STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0957

Driveway Design, LLC,
Appellant,

vs.

Johnson and Johnson Land Development, LLC, et al.,
Respondents,

Jenny Li, et al.,
Defendants.

Filed June 16, 2009
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CV-06-16049

Steven E. Ness, Business Law Center, PLC, 7825 Washington Avenue, Suite 500, Bloomington, MN 55439 (for appellant)

Stanford P. Hill, David E. Camarotto, Bassford Remele, P.A., 33 South Sixth Street, Suite 3800, Minneapolis, MN 55402-3707 (for respondents)

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Kalitowski, Judge.

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

KALITOWSKI, Judge

Appellant Driveway Design, LLC, challenges the district court's denial of its motion to compel arbitration, arguing that the district court: (1) exceeded its scope of

review; (2) exceeded its jurisdiction; and (3) made insufficient findings to conclude that appellant waived its right to arbitration. Appellant also challenges the denial of its motion to amend its answer to include arbitration as an affirmative defense. We affirm.

D E C I S I O N

Respondents hired appellant to furnish and install aggregate base in private driveways and under sidewalks and curbs, and to install asphalt in private driveways. Appellant and Johnson and Johnson Land Development, LLC, entered into a contract on September 22, 2004, that provides for arbitration as follows:

> a. All claims, disputes and other matters in question arising out of, or relating to, this contract or the breach thereof, except as to claims which have been waived by the making or acceptance of final payment, or barred by failure to demand arbitration within time limits specified, shall be decided by Arbitration Rules of the American Arbitration Association unless the parties mutually agree otherwise . . . .
>
> b. Notice of the demand for arbitration shall be filed in writing with the other party to the contract and with the American Arbitration Association, and a copy shall be filed with the ENGINEER. Demand for arbitration shall in no event be made after institution of legal proceedings based on any claim, dispute, or other matter in question . . . .

On August 22, 2006, appellant filed a complaint alleging that respondents failed to pay for materials provided and labor performed under the contract. Appellant alleged a breach of the 2004 contract, unjust enrichment, and sought to enforce a mechanic's lien. Respondents filed an answer in September 2006 and counterclaimed for breach of contract. Appellant replied to the counterclaim in mid-October 2006, but did not assert arbitration as an affirmative defense. The district court's original scheduling order set the

matter for trial beginning September 24, 2007. But in November 2007, the parties notified the court that they agreed to move the trial to the district court's next scheduled civil trial block. The district court accommodated the parties' request and moved the trial to the block beginning May 19, 2008. Twelve days before that trial block began, appellant moved to compel arbitration of respondents' breach-of-contract claim and moved to amend its answer to include arbitration as an affirmative defense. The district court concluded that appellant waived its right to compel arbitration under both the language of the 2004 contract and the doctrine of laches. The district court also denied appellant's motion to amend its answer.

I.

Appellant challenges the denial of its motion to compel arbitration. We review decisions concerning the arbitrability of disputes de novo. *Amdahl v. Green Giant Co.*, 497 N.W.2d 319, 322 (Minn. App. 1993).

Generally, a written agreement to submit a controversy to arbitration is valid and enforceable, and the law favors arbitration because it is recognized as a speedy, informal, and relatively inexpensive procedure for resolving controversies. *Id*; Minn. Stat. § 572.08 (2008). The Uniform Arbitration Act provides the procedure to compel arbitration: the district court shall compel arbitration upon a party's application showing the existence of an arbitration agreement and the opposing party's refusal to arbitrate. Minn. Stat. § 572.09(a) (2008).

The right to arbitration, however, may be waived. *Fedie v. Mid-Century Ins. Co.*, 631 N.W.2d 815, 819 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001).

Additionally, Minnesota Rule of Civil Procedure 8.03 expressly requires a party to plead affirmative defenses such as arbitration and the "[f]ailure to do so may constitute waiver of the defense." *W. St. Paul Fed'n of Teachers v. Indep. Sch. Dist. No. 197*, 713 N.W.2d 366, 377 (Minn. App. 2006) (discussing Minn. R. Civ. P. 8.03). A party may also waive its rights under an arbitration clause by defending arbitrable claims in a court action. *Id.* Finally, "the right to compel arbitration is waived if it is not raised expeditiously." *Id.*

Scope of review

Appellant, relying on *Amdahl*, 497 N.W.2d 319, argues that the district court exceeded its scope of review in deciding the motion to compel arbitration. In *Amdahl*, the court stated "[w]hen considering a motion to compel arbitration, the court's inquiry is limited to (1) whether a valid arbitration agreement exists, and (2) whether the dispute falls within the scope of the arbitration agreement." *Id.* at 322. Appellant argues that because there is no dispute that a valid agreement exists or that respondents' breach-of-contract counterclaim is within the scope of the arbitration agreement, the court's waiver inquiry exceeded its permissible scope of review. We disagree.

