

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CONVENIENCE VIDEO, INC.,)
)
 Plaintiff)
)
 v.) Civil No. 89-0040 P
)
 KENYON OIL COMPANY, INC.,)
)
 Defendant)

**RECOMMENDED DECISION ON PLAINTIFF'S MOTION TO
STAY PROCEEDINGS PENDING ARBITRATION AND
DEFENDANT'S MOTION FOR RELIEF¹**

On or about February 2, 1989 the plaintiff Convenience Video, Inc. (CVI) filed suit in the State of Maine Superior Court for Androscoggin County against the defendant Kenyon Oil Company, Inc. alleging that the defendant had wrongfully cancelled a contract between the parties for the lease and servicing of video cassettes and equipment. This contract contains a provision stating, "Any controversy between CVI and Retailer arising out of or related to this Agreement shall be settled by private arbitration in Portsmouth, N.H." Agreement for Lease and Servicing of Video Cassettes and Video Cassette Players & 25, attached as Exhibit A to Complaint. In its complaint, however, the plaintiff made no mention of any intent to seek arbitration. The plaintiff also moved for attachment of the defendant's property.

¹ Although 28 U.S.C. ' 636 does not clearly indicate that magistrates may not decide a motion to stay proceedings pending arbitration, the binding nature of arbitration is such as arguably to render such a stay order akin to a disposition of a case. Accordingly, out of an abundance of caution, I am casting my decision as a recommended decision.

The defendant removed the case to this court on February 21, 1989 and on March 2, 1989 filed an answer and counterclaim. In its answer, the defendant raised as a defense the plaintiff's failure to demand arbitration as required pursuant to the parties' contract. On March 3, 1989 the plaintiff demanded a jury trial, and on March 9, 1989 the plaintiff filed a reply to the defendant's counterclaim and raised arbitration as a defense. This court issued a scheduling order on March 9, 1989 setting deadlines for, inter alia, joinder of other parties, amendment of the pleadings, and for completion of discovery. In addition, on March 21, 1989, the defendant moved for attachment of the plaintiff's property. On June 20, 1989, the court, after hearing, denied both attachment motions. Before the court at this time are the plaintiff's motion, dated April 3, 1989, to stay all proceedings pending arbitration pursuant to 9 U.S.C. ' 3, and the defendant's motion, dated April 21, 1989, for relief if the stay is granted.²

The defendant has not disputed that the arbitration provision in the parties' contract is valid and covers the dispute at issue in this case. Nevertheless, the defendant argues that the plaintiff's motion to stay this action pending arbitration should be denied on the ground that the plaintiff has

² In a letter to the defendant dated April 6, 1989 the plaintiff demanded arbitration within fifteen days and designated its choice for arbitrator, pursuant to & 25 of the parties' contract. In the event the stay is granted, the defendant seeks an order that any arbitration is to be conducted within a reasonable time thereafter. Because I recommend that a stay be granted, I have addressed the defendant's motion for relief in my proposed order, infra.

waived arbitration. This contract involves interstate commerce; therefore, the Federal Arbitration Act, 9 U.S.C. ' 1-15, governs this dispute.³

Although public policy favors arbitration, parties to a contract containing an arbitration clause are free to waive their right to arbitration and instead bring suit in court. Jones Motor Co. v. Chauffeurs, Teamsters & Helpers Local Union No. 633, 671 F.2d 38, 42 (1st Cir.), cert. denied, 459 U.S. 943 (1982). A waiver of the right to arbitrate can be inferred from the circumstances. Singer v. Dean Witter Reynolds, Inc., 614 F. Supp. 1141, 1143 (D. Mass. 1985). In determining whether arbitration has been waived, courts must consider:

"whether the party has actually participated in the lawsuit or has taken other action inconsistent with his right, . . . whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit by the time an intention to arbitrate was communicated by the defendant to the plaintiff, . . . whether there has been a long delay in seeking a stay or whether the enforcement of arbitration was brought up when trial was near at hand. . . .

Other relevant factors are whether the defendants have invoked the jurisdiction of the court by filing a counterclaim without asking for a stay of the proceedings, . . . whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration . . .] had taken place, . . . and whether the other party was affected, misled, or prejudiced by the delay. . . ."

Jones Motor Co., 671 F.2d at 44, quoting Reid Burton Construction, Inc. v. Carpenters District Council, 614 F.2d 698, 702 (10th Cir.), cert. denied, 449 U.S. 824 (1980) (citations omitted; bracketed text in original).

³ The contract contains a provision stating, "This Agreement shall be construed and enforced in accordance with and be governed by the laws of the State of Maine," Exhibit A to Complaint, & 25. Nonetheless, the Federal Arbitration Act, rather than state law, controls the determination of whether arbitration has been waived. See Webb v. R. Rowland & Co., 800 F.2d 803, 806-07 (8th Cir. 1986) (despite choice of law provision stating that Missouri law governs contract, arbitration clause interpreted under Federal Arbitration Act).

In this case, the plaintiff acted inconsistently with its right to arbitrate by bringing suit against the defendant without communicating any intent to seek arbitration of the dispute. The plaintiff claims its action in initiating suit is not inconsistent with its right to arbitrate because, by going to court before seeking arbitration, it intended thereby to seek an attachment against the defendant's property to secure any arbitration award it might receive. See Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 47-51 (1st Cir. 1986) (Federal Arbitration Act permits courts to issue preliminary injunctive relief to preserve the status quo before deciding arbitrability of dispute); Salvucci v. Sheehan, 349 Mass. 659, 212 N.E.2d 243 (1965) (court may decide bill to reach and apply, which in effect sought equitable attachment, prior to submission of dispute to arbitration). Nevertheless, the plaintiff did not communicate its intent to seek arbitration until after it had commenced the suit. However, the plaintiff did raise the issue of arbitration in its reply to the defendant's counterclaim approximately one month after the suit was initiated, and the plaintiff filed the motion to stay the proceedings pending arbitration approximately two months after bringing suit. At the hearing on the attachment motions, counsel for both parties acknowledged that neither party has conducted any discovery to date. The plaintiff's delay in indicating that it intended to seek arbitration after obtaining a ruling on its motion for attachment has not substantially prejudiced the defendant. Therefore, I conclude from the circumstances as a whole that the plaintiff has not waived its right to arbitration.

Accordingly, I recommend that the plaintiff's motion be GRANTED, and that it be ORDERED that:

1. All proceedings, including discovery, shall be stayed pending the outcome of arbitration, and
2. The defendant shall have fifteen (15) days from the date

of such order within which to designate an arbitrator pursuant to & 25 of the parties' contract.⁴

3. Counsel shall advise the court when arbitration has been concluded and either the parties shall join in and the plaintiff shall file a stipulation of dismissal or counsel for one or both parties shall advise the court that further action of the court is required, in which latter case the Clerk shall schedule a conference of counsel in this matter.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 21st day of June, 1989.

David M. Cohen
United States Magistrate

⁴ This provision is intended to respond to the defendant's motion for relief and to make clear that the defendant is not foreclosed from designating an arbitrator.