IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

NO. 2014-CA-01410-COA

CITIBANK, N.A. **APPELLANT**

V.

JUDY STOVALL **APPELLEE**

On Appeal from the Circuit Court of Winston County, Mississippi
Civil Action No. 2013-061 CVM

REPLY BRIEF OF APPELLANT CITIBANK, N.A.

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I. SUMMARY OF THE ARGUMENT IN REPLY

To overcome the strong presumption against waiver of arbitration, Plaintiff had the burden to demonstrate (1) that Citibank manifested a clear intent to give up its right to arbitrate by actively participating in litigation or taking other actions inconsistent with its right; and (2) that Plaintiff was prejudiced by Citibank's participation in the litigation process. As detailed in Citibank's Brief, Plaintiff failed to carry this burden. Citibank's minimal litigation activity—accommodating Plaintiff's request to depose two alleged fact witnesses, and exchanging responses to interrogatories and requests for production—does not establish Citibank intended to relinquish its right to arbitration, and did not prejudice Plaintiff.

In response, Plaintiff tries to analogize Citibank's conduct to cases where, in addition to participating in written discovery, the defendants failed to raise arbitration as an affirmative defense, demanded a jury trial, entered into a scheduling order, and/or conducted the plaintiff's deposition—none of which occurred here. (*See* Plaintiff's Brief 4-7.) Those cases, which were addressed and distinguished in Citibank's Brief, only further illustrate that Citibank's conduct does not rise to the level of waiver. (*See* Citibank's Brief 8-11, 15-17.)

With respect to prejudice, Plaintiff proclaims that she "suffered prejudice" as a result of answering discovery, incurring expense, and experiencing delay, but she fails to cite any record evidence that would support such a finding of prejudice. (*See* Plaintiff's Brief 7-8.) Plaintiff's generalized, unsubstantiated allegations are insufficient to show prejudice and overcome the strong presumption in favor of arbitration.

The facts of this case, with all doubts resolved in favor of arbitration, do not demonstrate waiver. Thus, the trial court committed reversible error in denying Citibank's Motion to Compel Arbitration and to Dismiss.

II. ARGUMENT IN REPLY

A. The Cases Finding Waiver Are Factually Distinguishable.

Plaintiff argues that Citibank waived its right to arbitrate by engaging in litigation conduct that, when combined with other factors, supported a finding of waiver in *MS Credit Center, Inc. v. Horton*, 926 So. 2d 167 (Miss. 2006), and *Pass Termite & Pest Control, Inc. v. Walker*, 904 So. 2d 1030 (Miss. 2004); and was "close" to waiver in *Century 21 Maselle & Associates, Inc. v. Smith*, 965 So. 2d 1031 (Miss. 2007). (*See* Plaintiff's Brief 5-7.) The defendants in these cases participated in written discovery, like Citibank. But to find waiver, the defendants had to do more to substantially engage in the litigation process and evidence their intent to forgo the right to arbitration.

In *MS Credit Center, Inc. v. Horton*, this Court found waiver where, in addition to propounding discovery and a delay in moving to compel arbitration, the defendants consented to a scheduling order and conducted the plaintiff's deposition. 926 So. 2d at 180. Here, Citibank did not agree to a scheduling order or conduct any depositions, and there was no prejudice to Plaintiff, another "factor to be considered" to finding waiver. *Id.* at 180 n.7. (*See* Citibank's Brief 16-17.)

In *Pass Termite & Pest Control, Inc. v. Walker*, this Court found waiver where the defendant "answered the complaint, demanded a jury trial, and invoked the available discovery procedures," without ever raising arbitration as a defense. 904 So. 2d at 1033. The request for a jury trial "is characteristic of the judicial process" and "inconsistent with asserting a right to arbitration," and combined with the defendant's invocation of the discovery process, indicated the defendant's "intent to forgo its right to arbitration." *Id.* at 1035. Here, in contrast, Citibank did not request a jury trial and did raise arbitration as an affirmative defense in its Answer. (*See* Citibank's Brief 15-16.)

The *Pass Termite* defendant's failure to plead arbitration as an affirmative defense was an important factor in the Court's conclusion, particularly to the finding of prejudice. Plaintiff suggests that prejudice was "presumed" based on the sum of the *Pass Termite* defendant's conduct, but in fact, prejudice was only presumed because the defendant had failed to plead arbitration as an affirmative defense. (Plaintiff's Brief 6.) The Court stated: ". . . prejudice to the non-moving party will be presumed *for failure to comply with the provisions of Miss. R. Civ. P. 8(c)*." *Pass Termite*, 904 So. 2d at 1035 (emphasis added). Citibank complied with Miss. R. Civ. P. 8(c), pleading arbitration as an affirmative defense, so there is no presumption of prejudice here. (R. 75.) Thus, unlike *Pass Termite*, Plaintiff had the burden to demonstrate she was prejudiced by Citibank's conduct. *See Univ. Nursing Assocs., PLLC v. Phillips*, 842 So. 2d 1270, 1276 (Miss. 2003) ("Waiver of arbitration is not a favored finding, and there is a presumption against it; this is particularly true when the party seeking arbitration has included a demand for arbitration in its answer, and the burden of proof then falls even more heavily on the party seeking to prove waiver.").

The third case Plaintiff primarily relies upon, *Century 21 Maselle & Associates, Inc. v. Smith*, reinforces the importance of prejudice. In that case, this Court found *no* waiver despite the fact that the defendant initiated written discovery. *Century 21*, 965 So. 2d at 1038. Plaintiff cites this case for the proposition that a defendant "come[s] 'precipitously close' to waiving arbitration by merely propounding written discovery to the plaintiff." (Plaintiff's Brief 7 (quoting *Century 21*, 965 So. 2d at 1038)). But Plaintiff overlooks the Court's ultimate conclusion—while initiating discovery comes close, it does not constitute waiver unless there is proof of detriment and/or prejudice. *Century 21*, 965 So. 2d at 1038-39.

