STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1565

Richard Byers,
Appellant,

vs.

Pharmacists Mutual Insurance Company,
Respondent.

Filed June 10, 2008
Affirmed
Muehlberg, Judge[*]

Hennepin County District Court
File No. 27-CV-06-13230

Michael T. Courtney, Charles D. Slane, Terry & Slane P.L.L.C., 7760 France Avenue South, Suite 610, Bloomington, Minnesota 55435 (for appellant)

Timothy J. Leer, Stacey A. Molde, Johnson & Condon, P.A., 7401 Metro Boulevard, Suite 600, Minneapolis, Minnesota 55439 (for respondent)

Considered and decided by Shumaker, Presiding Judge; Schellhas, Judge; and Muehlberg, Judge.

U N P U B L I S H E D O P I N I O N

MUEHLBERG, Judge

On appeal from an order denying his motion to compel arbitration in an underinsured motorist case, appellant argues that the district court erred in concluding

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

that appellant waived his contractual right to arbitration because (1) he did not intentionally relinquish a known right to arbitration; and (2) even if he had constructive knowledge of his right to arbitrate, respondent failed to establish prejudice if compelled to arbitrate. Because appellant relinquished a known right to arbitrate, and respondent would be prejudiced if compelled to arbitrate, we affirm.

FACTS

In October 1998, appellant Richard Byers was injured when the vehicle he was driving was struck by a car driven by another motorist. The vehicle appellant was driving at the time of the accident was owned by his employer, Midwest IV, Inc., and insured by respondent Pharmacists Mutual Insurance Company. In May 2006, appellant brought suit against respondent seeking underinsured motorist benefits arising from the October 1998 accident. Respondent then moved to compel discovery, and the parties made preparations for trial.

In preparation for trial, respondent took appellant's deposition and appellant attended a rule 35 medical exam. Appellant was also provided with a certified copy of the insurance policy in response to his discovery requests. The insurance policy issued by respondent contains an arbitration clause that, appellant claims, he failed to discover until shortly before the mediation held on February 8, 2007. Appellant claims that during mediation, he attempted to convince respondent to arbitrate the claims, but respondent refused. Following mediation, appellant made a formal written demand for arbitration. Respondent refused to proceed to arbitration claiming that appellant waived his right to arbitration by commencing

a lawsuit instead of electing to proceed with arbitration. Appellant subsequently filed a motion to compel arbitration.

The district court found that appellant had constructive knowledge of the arbitration clause when the insurance policy was provided in discovery, and that he intended to waive his contractual right by initiating and participating in this lawsuit. The district court further concluded that arbitration would be prejudicial to respondent because respondent had incurred litigation costs and arbitration would cause further delay. Thus, the district court denied appellant's motion to compel arbitration. This appeal followed.

D E C I S I O N

Waiver of a contractual right to arbitration is ordinarily a question of fact and determination of this question, if supported by substantial evidence, is binding on an appellate court. *Fedie v. Mid-Century Ins. Co.*, 631 N.W.2d 815, 819 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). Findings of fact are not to be set aside unless they are clearly erroneous. *Id.* If there is reasonable evidence to support the district court's findings of fact, a reviewing court will not disturb those findings. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

Here, it is undisputed that the insurance policy issued by respondent contained an arbitration clause. This clause provides in relevant part:

> If we and an "insured" disagree whether the "insured" is legally entitled to recover damages from the owner or driver of an "uninsured motor vehicle" or "underinsured motor vehicle" or do not agree as to the amount of damages that are recoverable by that "insured", then the matter may be arbitrated. However, disputes concerning coverage under this

> endorsement may not be arbitrated. Either party may make a written demand for arbitration.

Minnesota favors arbitration as a means of conflict resolution, but the right to arbitration may be waived. *Hughes v. Lund*, 603 N.W.2d 674, 676 (Minn. App. 1999). Waiver is the "voluntary relinquishment of a known right." *County of Hennepin v. Ada-Bec Sys.*, 394 N.W.2d 611, 613 (Minn. App. 1986) (quotation omitted), *review denied* (Minn. Dec. 17, 1986). Waiver requires (1) an intentional relinquishment by the party giving up the right to arbitrate; and (2) prejudice to the opposing party if arbitration were to be required. *Preferred Fin. Corp. v. Quality Homes, Inc.*, 439 N.W.2d 741, 743 (Minn. App. 1989). Generally, a party waives an arbitration clause by commencing litigation over arbitrable claims or defending such claims in a court action. *Ada-Bec*, 394 N.W.2d at 613.

Appellant argues that the district court erred in denying his motion to compel arbitration because (1) he did not voluntarily relinquish a known right; and (2) respondent will not be prejudiced by resolving the matter through arbitration.

