

No. 1-11-2129

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DOLTON PROFESSIONAL FIREFIGHTERS)	Appeal from the
ASSOCIATION LOCAL 3766 INTERNATIONAL)	Circuit Court of
ASSOCIATION OF FIREFIGHTERS,)	Cook County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10 CH 22902
)	
VILLAGE OF DOLTON,)	
A Municipal Corporation,)	Honorable
)	Sophia H. Hall,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

ORDER

¶ 1 HELD: Trial court properly determined that plaintiff did not waive its right to arbitration; therefore, denial of defendant's motion to dismiss, grant of plaintiff's summary judgment motion, and denial of defendant's cross-motion for summary judgment is affirmed.

¶ 2 Defendant Village of Dolton appeals from orders of the circuit court denying its

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motion to dismiss and its motion for summary judgment. The court granted summary judgment in favor of plaintiff, Dolton Professional Firefighters Association Local 3766 International Association of Firefighters (Local 3766), on its cross-motion. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Briefly stated, as recorded in the trial court's memorandum decision, the facts relevant to the issue, which were not in dispute are as follows. On August 11, 2006, Fisher and Mays were hired as firefighters from a July 3, 2006, eligibility list, and on that day Local 3766 filed the instant grievance alleging that they were hired based on race. On August 29, 2006, defendant sent a letter stating that the grievance is not subject to arbitration and that it would take no further action. On August 31, 2006, Local 3766's attorney sent a letter advising defendant that "I am hereby referring the above-referenced grievance to arbitration."

¶ 5 In the meantime, another grievance procedure was being litigated in arbitration concerning the previous hiring of Berttron Shaw on June 3, 2005. The Shaw Grievance concerned defendant's hiring of Shaw without having an eligibility list. On February 27, 2007, Arbitrator Armedeo Greco issued an Arbitration Award in Local 3766's favor. In that decision, Arbitrator Greco ordered defendant to cease and desist from hiring firefighter applicants from the July 3, 2006, eligibility list. The arbitrator also referred to defendant's charge that a subsequent August 11, 2006, grievance (Fisher-Mays Grievance) involved the July 3, 2006, eligibility list, but centered on a separate issue of race, and the arbitrator mentioned a discussion of that matter going back to arbitration.

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¶ 6 On May 18, 2007, defendant filed a complaint in the Circuit Court of Cook County seeking to have the arbitration award vacated. On July 10, 2007, Local 3766 filed an answer and counterclaim, in which Count II claimed that the hiring of Fisher and Mays from the July 3, 2006, eligibility list was invalid. Defendant moved to dismiss Count II on September 11, 2007, asserting that the issue must be decided in arbitration. The trial court granted defendant's motion to dismiss Count II related to Fisher and Mays on December 28, 2009.

¶ 7 On February 26, 2010, Local 3766 proposed that Arbitrator Greco serve as the arbitrator for the Fisher-Mays Grievance. On both April 20, 2010, and April 22, 2010, defendant refused to arbitrate. Shortly thereafter, Local 3766 filed a complaint to compel arbitration of the Fisher-Mays Grievance on May 28, 2010.

¶ 8 Subsequently, Local 3766 filed a motion for summary judgment on its complaint to compel defendant to arbitrate the Fisher-Mays Grievance. Defendant then filed a cross-motion for summary judgment, affirmatively defending that Local 3766, by waiting more than three years to take affirmative steps to arbitrate the grievance, waived arbitration of that grievance.

¶ 9 The trial court found that Local 3766 did not signal to defendant that it was abandoning its right to arbitrate the grievance because its behavior of waiting until Arbitrator Greco resolved the issue of the July 3, 2006, eligibility list was not inconsistent with its rights to enforce arbitration of the Fisher-Mays Grievance. The court further found that it was required to honor the presumption of arbitration when considering defendant's waiver argument, and that the three and one-half-year time period did not violate the terms of the arbitration provision, nor did the facts indicate that Local 3766 abandoned its right to arbitrate with respect to which it gave timely

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notice to defendant. The trial court subsequently granted Local 3766's motion for summary judgment and denied defendant's cross-motion for summary judgment. This timely appeal followed.

