2017 IL App (5th) 160300-U

NO. 5-16-0300

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JOSIE LEE BEARD, Special Administrator of the Estate of Dennis James Beard, Deceased,	)	Appeal from the Circuit Court of St. Clair County.
Plaintiff,	)	
v.	)	No. 12-L-394
MICHAEL JETER, *et al.*,	)	
Defendants,	)	
and	)	
ENERGY ABSORPTION SYSTEMS, INC.,	)	
Counterplaintiff-Appellee,	)	
v.	)	
JOHN THOMAS, INC.,	)	Honorable Vincent J. Lopinot,
Counterdefendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Moore and Justice Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's order compelling arbitration is affirmed where the party seeking to enforce the arbitration agreement is a party to the agreement and

> has not waived arbitration by participating in the judicial forum. The court's order denying a stay of the civil proceedings is reversed where the court is statutorily required to stay the civil proceedings when it enters an order compelling arbitration. Thus, we remand for the trial court to stay the civil proceedings pending arbitration.

¶ 2 The counterplaintiff, Energy Absorption Systems, Inc. (EAS), sought to enforce an arbitration provision in a distributorship agreement (the agreement) between Quixote Transportation Safety, Inc. (QTS), and the counterdefendant, John Thomas, Inc. (JTI). EAS asserted that it was entitled to enforce the arbitration provision because it was a party to the agreement and was also assigned QTS's rights under the agreement. The circuit court of St. Clair County agreed and ordered the parties to arbitrate. JTI filed a notice of interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010). For the following reasons, we affirm in part, reverse in part, and remand with directions.

¶ 3 This appeal arises out of multi-party litigation filed by the plaintiff, Josie Lee Beard, special administrator of the estate of Dennis James Beard, deceased, in August 2012. The subject of the litigation was an accident that occurred on May 22, 2012, when a vehicle driven by Michael Jeter collided with equipment in a construction zone in which the decedent was working. The plaintiff's complaint asserted that the decedent was working near a truck-mounted attenuator when Jeter collided with it, causing it to strike the decedent. This accident resulted in the decedent's death. The complaint alleged various theories of liability against numerous defendants, one of which was EAS as the alleged manufacturer of the attenuator. In particular, the complaint asserted strict liability

and negligence claims against EAS concerning the manufacture, design, and warnings issued with respect to the attenuator.

¶ 4 The plaintiff also brought a new, independent cause of action against JTI, asserting that JTI sold the attenuator manufactured by EAS to defendant Briteway Leasing, LLC (Briteway). This complaint alleged that JTI sold the attenuator in a defective and unreasonably dangerous condition by improperly assembling it, failing to provide proper instruction for its use, and failing to provide the necessary components for its operation.

¶ 5 Thereafter, Briteway filed a third-party complaint for contribution against JTI in the original proceeding. On March 18, 2015, approximately two months before the scheduled trial date, EAS filed a counterclaim for contribution and indemnification against JTI. In the counterclaim, EAS asserted that it was entitled to indemnification from JTI pursuant to the agreement entered into between QTS and JTI because it was a party to the agreement and it had been assigned QTS's rights under the agreement. No written assignment was attached to the counterclaim. The counterclaim did not request relief pursuant to the arbitration clause in the agreement. On April 13, 2015, the plaintiff filed a fourth amended complaint, naming JTI as a direct defendant for the first time. Ultimately, the case was settled before trial, and the contribution claims between the various defendants were extinguished. The only remaining claim was EAS's contractual indemnification claim against JTI.

¶ 6 EAS's contractual indemnification claim arises out of the agreement, which permitted JTI to distribute transportation-safety products manufactured by QTS and its

affiliated companies. EAS was a wholly-owned subsidiary of QTS. The indemnification clause stated as follows:

> "[JTI] agrees to indemnify and hold QTS harmless from and against any and all claims, damages and liabilities whatsoever asserted by any person or entity resulting directly or indirectly from (a) any installation or use of any Product sold by [JTI] which is inconsistent with the manuals and specifications of the Products as provided by QTS; or (b) any breach of this Agreement by [JTI] or any of its employees or agents. Such indemnification shall include the payment of all reasonable attorneys' fees and other costs incurred by QTS in defending any such claims."