A. Relinquishment of a known right

"The party alleging waiver must provide evidence that the party that is alleged to have waived the right possessed both knowledge of the right in question and the intent to waive that right." *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 798 (Minn. 2004). The knowledge required for waiver may be actual or constructive. *Brothers Jurewicz, Inc. v. Atari, Inc.*, 296 N.W.2d 422, 429 (Minn. 1980). Moreover, the intent

can be inferred from the parties' conduct. *Stephenson v. Martin*, 259 N.W.2d 467, 470 (Minn. 1977).

Appellant argues that he did not waive his right to arbitration because, even though he initiated the lawsuit against respondent, he did not become aware of the arbitration clause until shortly before mediation. Appellant claims that as soon as he discovered the mediation clause, he sought to exercise that right. Thus, appellant claims that he did not relinquish his known right to arbitration.

To support his claim, appellant cites *Ada-Bec*, a case in which the sureties moved to stay court proceedings pending arbitration. 394 N.W.2d at 612. The district court denied the motion "ruling that the sureties had, by their conduct, waived their arbitration defense." *Id.* On appeal, this court reversed, having concluded that the sureties did not intend to waive arbitration because the sureties had asserted arbitration as a defense in their answer, and did not behave inconsistently with an intent to arbitrate. *Id.* at 613-14. This court also noted that participation in discovery by the sureties and a delay in requesting arbitration were not considered sufficient to show waiver. *Id.* at 613. Significantly, however, the court further noted that the sureties' motion to compel arbitration was apparently made after filing a notice of non-readiness for trial and before trial on the merits had actually begun. *Id.* at 612.

In contrast to *Ada-Bec*, the supreme court in *Atari* affirmed the district court's determination that Atari's right to arbitration had been lost where Atari failed to raise arbitration in its answer and participated in litigation for nearly one year without moving

the court to stay the proceedings and compel arbitration. *Atari*, 296 N.W.2d at 428-29. In reaching its decision, the supreme court noted:

> Even though parties have an agreement to arbitrate disputes, an attempt by one of the parties to enforce such an agreement may under certain conditions be challenged on the grounds of laches and waiver. We have held consistently that a party to a contract containing an arbitration provision will be deemed to have waived any right to arbitration if judicial proceedings based on that contract have been initiated and have not been expeditiously challenged on the grounds that disputes under the contract are to be arbitrated.

Id. at 428.

Respondent argues that *Atari* is controlling and that *Ada-Bec* is distinguishable from this case because, unlike here, the party seeking arbitration in *Ada-Bec* asserted arbitration as a defense in its initial pleadings. We agree. The record reflects that appellant never attempted to preserve his right to arbitrate, and instead proceeded to litigate his claim and proceed with discovery. It was not until discovery was closed and the parties were mediating their dispute that appellant attempted to arbitrate his claims. As respondent notes, this attempt to arbitrate came at least eight months after appellant initiated his lawsuit. At the very latest, appellant received a certified copy of the insurance policy in September 2006.[1] Yet appellant proceeded through five months of

[1] We note that the accident in which appellant was injured occurred in 1998, and his workers' compensation claim was filed immediately after the work-related accident. Also, appellant's claim for no-fault benefits, which was brought to supplement the workers' compensation benefits already received, was submitted in 1999. In the arbitration that followed, through the American Arbitration Association, discovery was informally exchanged. Thus, it is very possible that appellant had possession of respondent's insurance policy long before he initiated his lawsuit against respondent.

additional litigation before finally pursuing arbitration. Because appellant had possession of the insurance policy, he knew or should have known of the policy's contents.

Appellant claims that *Atari* is not applicable because, unlike the parties in that case, appellant was not a party to the contract. Appellant claims that the insurance contract was between his employer, Midwest IV, Inc., and respondent and should not be deemed to have held constructive knowledge of the terms of the contact in which he was not a party. Appellant argues that because he cannot be held to have constructive knowledge of the policy, and he did not have actual knowledge of the arbitration clause until shortly before mediation, he cannot be deemed to have relinquished his right to arbitrate.

We disagree. Although appellant was not a party to the contract, he had possession of the insurance policy no later than September 2006, when he received a certified copy of the policy through discovery. By receiving the policy through discovery, appellant is deemed to have knowledge of its contents. Appellant's claim that he was not aware of the arbitration clause until the scheduled mediation is simply the result of his failure to read the documents he obtained through discovery. *See SEC v. TLC Investments & Trade Co.*, 179 F. Supp. 2d 1149, 1154 (C.D. Cal. 2001) (noting that party's claimed failure to be aware of the contents of an important document in his possession "can only be explained by his reckless failure to read the financial documents [given to] him").

