

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

**LITCHFORD & CHRISTOPHER
PROFESSIONAL ASSOCIATION,
A Florida Professional Corporation,**

Appellant,

v.

CASE NO.: CVA1 08-19
Lower Court Case No.: 2007-SC-14335

**DANIEL J. DUETSCH and
JACQUELINE L. DEUTSCH,**

Appellees.

Appeal from the County Court,
for Orange County,
Nancy L. Clark, Judge.

David A. Beyer, Esquire,
for Appellant.

Marc P. Ossinsky, Esquire,
for Appellees.

Before ARNOLD, APTE, LUBET, J.J.

PER CURIAM.

FINAL ORDER AND OPINION REVERSING TRIAL COURT

Appellant Litchford & Christopher, P.A. (“Appellant”) appeals the lower court’s order granting the motion to dismiss or compel arbitration in favor of Appellees Daniel and Jacqueline Deutsch (“Appellees”). The nature of the order is non-final because it is an order referring the matter to arbitration and staying the proceedings pending arbitration. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(B).

Pursuant to Rule 9.200(b)(4), Florida Rules of Appellate Procedure, the parties submitted a proposed statement of evidence and proceedings to the lower court for purposes of settling the record on appeal because there was no transcript of the proceedings available. The factual and procedural background as stated below is based upon the statement of evidence and proceedings which was approved by the lower court on April 10, 2008.

On or about July 20, 2007, Appellant filed a complaint in circuit court seeking damages in the amount of \$3,575.15 from Appellees for breach of the fee agreement between the parties. (SEP Ex. A.) The complaint states that Appellees retained Appellant to act as co-counsel in their ongoing homeowners' suit and the parties executed a written fee agreement which was applicable towards both the contracted legal services and any additional future legal services. Upon performing legal services, Appellant rendered monthly invoices to Appellees but Appellees failed to pay the full amount due and owing.

On September 5, 2007, Appellees informed Appellant that the complaint was improperly filed in the circuit court and that Appellant had failed to attach to the complaint the portion of the fee agreement permitting recovery of attorney's fees. The omitted portion of the fee agreement was later provided to Appellees. On or about September 27, 2007, Appellees filed a motion to dismiss requesting that the circuit court either dismiss the action for lack of jurisdiction or transfer the action to county court because the amount in controversy was less than \$5,000. Appellees' motion to dismiss is devoid of any reference to a right to arbitration. On or about September 27, 2007, Appellees also served their first request to produce in the circuit court.

In an effort to settle the lawsuit, Appellees sent Appellant a proposal for settlement on October 18, 2007. The next day, Appellant filed and served an unopposed motion to transfer the action from circuit court to county court. Appellant also filed a statement of claim attaching the

fee agreement including all of the terms and conditions. Appellant later responded to Appellees' request to produce and provided a copy of each document requested.

On November 5, 2007, the circuit court judge approved the stipulated order granting Appellant's unopposed motion to transfer the action to county court. After the case was transferred to county court, the parties agreed to conduct all future proceedings pursuant to the Florida Rules of Civil Procedure. A stipulated order on the unopposed motion to invoke was filed with the county court and approved on November 20, 2007.

Appellees filed a motion to dismiss or compel arbitration on November 28, 2007, asserting that Appellant's claim should be dismissed for failure to comply with the contractual provision providing for arbitration as agreed between the parties pursuant to the terms and conditions of the fee agreement. At the hearing on January 9, 2008, Appellant acknowledged the enforceability of the arbitration provision and stipulated that the dispute fell within the parameters of the arbitration provision. Appellant argued that Appellees had waived their right to pursue arbitration because they continued to actively participate in the litigation or engage in acts inconsistent with the right to arbitrate. Alternatively, Appellees argued that Appellant's failure to attach the entire fee agreement to the complaint denied Appellees sufficient information to put them on notice of their right to compel arbitration. Given this lack of notice, Appellees asserted that they were entitled to raise their right to arbitration for the first time in their second motion to dismiss. On January 10, 2008, the lower court entered an order granting Appellees' motion to compel arbitration. This appeal followed.

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

Appellant asserts that the lower court erred in granting Appellees' motion to compel

arbitration because Appellees waived their right to arbitration by actively participating in the lawsuit and taking action inconsistent with the right to arbitrate. Alternatively, Appellees assert that Appellant failed to cite any facts showing actions by Appellees defending the merits of the claims so as to act as a waiver to the arbitration clause.

Arbitration provisions are generally favored by Florida courts; however, a party's contractual right to arbitrate must be safeguarded. Raymond James Fin. Serv., Inc. v Saldukas, 896 So. 2d 707, 711 (Fla. 2005). In ruling on a motion to compel arbitration, a court must determine: (1) whether a valid written agreement containing an arbitration clause exists; (2) whether an arbitrable issue exists; and (3) whether 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 Appellees waived their right to arbitration.

Waiver is the "intentional or voluntary relinquishment of a known right or conduct which warrants an inference of the relinquishment of a known right." Marine Env'tl. Partners, Inc. v. Johnson, 863 So. 2d 423, 426 (Fla. 4th DCA 2003)(citing Hill v. Ray Carter Auto Sales, Inc., 745 So. 2d 1136, 1138 (Fla. 1st DCA 1999)). A party claiming waiver of arbitration must show: (1) knowledge of an existing right to arbitrate and (2) active participation in litigation or other acts inconsistent with the right. Breckenridge v. Farber, 640 So. 2d 208, 211 (Fla. 4th DCA 1994). The question of waiver is one of fact, reviewable for competent substantial evidence. Marine, 863 So. 2d at 427. Waiver of a right to arbitration does not necessarily depend on the timing of the motion to compel arbitration, but rather on the prior taking of an inconsistent position by the party moving to compel arbitration. R.W. Roberts Constr. Co., Inc., v. Masters & Co., Inc., 403 So. 2d 1114, 1115 (Fla. 5th DCA 1981)(party's initial motion to dismiss and to transfer action was action totally inconsistent with later assertion that no court was proper forum

because arbitration was appropriate).

While an initial filing of a motion to dismiss does not alone constitute active participation to support a finding of waiver, filing motions and proceeding with discovery with knowledge of an applicable arbitration clause may constitute active participation in a lawsuit to constitute a waiver. Compare Houchins v. King Motor Co. of Fort Lauderdale, Inc., 906 So. 2d 325, 328 (Fla. 4th DCA 2005)(rejecting argument that initial motion to dismiss for failure to state cause of action constitutes active participation); and Hirschfeld v. Crescent Heights, X, Inc., 707 So. 2d 955, 956 (Fla. 3d DCA 1998)(filing of a motion to dismiss directed at technical deficiencies in the complaint is not active participation amounting to waiver); with Marthame Sanders & Co. v. 400 W. Madison Corp., 401 So. 2d 1145 (Fla. 4th DCA 1981)(defendant waived arbitration right by filing answer and participating in discovery and trial court proceedings prior to filing motion to compel arbitration).

The Court first finds that Appellees' argument regarding Appellant's failure to establish the fairness of the contract arrangement is irrelevant to the present issue of waiver. The Court also rejects Appellees' argument that they could not have waived their right to arbitration because Appellant did not attach the accompanying terms and conditions of the fee agreement to the complaint. Appellees must be assumed to have known, and are charged with knowledge, of the terms and conditions incorporated into the fee agreement they executed. See Marine, 863 So. 2d at 426-27.

The Court further finds that Appellees waived their right to arbitration by actively participating in the litigation and acting inconsistent with their right to arbitrate. Throughout the pendency of the proceedings in circuit court and county court, Appellees participated in the proceedings by filing a motion to dismiss or transfer the action and a request to produce

documents. The crux of Appellees initial motion to dismiss was that the lawsuit was filed in the wrong court given the amount at controversy, not that the lawsuit did not belong in court at all. See R.W. Roberts, 403 So. 2d at 1115. This is further illustrated by the stipulated order allowing transfer of the action to county court. Appellees also attempted to settle the lawsuit by serving a proposal for settlement pursuant to rule 1.442, Florida Rules of Civil Procedure, and section 768.79, Florida Statutes, and later stipulated to an order granting Appellant’s motion to invoke the Florida Rules of Civil Procedure. Appellees’ actions of participating in the litigation before raising the issue of arbitration were inconsistent with their contractual right to arbitration, thereby, waiving Appellees’ right to arbitration.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the lower court’s “Order on Defendant’s Motion to Dismiss, or in the Alternative Motion to Compel Arbitration” is **REVERSED**; “Appellant’s Motion for Attorney’s Fees” is **GRANTED**, the assessment of which is **REMANDED** to the lower 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 ___17___ day of _____ June _____, 2009.

_____/s/_____
C. JEFFERY ARNOLD
Circuit Judge

_____/s/_____
ALAN S. APTE
Circuit Judge

_____/s/_____
MARC L. LUBET
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: **David A. Beyer, Esquire**, Litchford & Christopher, P.A., Bank of America Building, 390 North Orange Avenue, Post Office Box 1549, Orlando, Florida 32802 and **Marc P. Ossinsky, Esquire**, Ossinsky & Cathcart, P.A., 2699 Lee Road, Suite 101, Winter Park, Florida 32789 on the 17 day of June , 2009.

_____/s/_____
Judicial Assistant