Circuit Court for Charles County
Case No. C-08-CV-20-000606

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 190

September Term, 2021

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GARY SHAW, ET AL.

v.

LITZ CUSTOM HOMES, INC.

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Nazarian,
Beachley,
Murphy, Joseph F., Jr.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Beachley, J.

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Filed: December 9, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In July 2005, appellants Gary and Joann Shaw (the "Shaws") entered into a "Custom Home Construction Contract" with appellee Litz Custom Homes, Inc. ("Litz") to build a home in Bryans Road, Maryland. In September 2014, the Shaws filed a complaint against Litz in the Circuit Court for Charles County, alleging breach of contract and fraud related to "long term water intrusion" in their home.[1] Litz moved to dismiss, raising arbitration and limitations as affirmative defenses, and generally asserting that the Shaws' complaint failed to state a cause of action. The circuit court denied Litz's motion to dismiss, but stayed the case pending arbitration as provided in the operative contract. Over the next five years, the Shaws and Litz engaged in extensive discussions—which we shall address at length *infra*—concerning mediation and arbitration of the Shaws' claims. After the Shaws filed a demand for arbitration with the American Arbitration Association in February 2020, Litz filed, in the circuit court, a Petition to Stay Arbitration, followed by a motion for summary judgment in which Litz claimed that the Shaws had waived their contractual right to arbitration. After a hearing, the circuit court agreed with Litz and entered judgment against the Shaws.

In this appeal, we must resolve a single issue: Did the circuit court err in determining, as a matter of law, that the Shaws waived their contractual right to arbitrate claims against Litz arising out of the contract?

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[1] The Shaws also sued their insurance company, Nationwide Mutual Fire Insurance Company ("Nationwide"), for breach of contract.

Concluding that the court erred, we reverse the judgment and remand for further proceedings.

**FACTUAL AND PROCEDURAL BACKGROUND**

Because "our courts engage with the facts of each case to decide whether the party seeking arbitration has intentionally and unequivocally waived that right," *Gannett Fleming, Inc. v. Corman Constr., Inc.*, 243 Md. App. 376, 398 (2019), we shall carefully review the lengthy history of this case.

Litz built a custom home for the Shaws pursuant to a contract dated July 7, 2005. Paragraph 11.3 of the contract provided for arbitration:

> In the event of a dispute between the parties, the parties agree to submit such dispute to binding arbitration with the American Arbitration Association in accordance with its rules for commercial arbitration ("Arbitration"). Arbitration is to be conducted by [a] three (3) member panel the cost of which shall be paid in equal shares by the parties. The parties agree that each party shall pay its own attorney fees. The decision of the Arbitrators shall be final and binding on the parties.

After the home was completed, the Shaws apparently lived there without incident until their basement flooded on September 8, 2011. On September 5, 2014, the Shaws filed a complaint in the circuit court against Litz and their own homeowners insurer, Nationwide. Alleging defects in the construction of their home, the Shaws asserted claims against Litz for breach of contract and fraud; their sole claim against Nationwide alleged a breach of contract.

Litz moved to dismiss the Shaws' complaint, arguing the operative contract required

the Shaws to submit their claims to arbitration.[2] In their response to Litz's motion to dismiss, the Shaws expressly acknowledged "the existence of the arbitration clause within the contract," but noted that because Nationwide was not subject to the arbitration clause, it would be "in the interest of expedience and justice" that the case be adjudicated in the circuit court. On March 17, 2015, the court, without a hearing, denied the motion to dismiss, but stayed the case "pending arbitration in accordance with section 11.3" of the contract.

Rather than proceed to arbitration, the parties embarked upon five years of discussions that focused on the possibility of settling the Shaws' claims in an effort to avoid what they both conceded would be an expensive arbitration hearing.

Although we will not attempt to recount the minutiae of the parties' communications, we shall provide a summary of relevant events that transpired after entry of the stay order:

- August 3, 2015: Letter from the Shaws' attorney advising Litz's attorney that the Shaws had "authorized [counsel] to prepare the arbitration demand," but inquiring whether "a resolution of the issues between our clients" was possible.

- August 17, 2015: Letter from Litz's counsel requesting further documentation to support the Shaws' claims, and indicating that he would be "happy to look at any documentation" prior to the filing of arbitration.

Between August 2015 and August 2016, the parties continued to communicate and share information about the Shaws' damages. We resume our summary of events:

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[2] Litz also raised a limitations defense and asserted that the complaint failed to state a cause of action.

