



SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-008815

10/13/2005

avored as a matter of public policy because it is an inexpensive and speedy final disposition of controversies between the parties. *Einhorn v. Valley Medical Specialists, P.C.*, 172 Ariz. 571, 572-3, 838 P.2d 1332, 1333-4 (App. 1992).

The filing of a lien does not, in and of itself, constitute a waiver or repudiation of an arbitration clause. *EFC Development Corp. v. F.F. Baugh Plumbing & H. Co.*, 24 Ariz. App. 566, 569, 540 P.2d 185, 188 (1975). However, the pursuit of litigation in court “rather than the reliance upon arbitration, with [an] answer by the opposing party upon the merits, is a waiver of the right to arbitrate by both parties.” *Bolo Corporation v. Homes & Son Construction Co.*, 105 Ariz. 343, 346, 464 P.2d 788, 791 (1970). “The basis of the finding of waiver is the showing of conduct inconsistent with utilization of the arbitration remedy - conduct showing an intent not to arbitrate.” *EFC Development Corporation*, 24 Ariz. App. at 569, 540 P.2d at 188.

In the case at bar, CSA filed its complaint with no prayer for relief to compel arbitration. Once it filed its complaint, CSA pursued a legal strategy to recover on its claim for payment without resort to arbitration, and did so aggressively. Only after 1) failing to default Crown Charter School, Inc. and 2) having to respond to Crown Charter School Inc.’s counterclaim, did CSA seek to compel arbitration, something it should have done from the outset if it wished to maintain its ability to enforce the arbitration provisions. Although the filing of a lien and pursuit of litigation do not constitute waiver of an arbitration clause, they may constitute waiver when pursued to the exclusion of arbitration provisions and remedies. In cases cited by both parties, the courts have routinely held that the combination of both filing the lien and related litigation do not constitute waiver, so long as those actions are part and parcel of some contemporaneous effort to compel arbitration. *EFC Development Corporation*, 24 Ariz. App. at 569, 540 P. 2d at P. 2d. at 188; see also *Meineke v. Twin City Fire Insurance Company*, 181 Ariz. 576, 582, 892 P.2d 1365, 1371 (App. 1995) holding, “In our view, a party’s filing of a lawsuit without invoking arbitration or appraisal would nearly always indicate a clear repudiation of the right to arbitrate.”

CSA argues that it in fact “invoked” the right to arbitrate, by reserving the right to arbitrate (found in language contained in its complaint) while it pursued litigation on the lien. In *Meineke*, Twin City Fire Insurance Company filed an answer to suit in Yavapai County, and filed a Notice of Removal to Federal District Court, and included a statement of reservation of the right to arbitrate in its pleading, as CSA has done in the case at bar. The Arizona Court of Appeals treated the filing of the answer and notice of removal as a “clear repudiation” of the right to arbitrate. In giving its reasons the Court of Appeals stated, “To allow parties to proceed on the dual pathways of arbitration...and litigation nullifies the time and expense-saving benefits of arbitration.” *Meineke*, 181 Ariz. at 582, 892 P.2d at 1371. CSA pursued litigation without resort to arbitration.

CSA also argues that Crown Charter Schools, Inc. has suffered no prejudice. Crown Charter Schools, Inc. argues that it has suffered prejudice. While not as extensive as in seen in cases that discuss prejudice in terms of the amount of discovery that can occur in a complex litigation case, Crown Charter Schools, Inc. has made a showing of prejudice and has been

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prejudiced, by being forced to litigate in superior court, by being given only three days to respond to the complaint after having new counsel taking over the case, by accelerating its efforts to file an Answer in order to stave off default, and by having to preserve its rights by formulating and filing a counterclaim in superior court in response to CSA's Complaint.

For the reasons set forth above,

**IT IS ORDERED** denying the motion.