¶ 7 The agreement also allowed QTS to assign its rights "to any subsidiary or affiliated business entity or to a successor of the right, title and interest of QTS's business." Moreover, the agreement contained an arbitration clause, which stated, in pertinent part, as follows: "Any controversy or claim arising out of or relating to this Agreement or any breach thereof shall be settled by arbitration in accordance with the rules of the American Arbitration Association."

¶ 8 On June 29, 2015, EAS filed an arbitration demand with the American Arbitration Association (AAA), asserting that JTI had breached the agreement in that it had failed to indemnify and hold harmless EAS with respect to the claim filed by Beard. On September 25, 2015, JTI filed a motion to stay in the circuit court of St. Clair County, arguing that EAS had acted inconsistent with its contractual right to arbitrate by submitting arbitrable issues to the court for determination in the form of the counterclaim

and by participating in discovery in the Beard litigation. Thus, JTI argued that EAS had waived its contractual right to arbitrate. The motion to stay did not address EAS's status as a party to the agreement and did not address any issues pertaining to the assignment of rights. EAS filed a response to the motion to stay arbitration demand, asserting that its conduct in filing the counterclaim and participating in limited discovery did not rise to the level of submission of arbitrable issues to the court for determination.

¶ 9 On December 1, 2015, JTI filed a reply in support of its motion to stay, arguing, for the first time, that EAS did not properly demonstrate a valid assignment of the rights provided for in the agreement. That same day, JTI also filed a motion to strike and dismiss EAS's counterclaim and arbitration demand pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)) and section 2-606 of the Code (735 ILCS 5/2-606 (West 2014)). In this motion, JTI contended that the counterclaim must be dismissed because EAS was not a party to the agreement. In addition, JTI argued that EAS had failed to sufficiently allege the existence of a valid oral assignment and had failed to attach as an exhibit any alleged written assignment as required by section 2-606.

¶ 10 On March 1, 2016, a hearing was held on the motion to stay and the motion to strike and dismiss EAS's counterclaim. At the hearing, the trial court denied JTI's motion to strike and dismiss, finding that the allegations were sufficient for the pleading stage. After JTI requested clarification as to whether the court had found that EAS was a party to the agreement or that EAS had properly alleged an assignment, the court stated:

"[EAS has] properly alleged–in their counterclaim they've alleged enough to get past the pleading stage. Now, you can arbitrate it, you can do discovery on it, you can find out at this point whether this is a written assignment, whether it's an oral assignment. You can get into all of that. But they've done what they needed to do to get past the pleading stage."

¶ 11 The court concluded that EAS had alleged "[s]ome kind of assignment."

¶ 12 Following the trial court's ruling on the motion to strike and dismiss, the parties presented arguments on the issue of whether EAS had waived arbitration. That same day, the court entered a written order denying JTI's motion to stay arbitration.

¶ 13 On March 8, 2016, JTI filed a motion to reconsider the denial of the motion to strike and dismiss. That same day, JTI also filed a motion to dismiss EAS's counterclaim pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)). In the section 2-619 motion to dismiss, JTI asserted that EAS lacked standing to invoke the indemnification provision in the agreement because it was not a party to the agreement and had not established the existence of a valid assignment. On March 26, 2016, JTI filed a second motion to reconsider the court's order denying the motion to stay.

¶ 14 On April 22, 2016, EAS filed an addendum to its response to JTI's motion to strike and dismiss and motion to stay the arbitration demand. Attached to the addendum was a written assignment dated March 24, 2016, between QEAS, Inc., and EAS. EAS argued that the attached written assignment unequivocally established the assignment of all rights and interests in the agreement to EAS. According to the assignment, EAS was a wholly-owned subsidiary of QTS when the agreement was executed. The assignment

indicated that on or about February 5, 2010, THP Merger Co. acquired Quixote Corporation and its subsidiaries, including QTS and EAS. The assignment stated that THP Merger Co. received and was assigned all the right, title, and interest in Quixote Corporation and its subsidiaries, which included EAS. The assignment further stated that, following the acquisition, THP Merger Co. was merged with and into Quixote Corporation, and Quixote Corporation was subsequently renamed QEAS, Inc. EAS remained a subsidiary of QTS, and QTS remained a subsidiary of Quixote Corporation, now QEAS.

