

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3633-09T1

JACK NELSON, individually and
on behalf of CONCORD VALLEY
DEVELOPMENT, LLC, and JAVELYN
DEVELOPMENT, LLC,

Plaintiff-Respondent,

v.

LEONARD C. KRIMSKY and EVELYN
KRIMSKY,

Defendants-Appellants.

Submitted March 2, 2011 - Decided March 14, 2011

Before Judges Fisher and Fasciale.

On appeal from the Superior Court of New
Jersey, Chancery Division, Bergen County,
Docket No. C-243-07.

Faugno & Associates, LLC, attorneys for
appellants (Paul Faugno, on the brief).

The Law Offices of Craig Weinstein,
attorneys for respondent (Corey Scott Zymet,
on the brief).

PER CURIAM

In 2005, plaintiff Jack Nelson and defendant Evelyn Krinsky
created Concord Valley Development, a limited liability company,
to acquire, own, develop, and sell real property in Englewood.

To that end, they executed an operating agreement, which included a stipulation requiring arbitration of any disputes arising from the performance or interpretation of the operating agreement. Defendant Leonard Krinsky was hired as the property's construction manager.

Notwithstanding the arbitration agreement, plaintiff commenced this suit on July 20, 2007, alleging violations of defendants' fiduciary and contractual duties with regard to the property. Defendants filed an answer and counterclaim, and defendant Evelyn Krinsky asserted therein an affirmative defense alleging that any disputes arising from the operating agreement were arbitrable; however, Evelyn Krinsky only "reserve[d]" her right to move for dismissal of the claims on that basis. According to a certification later filed by defense counsel, the parties: "propound[ed] and answer[ed] . . . interrogatories"; served document demands, which required "voluminous responses"; and served subpoenas on nonparties that also generated responses. A case management conference was held during this time frame. And the judge ordered that the parties sell the property in question.

In December 2007, plaintiff swore out a criminal complaint against defendant Leonard Krinsky, who thereafter moved for a stay of this civil action in order to avoid difficulties that

might arise upon his invocation of the right against self-incrimination. With plaintiff's consent, the trial judge granted a stay pending resolution of the criminal matter.

The criminal proceedings were resolved in July 2009 when the prosecutor's office declined to prosecute and plaintiff's criminal complaint was dismissed. Defendants then moved for the reinstatement of the civil action. Although unopposed, the motion was denied and a status conference conducted, apparently to determine whether the action should remain in Chancery or be transferred to the Law Division. During a later status conference, plaintiff apparently raised the arbitration provision for the first time in this litigation.


Thereafter, on January 11, 2010, defendants again moved for reinstatement and requested a transfer to the Law Division because only the demands for monetary relief were still pending. Plaintiff opposed the motion, arguing that the action should be dismissed because of the arbitration agreement. On March 2, 2010, the judge denied defendants' motion and, instead, ordered that the action against defendant Leonard Krinsky be dismissed with prejudice and the extant claims between plaintiff and defendant Evelyn Krinsky be arbitrated pursuant to the operating agreement.

Defendants properly appealed this final order, Wein v. Morris, 194 N.J. 364, 380 (2008), arguing that plaintiff's right to arbitrate was waived by his filing and prosecution of this action in superior court. Plaintiff filed a brief in which he argued that a waiver had not occurred. After this matter was placed on a calendar for disposition, plaintiff filed a motion in which he expressed his desire to withdraw his brief with the further intention that the case be "reinstated in the Law Division . . . for adjudication of the remaining, non-equitable issues still existing" between he and defendant Evelyn Krimsky. We granted that motion by order entered on February 23, 2011.

We now reverse that part of the order under review that compelled arbitration because plaintiff waived that right by commencing and prosecuting this civil action. A plaintiff may not file suit, participate in discovery, secure interim relief, and then -- more than two years later -- be heard to complain that the court is not a proper forum and that arbitration should be compelled. See, e.g., Wein, supra, 194 N.J. at 376; McKeeby v. Arthur, 7 N.J. 174, 182 (1951).

Reversed and remanded to the Chancery Division for the entry of an order that reinstates the action and transfers it to the Law Division.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION