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NO. COA14-711
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

ROXANNA BRYANT,
Plaintiff

v.

Randolph County
No. 11 CVS 2727

ROBERT MARK HOLZINGER, JR.,
Defendant

Appeal by plaintiff from order entered 1 April 2014 by Judge David L. Hall in Randolph County Superior Court. Heard in the Court of Appeals 5 November 2014.

Law Office of Michael W. Patrick, by Michael W. Patrick, and Holtkamp Law Firm, by Lynne Holtkamp, for Plaintiff.

Teague, Rotenstreich, Stanaland, Fox & Holt, P.L.L.C., by Camilla F. DeBoard and Kenneth Rotenstreich, for unnamed Defendant.

ERVIN, Judge.

Plaintiff Roxanne Bryant appeals from an order denying her motion to compel arbitration. On appeal, Plaintiff contends that the trial court erroneously refused to order that the dispute between the parties be arbitrated on the grounds that Plaintiff had not waived her right to enforce the provisions of their arbitration agreement by litigating her claim in Randolph

County Superior Court. After careful consideration of Plaintiff's challenge to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

On 23 September 2009, Plaintiff and Defendant Robert Mark Holzinger, Jr., were involved in a motor vehicle accident in Pender County. At that time, Defendant, who was apparently impaired as the result of the consumption of an intoxicant, crashed into Plaintiff's automobile, causing Plaintiff to sustain personal injuries and damage to her vehicle. At the time of the accident, Plaintiff was covered by an insurance policy issued by unnamed Defendant Nationwide Property and Casualty Insurance Company that provided Plaintiff with underinsured motorist coverage and included a provision authorizing Plaintiff to initiate an arbitration process within three years after the exhaustion of the underlying liability coverage.

Defendant was covered under a liability policy issued by Progressive Southeastern Insurance Company. In September 2011, Progressive tendered its policy limits of \$30,000 per person/\$60,000 per occurrence to those injured in the 23 September 2009 accident. After accepting Progressive's tender

of \$10,000 by means of a letter dated 21 November 2011, Plaintiff executed a limited release of her claims against Progressive on 6 April 2012.

On 27 October 2011, Plaintiff filed a civil action against Defendant and put Nationwide on notice of this action by forwarding a copy of the summons to its attention. Plaintiff's original counsel failed to serve Defendant within 60 days after the 15 December 2011 issuance of an alias and pluries summons. Defendant eventually received the summons on 27 February 2012. On 19 March 2012, Nationwide filed an answer that included a motion to dismiss for lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process. In addition, Nationwide submitted certain discovery requests, including interrogatories and a request for production of documents, to Plaintiff and Defendant. Plaintiff served interrogatories and a request for production of documents on Nationwide, to which Nationwide responded on 5 June 2012. On the following day, Nationwide filed a motion to compel Plaintiff to respond to the interrogatories and request for production of documents that had been served upon Plaintiff. Nationwide filed a second motion to compel on 5 November 2012. On 20 March 2013, Plaintiff served a second request for production of documents upon Nationwide, to which Nationwide responded on 5 April 2013.

On 5 September 2013, Judge W. Erwin Spainhour entered a consent order pursuant to which Plaintiff was given 45 days within which to respond to Nationwide's interrogatories and requests for production of documents.

After Plaintiff's original counsel failed to respond to Nationwide's discovery requests, he was allowed to withdraw from his representation of Plaintiff on 19 July 2013. On 26 July 2013, Plaintiff's current counsel noted an appearance. After discovering that Plaintiff's original counsel had failed to properly serve Defendant, counsel employed by the liability carrier for Plaintiff's original counsel filed a motion on 8 January 2014 seeking a retroactive extension of time within which to effectuate service upon Defendant. On 24 February 2014, Judge A. Robinson Hassell entered orders granting Plaintiff's motion for a retroactive extension of time within which to serve Defendant and denying Nationwide's dismissal motion.

On 18 February 2014, Plaintiff filed a motion to compel arbitration. After conducting a hearing on 20 March 2014, the trial court entered an order denying Plaintiff's motion on 1 April 2014. Plaintiff noted an appeal to this Court from the trial court's order.

II. Substantive Legal Analysis

In her sole challenge to the trial court's order, Plaintiff contends that the trial court erred by denying her motion to compel arbitration. More specifically, Plaintiff contends that the trial court erred by concluding that Plaintiff had waived her right to demand arbitration by causing Nationwide to incur substantial expenses in the course of the existing litigation and by utilizing discovery procedures that are not available during the arbitration process. We do not find Plaintiff's argument persuasive.

A. Appealability

Although an order denying a request that the dispute between the parties be submitted to arbitration is interlocutory in nature, this Court has held that "the right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable." *Moose v. Versailles Condominium Ass'n*, 171 N.C. App. 377, 381, 614 S.E.2d 418, 422 (2005) (quotation marks and citation omitted). As a result, Plaintiff's challenge to the trial court's order is properly before this Court.

B. Standard of Review

The extent to which a dispute is subject to arbitration must be resolved on the basis of an analysis of (1) whether the parties had a valid arbitration agreement and (2) whether the

specific dispute is encompassed within the scope of that agreement. *Id.* An order granting or denying a motion to compel arbitration is reviewed on appeal for the purpose of determining whether competent evidence exists to support the trial court's findings of fact and whether the trial court's findings of fact support the conclusions of law. *Sciolino v. TD Waterhouse Investor Services, Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66, *disc. review denied*, 356 N.C. 167, 568 S.E.2d 611 (2002). In light of the applicable standard of review, "when there is evidence in the record which supports the trial court's findings of fact, and those findings support its conclusions of law that a party has waived its right to compel arbitration, the decision must be affirmed." *Moose*, 171 N.C. App. at 385, 614 S.E.2d at 424. Although the extent to which a party has waived the right to have a dispute resolved by arbitration is a question of fact, the determination of whether a particular dispute is subject to arbitration is a conclusion of law that is subject to *de novo* review. *Id.* at 382, 614 S.E.2d at 422.

C. Applicable Legal Principles

"Due to strong public policy in North Carolina favoring arbitration, courts must closely scrutinize any allegation of waiver of the right to arbitration. In accordance with this policy, our Supreme Court has required a showing of prejudice to

the opposing party." *O'Neal Constr., Inc. v. Leonard S. Gibbs Grading, Inc.*, 121 N.C. App. 577, 580, 468 S.E.2d 248, 250 (1996) (internal quotation marks and citation omitted).

A party may be prejudiced by [its] adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration.

Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986).

D. Validity of Trial Court's Waiver Ruling

As the parties appear to recognize, Plaintiff was clearly entitled to have its dispute with Nationwide submitted to binding arbitration in accordance with the applicable policy of insurance.¹ For that reason, the sole question before the trial court in connection with Plaintiff's motion to compel

¹The arbitration provision contained in Plaintiff's policy stated, in pertinent part, that:

If we and an insured do not agree:

1. Whether that insured is legally entitled to recover compensatory damages from the owner or driver of an uninsured motor vehicle; or

2. As to the amount of such damages;

the insured may demand to settle the dispute by arbitration.

arbitration was whether Plaintiff had waived the right to insist that the parties' dispute be submitted to arbitration. In support of its contention that Plaintiff had waived the right to demand arbitration, Nationwide argued that Plaintiff had caused Nationwide to incur significant expense during the course of the litigation between the parties and had utilized discovery techniques that were not available in arbitration. In denying Plaintiff's motion to compel arbitration, the trial court stated that:

Ms. Bryant waived her right to demand arbitration by proceeding with this litigation in the Randolph County Superior Court so far and in such a manner that Nationwide has been prejudiced. Specifically, Nationwide appeared herein as Unnamed Defendant and expended significant resources in doing so.

In addition, Ms. Bryant waived her right to demand arbitration by making use of judicial discovery procedures not available in arbitration when she only partially responded to Nationwide's discovery responses, requiring a motion to compel and consent order to compel, and when she served Interrogatories and Requests for Production of Documents on Nationwide, without leave from the arbitrators.