- August 12, 2016: Letter from the Shaws' attorney to Litz's attorney stating, "per our discussion I will contact, for arbitration purposes, retired Circuit Court Judges in our area who perform this service which as you and I discussed would be substantially preferable to utilization of the American Arbitration Association." Litz's counsel promptly responded that he was "willing to discuss the manner in which this case is arbitrated[.]"

- After the court issued a Notification of Contemplated Dismissal pursuant to Rule 2-507 on March 3, 2017, the Shaws moved to defer dismissal, stating their anticipation that the arbitration process could be completed within sixty days. The court deferred dismissal until July 31, 2017.

- July 13, 2017: The Shaws' counsel filed a "Status Update" with the circuit court, advising the court that the parties had agreed to use Judge Sothoron as a mediator, but confirming that Litz's counsel "would prefer a different Arbitrator."

- Between August 2017 and July 2018 the parties exchanged multiple letters in an attempt to arrange mediation with Judge Sothoron.

- July 17, 2018: The circuit court issued a second Notification of Contemplated Dismissal.

- August 1, 2018: The Shaws moved to defer contemplated dismissal, asserting that "if this matter is not resolved within the next six (6) month period," they intended to file a "Motion to Compel Arbitration."

- August 30, 2018: The parties (including Nationwide) filed a Stipulation of Dismissal.

- September 5, 2018: Letter from the Shaws' counsel to the Shaws advising them of the dismissal and stating that "Litz has reaffirmed its obligation to submit to the binding arbitration" pursuant to the contract.

- Between September 2018 and March 2019, counsel exchanged letters and emails between themselves and Judge Sothoron in an effort to schedule mediation. In the end, mediation was never scheduled.

- April 5, 2019: The Shaws' attorney advised Litz's attorney that he was withdrawing from the case.

- February 4, 2020: The Shaws file a written "Demand for Arbitration" with

the American Arbitration Association (“AAA”).

- September 21, 2020: An AAA panel issued an Order, in response to Litz’s motion to dismiss or for summary judgment, that a court, not the arbitration panel, must decide whether the Shaws waived their right to arbitrate the controversy.

- October 14, 2020: Litz filed in the circuit court a petition to stay arbitration pending the ruling on a motion for summary judgment to be filed by Litz on whether the Shaws waived arbitration. The Shaws consented to the stay.

- March 9, 2021: After a hearing during which the court considered arguments on Litz’s motion for summary judgment and the Shaws’ opposition thereto, the court granted summary judgment in favor of Litz, concluding that the Shaws’ conduct constituted a waiver of their right to arbitration under the contract.

This timely appeal ensued.

**DISCUSSION**

We begin with some basic principles governing a party’s waiver of the right to arbitration. “In Maryland, it is well-settled that waiver is ‘the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances.’” *Cain v. Midland Funding, LLC*, 452 Md. 141, 161 (2017) (quoting *Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Ctr. at Parole, LLC*, 421 Md. 94, 122–23 (2011)). “The intention to waive must be clearly established and will not be inferred from equivocal acts or language.” *Freedman v. Comcast Corp.*, 190 Md. App. 179, 198 (2010) (quoting *Charles J. Frank, Inc. v. Associated Jewish Charities of Balt., Inc.*, 294 Md. 443, 449 (1982)).

Arbitration may be waived by failing to make a timely demand for arbitration. *Stauffer Constr. Co., Inc. v. Bd. of Educ. of Montgomery Cty.*, 54 Md. App. 658, 666–68

(1983). "[A]n inappropriate delay in demanding arbitration acts as a relinquishment of the contractual right to compel such a proceeding[.]" *Town of Chesapeake Beach v. Pessoa Constr. Co., Inc.*, 330 Md. 744, 748–49 (1993) (quoting *Stauffer Constr.*, 54 Md. App. at 668).

Writing for our Court in *Gannett Fleming*, Judge Kehoe stated,

> Maryland appellate decisions have identified two ways in which a court may find a right to arbitration is waived for "inappropriate delay" in asserting the right. First, a party may fail to make a demand for arbitration within the time limits spelled out in the text of the agreement itself. . . .
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> Second, even when the arbitration agreement sets no demand deadlines, a right to arbitration may be waived if the party waits too long to assert the right to arbitration and instead "engage[s] itself substantially in the judicial forum." *The Redemptorists*[ *v. Coulthard Servs., Inc.*, 145 Md. App. 116, 141 (2002)]. Because "a resort to litigation is inconsistent with an intent to arbitrate, . . . one who litigates an issue that otherwise would be subject to arbitration waives his right subsequently to arbitrate that issue." *Stauffer Construction*, 54 Md App. at 667, 460 A.2d 609. The question in these cases is essentially how long a defendant may let litigation go on before attempting to shove the dispute out of the judicial forum.

243 Md. App. at 393–95 (footnote omitted).

In the instant case, there is no dispute that the arbitration provision does not contain a time limit for a party to demand arbitration. Thus, we shall focus our attention on the second manner in which a party may waive arbitration—whether the Shaws "wait[ed] too long to assert the right to arbitration and instead 'engage[d] [themselves] substantially in the judicial forum.'" *Id.* at 394 (quoting *The Redemptorists*, 145 Md. App. at 141).

The Shaws contend that they did not "engage substantially in the judicial forum" because "the parties quickly stayed the court proceedings in order to engage in the alternative dispute resolution process." They further assert that the communications

between the parties demonstrated that the parties intended to pursue mediation and, if unsuccessful, proceed to arbitration. In the Shaws' view, they did not intentionally and unequivocally waive the right to arbitrate.

Litz responds that the Shaws substantially engaged the judicial process when they filed suit in circuit court, opposed Litz's request to stay the proceedings in favor of arbitration,[3] and then proposed mediation rather than arbitration. Additionally, Litz avers that the circuit court correctly concluded that the five-year delay "was purely a product of the Shaws seeking to resolve the claim without engaging in *any* arbitration." Litz therefore contends that the court properly found that the Shaws waived their contractual right to arbitration.

We review the circuit court's grant of summary judgment as a matter of law to determine whether the trial court was legally correct. *Windesheim v. Larocca*, 443 Md. 312, 326 (2015) (citing *Goodwich v. Sinai Hosp. of Balt., Inc.*, 343 Md. 185, 204 (1996)). Moreover, "[w]e review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Id.* (quoting *Myers v. Kayhoe*, 391 Md. 188, 203 (2006)). We stated in *Estate of Adams v. Cont'l Ins. Co.*, 233 Md. App. 1, 24 (2017) that

> "We generally limit our review to the grounds relied upon by the trial court." *Benway v. Md. Port Admin.*, 191 Md. App. 22, 46, 989 A.2d 1239 (2010). *Accord PaineWebber Inc. v. East*, 363 Md. 408, 422, 768 A.2d 1029 (2001) (stating that, "In appeals from grants of summary judgment, Maryland appellate courts, as a general rule, will consider only the grounds upon which

[3] Litz's appellate assertion notwithstanding, we note that Litz's motion to dismiss did not request a stay of the court proceedings.

> the lower court relied in granting summary judgment."). "We may, however, affirm the grant of summary judgment on a ground not relied upon by the circuit court if the alternative ground is one upon which the circuit court would have no discretion to deny summary judgment." *Rogers v. Home Equity USA, Inc.*, 228 Md. App. 620, 635, 142 A.3d 616 (2016) (internal quotation marks and citations omitted) (quoting *Warsham v. James Muscatello, Inc.*, 189 Md. App. 620, 635, 985 A.2d 156 (2009)).

Here, the court's basis for granting Litz's motion for summary judgment was as follows:

> And again, I believe that [Litz] was ready, willing and able at all times to engage in ADR, whatever form that may have been. I find that the -- that the [Shaws] engaged in the judicial process. Again, they filed suit, they opposed the arbitration, which the court granted ultimately at their hearing.[4] And I do find that there is a waiver of right conduct and I will grant the motion for summary judgment and dismiss the case.

In its brief, Litz characterizes the court's decision as concluding that the five-year delay was a "product of the Shaws seeking to resolve the claim without engaging in *any* arbitration." Although Litz is correct that the court found that Litz was not responsible for the delay and that Litz "was ready, willing and able at all times to engage in ADR," we see no evidence that the court expressly or implicitly determined that the Shaws engaged in a course of delay with the intention of disavowing arbitration. The court did not equate the Shaws' delay to an intentional and unequivocal waiver of arbitration; to the contrary, the court noted that "if the matter was not resolved by mediation then the parties would have arbitrated." Accordingly, we reject Litz's broad interpretation that the delay in this case

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[4] The docket entries do not reflect that the court held a hearing on the motion to dismiss. At oral argument, appellee's counsel confirmed that no hearing was held on the motion.

provided the basis for the circuit court's grant of summary judgment.

Even if we were to assume that the court relied on the Shaws' delay as a basis for granting summary judgment, such a determination would not be supported by this record. In our view, the substantial communications between the parties, viewed in a light most favorable to the Shaws, would not support a finding that the Shaws intentionally and unequivocally waived arbitration. Within months of the March 17, 2015 stay order, the Shaws' attorney advised Litz's attorney that the Shaws had "authorized [counsel] to prepare the arbitration demand[.]" On August 12, 2016, the Shaws' attorney advised Litz's attorney that "per our discussion I will contact, for arbitration purposes, retired Circuit Court Judges in our area[.]" After the court issued a Notification of Contemplated Dismissal on March 3, 2017, the Shaws expressed their intent to complete the arbitration process within sixty days in their motion to defer dismissal. After a second Notification of Contemplated Dismissal in July 2018, the Shaws again expressed their intent to file a motion to compel arbitration. We see nothing in the attorneys' correspondence after entry of the stay order to suggest that the Shaws intentionally and unequivocally waived the arbitration provisions of the contract. To the contrary, in the September 5, 2018 letter from the Shaws' attorney to the Shaws, counsel stated that "Litz has reaffirmed its obligation to submit to the binding arbitration" as provided in the contract. Although Litz's counsel may ultimately challenge the accuracy of the Shaws' attorney's recollection of their conversation concerning arbitration, that statement, when viewed most favorably to the Shaws, supports the conclusion that both sides were committed to—and had agreed to—arbitrate the dispute as of September 2018.

Having determined that the post-stay communications between the parties are equivocal at best (and perhaps even favorable to the Shaws' position that they did not intentionally waive arbitration), we are essentially left with determining whether the Shaws' filing of a complaint and a response to Litz's motion to dismiss constitutes, in the parlance of our caselaw, "substantial engagement in the judicial forum." We conclude that it does not.

In *Abramson v. Wildman*, Judge Zarnoch summarized the applicable law on waiver of arbitration based on a party's participation in court proceedings:

> On a number of occasions, Maryland appellate courts have addressed the issue of whether the right to arbitrate has been waived by participation in litigation that is inconsistent with an intent to insist upon enforcing arbitration. Participation in a judicial proceeding that results in a final judgment may, in certain circumstances, waive the right to arbitrate. Some limited participation in judicial proceedings does not constitute a waiver. Whether an answer directed to the merits is filed is a factor. Participation in extensive discovery is a factor in determining waiver. However, also relevant is whether a party utilized discovery devices that would not have been available in arbitration. Delay in attempting to compel arbitration, by itself, may not be conclusive, although coupled with prejudice to the other party can support a finding of waiver. The filing of suit can be a significant act in a waiver calculus, and in some instances it perhaps could be dispositive. Nevertheless, if there is a legitimate reason for participating in litigation, it will not be deemed a waiver.

184 Md. App. 189, 200–01 (2009) (internal citations and quotation marks omitted).

In *Brendsel v. Winchester Constr. Co., Inc.*, 392 Md. 601, 603 (2006), the Court of Appeals held that a "contractor does not waive its right to compel arbitration of an arbitrable dispute merely by seeking and obtaining an interlocutory mechanics' lien." There, the Court rejected the property owners' request "to adopt a *per se* rule that the mere seeking of an interlocutory lien constitutes a waiver of arbitration" without regard to the

contractor's actual intent. *Id.* at 610. In doing so, the Court stated, "[w]e have also made clear, however, specifically with respect to waiver of a contractual right to arbitrate disputes, that waiver 'involves a matter of intent that ordinarily turns on the factual circumstances of each case' and that the intention to waive 'must be clearly established and will not be inferred from equivocal acts or language.'" *Id.* (quoting *Gold Coast Mall v. Larmar Corp.*, 298 Md. 96, 109 (1983)).

