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Business Center Drive Partners L.P. v. Biogenec, Inc.
Cal.App. 4 Dist., 2005.
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Court of Appeal, Fourth District, Division 3, California.

BUSINESS CENTER DRIVE PARTNERS L.P.,
Plaintiff and Respondent,

v.

BIOGENEC, INC., Defendant and Appellant.

No. G033744.

(Super.Ct.No. 03CC02904).

July 19, 2005.

Appeal from an order of the Superior Court of Orange County, Michael Brenner, Judge. Affirmed.

Law Offices of Kelly S. Johnson and Kelly S. Johnson for Defendant and Appellant.
Klein & Wilson, Gerald A. Klein and Mark B. Wilson for Plaintiff and Respondent.

OPINION

ARONSON, J.

*1 Defendant BioGentec, Inc., (BioGentec) appeals from an order denying its petition to compel arbitration against its former lessor, plaintiff Business Center Drive Partners L.P., (Partners) based on an arbitration provision contained in a lease. Because substantial evidence supports the trial court's finding BioGentec waived its right to compel arbitration, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 19, 2001, Partners entered into a commercial lease with BioGentec in which the parties agreed to "resolve any and all claims" through arbitration, with the exception of those relating to Partners' exercise of unlawful detainer rights. The lease term expired on December 31, 2002, but BioGentec failed to vacate the leased premises as required under the lease. On January 3, 2003, Partners filed an unlawful detainer lawsuit. On the eve of trial in March 2003, BioGentec executed confessions of judgment that required them to vacate by March 14, 2003. On March 14, the confessions of judgment were filed entitling Partners to immediate possession.

Because possession was no longer at issue, Partners moved in early April 2003 to reclassify the case from an unlawful detainer to an unlimited civil case. At issue was unpaid rent in excess of \$60,000 accrued during the holdover period.^{FN1} As a result of an apparent oversight by the court, the matter was not reclassified until July 16, 2003.

FN1. Under paragraph 26 of the Lease, holdover rent is calculated at 150 percent of the usual monthly rent of \$15,000 per month.

On February 12, 2003, Partners first noticed BioGentec's deposition and requested documents. After several attempts to work out an acceptable date for the deposition, Partners served an amended notice of deposition on June 2, 2003. BioGentec objected to the amended deposition notice and failed to appear, but did not mention the arbitration clause in its objections. Partners moved to compel BioGentec's appearance at deposition. Although BioGentec opposed the motion to compel on a number of grounds, it again failed to raise the defense of arbitration. The motion to compel was granted on August 25, 2003.

BioGentec's deposition was taken on September 17, 2003. Immediately before the deposition com-

menced, BioGentec's counsel orally requested the case be submitted to arbitration. On October 16, 2003, BioGentec sent a letter to Partners demanding arbitration. Partner's counsel agreed to arbitrate the case if arbitration took place before January 15, 2004. BioGentec never responded to the offer.

On December 5, 2003, Partners filed a motion for summary judgment and, on December 10, 2003, filed a writ of attachment. BioGentec petitioned to compel arbitration on December 19, 2003. The trial court denied BioGentec's petition, finding it had waived its right to compel arbitration. The trial court then granted Partners' writ of attachment. BioGentec now appeals the order denying its petition to compel arbitration.

DISCUSSION

Arbitration has long been favored as a speedy and relatively inexpensive means of resolving disputes. (*Erickson, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322.) It enables parties to avoid many of the problems associated with formal litigation, such as the inherent cost and delays in discovery and trial. (*Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 783.) Despite the strong public policy favoring arbitration, not all arbitration clauses are enforced. Code of Civil Procedure section 1282.2, subdivision (a), expressly provides an exception where the right to compel arbitration has been waived. The party seeking to establish waiver bears the burden of proof, and waiver will not lightly be inferred in light of public policy favoring arbitration. (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211 (*Davis*).) Nonetheless, the question of waiver is ordinarily one of fact, and the appellate court will uphold a trial court's waiver finding if supported by substantial evidence. (*Ibid.*) Thus, if more than one reasonable inference may be drawn from undisputed facts, the substantial evidence rule requires indulging the inferences favorable to the trial court's judgment. (*Ibid.*)

*2 "There is no single test for waiver of the right to compel arbitration, but waiver may be found where the party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with willful misconduct. [Citations.] The moving party's mere participation in litigation is not enough; the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration." (*Davis, supra*, 59 Cal.App.4th at pp. 211-212.) Ample evidence supports the trial court's determination that BioGentec waived its right to compel arbitration.

First, BioGentec failed to plead its right to arbitrate as an affirmative defense. Under the Federal Arbitration Act, the failure to plead arbitration as an affirmative defense is not "by itself" sufficient to constitute waiver. (*Fisher v. A.G. Becker Paribas Inc.* (9th Cir.1986) 791 F.2d 691, 698.) Nonetheless, the trial court may consider this omission as inconsistent with a subsequent demand for arbitration. (*Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558.)

Next, BioGentec failed to raise the issue of arbitration until almost a year after Partners filed the case. True, as BioGentec notes, the case began as an unlawful detainer action not covered by the arbitration clause. Nevertheless, BioGentec knew the unlawful detainer issue had been resolved and that Partners moved to reclassify the matter as an unlimited civil case at the latest in April 2003. As BioGentec notes, by seeking to reclassify the case as unlimited civil, Partners "unequivocally manifested" its refusal to arbitrate the case. Nevertheless, BioGentec offers no explanation why it failed to demand arbitration at that time.

BioGentec had a number of opportunities to raise the arbitration clause as a defense to the civil case. BioGentec served written objections in early July 2003 to the taking of its deposition but failed to include any mention of the arbitration clause. Similarly, in August 2003, BioGentec filed an opposition

to Partners' motion to compel without raising arbitration. Although BioGentec's attorney, for the first time, orally demanded arbitration at the commencement of BioGentec's deposition in September, it waited another three months before filing its petition to compel arbitration.

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Significantly, BioGentec waited to file its petition until after Partners had filed both a petition for a writ of attachment and motion for summary judgment. Given the lack of any reasonable explanation for BioGentec's delay in seeking arbitration, the trial court could have properly concluded BioGentec was purposely dragging the court case out as long as possible, petitioning to compel arbitration only when facing the immediate prospect of a writ of attachment and summary judgment.

BioGentec's unreasonable delay in seeking arbitration required Partners to spend substantial legal fees pursuing its case in court. (See *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 983-984 [bank waived right to compel arbitration by causing plaintiff to incur attorney fees that could have been avoided by a prompt arbitration demand].) Moreover, if the trial court granted BioGentec's late arbitration petition, Partners would have suffered further delay before its claim would be heard. Two of arbitration's key benefits are economy and speed; BioGentec's delay effectively deprived Partners of both.

*3 Thus, substantial evidence supports the trial court's finding that BioGentec had waived its right to compel arbitration.

DISPOSITION

The order denying BioGentec's petition to compel arbitration is affirmed.

WE CONCUR: SILLS, P.J., and O'LEARY, J.
Cal.App. 4 Dist., 2005.
Business Center Drive Partners L.P. v. Biogentec, Inc.
Not Reported in Cal.Rptr.3d, 2005 WL 1684072