United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7104 **September Term, 2017**

FILED ON: APRIL 16, 2018

STEPHEN KELLEHER,
APPELLEE

v.

DREAM CATCHER, L.L.C., ET AL.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-02092-APM)

Before: KAVANAUGH, *Circuit Judge*, and EDWARDS and SENTELLE, *Senior Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the district court's denial of Dream Catcher, LLC's motion to stay and compel arbitration be affirmed for the reasons set forth in the memorandum filed simultaneously herewith.

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

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MEMORANDUM

Appellant Dream Catcher, LLC, and individual defendants-appellants Heidi Schultz and Cesar de Armas appeal the district court's denial of their motion to stay and compel arbitration. *See Kelleher v. Dream Catcher, LLC*, No. 1:16-cv-02092 (APM), 2017 WL 4712082 (D.D.C. June 2, 2017). The other issues raised by Dream Catcher are adequately addressed by our per curiam order of September 28, 2017.

This case arises from a dispute over a contract for renovation and construction work between Dream Catcher and Stephen Kelleher, owner of a residence in the District of Columbia. Kelleher filed a complaint against Dream Catcher in D.C. Superior Court on May 31, 2016, for breach of contract and other claims. Kelleher also sued the owners of Dream Catcher, Schultz and de Armas, under a veil-piercing theory. The defendants removed the case to federal court on October 21, 2016.

Months later, in January 2017, counsel for Dream Catcher reviewed the contract. The contract required arbitration of any disputes of $5,000 or more. Counsel for Dream Catcher communicated his client's desire for arbitration to Kelleher's counsel by email on January 13, 2017. Later that month, Dream Catcher filed a motion to dismiss the amended complaint and purported to preserve the right to arbitrate in a footnote noting that it sought Kelleher's consent to arbitration. Only in April 2017 did Dream Catcher move to stay the proceedings and compel arbitration. Applying *Zuckerman Spaeder v. Auffenberg*, 646 F.3d 919 (D.C. Cir. 2011), the district court denied the motion, holding that Dream Catcher had forfeited its right to arbitrate by failing to timely invoke that right. Dream Catcher timely appealed.

Forfeiture of the right to arbitrate is "a question of law we address de novo." *Id.* at 922. In *Zuckerman*, we clarified the standard for whether a litigant has acted inconsistently with preservation of the right to arbitrate by failing to timely invoke the right: "A defendant seeking a stay pending arbitration under Section 3 [of the Federal Arbitration Act] who has not invoked the right to arbitrate on the record at the first available opportunity, typically in filing his first responsive pleading or motion to dismiss, has presumptively forfeited that right." *Id.* To overcome the presumption of forfeiture, a defendant must show "his delay did not prejudice his opponent or the court." *Id.* at 923.

In this case, Dream Catcher opted to file an answer rather than a pre-answer motion to dismiss and did not invoke its right to arbitrate in the answer. Recognizing this, Dream Catcher argues that it timely invoked the right to arbitrate in its January 2017 motion to dismiss. We disagree. Even if a post-answer motion to dismiss filed over three months after the case was removed could constitute "the first available opportunity" under *Zuckerman*, a footnote purporting to reserve the right to arbitrate is not an "invocation" of that right.

Dream Catcher seeks to overcome the presumption, arguing that any litigation costs to Kelleher were de minimis. The district court, however, found that Dream Catcher's delay caused substantial prejudice to both Kelleher and the court. The district court noted various litigation and discovery activities that would not have occurred but for Dream Catcher's delay and which required the time of opposing counsel and the attention of the court. In light of those activities and the judicial resources expended, we cannot say that a delay of months before moving to stay and compel arbitration "did not prejudice [Dream Catcher's] opponent or the court." *Zuckerman*, 646 F.3d at 923. The district court did not err in holding that Dream Catcher failed to overcome the presumption of forfeiture.

For the foregoing reasons, we affirm the district court's denial of Dream Catcher's motion to dismiss and remand for proceedings not inconsistent with this judgment and our September 28, 2017 per curiam order.