

STATE OF MICHIGAN
COURT OF APPEALS

GARLAND, INC.,

Plaintiff/Counter-Defendant-
Appellee,

v

CORY GARY and MELISSA GARY,

Defendants/Counter-Plaintiffs-
Appellants.

UNPUBLISHED

June 14, 2005

No. 261201

Oscoda Circuit Court

LC No. 04-003821-CK

Before: O’Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendants appeal as of right the trial court’s order granting plaintiff’s motion for summary disposition, dismissing the case in part, and referring the remainder to arbitration. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff entered into a contract with defendants to cater defendants’ wedding. Defendants agreed to pay \$4,000 for plaintiff’s services. The contract contained an arbitration clause that stated, “Any dispute arising under this Agreement shall be promptly submitted to and heard and determined by the American Arbitration Association”

A dispute arose over the adequacy of the services provided by plaintiff, and defendants declined to pay a final bill in the amount of \$2,756.88. Plaintiff filed a claim for that amount in the Small Claims Division of district court. Defendants filed a countercomplaint alleging breach of contract and violation of the Michigan Consumer Protection Act (CPA), MCL 445.901 *et seq.* Defendants sought damages, a declaratory judgment that plaintiff violated the CPA, and an order enjoining plaintiff from violating the CPA. In response, plaintiff requested that the countercomplaint be dismissed, or that the matter be submitted to arbitration pursuant to the contract.

The matter was removed to circuit court. Thereafter, Cory Gary filed for bankruptcy for reasons unrelated to this matter. The circuit court stayed proceedings, but only with respect to plaintiff’s claim against Cory Gary.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that it had not waived its right to arbitrate by initiating litigation, and that defendants had

not demonstrated the existence of extraordinary circumstances to justify the grant of injunctive relief under the CPA. The trial court granted plaintiff's motion for summary disposition of defendants' counterclaims for declaratory and injunctive relief pursuant to MCR 2.116(C)(10), dismissed those claims with prejudice, and referred the remaining claims and counterclaims to arbitration.

Defendants argue that the trial court erred by granting plaintiff's motion for summary disposition. They assert that plaintiff waived its right to arbitration by initiating litigation, that the trial court's dismissal of their claim for injunctive relief was premature, and that the trial court erred by dismissing their claim for declaratory relief because that issue had not been argued by the parties. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

A party may waive its right to arbitration by engaging in acts inconsistent with the right to arbitrate, such as participating in litigation. *Salesin v State Farm Fire & Casualty Co*, 229 Mich App 346, 356; 581 NW2d 781 (1998). The party asserting the disfavored concept of waiver bears the heavy burden of demonstrating that the other party knew it had a right to compel arbitration, but acted contrary to that right in a way that prejudiced the asserting party. *Madison Dist Public Schools v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). We review a trial court's findings of fact regarding the applicable circumstances for clear error, and we review de novo its ultimate decision on the issue of waiver. *Id.* Here, plaintiff asserted its right to arbitration as an affirmative defense in response to defendants' counterclaim. At that time, the action was still in small claims court. When it was removed to circuit court, plaintiff moved for summary disposition and sought arbitration before taking any discovery. Under the circumstances, defendants were not prejudiced by the timing of plaintiff's request for arbitration, so the trial court correctly held that plaintiff could still assert its contractual right to arbitrate. *Id.*

Regarding the balance of defendants' claims, injunctive relief is available under the CPA to enjoin "a person who is engaging in or is about to engage in a method, act, or practice which is unlawful under [the CPA]." MCL 445.911(1)(b). However, injunctive relief is an extraordinary remedy that is granted under the CPA only when justice requires it and an actual and imminent danger of irreparable injury exists. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 110-111; 593 NW2d 595 (1999). In their countercomplaint, defendants asserted that plaintiff violated the CPA by failing to deliver goods and services agreed to in the parties' contract. Defendants failed to establish any risk of future harm that an injunction could remedy. *Id.* Therefore, the trial court properly dismissed their request for an injunction. Finally, defendants did not seek a declaratory judgment to guide their future conduct or prevent future harm, but merely to leave no procedural stone unturned. Therefore, the remedy of a declaratory judgment was inapposite in this case, *Detroit v State of Michigan*, 262 Mich App 542, 550-551; 686 NW2d 514 (2004), and the trial court properly granted plaintiff summary disposition on defendants' declaratory claim.

Affirmed.

/s/ Peter D. O'Connell
/s/ Bill Schuette
/s/ Stephen L. Borrello