Finally, appellant argues that we should overturn the district court's decision because there is more than one inference that can be drawn from the record. Appellant

contends that although the district court's decision that appellant knowingly waived the right to arbitrate is one inference that can be drawn from the facts, appellant asserts that the inference that we should adopt is that he did not knowingly waive his right to arbitrate because as soon as he became aware of the arbitration clause, he sought to arbitrate his claim. But even though there may be more than one inference that can be drawn from the record, the inference reached by the district court is supported by the facts in the record. *See Fletcher*, 589 N.W.2d at 101 (stating that if there is reasonable evidence to support the district court's findings of fact, the reviewing court will not disturb those findings). Therefore, because appellant sought to litigate his claim, and waited at least five months after receiving a copy of the insurance policy containing the arbitration clause before requesting arbitration, appellant relinquished a known right to arbitrate.

B. Prejudice

Appellant also contends that he has not waived his right to arbitration because respondent failed to establish that prejudice would result from arbitrating the dispute. Action by the party seeking arbitration, which is inconsistent with the right to arbitration is not enough to support a finding of waiver unless such action is accompanied by prejudice to the objecting party. *Hughes*, 603 N.W.2d at 676. Delay alone does not establish prejudice. *See Ada-Bec*, 394 N.W.2d at 612-13 (no waiver when appellants raised arbitration defense in answer but delayed six years before actually requesting arbitration); *cf. Atari*, 296 N.W.2d at 429 (waiver found when party allowed dispute to proceed through judicial system until issues were ripe for decision in that forum before requesting arbitration); *Preferred Fin. Corp.*, 439 N.W.2d at 743-45 (waiver found when

party waited until after trial to request arbitration). "Whether a party is prejudiced is a question of fact." *Fedie*, 631 N.W.2d at 820.

Here, the parties submitted written arguments along with affidavits and exhibits in support of their positions on whether the district court should compel arbitration. The district court subsequently issued its order finding that by litigating his claim, appellant caused respondent "to incur costs and expenses that it would not have incurred had the parties proceeded to arbitration at the outset." Specifically, the court found that these costs pertained to expenses "related to propounding and responding to written discovery, taking [appellant's] deposition, and arranging for an independent medical examination of [appellant]." The district court also noted that the costs incurred by respondent related to discovery were compounded by appellant's failure to respond to respondent's discovery requests, which resulted in respondent having to seek court intervention in the parties' discovery disputes. Finally, the court found that in addition to the costs incurred in discovery, "the parties have already incurred the cost and expense of preparing for and attending a mediation in this matter."

Appellant argues that the district court erred in finding prejudice because (1) the case has been proceeding through litigation for less than a year and the case is not ready for trial; (2) respondent would have conducted discovery in an arbitration setting as well as in preparation for trial; and (3) the expert respondent retained to conduct the IME would be necessary in an arbitration setting as well as at trial. To support his claim, appellant cites *Fedie*, where this court concluded that the district court did not abuse its discretion by finding that Fedie had not waived the right to demand arbitration because

the insurance company would suffer no prejudice. 631 N.W.2d at 822. In reaching its decision, this court noted that the insurance company conceded that it would have engaged in the same preparation for arbitration as for trial, and that the insurance company did not assert that arbitration lengthened the proceedings. *Id.* at 820. The court noted that, in fact, the "matter was resolved more quickly, and presumably more cheaply, than it would have been at trial." *Id.* at 822.

We conclude that *Fedie* is distinguishable from the case here. For example, unlike *Fedie*, respondent's attorney stated in his affidavit that his trial strategy would have differed substantially had he prepared for arbitration rather than the jury trial scheduled for June 2007. Specifically, he stated that he defended this lawsuit in reliance on the fact that certain collateral source offsets would be available from any judgment, and that these offsets may not be available in the arbitration forum. Moreover, respondent's counsel emphasized the cost of mediation and the various discovery-related costs, such as the independent medical examination, that would not have been incurred had appellant elected arbitration. Finally, the record reflects that appellant failed to respond to respondent's discovery requests, leading to respondent having to seek court intervention on the matter. This conduct further exacerbated the costs incurred by respondent related to discovery. Although the matter may not be completely ready for trial, respondent has made substantial preparations for a jury trial on the matter, and a trial was scheduled for June 2007, only a few months after appellant moved to compel arbitration in February 2007. Therefore, in light of respondent's expenses incurred in preparing to litigate appellant's claims, and appellant's failure to comply with respondent's requests for

discovery, the district court did not err in finding that respondent would be prejudiced if compelled to arbitrate the claims.

Affirmed.