Appellant's argument ignores the plain language of the arbitration agreement. The arbitration provision states that, "[*d*]*emand for arbitration shall in no event be made after institution of legal proceedings* based on any claim, dispute, or other matter in question." (Emphasis added.) Appellant filed its complaint in August 2006 and respondents answered in September, counterclaiming breach of contract. Appellant's reply filed in October 2006 did not demand arbitration or list arbitration as an affirmative defense. On appeal, appellant does not challenge these facts or address the above-quoted language in

the arbitration agreement. The district court denied appellant's motion in part because it concluded that appellant's demand for arbitration was brought "after [the] institution of legal proceedings," thus rendering the motion untimely under the plain language of the arbitration agreement. And consideration of the plain language of the arbitration agreement is not outside the scope of review on a motion to compel arbitration. *See Amdahl*, 497 N.W.2d at 322.

Moreover, appellant's scope-of-review argument ignores the rule that a party can waive its right to arbitration. *See Fedie*, 631 N.W.2d at 819 (holding that the right to arbitration may be waived). And finally, the case upon which appellant relies did not address waiver of the right to arbitrate. *See Amdahl*, 497 N.W.2d at 324 (reversing summary judgment because the district court erred by concluding collateral estoppel barred the appellants from attempting to compel arbitration). We conclude that in determining whether appellant waived its right to arbitrate, the district court's consideration of the plain language of the arbitration agreement was not outside its scope of review.

Jurisdiction

Appellant argues that the district court exceeded its jurisdiction by relying on *Brothers Jurewicz, Inc. v. Atari, Inc.*, 296 N.W.2d 422 (Minn. 1980), and determining that appellant lost its right to demand arbitration due to waiver or laches. We disagree.

In *Brothers*, the "threshold issue" was whether, in considering a motion to compel arbitration, the district court erred by assuming jurisdiction over the question of whether laches applied rather than referring the issue to an arbitrator. *Id.* at 425. The supreme

court noted that a majority of other courts have held that the arbitrator, rather than the district court, should decide issues of laches because laches is "often intertwined with the substantive issues that underlie the basic dispute." *Id.* at 426-27. But the court also noted that this general rule does not apply "when an arbitration request is made after litigation has been instituted and the party opposed to arbitration claims laches or waiver predicated solely upon participation in the lawsuit by the party seeking arbitration." *Id.* at 427. The rationale for this exception is twofold: first, it allows courts sufficient judicial control over their own proceedings to determine the validity of equitable defenses, and second, "issues such as laches may be beyond the scope of even a broadly worded arbitration clause." *Id.*

The *Brothers* court adopted the general rule that laches should be decided by arbitrators rather than the district court, but also adopted the limited exception "which allows courts to rule on a laches defense to a request for arbitration in cases where the defense is not based on the underlying dispute but instead is derived from activity before the very court being urged to compel arbitration." *Id.* at 427-28.

Here, because the exception to the general rule applies, the district court had jurisdiction to decide the issue of laches. Respondents' laches defense is not based on their underlying breach-of-contract claim, but rather is derived from the fact that appellant filed its complaint in August 2006, replied to respondents' counterclaim in October 2006, did not request or affirmatively assert arbitration in these filings, and waited until 12 days before trial to move for arbitration. Additionally, the contract dispute underlying this case is not "intertwined" with laches. *See id.* at 428 (concluding

that dispute over substantive issue of sales commissions not intertwined with a laches defense; affirming district court's finding of laches). Thus we conclude that the district court had jurisdiction to determine whether laches barred appellant's right to compel arbitration.

Sufficiency of the findings

Appellant argues that the district court's findings are insufficient to support the conclusion that appellant waived its right to arbitrate. We disagree.

"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*, 631 N.W.2d at 819 (quotation omitted). Waiver of the right to arbitration requires a finding of the voluntary relinquishment of a known right and a finding of prejudice to the party opposing arbitration. *Id.* at 819-20.

In *Brothers*, the supreme court stated:

> [w]e 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.

296 N.W.2d at 428. The court noted that respondent, by virtue of bringing the action, elected not to exercise its arbitration rights, and that appellant acquiesced by answering on the merits and participating in litigation for nearly one year without moving the court to compel arbitration. *Id.*

Here, the district court found that respondents presented evidence showing that appellant knew of its right to arbitrate and intentionally relinquished its right to arbitrate. Specifically, appellant was a party to the 2004 contract that contained the arbitration provision and was therefore aware of the arbitration provision. The court also found that appellant has "continuously acted in a manner inconsistent with the right to arbitrate." The record shows that appellant failed to raise arbitration as an affirmative defense and failed to seek arbitration during nearly two years of pretrial litigation. We conclude that substantial evidence supports the district court's finding that appellant knew of its right to arbitrate and relinquished that right.

The district court also found prejudice to respondents. In doing so, the district court relied on *Anderson v. Twin City Rapid Transit Co.*, where the supreme court determined that it is unfair to permit one side to resort to arbitration when "the defendant files an answer on the merits, joining with the plaintiff in rejecting arbitration and tendering the controversy to the court for trial." 250 Minn. 167, 181, 84 N.W.2d 593, 602 (1957) (quotation omitted). Here, appellant filed its reply to respondents' counterclaim and did not plead arbitration as an affirmative defense as required by Minn. R. Civ. P. 8.03. Moreover, appellant waited until 12 days before the trial block began to bring its motion to compel arbitration. On this record, substantial evidence supports the district court's conclusion that failure to apply laches would prejudice respondents. *See Brothers*, 296 N.W.2d at 428 (stating that a party waives its right to arbitration if it does not expeditiously challenge judicial proceedings on the grounds of arbitrability).

Appellant argues that *Brothers* is distinguishable because here the "vast majority" of the activity before the district court concerned the enforcement of the mechanic's lien. But the record indicates that for nearly two years the parties filed motions and memoranda and conducted discovery in preparation for the trial of respondents' breach-of-contract counterclaim. This is nearly one year longer than the delay in *Brothers* where the supreme court found no error in the district court's application of laches. 296 N.W.2d at 428-29; *see also Anderson*, 250 Minn. at 179-80, 84 N.W.2d at 601-02 (affirming denial of request for arbitration made 16 months after commencement of the court action). Furthermore, as in *Brothers*, appellant responded to the suit without seeking arbitration and commenced preparation for trial. *See Brothers*, 296 N.W.2d at 425.

Because the district court had jurisdiction to consider the applicability of laches and because substantial evidence supports the district court's findings of relinquishment and prejudice, we affirm the district court's denial of appellant's motion to compel arbitration.

II.

Appellant challenges the district court's denial of its motion to amend its answer to include arbitration as an affirmative defense.

Whether a party may amend a pleading depends on the point in litigation at which amendment is sought.

> A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20

> days after it is served. *Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.*

Minn. R. Civ. P. 15.01 (emphasis added). When an amendment is permitted by leave of court, a district court has broad discretion to grant or deny leave to amend a pleading, and its ruling will not be reversed absent a clear abuse of discretion. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

"Ordinarily, amendments should be freely granted, except where to do so would result in prejudice to the other party." *Hughes v. Micka*, 269 Minn. 268, 275, 130 N.W.2d 505, 510 (1964). But the *Hughes* court concluded that the district court did not abuse its discretion in denying a motion to amend because it was "apparent" from the record that the district court was concerned about the delay and prejudice resulting from inserting a new cause of action into the case. *Id.* at 275, 130 N.W.2d at 510-11. And the court cautioned that "[d]espite the need for liberality" in amendments to pleadings, the granting or denial of a motion for amendment of the pleadings is within "the sound discretion" of the district court. *Id.* at 275, 130 N.W.2d at 511 (quotation omitted).

Here, the district court concluded that appellant's motion was prejudicial to respondents, without including a discussion of its reasons. But it is apparent that the district court based its decision on appellant's nearly two-year delay in seeking to amend its reply. On this record, we conclude that the district court did not abuse its discretion in denying appellant's motion to amend its answer.

Affirmed.