COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-1170

RUSSO & MINCHOFF & others[1]

vs.

SAVVAS GIANASMIDIS.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This appeal arises from a dispute concerning a contingency fee agreement for the provision of legal services executed by the plaintiff lawyers and the defendant, Savvas Gianasmidis. The trial court judge, after denying Gianasmidis's attempt to have this matter proceed to arbitration as provided for in the fee agreement, entered a default judgment against him and assessed damages in the amount of $1,527,931.30. After untangling the procedural morass, as developed below, we conclude that Gianasmidis's appeal from the order denying his renewed motion to compel arbitration is properly before us. We also conclude that the order was in error and vacate the judgment.

[1] India L. Minchoff and Stephen J. Kuzman.

As pertinent here, the parties entered into two written fee agreements, one in 2009, providing for a contingency fee of thirty-three percent, and a new agreement in 2011 providing for a contingency fee of forty percent of any recovery made in the action for which the plaintiffs were representing Gianasmidis. Both agreements also contained identical, broadly worded, dispute resolution clauses which provided that any claim by counsel

> "for unpaid fees and expenses, and any defenses or counterclaims to such a claim . . . shall be resolved exclusively through arbitration. In other words, there will be no jury trial or non-jury court proceeding to resolve any dispute between the Client and the Attorneys; rather any such dispute will be resolved by the parties or through binding non-court arbitration proceedings. . . . The award of the [arbitrator] shall be final, binding and conclusive on the parties."

After the underlying case concluded with a substantial judgment in favor of Gianasmidis (which was later compromised by settlement), a dispute arose between the parties concerning the fee owed.[2] The plaintiffs then commenced this action alleging breach of contract by Gianasmidis and seeking injunctive relief to prevent Gianasmidis from selling certain real estate assets that had been transferred to him as part of the settlement of the underlying action. Gianasmidis failed to answer, and the plaintiffs requested he be defaulted. Gianasmidis responded by

[2] The dispute centers, in part, around whether the 2009 fee agreement or the 2011 fee agreement, which the defendant claimed was entered into under duress, was the operative agreement.

filing a request for arbitration with the Legal Fee Arbitration Board of the Massachusetts Bar Association (board). The plaintiffs initially agreed to arbitrate the dispute before the board.[3] On February 6, 2015, Gianasmidis filed two motions in the Superior Court, one to remove the default, which had not as yet been entered by the clerk, and a motion to compel arbitration. The clerk subsequently entered the default on March 11, 2015.

On April 15, 2015, the motion to compel arbitration was denied without prejudice as the defendant had failed to file the motion in compliance with Superior Court Rule 9A. The motion to remove the default was denied on the merits on May 5, 2015, and an assessment of damages hearing was then scheduled. Having obtained the default in the Superior Court action, the plaintiffs then moved before the board to have the pending arbitration petition dismissed by the arbitrator. When the arbitrator denied that motion, the plaintiffs filed an emergency motion with the Superior Court to enjoin the arbitration proceedings then pending before the board. The motion to enjoin arbitration was allowed on May 15, 2015, and Gianasmidis moved to reconsider that order and to again compel arbitration; the

[3] A March 3, 2015, letter from the Massachusetts Bar Association's Legal Fee Arbitration Board acknowledged the plaintiffs Kuzma and Minchoff's agreement to participate in arbitration of the dispute.

motion was denied by the trial judge on May 21, 2015. After the assessment of damages hearing, judgment entered for the plaintiffs on May 25, 2015.

Gianasmidis filed a notice of appeal on May 29, 2015, which purported to appeal from the "denial of the Motion to Vacate Default, the failure to order arbitration, and the orders following the Assessment of Damages Hearing." The plaintiffs moved to dismiss so much of the appeal as sought review of the April 15, 2015, order denying the motion to compel arbitration, as the May 29, 2015, notice of appeal was untimely as to that order. That motion was allowed on August 14, 2015.

We first address the procedural impediments to this appeal raised by the plaintiffs. The partial dismissal of the appeal is of no consequence to the orders properly before us. The motion to dismiss sought dismissal of "so much of Defendant's appeal which seeks review of this Court's April 15, 2015 Order denying Defendant's Motion to Compel Arbitration."[4] However, as noted, the April 15 order denied the motion to compel, without prejudice, upon compliance with Superior Court Rule 9A. The denial of the motion was not on the merits and clearly contemplated that the motion would be renewed. The motion was

[4] Contrary to the plaintiffs' assertion on appeal, the dismissal did not effect a dismissal of "the issue of arbitrability." The motion to dismiss specifically limited itself to the April 15, 2015, order, not to the general issue of arbitrability.

subsequently renewed by Gianasmidis after the plaintiffs' motion to enjoin the then pending arbitration was allowed. The notice of appeal was timely as to the May 21, 2015, order denying the motion to compel arbitration.

