

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

**DANKO HOLDINGS, L.P.,** : **No. CV-19-0636**  
**& DANIEL A. KLINGERMAN,** :  
**Plaintiffs** :  
 :  
**vs.** :  
 :  
**J.C. FORESTREE, INC., JAMES CORL,** :  
**& WHEELAND LUMBER COMPANY,** : **Defendant Wheeland's Petition**  
**Defendant** : **to Compel Arbitration**

**OPINION AND ORDER**

Before the court is Defendant Wheeland's Petition to Compel Arbitration. As this court noted in its March 27, 2020 Opinion and Order, this case has lingered at the pleading stage for far too long. Plaintiffs filed their original Complaint on April 18, 2019. Wheeland filed Preliminary Objections to the complaint on May 20, 2019. Briefs were submitted and oral argument was held on September 24, 2019.

Wheeland first claimed that Count VIII of the complaint, a claim under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, should be dismissed. Plaintiffs conceded such and accordingly, by subsequent Order of this Court, Count VIII was dismissed.

Wheeland next argued that Plaintiffs' request for punitive damages in connection with Count V, trespass, Count VI, agricultural crop destruction, and Count IX, civil conspiracy, should be stricken because Plaintiffs allegedly failed to plead any facts relating to the state of mind of Defendant that would support a claim for punitive damages. The court agreed as well and granted Wheeland's motion to strike Plaintiffs' punitive damages requests.

Wheeland further submitted that the request for relief in the Complaint as set

forth in Paragraphs 73 and 83 should be stricken arguing that this relief was expressly not permitted pursuant to a cause of action under 42 Pa. C.S. § 8311. This preliminary objection was granted and Paragraphs 73 and 83 of Plaintiffs' Complaint were stricken.

Alternatively, the court denied Wheeland's requests to dismiss Count IX, civil conspiracy, as well as Wheeland's request to dismiss Counts III, IV, V, VI, VII and IX. Wheeland argued that the civil conspiracy count should have been stricken based on insufficiency grounds. As to Count VII, Wheeland argued that the agricultural crop damage count was insufficiently pled. Finally, with respect to the remaining counts, Wheeland argued that Plaintiffs' claims for conversion of the timber were limited to Counts I and II and that the other counts could not be pursued. Wheeland more specifically argued that any claims pursuant to 42 Pa. C.S. § 8311 were in lieu of all other damages or civil remedies provided by law. The court concluded that while Plaintiffs could not receive any double recovery of damages, they were permitted to plead causes of action in the alternative.

On January 17, 2020, Wheeland filed its Answer with New Matter and Cross-claim to Plaintiffs' Complaint. Significantly, Wheeland denied jurisdiction pursuant to Pa. R. C.P. 1029 (e). In Paragraph 145 of its New Matter, Wheeland alleged that "the contract at issue requires arbitration." With respect to its Crossclaim, Wheeland asserted that the co-defendants were solely liable to Plaintiff for any proven damages and liable over to Wheeland, or jointly and severally liable with Wheeland.

On February 18, 2020, Defendants Forestree and Corl filed their response to the New Matter and Crossclaim of Wheeland. On February 20, 2020, Plaintiffs filed their Reply to the New Matter and Crossclaim of Wheeland.

On May 11, 2020, Wheeland filed a Petition to Compel Arbitration. The

parties submitted briefs and the court held an argument on July 7, 2020.

By way of further background, this case was first assigned to Judge Linhardt. He entered a recusal Order on July 19, 2019. The case was assigned to this court, which entered a scheduling order on January 3, 2020 setting, among other things, a cut-off date for the completion of discovery of November 2, 2020.

Further, during argument in this matter, the court was informed that Wheeland served Requests for Production of Documents upon Plaintiffs and obtained Plaintiffs' Responses and responsive documents, including the pre-harvest timber inventory and Plaintiffs' expert report from FORECON.

Arbitration agreements are governed by the Pennsylvania Uniform Arbitration Act, 42 Pa. C.S. § 731, et seq. An agreement to arbitrate can be asserted by preliminary objections or by petitions. Such agreements are favored as an effective method of dispute resolutions. Pursuant to § 7304 of the Act, entitled "Court Proceedings to Compel or Stay Arbitration" if a challenge to the agreement is raised, the court shall proceed summarily to determine the issue so raised and shall order the parties to proceed with arbitration if it finds for the moving party.

