November 17, 2015

Two Lawsuits, Two Years, and an Appeal Are Not Enough to Waive Arbitration

In *Stratton vs. Portfolio Recovery Assocs., LLC,* 2015 WL 6675551 (E.D. Ky. November 2, 2015), the district court permitted a defendant to amend its complaint to add arbitration as an affirmative defense after the defendant had filed suit in state court, briefed and argued two motions to dismiss the plaintiff's federal lawsuit, took part in an appeal to the Sixth Circuit, and engaged in more than two years of litigation. Despite this extensive litigation activity, the court held that the defendant had not waived its right to arbitrate the parties' dispute.

Portfolio Recovery Associates, LLC (PRA) was in the business of purchasing debt and then seeking to recover payment. It purchased Stratton's credit card debt and, on June 20, 2012, filed suit in state court to collect the sum due. On May 13, 2013, Stratton filed her own suit in federal court alleging that PRA's state-court action, which sought pre-judgment interest, violated the Fair Debt Collection Practices Act. Stratton also sought class certification.

PRA moved to dismiss Stratton's federal complaint, and its motion was denied. Stratton then filed an amended complaint, which further addressed the issue of pre-judgment interest. PRA moved to dismiss again. This time, the district court granted PRA's motion, but Stratton appealed. The Sixth Circuit reversed and reinstated Stratton's action.

On January 7, 2015, PRA filed an answer to Stratton's amended complaint. Thereafter, the district court issued a scheduling order that permitted the parties to amend their pleadings by July 31, 2015, slightly more than a month before discovery ended. Stratton served two requests for admissions during the discovery period. PRA moved for and was granted a protective order as to one of those requests which it ultimately answered, but it did not issue any discovery of its own.

On June 26, 2015, two years after the suit had been filed, PRA moved to amend its answer to add arbitration as an affirmative defense. Stratton opposed the motion, asserting that it would prejudice her and that, after two years of litigation, PRA had waived its right to arbitrate. She also argued that the motion was futile, because PRA was no longer entitled to arbitration. The court rejected her arguments.

So far as prejudice was concerned, the court held that Stratton had not shown that granting the motion would require her to spend significant additional resources in discovery or trial preparation. The court noted that, as of that time, only PRA had responded to any discovery requests and more than a month remained before discovery would be closed. The court also noted that it had not yet scheduled the matter for trial. The court stated that cases where prejudice was found involved extensive discovery and/or trial preparation, circumstances that did not exist here. The fact that PRA's motion was timely under the court's scheduling order was another factor in PRA's favor. The court concluded that Stratton failed to show any significant prejudice.

In ruling on waiver, the court applied federal law, holding that the parties' selection of Utah law was not specific enough to govern issues of arbitrability, including the waiver of arbitration rights. The court then noted that because of the strong federal presumption in favor of arbitration, "waiver is not to be lightly inferred." *Id.* at *4. Citing *Johnson Assocs. Corp. v. HL Operation Corp.*, 680 F. 3d 713 (6th Cir. 2012), the court held that the legal standard was whether the party seeking arbitration had taken actions inconsistent with reliance on its arbitration agreement and whether its delay had prejudiced its opponent.

The court again stressed that "very little discovery" had taken place. It also credited PRA's assertion that it had received the underlying credit card agreement just a short time before filing its motion to amend and had not realized before then that the parties' agreement contained an arbitration clause. The small amount of discovery taken to date plus PRA's lack of culpability in delaying its request for arbitration was enough for the court to conclude that PRA's conduct "[was] not inconsistent with its right to arbitrate." *Id.* Accordingly, the court allowed PRA to amend is answer to include arbitration as an affirmative defense and, one can only surmise, soon will be staying Stratton's lawsuit in favor of arbitration.

Practice Points: Litigators should not assume that every court will be as forgiving as the PRA court to parties who are ignorant of their right to arbitrate and have failed to assert that right in a prompt and diligent manner. Nonetheless, the PRA decision shows that a party's right to arbitrate may not be lost, even when that party has engaged in extensive and lengthy litigation. Thus, attorneys for parties who have participated in litigation and belatedly realized that the dispute should be in arbitration should not abandon hope before taking a close look at the law that governs the waiver of arbitration rights.

Keywords: alternative dispute resolution, adr, waiver, prejudice, litigation, motion to amend, affirmative defense, discovery

—Mitchell L. Marinello, Novack and Macey LLP, Chicago IL

November 16, 2015

Ignoring an Arbitration Proceeding Is No Protection Against an Adverse Award