IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): 'AY'
CASE NO: 502013AP000057XXXXMB
L.T. NO: 502013CC005426XXXXCV-RE

SANTANDER CONSUMER USA INC.
AKA SANTANDER AUTO FINANCE,
Appellant,

v.

RICHARD MUSZYNSKI,
Appellee.

_____/

Opinion filed: APR 29 2014

Appeal from the County Court in and for Palm Beach County,
Judge Nancy Perez.

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PER CURIAM.

This appeal comes before the Court on Appellant, Santander Consumer USA, Inc. ("SCUSA") appeal of the trial court's non-final order which denied its Motion to Compel Arbitration and Dismiss the Action. SCUSA argues on appeal that the trial court erred when it found SCUSA waived its right to compel arbitration by "affirmatively litigating the claim." SCUSA contends that the case first became arbitrable once its counterclaim brought the action

out of the Small Claims Division into the Civil Division of County Court, and furthermore, that once the action was in the Civil Division, it moved to compel arbitration at its first opportunity.

"Generally, whether a party has waived the right to arbitrate is a question of fact, reviewed on appeal for competent, substantial evidence to support the lower court's findings." *Green Tree Servicing, LLC v. McLeod*, 15 So. 3d 682, 687 (Fla. 2d DCA 2009) (quoting *Mora v. Abraham Chevrolet-Tampa, Inc.*, 913 So. 2d 32, 33 (Fla. 2d DCA 2005)). However, "[a]ll doubts regarding waiver should be construed in favor of arbitration rather than against it." *Marine Env'tl. Partners, Inc. v. Johnson*, 863 So. 2d 423, 426 (Fla. 4th DCA 2003) (citing *Miller & Solomon Gen. Contractors, Inc. v. Brennan's Glass Co.*, 824 So. 2d 288 (Fla. 4th DCA 2003).

The factual background which gave rise to this action began in 2010 when Muszynski executed a retail installment sale contract with SCUSA through CarMax for the purchase of a 2005 Toyota Camry.[1] The Loan Agreement contained an Arbitration Provision which provided that any and all claims arising from the Note which was the subject of the Loan Agreement would be arbitrated. However, there was an exception in the Provision for actions where the aggregate amount of the claim was less than $15,000.00, or any action pending in Small Claims Court. The Provision also stated "[p]articipation in a lawsuit seeking enforcement of this section by a court shall not waive the right to arbitrate." SCUSA ultimately repossessed the vehicle and sold it for $4,300.00. After applying the amount recovered from the sale of the vehicle and other costs, Muszynski owed SCUSA $13,294.48.

On January 2, 2013, Muszynski filed a Statement of Claim in the Small Claims Division of County Court seeking damages in the amount of $5,000.00 for an alleged breach of the Loan Agreement by SCUSA. On April 3, 2013, Muszynski filed a Request for Production of documents. On April 25, 2013, SCUSA filed a Counterclaim claiming damages exceeding

[1] SCUSA was the third-party finance provider for CarMax on this transaction.

$10,000.00 for the deficiency owed on the loan. On the same date as filing its Counterclaim, SCUSA filed a Motion to Transfer the action to the Civil Division of County Court since the new aggregate amount of the claims exceeded $5,000.00.

On April 25, 2013, the court transferred the action from the Small Claims Division of the County Court to the Civil Division of the County Court. On May 3, 2013, the date a new case number was opened for the transferred action, SCUSA filed a Motion for Extension of Time to Respond to Discovery requested by Plaintiff. The Motion for Extension references filing a motion to compel arbitration and specifically states "[n]othing in this motion shall be construed as to waive SCUSA's right to arbitrate this matter." On May 6, 2013, SCUSA filed a Motion to Compel Arbitration and Dismiss the Action, arguing that Muszynski agreed to arbitrate claims with SCUSA and that all prerequisites for arbitration had been met. On May 20, 2013, Muszynski filed an Answer to SCUSA's Counterclaim. Muszynski filed a Memorandum in Opposition to Defendant's Motion to Compel Arbitration which did not address any of SCUSA's arguments as to why arbitration was appropriate and instead merely made arguments about the authenticity and enforceability of the Loan Agreement in general. The trial court entered an order denying the Motion to Compel Arbitration and found Defendant waived its right to arbitrate by "affirmatively litigating the claim."

As a preliminary matter, in determining whether a dispute is subject to arbitration, courts consider at least three issues: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." *Stacy David, Inc. v. Consuegra*, 845 So. 2d 303, 306 (Fla. 2d DCA 2003) (citing *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999)). The sole issue in this appeal is whether SCUSA waived its right to arbitration by "affirmatively litigating the claim" as determined by the trial court in its

order entered on June 29, 2013. The Court holds there is no competent substantial evidence to support the trial court's determination that SCUSA waived its right to arbitrate since SCUSA could not assert its right to arbitrate the matter until after April 25, 2013 when this case was transferred to the Civil Division of the County Court.