If the validity of the agreement is not at issue, the court may be asked to determine if the party seeking arbitration has waived their right to enforce the agreement. As Plaintiffs assert, while it is undisputed that Pennsylvania law allows arbitration of claims where the parties have entered into a valid arbitration agreement and where the claims at issue are covered by the agreement, the right to enforce an arbitration provision is not absolute and can be waived. *Goral v. Fox Ridge, Inc.*, 683 A.2d 931, 933 (Pa. Super. 1996).

As the Superior Court noted in *Stanley-Laman Group v. Hyldahl*, "[w]aiver

may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with the purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary." 939 A.2d 378, 382 (Pa. Super. 2007).

Further, a party's acceptance of the regular channels of the judicial process can demonstrate a waiver of arbitration. Acceptance of judicial process includes a party's failure to raise the arbitration issue promptly, a party's engagement in discovery, and a party waiting until it receives adverse rulings on pretrial motions before raising arbitration. *Id.* at 382-383, citing *Smay v. E.R. Stuebner, Inc.*, 864 A.2d 1266, 1278 (Pa. Super. 2004).

"However, a waiver of a right to proceed to arbitration pursuant to a term of a contract providing for binding arbitration should not be lightly inferred and unless one's conduct has gained him an undue advantage or resulted in prejudice to another, he should not be held to have relinquished the right." *Id.* at 383, citing *Kwalick v. Bosacco*, 478 A.2d 50, 52 (Pa. Super. 1984).

In this particular case, the court finds waiver. Wheeland did not promptly raise the issue of arbitration but instead waited until after extensive pleading practice occurred, preliminary objections were litigated and decided, some discovery took place and a scheduling order was entered. Indeed, while this court noted in its March 27, 2020 Order that the case has lingered at the pleading stage far too long, Wheeland waited another two months before filing the petition to compel arbitration. The Complaint was filed on April 18, 2019 and Wheeland failed to file its petition to compel arbitration until approximately thirteen (13) months had passed. Clearly, Wheeland failed to raise the arbitration issue promptly.

Next, and as indicated above, Wheeland engaged in the discovery process. It utilized the Pennsylvania Rules of Civil Procedure to its advantage by serving upon Plaintiffs

a Request for Production of Documents and receiving said documents.

Next, Wheeland clearly waited until it received adverse rulings on its pretrial motion before raising arbitration. The Order denying in part Wheeland's preliminary objections was dated December 12, 2019. Wheeland waited another four (4) months until he filed his petition to compel arbitration. Finally, and perhaps determinatively, Wheeland gained an advantage by stalling and failing to promptly file a petition to compel arbitration. Specifically, Wheeland obtained a dismissal of Plaintiffs' claim under Pennsylvania's Unfair Trade Practices and Consumer Protection law, a dismissal of Plaintiffs' claims for punitive damages, a dismissal of Plaintiffs' claim for damages for the diminution in the value of their property as a result of the cutting and removal of the timber under two separate causes of action, and a holding that the plaintiffs cannot receive any double recovery of damages.

As in *Goral*, Wheeland requested arbitration "only as an alternative to [its] preferred option of winning a favorable ruling from the trial court." *Goral*, 683 A.2d at 933.

Finally, the court cannot ignore that in its original Answer and New Matter, Wheeland failed to argue that jurisdiction was improper. It limited its claim to jurisdiction under the Pennsylvania Rules of Civil Procedure.

### **ORDER**

**AND NOW**, this \_\_\_ day of September 2020, following a hearing and argument, the petition to compel arbitration by Wheeland Lumber Company is **DENIED**.

By The Court,

\_\_\_\_\_  
Marc F. Lovecchio, Judge

cc: Stephanie Carfley, Esquire  
McNees Wallace & Nurick, LLC (Counsel for Plaintiffs)  
570 Lausch Lane, Ste 200  
Lancaster PA 17601-3057  
Frank S. Miceli, Esquire  
Roberts Miceli LLP (Counsel for J.C. Forestree, Inc. & James Corl)  
146 East Water Street  
Lock Haven PA 17745  
C. Edward Mitchell, Esquire (Co-Counsel for Wheeland Lumber Company)  
Sarah E Argo, Esquire (Co-counsel for Wheeland Lumber Company)  
PO Box 3118  
Scranton PA 18505-3118  
Matthew Clayberger, Esquire (Co-Counsel for Wheeland Lumber Company)  
Thomas, Thomas & Hafer, LLP  
PO Box 999  
Harrisburg, PA 17108-0999  
Gary Weber, Esquire  
Work file