¶ 15 On May 31, 2016, JTI filed a reply in support of its motions for reconsideration and motion to dismiss. At the June 15, 2016, hearing, JTI's counsel argued, *inter alia*, that the court had not actually ruled on the issue of whether there was an enforceable arbitration agreement between EAS and JTI. In support, JTI noted that, where the court has determined that the parties are subject to a mandatory arbitration provision, section 2 of the Uniform Arbitration Act (Act) (710 ILCS 5/2 (West 2014)) requires the court to enter an order for arbitration and to stay the court proceeding. JTI contended that the court's March 2016 orders did not order the parties to arbitrate and did not stay the civil proceeding. Instead, JTI argued that the order merely concluded that EAS had sufficiently pled the existence of a valid assignment. Moreover, JTI asserted that EAS lacked standing to enforce the agreement in that the assignment, which was executed on March 24, 2016, occurred after EAS had filed its counterclaim. In response, EAS acknowledged that the trial court had not explicitly ordered the parties to arbitration but countered that the court's ruling constituted an implicit order compelling arbitration.

¶ 16 In addition, during the hearing, EAS's counsel presented, to the trial court, a motion to amend its counterclaim to incorporate the written assignment. The motion was granted over JTI's objection. After hearing arguments from counsel, the court denied JTI's motions for reconsideration and section 2-619 motion to dismiss. In its written order, the court found that the agreement contained a mandatory arbitration provision that applied to the controversy and the issues between the parties and ordered the parties to arbitration. The order did not address the argument that the March 2016 order did not compel arbitration.

¶ 17 On June 21, 2016, JTI filed a motion to strike EAS's amendment to the counterclaim and a motion to clarify the June 15 order. In the motion to clarify, JTI requested that the court stay the civil proceedings in accordance with section 2 of the Act (710 ILCS 5/2 (West 2014)). On July 11, 2016, the court denied both motions. On July 13, 2016, JTI filed its notice of interlocutory appeal pursuant to Illinois Supreme Court Rule 307 (eff. Feb. 26, 2010), appealing the June 15 and July 11 orders.

¶ 18 As a preliminary matter, we must review EAS's contention that we lack jurisdiction. Rule 307(a)(1) permits interlocutory appeals from four types of orders: (1) orders that deny (*i.e.*, refuse) injunctions; (2) orders that create (*i.e.*, grant) injunctions; (3) orders that change the effects of (*i.e.*, modify or dissolve) existing injunctions; and (4) orders that perpetuate the effects of (*i.e.*, refuse to modify or dissolve) existing injunctions. Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010); *Craine v. Bill Kay's Downers Grove Nissan*, 354 Ill. App. 3d 1023, 1025 (2005). An order compelling arbitration is an appealable interlocutory order because it is injunctive. *Fuqua v. SVOX AG*, 2014 IL App

(1st) 131429, ¶ 14. Moreover, an order granting or denying a stay also falls within Rule 307(a)(1). *Hastings Mutual Insurance Co. v. Ultimate Backyard, LLC*, 2012 IL App (1st) 101751, ¶ 28. To perfect an interlocutory appeal under Rule 307(a)(1), the appellant must file a notice of appeal within 30 days of the entry of the order compelling arbitration. Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010).

¶ 19 In the present case, the trial court's initial order in March 2016 denied JTI's motion to strike and dismiss EAS's counterclaim, finding that EAS had minimally pled the existence of a valid assignment. When JTI's counsel sought clarification as to whether the court had concluded that EAS was a party or whether there was a valid assignment, an issue that needed to be resolved to determine whether the parties were subject to arbitration, the court indicated that EAS had properly alleged "enough to get past the pleading stage." The court indicated that the parties could "arbitrate it, *** do discovery on it, *** find out at this point whether this is a written assignment, whether it's an oral assignment." That same day, the court also denied JTI's motion to stay arbitration. Although this was an appealable interlocutory order because it, in effect, denied an injunction, JTI did not file a timely appeal from this order and waited until the June 15 and July 11 orders to appeal. Thus, we must determine when the trial court first entered its order compelling arbitration.

¶ 20 EAS argues that the March 1 order compelled arbitration and, thus, JTI was obligated to appeal from that order rather than waiting to appeal from the June 15 and July 11 orders. In support, EAS cites *Trophytime, Inc. v. Graham*, 73 Ill. App. 3d 335

(1979), which sets forth the general rule that a motion attacking an interlocutory order will not toll the running of the 30-day deadline for the filing of the notice of appeal.

