



waiver was not an abuse of discretion.

¶ 2 This is an interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a) (eff. Feb. 26, 2010), from an order of the circuit court granting plaintiff West American's motion to stay the judicial proceedings and compel arbitration. Defendants Zeiter-Dickson Insurance Agency, Inc., Castle Insurance Services, Inc., Joel Ottosen and Richard W. Dickson contend on appeal that West American waived its right to arbitrate because it filed a complaint in the circuit court that sought judicial resolution of West American's arbitrable claims. For the following reasons, we affirm.

¶ 3 Background

¶ 4 The issue before us in this case is whether West American waived its right to arbitration. This case arose as a result of an underlying defamation lawsuit in which West American was the insurer. In 2001, an individual filed an underlying defamation suit against Yorkville National Bank (Yorkville) and its vice president. When the alleged defamatory statements occurred, West American had issued various liability policies to Yorkville. Zeiter-Dickson was the insurance agent for the policies. Yorkville notified West American of the underlying defamation lawsuit approximately 27 months after it had been filed. West American denied coverage based on the late notice. West American then filed a declaratory judgment action seeking a declaration of the parties rights and liabilities. In the declaratory judgment action, the circuit court found against West American, holding West American liable for the amount of the settlement reached in the underlying defamation case and other damages totaling almost \$2 million.

¶ 5 In 2007, while West American appealed the circuit court's order in the declaratory judgment action, it sent several letters to Zeiter-Dickson seeking indemnification based on Zeiter-Dickson's failure to timely notify West American of the underlying defamation suit, which West American alleged was a breach of their agency agreement. Zeiter-Dickson refused to indemnify West American. West American informed Zeiter-Dickson of its intent to settle the matter through arbitration, as provided for in their agreement, which also provided that the rules of the American Arbitration Association (AAA) would apply. However, West American never filed a demand for arbitration with the AAA.

¶ 6 Instead, West American instituted the present action by filing a complaint against defendants in the circuit court of Cook County on September 21, 2007. The complaint alleged a breach of contract against each defendant for failing to timely notify West American of the underlying defamation suit. Shortly thereafter, defendants responded with a motion to dismiss the complaint pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2006)), alleging that the complaint was time-barred. The parties subsequently agreed to numerous continuances while the appeal of the declaratory judgment action was pending.

¶ 7 In 2009, the appellate court reversed the circuit court in the declaratory judgment action. See *West American Insurance Co. v. Yorkville National Bank*, 388 Ill. App. 3d 769 (2009). Yorkville petitioned for leave to appeal to the Illinois Supreme Court, which was granted. Ultimately, in September 2010, the supreme court reversed the appellate

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court, and found in favor of Yorkville in the declaratory judgment action. See *West American Insurance Co. v. Yorkville National Bank*, 238 Ill. 2d 177 (2010).

¶ 8 Subsequently, at the next case management conference, the court ordered West American to respond to defendants' motion to dismiss. However, instead of responding to the motion, West American filed a motion to stay the judicial proceedings and compel arbitration on November 15, 2010. After a hearing on West American's motion, the court granted the motion, staying the proceedings and compelling arbitration.

Defendants then filed this interlocutory appeal.

¶ 9 Illinois courts favor using arbitration as a method of settling disputes. *Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1095 (2001). Arbitration is a favored alternative to litigation because it is a speedy, informal and inexpensive procedure for resolving controversies. *Board of Managers of the Courtyards at the Woodlands Condominium Association v. IKO Chicago*, 183 Ill. 2d 66, 71 (1998). A contractual right to arbitrate, like any other contractual right, can be waived; however, courts disfavor finding that a party has waived its right to arbitrate. *Kostakos v. KSN Joint Venture No. 1*, 142 Ill. App. 3d 533, 536 (1986). The right can be waived only when a party's conduct is found to be inconsistent with the arbitration clause, thereby indicating that it had abandoned its right. *Hilti, Inc. v. Griffith*, 68 Ill. App. 3d 528, 533 (1979). A party's conduct amounts to waiver when the party submits arbitrable issues to a court for decision. *Kostakos*, 142 Ill. App. 3d at 533. The existence of a waiver is determined by the types of issues submitted to the court, not by

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the number of papers filed with the court. *Kostakos*, 142 Ill. App. 3d at 533. We review the trial court's order granting a motion to stay the proceedings and compel arbitration for an abuse of discretion. *Schroeder Murchie Laya Associates, Ltd.*, 319 Ill. App. 3d at 1094.

