

Interpreting Arbitration Agreements: Two Key Points from Recent Texas Supreme Court Decisions

11.13.15

Stephen Taylor, Texas Lawyer

November 13, 2015

The Texas Supreme Court recently added another opinion to its ever-growing body of law interpreting arbitration agreements. The opinion falls in line with prior decisions on two key issues: 1. what amounts to waiver of the right to arbitrate; and 2. can an arbitration agreement be enforced by a party that did not sign the agreement?

In *G.T. Leach Builders v. Sapphire V.P.*, a developer brought suit after a hurricane damaged its luxury condominium project midway through construction. The developer sued the insurance brokers who purportedly allowed a builders risk insurance policy to lapse prior to the hurricane. Eventually, the general contractor, engineer, and two subcontractors were joined in the lawsuit.

After pursuing pretrial motions and participating in discovery, the general contractor moved to compel arbitration, relying on an arbitration agreement contained in its contract with the developer. The engineer and subcontractors likewise moved to compel arbitration, citing the same arbitration agreement, even though they were not parties to that agreement. The developer opposed the motions, and the motions were denied by the trial court.

The lengthy opinion from the Texas Supreme Court addresses a litany of issues, but two stand out as particularly important in the context of arbitration agreements. The first is waiver. The developer argued that the general contractor waived the right to enforce the arbitration agreement because the general contractor participated in the lawsuit by: 1. seeking a continuance in the trial court and agreeing to a trial date; 2. filing motions for relief in the trial court; and 3. participating discovery over a six month period (including designation of experts).

Addressing the first of the three grounds for waiver, the court found that merely moving for a continuance and agreeing to a trial date did not amount to waiver of the right to arbitrate. The court reasoned that the motion for continuance was a "joint" motion, and even though agreeing to a trial date could be inconsistent with an intent to arbitrate, that fact alone did not amount to an express waiver of the right.

The court then assessed the second waiver argument—that the general contractor had substantially invoked the judicial process by filing motions for relief in the trial court. The court likewise rejected this argument, noting that "[m]erely taking part in litigation" is not enough to satisfy a waiver defense. Instead, the test is whether the party "has substantially invoked the judicial process to [its] opponent's detriment." Applying that principle, the court found that the motions and relief sought in the lawsuit were defensive in nature—i.e. a compulsory counterclaim, and motions to transfer venue, abate, and to designate responsible third parties. The court distinguished the motions from an offensive motion, such as a motion for summary judgment, and concluded that "[a] party's litigation conduct aimed at defending itself and minimizing its litigation expenses . . . does not amount to substantial invocation of the judicial process."

The court then looked to the third ground for waiver—that the general contractor participated in discovery. The court first pointed out that the general contractor merely responded to discovery requests from other parties. On that basis, the court concluded that responding to discovery and being in a lawsuit while discovery is ongoing was not tantamount to waiver. The court also explained that serving requests for disclosure to parties in the case did not give rise to waiver because a request for disclosure seeks basic information about the case. Similarly, the court considered the general contractor's designation of experts and responsible third parties as acts that were "defensive in nature and necessary to preserve [the general contractor's] rights." The court therefore concluded that, by participating in limited discovery, the general contractor did not substantially invoke the litigation process contrary to its contractual right to arbitration.

The second key issue addressed in the opinion was whether the engineer and subcontractors could force the developer to arbitration by bootstrapping to the arbitration provision in the contractor's agreement with the developer. In addressing this issue, the court first cited the general rule that "an arbitration clause cannot be invoked by a non-party to the arbitration

contract." However, it also pointed out that under certain circumstances, a party may have a valid legal right to enforce the arbitration agreement if the agreement contemplated enforcement by non-signatories.

Citing that principle, the engineer and subcontractors relied upon a provision in the arbitration agreement providing: "any arbitration may include . . . parties other than the Owner, Contractor, a Subcontractor . . . and other persons. . ." They urged that the provision evidenced an intent to join other parties in the arbitration.

The court, however, rejected this argument, explaining that the particular wording used was that arbitration "may include" other parties, rather than a mandatory term such as "shall include." Because the term "may" is permissive, the Court found the provision to permit joinder of additional parties in the arbitration, but that it did not require them to do so. The court thus concluded that the contract between the developer and the general contractor did not require arbitration of claims against the engineer and subcontractors if the developer and general contractor did not consent to the joinder.

Two key points that can be taken from this opinion. The first is that Texas courts are hesitant to find waiver of the right to arbitrate, even when the party has participated in limited discovery and filed motions with the court. The second is that Texas Courts will not allow non-signatories to enforce an arbitration agreement against the wishes of the parties to the agreement unless the agreement specifically requires inclusion of the non-signatories in the arbitration.

Stephen Taylor is of counsel in Winstead's Business Litigation Practice. He represents clients on business and construction litigation matters.

Read more: <http://www.texaslawyer.com/id=1202742084185/Interpreting-Arbitration-Agreements-Two-Key-Points-from-Recent-Texas-Supreme-Court-Decisions#ixzz3rxeTXmBW>

Reprinted with permission from the Nov. 13, 2015 edition of Texas Lawyer. © 2015 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited.