KeyCite Yellow Flag - Negative Treatment
Distinguished by Schwendeman v. Health Carousel, LLC, N.D.Cal., November 20, 2019

931 F.3d 935
United States Court of Appeals, Ninth Circuit.

June NEWIRTH, BY AND THROUGH her Guardian ad Litem, Frederick J. NEWIRTH, on her own behalf and on behalf of others similarly situated; Elizabeth Barber; Andrew Bardin; Thomas Bardin, as successors-in-interest to the Estate of Margaret Pierce; on their own behalves and on behalf of others similarly situated, Plaintiffs-Appellees,
v.
AEGIS SENIOR COMMUNITIES, LLC, dba Aegis Living, Defendant-Appellant.

No. 17-17227
|
Argued and Submitted May 14, 2019 San Francisco, California
|
Filed July 24, 2019

Synopsis
Background: Residents of senior living communities brought putative class action against operator of communities, alleging violations of California's Consumer Legal Remedies Act (CLRA), Unfair Competition Law (UCL), and Welfare and Institutions Code. Following removal, the United States District Court for the Northern District of California, Jeffrey S. White, J., 2017 WL 11002219, denied operator's motion to compel arbitration. Operator appealed.

[Holding:] The Court of Appeals, Ikuta, Circuit Judge, held that operator waived its right to compel arbitration.

Affirmed.

West Headnotes (24)

[1] Alternative Dispute Resolution
Decisions reviewable; finality
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(3) Decisions reviewable; finality
District court's denial of a motion to compel arbitration is a final order appealable under the Federal Arbitration Act (FAA). 9 U.S.C.A. § 16(a)(1)(B); 28 U.S.C.A. § 1291.

[2] Alternative Dispute Resolution
Scope and standards of review
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) Scope and standards of review
Appellate court reviews de novo the district court's denial of a motion to compel arbitration, including its determination that a party has waived the right to arbitrate.

[3] Alternative Dispute Resolution
Waiver or Estoppel
Alternative Dispute Resolution
Evidence
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(1) In general
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 Evidence

Although arbitration agreements are subject to general contract principles such as waiver, a waiver of a contractual right to arbitration is not favored, and any party arguing waiver of arbitration bears a heavy burden of proof.

1 Cases that cite this headnote

[4] Alternative Dispute Resolution
Waiver, laches, or estoppel

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk202 Waiver, laches, or estoppel

If parties to a contract want an arbitrator to decide the question of waiver, they must place clear and unmistakable language to that effect in the agreement.

[5] Estoppel
Nature and elements of waiver

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52.10 Waiver Distinguished
156k52.10(2) Nature and elements of waiver

Under federal law, waiver is the intentional relinquishment or abandonment of a known right.

1 Cases that cite this headnote

[6] Alternative Dispute Resolution
Waiver or Estoppel

Alternative Dispute Resolution
Evidence

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(1) In general
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 Evidence

Party seeking to prove that the right to compel arbitration has been waived must carry the heavy burden of demonstrating: (1) knowledge of an existing right to compel arbitration; (2) intentional acts inconsistent with that existing right; and (3) prejudice to the person opposing arbitration from such inconsistent acts.

3 Cases that cite this headnote

[7] Alternative Dispute Resolution
Waiver or Estoppel

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(1) In general

There is no concrete test to determine whether a party has engaged in acts that are inconsistent with its right to arbitrate, as required for waiver; rather, court considers the totality of the parties' actions.

[8] Alternative Dispute Resolution
Suing or participating in suit

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) Suing or participating in suit

Party acts inconsistently with exercising the right to arbitrate, as required for waiver, when it (1) makes an intentional decision not to move to compel arbitration and (2) actively litigates the merits of a case for a prolonged period of time in order to take advantage of being in court.

1 Cases that cite this headnote

[9] Alternative Dispute Resolution
Waiver or Estoppel

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(1) In general

Seeking a decision on the merits of a key issue in a case indicates an intentional and strategic decision to take advantage of the judicial forum, for purposes of waiver of right to arbitrate.