"Waiver" has been defined "as the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Raymond James Fin. Servs., Inc. v. Saldukas (Saldukas II)*, 896 So. 2d 707, 711 (Fla. 2005). The general definition of waiver is applicable to the right to arbitrate. *Id.* A right to arbitrate is like any other contract right and may be waived. *Id.* "Once a party has waived the right to arbitration by active participation in a lawsuit, the party may not reclaim the arbitration right without the consent of his or her adversary." *Estate of Williams ex rel. Williams v. Manor Care of Dunedin, Inc.*, 923 So. 2d 615, 616-17 (Fla. 2d DCA 2006). "In determining whether a party waived its right to arbitrate, the essential question is whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right." *Ibis Lakes Homeowners Ass'n, Inc. v. Ibis Isle Homeowners Ass'n, Inc.*, 102 So. 3d 772, 731 (Fla. 4th DCA 2012) (quoting *Roger E. Freilich, D.M.D., P.A. v. Shochet,* 96 So. 3d 1135, 1138 (Fla. 4th DCA 2012) (internal quotation marks and citations omitted)). "Waiver of the right 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 therefor." *Paine, Webber, Jackson & Curtis, Inc. v. Fredray,* 521 So. 2d 271 (Fla. 5th DCA 1988) (citing *Ojus Indus. v. Mann,* 221 So.2d 780 (Fla. 3d DCA 1969) and *King v. Thompson & McKinnon, Auchincloss Kohlmeyer, Inc.,* 352 So. 2d 1235 (Fla. 4th DCA 1977)).

"A party claiming waiver of arbitration must demonstrate: 1) knowledge of an existing right to arbitrate and 2) active participation in litigation or other acts inconsistent with the right." *Inverrary Gardens Condo. I Ass'n, v. Spender*, 939 So. 2d 1159, 1161 (Fla. 4th DCA 2006) (quoting *Breckenridge v. Farber*, 640 So. 2d 208, 211 (Fla. 4th DCA 1994)). For example, defending an action on the merits by answering a complaint without demanding arbitration constitutes a waiver. *See Summit Brokerage Services, Inc. v. Parker*, 912 So. 2d 41 (Fla. 4th DCA 2005); *Marine Env'tl. Partners, Inc. v. Johnson*, 863 So. 2d 423, 426 (Fla. 4th DCA 2003).

SCUSA has done nothing to contest the merits of this case. SCUSA has not answered the initial Complaint, the Amended Complaint, or filed any motions attacking the merits of the case. Based on a review of the Record, the Court concludes that only two possible actions provide a basis to support a possible waiver. First, whether the filing of a counterclaim constitutes a waiver of the right to arbitrate, and second, whether requesting an extension of time to comply with a discovery obligation waives the right to arbitrate. Upon review of the case law discussed below, the Court concludes that neither action in the instant case waived SCUSA's right to arbitrate.

SCUSA filed a Counterclaim and Motion to Transfer the action while the action was pending in Small Claims Court. Filing a motion to transfer an action to another division within the same court does not waive the right to arbitrate. *See 13 Parcels LLC v. Laquer*, 104 So. 2d 377, 380 (Fla. 3d DC 2012). Under the facts of this case, SCUSA could not compel arbitration, in compliance with the terms of the Loan Agreement, until the action had been transferred to the Civil Division. A party does not waive the contractual right to arbitration through active participation in a lawsuit where the party seeks to enforce the right to arbitration in the initial response to the complaint. *Concrete Design Structures, Inc. v. P.L. Dodge Foundation, Inc.*, 532

So. 2d 1334, 1334-35 (Fla. 3d DCA 1988); *Balboa Ins. Co. v. W. G. Mills, Inc.*, 403 So. 2d 1149 (Fla. 2d DCA 1981). SCUSA's first opportunity to file its Motion to Compel Arbitration and Dismiss the Action occurred when this action was transferred to the Civil Division of County Court. *See Waterhouse Const. Grp., Inc. v. 5891 SW 64th Street, LLC*, 949 So. 2d 1095, 1100-01 (Fla. 3d DCA 2007) (holding a defendant does not waive the right to arbitration by simultaneously filing a counterclaim and a motion to stay the plaintiff's litigation and compel arbitration); *Concrete Design Structures, Inc. v. P.L. Dodge Foundation, Inc.*, 532 So. 2d 1334, 1334–35 (Fla. 3d DCA 1988) (filing a counterclaim and motion to dismiss simultaneously with a motion to compel arbitration, *without more,* does not waive the contractual right to arbitrate) (emphasis added).

According to the terms of the Arbitration Provision, an action could not be subject to arbitration if the amount in controversy was less than $15,000.00, or the action was pending in Small Claims court (*i.e.* less than $5,000.00). Therefore, SCUSA's right to arbitrate the action did not arise until it was out of Small Claims court. By filing its Counterclaim which raised the aggregate amount of the claim above $15,000.00, outside the jurisdiction of the Small Claims Court, SCUSA was able to have the action transferred to the Civil Division. SCUSA filed its Motion to Compel Arbitration shortly after the transfer was completed. In light of the fact that SCUSA filed its Motion to Compel Arbitration at its first opportunity, the Court finds it did not waive its right to demand arbitration.

The Court also finds that SCUSA did not waive its right to arbitrate by requesting an extension of time on discovery propounded by Muszynski. SCUSA's action with respect to the discovery efforts initiated by Muszynski was in compliance with procedural deadlines. SCUSA's Motion to Transfer the action to the Civil Division was pending close to the deadline to comply

with discovery and therefore, its application for a brief extension of time, in light of the fact that the motion had not yet been granted, does not constitute active participation in the litigation but simply procedural compliance. Further, the Motion for Extension specifically references the Motion to Compel Arbitration. When the Motion for Extension was filed, the action had not yet been transferred to the Civil Division and therefore SCUSA did not yet have the right to arbitrate the dispute. Accordingly, the Court holds that SCUSA did not actively participate in the litigation by requesting an extension of time on a deadline for discovery initiated by Muszynski.

Since the trial court order denying SCUSA's Motion to Compel Arbitration and Dismiss the Action was not supported by competent substantial evidence, the order is REVERSED and REMANDED for the trial court to grant the motion to compel arbitration. The motion to dismiss should be treated as a motion to stay and granted. *See EMSA Ltd. P'ship v. Mason*, 677 So. 2d 105, 107 (Fla. 4th DCA 1996)

FINE and KEYSER, J. JJ., concur. McCARTHY, J., concurs in result with opinion.

MCCARTHY, J., concurring.

I disagree that this case needs to be reversed as a matter of law. But I agree that as a matter of contract, the parties agreed not to waive arbitration until final judgment.

Purely as a matter of law, a Motion to Compel Arbitration must be filed either prior to or simultaneously with a request for affirmative judicial action. *Waterhouse Const. Grp., Inc., v. 5891 SW LLC*, 949 So. 2d 1095 (Fla. 3d DCA 2007). Here, however, SCUSA filed their counterclaim seeking affirmative judicial relief on April 25, 2013. The Motion to Compel Arbitration was not filed until 13 days later on May 7, 2013. As pure matter of law, but for the

further agreement, the Appellant waived arbitration. *Ziegler v. Knuck*, 419 So. 2d 818 (Fla. 3d DCA 1982).

However, as a matter of contract the parties also agreed as follows in the Arbitration Provision:

> (a) Participation in a lawsuit or seeking enforcement of this section shall not waive the right to arbitrate."
>
> (b) We or you may bring an action, including a summary or expedited proceeding, to compel arbitration of any Claim, and/or to stay the litigation of any Claim pending arbitration, in any Court having jurisdiction. Such action may be brought at any time, even if the Claim is part of a lawsuit, up until the entry of a Final judgment"

Both parties here agreed not to waive arbitration prior to the entry of a final judgment. Therefore, Appellant's Motion to Compel Arbitration should be granted as a matter of a contractual agreement between the parties.

I also agree with majority, that the case must be stayed and not dismissed. The Florida Arbitration Code, section 682.03, Florida Statutes, requires that judicial proceedings be stayed pending arbitration. Although the Third District Court of Appeal has allowed dismissals as an appropriate vehicle for obtaining enforcement of an arbitration clause, *Fla. Keys Elec. Coop. Assn. v A & G Blaton of Fla., Inc.*, 574 So. 2d 1225 (Fla. 3d DCA 1991), both the Fourth and Fifth District Court of Appeal cite section 682.03 and do not allow dismissals. *Neate v. Cypress, Club Condo.*, 18 So. 2d 390, 392 (Fla. 4th DCA 1998) ("[T]he Florida Arbitration code itself required that the action be stayed rather than dismissed") and *Kinder Mobile Home Sales, Inc. v. Clemens*, 794 So. 2d 677 (Fla. 5th DCA 2001). Therefore Appellant's requested relief of a dismissal of this action in favor of arbitration is simply not available.