Order

Michigan Supreme Court
Lansing, Michigan

March 31, 2017

Stephen J. Markman,
Chief Justice

153413

Robert P. Young, Jr.
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

NEXTEER AUTOMOTIVE CORPORATION,
Plaintiff-Appellee,

v

SC: 153413
COA: 324463
Saginaw CC: 13-021401-CK

MANDO AMERICA CORPORATION, TONY DODAK, THEODORE G. SEEGER, TOMY SEBASTIAN, CHRISTIAN ROSS, KEVIN ROSS, ABRAHAM GEBREGERIS, RAMAKRISHNAN RAJA VENKITASUBRAMONY, TROY STRIETER, JEREMY J. WARMBIER, and SCOTT WENDLING,
Defendants-Appellants.

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On March 8, 2017, the Court heard oral argument on the application for leave to appeal the February 11, 2016 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

MARKMAN, C.J. (*dissenting*).

The Court of Appeals, in my judgment, correctly held that a party claiming that an opposing party has expressly waived a contractual right to arbitration does not need to show that it will suffer prejudice if the waiver is not enforced. Prejudice is simply not an element of express waiver. *Dahrooge v Rochester German Ins Co*, 177 Mich 442, 451-452 (1913) ("A waiver is a voluntary relinquishment of a known right."); 28 Am Jur 2d, Estoppel and Waiver, § 35, p 502 ("Prejudice to the other party is one of the essential elements of an equitable estoppel whereas a waiver does not necessarily imply that the party asserting it has been misled to his or her prejudice or into an altered position.") (citation omitted).

However, I would not deny leave because I believe the Court of Appeals erred by holding that defendant here expressly waived its right to arbitration by signing a preliminary case management order (CMO) that contained a checked box next to the following statement: "An agreement to arbitrate this controversy . . . exists . . . [and] is not applicable." A waiver of any type, express or implied, "is a voluntary and intentional abandonment of a known right." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374 (2003). It is "express" when it is "[c]learly and unmistakably communicated [or] stated with directness and clarity." *Black's Law Dictionary* (10th ed) (defining "express"). I do not believe that defendant's act of signing a CMO with a checked box next to the language quoted above clearly and unmistakably communicated an intention to abandon a known right, in particular when an adjacent box on the CMO next to the following statement went unchecked: "An agreement to arbitrate this controversy . . . is *waived*." [Emphasis added.] Furthermore, the fact of the waiver is made even more uncertain given that plaintiff at the time of the CMO was seeking injunctive relief and the arbitration agreement between the parties excluded such a claim. I would reverse the Court of Appeals on the finding of express waiver and remand to that court for consideration of whether defendant's conduct alternatively gave rise to an implied waiver, a waiver by estoppel, or no waiver at all.

YOUNG, J., did not participate.