IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THOMASSEN & DRIJVER-VERBLIFA N.V.,	)	
Plaintiff,	)	
v.	)	No. 88 C 4271
SARDEE INDUSTRIES, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The plaintiff Thomassen & Drijver-Verblifa N.V. brings this three count complaint alleging that the defendant Sardee Industries, Inc. tortiously interferred with its prospective business and economic advantage and breached a fiduciary duty. Sardee has filed a counterclaim alleging that Thomassen breached the parties' written agreement. Thomassen moves to dismiss Sardee's counterclaim pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Sardee moves to dismiss Count III of Thomassen's complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). The court grants relief as follows.

Rule 12(b)(1): Lack of Subject Matter Jurisdiction

Thomassen moves to dismiss Sardee's counterclaim on the grounds that it involves the type of dispute that the parties

have a written agreement to arbitrate. Thus, Thomassen, in other words, moves to compel the arbitration of Sardee's counterclaim. Accordingly, the court will treat Thomassen's motion to dismiss as a motion to compel arbitration pursuant to the Federal Arbitration Act ("Act"), 9 U.S.C. § 4. See Interstate Securities Corp. v. Siegel, 676 F. Supp. 54, 55 (S.D. N.Y. 1988). The question if parties contracted to arbitrate a dispute is a matter for judicial determination. Graphic Communications Union v. Chicago Tribune Co., 794 F.2d 1222, 1226 (7th Cir. 1986). The court must ascertain whether there is a written agreement to arbitrate and whether the dispute in question falls within the scope of the arbitration agreement. 9 U.S.C. § 4; In Re Oil Spill by Amoco Cadiz, 659 F.2d 789, 793 (7th Cir. 1981). "It is axiomatic that arbitration is a matter of contract." R. J. Distributing Co. v. Teamsters, Chauffeurs & Helpers Local Union No. 627, 771 F.2d 211, 214 (7th Cir. 1986).

Generally, the court should order arbitration "if the contract is susceptible of an interpretation that the dispute is arbitrable." Id. at 214. Arbitration will not be ordered "if the court is positively assured that the contract is not susceptible of such an interpretation...." Id. (emphasis added). As the Supreme Court has stated, the Act "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable

issues should be resolved in favor of arbitration, whether the problem at hand is the construction of contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983)(emphasis added). In this case, the parties dispute the construction of their agreement as well as whether Thomassen has waived its right to seek arbitration.

The parties' written agreement, entitled the "Protocol of Settlement," was executed on May 12, 1987. See Sardee's Counterclaim, Exhibit B, at 1. The Protocol "reflects and embodies the terms on which Sardee and CSW [Constructies, Systemen en Werk Tvigen, a division of Thomassen] have mutually resolved to settle various differences and disagreements with respect to the former Distributorship Agreement between them dated October 1, 1985." Id. The Distributorship Agreement designated Sardee as the sole distributor of certain products manufactured by CSW. Sardee's Counterclaim, Exhibit A, at 1. The Distributorship Agreement was terminated in February 1987. The Protocol expressly provides for the arbitration of certain claims. Sardee's Exhibit B, at 11-12. However, these provisions are not applicable to the matters at issue here.

The parties' dispute concerns whether paragraph fifteen of the Protocol, entitled "Conflicts," incorporates the arbitra-

tion clause found in the Distributorship Agreement. [1] Paragraph fifteen of the Protocol states that

> "[f]ulfillment of the parties' respective obligations under the orders reinstated by this Protocol shall be governed by applicable provisions of the Distributorship Agreement; provided, however, that the provisions of this Protocol shall, with respect to such orders, supercede and override any conflicting provisions in the Distributorship Agreement or in CSW's General Conditions of Sale.

Sardee's Exhibit B at 12 (emphasis added). Thus, paragraph fifteen incorporates any non-conflicting applicable provisions of the Distributorship into the Protocol. Sardee's counterclaim involves a dispute concerning, among other things, the quality of certain CSW machines that were ordered by Metal Container Corporation ("MCC"), a customer of Sardee's. Sardee asserts that the Distributorship Agreement's arbitration clause was not intended to be incorporated into the Protocol because its inclusion would render the Protocol's specific arbitration provisions "meaningless surplusage."

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[1] The pertinent clause of the Distributorship Agreement reads as follows:

> 10.6 **Disagreement and Arbitration**
> Any dispute arising out of or in connection with this Agreement shall be finally settled under the rules of conciliation and arbitration of the International Chamber of Commerce in Paris by one or more arbitrators appointed in accordance with said rules.

Sardee Exhibit A, at 7.