The plaintiffs also argue that the notice of appeal failed to comply with the specificity requirement of Mass.R.A.P. 3(c), as appearing in 430 Mass. 1602 (1999).[5] Although the language in the notice was somewhat vague ("failure to order arbitration"), it was sufficient to fairly identify the order denying the motion to compel arbitration.[6] Requiring further specificity in these circumstances would elevate form over substance. See Morgan v. Evans, 39 Mass. App. Ct. 465, 467 n.4 (1995) (declining to dismiss appeal on technicality where notice of appeal referenced order for judgment, but not judgment itself). Accordingly, we conclude that the appeal from the May 21, 2015, order denying the motion to compel arbitration is properly before us.

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[5] In civil cases, "[t]he notice of appeal shall . . . designate the judgment, decree, adjudication, order, or part thereof appealed from."

[6] The notice was likely deficient as to the default judgment and perhaps as to the order enjoining arbitration, but given our conclusion that it was sufficient as to the order denying the motion to compel arbitration, those deficiencies are of no consequence. The purported appeal from the denial of the motion to vacate the default is a nullity, as that order is interlocutory and cannot be separately appealed. See Krupp v. Gulf Oil Corp., 29 Mass. App. Ct. 116, 118-119 (1990).

As to the merits, there is no dispute that the parties had a binding contractual obligation to arbitrate any disagreement concerning the fee owed to the plaintiffs.[7] Rather, the plaintiffs argue that Gianasmidis waived his right to arbitrate by defaulting and by failing to file timely and proper motions to compel arbitration. See Home Gas Corp. of Mass., Inc. v. Walter's of Hadley, Inc., 403 Mass. 772, 775 (1989), quoting from Bodine v. United Aircraft Corp., 52 Cal. App. 3d 940, 945, (1975) ("The right to arbitration 'may be lost, . . . through a failure properly and timely to assert the right'"). While the denial of an application to compel arbitration is reviewed de novo, see Machado v. System4 LLC, 471 Mass. 204, 208 (2015), a determination that a party has waived his right to arbitration, especially where, as here, the issue of waiver turns on the significance of actions taken in a judicial forum, is reviewed for abuse of discretion. See Martin v. Norwood, 395 Mass. 159, 162 (1985). Accordingly, we review the judge's implicit determination that waiver occurred here for abuse of discretion.

[7] The plaintiffs argue that the plaintiff "Russo & Minchoff" was not a party to the fee agreement and thus cannot be compelled to arbitrate under the agreement's arbitration clause. This would suggest that Russo & Minchoff have no contract claim whatsoever, an argument that we leave for further development before the arbitrator. We also note that India Minchoff signed the second fee agreement, which she contends is the controlling agreement, as "India L. Minchoff, Esquire of the Law Offices of Russo & Minchoff."

In deciding whether Gianasmidis waived his right to arbitrate the dispute, the "essential question is whether, under the totality of the circumstances, the defaulting party acted inconsistently with the arbitration right." Home Gas Corp. of Mass., Inc. v. Walter's of Hadley, Inc., supra (quotations omitted). To make this determination, we look to, among other factors, "whether the litigation machinery has been substantially invoked and . . . 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." Id. at 776. Here, although a substantial delay was created by Gianasmidis's failure to answer the complaint in a timely manner, upon appearing in the action he moved immediately to compel arbitration and consistently asserted his right to do so. In addition, at the time he initially moved to compel arbitration, a default had not yet entered, no discovery or motion practice had occurred, and trial was not imminent. In these circumstances, given the strong public policy favoring the arbitration of disputes generally, see, e.g., Drywall Sys., Inc. v. ZVI Constr. Co., 435 Mass. 664, 669 (2002); Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County, 451 Mass. 698, 700 (2008), we conclude that Gianasmidis did not waive his right to arbitration and that the denial of his motion to compel arbitration was an abuse of discretion. Accordingly,

the May 21, 2015, order denying the motion to compel arbitration is reversed, the judgment is reversed, and the matter is remanded to the Superior Court for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Kafker, C.J., Cohen & Green, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: June 28, 2016.

[8] The panelists are listed in order of seniority.