As a result, the ultimate issue raised by Plaintiff's challenge to the trial court's order is whether either of these two determinations are correct.²

The act of filing a lawsuit in and of itself does not constitute a waiver of the right to arbitrate. *N.C. Farm Bureau Mut. Ins. Co. v. Sematoski*, 195 N.C. App. 304, 308, 672 S.E.2d 90, 93 (2009). On the contrary,

[t]his Court has consistently held that when considering whether a delay in requesting arbitration resulted in significant expense for the party opposing arbitration, the trial court must make findings (1) whether the expenses occurred after the right to arbitration accrued, and (2) whether the expenses could have been avoided through an earlier demand for arbitration.

Herbert v. Marcaccio, 213 N.C. App. 563, 568, 713 S.E.2d 531, 536, *disc. review denied*, 365 N.C. 363, 717 S.E.2d 746 (2011).

The right to arbitrate a dispute involving underinsured motorists coverage accrues when the policy limits available pursuant to the underlying liability policy are exhausted by settlement or the payment of a judgment or when the liability carrier tenders its policy limits as part of a settlement offer,

²As a result of the fact that the examples of the methods by which a party can waive the right to compel the submission of a dispute to arbitration listed in *Servomation* are stated in the disjunctive, a decision to hold that the trial court ruled correctly with respect to one of the two grounds mentioned in its order necessitates an affirmance of its decision to deny Plaintiff's motion to compel arbitration.

Register v. White, 358 N.C. 691, 698, 599 S.E.2d 549, 555 (2004); see N.C. Gen. Stat. § 20-279.21(b)(4), so that "exhaustion occurs upon tender, rather than upon payment, of a liability insurer's policy limit." *Creed v. Smith*, ___ N.C. App. ___, ___, 732 S.E.2d 162, 164 (2012), *disc. review denied*, 366 N.C. 572, 738 S.E.2d 372 (2013). In the present case, Progressive, which provided Defendant's liability coverage, exhausted its policy limits by tendering \$10,000 to Plaintiff on 20 September 2011. For that reason, any expenses incurred by Nationwide in connection with this litigation after that date and before Plaintiff demanded that Nationwide submit the parties' dispute to binding arbitration on 18 February 2014 should be considered in the course of determining whether Nationwide expended significant amounts of money in defending against Plaintiff's claim.

As the trial court noted in its order denying Plaintiff's motion to compel arbitration, Plaintiff filed a number of motions in the Randolph County Superior Court before seeking to compel the submission of the parties' dispute to arbitration, including a motion by means of which Plaintiff's original counsel sought to withdraw and a motion seeking a retroactive extension of time within which to effectuate service upon Defendant. In addition, as we noted earlier, the parties

submitted a number of discovery requests to each other, responded to those requests, and filed and litigated a motion to compel. Moreover, the parties unsuccessfully attempted to resolve their dispute using the mediation process. Although this case was originally scheduled for trial on 14 January 2013, that trial date was continued on three occasions before the case was eventually set on 14 April 2014. In preparation for trial, Plaintiff obtained the issuance and service of at least five subpoenas. According to its counsel, Nationwide "took significant steps in this litigation to its detriment and expended a significant amount of money, in excess of \$19,000, in attorneys' fees and expenses, through appearance by the undersigned at numerous hearings in Randolph County Superior Court on several motions filed by the Parties." As a result, given that the record clearly reflects that Plaintiff waited more than two and a half years after filing her complaint in this case before demanding that the dispute between the parties be submitted for binding arbitration, that the parties actively engaged in litigation-related activities throughout that entire period of time, and that Nationwide expended significant amounts of money in defending against Plaintiff's claim that could have been avoided had Plaintiff sought to compel arbitration at an earlier time, we believe that the record contains ample support

for the trial court's determination that Plaintiff had waived her right to demand arbitration by causing Nationwide to expend significant amounts of money in connection with the litigation of this case as the result of her delay in invoking her right to submit the dispute between the parties for binding arbitration.

In seeking to persuade us that no waiver of the right to compel the submission of her dispute with Nationwide to arbitration had occurred, Plaintiff argues that the trial court erred by utilizing all of the costs that Nationwide incurred in making its waiver-related determination. In support of this contention, Plaintiff asserts that the trial court was precluded from considering the general expenses ordinarily associated with litigation in making its waiver determination and was required, instead, to sort out which expenses were and were not eligible for consideration in making the required waiver determination. For example, Plaintiff contends that discovery-related expenses, including expenses resulting from a litigant's failure to respond to discovery in a proper manner and expenses associated with the mediation process, do not support a finding of waiver. Plaintiff's argument is not, however, consistent with the relevant decisions of this Court.