¶ 10 ANALYSIS

¶ 11 On appeal, defendant contends that the trial court erred in denying its motion to dismiss Local 3766's complaint to compel arbitration and in granting Local 3766's motion for summary judgment and denying defendant's cross-motion for summary judgment.

¶ 12 As a preliminary matter, Local 3766 challenges this court's jurisdiction to consider the trial court's denial of defendant's motion to dismiss the complaint without prejudice because defendant did not specify in its notice of appeal that it was appealing the trial court's order of October 26, 2010. This contention is without merit.

¶ 13 A notice of appeal confers jurisdiction on an appellate court to consider only the judgments or parts thereof specified in the notice of appeal. *In re Marriage of King*, 336 Ill. App. 3d 83, 86 (2002). A notice of appeal is to be liberally construed and an appeal from a subsequent final judgment will draw into question all prior nonfinal rulings and final but nonappealable orders that produced the judgment. *Marriage of King*, 336 Ill. App. 3d at 86. "An unspecified judgment is reviewable if it is a 'step in the procedural progression leading to the judgment specified in the notice of appeal.'" *Taylor v. Peoples Gas Light & Coke Co.*, 275 Ill. App. 3d 655, 659 (1995) (quoting *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 435 (1979)).

¶ 14 Local 3766 does not contest that the trial court's October 26, 2010, order which denied

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defendant's motion to dismiss the complaint without prejudice was a procedural step in the final judgment appealed from. Moreover, it was a nonfinal ruling in the case below. As such, it is properly before this court on appeal from the final summary judgment ruling that was entered in this case.

¶ 15 Turning to the merits of defendant's appeal, defendant contends that Local 3766 waived its right to arbitration by waiting more than three years to seek a grievance hearing by an arbitrator. Defendant argued in its motion to dismiss that the subject grievance was filed in August 2006, and as acknowledged by Local 3766, it was advised in the same month that defendant would not take any further steps as to the grievance. Because of this, defendant argues that Local 3766 waited more than 30 days to refer the grievance to arbitration and thus waived its right to arbitration. Additionally, defendant argued in its motion that because Local 3766 participated in a court action regarding the same subject matter, its right to arbitration was waived. Defendant sought to have Local 3766's complaint dismissed with prejudice.

¶ 16 The record does not contain a report of proceedings or bystander's report from the hearing on defendant's motion to dismiss, however, the common law record contains a draft order from October 26, 2010, which denied defendant's motion without prejudice.

¶ 17 A motion to dismiss, pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 2-619 (West 2010)), admits the legal sufficiency of the plaintiff's complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *Wilson v. Molda*, 396 Ill. App. 3d 100, 104 (2009) (citing *DeLuna v. Burciaga*, 223 Ill. 2d 49, 50 (2006)). For a section 2-619 dismissal, our standard of review is *de novo*. *Wilson*, 396 Ill. App. 3d at 104.

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¶ 18 As the appellant, defendant has the burden of providing a sufficiently complete record to support any claim of error. *Government Employees Insurance Co. v. Buford*, 338 Ill. App. 3d 448, 453 (2003). In the absence of such a record, we must presume that the trial court's order of October 28, 2010, was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Doubts that arise from the incompleteness of the record will be resolved against the appellant. *Muellman-Cohen v. Brak*, 361 Ill. App. 3d 52, 54 (2005). Accordingly, as we are unable to review the trial court's basis for its legal conclusion due to the lack of a report of proceedings or bystander's report, we affirm the trial court's order denying defendant's motion without prejudice.

¶ 19 Defendant further contends that the trial court erred in granting Local 3766's motion for summary judgment and denying defendant's cross-motion for summary judgment. Defendant argued the same basis for summary judgment as it argued on its motion to dismiss. In a written memorandum decision filed on June 3, 2011, the trial court held that Local 3766 did not waive its right to demand arbitration and granted Local 3766's motion for summary judgment while denying defendant's cross-motion for summary judgment.

¶ 20 Summary judgment is proper where the pleadings, depositions, and admission on file, together with affidavits, reveal no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Daniel v. Aon Corp.*, 2011 IL App (1st) 101508, ¶13. The standard of reviewing a trial court's order granting summary judgment is *de novo*. *Daniel*, 2011 IL App (1st) 101508, ¶13.

¶ 21 Once again we note that defendant has failed to include a report of the proceedings or

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bystander's report from the hearing on the cross-motions to dismiss. As previously noted, as the appellant, defendant has the burden of providing a sufficiently complete record to support any claim of error. *Government Employees Insurance Co.*, 338 Ill. App. 3d at 453. In the absence of such a record, we generally must presume that the trial court's order of June 3, 2011, was in conformity with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391-92.

However, because we find the instant record, which includes a written memorandum decision by the trial court, sufficiently complete to support defendant's claim of error (See *Medow v. Flavin*, 336 Ill. App. 3d 20, 36 (2002)), we will review its claim on the merits.

¶ 22 We begin our analysis by noting that because the parties filed cross-motions for summary judgment in the trial court, they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law. *Daniel*, 2011 IL App (1st) 101508, ¶17.

¶ 23 As is well established, even though arbitration is a favored method of dispute resolution, an agreement to arbitrate is a matter of contract. *Northeast Illinois Regional Commuter Railroad Corp. v. Chicago Union Station Co.*, 358 Ill. App. 3d 985, 996 (2005). Parties to such agreement are bound to arbitrate " 'only those issues they have agreed to arbitrate, as shown by the clear language of the agreement and their intentions expressed in that language.' " *Northeast Illinois Regional Commuter Railroad Corp.*, 358 Ill. App. 3d at 996 (quoting *Salsitz v. Kreiss*, 198 Ill. 2d 1, 13 (2001)). Moreover, a contractual right to arbitrate may be waived like any other contract right. *Northeast Illinois Regional Commuter Railroad Corp.*, 358 Ill. App. 3d at 996. Waiver of the right to arbitrate may occur when a party conducts itself in a manner inconsistent with the

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arbitration clause, thereby demonstrating an abandonment of that right. *Northeast Illinois Regional Commuter Railroad Corp.*, 358 Ill. App. 3d at 996.

¶ 24 Section 6.3 of the Collective Bargaining Agreement between defendant and Local 3766 governs the arbitration procedure. Step 5 of Section 6.3 provides, in pertinent part:

"If the grievance is not settled in Step 4 and the Association wishes to appeal the grievance, the Association may refer the grievance to arbitration within thirty (30) calendar days of receipt of the Trustee's written answer ***.

(a) The parties shall attempt to agree upon an arbitrator after receipt of the notice of referral. In the event the parties are unable to agree upon the arbitrator the parties shall jointly request the Federal Mediation and Conciliation Service to submit a panel of seven (7) arbitrators ***."

¶ 25 Upon application of a party, the Illinois Uniform Arbitration Act (710 ILCS 5/1 *et seq.* (West 2008)) empowers courts to compel or stay court action pending arbitration. *City of Centralia v. Natkin & Co.*, 257 Ill. App. 3d 993, 995 (1994). The only issue before a court at a hearing to compel arbitration is whether an agreement exists to arbitrate the dispute in question. *City of Centralia*, 257 Ill. App. 3d at 995. If the language of an arbitration agreement is clear and it is obvious that the dispute desired to be arbitrated falls within the scope of the arbitration clause, the court should decide the arbitrability issue and compel arbitration. *City of Centralia*, 257 Ill. App. 3d at 996.

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¶ 26 In the case at bar, it is undisputed that Step 5 of Section 6.3 of the parties' collective bargaining agreement allows Local 3766 to refer a grievance to arbitration if it was not settled in the previous step. Thus it is clear that the Fisher-Mays Grievance at issue here falls within the scope of the parties' arbitration clause because it was not settled in the previous step. It is undisputed that Local 3766 referred the grievance to arbitration within 30 days of the Trustee's answer regarding the grievance.

¶ 27 Defendant, however, contends that Local 3766 waived its right to arbitration and that it would be prejudiced by an order compelling arbitration. We disagree.

¶ 28 In Illinois, waiver has been found when: (1) a party has instituted legal proceedings and participated in a trial on the merits; (2) a party has filed an answer without asserting his right to arbitrate; and (3) a party that has sought arbitration files a motion for summary judgment on an arbitrable issue. *City of Centralia*, 257 Ill. App. 3d at 996. The trial court has discretion in determining whether a party's actions constitute waiver of the right to compel arbitration. *Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1095 (2001).