¶ 21 In addition, EAS cites *Craine*, 354 Ill. App. 3d at 1027, where the court held that an order denying a motion to reconsider a refusal to compel arbitration was not an appealable interlocutory order because it did not deny an injunction. There, the court considered whether the order fell within one of the four categories of appealable interlocutory orders, *i.e.*, orders that deny injunctions; orders that create injunctions; orders that change the effects of existing injunctions; and orders that perpetuate the effects of existing injunctions. *Id.* at 1025-27. The court concluded that the order was excluded from categories (3) and (4) because those categories required a preexisting injunction. *Id.* at 1026. Similarly, the court concluded that the order was excluded from category (2) because it required the creation of an injunction. *Id.* The court further determined that the order was excluded from category (1) because the denial of a motion to reconsider a refusal to compel arbitration did not deny an injunction. *Id.* at 1027. Instead, the court found that the court's initial denial of the motion to compel had already denied the injunction. *Id.* Thus, the court determined that the denial of the motion to reconsider was not an appealable interlocutory order. *Id.*

¶ 22 In making this decision, the court recognized that, under certain circumstances, denials of motions for reconsideration have been found to fall within Rule 307(a)(1). *Id.* at 1025. In particular, the court cited two cases from this district, *Clark v. Country Mutual Insurance Co.*, 131 Ill. App. 3d 633, 636 (1985), and *Property Management, Ltd. v. Howasa, Inc.*, 14 Ill. App. 3d 536, 539 (1973), where the subjects of the appeals were

orders denying motions to reconsider orders compelling arbitration. In both cases, the courts found the orders to be, in effect, injunctions and appealable under Rule 307(a)(1). The *Craine* court concluded that those cases were distinguishable because neither applied the general rule from *Trophytime,* and the orders had the effect of staying the proceedings before the circuit courts. *Craine,* 354 Ill. App. 3d at 1027. Thus, the orders perpetuated the effects of the injunctions, thereby falling into category (4). *Id.* at 1025. In other words, the denials were, in effect, injunctions and thus appealable in and of themselves. *Id.* at 1027. In contrast, the *Craine* court concluded that the denial of a motion to reconsider a refusal to compel arbitration was not, in effect, an injunction because no injunction existed or was created. *Id.*

¶ 23 JTI counters that the June 15 order was the first time that the trial court ordered the parties to arbitrate and, thus, it had perfected its appeal within the 30-day time limit. In support of its position, JTI cites *Heider v. Knautz,* 396 Ill. App. 3d 553 (2009). In *Heider,* the parties informed the trial court that they had entered into an oral agreement to arbitrate. *Id.* at 555. As a result of the parties' agreement, in September 2008, the court entered an order staying the judicial proceedings pending arbitration. *Id.* at 556. Thereafter, the defendant sought to revoke his agreement to arbitrate. *Id.* at 557. In July 2009, the court denied the defendant's motion, finding that the defendant's agreement was irrevocable, and compelled the defendant to proceed with binding arbitration. *Id.* On appeal, the plaintiff argued that the reviewing court lacked jurisdiction to consider the appeal because the defendant was obligated to appeal from the September 2008 order. *Id.* at 558. The appellate court disagreed, finding that the September 2008 order simply

stayed the trial court proceedings pending arbitration and did not impose a requirement upon either party to attend arbitration. *Id.* Thus, the court concluded that the first order compelling the defendant to attend arbitration was the July 2009 order. *Id.* As the defendant's notice of appeal was filed within 30 days of the July order, the court determined that it had jurisdiction over the matter. *Id.*

¶ 24 Here, in its March 2016 orders, the trial court made no finding as to whether EAS was a party to the agreement or whether there was a valid assignment; nor did the court require either party to attend arbitration. It was not until June 15 that the court concluded that there was a mandatory arbitration provision that applied to the controversy and the issues between the parties. Thus, we conclude that the June 15 order was the first time that the court ordered the parties to arbitrate. Because the denial of the motion to reconsider falls within one of the four categories of interlocutory orders that are appealable, *i.e.*, grants an injunction, it is appealable in and of itself.

¶ 25 We now turn to JTI's first argument on the merits, *i.e.*, whether the trial court erred in compelling arbitration. This issue requires us to evaluate the agreement to determine whether EAS can enforce the arbitration provision.

