

Nitfy

34

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2284CV01603-BLS-1

WESTERN AIR CHARTER, INC.¹

vs.

DARRYN MACKENZIE & another²

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT
MACKENZIE'S MOTION FOR LEAVE TO FILE A COUNTERCLAIM AND
THIRD-PARTY COMPLAINT**

Plaintiff Western Air Charter, Inc., d/b/a Jet Edge (“Jet Edge”), commenced this action against its former employee, Darryn Mackenzie (“Mackenzie”), and his new employer, Exclusive Jets, LLC, d/b/a flyExclusive (“flyExclusive”), alleging that Mackenzie breached certain employment agreements he had with Jet Edge and stole its trade secrets, proprietary, and confidential information prior to leaving his employment.³ On September 22, 2022, the court stayed proceedings against Mackenzie pending arbitration. Mackenzie has now moved to lift the stay and permit him to file a counterclaim and third-party complaint on the grounds that Jet Edge has waived its right to arbitration. Mackenzie’s proposed claims relate to his allegation that Jet Edge failed to pay certain wages in violation of the Wage Act, G.L. c. 149, § 148 (“Wage Act”). After a hearing and careful consideration of the written submissions, the motion is **ALLOWED**.

BACKGROUND

Mackenzie resigned from his employment at Jet Edge on June 10, 2022, and went to work for flyExclusive. Prior to filing this lawsuit, Jet Edge had filed a demand for arbitration

¹ d/b/a Jet Edge

² Exclusive Jets, LLC, d/b/a flyExclusive.

³ On March 16, 2023, the court allowed flyExclusive’s motion to dismiss.

against Mackenzie with JAMS on July 6, 2022, relying on a provision in the Proprietary Information Protection Agreement, between Jet Edge and Mackenzie in which both parties agreed to arbitration to resolve any employment disputes (“Arbitration Agreement”).⁴ The Arbitration Agreement included a right to seek preliminary relief from the arbitrator and to pursue discovery. It also required that Jet Edge pay for all arbitration costs.

On July 15, 2022, Jet Edge brought this action in Massachusetts Superior Court against Mackenzie and flyExclusive. Jet Edge sought from this court a preliminary injunction against

⁴ The Mutual Agreement to Arbitrate provides in pertinent part as follows:

8. Mutual Agreement to Arbitrate Claims. [Jet Edge] subscribes to a system of alternative dispute resolution, which involves binding arbitration to resolve disputes which may arise out of the employment context. To the extent disagreements may arise between [Jet Edge] and [Mackenzie] during or following employment, this Mutual Agree to Arbitrate claims (“Arbitration Agreement”) is intended to provide an impartial dispute-resolution procedure for disputes arising between or among [Jet Edge] and [Mackenzie], as provided in detail below.

8.3 Claims Covered. [Jet Edge] and [Mackenzie] mutually consent to the resolution by arbitration of all disputes, claims or controversies of any kind arising out of or in any way related to or connected to [Mackenzie’s] employment with [Jet Edge] . . . and/or this Proprietary Information Protection Agreement that could be brought in a court of law, including contract, tort, statutory, and any other type of claims (“Claims”), except claims excluded in this section of this [Arbitration Agreement] entitled “Claims not Covered.” . . .

8.4 Claims Not Covered. This Agreement does not cover claims for workers’ compensation, state or federal disability benefits, or unemployment compensation benefits; administrative charges of discrimination to the Equal Employment Opportunity Commission, Massachusetts Department of Labor Relations, Massachusetts Commission Against Discrimination, California Department of Fair Employment and Housing, or similar fair employment practices agency claims; and claims under an employee welfare benefit or pension plan that either (1) specifies that its claims procedure shall culminate in an arbitration procedure different from this one; or (2) is underwritten by a commercial insurer which decides claims.

8.7 Arbitration Procedures. Disagreements or disputes shall be submitted and determined exclusively by binding arbitration. . . . Each party shall have the right to conduct discovery [Jet Edge] and [Mackenzie] shall have the right to file motions for summary judgment. . . . [Mackenzie] and [Jet Edge] agree that each party may seek emergency injunctive relief from the arbitrator on an expedited basis pursuant to the applicable arbitration rule, including but not limited to in the instance of any breach or threatened breach of the provisions of this Agreement related to the protection and return of Proprietary Materials and non-solicitation obligations. . . .

8.8 Arbitration Fees and Costs. [Jet Edge] will be responsible for paying all administrative fees unique to the arbitration, including fees and costs of the Arbitrator. Each party shall have the right to be represented by an attorney in connection with any dispute under this Agreement, and each party shall pay for its own costs and attorneys’ fees, if any (other than costs unique to the arbitration process, which will be paid for by [Jet Edge]).

both defendants and requested expedited discovery. A hearing was held on the motion for a preliminary injunction on July 21, 2022. On July 25, 2023 the court issued its order denying relief as to flyExclusive but granting partial relief as to Mackenzie, and denied the motion for expedited discovery.

On August 22, 2022, Mackenzie filed with JAMS, his affirmative defenses and counterclaims against Jet Edge, and third-party claims against two corporate entities and various individuals. In his counterclaims and third-party claims, Mackenzie alleged that Jet Edge failed to pay him certain wages in violation of the Wage Act. Between August 30, 2022 and April 12, 2023, a JAMS Case Manager reached out to counsel for Jet Edge nine times seeking payment for the arbitration fee as required by the Arbitration Agreement. Jet Edge either failed to respond or indicated that it would “check.”

