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2021 VT 1

No. 2019-416

Knaresborough Enterprises, LTD

v.

Ernest Dizazzo, Jean Dizazzo, Nicole Durand, and Anne Dizazzo

Supreme Court

On Appeal from
Superior Court, Grand Isle Unit,
Civil Division

September Term, 2020

Robert A. Mello, J.

Kevin A. Lumpkin and Daniel J. Mullen of Sheehey Furlong & Behm P.C., Burlington, for Plaintiff-Appellee.

Thomas C. Nuovo of Bauer Gravel Farnham, LLP, Colchester, for Defendants-Appellants.

PRESENT: Reiber, C.J., Robinson, Eaton, Carroll and Cohen, JJ.

¶ 1. **EATON, J.** In this property dispute between neighboring landowners, defendants appeal a provision in the trial court's final order that requires the parties to submit future disagreements to binding arbitration. The court included the provision in the order based on plaintiff's representation during the final hearing that the parties had orally agreed to such a provision. Defendants argue that this was error because they did not confirm plaintiff's assertion and the parties did not sign a written agreement or acknowledgement of arbitration, as required by the Vermont Arbitration Act, 12 V.S.A. § 5652. We conclude that under the circumstances of this

case, it was inappropriate for the court to include an arbitration provision in its final order, and therefore reverse and remand for the court to strike the provision.

¶ 2. In December 2014, plaintiff filed this declaratory judgment action in the civil division to determine whether defendants had the right to use an easement granted by plaintiff's predecessor-in-interest to defendants' predecessor-in-interest to access a beach on plaintiff's property on Lake Champlain. In March 2017, the court granted partial summary judgment to defendants, concluding that the easement was an appurtenant easement that benefited defendants' property.[1] However, it determined that a material dispute of fact remained about whether defendants' use of the land had overburdened the conveyed easement. Plaintiff moved for reconsideration, and in response, the court modified its decision to give plaintiff an opportunity to offer further evidence regarding whether the easement was an appurtenant easement.

¶ 3. A few days before trial was set to begin in April 2019, the parties entered into a partial settlement agreement that was approved by the court. The agreement clarified that the easement was an appurtenant easement and stated that defendants could use it solely for the purposes of keeping, mooring, accessing, or launching boats on Lake Champlain.

¶ 4. At trial, the court heard evidence regarding the remaining unresolved issues, which included how defendants were permitted to store their boats on the easement and whether defendants could use the easement to launch jet skis. Testimony regarding the latter issue gave rise to questions about how the parties would manage erosion and maintenance of the beach. After some discussion of these issues, the court took a recess to permit the attorneys to consult with their

[1] An "appurtenant easement" serves a parcel of land, rather than a particular person, and when the property is conveyed, the easement passes to the new owner. Barrett v. Kunz, 158 Vt. 15, 18, 604 A.2d 1278, 1280 (1992). In contrast, an "easement in gross" is an easement of limited purpose and duration that is intended to benefit only the holder and expires when the property is conveyed, unless specifically reserved. Id.

clients. Following the recess, plaintiff's attorney, on the record, informed the court that the parties had agreed to revise paragraph 12 of the settlement agreement concerning maintenance of the beach and right-of-way, and to add a new paragraph 16. He read the revised language of paragraph 12 into the record. He then stated: "Paragraph 16, because we kept identifying potential skirmishes around the edges of this agreement, we have agreed to add a mandatory arbitration clause, the specific language of which would be worked out between [defendants' attorney] and I. I imag[in]e we can get it from a Horn book [sic] somewhere."

¶ 5. The court responded that the provisions sounded appropriate and that it would incorporate the proposed language into its final order. Defendants' attorney interjected, "Judge, I just had one other brief comment . . . because we sort of stalled at this point, and I just wanted to address one other area that my colleague addressed that I feel the need to respond to." Plaintiff's attorney stated that he was not finished speaking. Defendants' attorney responded that he would let plaintiff's attorney finish. Plaintiff's attorney briefly argued that defendants should be required to launch their jet skis from a different location than the beach. Defendants' attorney then presented argument regarding various topics but did not discuss or object to the proposed arbitration provision. There was no further discussion of the arbitration provision at the hearing. At the end of the hearing, the court asked the parties to submit an amended order reflecting the discussed modifications.