1 Cases that cite this headnote

[10] Alternative Dispute Resolution
Suing or participating in suit

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) Suing or participating in suit

Parties do not act inconsistently with a right to compel arbitration, as required for waiver, when they engage in litigation activities that do not evince a decision to take advantage of the judicial forum.

1 Cases that cite this headnote

[11] Alternative Dispute Resolution
Suing or participating in suit

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) Suing or participating in suit

Filing a motion to dismiss that does not address the merits of the case is not sufficient to constitute an inconsistent act, as required for waiver of right to arbitrate.

[12] Alternative Dispute Resolution
Suing or participating in suit

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) Suing or participating in suit

Moving to dismiss a complaint without prejudice or moving to dismiss an action on jurisdictional or res judicata grounds is not inconsistent with a known right to compel arbitration, as required for waiver, because such motions do not seek a judicial determination on the merits.

[13] Alternative Dispute Resolution
Suing or participating in suit

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) Suing or participating in suit

Operator of senior living community took actions inconsistent with its known right to arbitrate, supporting waiver of right to compel arbitration, in residents' class action for violations of California's Consumers Legal Remedies Act (CLRA), Unfair Competition Law (UCL), and Welfare and Institutions Code, although operator promptly filed motion to compel arbitration; operator intentionally withdrew motion and proceeded to take advantage of federal forum by filing motion to dismiss arbitrable claims, with prejudice, for failure to state a claim, and only after receiving adverse ruling on motion did operator refile motion to compel arbitration that it had withdrawn a year earlier. Cal. Civ. Code § 1750 et seq.; Cal. Bus. & Prof. Code § 17200 et seq.; Cal. Welf. & Inst. Code § 15610.30.

1 Cases that cite this headnote

[14] Contracts
Waiver
95 Contracts
95II Construction and Operation
95II(E) Conditions
95k227 Waiver
Parties to a contract can impliedly waive a right, so long as the parties' actions amount to a knowing relinquishment of that right.

[15] Alternative Dispute Resolution
Suing or participating in suit
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) Suing or participating in suit
For purposes of waiver of right to arbitrate, decision to avoid severance of the arbitrable and non-arbitrable claims by proceeding with litigation on all claims may be inconsistent with the agreement to arbitrate the arbitrable claims in some circumstances.

[16] Alternative Dispute Resolution
Suing or participating in suit
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) Suing or participating in suit
Party is not prejudiced by self-inflicted wounds incurred as a direct result of suing in federal court contrary to the provisions of an arbitration agreement.

[17] Alternative Dispute Resolution
Suing or participating in suit
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) Suing or participating in suit
When a party agrees to arbitrate disputes, and then breaches that agreement by filing a lawsuit, any extra expense incurred as a result of the plaintiffs' deliberate choice of an improper forum, in contravention of their contract, cannot be charged to the defendant, so as to preclude defendant from exercising its right to compel arbitration.

[18] Alternative Dispute Resolution
Suing or participating in suit
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) Suing or participating in suit
Plaintiff that has breached its arbitration agreement is not prejudiced, as required for waiver of right to arbitrate, by costs incurred in preparing the complaint, serving notice, and litigating non-merits issues, such as jurisdiction or venue; nor is such a plaintiff prejudiced by costs incurred due to substantial discovery in federal court, even though such discovery would be rendered nugatory by a direction that arbitration now be had.

[19] Alternative Dispute Resolution
Suing or participating in suit
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel

25Tk182(2) Suing or participating in suit

Plaintiff is not prejudiced, as required for waiver of right to arbitrate, by the possibility that there may be some duplication from parallel proceedings in litigation and arbitration.

[20] Alternative Dispute Resolution

Waiver or Estoppel

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(1) In general

Plaintiff that has breached arbitration agreement may show prejudice when the defendant has engaged in acts that are inconsistent with its right to arbitrate, and the plaintiff has incurred costs due to such inconsistent acts.

