

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (4th) 140848-U

NO. 4-14-0848

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

April 13, 2015
Carla Bender
4th District Appellate
Court, IL

GARDNER DENVER, INC.,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Adams County
NATIONAL UNION FIRE INSURANCE COMPANY)	No. 13L45
OF PITTSBURGH, PENNSYLVANIA,)	
Defendant-Appellant,)	
and)	
NATIONAL INDEMNITY COMPANY and)	Honorable
RESOLUTE MANAGEMENT, INC.,)	Thomas J. Ortbal,
Defendants.)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Appleton and Steigmann concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed, concluding the trial court did not err in finding the defendant waived its right to arbitration.
- ¶ 2 In October 2013, plaintiff, Gardner Denver, Inc. (Gardner Denver), filed a complaint against defendants, National Union Fire Insurance Company of Pittsburgh, Pennsylvania (National Union), National Indemnity Company, and Resolute Management, Inc. National Indemnity Company and Resolute Management, Inc., are not parties to this appeal. As to National Union, Gardner Denver's complaint alleged National Union failed to perform its obligations under a 2003 settlement agreement.

¶ 3 In November 2014, National Union filed a motion to dismiss asking the court to interpret the 2003 settlement agreement in conjunction with a series of prior indemnity agreements. In June 2014, the trial court denied National Union's motion in part.

¶ 4 Later that month, National Union filed a motion to stay the action pending arbitration, arguing the prior indemnity agreements required the parties to arbitrate the pending issues arising from the settlement agreement. In September 2014, the court denied National Union's motion, finding (1) National Union waived its right to arbitration by seeking a substantive ruling on the motion to dismiss and (2) the issues raised by Gardner Denver did not concern the parties' obligations under the indemnity agreements.

¶ 5 National Union appeals, asserting the trial court erred by (1) finding National Union waived its right to arbitration by filing a motion to dismiss; and (2) determining the settlement agreement did not concern Gardner Denver's obligations under the indemnity agreements, thus usurping an issue reserved for the arbitrator. We affirm.

¶ 6 I. BACKGROUND

¶ 7 Starting in 1978, National Union entered into a series of indemnity agreements with Gardner Denver's predecessors in interest, Gardner-Denver Company and Joy Manufacturing Company (collectively, Old Gardner). In relevant part, the indemnity agreements required Old Gardner to pay National Union certain fees in exchange for automobile-liability, general-liability, and workers-compensation coverage, as well as other administrative fees. In addition, the indemnity agreements required Old Gardner to indemnify National Union against any products-liability actions as set forth in the respective premium-calculation agreements. Each indemnity agreement contained an arbitration clause, providing, "[a]ll disputes or differences arising out of the interpretation of this agreement shall be submitted to the decision

of two (2) Arbitrators." In 1993, the companies comprising Old Gardner merged with another company, creating Gardner Denver.

¶ 8 In 2001, Gardner Denver instituted litigation against National Union, seeking a declaration that National Union was obligated to defend and indemnify Gardner Denver against claims arising under the policies and indemnity agreements issued to Old Gardner. In 2003, the parties entered into a settlement agreement resolving National Union's obligation to Gardner Denver. The settlement agreement memorialized the parties' resolution of those claims "relating to any and all past, present or future liability or obligations of National Union to investigate, to defend, to pay defense costs, to indemnify, or to provide any insurance coverage whatsoever to [Gardner Denver] relating to the Underlying Claims under the National Union Policies." Additionally, subject to National Union's performance of the settlement agreement, Gardner Denver "forever release[d], acquit[ted] and discharge[d] National Union from any and all Underlying Claims" arising out of the enumerated policies. However, the settlement agreement further provided each of the parties "reserve[d] and d[id] not waive any and all rights, defenses, remedies or Claims it may have" in the remaining policies not enumerated in the settlement agreement.

¶ 9 In October 2013, Gardner Denver filed a complaint against National Union and the other defendants relating to the 2003 settlement agreement. As to National Union, Gardner Denver sought a declaratory judgment, asserting National Union (1) engaged in deceptive business practices, (2) breached its contract with Gardner Denver, and (3) breached its insurance contract with Gardner Denver in bad faith. These claims arose from National Union allegedly breaching the settlement agreement. As part of Gardner Denver's prayer for declaratory judgment, it requested the trial court find the settlement agreement "encompasses and addresses

all existing policies and agreements between Gardner Denver and National Union, including the Indemnity Agreements, and thus that the Indemnity Agreements do not excuse National Union's performance under the Settlement Agreement."

