

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2006-009625

03/27/2007

THE HONORABLE ANNA M. BACA

CLERK OF THE COURT
A. Gonzalez
Deputy

TERRAMAR HOMEOWNERS ASSOCIATION

CHARLES E MAXWELL

v.

PAINTING COMPANY, THE, et al.

PAUL E STEEN

RULING

This court has received and reviewed Defendants' Motion/Application to Compel Arbitration, Plaintiff's Response and Defendants' Reply. The court has considered the legal memorandua, the court's file and the relevant law. The court finds and rules as follows.

Defendants move to compel arbitration under the Construction Industry Arbitration Rules of the American Arbitration Association pursuant to their arbitration agreement and A.R.S. § 12-1501 and 12-1502(A). Defendants also seek dismissal of Plaintiff's complaint and an award of costs and attorneys' fees.

"The public policy of Arizona favors arbitration," and courts prefer to uphold arbitration agreements where possible. *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 189 (App. Div. 1 1994). "Unless repudiation is clear...the court should not infer it." *Id.* at 192. Despite that preference for enforcing arbitration agreements, a party may, through its actions, waive its rights under the arbitration agreement. *U.S. Insulation, Inc. v. Hilro Const. Co., Inc.*, 146 Ariz. 250 (1985); *Bolo Corp. v. Homes & Son Const. Co.*, 105 Ariz. 343 (1970). Arizona courts have held that filing a lawsuit or answering on the merits despite the existence of an arbitration agreement will "nearly always indicate a clear repudiation of the right to arbitrate." *Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576, 582 (App. Div. 1 1994). *See also, Bolo*, 105 Ariz. 343, 346 (1970) ("[D]efendants joined in the repudiation by answering to the merits without a demand for arbitration or a motion to stay the suit until arbitration could be had.").

Plaintiffs in this case choose to submit the controversy to the courts, and consequently waived any right they may have had to arbitrate the matter. Defendants answered the complaint on its merits without demanding arbitration or otherwise objecting to the forum, thereby waiving their right to demand arbitration. Defendants argue that they made a tactical decision not to demand arbitration and that

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Plaintiff's later decision to seek greater damages will result in their incurring higher costs. However, frustration of a tactical decision is no basis on which to compel arbitration. *Rancho Pescado, Inc. v. Northwestern Mut. Life Ins. Co.*, 140 Ariz. 174 (App. Div. 1 1984). Defendants could have chosen to pursue arbitration in addition to or instead of answering the Complaint. They did not.

The court finds that because Defendants responded to the Complaint on the merits, and because they did not then seek to enforce their right to arbitrate the dispute, Defendants repudiated the arbitration agreement and thereby waived their right to arbitrate. Consequently,

IT IS ORDERED denying Defendant's Motion/Application to Compel Arbitration.

IT IS FURTHER ORDERED denying Defendant's request for an award of costs and attorneys' fees.