¶ 6. Following the hearing, the parties submitted proposed findings and orders addressing the use of the easement for storage of boat trailers and launching of jet skis. In May 2019, the court issued an order confirming its findings on these points and directing the parties to incorporate the text of the order, as well as the modifications made on the record at the hearing, into their settlement agreement.

¶ 7. The parties submitted proposed final orders that were nearly identical. However, plaintiff's version included a clause requiring the parties to submit "any dispute arising hereunder" to binding arbitration, while defendants' version contained no arbitration clause. In a memorandum accompanying its proposed order, plaintiff argued that defendants had stipulated to an arbitration provision at the April 2019 hearing and were now attempting to renege on that agreement. In response, defendants argued that the parties never negotiated or signed an agreement to arbitrate future disputes, and that if the record indicated that they acquiesced to such an agreement, they were withdrawing their consent. The court directed plaintiff to order a transcript of the relevant portion of the April 2019 hearing, which is quoted above. Plaintiff argued that the transcript showed that the parties had stipulated to arbitration. In October 2019, after looking at the transcript, the court issued a final order that included the arbitration clause proposed by plaintiff.

¶ 8. Defendants moved for reconsideration, claiming that plaintiff had recently installed posts obstructing the right-of-way in contempt of the order. Defendants asked the court to clarify that the court, rather than an arbitration panel, was the exclusive venue for enforcement of the order so that they could seek to enforce the order in court. The court denied the motion, stating that the language of the order was unambiguous and required any further dispute to be submitted to arbitration.

¶ 9. Defendants then moved to amend the final order to strike the arbitration provision on the grounds that there was no written acknowledgement of arbitration as required by the Vermont Arbitration Act, 12 V.S.A. § 5652, and no clear evidence that defendants had agreed to arbitrate further disputes. Defendants also filed a notice of appeal to this Court. Shortly after defendants filed their notice of appeal, the trial court denied their motion to amend the final order,

stating that § 5652 did not apply because the duty to arbitrate arose not from a contract but from the court's order, which was based on the parties' stipulation at the April 2019 hearing. [2]

¶ 10. On appeal, defendants argue that the trial court erred in including the arbitration provision in the final order because there was no written agreement or acknowledgement signed by the parties as required by 12 V.S.A. § 5652 and defendants did not confirm plaintiff's assertion that they had orally agreed to arbitrate.[3] Plaintiff argues that defendants are estopped from invoking § 5652 or denying that an arbitration agreement existed because they failed to object to plaintiff's assertions during the April 2019 hearing. Plaintiff further claims that where the parties, through counsel, stipulate to arbitration on the record in a court proceeding, the requirement of a writing is met and there is no need for a written acknowledgement under § 5652(b). The interpretation of the statute, the applicability of estoppel or waiver, and the existence of an enforceable agreement are legal questions that we review de novo. See Adams v. Barr, 2018 VT 12, ¶ 8, 206 Vt. 480, 182 A.3d 1173; In re Langlois/Novicki Variance Denial, 2017 VT 76, ¶ 11, 205 Vt. 340, 175 A.3d 1222; Miller v. Flegenheimer, 2016 VT 125, ¶ 11, 203 Vt. 620, 161 A.3d 524.

¶ 11. Vermont law and public policy favor arbitration as an alternative to litigation for resolving disputes. Lamell Lumber Corp. v. Newstress Int'l, Inc., 2007 VT 83, ¶ 9, 182 Vt. 282, 938 A.2d 1215; see 12 V.S.A. § 5652(a) (stating that written agreement to arbitrate disputes is

[2] Although the decision was issued after defendants filed their notice of appeal and therefore is not technically part of the record on appeal, we take judicial notice of the decision because it explains the court's reasoning for including the contested arbitration provision in the final order. Cf. In re A.M., 2015 VT 109, ¶ 31, 200 Vt. 189, 130 A.3d 211 (explaining that it is generally appropriate for court to take notice of other records in same case before it).

[3] Defendants also argue that there was no meeting of the minds sufficient to create an enforceable agreement to arbitrate. We do not address this argument because we conclude that defendants are entitled to reversal on a different basis.

"valid, enforceable, and irrevocable, except upon such grounds as exist for the revocation of a contract"). However, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). By agreeing to submit a controversy to arbitration, parties waive important rights, including trial by jury, procedural protections offered by the courts, and appellate review by an independent judiciary. See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) (explaining that "[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"). Accordingly, we have held that "[a] court may not order the parties to submit their future disputes to arbitration without a voluntary agreement of the parties concerned, or a statute or rule authorizing such an order." Gates v. Gates, 168 Vt. 64, 72, 716 A.2d 794, 800 (1998). The parties have not identified any applicable statute or rule that would permit the court to order arbitration in this case. Thus, the question before us is whether the parties' alleged oral stipulation was sufficient to create an enforceable agreement.

¶ 12. In general, arbitration agreements must be in writing to be enforceable. The Vermont Arbitration Act (VAA), which is based on the Uniform Arbitration Act, states that written arbitration agreements are "valid, enforceable, and irrevocable, except upon such grounds as exist for the revocation of a contract." 12 V.S.A. § 5652(a). The VAA does not mention oral agreements, and courts in jurisdictions that have adopted the uniform act agree that it supersedes common law permitting oral agreements to arbitrate and makes such agreements unenforceable. See, e.g., Bennett v. Meader, 545 A.2d 553, 557 (Conn. 1988); Anderson v. Federated Mut. Ins. Co., 465 N.W.2d 68, 70 (Minn. Ct. App. 1991), aff'd, 481 N.W.2d 48 (Minn. 1992); Jenkins v. Percival, 962 P.2d 796, 800 (Utah 1998); see also Magness Petroleum Co. v. Warren Res. of Cal.,

Inc., 127 Cal. Rptr. 2d 159, 164 (Ct. App. 2002) (interpreting arbitration statute to permit courts to specifically enforce only written agreements to arbitrate). The VAA requires us to construe its terms uniformly with these other jurisdictions. See 12 V.S.A. § 5654 (stating that VAA "shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it or substantially similar provisions."). Accordingly, we conclude as a general matter that arbitration agreements must be in writing to be enforceable.

¶ 13. The VAA also requires a written acknowledgement of arbitration:

> No agreement to arbitrate is enforceable unless accompanied by or containing a written acknowledgment of arbitration signed by each of the parties or their representatives. When contained in the same document as the agreement to arbitrate, that acknowledgment shall be displayed prominently. The acknowledgment shall provide substantially as follows:
>
> "ACKNOWLEDGMENT OF ARBITRATION.
>
> I understand that (this agreement/my agreement with _____ of _____) contains an agreement to arbitrate. After signing (this/that) document, I understand that I will not be able to bring a lawsuit concerning any dispute that may arise which is covered by the arbitration agreement, unless it involves a question of constitutional or civil rights. Instead, I agree to submit any such dispute to an impartial arbitrator."

Id. § 5652(b). The statutory requirement of a written acknowledgement is designed to ensure that parties understand the significance of the arbitration provision and to protect them from unknowingly waiving their right to seek redress in court. See Joder Bldg. Corp. v. Lewis, 153 Vt. 115, 119, 569 A.2d 471, 473 (1989) (explaining purpose of acknowledgement is to inform parties "that signing the agreement forecloses any court remedies concerning any dispute that arises which is covered by the arbitration agreement, except as to constitutional or civil rights"). The statute does not identify any exceptions to this requirement.

¶ 14. In this case, it is undisputed that there was no written agreement between the parties containing the acknowledgement required by § 5652. However, plaintiff argues that defendants are estopped from denying the existence or validity of an arbitration agreement on this basis because defendants failed to object to the assertion of plaintiff's counsel at the hearing that the parties had stipulated to an arbitration provision.

¶ 15. "As a general rule one may be estopped by an agreement or stipulation made in a judicial proceeding. . . . A judgment entered up by the court upon an agreement of the parties is, to say the least, as conclusive upon them as if judgment was rendered in the ordinary course of the proceeding." In re Cartmell's Estate, 120 Vt. 234, 240, 138 A.2d 592, 595 (1958) (citations omitted). "Once a party agrees to a stipulation, he is bound by it, and the course of the trial is determined by it." Cooper v. Savage, 145 Vt. 223, 225, 485 A.2d 1258, 1260 (1984) (holding that defendant was bound by his own attorney's in-court stipulation to amount of damages where he failed to timely object to damages as stipulated or to court's express understanding of stipulation).

