UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

LEE CONSTRUCTION, LLC *Plaintiffs*, v. MICHAEL L. BRATTON, and ROBERT BENJAMIN BRATTON *Defendant*.	)	Case No. 1:22-cv-196 District Judge Atchley Magistrate Judge Lee

MEMORANDUM OPINION AND ORDER

Before the Court is the Motion to Compel Arbitration [Doc. 9] filed by Plaintiff Lee Construction, LLC. Defendants Michael L. Bratton and Robert Benjamin Bratton filed an Opposition [Doc. 11]. The only disputed issue is whether Plaintiff waived its right to compel arbitration by filing this litigation. Before the court can answer this question, however, it must determine the appropriate test to use in light of the Supreme Court's pivotal decision in *Morgan v. Sundance*, 142 S.Ct. 1708 (2022).

Courts in this circuit have long applied a waiver analysis that is specific to the arbitration context, and which is expressly designed to favor arbitration agreements more than other contractual provisions. *Hurley v. Deutsche Bank Trust Co. Americas*, 610 F.3d 334, 338 (6th Cir. 2010). That analysis involves a two-part test: a party waives it right to arbitrate by: "(1) taking actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) delaying its assertion to such an extent that the opposing party incurs actual prejudice." *Id.* (internal quotation marks omitted) (quoting *Germany v. River Terminal Ry. Co.*, 477 F.2d 546, 547 (6th Cir. 1973). Both complete inconsistency and actual prejudice are required. *Id.*

Enter the Supreme Court. In *Morgan v. Sundance*, decided on May 23, 2022, the Supreme Court held that courts have been wrong to "condition a waiver of the right to arbitrate on a showing of prejudice." 142 S.Ct. at 1713. Writing for a unanimous Court, Justice Kagan stated that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Id.* Recognizing that a federal court assessing waiver does not generally ask about prejudice outside the arbitration context, the Supreme Court directed the Eighth Circuit to strip the requirement of actual prejudice from its waiver analysis. *Id.* at 1714. More broadly, the Court explained: "If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id.* at 1713.

Although the Sixth Circuit has yet to address the validity of its two-part waiver test following *Morgan*, district courts in this circuit have held that *Morgan* abrogates the latter prejudice prong. *See, e.g., Sevier Cnty. Sch. Fed. Credit Union v. Branch Banking & Trust Co.*, 2022 WL 19403610 (E.D. Tenn. Sept. 15, 2022). However, no court has confronted the validity of the first factor—complete inconsistency—in light of *Morgan's* arbitration-neutral principles. The Court does so here. Like the second prong, the first prong appears to be the very kind of "special, arbitration-preferring procedural rule[]" that *Morgan* prohibits. The Court concludes that *Morgan* invalidates both parts of the Sixth Circuit's two-part waiver test, instead instructing the Court to apply the general federal rule of waiver as it would with any other contractual provision. Because Plaintiff, by filing this litigation, has waived its right to arbitrate under a general waiver analysis, the Motion to Compel Arbitration [Doc. 9] is **DENIED**.

I. FACTUAL BACKGROUND

Plaintiff commenced this action for breach of contract on May 11, 2022, in the Circuit Court of Sequatchie County. Plaintiff made no mention of an arbitration agreement in its Complaint [Doc. 1-1]. On August 2, 2022, Defendants removed this action to federal court and subsequently filed their Answer and Counterclaim. [Doc. 6]. To date, neither party has conducted any discovery or filed a dispositive motion.

On September 9, 2022, roughly a month after removal, Plaintiff filed the instant Motion [Doc. 9] to compel arbitration under the Federal Arbitration Act ("FAA"). The contract at issue, which is attached to the Complaint, contains the following arbitration agreement:

> In the event of a contract dispute the Owner and Contractor agree to settle such dispute together during an agreeable meeting; in the event this meeting cannot resolve the dispute the Owner and Contractor agree to settle the dispute through arbitration.

[Doc. 1-1, p. 14]. Defendants oppose the Motion, arguing that "Plaintiff has acted inconsistently with the arbitration agreement and cannot now invoke that right simply because its choice of forum has been changed." [Doc. 11, p. 1-2].

II. LAW

The FAA enables contracting parties to agree to settle certain contractual disputes with an arbitrator rather than a court. See 9 U.S.C. § 2. The FAA provides in pertinent part:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The principal purpose of the

FAA, as the Supreme Court recently emphasized in *Morgan*, is to ensure that private arbitration agreements are enforced according to their terms, just as with any other contract. *Morgan*, 142 S. Ct. at 1709 (noting that the FAA's policy "is about treating arbitration contracts like all others"). If a court determines that the cause of action is covered by an arbitration clause, it must stay the proceedings until the arbitration process is complete. 9 U.S.C. § 3.

III. ANALYSIS

The only disputed issue is whether Lee Construction waived its right to compel arbitration by commencing this litigation. The right to arbitrate a dispute, like all contract rights, is subject to waiver. *Gala v. Telsa Motors TN, Inc.*, No. 2:20-CV-2265, 2020 WL 7061764, at *7 (W.D. Tenn. Dec. 2, 2020). The party claiming waiver bears the burden of demonstrating that waiver has occurred. *Id.* Prior to *Morgan*, the Sixth Circuit held that a party waives it right to arbitrate by: "(1) taking actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) delaying its assertion to such an extent that the opposing party incurs actual prejudice." *Hurley*, 610 F.3d at 338 (internal quotation marks omitted) (quoting *River Terminal Ry. Co.*, 477 F.2d at 547). Both complete inconsistency and actual prejudice are required. *Id.* This test was abrogated, at least in part, by the Supreme Court's unanimous decision in *Morgan*, which held that courts may not "condition a waiver of the right to arbitration on a showing of prejudice." 142 S. Ct. at 1713. Although the Sixth Circuit has not directly addressed its two-part waiver test following *Morgan*, district courts have determined that the second factor is no longer valid. *See, e.g.*, *Sevier Cnty. Sch. Fed. Credit Union*, 2022 WL 19403610, at *8.

The status of the first factor remains unclear. At first glance, *Morgan* seems to leave it intact, only directing each circuit court to lance the element of prejudice from its arbitration-specific waiver analysis. This Court would not be alone in taking such an approach. *See Narcio v.*

G2 Secure Staff, LLC, No. 5:22-cv-6045, 2022 WL 2960021, at *6 (W.D. Mo. July 26, 2022) ("*Morgan* abrogated the prejudice requirement. *Morgan* did not, however abrogate the requirement that a party be found to have acted inconsistently with its right to arbitrate for waiver to apply.") (citation omitted).

Other courts, however, have noted that this approach is not entirely consistent with *Morgan*, which rejects any "special, arbitration-preferring procedural rules." *See Herrera v. Manna 2nd Ave. LLC*, No. 1:20-cv-11026, 2022 WL 2819072, at *7 (S.D.N.Y. July 18, 2022). *Morgan* directs courts "to make arbitration agreements as enforceable as other contracts, but not more so" 142 S.Ct. 1708, 1713-14 (2022) (internal quotation marks omitted) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967). "If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id.* at 1713. Put differently, *Morgan* invalidates any element in a court's waiver analysis that "fosters" arbitration more than "the usual federal rule of waiver." *Id.* at 1713-14. Post-*Morgan*, the Third Circuit has tossed its arbitration-specific rules and applied the general rule for waiver "as *Morgan* directs." *White v. Samsung*, 61 F.4th 334, 339 (3d Cir. 2023).

This creates a problem for the first prong of the Sixth Circuit's waiver analysis, which like the second prong, appears to be the very kind of "special, arbitration-preferring procedural rule[]" that *Morgan* prohibits. As discussed, the first prong states that a party waives arbitration when it takes actions "that are completely inconsistent with any reliance on an arbitration agreement." *Hurley*, 610 F.3d at 338. This test greatly differs from the general test for waiver of a contractual right under Tennessee law, which requires "the intentional, voluntary relinquishment of a known

right" as demonstrated by "clear, unequivocal and decisive acts of the party." *Am. Bank, FSB v. Cornerstone Cmty. Bank,* 733 F.3d 609, 615 (6th Cir. 2013). In fact, the "completely inconsistent" test not only "fosters" arbitration more than the general rule of waiver but more than any other circuits court's arbitration-specific waiver test. The Eighth Circuit simply asks whether a party "knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right," *Morgan,* 142 S. Ct. at 1714, and the Fifth Circuit asks whether the party has "substantially invoked the judicial process." *Vollmering v. Assaggio Honolulu, LLC*, No. 2:22-CV-00002, 2022 WL 6246881, at *12 (S.D. Tex. Sept. 17, 2022).

It does not appear that any other court in this circuit has been forced to confront whether *Morgan* instructs courts to adopt a general waiver analysis or instead apply the "completely inconsistent" test as a standalone rule. This question was raised by the Western District of Tennessee but left unanswered because the court found that "a general waiver analysis would lead to the same results" as the arbitration-preferring test. *Sevier Cnty. Sch. Fed. Credit Union*, 2022 WL 19403610, at *8 n.15. That is not the case here. As the Court will show, the two tests reach opposite results on whether Plaintiff waived its arbitration rights by commencing this litigation.

Start with the "completely inconsistent" test. The Sixth Circuit has not spoken directly to whether filing a complaint is by itself "completely inconsistent" with a waiver of arbitration. However, one district court has already determined that it isn't. *O'Meara as next friend of O'Meara v. Fidelity Investments*, 2021 WL 493422, *4 (W.D. Tenn. 2021). There, the court found that the plaintiff, despite filing a complaint which sought relief on the merits, had not acted in a manner that was "*completely* inconsistent with *any* reliance" on an enforceable arbitration agreement where the case was in litigation for less than three months and had not progressed to the point of discovery. *Id.* at 3-4. Indeed, precedent from this district has found that far greater litigation

activity and delay was not "completely inconsistent" with the invocation of arbitration rights even when not raised as an initial matter. *See Paxton v. Bluegreen Vacations Unltd.*, No. 3:16-cv-523, 2019 WL 7791889, at *6 (E.D. Tenn. Feb. 14, 2019) (Mattice, J.) (citation omitted).

A different result is reached if the Court treats the arbitration provision like any other contract provision, applying a general waiver analysis under Tennessee law. Tennessee courts hold that waiver of a contractual provision requires that there be an "intentional, voluntary relinquishment of a known right" as demonstrated by "clear, unequivocal and decisive acts of the party." *Am. Bank, FSB v. Cornerstone Cmty. Bank*, 733 F.3d 609, 615 (6th Cir. 2013). One could hardly dispute that by filing the Complaint, which seeks relief on the merits and makes no mention of arbitration, Plaintiff demonstrated a clear and unequivocal intent to disregard the arbitration agreement and to resolve this action in a judicial forum. Indeed, "[s]hort of directly saying so in open court, it is difficult to see how a party could more clearly evince a desire to resolve a dispute through litigation rather than arbitration than by filing a lawsuit going to the merits of an otherwise arbitrable dispute." *Nicholas v. KBR, Inc.*, 565 F.3d 904, 908 (5th Cir. 2009) (cleaned up) (quoting *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 484 (5th Cir. 2002)).

In the end, the Court concludes that the latter approach is more appropriate. The Court reads *Morgan's* position on arbitration clauses—that "the FAA's 'policy favoring arbitration' does not permit courts to invent special, arbitration-preferring procedural rules"—as abrogating *both* prongs of the Sixth Circuit's waiver test. The Supreme Court has made clear that courts should not make arbitration agreements more enforceable than other contract provisions. Yet, as shown above, that is exactly what would happen if the Court applied the "completely inconsistent" test as a standalone rule. Therefore, following the lead of the Third Circuit, the Court will instead apply the general waiver rule as *Morgan* directs. *See White*, 61 F.4th at 339. Having concluded that Lee

Construction waived its right to arbitration under a general waiver analysis by filing this litigation, the Court will deny Plaintiff's Motion to Compel Arbitration [Doc. 9].

IV. CONCLUSION

For the foregoing reasons, the Motion to Compel Arbitration [Doc. 9] is **DENIED**.

SO ORDERED.

/s/ Charles E. Atchley, Jr.
CHARLES E. ATCHLEY, JR.
UNITED STATES DISTRICT JUDGE