We also find *Harris v. Bridgford*, 153 Md. App. 193 (2003) instructive. In that case, Bridgford claimed that Harris owed him $27,000 in unpaid legal fees. *Id.* at 196. After Harris filed a complaint with the Maryland State Bar Association Committee on the Resolution of Fee Disputes, Harris and Bridgford signed a binding arbitration agreement designating the Committee as the arbitrator of the fee dispute. *Id.* at 196–97. Harris later sought to withdraw his consent to arbitration, to which Bridgford "strongly objected," but the Committee dismissed Harris's complaint for arbitration. *Id.* at 197. Bridgford then filed a complaint in the District Court, alleging breach of contract by Harris for failing to pay for Bridgford's legal services. *Id.* Harris prayed a jury trial, and the case was transferred to the circuit court. *Id.* After Harris filed an answer and counterclaim, Bridgford filed a "Motion to Arbitrate" pursuant to the agreement executed with the State Bar Association Committee and asked the court to stay the case and compel arbitration. *Id.* at 197–98. Harris responded by arguing that Bridgford waived arbitration when he initially filed suit in the District Court. *Id.* at 198. The circuit court granted Bridgford's motion to arbitrate. *Id.*

On appeal, Harris urged us to adopt a *per se* rule "that the filing of the suit automatically waived arbitration." *Id.* a 202–03. We rejected Harris's argument for a *per se* rule:

> Certainly, the filing of a suit is a significant act in a waiver calculus, and in some instances it perhaps could be dispositive. We are persuaded, however, that a per se rule is the antithesis of the proposition that a knowing and intentional waiver of arbitration is generally a question of fact and ordinarily turns on the factual circumstances of each case. As we said recently in *The Redemptorists*, "there is no 'bright-line' test for determining waiver, . . . the determination of what conduct constitute[s] an 'intentional relinquishment' of one's right to arbitrate is highly factually-dependent." *The Redemptorists*, 145 Md. App. at 137[.]

*Id.* at 206 (alterations in original). We concluded that "the filing was an important event, but it is only one factor that is to be considered in light of all the circumstances surrounding the dispute and the efforts to resolve it." *Id.* at 207. Although we acknowledged that Bridgford could have pursued "a more appropriate action" by filing a petition to compel arbitration as provided in Section 3-207 of the Courts and Judicial Proceedings Article rather than a District Court suit, we held that "Bridgford's resort to litigation prior to filing a petition with the court to order arbitration did not constitute, as a matter of law, a knowing and intentional waiver of his right to arbitrate."[5] *Id.* at 208. The *Harris* Court therefore rejected any *per se* rule that a party who initiates litigation waives arbitration as a matter of law. *Compare id. with Abramson*, 184 Md. App. at 201–02 (party waived arbitration by

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[5] In *Harris*, the Court made fact findings after a hearing on the petition to arbitrate, which findings we concluded were not clearly erroneous. 153 Md. App. at 208. The instant case, however, was resolved on summary judgment, thus requiring an independent view of the facts in a light most favorable to the Shaws.

filing suit in District Court, engaging in discovery not available in arbitration, and waiting nearly four months to file a petition to compel arbitration).

We turn to the present case. It is undisputed that the Shaws filed their complaint in the circuit court, an action that "can be a 'significant act in a waiver calculus,'" and in some circumstances could be dispositive. *Abramson*, 184 Md. App. at 201. In their response to Litz's motion to dismiss, the Shaws readily acknowledged the arbitration provision in the contract, but requested the court to accept jurisdiction because they also sued Nationwide, an entity that was not a party to the arbitration agreement. We also note that the Shaws responded to the statute of limitations defense raised in Litz's motion to dismiss as well as Litz's claim that the complaint failed to state a cause of action. Although we acknowledge that the more appropriate course would have been for the Shaws to move for a stay and expressly consent to arbitration, we are also mindful that Nationwide was not subject to compelled arbitration and the suit was filed within days of expiration of the applicable three-year statute of limitations. Moreover, we infer that the Shaws filed a response to Litz's motion to dismiss because they did not want their complaint dismissed based on limitations or failure to state a cause of action. None of these circumstances were considered by the circuit court, circumstances which suggest that the Shaws had "legitimate reason for participating in litigation[.]" *Id.*

As previously noted, whether a party has waived its right to arbitration is a fact-specific inquiry. *Gannett Fleming*, 243 Md. App. at 398. We conclude that the circumstances here are insufficient to establish that the Shaws, as a matter of law,

intentionally and unequivocally waived their right to arbitration. We therefore reverse the judgment and remand to the circuit court for further proceedings.

**JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS. APPELLEE TO PAY COSTS.**