

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5622-11T4

CITIBANK, N.A.,

Plaintiff-Respondent,

v.

JEAN-GARET DELIA,

Defendant-Appellant.

Submitted October 23, 2013 – Decided March 13, 2014

Before Judges Waugh and Accurso.

On appeal from Superior Court of New Jersey,
Law Division, Special Civil Part, Middlesex
County, Docket No. DC-2839-12.

Jean-Garet Delia, appellant pro se.

Jaffe & Asher, LLP, attorneys for respondent
(Michael J. Hoefs, on the brief).

PER CURIAM

Defendant Jean-Garet Delia appeals from two Special Civil
Part orders granting summary judgment to plaintiff CITIBANK,
N.A., and denying his cross-motion to compel arbitration. We
reverse.

The record before us is limited. Although neither party provided us with a copy of the complaint, plaintiff apparently filed suit against defendant on a delinquent credit card account in February 2012. Defendant, representing himself, answered in early March, essentially leaving plaintiff to its proofs. Defendant did not assert any affirmative defenses, including arbitration. Although both parties requested adjournments of the trial date to conduct discovery, we have not been made aware of what discovery, if any, was conducted. Defendant advises that he did not serve any discovery on plaintiff.

Although we have not been provided with the motion papers, plaintiff filed a motion for summary judgment on May 15, 2012. Defendant filed a cross-motion to compel arbitration and stay the proceedings, supported by his certification and the card member agreement containing the arbitration clause. Although plaintiff apparently opposed the cross-motion, we do not know why because those papers are also not in the record on appeal.

The judge granted plaintiff's motion and denied defendant's cross-motion without oral argument. On the order denying the cross-motion, the judge wrote: "Defendant has waived its right to compel arbitration. The summary judgment motion is not opposed with contrary evidence, and the motion to compel

arbitration was raised as an attempt to avoid judgment on the merits." This appeal followed.

We review orders compelling or denying arbitration de novo, bearing in mind the strong preference to enforce arbitration agreements found in our State and federal law. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013). Although parties may waive their contractual right to arbitrate, "[w]aiver is never presumed. An agreement to arbitrate a dispute 'can only be overcome by clear and convincing evidence that the party asserting it chose to seek relief in a different forum.'" Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276 (2013) (quoting Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div. 2008)).

Determining whether a party has waived an agreement to arbitrate requires a fact-sensitive analysis. Id. at 280. Recognizing that a party might implicitly waive the right to arbitrate by its conduct in litigation, the Court in Cole directed that

courts should evaluate: (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. No one factor is dispositive

[Id. at 280-81.]

Cole was decided after the orders from which plaintiff appeals were entered. Applying its factors to the limited record before us, we would be hard pressed to find waiver on these facts. Defendant asserts that his delay in demanding arbitration was because he no longer possessed a copy of the card member agreement, which he entered into eighteen years before suit was filed. He represents that he only found the agreement by searching plaintiff's own on-line data repositories. Defendant served no discovery and asserted no affirmative claims. His demand for arbitration came in response to plaintiff's motion for summary judgment, but the motion was made roughly two months after defendant filed his answer. While we can assume that the motion was made returnable shortly before the trial date because of scheduling in the Special Civil Part, neither party has advised that such was the case.

We ordinarily defer to the trial court's factual findings underlying the waiver determination. Id. at 275. We do not do so here, however, as we cannot discern the factual basis for the court's finding that defendant sought arbitration in "an attempt

to avoid judgment on the merits." Accordingly, we reverse both orders under review. Because we recognize the very limited record before us, and that the parties may wish to re-brief the motion to compel arbitration in light of Cole, we remand for reconsideration of defendant's motion to compel arbitration. If the motion to compel arbitration is denied, the judge should reconsider plaintiff's motion for summary judgment after providing defendant an opportunity to respond on the merits. We do not retain jurisdiction.

Reversed and remanded for further proceedings in accordance with this opinion.

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



CLERK OF THE APPELLATE DIVISION