

Right to Enforce Arbitration Is Waived Upon Default

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Cheryl D. Shoun
843.720.1762
cshoun@maynardnexsen.com

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Generally, the right to enforce arbitration may be waived. While there is no established rule as to what constitutes waiver, it typically requires a showing of prejudice through undue burden resulting from the delay in demanding arbitration. That given, the South Carolina Court of Appeals recently made what appears to be its initial assessment of whether waiver is inherent upon a party's default. See *Palmetto Construction Group, LLC v. Restoration Specialists, LLC, Reuben Mark Ward and Lynette Pennington Ward*, 2019 WL 2608493 (June 26, 2019).

Palmetto Construction Group (PCG), a Georgia company, and Palmetto, a South Carolina limited liability company, entered into a subcontract agreement pursuant to which Restoration would pay PCG for certain subcontract work. PCG also claimed that Mark Ward requested PCG's assistance in securing a bond from PCG's surety to cover the project undertaken by the parties. The entities, their principals and their spouses were required to execute indemnities in favor of the surety. As the project drew near a close, several subcontractors made claims for non-payment pursuant to the bond. PCG filed suit against Restoration claiming failure to pay amounts owed to it under the subcontract and for other causes of action including actual and constructive fraud and negligent misrepresentation. PCG also filed a motion to stay the action and compel arbitration, as set forth in the subcontract agreement.

Defendants were personally served but failed to respond, following which PCG submitted an affidavit of default. PCG also withdrew its motion to stay and to compel arbitration. The circuit court entered default and referred the case to the master-in-equity for a damages hearing. Immediately prior to the damages hearing, Defendants filed a motion to set aside the default and motion for continuance, quickly followed by a motion to stay and to compel arbitration. The master denied the motion to set aside default and denied the motion to stay and compel arbitration, based upon Defendants' default. Shortly

thereafter, Defendants filed a motion to alter or amend the master's order, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. The master then held a hearing at which PCG proffered evidence as to damages and Defendants argued their 59(e) motion. Thereafter, although not establishing damages, the Master entered an order denying the 59(e) motion and finding arbitration had been waived. The matter came before the court on Defendants' appeal of the denial of their motion to set aside the default and the denial of their Rule 59 (e) motion. The appeal was dismissed as interlocutory.

Denial of a motion to set aside a default *judgment* is immediately appealable; the denial of a motion to set aside an entry of default, where there is no final judgment, is not. Defendants argued that the denial of the motion to compel arbitration was an appealable issue making both of the court's conclusions ripe for appeal. The Court of Appeals disagreed.

Here, the court reasoned that a defaulting party concedes liability, leaving nothing to decide other than damages. Thus, granting a motion to compel arbitration after an entry of default would allow a defaulting party an opportunity to revisit liability issues, in contravention of the purpose of arbitration, which is achieve truncated proceedings and swift results.

Continuing its analysis of the issues before it, the court also concluded that a defaulting party waives its right to compel arbitration. Borrowing from other jurisdictions, the court concluded that while denial of a motion to compel arbitration is generally appealable, it remains that arbitration is a defense and like any defense, it is waived by failing to timely assert it.

Cheryl D. Shoun is a trial attorney and certified mediator whose experience includes construction law, insurance defense, personal injury defense, employment litigation and medical malpractice. As a frequent writer, she serves as editor for Nexsen Pruet's TIPS: Torts, Insurance and Products Blog.