

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA**

RUBY KERCE and DAVID KERCE,

Appellants,

v.

CASE NO.: CVA1 07-31

Lower Court Case No.: 48-2006-CC-016875-O

**CONSUMER CREDIT COUNSELING
FOUNDATION, INC., d/b/a
NATIONAL FAMILY SERVICES,
A Florida Corporation,**

Appellees.

Appeal from the County Court,
for Orange County,
C. Jeffrey Arnold, Judge.

William J. Denius, Esquire,
for Appellants.

David Muellenhoff, Esquire,
for Appellee.

Before BLACKWELL, T. SMITH, DAVIS, J.J.

PER CURIAM.

FINAL ORDER AND OPINION REVERSING TRIAL COURT

Ruby Kerce and David Kerce (“Appellants”) timely appeal the trial court’s order granting in part and denying in part Appellee’s Motion to Dismiss and for Assessment of Attorney’s Fees. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

On June 1, 2004, Appellants filed an initial complaint against Consumer Credit Counseling Foundation, Inc. d/b/a National Family Services (“Appellee”) alleging breach of

contract and violation of Florida's Credit Counseling Services Act. A pre-trial conference and mediation was scheduled for July 22, 2004. The notice to appear informed Appellee that if it believes it has been sued in the wrong place, it has the right to request that the case be moved to a proper location or venue. At the small claims pretrial conference, the parties entered into a stipulation to continue mediation. On August 12, 2004, after failing to reach a settlement, the parties entered into another stipulation to continue mediation. Thereafter, the parties entered into three additional stipulations to continue mediation, and corresponded both over the phone and in writing numerous times about the merits of the case and possibility of settlement.

On March 31, 2006, Appellants filed an amended complaint and motion to transfer case to county court on the grounds that Appellants' damages now exceeded \$5,000.00. After the hearing on the motion to transfer in which Appellee argued against the merits of Appellants' claims, the trial court denied the motion without prejudice to allow Appellants to allege their damages in more detail. At the hearing on Appellants' amended motion to transfer, Appellee again argued in opposition of the motion on the basis that the case was in the proper court. The trial court denied the amended motion without prejudice to allow Appellants to allege claims for declaratory relief, injunctive relief, and damages in separate counts.

Appellants' second amended motion to transfer was granted on October 18, 2006, and the case was transferred from small claims court to county court. On December 11, 2006, Appellee filed a motion for enlargement of time to respond stating that it did not receive the transfer order until November 9, 2006, and needed additional time to obtain competent Florida-licensed counsel before it could respond to Appellants' third amended complaint.

In January 2007, Appellee filed a Motion to Dismiss stating that per the parties' agreement, Appellants' only option was to submit the issues to arbitration. A hearing on the

motion was held on February 20, 2007, and the trial court entered an order granting the motion on March 23, 2007, thereby referring the matter to arbitration and staying the proceedings pending arbitration.

An order granting a motion to compel arbitration is reviewed de novo. Roth v. Cohen, 941 So. 2d 496 (Fla. 3d DCA 2006).

Appellants assert that the trial court erred in granting Appellee's Motion to Dismiss and in referring the case to arbitration because Appellee waived the right to arbitration by actively participating in the lawsuit and taking action inconsistent with the right to arbitrate. Appellee did not file an answer brief.

In ruling on a motion to compel arbitration, a court must determine whether: (1) a valid written agreement containing an arbitration clause exists; (2) an arbitrable issue exists; and (3) the right to arbitration has been waived. Morrell v. Wayne Frier Manufactured Home Ctr., 834 So. 2d 395, 397 (Fla. 5th DCA 2003). The only issue in the present case is whether Appellee waived the right to arbitration.

Arbitration provisions are generally favored by Florida courts; however, a party's contractual right to arbitrate must be safeguarded. Raymond James Fin. Services, Inc. v. Saldukas, 896 So. 2d 707, 711 (Fla. 2005). A party waives its right to arbitrate by: (1) actively participating in the lawsuit; or (2) taking action which is inconsistent with the right to arbitrate. Morrell, 834 So. 2d at 397 (waiver where the defendant filed an answer and affirmative defenses addressing the merits of the case and allowed cause to proceed for nearly a year without raising the issue of arbitration); Breckenridge v. Farber, 640 So. 2d 208 (Fla. 4th DCA 1994) (waiver where the defendant participated in litigation by filing pleadings and motions for two and one-half years without raising the issue of arbitration); Biotronix Lab., Inc. v. Oak Cas. Ins. Co., 4

Fla. L. Weekly Supp. 762a (Fla. 11th Cir. Ct. June 20, 1997)(waiver where the defendant's actions of filing answer, affirmative defenses, and demand for jury trial were deemed inconsistent with right to arbitrate).

Throughout the pendency of the proceedings in small claims court and county court, Appellee participated in several mediations and hearings in which it argued the merits of Appellant's claims and discussed the possibility of settlement. Appellee's actions of participating in the litigation for nearly two and one-half years before raising the issue of arbitration was inconsistent with its contractual right to arbitration, and waived Appellee's right to arbitration.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Order on Defendant's Motion to Dismiss and for Assessment of Attorney's Fees" is **REVERSED**; "Appellant's Motion for Attorney's Fees" is **GRANTED**, the assessment of which is **REMANDED** to the trial court; and this case is **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the ___14_ day of ___March_____, 2008.

/S/
ALICE L. BLACKWELL
Circuit Judge

/S/
THOMAS B. SMITH
Circuit Judge

/S/
JENIFER M. DAVIS
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **Williams J. Denius, Esquire**, Post Office Box 1913, Orlando, Florida 32802 and **David Mullenhoff, Esquire**, Post Office Box 10069, Pleasanton, California 94588 on the 20 day of March, 2008.

_____/S/_____
Judicial Assistant