

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

RED ROCKS RESOURCES L.L.C.,	)	
d/b/a Red Rocks Oil and Gas	)	
Operating, a Colorado Limited	)	
Liability Company,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-14-0948-C
	)	
TRIDENT STEEL CORPORATION,	)	
a Missouri corporation,	)	
	)	
Defendant and	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
NORTH AMERICAN INTERPIPE, INC.,	)	
	)	
Third-Party Defendant.	)	

MEMORANDUM OPINION AND ORDER

Red Rocks Resources L.L.C., d/b/a Red Rocks Oil and Gas Operating (“Red Rocks”) sued Trident Steel Corporation (“Trident”) for damages alleged resulting from a downhole failure of P-110 casing. Third-Party Defendant North American Interpipe, Inc. (“NAI”) sold Trident the P-110 casing which allegedly was defective. In the Third-Party Complaint against NAI, Trident claims that NAI manufactured the subject casing and had it heat treated, inspected, and processed by Third-Party Defendant Laguna Tubular Products Corporation (“Laguna”) and as a result NAI and Laguna are responsible for the damages Red Rocks seeks from Trident.

This matter was originally filed in 2014. There has been some motion practice in the matter, primarily dealing with Laguna's efforts to be dismissed for lack of personal jurisdiction. The third-party claim of Trident against NAI was filed in January of 2015. Those two parties have engaged in some motion practice and some discovery, preparing for a May trial. NAI has now filed a Motion to Stay Litigation and Compel Arbitration (Dkt. No. 99) arguing that the purchase order governing the purchase of the allegedly defective casing contains an arbitration provision.<sup>1</sup> Trident has responded, arguing that NAI's actions in this matter have waived its right to rely on the arbitration clause.

Without question, arbitration is favored. The Supreme Court has held the Federal Arbitration Act is a "congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Code Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). While courts routinely recognize that arbitration agreements are to be enforced, the rule is not without exception. 9 U.S.C. § 2 provides 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." The Tenth Circuit has recognized that waiver by conduct in litigation is grounds to deny enforcement. See Reid- Burton Constr. Inc. v. Carpenters Dist. Council of S. Colo. 535 F.2d 598, 604 (10th Cir. 1976) ("It is entirely appropriate in some instances for a district court to retain . . . jurisdiction of an arbitrable dispute where, because

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<sup>1</sup> Since filing the present Motion, Trident and NAI have requested to withdraw the request to stay deadlines. The Court granted that request by Order dated February 6, 2017. (Dkt. No. 107). Accordingly, only the request to compel arbitration will be considered herein.

of conduct before the court, it may be deemed that a party is prevented on the basis of some equitable principle from asserting a right to arbitration.”). In Peterson v. Shearson/American Express, Inc., 849 F.2d 464 (10th Cir. 1988), the Circuit identified six factors to consider in evaluating the waiver. Those factors are:

- (1) whether the party’s actions are inconsistent with the right to arbitrate;
- (2) whether “the litigation machinery has been substantially invoked” and the parties “were well into preparation of a lawsuit” before the party notified the opposing party of an intent to arbitrate;
- (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;
- (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings;
- (5) “whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place”; and
- (6) whether the delay “affected, misled, or prejudiced” the opposing party.

Id., 849 F.2d at 467-68 (citing Reid-Burton, 535 F.2d. at 702). The six factors are not a balancing test, nor are they exclusive, “rather these factors reflect certain principles that should guide courts in determining whether it is appropriate to deem that a party has waived its right to demand arbitration.” Hill v. Rico Ams. Corp., 603 F.3d 766, 773 (10th Cir. 2010). However, the Tenth Circuit has recognized that three of the factors -- “(2) substantial progress in the litigation, (3) an imminent trial, and (5) substantial use of discovery procedures – can be significant in deciding whether the court should find waiver because of the inefficiencies that would result from ordering arbitration. Id. at 774.

Trident argues that NAI’s actions are inconsistent with the right to arbitrate. According to Trident, from early 2015 until recently, NAI litigated without ever mentioning arbitration; it did not raise the arbitration issue in its Rule 26 disclosures, in preparing the

Scheduling Order, in its answer and cross claim, or in any of its previous court filings. Indeed, even after the issue of arbitration was raised in December of 2016, NAI continued to issue discovery requests to Plaintiff Red Rocks, including deposing Red Rocks' expert witnesses, and attended mediation.

NAI asserts that Trident has substantially invoked the litigation machinery and that the parties are well into preparation of the lawsuit. According to Trident, after NAI filed its Answer and Cross-Claim, the parties have exchanged tens of thousands of documents, dozens of interrogatory responses, multiple pleadings in the Court, as well as other discovery preparation. Trident also notes the matter is currently set on the Court's May 2017 trial docket.

Trident argues that NAI has waited a long time to seek arbitration, noting the present request was filed almost two years after the answer and cross-claim. Trident also points out that NAI has filed a cross-claim in this matter against Laguna without mentioning the arbitration issue.<sup>2</sup> Trident argues that NAI has taken advantage of extensive discovery that would not be available in the arbitration of Trident's claim, including discovery from Red Rocks regarding the failure, and discovery from NAI. According to Trident, the rules of the American Arbitration Association ("AAA") restrict such discovery and leave its scope to the arbitrator's discretion. Finally, Trident asserts that NAI's delay has severely prejudiced

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<sup>2</sup> Because the claims against Laguna have been dismissed, the existence of a cross claim does not impact the Court's decision on waiver.

Trident in that it has invested hundreds of hours and tens of thousands of dollars in time and expenses in preparing the case for trial, not arbitration.

In response, NAI argues that it has not waived its right to arbitration; that the delay in seeking arbitration should be overlooked because both parties were aware of the arbitration agreement and thus are equally responsible for any delay. Further, the depositions and discovery will be useful in the arbitration proceedings for both parties and that the motion practice occurring in this Court was relatively limited when compared to other cases where waiver has been found. NAI argues that much of the motion practice was related to matters which would have required litigation in some judicial forum even if arbitration had been requested at the earliest stage.

As noted above, the factors set forth in Peterson are not exclusive, nor do they create some mechanical process in which each factor is assessed and when balanced, one side prevails. Rather, the factors are to be tethered to the fundamental reasons for finding waiver. Hill, 604 F.3d at 773. Further, “[t]he burden of persuasion lies with the party claiming that the right to demand arbitration has been waived.” Id. at 775. Finally, any doubts are resolved in favor of arbitration. See Moses H. Cone, 460 U.S. at 24-25. Applying these standards, the Court finds that the NAI has not waived its right to enforce the arbitration agreement. Rather, the Court finds that the actions taken by NAI, in terms of discovery, would have occurred whether the arbitration agreement had been enforced early in the litigation or at this stage. Thus, there is no wasted or excess effort. The motion practice only tangentially involved the dispute between Trident and NAI and the Court was not forced to

decide issues regarding those two parties in a manner inconsistent with enforcement of the arbitration provision. Indeed, given the posture of the dispute between Trident and NAI, it seems that any arbitration would have little impact on the underlying action. Certainly Red Rocks may pursue its claims against Trident and a determination can be made in a May trial regarding the claims the casing was defective and whether or not Trident is responsible for any damages that may have occurred. Whether or not Trident may ultimately recover its expenses or costs from NAI can be resolved through the arbitration process to which the parties agreed in the purchase order.

Accordingly, Third-Party Defendant North American Interpipe, Inc.'s Motion to Stay Litigation and Compel Arbitration (Dkt. No. 99) is GRANTED in part. Trident Steel Corporation's claims against North American Interpipe will be stayed and referred to arbitration. Either party may seek additional action from this Court once the arbitration process is complete.

IT IS SO ORDERED this 7th day of February, 2017.

  
ROBIN J. CAUTHRON  
United States District Judge