

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

KUBOTA TRACTOR CORPORATION,	:	APPEAL NO. C-150070
Plaintiff-Appellee,	:	TRIAL NO. A-1306478
vs.	:	
KUBOTA OF CINCINNATI, INC.,	:	<i>JUDGMENT ENTRY.</i>
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Kubota of Cincinnati, Inc., (“KOC”) appeals the overruling of its motion to stay proceedings and compel arbitration in an action brought against KOC by Kubota Tractor Corporation (“KTC”). We affirm the judgment of the trial court.

KOC was a dealer of Kubota equipment located in Cleves, Ohio. In 2004, KOC entered into a dealer sales and service agreement with KTC, the manufacturer of Kubota equipment. In 2009, KOC entered into a retail finance agreement with Kubota Credit Corporation, U.S.A. (“KCC”), an affiliate of KTC. Through this agreement, KOC would facilitate KCC’s financing of consumer purchases of Kubota equipment from KOC.

In 2010, Angela Steele, the secretary and treasurer of KOC, as well as the daughter of Donald Holden, president of KOC, entered into three separate retail installment contracts for her own purchases of Kubota equipment. Effective October

15, 2013, KCC assigned to KTC all of its rights and obligations under its retail finance agreement and Steele's retail installment contracts.

In June 2013, KTC terminated its dealer agreement, based on alleged violations of the agreement, and, in September 2013, filed a complaint against KOC seeking damages and equitable relief.

A year later, KTC amended its complaint, to allege that KOC was obligated under the retail finance agreement to repurchase from KTC (as KCC's assignee), the 2010 retail installment contracts between KCC and Angela Steele, which were then in default.

In response to KTC's amended complaint, KOC filed an answer and a counterclaim, and requested a jury trial. In its answer, it raised as an affirmative defense that "[a]ny claim against [KOC] relating to the alleged amounts owed by Angela Steele is subject to arbitration * * *." In the counterclaim, KOC alleged that it was entitled to an award of money damages from KTC for a variety of claims originating out of the business relationship between the two parties.

In December 2014, the trial court amended its scheduling order to require the parties to complete discovery by January 30, 2015, and to submit pretrial statements on February 10, 2015. In addition, the court set a pretrial conference for February 17, 2015, and a jury trial for February 23, 2015. KTC alleges that the trial judge also verbally ordered KOC to submit responses to outstanding discovery requests by December 19, 2014. On January 5, 2015, after KOC had not responded to discovery, KTC filed a motion to compel discovery and for sanctions.

On January 12, 2015, KOC filed its motion to stay proceedings and compel arbitration, arguing that the retail installment contracts entered into by Angela Steele had arbitration provisions for disputes arising out of the agreements. KTC

opposed the motion, arguing that KOC did not have a right to arbitrate the issues before the trial court, and even if it did, it had waived that right.

The trial court denied KOC's motion to stay proceedings and compel arbitration. The court noted that KOC had ample time to assert its right, but had waited two weeks before discovery was cut off and six weeks before the scheduled trial. Thus, the court determined that if it had a right to arbitrate, KOC had waived that right. KOC timely appealed.

In its sole assignment of error, KOC asserts that the trial court erred in denying its motion to stay the proceedings and compel arbitration. We disagree.

KOC argued that the facts demonstrated that it had not waived its right to arbitrate the claims contained in KTC's amended complaint. An order granting or denying a stay of proceedings pending arbitration is a final order as provided in R.C. 2711.02(C). *Philpott v. Pride Technologies of Ohio, LLC*, 1st Dist. Hamilton No. C-140730, 2015-Ohio-4341, ¶ 13; see *Rippe & Kingston Co. PSC v. Kruse*, 1st Dist. Hamilton No. C-130587, 2014-Ohio-2428, ¶ 14. Although we review the denial of a motion to stay under R.C. 2711.02(B) for an abuse of discretion, in circumstances “where the enforceability of an arbitration agreement raises questions as to whether a party's actions constitute a waiver of the right to arbitrate as a matter of law[,] * * * we review the trial court's order de novo.” *Philpott* at ¶ 13.

“Ohio law favors arbitration such that if a claim falls within an agreement to arbitrate, a presumption in favor of arbitration arises.” *Id.* at ¶ 12. “To demonstrate waiver a defendant must (1) know about the right to arbitrate, and (2) act inconsistently with its right to arbitration under the totality of the circumstances.” *Hilton v. Mill Rd. Constr. II, Ltd.*, 1st Dist. Hamilton No. C-030200, 2003-Ohio-

7107, ¶ 7; see *Harsco Corp. v. Carne Carrier Co.*, 122 Ohio App.3d 406, 701 N.E.2d 1040 (3d Dist.1997).

In this case, KOC included arbitration as its fourth affirmative defense in its answer to KTC's amended complaint. Therefore, we look to the totality of the circumstances to determine whether KOC acted inconsistently with its alleged right to arbitration. To determine whether the totality of the circumstances warrant a finding of waiver, courts have considered

(1) any delay in the requesting party's demand to arbitrate * * *; (2) the extent of the requesting party's participation in the litigation prior to its filing a motion to stay * * *, including a determination of the status of discovery, dispositive motions, and the trial date; (3) whether the requesting party invoked the jurisdiction of the court by filing a counterclaim * * *; and (4) whether the non-requesting party has been prejudiced by the requesting party's inconsistent acts.

Harsco Corp. at 414; see *Philpott* at ¶ 16.

KOC argues that the totality of the circumstances were insufficient to conclude that it had waived its right to arbitration. KOC compares the facts of this case to those found in the decision of the Third Appellate District in *Harsco Corp.*, where the defendant had preserved its right to arbitration by asserting the right in its answer, filing a motion to stay three months later, and "by not conducting itself in a manner acknowledging that the trial court had jurisdiction over the dispute." However, these two cases are easily distinguishable. Here, KOC moved to stay the proceedings nearly four months after raising arbitration as an affirmative defense and only after KTC had filed its motion to compel discovery. Before filing its motion to stay proceedings and compel arbitration, KOC actively participated in the

litigation by filing an answer to KTC's amended complaint, asserting a counterclaim and a jury demand, engaging in discovery, and participating in a scheduling hearing with the trial court.

But when parties have not engaged in extensive discovery, this court declined to find waiver. *See Philpott*, 2015-Ohio-4341, ¶ 17 (defendant responded to the complaint with its motion to enforce arbitration prior to answering or conducting any discovery); *Hilton* at ¶ 11 (appellant did not waive its arbitration argument as it had asserted arbitration as a defense at every step of the proceedings, did not file a counterclaim, and had engaged in limited discovery). However, in this case, discovery was almost complete.

Furthermore, when KOC filed its motion to stay proceedings and compel arbitration, the trial date had been set for over a month, and the jury trial was six weeks away. *Compare Milling Away, LLC. v. Infinity Retail Environments, Inc.*, 9th Dist. Summit No. 24168, 2008-Ohio-4691 (holding that because it was early in the proceedings and a trial date had not been set, defendant's six-month delay in asserting arbitration was not a waiver). KOC's actions, or lack thereof, were inconsistent with its desire to arbitrate. We, therefore, agree with the trial court and hold that KOC's actions constituted a waiver of any right to arbitrate.

KOC also argues that KTC is equitably estopped from denying its obligation to arbitrate. KOC essentially argues that the retail installment contracts, raised for the first time in the amended complaint, were intertwined with the original broader litigation between KTC and KOC. Even if this is true, KOC has forfeited this argument, as KOC did not assert it below. *See Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, ¶ 34; *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1993). Therefore, because

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KOC forfeited the right to assert an equitable-estoppel argument and waived any right to assert arbitration, we overrule the sole assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DEWINE and STAUTBERG, JJ.

To the clerk:

Enter upon the journal of the court on December 30, 2015
per order of the court _____.
Presiding Judge