On May 4, 2023, at a conference with this court, the court asked the parties why this action should not be dismissed in light of the dismissal of Jet Edge’s claims against flyExclusive and the pending arbitration with Mackenzie. Mackenzie’s counsel raised its concern that Jet Edge was not pursuing arbitration. A further conference was scheduled for May 10, 2023, for a show cause hearing as to why the case should not be dismissed.

At the May 10, 2023 hearing, Mackenzie’s counsel argued that Jet Edge had failed to pursue arbitration and therefore, had waived its right to arbitrate. Mackenzie argued that the case should proceed in the Superior Court. Jet Edge’s counsel admitted that Jet Edge had not paid the JAMS case fee of \$5,000. He indicated that Jet Edge would be content with proceeding in the Superior Court and would waive arbitration. After the court accepted the parties’ waivers of arbitration, Jet Edge’s counsel backed away from its waiver. The court scheduled a further status

conference to give the lawyers time to consult with their clients and to determine their positions on this issue.

At a hearing on May 18, 2023, Jet Edge's counsel represented that Jet Edge did intend to proceed with arbitration before JAMS and that the fee had been paid. Mackenzie's counsel indicated that JAMS was not showing the fee as having been paid, and that Mackenzie was taking the position that arbitration had been waived. It was agreed that this motion would follow.

JAMS did not receive payment from Jet Edge until June 7, 2023, when it received the initial filing fee of \$5,000.

DISCUSSION

Mackenzie argues that Jet Edge has waived its right to arbitration and asks the court to lift the stay and permit him to file a counterclaim and third-party complaint in this court. Jet Edge opposes the motion.

A party's contractual right to arbitrate may be lost if they fail to properly and timely assert that right. *Home Gas Corp. of Mass., Inc. v. Walther's of Hadley, Inc.*, 403 Mass. 772, 775 (1989) (citing *Bodine v. United Aircraft Corp.*, 52 Cal. App. 3d 940, 945 (1975)). The Supreme Judicial Court has held that "[w]hether a party has waived arbitration is a question of arbitrability for the court to determine." *O'Brien v. Hanover, Ins. Co.*, 427 Mass. 194, 199 (1998) (quoting *Martin v. Norwood*, 395 Mass. 159, 162 (1985)) (applying the Massachusetts Arbitration Act). Waiver under the Federal Arbitration Act is likewise an issue for the court. *Kettle Black of MA, LLC v. Commonwealth Pain Mgt. Connection, LLC*, 101 Mass. App. Ct. 109, 115 (2022); *Shalaby v. Arctic Sand Techs., Inc.*, No. MICV2014-03621, 2014 WL 7235830,

at *1-2 (Mass. Super. Dec. 15, 2014); *Element Prods., Inc. v. EditBar, LLC*, No. SUCV20161476BLS1, 2017 WL 4479207, at *2 (Mass. Super. Aug. 15, 2017).⁵

To decide if Jet Edge has waived arbitration, the court considers several factors: (1) whether Jet Edge has participated in litigation or taken action inconsistent with its right to arbitrate; (2) whether “the litigation machinery has been substantially invoked”; (3) how much time passed before Jet Edge sought arbitration; (4) whether Jet Edge has invoked judicial jurisdiction by filing a counterclaim without asking for a stay; (5) whether intervening steps not available in arbitration, such as discovery, have taken place; and (6) whether Mackenzie has been affected, misled or prejudiced by the delay. *See Home Gas Corp. of Mass., Inc.*, 403 Mass. at 775-76.

Here, despite the agreement to arbitrate, which included a right to seek preliminary relief from the arbitrator and to pursue discovery, Jet Edge filed this action in Superior Court, and sought preliminary relief and expedited discovery from the court. For almost a year, Jet Edge failed to pursue the arbitration despite having initiated it at JAMS. It ignored nine inquiries from JAMS regarding payment. Jet Edge’s failure to pursue the arbitration has caused substantial delay in Mackenzie’s ability to pursue his claims. While Jet Edge asserts that some if not all of the delay was attributable to settlement discussions, the court credits the affidavits of Mackenzie’s counsel and is persuaded that no meaningful settlement discussions have taken place in this case.

Accordingly, the court finds that Jet Edge’s failure to pay the arbitration fee and to otherwise pursue arbitration, constitutes a waiver of its right to arbitrate. *See Home Gas Corp. of Mass., Inc.*, 403 Mass. at 775-76; *Samsill v. Dave & Buster’s of Massachusetts, Inc.*, 100 Mass.

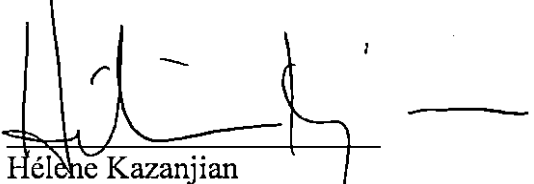
⁵ Section 8.1 of the Arbitration Agreement provides that the Federal Arbitration Act governs the agreement.

App. Ct. 1115 *2 (2021) (unpublished decision) (citing *Pre-Paid Legal Servs. v. Cahill*, 786 F.3d 287, 1297 (10th Cir. 2021)). The stay is lifted and Mackenzie's motion for leave to file a counterclaim and third-party complaint is **ALLOWED**.

ORDER

It is hereby **ORDERED** that Defendants' Motion for Leave to File Counterclaim and Third-Party Complaint **ALLOWED**.

SO ORDERED.


Hélene Kazanjian
Justice of the Superior Court

DATE: August 28, 2023