The most serious problem with this aspect of Plaintiff's argument is that the decisions upon which she relies do not

stand for the proposition for which she cites them. For example, neither *Sematoski* nor *O'Neal Construction* states that "[t]he ordinary fees and expenses of defending a lawsuit are not expenses justifying waiver of the right to arbitration." Instead, *Sematoski* rejected a claim of waiver on the grounds that the mere filing of a pleading did not have the effect of waiving a party's right to have a claim submitted to arbitration and that "the expenditure of \$3,402.24 in legal fees and expenses in defense of" a civil action is "not the type contemplated by" the Supreme Court, *Sematoski*, 195 N.C. App. at 308-09, 672 S.E.2d at 93, while *O'Neal Construction* rejected a claim of waiver on the grounds that the expenses upon which the trial court relied were incurred after the defendant pled "the right to arbitration as an affirmative defense and mov[ed] for arbitration in its answer." *O'Neal Constr.*, 121 N.C. App. at 580-81, 468 S.E.2d at 250. Although this Court held that the fact that a party had participated in a mediated settlement conference did not support a finding of waiver, *O'Neal Constr.*, 121 N.C. App. at 580-81, 468 S.E.2d at 250-51, all of the expenses upon which the trial court relied in concluding that Plaintiff had waived her right to demand arbitration, including the costs associated with the mediation process, occurred before Plaintiff demanded that the matter in question be submitted to

arbitration. Similarly, although Plaintiff is correct in noting that a litigant's failure to respond to discovery and the expenses associated with motions to compel do not support a finding of waiver based on the *Servomation* factor relating to the use of discovery procedures not available in arbitration, *Herbert*, 213 N.C. App. at 568, 713 S.E.2d at 535, the same principle does not apply in determining whether the litigant waived the right to have a dispute submitted for binding arbitration as a result of the opposing party's expenditure of significant resources in litigation prior to the demand for arbitration. As a result, the trial court did not err by utilizing all of the costs that Nationwide incurred in defending against Plaintiff's claim in making the required waiver determination.

In addition, Plaintiff contends that the trial court was required to make specific findings of fact quantifying the amounts that Nationwide expended in connection with the litigation of this case. In rejecting a similar argument, this Court stated that:

[w]hile [the unnamed defendant's counsel] did not quantify the expenses, the trial court's specific findings regarding what occurred during the superior court proceedings and the [unnamed defendant's counsel's] affidavit are sufficient to support the ultimate finding that [the unnamed defendant] expended "significant

resources," sufficient to constitute prejudice. We can conclude without specific dollar amounts that attendance by counsel at multiple hearings and defense of a litigation over a two-year period (with the case being twice calendared for trial as well as other hearings) involves "significant resources."

Herbert, 213 N.C. App. at 569, 713 S.E.2d at 536. Similarly, we can conclude in this case that the defense of a civil action over a two and a half year period, during which several motions were filed and heard, the parties engaged in discovery, and the case was calendared for trial on multiple occasions, would necessarily involve the expenditure of "substantial resources." As a result, the trial court correctly concluded that Plaintiff had waived her right to demand arbitration based on the significant expenses that Nationwide incurred before the motion to compel arbitration was filed.³

III. Conclusion

Thus, for the reasons set forth above, we conclude that Plaintiff is not entitled to obtain relief from the trial

³As a result of our decision that the trial court did not err by concluding that Plaintiff waived the right to insist that her dispute with Nationwide be submitted to binding arbitration based on the significant litigation-related expenses that Nationwide incurred between the time that Plaintiff's right to demand arbitration accrued and the date upon which Plaintiff demanded that her dispute with Nationwide be submitted for binding arbitration, we need not determine whether the trial court correctly concluded that Plaintiff had waived her right to arbitration by utilizing discovery procedures that were not available in the arbitration context.

court's order based on the arguments set out in her brief. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).