¶ 26 The question of whether the parties are bound by contract to arbitrate is generally a question for the trial court. *Ford Motor Credit Co. v. Cornfield*, 395 Ill. App. 3d 896, 913 (2009). Section 2 of the Act (710 ILCS 5/2 (West 2014)) states that the court shall hold a hearing to determine the existence of an agreement to arbitrate if that issue is in substantial and *bona fide* dispute. Further, section 2 of the Act empowers the court, upon application by a party, to compel or stay arbitration or to stay court action pending

arbitration. The court should compel arbitration where the language of the arbitration agreement is clear and it is apparent that the dispute falls within the scope of the agreement. *Equistar Chemicals, LP v. Hartford Steam Boiler Inspection & Insurance Co. of Connecticut*, 379 Ill. App. 3d 771, 775 (2008). The party seeking to enforce the arbitration agreement typically has the burden of establishing the existence of the agreement. *C. Iber & Sons, Inc. v. Grimmett*, 108 Ill. App. 2d 443, 447-48 (1969).

¶ 27 In general, the standard of review for a decision on a motion to compel arbitration is whether there was a sufficient showing to sustain the trial court's order. *Keefe v. Allied Home Mortgage Corp.*, 393 Ill. App. 3d 226, 229 (2009). However, where the trial court renders its decision without an evidentiary hearing and without any factual findings, the standard of review is *de novo*. *Id.* Moreover, the interpretation of a contract involves a question of law, which is subject to *de novo* review. *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 20 (2011). In this case, the court did not hold an evidentiary hearing but decided the matter on the basis of the pleadings and the parties' argument. In addition, this appeal requires us to interpret the parties' agreement to determine whether EAS can enforce the arbitration provision. Thus, our review is *de novo*.

¶ 28 In construing the language of a contract, a court's primary objective is to give effect to the intention of the parties. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). The contract must be construed as a whole, giving meaning and effect to every provision when possible, and a court may not interpret the contract so as to nullify provisions or render them meaningless. *Board of Managers of Hidden Lake Townhome Owners Ass'n v. Green Trails Improvement Ass'n*, 404 Ill. App. 3d 184, 190 (2010). "The parties' intent

is not determined by viewing a clause or provision in isolation, or in looking at detached portions of the contract." *Thompson*, 241 Ill. 2d at 441.

¶ 29 JTI notes that a representative for EAS did not sign the agreement. Instead, the agreement was entered into, executed, and signed by two parties only, namely, QTS and JTI. Thus, JTI argues that EAS, as a nonparty to the agreement, cannot invoke the arbitration provision in the agreement. A nonparty to an arbitration agreement can neither compel arbitration nor be compelled to arbitrate. *Vukusich v. Comprehensive Accounting Corp.*, 150 Ill. App. 3d 634, 640 (1986). The status of a person or entity entitled to compel arbitration is determined from the language of the agreement containing the arbitration provision. *Id.* at 642.

¶ 30 JTI references specific provisions in the agreement in support of its argument that EAS was not a party to the contract. Specifically, JTI cites to the preamble of the agreement, which refers to: "[t]his Distributorship Agreement ('Agreement'), entered into as of July 1, 2009, between Quixote Transportation Safety, Inc. *** and John Thomas, Inc." JTI also points to section 15 of the agreement, which states that: "[t]his Agreement constitutes the entire understanding of the parties and supersedes any and cancels all previous Agreements made between the parties and may not be changed in any way, except by an Instrument, in writing, and signed by *both* parties." (Emphasis added.) Furthermore, JTI points to the assignment provision in the agreement and argues that a provision allowing QTS to assign its rights to any subsidiary or affiliated business entity would be meaningless if QTS's subsidiaries and affiliated companies were considered parties to the agreement.

¶ 31 In response, EAS acknowledges that it was not a signatory to the agreement but cites *Dannewitz v. Equicredit Corp. of America*, 333 Ill. App. 3d 370, 373 (2002), for the proposition that arbitration is proper where the signatories to an agreement intended that nonsignatories were to derive benefits from the agreement and where the arbitration clause itself is susceptible to this interpretation. EAS argues that a review of the contract as a whole indicates that EAS, as a wholly-owned subsidiary of QTS, is a party and can enforce the arbitration provision. EAS argues that JTI's interpretation ignores the plain language of the agreement and renders significant portions of it meaningless. EAS points to the following definition of "QTS" in a "whereas" clause of the agreement: "Quixote Transportation Safety and its affiliated companies (hereinafter referred to collectively as 'QTS') manufacture certain transportation safety products described on Exhibit A attached hereto." EAS argues that it is clearly identified as an affiliated company of QTS in Exhibit A of the agreement, which lists products manufactured by EAS. Moreover, it notes that, under the warranty and indemnification section, the agreement indicates that "QTS makes the warranties set forth in Exhibit A for its products." Exhibit A addresses a limited warranty extended by EAS.

