the appeal, other circuits had concluded that there was no right to arbitration of these claims. The court characterized the relevant law at the time of the defendant's dismissal as "clearly adverse." *Id.* The court then considered the defendant's conduct after the United States Supreme Court's decision in *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20; 111 S Ct 1647; 114 L Ed 2d 26 (1991), which along with the Court's vacating of *Alford v Dean Witter Reynolds, Inc,* 905 F2d 104 (CA 5, 1990), "clearly signaled a change in the law governing the arbitrability of Title VII claims . . . ." *Metz, supra* at 1490. *Gilmer* was decided May 13, 1991. The defendant did not indicate to the district court that the law had changed until September 17, 1991, three months after trial. Considering the totality of circumstances, the Tenth Circuit Court of Appeals held that the defendant waived its right to compel arbitration.

We are not persuaded that in this case defendant's failure to assert the right to arbitration can be excused because of the state of the law before this Court's decision in *Heurtebise.* In *Metz,* the Tenth Circuit Court of Appeals was persuaded that, because of the unfavorable state of the law before *Gilmer*, the defendant did not waive its right to arbitrate by dismissing its interlocutory appeal. Defendant in this case attempts to analogize the effect of this Court's opinion in *Heurtebise* to the effect *Gilmer* had on federal law. In *Metz,* the court noted that the arbitrability of Title VII claims was an open question in the Tenth Circuit before the Supreme Court's opinion in *Gilmer,* and the decision of other federal courts was "clearly adverse" to the defendant. Before this Court's decision in *Heurtebise,* there was no controlling Michigan authority indicating that agreements to arbitrate civil rights claims would not be enforced. The matter was, and is, an open question[3]. However, persuasive authority, such as the Supreme Court's decision in *Gilmer,* supported defendant's argument that agreements to arbitrate civil rights claims were enforceable. The state of the law in Michigan was not "clearly adverse" to defendant before *Heurtebise* as it was to the defendant in *Metz* before *Gilmer,* and we cannot say that before the issuance of *Heurtebise,* defendant "almost certainly" could not have obtained an order for arbitration. *Metz, supra* at 1489.

Furthermore, the absence of controlling authority indicating that the arbitration provision in the collective bargaining agreement was enforceable does not excuse defendant's nearly complete failure to assert its right to arbitrate. In *Metz*, the defendant made a timely request for arbitration, moved for reconsideration when its request was denied, and began an interlocutory appeal of the district court decision, but dismissed it three months later. In this case, defendant referred to the collective bargaining agreement as an affirmative defense in its answer, but never moved to compel arbitration as did the defendant in *Metz*. *Metz* indicates that abandonment of an appeal of an adverse ruling at a time when the persuasive authority is "clearly adverse" does not alone constitute a waiver. That is distinguishable from the circumstances in this case where defendant delayed twenty months in asserting its right to arbitration at a time when persuasive authority was not "clearly adverse" to defendant's position.

Finally, defendant delayed filing the motion for summary disposition for nearly five months after this Court issued its opinion in *Heurtebise*. In this respect also, defendant's conduct does not compare favorably with the defendant in *Metz*. In that case, the defendant waited four months after *Gilmer* was decided to assert that a change in the law occurred. The Tenth Circuit Court of Appeals held that under the circumstances, that delay was too long. In this case, defendant waited even longer than the defendant in *Metz*. Thus, the length of the delay following the issuance of this Court's opinion in *Heurtebise* also supports a conclusion that defendant waived its right to arbitration.

In summary, we conclude that the trial court erred in granting defendant's motion for summary disposition on the basis of the collective bargaining agreement provision to arbitrate. Defendant's failure to assert the right to arbitrate for twenty months following the filing of its answer, its participation in the litigation, including mediation, discovery, and removal of the action to federal court, indicate that defendant waived its right to arbitrate plaintiff's claims. Although this Court's opinion in *Heurtebise* provided support for defendant's position that plaintiff's claims were subject to arbitration, the state of the law before *Heurtebise* was not so clearly adverse to defendant's position that defendant's nearly complete failure to assert the right to arbitration can be excused. Furthermore, even after this Court's opinion in *Heurtebise* was issued, defendant failed to promptly assert the right to arbitration. For these reasons, the trial court order granting summary disposition in favor of defendant is reversed.

Reversed.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Charles D. Corwin

[1] The record does not indicate if the deposition was taken at a later time.

[2] In *Kauffman v The Chicago Corp*, 187 Mich App 284, 292; 466 NW2d 726 (1991), this Court, relying on federal precedent, stated that a party arguing that there has been a waiver of the right to arbitration must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the arbitration right, and prejudice to the party opposing arbitration resulting from the inconsistent acts. See also *Burns v Olde Discount Corp*, 212 Mich App 576, 582; 538 NW2d 686 (1995), which cites *Kauffman*. However, *Kauffman* and *Burns* were cases involving the federal arbitration act, 9 USC 1-

15, and this Court was required to apply federal law. *Kauffman, supra* at 286; *Burns, supra* at 580. The requirements for waiver stated in *Kauffman* and repeated in *Burns* do not appear in other decisions in which Michigan law was applied. See *Capital Mortgage, supra*; *North West, supra*; *Hendrickson, supra*; *Joba Construction, supra*; *Campbell, supra*; *SCA Services Inc v General Mill Supply Co*, 129 Mich App 224; 341 NW2d 480 (1983); *Bielski v Wolverine Ins Co*, 379 Mich 280; 150 NW2d 788 (1967).

[3] The Supreme Court reversed this Court's opinion in *Heurtebise* without reaching the issue whether and when an agreement to arbitrate civil rights claims would be enforceable. *Heurtebise*, 452 Mich 438-439.