

Circuit Court for Prince George's County  
Case No. CAL-19-06091

UNREPORTED  
IN THE APPELLATE COURT  
OF MARYLAND\*

No. 1488

September Term, 2022

---

GWENDOLYN JONES, ET AL.

v.

CARUSO BUILDER WASHINGTON  
OVERLOOK, LLC

---

Arthur,  
Shaw,  
Sharer, J. Frederick  
(Senior Judge, Specially Assigned),

JJ.

---

Opinion by Sharer, J.

---

Filed: October 19, 2023

\*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

The basis of the case before us is a dispute between property buyers, Gwendolyn Jones and Lorne Browne (“appellants”), and a property seller, Caruso Builder Washington Overlook, LLC (“Caruso Washington”), but more particularly involves the enforceability of an arbitration clause in a purchase agreement (the “Agreement”) executed by the parties in September 2018 for the sale of a home in Prince George’s County (the “Property”). The Agreement provided, in relevant part, that the parties would submit all disputes to binding arbitration, and that the arbitration clause would be enforceable for two years after the date of closing on the Property. It is not disputed that appellants closed on the Property in October 2018.

Several months later, appellants filed, in the Circuit Court for Prince George’s County, a civil complaint alleging that Caruso Washington had failed to disclose certain deferred water and sewer assessments related to the Property.

In October 2021, Caruso Washington filed a motion to dismiss the complaint, arguing that appellants were required to submit all disputes to arbitration. Appellants opposed the motion, arguing that Caruso Washington had waived its right to arbitration by failing to demand arbitration within the two-year period set forth in the Agreement.

Following a hearing, the court ruled in favor of Caruso Washington and dismissed appellants’ complaint on the grounds that appellants’ civil complaint was “premature.” The court did not reach the waiver issue.

In this appeal, appellants present two questions for our review:

1. Did the circuit court err in granting Caruso Washington’s motion to dismiss on the grounds that appellants’ complaint was “premature?”

2. Did Caruso Washington waive its right to enforce the arbitration clause ?

We hold that the circuit court erred in granting Caruso Washington’s motion to dismiss without deciding the waiver question. Thus, we shall remand to the circuit court for such further proceedings as may be required to determine whether Caruso Washington waived its right to enforce the arbitration clause.

### **BACKGROUND**

In September 2018, Appellants contracted with Caruso Washington, a homebuilder, for the sale and construction of the Property. As part of that transaction, the parties executed the Agreement, which included the following language:

#### **24. Arbitration.**

**i. In the event of a dispute between the parties, the parties agree to submit such dispute to a binding arbitration** (the “**Arbitration**”) administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules, as supplemented by its Supplementary Arbitration Procedures for Residential Construction. Arbitration is to be conducted by a hearing before one (1) arbitrator, the cost of which shall be paid in equal shares by the parties. The parties agree that each party shall initially pay its own attorney fees subject to the provisions of paragraph 23(ii). The decision of the Arbitrator shall be final and binding on the parties.

\* \* \*

**v. The provisions of paragraphs 4, 8-9 and 20-24, inclusive, of this Agreement shall survive for a period of two (2) years after the date of Closing but not thereafter.**

(Emphasis added.)

On October 30, 2018, appellants closed on the Property. In February 2019, appellants filed a civil complaint against Caruso Washington. In that complaint, appellants alleged that Caruso Washington had failed to disclose certain deferred water and sewer assessments related to the Property. Maryland law requires the seller of residential real property in Prince George’s County to provide, in the contract of sale, specific disclosures regarding any deferred water and sewer assessments. Md. Code, Real Property § 14-117.

In addition to appellants’ lawsuit, six other plaintiffs filed similar complaints against six different Caruso-related homebuilders. *Sullivan v. Caruso Builder Belle Oak, LLC*, 251 Md. App. 304, 313 n.2 (2021). Shortly thereafter, the defendant in one of those cases, Caruso Builder Belle Oak, LLC (“Caruso Belle Oak”), filed a motion to dismiss, claiming, among other things, that it had complied with the disclosure requirements at issue and that the plaintiff had failed to state a claim upon which relief could be granted. *Id.* at 310. The court eventually agreed with Caruso Belle Oak and dismissed the plaintiff’s complaint. *Id.* at 310-11. The plaintiff thereafter noted an appeal to this Court. *Id.* at 311.

Due to the similarities between that case and the six other cases (including the instant case), the parties agreed to designate that case, which was captioned *Sullivan v. Caruso Builder Belle Oak, LLC*, as the “test case” and to stay the remaining cases (including the instant case) pending the outcome of that appeal. *Id.* at 313 n.2.

On July 2, 2021, we issued a reported opinion in *Sullivan*. *Id.* at 304. The sole issue in that case was whether the plaintiff had adequately alleged a violation of the statutory disclosure requirements. *Id.* at 315-16. We held that the plaintiff had stated a claim upon

which relief could be granted and that, consequently, the trial court had erred in granting Caruso Belle Oak’s motion to dismiss. *Id.* at 333-34. Accordingly, we remanded the case to the circuit court for further proceedings. *Id.* at 335.

On September 17, 2021, appellants filed, in the instant case, an amended complaint. Although appellants’ amended complaint included additional allegations, appellants’ primary claims – that Caruso Washington had violated the statutory disclosure requirements – remained viable.

On October 5, 2021, approximately three years after appellants closed on the Property, Caruso Washington filed a motion to dismiss the amended complaint, asserting that appellants’ claims should have been submitted to arbitration pursuant to the parties’ Agreement. On October 27, 2021, the court denied Caruso Washington’s motion without a hearing.

Thereafter, Caruso Washington filed a motion to alter or amend the court’s judgment. At the hearing that followed, Caruso Washington argued that appellants’ allegations, as set out in their original complaint, which was filed only a few months after appellants closed on the Property, should have been submitted to arbitration pursuant to the Agreement. Appellants argued that Caruso Washington had waived its right to arbitration because, by the time that Caruso Washington filed its motion to dismiss in October 2021, the two-year time limit set forth in the Agreement had lapsed and the arbitration provision was no longer enforceable.

During the hearing, the circuit court expressed concerns about the fact that appellants filed their initial complaint only a few months after closing on the Property, at a time when they should have submitted their claim to arbitration pursuant to the terms of the Agreement. The court suggested that appellants had the affirmative responsibility to pursue their initial complaint via arbitration. Appellants responded that, even if their initial complaint was improperly filed, Caruso Washington nevertheless had the responsibility to demand arbitration in a timely fashion, which they failed to do and which, consequently, resulted in a waiver of that right. Appellants insisted that the court, were it to grant Caruso Washington’s motion to dismiss, would be “rewriting the contractual agreement[.]” The court responded:

That part I disagree with. You know, you might be right that they waived, and that’s different. But to say that the Court is rewriting when – that’s why I go back to the fact that the contract says that you shouldn’t have filed this action in the first place.

I mean, I don’t think that’s fair to say the Court would be rewriting. Again, maybe the Court doesn’t find that there was waiver. That’s a different issue.

The court held the matter *sub curia* and subsequently issued an order amending its previous judgment and granted Caruso Washington’s motion to dismiss appellants’ complaint. The court stated: “Plaintiff’s Closing Date in the instant case was October 30, 2018, and the binding arbitration agreement survived for two years after the parties[’] closing date. Plaintiff’s filing of this matter was premature.” This timely appeal followed.

## DISCUSSION

Appellants contend that the court erred in granting Caruso Washington’s motion on the grounds that the filing of appellants’ initial complaint was “premature.” They assert that the existence of the arbitration provision did not preclude them from filing their complaint. Rather, they argue that the onus was on Caruso Washington to demand arbitration. Therefore, they conclude that Caruso Washington subsequently waived its right to arbitration by failing to demand arbitration within the two-year time period set forth in the Agreement.

“Arbitration is the process whereby parties voluntarily agree to substitute a private tribunal for the public tribunal otherwise available to them.” *Charles J. Frank, Inc. v. Associated Jewish Charities of Baltimore, Inc.*, 294 Md. 443, 448 (1982). When parties agree to arbitration, and one of those parties later refuses to arbitrate, “the other party may file a petition with a court to order arbitration.” Md. Code, Cts. & Jud. Proc. § 3-207(a). When that happens, “the court must expeditiously determine, without a jury, whether an arbitration agreement for the specific dispute exists.” *Park Plus, Inc. v. Palisades of Towson, LLC*, 478 Md. 35, 51 (2022). “If an arbitration agreement does exist, the court must enforce it by ordering the parties to arbitrate.” *Id.* at 51 (emphasis omitted).

That said, “[b]ecause the right to arbitrate is a matter of contract, it is possible for parties to waive that right.” *Frank*, 294 Md. at 448. Thus, a court’s determination as to the existence of an arbitration agreement “includes not only whether the arbitration agreement applies to the dispute, but also whether the right to arbitrate was waived.” *Park*

*Plus*, 478 Md. at 52. “When waiver is found, it is as if the agreement to arbitrate never existed, and the court will deny the petition to compel arbitration.” *Id.*

Waiver may be found when a party fails to make a timely demand for arbitration. *Id.* “Timeliness becomes a waiver issue when the parties’ contract includes a limitations period for demanding arbitration.” *Id.* at 53. “[T]he timeliness of a demand for arbitration is an issue for the court to decide.” *Id.* at 52; *see also Brendsel v. Winchester Constr. Co., Inc.*, 162 Md. App. 558, 574 (2005) (noting that waiver “involves a matter of intent” and is “highly factually dependent” (quotation marks and citations omitted)).

However, we cannot properly evaluate the parties’ claims because the court never reached the issue of waiver. We therefore must remand for further proceedings.

Against that backdrop, we hold that the circuit court erred in dismissing appellants’ complaint without first determining the issue of waiver. As noted, when a party refuses to arbitrate and the other party asks the court to compel arbitration, which was the case here, a court must determine whether an arbitration agreement exists, and that determination requires a consideration of waiver. Here, the court, in finding that appellants’ initial complaint was “premature,” clearly determined that an arbitration agreement was in existence and enforceable. But, the court did not decide, either explicitly or implicitly, whether Caruso Washington had waived its right to enforce the arbitration agreement, even though that issue was appellants’ primary argument at the hearing on Caruso Washington’s motion to alter or amend. As such, we neither affirm nor reverse the court’s judgment and



remand the case so that the court can determine whether Caruso Washington waived its right to enforce the Agreement’s arbitration clause.<sup>1</sup>

**JUDGMENT OF THE CIRCUIT COURT  
FOR PRINCE GEORGE’S COUNTY  
NEITHER AFFIRMED NOR REVERSED;  
CASE REMANDED FOR FURTHER  
PROCEEDINGS CONSISTENT WITH  
THIS OPINION; PENDING FURTHER  
PROCEEDINGS BEFORE THE CIRCUIT  
COURT, THIS MATTER IS STAYED.  
COSTS TO BE HELD IN ABEYANCE.**

---

<sup>1</sup> This appeal was fully briefed and argued on the merits before a panel of this Court on September 13, 2023. We shall order a stay of this appeal pending a ruling from the circuit court.