[21] Alternative Dispute Resolution

Suing or participating in suit

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) Suing or participating in suit

Prejudice requirement for waiver of right to arbitrate is satisfied when plaintiffs would be forced to relitigate an issue on the merits on which they have already prevailed in court, or when defendants have sought and received an advantage from litigating in federal court that they would not have received in arbitration.

[22] Alternative Dispute Resolution

Suing or participating in suit

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) Suing or participating in suit

Plaintiff may show it was prejudiced by expenses of litigation when it attempts to arbitrate a dispute, but is forced by the defendant to pursue its remedies in court.

[23] Alternative Dispute Resolution

Suing or participating in suit

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) Suing or participating in suit

Defendant may show prejudice due to the expenses of litigation when a plaintiff pursues its claims in state court, pursuant to an agreement with the defendant to waive its arbitration rights, and then demands arbitration of a related claim.

[24] Alternative Dispute Resolution

Suing or participating in suit

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) Suing or participating in suit

Resident of senior living community was prejudiced by community operator's inconsistent actions with its known right to arbitrate, and thus operator waived its right to compel arbitration, in class action for violations of California's Consumers Legal Remedies Act (CLRA), Unfair Competition Law (UCL), and Welfare and Institutions Code; resident was prejudiced by costs incurred in defending against operator's motion to dismiss complaint on merits, operator attempted to take advantage of judicial forum to prevail on merits of arbitrable claims and did not file motion to compel arbitration until

after receiving adverse ruling, and if court had granted motion to compel arbitration, resident would have been forced to relitigate key legal issue on merits on which court had ruled in her favor. Cal. Civ. Code § 1750 et seq.; Cal. Bus. & Prof. Code § 17200 et seq.; Cal. Welf. & Inst. Code § 15610.30.

1 Cases that cite this headnote

Attorneys and Law Firms

***937** Lann G. McIntyre (argued), Lewis Brisbois Bisgaard & Smith LLP, San Diego, California; Leona Lam Reddy, Katherine C. Den Bleyker, and Jeffrey S. Ranen, Lewis Brisbois Bisgaard & Smith LLP, Los Angeles, California; for Defendant-Appellant.

Sarah Colby (argued) and Guy B. Wallace, Schneider Wallace Cottrell Konecky Wotkyns LLP, Emeryville, California; Christopher J. Healey, Dentons US LLP, San Diego, California; George Kawamoto and Kathryn A. Stebner, Stebner and Associates, San Francisco, California; Michael D. Thamer, Law Offices of Michael D. Thamer, Callahan, California; W. Timothy Needham, Janssen Malloy LLP, Eureka, California; Robert S. Arns, The Arns Law Firm, San Francisco, California; Kirsten M. Fish, Neeham Kepner & Fish LLP, San Jose, California; for Plaintiffs-Appellees.

Appeal from the United States District Court for the Northern District of California, Jeffrey S. White, District Judge, Presiding, D.C. No. 4:16-cv-03991-JSW

Before: J. Clifford Wallace and Sandra S. Ikuta, Circuit Judges, and Donald W. Molloy, [*] District Judge.

* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

OPINION

IKUTA, Circuit Judge:

***938** Aegis Senior Communities, LLC, appeals from the district court's order denying its motion to compel arbitration. Because Aegis knew of its right to compel arbitration, but made an intentional decision not to compel arbitration in order to take advantage of the judicial forum, and because the plaintiffs incurred costs as a direct result, the district court did not err in concluding that Aegis waived its right to arbitrate. Therefore, we affirm.

I

June Newirth, Margaret Pierce, and Barbara Feinberg were residents of three different senior living communities, all operated by Aegis Senior Communities, LLC (Aegis). [1] Each of them (through a representative holding a valid power of attorney) entered into an agreement with Aegis which included an arbitration provision. The provision stated "that any legal claim or civil action arising out of or relating to care or services provided" by Aegis "will be determined by submission to arbitration as provided in accordance with California law."