¶ 32 Keeping the basic rules of contract interpretation in mind, we conclude that the plain language of the agreement evidences the parties' intention to make EAS a party to the agreement. The agreement provided distributor rights to JTI with respect to products manufactured by EAS. The transportation safety product at issue in the underlying Beard litigation was manufactured by EAS and distributed by JTI.

¶ 33 In addition, we note that the "whereas" clause in the agreement defines QTS as "QTS and its affiliated companies." JTI argues that the "whereas" clause is not a part of the contract because it was never specifically incorporated into the operative portion of the agreement. We disagree. Illinois courts have held that a preliminary recital, defined as an explanation of the circumstances surrounding the contract's execution, does not become a binding obligation unless referred to in the operative portion of the contract. *McMahon v. Hines*, 298 Ill. App. 3d 231, 237 (1998). The specific provision in the present case contains two definitions. It defines "QTS" as "Quixote Transportation Safety and its affiliated companies" and defines "Products" as "certain transportation safety products described on Exhibit A attached." These terms are extensively utilized throughout the operative portion of the agreement. Also, Exhibit A specifically identifies EAS as the company that manufactures the listed products.

¶ 34 JTI's interpretation would also create an inconsistency with regard to the warranty provision of the agreement where the agreement reflects that warranties are extended by QTS, but Exhibit A identifies EAS as the party extending the warranty. The conclusion that EAS is a party to the agreement eliminates this inconsistency. Moreover, JTI contends that EAS's interpretation would render the assignment provision in the agreement, allowing QTS to assign its rights to any affiliated business or company, meaningless and redundant. However, the fact that QTS may assign its rights pursuant to the agreement does not mean that EAS, which is specifically identified in the agreement, is not a party to the agreement. There is nothing in this provision that precludes EAS from being designated a party to the agreement. Thus, we conclude that EAS, as a named

affiliate in the agreement, was a party to the agreement and, thus, could enforce the arbitration provision.

¶ 35 JTI next argues that the trial court erred in compelling arbitration because EAS had waived any right to arbitration. The proper standard of review is dictated by the nature of the question presented to the trial court. *Midland Funding LLC v. Hilliker*, 2016 IL App (5th) 160038, ¶ 26. Here, the trial court was asked to determine as a matter of law whether EAS's participation in the underlying Beard litigation constituted a waiver of its right to arbitrate. Thus, the standard of review is *de novo*. *Id.*

¶ 36 Arbitration is a favored method of resolving disputes in Illinois. *Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1095 (2001). However, a contractual right to arbitrate may be waived just like any other contractual right. *Id.* A court will find waiver where the party's conduct is inconsistent with the arbitration clause, thereby indicating an intention to abandon the right to arbitrate. *Bishop v. We Care Hair Development Corp.*, 316 Ill. App. 3d 1182, 1191 (2000). The party's conduct results in waiver when the party submits arbitrable issues to a court for decision. *Id.* Thus, waiver will be found where the party seeking to compel arbitration invokes the judicial process and substantially participates in litigation to a point that is inconsistent with an intent to arbitrate, to the detriment or prejudice of the other party. *Midland Funding LLC*, 2016 IL App (5th) 160038, ¶ 27. For example, Illinois courts have found that the following conduct constitutes waiver: filing a motion for summary judgment on an arbitrable issue; filing an answer without asserting the right to arbitrate; and initiating legal proceedings and participating in a trial on the merits.

Schroeder Murchie Laya Associates, Ltd., 319 Ill. App. 3d at 1096. "Whether a party's conduct results in waiver depends on the unique facts and circumstances present in a particular case." *Midland Funding LLC*, 2016 IL App (5th) 160038, ¶ 27. The courts disfavor a finding that a party has waived its contractual right to arbitrate. *Schroeder Murchie Laya Associates, Ltd.*, 319 Ill. App. 3d at 1096.

