NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2621-12T4

GALAXY BUILDERS, LLC,
THOMAS FINLEY, and JERRY KUBIS,

Plaintiffs-Respondents,

v.

PAULO SERODIO, SILVER HOLLOW
ESTATES, INC., and JIM FUREY,

Defendants,

and

LAI-NO CHIU-SERODIO,

Defendant-Appellant.

Argued November 14, 2013 – Decided September 10, 2014

Before Judges Waugh and Nugent.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-1049-09.

Lawrence B. Sachs argued the cause for appellant.

Gary R. Katz argued the cause for respondents.

PER CURIAM

Nearly four years after plaintiffs Galaxy Builders, LLC, Thomas Finley, and Jerry Kubis filed their complaint in this

breach-of-contract action, defendant Lai-No Chiu-Serodio (Chiu-Serodio) filed a motion to dismiss the complaint based on the arbitration clause in the parties' contract.[1] During the intervening time, the parties had completed discovery and attended settlement conferences, Chiu-Serodio had filed a bankruptcy petition, and the court had twice scheduled the case for trial. The court denied Chiu-Serodio's motion. Chiu-Serodio appealed. We affirm.

Silver Hollow Estates, Inc., contracted through its president, Jim Furey, to build a home for Paulo Serodio and Chiu-Serodio. A month after signing the contract on June 3, 2007, Silver Hollow assigned the contract to Galaxy Builders, LLC, and its managing member, Thomas Finley. The parties do not dispute that an arbitration clause in the construction contract required them to submit to binding arbitration any disputes in excess of $5000 arising out of or related to the construction contract. Nevertheless, when a dispute arose during the course of construction over the scope of the work, payments, and other issues, none of the parties invoked the arbitration clause.

In February 2009, plaintiffs Galaxy, Finley, and Kubis, a Galaxy employee who had not been paid for some of his work,

[1] Paulo Serodio is in default and no other defendants are participating in this appeal.

filed a seven-count complaint against defendants alleging various causes of action for breach of contract, quantum meruit, fraud, and misrepresentation. The Serodios filed an answer, separate defenses, and a counterclaim against plaintiffs alleging breach of contract and consumer fraud.[2]

The parties completed discovery and the court scheduled the case for trial. Before the case could be tried, Chiu-Serodio filed a Chapter 13 bankruptcy petition. Plaintiffs filed a complaint objecting to Chiu-Serodio's discharge and Chiu-Serodio's petition was ultimately dismissed. Following dismissal of the Chapter 13 petition, the court restored the case to the Law Division trial list where, after an adjourned trial listing, Chiu-Serodio filed her motion to dismiss the complaint and compel arbitration.

The plaintiffs opposed the motion, pointing out that Chiu-Serodio had not asserted the arbitration clause as a separate defense, had waited until the first day of trial to inform plaintiffs of the bankruptcy petition, had litigated the bankruptcy petition for eighteen months, and had obtained an adjournment of the first Law Division trial listing following the discharge of the bankruptcy petition. Plaintiffs also

[2] Because defendants Silver Hollow Estates, Inc. and Jim Furey are not involved in this appeal, the parties have not included their pleadings.

pointed out that Chiu-Serodio had filed the dismissal motion on January 23, 2013, nearly four years after the complaint had been filed, and had never referred to arbitration before filing the dismissal motion on the eve of the trial scheduled for the following month. Chiu-Serodio did not dispute these assertions. The court denied Chiu-Serodio's motion. This appeal followed.

We review a judge's decision to compel or deny arbitration de novo. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013). Indisputably, arbitration is recognized as a "favored method for resolving disputes." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001). Nevertheless, our Supreme Court "has recognized that parties may waive their right to arbitrate in certain circumstances." Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276 (2013). "[W]aiver can occur implicitly." Id. at 277.

When determining whether a party has implicitly waived a contractual arbitration provision, we evaluate whether the party's litigation conduct is consistent with having reserved its contractual right to arbitrate under the totality of circumstances, including the following factors:

> (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of

> discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any.
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> [Id. at 280-281.]

"No one factor is dispositive. A court will consider an agreement to arbitrate waived, however, if arbitration is simply asserted in the answer and no other measures are taken to preserve the affirmative defense." Id. at 281.

In the case before us, Chiu-Serodio neither asserted the right to arbitrate in the answer to the complaint, nor took any other measure to preserve the affirmative defense before filing the belated motion to dismiss. Rather, Chiu-Serodio completed discovery and avoided going to trial by filing a bankruptcy petition. When the bankruptcy petition was dismissed and this action relisted for trial in the Law Division, Chiu-Serodio obtained plaintiffs' consent to an adjournment. In the month before the new trial was to begin, Chiu-Serodio filed a motion to dismiss the complaint and compel arbitration, raising the arbitration issue for the first time. Nearly four years had elapsed since plaintiffs had filed the complaint.

Chiu-Serodio disputes none of these facts. Although Chiu-Serodio asserts that "[d]efendant raised its defense to [p]laintiff's claim as a separate defense for failure to state a claim for which relief can be granted," we reject the proposition that asserting "failure to state a claim" as an affirmative defense is sufficient to either state or preserve a contractual arbitration claim, particularly where no other measures are taken to preserve this affirmative defense.

The totality of circumstances in this case leads to a single conclusion: Chiu-Serodio engaged in litigation conduct that was entirely inconsistent with the preservation of the contractual right to arbitrate the parties' dispute. Chiu-Serodio implicitly waived the right to arbitration.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION