

STATE OF MICHIGAN
COURT OF APPEALS

GARY L. ROBINSON,

Plaintiff-Appellant,

v

DAIMLER CHRYSLER CORPORATION,

Defendant-Appellee.

UNPUBLISHED

June 22, 2004

No. 247752

Lapeer Circuit Court

LC No. 01-029652-CP

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right a circuit court order granting summary disposition in favor of defendant. We reverse.

Plaintiff purchased a new truck from defendant manufacturer. As consideration for a discount on the vehicle purchase, plaintiff signed an agreement to abide by certain purchase program rules, including one that required binding arbitration as the exclusive means for resolving any warranty dispute. Plaintiff asserted that he had several problems with the vehicle that defendant was unable to repair. Plaintiff then filed this suit alleging violations of the Magnusson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq.*, the Michigan Consumer Protection Act, (MCPA), MCL 445.901 *et seq.*, and Michigan's motor vehicle lemon law, MCL 257.1401 *et seq.* Defendant denied all of plaintiff's claims and raised several affirmative defenses, including that the action should be dismissed because plaintiff had agreed to binding arbitration. The trial court held that a provision in plaintiff's purchase agreement that required the parties to arbitrate all warranty claims was enforceable under the MMWA and that defendant had not waived its right to demand arbitration.

Plaintiff argues that the trial court erred when it failed to address whether the MMWA prohibits binding arbitration agreements within written warranties. We review *de novo* a trial court's ruling on a summary disposition motion to determine if the moving party was entitled to judgment as a matter of law. *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 496; 591 NW2d 364, 366 (1998).

At the time this case began, the enforceability of a binding arbitration clause in a consumer contract or warranty under the MMWA had not been addressed by a Michigan appellate court. Shortly after plaintiff filed this appeal, however, this Court decided *Abela v General Motors Corp*, 257 Mich App 513; 669 NW2d 271 (2003), *aff'd* 469 Mich 603; 677

NW2d 325 (2004). In *Abela*, this Court held that valid binding arbitration agreements within written warranties do not violate the consumer protections of the MMWA and that the Federal Arbitration Act (FAA), 9 USC 1 *et seq.*, preempts any state statute or law that invalidates agreements to submit warranty-related claims to binding arbitration.

The *Abela* plaintiffs had purchased a vehicle through a General Motors employee discount program. A provision in the program required binding arbitration of all warranty claims, with no recourse to a lawsuit. The issue in *Abela* was “whether the agreement between plaintiffs and defendant to submit any warranty claims to binding arbitration must be enforced.” *Abela, supra*, 257 Mich App at 515. The plaintiffs argued that, under both the MMWA and the Michigan lemon law, the binding arbitration agreement was unenforceable. The defendant claimed that the FAA was controlling on the issue of arbitration and required enforcement of the agreement.

The *Abela* panel reached its conclusion by relying on *Walton v Rose Mobile Homes LLC*, 298 F3d 470, 478 (CA 5, 2002), and *Davis v Southern Energy Homes, Inc*, 305 F3d 1268, 1272 (CA 11, 2002), which held that the MMWA permits the enforcement of binding arbitration agreements within written warranties. *Abela, supra*, 257 Mich App at 521-523. The Court found that it was bound by *Walton* and *Davis*, stating that “[w]here there is no conflict among the circuits of the federal court of appeals on a question of federal law, we are bound by the authoritative holdings of the federal circuit courts on federal questions.” *Id.* at 523 (citation omitted). Our Supreme Court affirmed this Court’s decision in *Abela*, but it did so because it found *Walton* and *Davis* to be substantively persuasive, and the Court ruled that “federal courts of appeals decisions are not binding” on Michigan courts. *Abela, supra*, 469 Mich at 607.

The facts in this case are identical to those in *Abela*, and the issue of the validity of a binding arbitration agreement under the MMWA is also precisely the one ruled on in *Abela*. Accordingly, there was no error with respect to this issue. The record, however, clearly establishes that defendant effectively waived its right to arbitrate plaintiff’s warranty claims. We review *de novo* whether the relevant circumstances establish a waiver of arbitration, and we review for clear error the court’s factual determinations concerning the circumstances of the waiver. *Madison Dist Public Schools v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001).