1 Newirth resided at Aegis's Corte Madera community from July 2010 through July 2014. Pierce resided at Aegis's Moraga community from April 2013 until January 2015. Feinberg has resided at Aegis's Laguna Niguel community since October 2013.

Notwithstanding her arbitration agreement, Newirth filed a class action complaint against Aegis in California state court in April 2016, alleging that Aegis engaged in a scheme to defraud seniors by falsely representing that staffing levels would be determined by the overall needs of the residents, when in fact staffing was based on budget considerations. [2] Aegis removed the complaint to district court in July 2016, and filed a motion to compel arbitration as well as a motion to dismiss a week later.

2 Newirth claimed that Aegis's allegedly fraudulent actions violated California's Consumers Legal Remedies Act (CLRA), Cal. Civ. Code § 1750 et seq., California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 et seq., and section 15610.30 of California's Welfare and Institutions Code (which prohibits the financial abuse of an elder).

***939** Instead of pursuing these motions, however, Aegis and Newirth filed a stipulated agreement a week later. Pursuant to the stipulation, Newirth filed a second amended complaint in August 2016, adding additional plaintiffs. [3] For its part, Aegis withdrew its motion to compel arbitration and its motion to dismiss. In September 2016, it filed a new motion to dismiss the second amended complaint, in which it made

no mention of arbitration or the arbitration agreements. The following day, the parties filed an agreement stating they were attempting mediation of their dispute. [4]

3 The second amended complaint added Feinberg as a plaintiff, as well as Elizabeth Barber, Andrew Bardin, and Thomas Bardin, as successors-in-interest to Pierce's estate.

4 The parties began the mediation process on May 29, 2018, but it proved unsuccessful.

Over the next 11 months, while the second motion to dismiss was pending, the parties actively engaged in the discovery process. The parties participated in a discovery conference, entered into a court-approved stipulation regarding the production of documents and electronic records, and submitted a proposed joint conference report that included a proposed schedule for discovery, class certification briefing and hearing dates, and a date for trial. In December 2016, the parties served their initial disclosures. In the early stages of discovery, Aegis disclosed a copy of the relevant agreements with Newirth, Pierce, and Feinberg; each agreement included an arbitration provision initialed by the party's representative.

Feinberg and Aegis entered into a settlement agreement later that month. [5] The remaining parties continued to meet and confer regarding moving forward with the discovery process.

5 Feinberg was formally removed as a class representative in October 2017, and is not a party to this appeal. Through the remainder of this opinion, we use "Newirth" to refer collectively to plaintiffs-appellees.

The district court finally denied Aegis's pending motion to dismiss Newirth's second amended complaint in May 2017. Aegis filed a new motion to compel arbitration two months later, almost a year after it had withdrawn its initial motion to compel arbitration.

In September 2017, the district court denied Aegis's renewed motion to compel arbitration on the ground that Aegis had waived its right to arbitrate. Aegis filed a timely notice of appeal. [6] *See* Fed. R. App. P. 4(a)(1).

6 The district court denied Aegis's motion to stay the district court's order pending appeal. Accordingly, litigation has continued at the district court and is ongoing. This ongoing litigation does not render this appeal moot because effective relief remains available to Aegis. If Aegis prevailed in its claim that it was entitled to arbitrate the dispute, "the district court judgment would be vacated and the parties could proceed to arbitration." *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1410 & n.6 (9th Cir. 1990).

[1] **[2]** We have jurisdiction under 28 U.S.C. § 1291 because a "district court's denial of a motion to compel arbitration" is a final order appealable under the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(B). *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1117 (9th Cir. 2008). We review de novo the district court's denial of a motion to compel arbitration, including its determination that a party has waived the right to arbitrate. *Id.* at 1119.

