The Arbitration Newsletter

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(John Allen Chalk, Sr., Editor)

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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WAIVER OF ARBITRATION REVISITED

Richmont Holdings, Inc. v. Superior Recharge Systems, L.L.C., No. 13-0907, 2014 WL 7204482 (Tex. Dec. 19, 2014) (per curiam)

On the second time before the Texas Supreme Court,[2] the Court reversed the Fort Worth Court of Appeals' affirmation of the trial court's denial of the appellants' motion to compel arbitration. In a per curiam opinion, the Court reminded Texas courts that waiver of the right to compel arbitration is difficult to prove because of the "strong presumption against waiver."[3] The Court discussed the several factors involved in determining whether a party has substantially invoked the judicial process, and that no one factor is sufficient or necessary.[4]

In 2007, Jon Blake entered into an employment agreement with Superior Acquisitions, a subsidiary of Richmont Holdings, after Superior Acquisitions' purchase of Superior Recharge Systems, a company in which Blake was an owner and manager.[5] Although the employment agreement did not contain an arbitration agreement, the asset purchase agreement for Superior Recharge Systems, signed by both Blake and Superior Acquisitions, did contain an arbitration agreement.[6] Six months after Blake was employed, he was terminated and subject to the agreement's non-compete clause.[7] He and Superior Recharge Systems, ("Appellees"),

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[1] Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel. My thanks to Nicole Muñoz, third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, No. 13-0907, 2014 WL 7204482 (Tex. Dec. 19, 2014) (per curiam), *rev'g*, No. 02-10-00161-CV, 2013 WL 4517220 (Tex. App.—Fort Worth Aug. 22, 2013, pet. granted) (mem. op.).

[3] *Id.*

[4] *Id.*

[5] *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 392 S.W.3d 633 (Tex. App.—Fort Worth 2012, pet. granted).

[6] *Richmont Holdings*, 392 S.W.3d at 634.

[7] *Id.*

subsequently filed a suit in Denton County against Richmont Holdings and Superior Acquisitions, ("Appellants"), in June of 2008, seeking to declare the non-compete provision unenforceable.[8] On October 20, 2008, Appellants separately sued the Appellees in Dallas County for breach of contract and other claims arising from Blake's employment. On June 18, 2009, the Appellees amended their petition in Denton County by adding additional complaints and details regarding fraud in the inducement to sign the asset purchase agreement.[9] Throughout all of these filings in both trial courts, none of the parties raised the question of arbitration.[10]

On January 25, 2010, the Appellees filed a motion to consolidate the lawsuits pending in Denton County and Dallas County.[11] Immediately following the filing of the motion to consolidate, the Appellants, *for the first time*, filed a motion to compel arbitration in the Appellees' underlying employment and non-compete suit.[12] The Appellants explained that if the motion to consolidate was granted, the consolidated suit would involve the asset purchase agreement, which includes an arbitration clause.[13] The Appellees argued that the Appellants had invoked the judicial process and waived the right to compel arbitration by filing a suit in Dallas County and filing motions for a continuance and for change of venue, among other things.[14]

The trial court agreed with the Appellees and found that the Appellants' refusal to comply with discovery requests did not waive their right to arbitration. The Fort Worth Court of Appeals affirmed the order denying arbitration, but on the grounds that the movants failed to establish the existence of an arbitration agreement covering the dispute; therefore, the appellate court did not address the issue of waiver.[15] The Appellants appealed to the Texas Supreme Court. [16] The Court reversed and remanded the issue to the court of appeals, explaining that the Appellants had established the existence of an applicable arbitration agreement since both parties conceded that the underlying dispute involved both the asset purchase and employment agreements.[17]

On remand, the Fort Worth Court of Appeals, again, affirmed the trial court's denial of the Appellants' motion to compel arbitration, but this time finding that the Richmont parties substantially invoked the judicial process to the prejudice of the Blake parties.[18] The Court of Appeals opined that when the Appellants filed motions and pleadings in district court, requested

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[8] *Id.*
[9] *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C,* 392 S.W.3d 174, 177 (Tex. 2013) (per curiam).
[10] *Id.* at 177.
[11] *Id.* at 178.
[12] *Id.* From the date of the Appellees' initial petition filing to May of 2010, the Appellants had yet to produce any substantive discovery to the Appellees, despite several motions to compel discovery that were granted and sanctions ordered against the Appellants.
[13] *Id.* at 182.
[14] *Id.* 178-79.
[15] *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 392 S.W.3d 633 (Tex. App.—Fort Worth 2012, pet. granted).
[16] *Id.*
[17] *Id.* at 634.
[18] *Richmont Holdings, Inc. v. Superior Recharge Sys,. L.L.C.*, No. 02-10-00161-CV, 2013 WL 4517220 at *1 (Tex. App.—Fort Worth Oct. 3, 2013, pet. granted) (mem. op.).

continuances, met with the Appellees about Rule 11 agreements, delayed discovery, and incurred sanctions, the Appellants had impliedly waived arbitration.[19]

When the Appellants' petition for review was granted by the Texas Supreme Court for the second time, the Court, again, reversed the Fort Worth Court of Appeals on December 19, 2014.[20] The Court began its opinion by reiterating that waiver of arbitration can only be established by overcoming the strong presumption against waiver, which includes a two part test: a party waives the arbitration clause by (1) "substantially invoking the judicial process,"[21] and (2) "to the other party's detriment or prejudice."[22] The Court held that the court of appeals misapplied their decision in *Perry Homes v. Cull*,[23] which is currently the controlling case in Texas on the application of waiver as an affirmative defense to compelling arbitration. In *Perry*, the Texas Supreme Court held that "whether a party has substantially invoked the judicial process depends on the totality of the circumstances; key factors include the reason for delay in moving to enforce arbitration, the amount of discovery conducted by the movant, and whether the movant sought disposition on the merits."[24] *Perry* also explained that "how much litigation conduct will be 'substantial' [for invoking the judicial process] will depend very much on the context..."[25]

In applying the *Perry* principles, the Supreme Court went on to hold that the Appellant parties did not engage in litigation to the level required for showing substantial invocation of the judicial process merely by filing a suit in district court.[26] The Court explained that moving to transfer venue and engaging in only minimal discovery does not waive arbitration, since neither addresses the merits of the case. [27] The Court also referred to several previous cases holding that mere delay in moving to compel arbitration does not substantially invoke the judicial process.[28] After considering the lengthy procedural history of this litigation, the Court found that the totality of the circumstances did not show the Appellants intended to waive arbitration, and thus, remanded to the trial court.[29]

OBSERVATIONS

1. Mere delay in moving to compel arbitration is not necessarily enough to establish waiver to arbitrate in Texas.[30]

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[19] *Id.* at *3-5.
[20] *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, No. 13-0907, 2014 WL 7204482 (Tex. Dec. 19, 2014) (per curiam).
[21] *Id.* at *1.
[22] *Id.*
[23] *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008).
[24] *Richmont Holdings*, 2014 WL 7204482 at *1 (Tex. Dec. 19, 2014) (citing to *Perry Homes*, 258 S.W.3d at 590-93).
[25] *Perry Homes*, 258 S.W. 3d at 593. ("three or four depositions may be all the discovery needed in one case, but purely preliminary [and unsubstantial] in another.").
[26] *Richmont Holdings*, 2014 WL 7204482 at *2.
[27] *Id.*
[28] *Id.* at *3; *See e.g. In re Fleetwood Homes of Tex., L.P.*, 257 S.W.3d 692, 694 (Tex. 2008) (per curiam) (eight-month delay); *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (per curiam) (two-year delay); *see also Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 898–99 (Tex. 1995) (per curiam).
[29] *Richmont Holdings*, 2014 WL 7204482 at *3.
[30] *Richmont Holdings*, 2014 WL 7204482 at *3.

2. The Appellants' refusal to respond to the Appellees' trial court discovery requests seems to have helped the Appellants argue that they did not substantially invoke the judicial process, despite such refusal resulting in trial court sanctions.

3. This holding suggests that a party's filings and activities in litigation that are purely procedural, and not substantive, tend not rise to the level that will substantially invoke the judicial process, absent other factors.[31]

4. A party opposing a motion to compel arbitration automatically has a high hurdle when attempting to show the movant has substantially invoked the judicial process.

5. The Texas Supreme Court has repeatedly emphasized that applying the two part test for waiving arbitration is difficult to apply uniformly since it is largely determined by the specific facts and underlying nature of each individual lawsuit.[32]

6. Although there is a slight federal circuit split on whether showing prejudice to the other party is required for establishing waiver to arbitrate, the Fifth Circuit and nine other circuits require the party opposing arbitration to show it will suffer prejudice if compelled to arbitrate.[33]

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[31] *Id.; See also Perry Homes*, 258 S.W.3d at 590 (listing several actions taken by a party that fall short of demonstrating substantially invoking the judicial process, all of which are either procedural in nature or preliminary discovery.)

[32] *See Perry Homes*, 258 S.W. 3d at 592.

[33] *See Perry Homes*, 258 S.W.3d at 593-92 (reviewing the waiver requirements in each circuit).