¶ 16. In accordance with this general rule, some jurisdictions have held that an oral stipulation to arbitrate may be enforceable, despite a statutory requirement that such agreements be in writing, where the circumstances demonstrate waiver, estoppel, or agreement reflected in a written court record. See Magness Petroleum Co., 127 Cal. Rptr. 2d at 166 (stating same and collecting California cases). But see Pinard v. Dandy Lions, LLC, 987 A.2d 406, 411-12 (Conn. App. Ct. 2010), cert denied, 991 A.2d 566 (Conn. 2010) (holding that parties' oral agreement, made on record during court proceeding, to treat judge's informal mediation decision as arbitration award was insufficient to create binding arbitration agreement because Connecticut law requires writing to prove existence and terms of agreement).

¶ 17. For example, in Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics, 71 Cal. Rptr. 2d 771 (Ct. App. 1998), the parties orally agreed in court to arbitrate their dispute.

The plaintiff's attorney read the terms of the arbitration agreement into the record and specifically stated that there was no need to have a written agreement and that the oral agreement on the record would be sufficient if the court so ordered. The defendant, a lawyer who was representing himself, responded, "So stipulated." The parties then proceeded to arbitration, and the arbitrator found in favor of the plaintiff. When the plaintiff sought judicial confirmation of the arbitration award, the defendant objected that the earlier order to arbitrate was unenforceable because there was no written arbitration agreement. The court held that although California statutes permitted the courts to compel arbitration based only on a written agreement, the defendant could and did waive his rights under those provisions by agreeing that the court should order arbitration and no written stipulation was necessary. Id. at 774. The court reasoned that the statutory requirement of a written agreement was a law intended for the defendant's benefit and therefore could be waived by him. Id. The court further held that the defendant was estopped from objecting that a written arbitration agreement was required where he had previously told the court that no written stipulation was required and then participated in arbitration, and the plaintiff had participated in arbitration believing that it would be binding. Id. at 774-75.

¶ 18. We agree in principle that a party's oral stipulation on the record in a court proceeding to the material terms of an arbitration agreement, coupled with a knowing and voluntary waiver of the statutory requirement of a written acknowledgement, could be sufficient to create an enforceable agreement. See Vandenberg v. Superior Court, 982 P.2d 229, 238 n.8 (Cal. 1999) (enforcing arbitration provision included in settlement agreement that was read in open court by counsel, after which court questioned individual parties to ascertain understanding and assent); Herzog, 71 Cal. Rptr. 2d at 774. Parties are typically free to waive statutory rights designed for their benefit. See Neverett v. Towne, 121 Vt. 447, 457, 159 A.2d 345, 351 (1960) ("[T]hat the benefit of a statute may be waived is well established."); see also State v. Kandzior,

2020 VT 37, ¶ 17, __ Vt. __, 236 A.3d 181 (explaining that in criminal context, defendant may "waive virtually any right, constitutional or statutory, as long as the waiver is knowing, intelligent, and voluntary" (quotation omitted)); Murray v. Williams, 169 Vt. 625, ___, 740 A.2d 791, 791 (1999) (mem.) (holding tenant's stipulation to pay $677 in unpaid rent and vacate premises by certain date waived her statutory right to redeem tenancy); Herzog, 71 Cal. Rptr. 2d at 774 ("Any one may waive the advantage of a law intended solely for his benefit." (quotation omitted)). Section 5652 does not prohibit a voluntary waiver of its protections; nor do the other provisions of the Vermont Arbitration Act. And an oral stipulation made in open court and subsequently incorporated into a court order typically creates a sufficiently formal and definite record of the terms of the agreement to satisfy the requirement of a writing. See In re Dolgin Eldert Corp., 286 N.E.2d 228, 232 (N.Y. 1972) ("The rule had always been that oral stipulations or concessions made in open court, despite statutory or rule requirements for writings, would be enforced over the objection of lack of a subscribed writing."); see also Grisham v. Grisham, 289 P.3d 230, 233-34 (Nev. 2012) (explaining that "formality, publicity, and solemnity of an open court proceeding protects parties against hasty and improvident settlement agreements," and open-court stipulation ensures formal record to avoid subsequent disputes over terms of agreement (quotation omitted)).