¶ 37 JTI argues that EAS's conduct constituted waiver where EAS filed a counterclaim against JTI for contribution and indemnification and availed itself of discovery tools not readily available in arbitration. Specifically, JTI notes that EAS's counsel actively questioned John Thomas Dvorak, the president and owner of JTI, at a deposition in December 2014 with regard to allegations subsequently brought in EAS's counterclaim and issued requests to produce to JTI in March 2015.

¶ 38 In support of its position, JTI cites *Woods v. Patterson Law Firm, P.C.*, in which the appellate court found that the defendants' conduct in filing two section 2-615 motions to dismiss the plaintiffs' complaint, filing a demand for a bill of particulars, issuing a subpoena for documents to a third-party, serving the plaintiffs with requests to produce documents and written interrogatories, and serving the plaintiffs with a notice of deposition constituted waiver. 381 Ill. App. 3d 989, 995-96 (2008). The court concluded that the proper focus of the inquiry is whether the defendants acted inconsistently with their right to compel arbitration by actively participating in the judicial forum, not whether they were successful. *Id.* at 997. The court further found that the active participation was the defendants' motion practice and their attempt to obtain discovery through filing interrogatories and depositions. *Id.*

¶ 39 In contrast, EAS argues that the filing of a counterclaim and participating in limited discovery does not operate as waiver of its right to arbitrate. EAS cites *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC,* 382 Ill. App. 3d 1171, 1176 (2008), which concluded that the defendant's conduct in filing a responsive pleading, *i.e.,* a counterclaim, along with a 10½-month delay in asserting a right to arbitration did not result in waiver. In making this decision, the court recognized that the defendant filed the counterclaims to preserve rights that may have been lost had the counterclaims not been filed. *Id.* Similarly, in *Edward Electric Co. v. Automation, Inc.*, 164 Ill. App. 3d 547, 555 (1987), the appellate court concluded that the filing of a counterclaim and answer did not automatically result in a waiver of arbitration rights. Moreover, EAS cites *Kostakos v. KSN Joint Venture No. 1,* 142 Ill. App. 3d 533, 536-37 (1986), for the proposition that a party's participation in some discovery proceedings is not so inconsistent with the contractual right to arbitrate as to indicate an abandonment of that right. The defendant in *Kostakos* filed an answer, participated in numerous procedural motions, and participated in limited discovery by filing requests to produce documents and participating in depositions taken by the plaintiff. *Id.* at 535. Although the court recognized that the defendant did subpoena documents, which is allowed in arbitration, it observed that the defendants did not file interrogatories or take depositions, procedures not available in arbitration. *Id.* at 537.

¶ 40 Here, the plaintiff initiated the Beard litigation in August 2012. In March 2015, EAS filed a counterclaim for contribution and indemnification against JTI in response to the plaintiff's complaint asserting various claims against EAS and numerous other parties.

EAS filed the counterclaim after the plaintiff initiated a new, independent cause of action against JTI and after a codefendant identified JTI as a third-party defendant. EAS also filed the counterclaim less than two months before the scheduled trial date. EAS was brought into complex multiple-party litigation in the late stages of discovery with an impending trial date. EAS did not have the right to compel all of the parties to arbitrate their various claims. Instead, it was required to respond to the pleadings and motions that were filed by the various parties to preserve rights that may have been lost had the counterclaim not been filed. Thus, we find EAS's conduct in filing the counterclaim was responsive to the litigation initiated by the plaintiff.

¶ 41 Moreover, with regard to EAS's participation in discovery, EAS notes that JTI's president was deposed in December 2014, only two days after a codefendant identified JTI as a third-party defendant. At the time of the deposition, EAS had not initiated any proceedings against JTI. In addition, the deposition was noticed by the plaintiff's counsel, not EAS. Eight attorneys actively participated in the deposition. Further, the request to produce documents issued to JTI requested documents pertaining to insurance coverage. Specifically, the requests asked for a copy of JTI's liability insurance policies; material reflecting any attempt on the part of JTI to have EAS named as an additional insured on any liability insurance policy; and material addressing the coverage or potential coverage of EAS under any insurance policy. JTI never responded to these requests. Also, EAS did not serve interrogatories on JTI. This limited participation in discovery was merely responsive to the litigation pending against EAS and did not constitute active participation. Accordingly, like *Kostakos*, we conclude that EAS's

participation in the judicial forum was not so inconsistent with the contractual right to arbitrate as to indicate an abandonment of that right.