¶ 10 In February 2014, National Union filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-615 (West 2012)), asserting the complaint was substantially insufficient in law and asking the trial court to dismiss the complaint with prejudice. Specifically, National Union asked the court to find "the Settlement Agreement [was] unambiguous and [did] not release or bar National Union's right to enforce the terms of the separate Indemnity Agreements as a matter of law." National Union further asserted it was "entitled to demand that Gardner Denver perform the terms of the separate Indemnity Agreements." National Union did not discuss the arbitration clauses contained within the indemnity agreements, nor did it argue the claims were subject to arbitration under the indemnity agreements.

¶ 11 On June 6, 2014, the trial court entered a written order regarding National Union's motion to dismiss. The court reviewed the indemnity and settlement agreements and engaged in a threshold interpretation of those agreements. The court found Gardner Denver had "set forth, at a minimum, a reasonable interpretation of the Settlement Agreement," which was sufficient to survive a motion to dismiss. Accordingly, the court denied the motion to dismiss the allegations related to National Union's alleged breach of contract and bad-faith breach of the insurance contract. At the same time, the court granted National Union's motion to dismiss Gardner Denver's deceptive-practices claim, finding the complaint failed to set forth an independent tortious act which would otherwise exempt it from complying with section 155 of the Insurance Code (215 ILCS 5/155 (West 2012)).

¶ 12 On June 27, 2014, National Union served Gardner Denver with a motion to compel arbitration and filed a motion to stay the trial court proceedings pending arbitration of the parties' dispute pursuant to the arbitration clauses set forth in the indemnity agreements. National Union asserted the interpretation of the indemnity and settlement agreements should be resolved through arbitration, not by the court. In July 2014, Gardner Denver responded, contending, in part, National Union waived its right to seek arbitration by failing to raise its arbitration argument until after the court issued a ruling on the motion to dismiss, a portion of which was favorable to National Union.

¶ 13 In August 2014, the trial court held a hearing via telephone regarding National Union's motion. During the hearing, National Union acknowledged its motion to dismiss sought dismissal (1) with prejudice and (2) based on the court's interpretation of the indemnity and settlement agreements. When the court asked how the nature of National Union's motion to dismiss, which asked the court to make a finding as a matter of law, differed from a motion for summary judgment, National Union responded its motion was based on the insufficiency of the complaint rather than a substantive legal issue. The court disagreed and observed, "[i]t appears to me that you didn't get the results you liked or desired upon the motion to dismiss, so you're now going to the arbitrator and saying: well, you decide this." National Union argued it could proceed with arbitration because the court's ruling on the motion to dismiss was only procedural, not substantive. In response to further questioning from the court, National Union acknowledged it sought a determination as a matter of law that the settlement agreement did not release Gardner Denver from complying with the indemnity agreements. Gardner Denver pointed out the court had already issued a ruling beneficial to National Union by dismissing the deceptive-practices

claim, a ruling that would carry into the arbitration proceedings if the court allowed National Union's motion to stay the proceedings.

¶ 14 After considering the arguments of the parties, the trial court denied National Union's motion to stay the action pending arbitration. The court acknowledged that filing a motion to dismiss did not, in and of itself, constitute a waiver of the right to arbitrate. However, the court found, in this instance, the nature of National Union's motion to dismiss was similar to a motion for summary judgment in that it asked the court to interpret the indemnity and settlement agreements and make a finding as a matter of law. Moreover, even if National Union had not waived its right to arbitration, the court found Gardner Denver's claims regarding the settlement agreement did not trigger the arbitration clauses set forth in the indemnity agreements.