Unable to point to any evidence of prejudice, Plaintiff ignores this element and tries to distinguish the conduct at issue at *Century 21*. Specifically, Plaintiff argues that, in addition to exchanging written discovery, Citibank "participated in depositions"; "noticed [Plaintiff's] deposition, and then canceled at the last minute, filing the Motion to Compel Arbitration before the lower court one week later"; and "chose to delay filing its Motion to Compel Arbitration for over seven months." (Plaintiff's Brief 7.) The only depositions taken in this case were those Plaintiff requested as an "accommodation" to perpetuate testimony. (R. 310-12.) Citibank's courtesy to Plaintiff hardly constitutes evidence of waiver. *See, e.g.*, *Gen. Guar. Ins. Co. v. New Orleans Gen. Agency, Inc.*, 427 F.2d 924, 928, 930 (5th Cir. 1970) (finding no waiver where the defendant "allowed plaintiff to proceed with taking depositions"). With respect to noticing Plaintiff's deposition, as Plaintiff acknowledges, Citibank canceled that deposition and shortly thereafter filed its Motion to Compel Arbitration. Canceling the deposition was consistent with Citibank's intent to arbitrate. Plaintiff has not cited any authority finding such acts to demonstrate an intention to disregard the right to arbitrate.

As to the timing of Citibank's Motion to Compel Arbitration, Plaintiff emphasizes that this Court has instructed parties to file motions to compel "immediately." (*See* Plaintiff's Brief 5, 7.) A lack of immediacy, however, does not result in waiver without "active participation in the litigation process." *Horton*, 926 So. 2d at 180. (*See* Citibank's Brief 11-12 (collecting cases)). Citibank's "minimal pretrial activities" do not rise to the level of active participation in the litigation process. *Phillips*, 842 So. 2d at 1277. Accordingly, under the facts of this case, resolving all doubts in favor of arbitration, Citibank's conduct in the litigation is not tantamount to waiver of arbitration. *See generally Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) ("The Arbitration Act establishes that, as

a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

B. Plaintiff Was Not Prejudiced.

Given the limited extent of Citibank's participation in this case, it comes as no surprise that Plaintiff failed to present any evidence of prejudice. Prejudice, in this context, "refers to the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Phillips*, 842 So. 2d at 1278 (citing *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 327 (5th Cir. 1999)).

In her Brief, Plaintiff makes vague allegations of prejudice, with no citation to the record:

> Ms. Stovall suffered prejudice as a result of providing information to Defendant Citibank in discovery, incurring legal expenses, and experiencing procedural delays. Further, the other defendants in this lawsuit, Adams & Edens, Bradley P. Jones, and Richard E. Massey, responded to Ms. Stovall's discovery requests and propounded written discovery to Ms. Stovall. Ms. Stovall responded to those discovery requests, and her counsel conferenced with defense counsel regarding her responses.

(Plaintiff's Brief 7-8.) These conclusory, unsubstantiated allegations are insufficient to show prejudice. *See Greater Canton Ford Mercury, Inc. v. Ables*, 948 So. 2d 417, 423 (Miss. 2007) ("This Court is limited to consideration of the facts in the record, while reliance on facts only disclosed in the briefs is prohibited.").

As discussed in Citibank's Brief, Plaintiff failed to show how she was prejudiced by the relatively limited discovery that took place prior to Citibank filing its Motion to Compel Arbitration. (*See* Citibank's Brief 14-16.) There is no indication that Plaintiff provided any information to Citibank that would not have been available in arbitration, or that harmed her legal position. Plaintiff adds in her Brief that she also exchanged written discovery responses

with Defendants Adams & Edens, Bradley P. Jones, and Richard E. Massey, but does not explain how she was prejudiced by this discovery either. Indeed, Plaintiff has not alleged, or shown, that she would not have had to respond to the other defendants' discovery even if her claims against Citibank had been submitted to arbitration.

With respect to "legal expenses," Plaintiff again presented no evidence of this claim. Nor has she specifically identified any expense she incurred that would not have been incurred in arbitration.

Finally, Plaintiff does not explain how she was allegedly prejudiced by "procedural delays." Citibank pointed out in its Brief that a delay actually appears to benefit Plaintiff, and prejudice Citibank, because Plaintiff has been able to retain possession of the foreclosed property throughout this litigation. (*See* Citibank's Brief 13.) And Plaintiff herself demonstrated no urgency in pursuing litigation, waiting months to file suit and months more to serve Citibank. (*See* Citibank's Brief 13-14.) Plaintiff did not respond to these facts in her Brief.

The strong presumption in a favor of arbitration cannot be overcome by Plaintiff's "generalized protestations." *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 578 (5th Cir. 1991). Without any proof of prejudice, the trial court erred in finding a waiver of the right of arbitration.

III. CONCLUSION

For the foregoing reasons, Citibank prays that the decision and order of the trial court denying arbitration be **REVERSED** and this case be **REMANDED** to the Circuit Court of Winston County, Mississippi, for entry of an order compelling arbitration and staying this matter until resolved by arbitration.

Respectfully submitted, this the 6th day of May, 2015.

/s Christopher D. Meyer

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CERTIFICATE OF SERVICE

I, Christopher D. Meyer, hereby certify that a true and correct copy of the foregoing has been served upon the parties listed below by CM/ECF or MEC:

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And I hereby certify that I have mailed by U.S. Mail the document to the following non-MEC participants:

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This the 6th day of May, 2015.

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