¶ 42 Furthermore, we note that the agreement and the AAA rules support our finding that EAS has not waived its right to arbitrate. The agreement instructs that the failure of either party to enforce the provisions shall not be construed as a waiver of those provisions or of the right of that party thereafter to enforce those provisions. In addition, the agreement indicates that any controversy or claim arising out of the agreement shall be settled in arbitration in accordance with the rules of the AAA. Rule 52(a) of the AAA provides that "no 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." Thus, we conclude that EAS's limited actions in filing the counterclaim, issuing requests to produce, and participating in a deposition were not inconsistent with the arbitration clause.

¶ 43 When evaluating waiver, this court must also consider whether the party's delay in seeking arbitration prejudiced the party opposing arbitration. *Midland Funding LLC*, 2016 IL App (5th) 160038, ¶ 33. Thus, we must consider whether JTI was prejudiced by EAS's delay in seeking arbitration. EAS was first named as a defendant in the Beard litigation on March 28, 2014. JTI was first identified as a third-party defendant by a codefendant on December 9, 2014. EAS filed its counterclaim against JTI on March 18, 2015. On June 29, 2015, approximately three months after filing its counterclaim, EAS filed its arbitration demand. JTI has not identified any prejudice that it has suffered as a result of this delay. Thus, we conclude that the record does not support a finding of prejudice. Accordingly, we affirm the court's order compelling arbitration. Because we

find that EAS is a party to the agreement, we need not address JTI's remaining arguments concerning assignment.

¶ 44 JTI also argues that the trial court abused its discretion in granting EAS's motion for amendment by interlineation. We disagree. To determine if a court abused its discretion in denying a proposed amendment, the reviewing court must consider the following four factors: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleadings could be identified. *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). As a general rule, leave to amend is freely granted. *Wallace v. Weinrich*, 87 Ill. App. 3d 868, 876 (1980).

¶ 45 Here, EAS filed its counterclaim raising the assignment issue without indicating whether the assignment was oral or written. After JTI argued that EAS had failed to attach any alleged written assignment as an exhibit to its counterclaim, EAS sought to amend its counterclaim to incorporate the written assignment executed in March 2016 in accordance with section 2-606 of the Code. The assignment was consistent with EAS's status as a party to the agreement and was consistent with EAS's right to enforce the provisions contained therein. JTI encountered no prejudice or surprise by the proposed amendment because EAS asserted in its counterclaim that it was entitled to enforce the provisions of the agreement as a party and as a result of an assignment. Moreover, at the March 1, 2016, hearing, EAS indicated that there was an assignment. Shortly thereafter, on March 24, the assignment was executed. EAS filed its motion for leave to file the

amendment in June 2016. Thus, we conclude that it was timely filed and brought at an appropriate opportunity. Accordingly, we conclude that the court did not abuse its discretion by allowing the amendment.

¶ 46 The last argument that we must address is whether the trial court's denial of JTI's motion to stay the trial court proceedings in accordance with section 2 of the Act (710 ILCS 5/2 (West 2014)) should be reversed. Under section 2(d) of the Act, any action involving an issue subject to arbitration shall be stayed pending arbitration, or if the issue is severable, the stay may be with respect to arbitrable issues only. 710 ILCS 5/2(d) (West 2014).

¶ 47 EAS argues that a stay of proceedings is presently in place during the pendency of the appeal and, thus, JTI's argument is moot. We disagree. On August 1, the trial court entered the following order: "[e]nforcement of the portion of the Order entered on June 15, 2016, ordering the parties to arbitrate is stayed pending interlocutory appeal." Although there is a stay in place pending resolution of this interlocutory appeal, the court was statutorily required to stay the civil proceedings pending arbitration. Thus, we reverse the trial court's order denying JTI's motion to stay the civil proceedings and remand for the trial court to stay the civil proceedings pending arbitration.

¶ 48 In summary, we affirm the circuit court's June 15, 2016, order compelling the parties to arbitrate. We reverse the court's July 11, 2016, order with regard to JTI's motion to stay the civil proceedings and remand for the trial court to issue an order in accordance with section 2 of the Act.

¶ 49 Affirmed in part and reversed in part; cause remanded with directions.