¶ 15 In September 2014, the trial court entered a written order denying National Union's motion to stay the action pending arbitration. The court found National Union waived its right to compel arbitration by seeking "a substantive, dispositive ruling as to Gardner Denver's complaint, namely, that as a matter of law[,] the 2003 settlement agreement between National Union and Gardner Denver did not release, discharge or resolve any claim or dispute concerning the indemnity agreements between the parties." Further, the court found the scope of the arbitration clause contained in the indemnity agreements did not encompass the issues in dispute over the settlement agreement.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, National Union asserts the trial court erred by (1) finding National Union waived its right to arbitration by filing a motion to dismiss; and (2) determining the settlement agreement did not concern Gardner Denver's obligations under the indemnity

agreement, thus usurping an issue reserved for the arbitrator. We first address whether the court erred by finding National Union waived its right to arbitration by pursuing a motion to dismiss.

¶ 19

A. Waiver of the Right To Arbitrate

¶ 20

1. *Standard of Review*

¶ 21

We begin by noting the parties dispute the standard of review. National Union asserts the standard of review is *de novo* because the trial court made no factual findings and based its decision purely on legal analysis. *Vassilkovska v. Woodfield Nissan, Inc.*, 358 Ill. App. 3d 20, 24, 830 N.E.2d 619, 623 (2005). Gardner Denver asserts the appropriate standard of review is the abuse-of-discretion standard because the court considered both questions of law and fact. See *Glazer's Distributors of Illinois, Inc. v. NWS-Illinois, LLC*, 376 Ill. App. 3d 411, 423-24, 876 N.E.2d 203, 214 (2007). Specifically, Gardner Denver asserts the court made factual findings as to whether National Union's actions constituted a waiver.

¶ 22

We disagree with Gardner Denver that the trial court's finding of waiver required a factual determination, as the facts pertaining to National Union's actions were undisputed. Rather, the court determined whether National Union's undisputed actions—*e.g.*, pursuing a motion to dismiss and failing to initially raise the arbitration issue—legally constituted waiver, which was a legal analysis. Accordingly, because the appeal involves the court's legal decisions and not a factual dispute, we will utilize a *de novo* standard of review. *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1174, 890 N.E.2d 1220, 1223 (2008).

¶ 23

2. *Whether National Union's Actions Constituted Waiver*

¶ 24

Generally, Illinois favors arbitration as a method for settling disputes. *Kostakos v. KSN Joint Venture No. 1*, 142 Ill. App. 3d 533, 536, 491 N.E.2d 1322, 1325 (1986). If the parties dispute the scope of an arbitrable issue, then the issue should be resolved in favor of

arbitration. *LAS, Inc. v. Mini-Tankers, USA, Inc.*, 342 Ill. App. 3d 997, 1002, 796 N.E.2d 633, 637 (2003).

¶ 25 However, a party may waive the right to arbitrate by acting in a manner inconsistent with the arbitration clause, which indicates an abandonment of the right to arbitrate. *Kostakos*, 142 Ill. App. 3d at 536, 491 N.E.2d at 1325. "A party's conduct amounts to waiver when the party submits arbitrable issues to a court for decision." *Id.* In Illinois, "courts disfavor a finding of waiver." *Id.* In determining whether a party has waived its right to arbitrate, "waiver will be found when the party seeking arbitration substantially invokes the judicial process and substantially participates in litigation to a point inconsistent with an intent to arbitrate, to the detriment or prejudice of the other party." *LAS*, 342 Ill. App. 3d at 1002, 796 N.E.2d at 637.

¶ 26 a. Actions Inconsistent With the Intent To Arbitrate

¶ 27 In the present case, National Union filed a motion to dismiss Gardner Denver's complaint pursuant to section 2-615 of the Civil Code, asserting all counts failed to state a cause of action. National Union asserts its motion to dismiss sought determination of preliminary procedural issues, an action which was not inconsistent with its right to arbitrate.

¶ 28 National Union relies on several cases in support of its argument. In *Kostakos*, 142 Ill. App. 3d at 537, 491 N.E.2d at 1325, the First District held the defendant did not waive its arbitration claim merely by filing an answer and participating in procedural proceedings where the defendant did not submit any substantive issues to the trial court. The defendant also did not file interrogatories or participate in depositions; the extent of the defendant's participation involved subpoenaing documents, which would have been otherwise permitted in arbitration. *Id.*

¶ 29 In *Kennedy v. Commercial Carriers, Inc.*, 258 Ill. App. 3d 939, 943, 630 N.E.2d 1059, 1062 (1994), the First District held the defendant did not waive its contractual right to arbitrate by challenging the circuit court's subject-matter jurisdiction or attempting to remove the case to federal court. Similarly, in *Edward Electric Co. v. Automation, Inc.*, 164 Ill. App. 3d 547, 554-55, 518 N.E.2d 172, 177 (1987), the First District concluded the defendant's counterclaim, which was filed to preserve an issue that would thereafter be time-barred, did not constitute a waiver of its contractual agreement to arbitrate. In *Bishop v. We Care Hair Development Corp.*, 316 Ill. App. 3d 1182, 1192, 738 N.E.2d 610, 618 (2000), the First District held contesting venue did not constitute waiver of an arbitration agreement where no substantive issues were presented to the trial court.

¶ 30 National Union likens its motion to dismiss to the procedural issues raised in *Kennedy*, *Edward Electric*, *Bishop*, and *Kostakos*, in that it did not submit any substantive issues before the court. However, as the trial court noted and National Union conceded, the basis of National Union's motion to dismiss relied on the court's interpretation of the settlement and indemnity agreements. This required the court to engage in at least a threshold analysis of the substantive issues underlying the case, not merely procedural issues as National Union asserts.

¶ 31 We find support for this reasoning in other appellate court cases. In *LAS*, the Fifth District concluded the defendant did not waive arbitration by filing a motion to dismiss where (1) the defendant "did not substantially participate in the trial court litigation to a point inconsistent with an intent to arbitrate," and (2) the plaintiff did not demonstrate prejudice resulting from the defendant's filing of a motion to dismiss, as the defendant never pursued a hearing on the motion to dismiss. *LAS*, 342 Ill. App. 3d at 999, 1003, 796 N.E.2d at 635, 638. Thus, *LAS* is distinguishable because, in this case, National Union pursued a court ruling on the

motion to dismiss. Moreover, unlike the plaintiff in *LAS*, Gardner Denver asserted allowing arbitration at this point would be prejudicial because it had already spent money defending the motion to dismiss, which resulted in a partially unfavorable outcome on its deceptive-practices count that would carry into arbitration.

¶ 32 We find further support in *Atkins v. Rustic Woods Partners*, 171 Ill. App. 3d 373, 378, 525 N.E.2d 551, 555 (1988), in which the defendants filed a motion to dismiss pursuant to section 2-615 of the Civil Code for failure to state a cause of action. As part of their motion, the defendants asked the trial court to interpret a partnership agreement. *Id.* at 377, 525 N.E.2d at 554. Notably, like in the present case, the defendants did not raise an arbitration claim in their motion to dismiss. *Id.* at 379, 525 N.E.2d at 556. Rather, the defendants in *Atkins* did not raise an arbitration claim until the trial court's decision to grant its motion to dismiss was reversed on appeal, which occurred approximately three years after the plaintiffs initiated the action. *Id.* Thus, the *Atkins* court concluded the defendants waived their contractual right to arbitrate, stating, "[d]efendants' participation in this litigation was not merely responsive, and its pleadings were not filed solely to protect its rights from litigation." *Id.* Though the case at bar does not present the same lapse in time, the other factual similarities lead us to conclude the extent to which National Union participated in the litigation demonstrates an action inconsistent with its right to arbitrate.

¶ 33 National Union also relies on *TSP-Hope*, 382 Ill. App. 3d at 1172, 890 N.E.2d at 1222, in which the plaintiff served the defendant with a demand to file a suit within 30 days to preserve a lien on the plaintiff's property. The defendant thereafter filed an answer and counterclaim to preserve the lien on the property. *Id.* The defendant later filed a motion to dismiss pursuant to section 2-619 of the Civil Code, asserting the agreement between the parties

required arbitration. *Id.* at 1173, 890 N.E.2d at 1222. In concluding the defendant had not waived arbitration, this court held the defendant did not conduct discovery or interject pleadings that were other than responsive to the plaintiff's complaint. *Id.* at 1175, 890 N.E.2d at 1224. Though the defendant filed a counterclaim, which could result in the waiver of the right to arbitrate, the defendant's counterclaim was responsive to the plaintiff's demand and statutory requirement that the defendant file a lien within 30 days to preserve its rights. *Id.* Thus, *TSP-Hope*, is distinguishable from the present case because the defendant in *TSP-Hope* was statutorily mandated to file responsive pleadings or waive his claims; the same is not true of this case. Moreover, National Union did not file a motion to dismiss under section 2-619 of the Civil Code invoking its right and intent to arbitrate.

¶ 34 One common issue presented throughout the cases cited by the parties is whether the defendant sought a substantive ruling from the trial court. Here, National Union filed a motion to dismiss pursuant to section 2-615 in lieu of an answer. Similar to the factual scenario presented in *Atkins*, National Union asked the court to find Gardner Denver's complaint failed to state a cause of action, which required the court to interpret the agreement between the parties. National Union did not assert the parties were required to submit to arbitration or respond in order to preserve rights that would be otherwise statutorily forfeited.

¶ 35 As a result of the motion to dismiss, the trial court engaged in at least a preliminary interpretation of the settlement and indemnity agreements, as requested by National Union in its motion to dismiss. It was not until the court issued a largely dispositive ruling against National Union that National Union filed its motion to stay further proceedings pending arbitration. In other words, National Union waited "to see which way the wind was blowing" before seeking to arbitrate the matter. *LAS*, 342 Ill. App. 3d at 1004, 796 N.E.2d at 638 (upheld

the right to arbitration where "[t]he defendant did not check to see which way the wind was blowing and then change its course because it did not like the wind's direction.").

¶ 36 National Union correctly asserts its motion was not one requesting summary judgment but seeking dismissal on the face of the complaint. However, National Union concedes it sought (1) the affirmative relief of dismissal with prejudice, (2) a conclusion of the case, and (3) a determination as a matter of law that the settlement agreement did not release the indemnity agreements. With the latter concession, National Union acknowledges it sought a substantive ruling from the trial court, even though the request came in the form of a motion to dismiss rather than a motion for summary judgment. "The existence of a waiver is determined by the types of issues submitted, not by the number of papers filed with the court." *Kostakos*, 142 Ill. App. 3d at 536-37, 491 N.E.2d at 1325.

¶ 37 That concession distinguishes this case from the others cited by the parties, as National Union acknowledges the court's ruling necessarily required the court to make a substantive ruling, as a matter of law, regarding the interpretation of the settlement and indemnity agreements. Therefore, this case does not present an issue where National Union filed, but chose not to pursue, pretrial motions or simply acted to preserve claims it would otherwise forfeit. Rather, National Union fully participated in the motion to dismiss by seeking affirmative relief from the court and the resolution of a substantive issue, which is inconsistent with an intent to arbitrate.

¶ 38 Accordingly, we conclude the trial court did not err in determining National Union acted inconsistently with an intent to arbitrate.

¶ 39 b. Prejudice to Gardner Denver

¶ 40 The next issue is whether Gardner Denver was prejudiced by National Union's delay in seeking arbitration. See *LAS*, 342 Ill. App. 3d at 1002, 796 N.E.2d at 637. As National Union fails to address this issue in its brief, we deem this issue forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Regardless, we find sufficient evidence in the record to support a finding of prejudice.

¶ 41 Gardner Denver asserted to the trial court it would be prejudiced if the court stayed the proceedings pending arbitration, as the court had already engaged in a preliminary interpretation of the indemnity and settlement agreements and further made a ruling dismissing one of its claims, which would carry into the arbitration proceedings. Moreover, Gardner Denver argued it expended "significant resources addressing this case," and would be required to relitigate issues already determined by the court if compelled to arbitration. We agree. To find otherwise would essentially allow National Union a second bite at the apple as it sought a more favorable ruling at arbitration.

¶ 42 Accordingly, we conclude the trial court did not err in determining National Union waived its right to arbitrate in this case.

¶ 43 B. Interpretation of the Indemnity and Settlement Agreements

¶ 44 Because we have determined the trial court did not err by finding National Union waived its right to arbitration, we need not determine whether the terms of the settlement agreement were subject to the arbitration clauses contained within the indemnity agreements.

¶ 45 III. CONCLUSION

¶ 46 For the foregoing reasons, we affirm the trial court's judgment.

¶ 47 Affirmed.