II

Congress enacted the Federal Arbitration Act (FAA) in 1925 "in response to a perception that courts were unduly hostile to arbitration." ***940** *Epic Sys. Corp. v. Lewis*, —— U.S. ——, 138 S. Ct. 1612, 1621, 200 L.Ed.2d 889 (2018). The Act provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court has "described this provision as reflecting both a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract.' " *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (first quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); then quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010)). In light of the FAA's savings clause and the fundamental principle that contract rules apply to arbitration agreements, the Supreme Court has concluded that "[a] court may invalidate an arbitration agreement based on 'generally applicable contract defenses,' " but "any state rule discriminating on its face against arbitration" or "that covertly accomplishes the same objective" is preempted. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, —— U.S. ——, 137 S. Ct. 1421, 1426, 197 L.Ed.2d 806 (2017) (quoting *Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740).

[3] **[4]** Although arbitration agreements are subject to general contract principles such as waiver, a "[w]aiver of a contractual right to arbitration is not favored," and "any party arguing waiver of arbitration bears a heavy burden of proof." [7] *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d

691, 694 (9th Cir. 1986) (internal quotation marks omitted). Moreover, where the waiver of the right to compel arbitration implicates questions of arbitrability that "affect the allocation of power" between a court and arbitrator, we have applied a federal law standard for determining whether an arbitration agreement has been waived. *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (internal quotation marks omitted); *compare id. with Cox*, 533 F.3d at 1124–25 & n. 7 (applying California waiver law in lieu of the federal standard). The parties do not dispute that the federal standard applies here. [8]

7 Because Newirth does not rely on California's longstanding rule that a party may waive a contract right, *see Roesch v. De Mota*, 24 Cal. 2d 563, 572, 150 P.2d 422 (1944), or assert that this rule precludes enforcement of the arbitration agreement, we do not reach the question whether this rule would be preempted by the FAA under the "equal-treatment principle" recognized in *Kindred Nursing Centers*. 137 S. Ct. at 1426.

8 The parties also do not dispute that a court, rather than an arbitrator, should determine whether Aegis waived the right to arbitration. If parties to a contract want an arbitrator to decide the question of waiver, "they must place clear and unmistakable language to that effect in the agreement." *Martin v. Yasuda*, 829 F.3d 1118, 1124 (9th Cir. 2016). Here, the parties' contract does not clearly and unmistakably provide that the arbitrator will decide the question of waiver.

[5] **[6]** Under federal law, waiver is "the intentional relinquishment or abandonment of a known right." *Hamer v. Neighborhood Hous. Servs. of Chi.*, —— U.S. ——, 138 S. Ct. 13, 17 n.1, 199 L.Ed.2d 249 (2017) (internal quotation marks omitted). A party seeking to prove that the right to compel arbitration has been waived must carry the heavy burden of demonstrating: (1) knowledge of an existing right to compel arbitration; (2) intentional acts inconsistent with that existing right; and (3) prejudice to the person opposing arbitration from such inconsistent acts. *Fisher*, 791 F.2d at 694.

Aegis does not dispute that it knew it had a right to compel arbitration with Newirth. ***941** Therefore, we consider only the second and third elements of waiver.

A

We first consider Newirth's argument that Aegis intentionally took actions inconsistent with the right to compel arbitration of Newirth's claims.

[7] **[8]** "There is no concrete test to determine whether a party has engaged in acts that are inconsistent with its right to arbitrate," *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016); rather, we consider the totality of the parties' actions, *see id.* at 1126. Applying this holistic approach, we have generally asked whether a party's actions "indicate a conscious decision ... to seek judicial judgment on the merits of [the] arbitrable claims, which would be inconsistent with a right to arbitrate." *Id.* at 1125 (internal quotation marks omitted) (second alteration in original). That is, a party acts inconsistently with exercising the right to arbitrate when it (1) makes an intentional decision not to move to compel arbitration and (2) actively litigates the merits of a case for a prolonged period of time in order to take advantage of being in court.