¶ 10 Determining whether a party has waived the right to arbitrate involves numerous considerations. Courts look at the substance of the plaintiff's complaint and the relief sought, whether and to what extent the parties conducted or participated in discovery, the substance of the defendant's answer or whether the defendant filed an answer, any motions filed by the parties, any rulings made by the circuit court, whether the plaintiff or the defendant moved to compel arbitration, and how much time had passed when the motion to compel arbitration was filed.

¶ 11 Courts may also need to consider the effect of the "no-waiver" rule contained in the rules governing arbitration set forth by the AAA, if the rules were incorporated into the parties' contract, as is the case here. That rule, Rule 48(a), provides that "[n]o judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate." Courts have applied Rule 48(a) both literally and narrowly, as well as it being just one factor to consider in determining if a party's prior conduct in litigation amounts to a waiver of the right to arbitrate. *State Farm Mutual Automobile Insurance Co. v. George Hyman Construction Co.*, 306 Ill. App. 3d 874, 884 (1999). However, even those cases that have applied Rule 48(a) narrowly, many of them being from the first district, have not held the rule to be

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dispositive, and have engaged in a waiver analysis that included evaluating each party's actions. *Kostakos*, 142 Ill. App. 3d at 537-38; *Atlas v. 7101 Partnership*, 109 Ill. App. 3d 236, 240-41 (1982); *Bishop v. We Care Hair Development Corporation*, 316 Ill. App. 3d 1182, 1191-93 (2000). Therefore, we will examine each party's actions as well as the effect of AAA Rule 48(a).

¶ 12 Defendants contend on appeal that West American waived its right to arbitrate because it filed a complaint in the circuit court seeking judicial resolution of West American's arbitrable claims. West American responds that the "no-waiver" provision in AAA Rule 48(a) controls the outcome of this case, and no waiver occurred.

¶ 13 We start our analysis by looking at West American's complaint. The complaint was entitled "Complaint For Damages." Each of the four counts alleged a breach of contract against each defendant for failing to timely notify West American of the underlying defamation suit. The complaint also alleged that even though West American had demanded that defendants submit to arbitration pursuant to their agreement, defendants "failed to submit this breach of the Agreement claim to arbitration." The prayer for relief requested a judgment against defendants: (1) in the amount of \$2,105,414.25; (2) for attorneys fees; (3) for recovery of the benefits due under the Agency Agreement; and (4) for all other relief that is just and proper.

¶ 14 The complaint seeks full relief of West American's claims against defendants. The prayer for relief seeks monetary damages in excess of \$2 million, as well as attorneys fees, which would satisfy West American's claims against defendants. These

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claims are the same claims that West American could have sought to arbitrate had it filed a demand with the AAA. The complaint submits arbitrable issues to the court for a judicial determination. This weighs in favor of finding waiver.

¶ 15 Nevertheless, the following factors mitigate against a finding of waiver. Prior to West American's motion to compel arbitration, no discovery had yet occurred and the court had not yet made any rulings in the case other than agreed continuances.

Although over three years had passed since the filing of the complaint and the motion to compel arbitration, the parties had agreed to the continuances so that the appeals of the declaratory judgment action could conclude. The delay caused no prejudice to either party. Additionally, the parties' agreement provided that the AAA rules would apply, which included Rule 48(a), the "no-waiver" rule. As stated in the rule, a judicial proceeding by a party relating to the subject matter of the arbitration does not waive that party's right to arbitrate. This judicial proceeding initiated by West American relates to the subject matter of the arbitration. Therefore, the effect of AAA Rule 48(a), as well as each party's actions, weigh against a finding of waiver.