¶ 19. However, for a party to effectively waive the statutory requirements of a written arbitration agreement and acknowledgement, the waiver must be clear and unequivocal. See Suh v. Superior Court, 105 Cal. Rptr. 3d 585, 597 (Ct. App. 2010) (holding oral statement by plaintiffs' attorney about willingness to arbitrate under particular rules if arbitration was compelled, while reserving position that arbitration could not be compelled, did not constitute agreement to arbitrate because plaintiffs did not unequivocally enter into any stipulation in court to arbitrate); see also In re Estate of Eberle, 505 N.W.2d 767, 770 (S.D. 1993) (explaining that oral stipulations of parties in presence of court are generally held to be binding, and stipulation need not be signed or in

particular form, but "its terms must be definite and certain in order to render the proper basis for a judicial decision"). It is true that a party's silence can constitute waiver when there is a duty to object. See Reynolds v. John Hancock Life Ins. Co., 117 Vt. 541, 548-49, 97 A.2d 121, 126-27 (1953) (holding, in action to recover under life insurance contract, that trial court did not err in failing to charge jury that insurer's mere silence was not waiver because insured took all steps required by insurer to prove claim and insurer therefore had obligation to inform insured if there were deficiencies in her claim). But given the clear requirements of the arbitration statute and the important rights at stake, we conclude that mere silence by one party in response to another party's representation that an arbitration agreement has been reached is insufficient to create an enforceable agreement. Cf. Milton Educ. & Support Ass'n v. Milton Bd. of Sch. Trs., 171 Vt. 64, 75, 759 A.2d 479, 487 (2000) (stating that party may waive statutory right to have issue collectively bargained but waiver must be "conscious and explicit"); Kanaan v. Kanaan, 163 Vt. 402, 413-14, 659 A.2d 128, 136 (1995) (holding plaintiff's delay in filing action to enforce maintenance agreement "cannot be construed as a waiver of her rights because waiver is not created by mere oversight and cannot be inferred from silence").

¶ 20. Here, defendants did not unequivocally agree on the record to the material terms of an arbitration agreement or to waive their statutory right to a written acknowledgement of arbitration. At the April 2019 hearing, plaintiff's counsel told the court simply that the parties had orally agreed to an arbitration provision and planned to work out the terms between themselves. Defendants did not respond, and arbitration was not mentioned again by either party or the court during the hearing. Defendants' silence at the hearing was insufficient to demonstrate a knowing and voluntary waiver of the protections of § 5652. And their subsequent actions similarly do not support a conclusion of waiver. Before the court issued its final order and afterward, defendants

repeatedly objected to the inclusion of an arbitration provision on several different grounds, including failure to comply with § 5652.

¶ 21. Because defendants' silence at the hearing was insufficient to constitute an enforceable stipulation to arbitrate and to waive the protections of § 5652, we disagree with plaintiff's argument that defendants are estopped from objecting on that basis now. Furthermore, plaintiff has failed to demonstrate that it relied on the alleged stipulation to its detriment, as is required to establish estoppel. See Langlois/Novicki Variance Denial, 2017 VT 76, ¶ 13 (listing elements of equitable estoppel). Defendants challenged the existence of an arbitration agreement before and after the court entered its final order, and the parties' dispute was never actually submitted to arbitration. Cf. Herzog, 71 Cal. Rptr. 2d at 774-75 (concluding defendant estopped from arguing on-the-record arbitration agreement was void for lack of writing where parties then fully participated in arbitration, and plaintiff understood arbitration to be binding). In the absence of any detrimental reliance by plaintiff on the alleged agreement, defendants are not estopped from challenging the existence of that agreement.

¶ 22. To the extent plaintiff is arguing that defendants failed to adequately preserve their challenge to the arbitration provision for our review, the argument lacks merit. Prior to the court's final order, defendants objected to the inclusion of the arbitration provision on the ground that they had never negotiated or signed an agreement to arbitrate further disputes—that is, that there was no written agreement. After the court issued the order, defendants timely sought to amend it, arguing that the imposition of the arbitration provision was also contrary to 12 V.S.A. § 5652(b). Defendants' filings presented their arguments with sufficient clarity and specificity to give the trial court an opportunity to rule on them, and thereby preserved them for our review. See Progressive Ins. Co. v. Brown ex rel. Brown, 2008 VT 103, ¶ 8, 184 Vt. 388, 966 A.2d 666 (explaining preservation rule).

¶ 23. Because there was no written agreement and acknowledgement of the important rights waived by the arbitration agreement signed by the parties, and defendants did not clearly and unequivocally agree on the record to waive the protections of § 5652, we agree that the matter must be remanded for the trial court to strike the arbitration provision from its final order and determine whether and to what extent the remainder of the order should stand. See Gates, 168 Vt. at 72, 716 A.2d at 800.

Reversed and remanded for the trial court to strike the arbitration provision from its final order and determine whether the remainder of the order should stand.

FOR THE COURT:

_____

Associate Justice