

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2006-005313

01/31/2008

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT  
S. Brown  
Deputy

D/ A Q CORPORATION

JOSHUA R FOREST

v.

DAVID BUTCHER, et al.

ELLIOT J PESKIND

MINUTE ENTRY

The Court has considered the Motion To Compel Arbitration Filed On Behalf of Defendants David Butcher and Bonnie Butcher, Husband and Wife (Motion to Dismiss For Lack Of Subject Matter Jurisdiction) and the briefs.

The Court's review of Defendants' Verified Answer and Counterclaim, filed June 14, 2006, reveals that they did indeed raise the defense of lack of subject matter jurisdiction, but not because a valid arbitration agreement existed. Paragraph 7 reads, "In response to Plaintiffs' paragraph 7, Defendants lack knowledge or information sufficient to form a belief as to whether this Court has jurisdiction and venue over the parties, and without strict proof thereof deny that this Court has jurisdiction and venue over the parties." This is inconsistent with asserting the existence of an arbitration agreement of which Defendants not only did have knowledge and information sufficient to form a belief, but to which they appealed. Later, in their recital of affirmative defenses, Defendants' Paragraph 42 states, "Without proof of Plaintiffs' residency in the State of Arizona, this court may lack subject matter jurisdiction over these claims." Here, the basis for challenging subject matter jurisdiction is expressly identified as the possibility that Plaintiffs might reside out of state, not that a valid arbitration agreement deprived the Court of jurisdiction. In Defendants' Controverting Certificate to Plaintiffs' Motion to Set, filed February 2, 2007, there is again no mention of arbitration. They in fact affirmatively ask the Court to set

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deadlines for disclosure of witnesses, Rule 26.1 disclosure, and completion of discovery, and “to establish a realistic trial date.” This is inconsistent with a demand to compel arbitration, which would require the Court to *abstain* from setting a trial date. The Court has not been given the disclosure statements in which jurisdiction was allegedly contested on the basis of the arbitration agreement. Assuming that their demand for arbitration was included in these disclosure statements, it would appear that Defendants waited several months from the date of their Answer before informing the opposing party of their intent to compel arbitration under the Purchase Contract. It was not until January 18, 2008, *more than one and a half years after filing their Answer* that Defendants finally informed the Court of the arbitration agreement and their intent to enforce it. (The Court notes as of January 18, a trial date of February 5, 2008 was scheduled. Subsequently, that trial date has been vacated on the Court’s motion due to a trial conflict)

The right to arbitration is waived by conduct inconsistent with the use of the arbitration remedy, which includes “unreasonable delay.” *EFC Dev. Corp. v. F.F. Baugh Plumbing & Heating, Inc.*, 24 Ariz.App. 566, 569 (1975). “[A] party’s filing of a lawsuit without invoking arbitration or appraisal would nearly always indicate a clear repudiation of the right to arbitrate or have an appraisal, and the filing of an answer normally has the same effect.” *Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576, 582 (App. 1994). By filing an Answer without asserting the defense of a valid and binding arbitration agreement, and then by waiting over a year to raise the issue with the opposing party and the Court, Defendants waived any right to arbitrate. Defendants’ reliance on Judge Voss’s dissenting opinion in *Meineke* is unavailing. The dissent would have held that a ten-day delay was insufficient to establish waiver, *id.* at 584 (Voss, J., dissenting); it does not say that a defendant can never waive arbitration no matter how tardily he demands it. At any rate, the majority opinion in *Meineke* is the law which the Court must follow.

Therefore, IT IS ORDERED denying Defendants’ Motion To Compel Arbitration (Motion To Dismiss For Lack Of Subject Matter Jurisdiction).