¶ 29 Here, it is undisputed that Local 3766 participated in an arbitration process involving the Shaw Grievance, which raised some issues relating to the July 3, 2006, eligibility list. The arbitration award from the Shaw Grievance was challenged by defendant in the circuit court and Local 3766 responded in part with a counterclaim that raised an issue regarding the Fisher-Mays Grievance. The trial court subsequently dismissed the issue concerning the Fisher-Mays Grievance on defendant's motion, on the basis that it must be decided in arbitration. This

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dismissal occurred on December 28, 2009. Approximately two months later, Local 3766 proposed an arbitrator, and defendant has refused to arbitrate the Fisher-Mays Grievance, which led to the instant litigation. Now defendant claims that Local 3766 waived its right to arbitration based on the three and one-half-year time period between the first referral to arbitration and the arbitration itself. However, the record does not indicate that Local 3766 instituted any legal proceedings relating to the Fisher-Mays Grievance other than the counterclaim in the Shaw Grievance and the instant litigation to compel arbitration, nor has there been a trial on the merits of the issue. We note here that the issue was not settled through litigation as defendant sought and successfully won the dismissal of the issue from the legal proceedings involving the Shaw Grievance on the basis that the issue had to be arbitrated. Despite defendant's assertions to the contrary, Local 3766's participation in court proceedings related to the Shaw Grievance did not constitute a waiver of its right to arbitrate the Fisher-Mays Grievance as there was no trial on the merits. Moreover, the record does not indicate that Local 3766 ever filed any documents without asserting its right to arbitrate. Nor did Local 3766 seek summary judgment on an arbitrable issue. Thus, the test for waiver has not been met on the circumstances presented in this case, despite the lengthy time period.

¶ 30 Additionally, we note that the steps contained in Section 6.3 of the parties' Collective Bargaining Agreement do not contain any time limits beyond the 30-day requirement for the initial referral of the grievance to arbitration. The parties do not dispute that Local 3766 referred the grievance to arbitration within the applicable 30-day time period. Section 6.5 of the agreement relates to the time limit for filing, which states as follows:

"If a grievance is not presented by the employee or the Association within the time limits set forth in this Article it shall be considered waived and may not be further pursued by the employee or the Association. If a grievance is not appealed to the next step within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the last answer of Employer. If the Employer does not hold a meeting or answer a grievance or an appeal thereof within the specified time limits, the grievant may elect to treat the grievance as denied at that step and shall have the additional days as are specified in this Article to appeal the grievance to the next step or to arbitration. The parties may, by mutual agreement in writing, extend any of the time limits set forth in this Article."

¶ 31 Here, the applicable time period was the 30-day referral to arbitration period. Local 3766 complied with that. The next step, as identified in the parties' agreement, is to select an arbitrator. There is no specified time limit for this step. We agree with the trial court's determination that it was reasonable for Local 3766 to wait until the arbitrator resolved the issue regarding the 2006 eligibility list and that it was not inconsistent with its right to pursue arbitration at the same issue pertained to the Fisher-Mays Grievance. Accordingly, we conclude that the three and one-half-year passage of time between Local 3766's assertion of its right to arbitrate the Fisher-Mays Grievance and the selection of an arbitrator was within the time limits

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set forth in the parties' agreement. Therefore, we find that Local 3766 did not waive its right to arbitrate based on untimeliness.

¶ 32 Defendant additionally contends that prejudice due to delay is a consideration in determining whether a party has waived its right to arbitration. Defendant cannot seriously claim prejudice from Local 3766 asserting its right to arbitration in February 2010 when it agreed that the issue "must" be arbitrated in December 2009 when it sought to have it dismissed from the then pending litigation. Additionally, any speculative monetary prejudice to defendant due to the lapse of time would be considered by the arbitrator in fashioning a remedy as determined by the outcome of the arbitration hearing.

¶ 33 We conclude that the trial court properly denied defendant's motion to dismiss Local 3766's complaint to compel arbitration, properly granted Local 3766's motion for summary judgment and properly denied defendant's cross-motion for summary judgment.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.