Waiver of a contractual right to arbitrate is disfavored. *Salesin v State Farm Fire & Cas Co*, 229 Mich App 346, 356; 581 NW2d 781 (1998). A party arguing that a waiver occurred bears a heavy burden of proof. *Id.* Nevertheless, the right to compel arbitration may be waived in certain circumstances, with each case to be decided on its particular facts. *Madison, supra* at 589 (citation omitted).

A party arguing that there has been a waiver of the right to arbitrate must show that the party waiving the right: (1) knew that the right existed; (2) engaged in conduct inconsistent with the right to arbitrate; and, (3) prejudiced the party opposing arbitration by his acts. *Kauffman v The Chicago Corp*, 187 Mich App 284, 292; 466 NW2d 726 (1991).

Defendant admits it knew of the agreement to arbitrate all warranty claims, but argues that despite engaging in litigation for eighteen months, it did not waive its right to arbitrate the claim because it immediately asserted its right to arbitrate as an affirmative defense. An affirmative defense, such as “the existence of an agreement to arbitrate,” must be stated in a

party's responsive pleading or in a motion for summary disposition made before the filing of a responsive pleading, or the defense is waived. MCR 2.111(F)(3); *Madison, supra* at 596; *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001); see also *Joba Const Co, Inc v Monroe Co Drain Comm'r*, 150 Mich App 173, 179; 388 NW2d 251 (1986)(noting that plaintiff waived arbitration in part because he failed to raise arbitration as a defense to a counterclaim filed by defendant); *Kauffman, supra* at 292 (emphasizing that defendant's first responsive pleading was a motion to compel arbitration and that defendant raised arbitration as an affirmative defense). However, raising the issue of arbitration early in the judicial proceedings does not guarantee that subsequent acts will not constitute a waiver.

This Court has generally found waiver where extensive discovery has occurred prior to the assertion of the right to arbitrate. For example, in *Madison, supra* at 596-597, this Court listed acts, including exchange of exhibit and witness lists, filing requests for admission, engaging in mediation, filing motions and briefs, and participation in witness depositions, as being inconsistent with an intent to arbitrate. Pursuing discovery is also considered inconsistent with arbitration, given that discovery is not usually available in arbitration. *Joba Constr Co, supra* at 179, citing *SCA Services, Inc v General Mill Supply Co*, 129 Mich App 224, 231; 341 NW2d 480 (1983).

Other acts in furtherance of litigation have also been found to be inconsistent with the intent to arbitrate:

“[A] defendant has been held to have waived the right to arbitration of the dispute involved . . . 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, . . . or by taking various other steps, including . . . filing a motion for summary judgment[.]” [*Hendrickson v Moghissi*, 158 Mich App 290, 300; 404 NW2d 728 (1987), quoting anno: *Defendant's participation in action as waiver of right to arbitration of dispute involved therein*, 98 ALR3d 767, § 2, pp 771-772.]

In this case, the record shows that defendant filed a counterclaim for fraud, filed and defended motions, deposed plaintiff's witnesses, and performed a general inspection on plaintiff's vehicle. By the time defendant filed its motion to compel arbitration, discovery had been closed for over six months and the parties were ready for trial.

The facts surrounding the arbitration waiver in this case are similar to those in *North West Michigan Const, Inc v Stroud*, 185 Mich App 649; 462 NW2d 804 (1990). In *Stroud*, the defendants raised the issue of arbitration in their affirmative defenses and in a pretrial statement. It was not until eight months after the answer and affirmative defenses were filed that the defendants filed a motion to dismiss on grounds that the plaintiff had agreed to arbitrate. The trial court made the following observations:

“After the initial pleadings neither party took any action to invoke the arbitration provisions. Both parties have actively participated in the litigation through discovery, pretrial and mediation. . . . With the passage of time, the

Defendant's [sic] active participation in the litigation and the Defendant's [sic] failure to seek enforcement of the arbitration provision, the Court finds there has been a waiver of that contractual right." [*Id.* at 651 ("sics" in original).]

The *Stroud* panel concluded that the trial court did not err in finding that the defendants had waived arbitration. *Id.* at 652.

As in *Stroud*, defendant here took no action beyond asserting its right to arbitrate as an affirmative defense in its responsive pleading. Defendant then proceeded to extensively engage in the judicial process in a manner inconsistent with any intent to arbitrate. Pretrial conferences were held, discovery was conducted, and case evaluation – mediation proceeded, all without an indication by defendant that it planned on relying on the arbitration agreement. Further, defendant's argument that it was justified in waiting to assert its right to compel arbitration because there was uncertainty about the enforceability of the arbitration agreement is without merit. Defendant cites no authority that demonstrates that legal uncertainty is justification for an eighteen-month delay in asserting this right. Moreover, at the time defendant moved to dismiss predicated on the arbitration agreement, the *Abela* decision had not yet been issued, nor had the *Walton* and *Davis* opinions been issued. Therefore, it is unreasonable for defendant to argue that it delayed seeking arbitration and dismissal until there was certainty in the law, where the law remained equally uncertain when it actually filed for dismissal.¹ Defendant could have and should have filed a motion for summary disposition early in the action when the law was just as speculative. Even where the law was uncertain, defendant was obligated to seek enforcement of the arbitration agreement in timely fashion if not merely to preserve the issue of arbitration and have the record reflect a desire to actually pursue arbitration as opposed to waiving it. Simply raising the matter in the affirmative defenses, without further pursuit, was insufficient. See *Stroud, supra*. It is common practice for a defendant to raise numerous affirmative defenses and yet not rely on all of those defenses later in the judicial proceedings. Defendant's argument that it did not wish to waste the trial court's time in hearing a timely motion to compel arbitration and motion for dismissal begs the response that it was a greater waste of judicial resources and time by extensively litigating the case for approximately eighteen months.

The third prong of the waiver test is whether the acts of the party asserting its right to arbitrate prejudiced the party claiming that arbitration was waived. In *Madison, supra* at 599-600, this Court determined that, where the arbitration-seeking party forces the opposing party to

¹ We also note that at the time this action was commenced, there existed case law issued by federal district courts and state courts on both sides of the issue, and defendant certainly could have argued to the trial court that the opinions finding that the MMWA did not preclude binding arbitration agreements were persuasive. See *Abela, supra* at 523-524 n 5. This negates defendant's assertion that the FTC's position contrary to enforcing binding arbitration agreements tied defendant's hands on the matter. Moreover, a review of defendant's motion for summary disposition reveals reliance on favorable Alabama and Georgia appellate court decisions that had been issued in 2000; the complaint here was filed on December 8, 2000, and thus those cases could have been cited early on.

expend significant time and resources in protracted litigation, the opposing party “certainly would endure unfair prejudice were he forced to submit to [a] long-delayed demand for arbitration.” The *Madison* panel reasoned that by finding waiver in the case, Michigan’s strong public policy in favor of arbitration was effectively reinforced:

Plaintiff’s decision to litigate this matter aggressively for over 1 ½ years before resorting to arbitration plainly defeats the purpose of arbitration, which is “the final disposition of differences between parties in a faster, less expensive, more expeditious manner than is available in ordinary courtroom proceedings.”

* * *

Plaintiff’s conduct . . . reflects a clear disregard for concerns of expedient dispute resolution and conservation of judicial resources. [*Id.* at 600, quoting *Joba, supra* at 179-180.]

This reasoning applies to the instant case as well. Defendant did not file a motion to compel arbitration until virtually the eve of the trial, after plaintiff had expended considerable time and resources to resolve his warranty claims against defendant in the circuit court.

The record clearly shows that defendant knew about its right to arbitrate plaintiff’s warranty claim, but nevertheless engaged in extensive litigation. These circumstances indicate that defendant waived its right to arbitrate. Therefore, we conclude that the trial court erred in granting defendant’s motions to compel arbitration and for summary disposition.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Jessica R. Cooper