[9] Seeking a decision on the merits of a key issue in a case indicates an intentional and strategic decision to take advantage of the judicial forum. *Id.* at 1126. For example, in *Van Ness Townhouses v. Mar Industries Corp.*, we concluded that the defendant acted inconsistently with its known arbitration right when it made an intentional decision to refrain from filing a motion to compel arbitration (because it did not want to sever the arbitrable claims from the nonarbitrable claims), and litigated the arbitrable claims for two years in federal court, including filing a motion to dismiss for failure to state a claim. 862 F.2d 754, 756, 759 (9th Cir. 1988). Similarly, in *Martin v. Yasuda*, we concluded that the defendants acted inconsistently with pursuing arbitration when they spent seventeen months actively litigating their case in federal court, including filing a motion to dismiss "on a key merits issue." 829 F.3d at 1126. Again, the record established that the defendants in *Martin* intentionally refrained from filing a motion to compel arbitration: when the district court asked defendants' counsel directly whether he intended to move to compel arbitration, counsel responded: "[W]e haven't made a decision about that. And frankly ... I think our view of it is we are probably better off just being here in the court with the procedures of Rule 23 and discovery and federal practice than handling it in arbitration." *Id.* at 1122 (alterations in original). [9]

9 In a slightly different context, we have held that when a defendant with a non-mandatory arbitration agreement litigated its claims to a verdict in trial court, it acted

inconsistently with its known right to timely demand arbitration. *See Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 721–22 (9th Cir. 2012).

[10] **[11]** **[12]** Conversely, parties do not act inconsistently with a right to compel arbitration when they engage in litigation activities that do not evince a decision to take advantage of the judicial forum. Thus *Britton v. Co-op Banking Group* held that a defendant who resisted discovery requests, pursued a court-appointed attorney, and applied for in forma pauperis status, did not act inconsistently with his right to arbitrate. 916 F.2d 1405, 1413 (9th Cir. 1990). Such actions reflected only a "determination to avoid or frustrate the litigation" rather than a strategic decision to "active[ly] litigat[e]," i.e., to forgo the right to compel arbitration and take advantage of a judicial forum. *Id.* Even "filing a motion to dismiss that does not address ***942** the merits of the case is not sufficient to constitute an inconsistent act." *Martin*, 829 F.3d at 1125;[10] *see also In re Mirant Corp.*, 613 F.3d 584, 589 (5th Cir. 2010) (concluding that a party did not waive its right to compel arbitration unless that party "at the very least" had engaged "in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration"). Likewise, where it would have been "futile [at the time] to file a motion to compel arbitration" under then-existing law, even a defendant's active litigation for three and a half years is not inconsistent with a known right to compel arbitration. *Fisher*, 791 F.2d at 695; *accord Letizia v. Prudential Bache Secs., Inc.*, 802 F.2d 1185, 1187 & n.3 (9th Cir. 1986). Conversely, when a defendant successfully opposed a plaintiff's initial demand for arbitration, the plaintiff's subsequent pursuit of a remedy in federal court was not inconsistent with its known right to arbitrate, and the plaintiff could therefore pursue a renewed arbitration demand at a later date. *See United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 921 (9th Cir. 2009). In context, such actions do not evince an intentional decision to forgo arbitration in favor of a judicial forum.

10 Thus, moving to dismiss a complaint without prejudice or moving to dismiss an action on jurisdictional or res judicata grounds is not inconsistent with a known right to compel arbitration because such motions do not seek a judicial determination on the merits. *See Martin*, 829 F.3d at 1125–1126 & n.4.

[13] Applying this framework, Newirth carried her burden of showing that Aegis took actions inconsistent with its known right to arbitrate. Although Aegis promptly filed a motion to compel arbitration, Aegis intentionally withdrew the motion and proceeded to take advantage of the federal forum by filing a motion to dismiss Newirth's arbitrable claims, with prejudice, for failure to state a claim. As we have explained, "[w]hen defendants move for dismissal with prejudice on a key merits issue that would preclude relief as to one or more of plaintiffs' claims ... they are seeking a ruling on the merits." *Martin*, 829 F.3d at 1126 n.4. Only after receiving an adverse ruling on this motion did Aegis refile the motion to compel arbitration that it had withdrawn a year earlier. Under the totality of these circumstances, we conclude that Aegis knowingly decided to defer its right to compel arbitration to avail itself of the benefits of the federal court forum, an intentional action inconsistent with its known right to compel arbitration.