¶ 16 Since we review the circuit court's order for an abuse of discretion and, because Illinois courts disfavor a finding of waiver, we conclude that West American did not waive its right to arbitrate under these circumstances. West American's prior conduct in the judicial proceeding below was minimal and not so inconsistent with its right to arbitrate. Although their complaint sought full relief, the additional circumstances present here do not amount to waiver.

¶ 17 We believe our determination is in line with prior case law. We find this case similar to *Atlas*, where we found that the plaintiff did not waive its right to arbitration. In *Atlas*, this court determined that the plaintiff's "limited legal maneuverings" of filing complaints and in obtaining rulings on its motions for preliminary injunctions were not inconsistent with its right to arbitrate. *Atlas*, 109 Ill. App. 3d at 241. The court also emphasized its reliance on the "no-waiver" rule in the AAA rules, which applied to the parties' contract. The court further noted that even if the plaintiff had waived its right to arbitrate, one of the defendants, who had moved for arbitration, had not waived its right to compel arbitration. *Atlas*, 109 Ill. App. 3d at 241.

¶ 18 Here, West American's actions were even more limited than the plaintiff's actions in *Atlas*. West American only filed a complaint and agreed to numerous continuances in the proceedings before the circuit court. Therefore, *Atlas* supports our finding that West American did not waive its right to arbitrate.

¶ 19 Defendants argue that the holding in *Atlas* should not apply to the case at bar because the facts are inapposite. Defendants place much emphasis on the fact that in *Atlas*, the defendant had the right to compel arbitration, and characterize the court's finding that the plaintiff did not waive arbitration as "near-*dicta*." However, we disagree. The court specifically found that the plaintiff had not waived arbitration because of its "limited legal maneuverings" and because of the AAA "no-waiver" rule. We decline defendants' invitation to demote part of the court's holding to *dicta*.

¶ 20 We find further support for our determination that West American did not waive

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its right to arbitrate when we consider the following cases below in which the plaintiffs were found to have waived arbitration because their actions in the judicial proceedings were significant.

¶ 21 In *Hilti*, we found that the plaintiff had waived its right to arbitrate because its complaint for injunctive relief included a prayer for damages and the plaintiff participated in a six day trial on the merits of the case that resulted in permanent injunctions against the defendants. *Hilti*, 68 Ill. App. 3d at 533.

¶ 22 In *Schroeder Murchie Laya Associates*, we determined that the plaintiff had waived its right to arbitrate because the plaintiff engaged in discovery at the trial court level, it opposed the defendant's earlier attempts to compel arbitration, it failed to file for arbitration when the case was previously dismissed on the defendant's motion, and it moved to reinstate the case in the trial court. *Schroeder Murchie Laya Associates*, 319 Ill. App. 3d at 1098.

¶ 23 In *Glazer's*, we found that the plaintiff waived its right to arbitrate by submitting arbitrable issues for judicial determination in its complaint and because the plaintiff was engaging in impermissible forum shopping by seeking a demand for arbitration only after unsuccessfully seeking relief before the circuit court. *Glazer's*, 376 Ill. App. 3d at 426.

¶ 24 West American's actions in the circuit court were much less involved than those of the plaintiffs in the above cases. We find West American's actions more similar to the actions of the plaintiff in *Atlas*, and accordingly find that West American did not

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waive its right to arbitrate.

¶ 25 Lastly, we note that we do agree with defendants' assertion that despite West American's characterization in its complaint of defendants' refusal to agree to arbitration, all West American needed to do to initiate arbitration was to file a demand with the AAA pursuant to AAA Rule 4. The parties' correspondence contained in the record is dubious as to whether defendants would have agreed to or refused to attend arbitration proceedings had West American actually initiated such proceedings. Our agreement with defendants on this point however, does not change our determination regarding waiver.

¶ 26 Accordingly, we affirm the judgment of the circuit court.

¶ 27 Affirmed.