This argument is unavailing. Paragraph fifteen of the Protocol is applicable because it is undisputed that the MCC order is one of the orders reinstated by the Protocol. 2/ Sardee Exhibit B, at 1. The plain language of paragraph fifteen incorporates any applicable provisions of the Distributorship Agreement unless they are conflicting. While the arbitration clause may render some of the Protocol's provisions unnecessary, it does not conflict with them. The arbitration clause is an "applicable provision" with regard to this dispute involving the MCC order. Thus, Sardee's counterclaim will be subject to arbitration unless Thomassen has defaulted, or waived, its right to proceed. See 9 U.S.C. § 3.

Sardee argues that Thomassen has waived its right to arbitration. Although "arbitration is a waivable contract right," its waiver "is not to be lightly inferred." Dickinson v. Heinold Securities, Inc., 661 F.2d 638, 641 (7th Cir. 1981); Midwest Window Systems, Inc. v. Amcor Industries, Inc., 630 F.2d 535, 536 (7th Cir. 1980); see also Lawrence v. Comprehensive Business Services Co., 833 F.2d 1159, 1164 (5th Cir. 1987)(waiver

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2/ (Sardee suggests that the Distributorship Agreement's arbitration clause "died" with the termination of the Agreement itself. Sardee's Response at 9; Sardee's Surreply at 2. This suggestion is undermined by the Protocol's direction that the explicitly mentioned arbitrable claims "may be submitted by either party for final settlement through arbitration in accordance with the terms of the Distributorship Agreement." Sardee Exhibit B, at 12.

not favored). All doubts as to waiver are to be resolved in favor of arbitration. Moses H. Cone, 460 U.S. at 24-25; National Foundation For Cancer Research v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 774 (D.C. Cir. 1987). When determining waiver, "the essential question is whether, under the totality of the circumstances, the defaulting party acted 'inconsistently with the arbitration right.'" Dickinson, 661 F.2d at 641, quoting Midwest Window, 630 F.2d at 537 (quoting Shinto Shipping Co. v. Fibrex & Shipping Co., 572 F.2d 1328, 1330 (9th Cir. 1978)). The defaulting party's "inconsistent action" must prejudice the opposing party to result in a waiver. Midwest Window, 630 F.2d at 537; Knorr Brake Corp. v. Harbil, Inc., 556 F. Supp. 489, 492 (N.D. Ill. 1983)(Shadur, J.).

Sardee asserts that Thomassen acted inconsistently with its arbitration right by failing to seek arbitration of its own claims. Thomassen responds by arguing that its own claims are not arbitrable because they involve torts rather than breaches of contract. This is an immaterial distinction. The arbitrability of a claim depends "upon the relationship of the claim to the subject matter of the arbitration clause" and "not upon the characterization of the claim." In Re Oil Spill, 659 F.2d at 794. Thomassen concedes that the facts underlying the complaint and the counterclaim are "the same." Thomassen Reply at 2-3. In addition, Thomassen's complaint is replete with references to the

Distributorship Agreement and the Protocol. See, e.g., Complaint ¶¶ 5-14, at 2-4. 3/ Sardee's alleged failure to fulfill its obligations with regard to the orders reinstated by the Protocol is at least partially responsible for the tortious damage that Thomassen has suffered. See Complaint ¶ 15, at 5 ("Sardee's failure to perform its contractual obligations [under the Protocol] forced CSW to seek alternative ways to establish itself in the United States.") Thomassen was further damaged when Sardee allegedly interferred with the alternative ways that Thomassen used to increase its business in the United States. Complaint ¶ 17, at 5.

Consequently, Sardee's alleged failure to fulfill its obligations under the orders reinstated by the Protocol is at issue in this case. Any conflicts with regard to a party's fulfillment of its obligations are governed by paragraph fifteen of the Protocol. As a result, the arbitration clause of the Distributorship Agreement, which is incorporated into the Protocol pursuant to paragraph fifteen, is also applicable to this "dispute" between the parties. When, as here, "there is a broad arbitration clause, '[i]n the absence of any express provisions excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from

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3/ In light of this, Thomassen's contention that its complaint "deals with matters unrelated to the Agreement and Protocol" is rather anomalous. ~~Thomassen's Reply at 7 (emphasis added).~~

arbitration can prevail.'" R. J. Distributing Co., 771 F.2d at 338, quoting United Steelworkers of America v. Warrier & Gulf Navigation Co., 363 U.S. 574 (1960); see also Dickinson, 661 F.2d at 643. There is no such evidence in this case. Accordingly, Thomassen's claims are subject to arbitration. As a result, Thomassen has acted inconsistently with its right to arbitration.

[9] Nevertheless, the court finds that Thomassen has not waived its right to seek arbitration because Sardee has failed to make the requisite showing of prejudice. Sardee asserts that Thomassen waived its right to arbitration by filing suit when its own claims were arbitrable. See Gutor International A.G. v. Raymond Packer Co., Inc., 493 F.2d 938, 945 (1st Cir. 1974). The Seventh Circuit issued a similar holding in Galion Iron Works & Manufacturing Co. v. J. D. Adan Manufacturing Co., 128 F.2d 411, 413 (7th Cir. 1942). However, in Midwest Window Systems the Seventh Circuit stated that it would not "rigidly or mechanically" apply the Galion rule. Midwest Window Systems, 630 F.2d at 537. Thus, the filing of suit by a plaintiff with arbitrable claims does not automatically establish the waiver of the plaintiff's arbitration right.

[10] The requisite prejudice can be indicated in several ways. See generally Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado, 614 F.2d 698, 702 (10th Cir.), cert. denied, 449 U.S. 824 (1980). A party's "substantial invocation" of the litigation process may prejudice

its opponent. A. G. Edwards & Sons, 821 F.2d at 777. For example, proceeding with a full trial or requiring the opponent to defend a motion for partial summary judgment have been found to cause prejudice. Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1162 (5th Cir. 1986); Interstate Securities Corp., 676 F. Supp. at 57 (and cases cited within). Prejudice can also result if the opponent is required to expend significant fees and devote significant labor to the litigation. See, e.g., Miller Brewing Co. v. Fort Worth Distributing Co., Inc., 781 F.2d 494, 497 (5th Cir. 1986) (waiver found when, among other things, the opponent incurred $85,000 in fees and expended 300 hours of labor on the litigation.)

11 11 A party's "[d]elay, especially when it causes actual prejudice, may constitute default (waiver) under the statute." Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 712 F.2d 270, 273 (7th Cir. 1983), cert. denied, 464 U.S. 1044 (1984); see Drexel Burnham Lambert, Inc. v. Warner, 665 F. Supp. 1549, 1554 (S.D. Fla. 1987)(see cases cited within for periods of extensive delay which caused prejudice). Finally, taking discovery on arbitrable claims can result in prejudice because it provides an advantage not available in arbitration. Dickinson, 661 F.2d at 642; Cf. Shinto Shipping, 572 F.2d at 1330 (three depositions were taken yet no prejudice was found because the depositions involved non-parties, there was no showing that the deponent's testimony would have a material effect, the opponent had competent counsel present, and the expenses were insignificant).

In this case, Sardee fails to make a sufficient showing of prejudice. Thomassen has filed no substantive pretrial motions with the exception of this one. Thomassen invoked its right to arbitration by bringing this motion approximately two months after filing its complaint. Thomassen has pursued limited discovery by taking three depositions. However, there has been no showing that Sardee was prejudiced by these depositions. Consequently, the court finds that Thomassen has not waived its right to seek arbitration. Accordingly, the court will grant Thomassen's motion to compel arbitration of Sardee's claims. The court notes that Thomassen's claims should be arbitrated as well in light of the court's finding that they are covered by the parties' arbitration clause. However, the court will not order Thomassen to arbitrate its claims in the absence of a motion to compel.

Conclusion

Accordingly, Sardee is ordered to submit its claim to arbitration in accordance with the parties' agreement. The court's order enjoining Thomassen from proceeding with arbitration is vacated. Sardee's motion to dismiss Count III of Thomassen's complaint will be resolved once the arbitration is concluded.

E N T E R:

Ann Claire Williams

Ann Claire Williams, Judge
United States District Court

Dated: SEP 27 1988

(2) US 93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SEN & DRIJVER-VERBLIFA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 88 C 4271
	)	
INDUSTRIES, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The defendant Sardee Industries, Inc. moves this court onsider its ruling of September 27, 1988 which granted the iff Thomassen & Drijver-Verblifa, N.V.'s motion to compel ation of Sardee's counterclaim. Sardee's motion is granted e following reasons.

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Rule 59(e)

he court will treat Sardee's motion to reconsider, as filed within ten days of the judgment, as a motion to or amend the judgment pursuant to Federal Rule of Civil re 59(e). A.D. Weiss Lithograph Co. v. Illinois Adhesive s Co., 705 F.2d 249, 250 (7th Cir. 1983); F/H Industries, National Union Fire Insurance Co., 116 F.R.D. 224, 225-26

[16]

because Thomassen brought suit in this forum. Thomassen further contends that the cases cited in the court's opinion are distinguishable from this case. While this case is not a precise factual match to the cases cited in the court's opinion, such a match is not required. These cases do not purport to define some precise factual scenario that establishes a finding of waiver. See Miller Brewing Co. v. Fort Worth Distributing Co., 781 F.2d 494, 498 (5th Cir. 1986)(citing to Brown-McKee, Inc. v. Fiatallis, 587 F. Supp. 38, 40 (N.D. Tex. 1984)(waiver of arbitration was found where defendant in earlier suit expended 100 man-hours and $1,400 in attorney's fees)). Finally, Thomassen suggests that Sardee's fees are "possibly excessive." Although the court is shocked at the amount of fees given the nature of the case, Sardee's expenses are supported by affidavits. Consequently, the court will not question the amount of expenses incurred.

Conclusion

For the foregoing reasons, the court reconsiders its judgment of September 27, 1988 to find that Thomassen's motion to compel the arbitration of Sardee's counterclaim is denied.

E N T E R:

Ann Claire Williams

Ann Claire Williams, Judge
United States District Court

Dated: 10/21/89

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THOMASSEN & DRIJVER-VERBLIFA, N.V.,	)	
Plaintiff,	)	
v.	)	No. 88 C 4271
SARDEE INDUSTRIES, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The plaintiff Thomassen & Drijver-Verblifa, N.V. moves this court to amend its judgment of October 21, 1988, pursuant to Federal Rule of Civil Procedure 59(e) or, in the alternative, to certify this matter for immediate appeal pursuant to 28 U.S.C. § 1292(b). Thomassen's motions are denied. This court explicitly found that Thomassen acted inconsistently with its right to arbitration by bringing suit on its own arbitrable claims. Thomassen & Drijver-Verblifa, N.V. v. Sardee Industries, Inc., No. 88 C 4271, slip op. at 8 (N.D. Ill. September 27, 1988). Thomassen has unduly minimized the significance of the above finding. See Thomassen Rule 59(e) Memorandum at 1 ("The Court's reconsideration of its earlier ruling in favor of TDV on the grounds that TDV has waived its right to arbitration was, in large measure, influenced by the purported prejudice suffered by Sardee....")(emphasis added). Thomassen's inconsistent action

along with the court's later finding of prejudice has compelled the court to find that Thomassen has waived its right to arbitration.

This case stands in contrast to Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348 (7th Cir. 1983), cert. denied, 464 US. 1070 (1984). In Sauer, the court held that the plaintiff's right to arbitration was not inconsistent with its right to seek injunctive relief before the court. Id. at 350. The plaintiff sought to enjoin the defendant pending a resolution of the parties' arbitration. Id. at 351. This action was expressly permitted by the parties' arbitration agreement. Id. at 350. In this case, Thomassen did not file suit to maintain the status quo with respect to its claims until it could seek arbitration of those same claims. Rather, Thomassen filed suit seeking injuctive relief on its claims with no apparent intention of later seeking to arbitrate them. In fact, Thomassen has vigorously -- albeit unavailingly -- contended that its claims are not within the scope of the parties' arbitration agreement. Thus, the Sauer plaintiff's filing of suit was not inconsistent with its right to arbitration while Thomassen's filing of suit was. Consequently, Sauer is distinguishable. Accordingly, Thomassen's motion to amend the judgment of October 21, 1988 is denied.

Thomassen requests in the alternative that this matter be certified for immediate appeal pursuant to 28 U.S.C.

§ 1292(b). The court notes "that a party seeking review pursuant to Section 1292(b) has the burden of persuading the court that 'exceptional circumstances' justify a departure from the basic policy of postponing applicable review until the court has entered a final judgment in the case." General Dynamics Corp. v. American Telephone and Telegraph Co., 658 F. Supp. 417, 419 (N.D. Ill. 1987)(Nordberg, J.) (emphasis added). The court recognizes that two of the three elements needed to authorize an interlocutory appeal are present: there is a controlling question of law and an immediate appeal may materially advance the ultimate determination of the litigation.

Nevertheless, the issue involved is not a "complex" one. The determination of whether a party has waived its right to arbitration is a question of law made in the court's discretion after an evaluation of the totality of circumstances. When a discretionary determination is involved, "a district court should [ordinarily] refuse to certify [the] matter, not only because of the low probability of reversal, but also because the appellate courts should not generally interfere." Wright, Miller, Cooper & Gressman, Federal Practice and Procedure: § 3930, at 161 (1977); General Dynamics, 658 F. Supp. at 418-419. A discretionary decision is properly certified only if "it truly implicates the policies favoring interlocutory appeal." Katz v.

Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir.), cert. denied, 419 U.S. 885 (1974).

The policies favoring interlocutory appeal are not implicated in this case. The determination of waiver is a relatively straightforward one. Cf. General Dynamics, 658 F. Supp. at 419 (the court considered "several difficult issues concerning the applicability of offensive collateral estoppel.") The court notes that it would have found that Thomassen waived its right to arbitration in its initial ruling on this matter if Sardee had fully appraised the court of the prejudice that it had suffered. This is not an "'exceptional case where a decision of the appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases.'" Id., quoting Report, 1958 U.S. Code Cong. & Admin. News 5255, 5260-61. Accordingly, Thomassen's request for an interlocutory appeal is denied.

Conclusion

Thomassen's motions to amend the judgment and to certify for an interlocutory appeal are denied for the foregoing reasons.

E N T E R:

Ann Claire Williams, Judge
United States District Court

Dated: NOV 14 1988