[14] Aegis makes several arguments to avoid this conclusion. First, it argues that it never expressly waived its right to compel arbitration. But parties to a contract can impliedly waive a right, so long as the parties' actions amount to a knowing relinquishment of that right. *See Van Ness*, 862 F.2d at 759. Second, Aegis argues that its initial filing of a motion to compel arbitration is evidence that it did not intend to waive the right. But again, Aegis's withdrawal of the motion to compel arbitration and failure to renew it for a year while it sought a determination on the merits provides strong support for Newirth's argument that Aegis intentionally waived its right to compel arbitration.

Third, Aegis argues that it "engaged in only the minimum amount of litigation activity required ... to comply with its obligations under the applicable court rules and orders, and therefore did not act inconsistently with its right to arbitrate." This argument also fails. Aegis could have filed a renewed motion to compel arbitration at any time after withdrawing its initial motion, but waited a year to do so. In ***943** the meantime, Aegis sought a judgment on the merits from the district court. Nor did Aegis avail itself of local rules that would have allowed it to seek relief from case management and discovery obligations. *See* N.D. Cal. Civil L.R. 16-2(d).

[15] Finally, Aegis argues that the one-year delay in filing its second motion to dismiss was not inconsistent with its arbitration right because the lengthy delay was due to its mistaken belief that Feinberg had not signed an arbitration agreement, and could pursue her claims in court. Rather than defend against the same claims in court and in arbitration proceedings, Aegis asserts, it decided to proceed in court until Feinberg withdrew as a class representative. The record does not support this argument. Aegis provided the plaintiffs with a copy of Feinberg's signed and initialed arbitration

agreement in December 2016, more than seven months before renewing its motion to compel arbitration. Moreover, Feinberg settled with Aegis on December 19, 2016, again, more than seven months before Aegis renewed its motion to compel arbitration, and Aegis's renewed motion was filed nearly three months before Feinberg was removed as a class representative. In any event, a decision "to avoid severance of the arbitrable and non-arbitrable claims" by proceeding with litigation on all claims may be "inconsistent with the agreement to arbitrate [the arbitrable] claims" in some circumstances. *Van Ness*, 862 F.2d at 759.[11] Accordingly, Newirth carried her burden of showing that Aegis took actions inconsistent with its known right to compel arbitration.

11 Aegis also argues that it "regularly referenced arbitration in its filings and in its correspondence with opposing counsel, and therefore continuously reiterated its intention to compel arbitration of this matter." Aegis points to nothing in the record that supports this argument.

B

[16] **[17]** **[18]** **[19]** Finally, we consider whether appellees were prejudiced by the inconsistent actions taken by Aegis. A party is not prejudiced by self-inflicted wounds "incurred as a direct result of suing in federal court contrary to the provisions of an arbitration agreement." *Martin*, 829 F.3d at 1126; *see also Fisher*, 791 F.2d at 698. When a party agrees to arbitrate disputes, and then breaches that agreement by filing a lawsuit, "[a]ny extra expense incurred as a result of the [plaintiffs'] deliberate choice of an improper forum, in contravention of their contract, cannot be charged to [the defendant]." *Fisher*, 791 F.2d at 698. Accordingly, a plaintiff that has breached its arbitration agreement is not prejudiced by costs incurred in preparing the complaint, serving notice, and litigating non-merits issues (such as jurisdiction or venue). *See id.* Nor is such a plaintiff prejudiced by costs incurred due to substantial discovery in federal court, even though such discovery "would be rendered nugatory by a direction that arbitration now be had." *Britton*, 916 F.2d at 1413; *see also Lake Commc'ns, Inc. v. ICC Corp.*, 738 F.2d 1473, 1477 (9th Cir. 1984) (holding discovery costs resulting from plaintiff's decision to sue in federal court were insufficient to show prejudice). Finally, a plaintiff is not prejudiced by "the possibility that there may be some duplication from ... parallel proceedings" in litigation and arbitration. *Fisher*, 791 F.2d at 698.

[20] **[21]** **[22]** **[23]** A breaching plaintiff may nevertheless show prejudice when the defendant has engaged in acts that are inconsistent with its right to arbitrate (as explained above), and the plaintiff has incurred costs due to such inconsistent ***944** acts. This prejudice requirement is satisfied when plaintiffs would be forced to "relitigate an issue on the merits on which they have already prevailed in court," or when defendants have sought and "received an advantage from litigating in federal court that they would not have received in arbitration." *Martin*, 829 F.3d at 1126, 1128 (prejudice found where plaintiff incurred costs "contesting the defendants' motion to dismiss on the merits"); *see also Van Ness*, 862 F.2d at 759. A plaintiff may also show it was prejudiced by expenses of litigation when it attempts to arbitrate a dispute, but is forced by the defendant to pursue its remedies in court. *See Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1012–13 (9th Cir. 2005). Conversely, a defendant may show prejudice due to the expenses of litigation when a plaintiff pursues its claims in state court (pursuant to an agreement with the defendant to waive its arbitration rights), and then demands arbitration of a related claim. *See Hoffman Constr. Co. of Or. v. Active Erectors & Installers, Inc.*, 969 F.2d 796, 799 (9th Cir. 1992).

[24] Applying these principles, Newirth was not prejudiced by Aegis's participation in discovery and scheduling conferences, development of a proposed order regarding electronic records, and conferring about alternative dispute resolution. She was prejudiced, however, by the costs incurred in defending against Aegis's motion to dismiss her complaint on the merits. Aegis attempted to take advantage of the judicial forum to prevail on the merits of Newirth's arbitrable claims, and did not file a motion to compel arbitration until after receiving an adverse ruling. If the court had granted the motion to compel arbitration, Newirth would have been forced "to relitigate a key legal issue [on the merits] on which the district court has ruled in [her] favor." *Martin*, 829 F.3d at 1128. The costs of rearguing this ruling are directly traceable to Aegis's acts that were inconsistent with its known right to compel arbitration. *See id.* at 1126.

Aegis argues that despite the fact its motion to dismiss on the merits directly caused Newirth to incur costs contesting that motion, Newirth was not prejudiced because Aegis does not intend to make the same challenges in arbitration. This argument fails. It ignores that Newirth already expended costs "contesting the defendants' motion to dismiss on the merits," *id.* at 1128; costs directly traceable to Aegis's acts inconsistent with its known right to compel arbitration. That

Aegis intends not to revive its rejected merits arguments once sent to arbitration does not alleviate this prejudice.

Accordingly, Newirth has carried her heavy burden of showing prejudice.

AFFIRMED.

All Citations

931 F.3d 935, 19 Cal. Daily Op. Serv. 7195, 2019 Daily Journal D.A.R. 6889

End of Document

Negative Treatment

Negative Citing References (1)

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by	1. Schwendeman v. Health Carousel, LLC MOST NEGATIVE 2019 WL 6173163 , N.D.Cal. Plaintiff Connie Schwendeman asserts a single claim under California's Private Attorneys General Act ("PAGA") against her former employers, Defendants Health Carousel, LLC and...	Nov. 20, 2019	Case		13 24 F.3d

History (3)

Direct History (2)

1. Newirth v. Aegis Senior Communities LLC
2017 WL 11002219 , N.D.Cal. , Sep. 29, 2017

Affirmed by

2. Newirth by and through Newirth v. Aegis Senior Communities, LLC
931 F.3d 935 , 9th Cir.(Cal.) , July 24, 2019

Related References (1)

3. Newirth v. Aegis Senior Communities LLC
2017 WL 3328073 , N.D.Cal. , May 18, 2017