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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

EN POINTE TECHNOLOGIES, INC. Plaintiff and Appellant, v. SHEILA JOHNS et al. Defendants and Respondents.	B211847 (Los Angeles County Super. Ct. No. SC097009)

APPEAL from an order by the Superior Court of Los Angeles County, Terry B. Friedman, Judge. Affirmed.

Fischbach and Fischbach and Joseph S. Fischbach for Plaintiff and Appellant.

Walsh and Associates, Dennis J. Walsh and Stephan Birgel, for Defendants and Respondents.

The sole question on appeal is whether the trial court improperly denied appellant's motion to compel arbitration based on its conclusion that appellant waived its contractual right to arbitration. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

On February 8, 2008 (all further dates are in 2008 unless otherwise indicated), appellant En Pointe Technologies, Inc. filed a complaint for damages and injunctive relief against respondents Sheila Johns and Tim Townsend. According to appellant, respondents were employees who maintained customer and vendor lists with "great and independent economic value [which] were the subject of reasonable efforts to maintain their secrecy and confidentiality." Appellant alleged that after respondents secured employment with a competitor, they secretly removed files from appellant's offices, erased hard drives and laptops with copies of the vendor list, and resigned with the intention of using the lists to replicate appellant's business model.

The complaint alleged causes of action for violation of the Uniform Trade Secrets Act, violation of Business and Professions Code section 17200, breach of confidential relationship, and breach of written employment agreements. Appellant sought to compel the return of its trade secrets and proprietary information, and restrain respondents' "anti-competitive activities." The employment agreements between respondents and appellant were attached to the complaint. They indicated a contractual right to arbitrate, but the complaint did not request an order compelling arbitration or otherwise mention the parties' right to arbitrate.

The trial court granted a motion for a temporary restraining order on February 8, but denied appellant's request for a preliminary injunction at a hearing on February 27. The order denying the injunction was signed on March 27. On May 13, respondents' demurrer was sustained in part. On June 6, appellant filed a first amended complaint alleging all previously pled causes of action except violation of the Uniform Trade

Secrets Act. It requested an order assigning the matter to arbitration as well as damages and injunctive relief. On June 18, appellant filed a motion to stay proceedings pending arbitration. Respondents answered the complaint on July 10. The trial court denied the motion to stay proceedings on September 11. Appellant filed a motion to compel arbitration on September 15, which was denied on October 16 following a hearing. Appellant timely appeals pursuant to Code of Civil Procedure section 1294, subdivision (a).[1]

DISCUSSION

Appellant argues the trial court erred in denying the motion to compel arbitration because it did not waive arbitration. (See § 1281.2, subd. (a).)

Appellant contends that the Federal Arbitration Act (9 U.S.C.A. § 2 (FAA)) is applicable to this case because that statute governs arbitration agreements involving interstate commerce and appellant provides services nationwide. Respondent does not dispute this assertion. "Although the FAA generally preempts any contrary state law regarding the enforceability of arbitration agreements [citation], the federal and state rules applicable" to questions of waiver are very similar. (*St. Agnes Medical Center v. PacificCare of California* (2003) 31 Cal.4th 1187, 1194 (*St. Agnes*).)

Under section 1281.2, on petition of a party to an arbitration agreement, if the court determines that an agreement to arbitrate a controversy exists, it shall order the petitioner and the respondent to arbitrate the controversy unless it determines that the right to compel arbitration has been waived by the petitioner. There is no single test to determine whether a party has waived its right to arbitration. The court may consider: """(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to

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[1] All unspecified statutory references are to the Code of Civil Procedure.

arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party.'''' (*St. Agnes, supra,* 31 Cal.4th at p. 1196, quoting *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992, which in turn, relies on a federal decision, *Peterson v. Shearson/American Exp., Inc.* (10th Cir. 1988) 849 F.2d 464, 467-468.)

Prejudice is "the determinative issue under federal law." (*St. Agnes, supra,* 31 Cal.4th at p. 1203.) "In California, whether or not litigation results in prejudice also is critical in waiver determinations." (*Ibid.*) As this court held in *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1197, the mere expense of responding to motions or other preliminary pleadings is not the kind of prejudice that bars a petition to compel arbitration. While "prejudice can be established when the party seeking arbitration used *judicial discovery procedures not available in arbitration* to *obtain* discovery of the opposing party's strategies, evidence, theories, or defenses," merely instituting discovery requests is not sufficient to establish waiver. (*Id.* at p. 1196.) (See also *Aviation Data, Inc. v. American Express Travel Related Services Co., Inc.* (2007) 152 Cal.App.4th 1522, 1538 [finding the extent to which both parties engaged in discovery relevant to waiver inquiry under federal law].)

"Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] 'When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.' [Citation.]" (*St Agnes, supra,* 31 Cal.4th at p. 1196.)

In this case, the trial court found: "Plaintiff initiated this action by filing it in court, despite full awareness of the arbitration clause. It sought a preliminary injunction in which it vigorously litigated the merits of the action. It has conducted substantial discovery, including taking the Defendants' depositions. After the Court sustained Defendants' Demurrer it filed an amended complaint rather than a petition to arbitrate. As a result of this significant litigation, Defendants incurred much expense and would be prejudiced by that cost as well as delay if the Court were to grant Plaintiff's Motion. Consequently, the Court finds that Plaintiff waived its right to arbitrate."

The record presented to us on appeal is not sufficient to determine as a matter of law whether the trial court erred. In its opening brief, appellant states that "[t]he limited discovery was limited in scope to issues pertinent to the preliminary injunction . . . En Pointe did not conduct discovery relating to any matters not discoverable through arbitration." In its reply brief, appellant describes the discovery as "a handful of depositions" of respondents and some of appellant's "key personnel," and written discovery propounded by respondents. Neither brief is supported with citations to the record on this point. (See Cal. Rules of Court, rule 8.204(a)(1)(C) [briefs must support references to matters in record by citation to volume and page].) Respondents' opposition to the motion to compel, filed in the trial court, argued in support of waiver that "six depositions have been taken, written discovery propounded, a motion for protective order and motion to stay were heard by the court and the parties made numerous appearances before this court." But the record does not show who was deposed or when, the scope of the depositions, what kind of written discovery was propounded, and by whom. We glean from the civil case summary included in the record that a motion for a protective order was filed by appellant on April 15, but we do not know its subject. At oral argument, appellant referred to a motion for stay, saying "[b]efore June, the motion to stay was brought, which is identical to this motion," yet the record is bereft of any mention of a motion to stay filed before June. Appellant contends

that "there has not been any deliberate stalling or other dilatory tactics that would constitute a waiver of arbitration," but the record does not provide enough information to verify that claim.

We note that the complaint requesting injunctive relief and damages made no mention of arbitration although employment agreements providing for arbitration were attached as exhibits. Under section 1281.8, a party to an arbitration agreement may seek provisional relief in court which will not operate to waive the right to arbitrate if the application for relief is accompanied by a request that proceedings be stayed pending arbitration. Appellant's failure to follow the procedures prescribed by the statute supports the trial court's findings.

A trial court's ruling "'is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.'" (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631.) "[A]mbiguities are resolved in favor of affirmance,"and "[t]he burden of demonstrating error rests on the appellant." (*Id.* at pp. 631, 632.) The trial court found that appellant engaged in "substantial discovery" as part of "significant litigation." As the record does not support a contrary finding, appellant failed to demonstrate error and we affirm the order.[2]

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[2] Appellant also argues that "[t]his Court must find that only an arbitrator could have properly determined whether [appellant] waived its right to arbitrate the underlying dispute." This argument fails because state and federal cases hold that allegations of waiver arising from litigation conduct are decided by courts, and respondents' allegation of waiver rested on appellant's actions during the lawsuit rather than on the arbitration agreements. (See *Thorup v. Dean Witter Reynolds, Inc.* (1986) 180 Cal.App.3d 228, 234, citing *N&D Fashions, Inc. v. DHJ Industries, Inc.* (8th Cir. 1976) 548 F.2d 722, 278; cf. *Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955, 964, applying *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, fn. omitted ["issue of waiver must be determined by an arbitrator here because all of respondent's waiver allegations involve non-litigation conduct and necessitate interpretation of the arbitration agreement"]; see also *Omar* at pp. 961-963.)

DISPOSITION

The order denying the motion to compel arbitration is affirmed. Respondents to have their costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.