

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

OTIS HOUSING ASSOCIATION,)	
INC., a Washington corporation,)	
)	
Petitioner,)	No. 80626-8
)	
v.)	En Banc
)	
JOHN HA and MIN HA, husband)	
and wife,)	
)	
Respondents.)	Filed February 5, 2009
_____)	

CHAMBERS, J. — For many years, Otis Housing Association, Inc. (OHA) rented a hotel from John and Min Ha with the hope of purchasing it someday. To that end, the parties negotiated a sale price and an option to purchase. Unfortunately, it appears that OHA lacked the resources to complete the sale during the option period. After several years, and several extensions, the option expired in 2004 with no sale completed. Not long after, OHA stopped paying rent and the Has successfully brought an unlawful detainer action. During a show cause hearing in the unlawful detainer action, the trial court rejected OHA’s argument that it had successfully exercised the option, triggering the protections of the Real Estate Contract Forfeiture Act, chapter 61.30 RCW. Subsequently, and in a separate action, OHA

unsuccessfully attempted to invoke the arbitration clause in the option. The trial court and the Court of Appeals concluded that the arbitration clause expired with the option clause and that there was no basis for arbitration. *State v. Otis Hous. Ass'n*, 140 Wn. App. 470, 164 P.3d 511 (2007). We granted review at 163 Wn.2d 1031 (2008). We affirm on different grounds, holding that whatever rights to arbitrate may have existed in the option, OHA waived them by raising the option as a defense in the unlawful detainer action.

Facts

In 1997, OHA entered into a lease with a purchase option with the Has to lease the Otis Hotel in Spokane, Washington. The purchase option was for \$1,300,000. The record is not crystal clear, but it appears originally that the option period was one year, extendable by agreement, and that OHA would have 60 days from announcing intent to exercise the option to close the sale or the option would expire. In 2001, OHA announced its intent to exercise the option and began making monthly payments toward the purchase price. No sale closed within 60 days, but both OHA and the Has entered into subsequent option agreements over the next few years extending the time frame. The final option agreement stated plainly that the option must be exercised no later than December 1, 2004, and it would expire if no sale closed by December 31, 2004. Clerk's Papers (CP) at 32.¹

¹ The option provided that “[s]uch option may be exercised at any time before December 1, 2004, with closing to be on a date specified in the notice to exercise, but in no event . . . later than December 31, 2004.”

On November 30, 2004, OHA announced its intent to exercise the option. No sale closed before the option expired on December 31, 2004. At about that time, OHA stopped paying rent, and after receiving no rent for six months, the Has filed an unlawful detainer action. OHA did not invoke the arbitration clause in its answer. Again, the record is not crystal clear, but it appears that OHA served an answer and counterclaim on the Has asserting that it had exercised the option and therefore was entitled to possession. Apparently, the answer and counterclaim was never filed but OHA did appear at the show cause hearing in the unlawful detainer action. OHA unsuccessfully argued that it had exercised its option, which, it contended, converted the lease and option agreements into a purchase and sale agreement and conveyed a right to retain possession of the hotel to OHA. The trial court disagreed, finding that the option had expired. On October 14, 2005, the court issued a writ of restitution in favor of the Has, restoring their possession of the hotel. From what we can discern from the record, OHA never sought arbitration during the unlawful detainer action.

Several days after the trial court issued its order awarding possession of the Otis Hotel to the Has, OHA sent a letter to the Has demanding arbitration. The Has declined to arbitrate. The Has contended that the option's arbitration clause had expired at the same time that the option did, on December 31, 2004. In November 2005, and under a separate cause number, OHA filed an action to compel arbitration under the option agreement. OHA

also filed a lis pendens with the county auditor against the hotel. OHA noted a motion to compel the Has to appoint an arbitrator. The Has resisted and responded with their own motion to quash the lis pendens. In March 2006, the trial court canceled the lis pendens and denied the motion to compel arbitration, finding that OHA had “materially failed to timely exercise and/or close the Option to Purchase” and that the “right to seek arbitration under the Option to Purchase no longer exists and has lapsed.” CP at 74-76. OHA sought review of the denial of its motion to compel arbitration and of the trial court’s canceling of its lis pendens. The Court of Appeals affirmed, and so do we.

Analysis

We must decide whether the trial judge properly denied the motion to compel arbitration. Our review of this decision is de novo. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007) (quoting *Zuver v. Airtouch Commc'n, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004)). The Has, as the party opposing arbitration, bear the burden of showing the arbitration clause is inapplicable or unenforceable. *Id.* (citing *Zuver*, 153 Wn.2d at 302). “We may affirm the trial court on any grounds established by the pleadings and supported by the record.” *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002) (citing *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994)).

We need not decide whether or not the courts below erred in rejecting

the motion to arbitrate based on their conclusion that the arbitration clause had expired along with the option on December 31, 2004. The Has correctly contend, among other things, that OHA waived arbitration by raising the option as a defense to the unlawful detainer action. While this precise issue has not been raised before in this court, Washington courts have long held that the contractual right to arbitration may be waived if it is not timely invoked. *See, e.g., Ives v. Ramsden*, 142 Wn. App. 369, 382-83, 174 P.3d 1231 (2008) (securities' broker impliedly waived arbitration by not raising it in his answer to plaintiff's complaint); *Harting v. Barton*, 101 Wn. App. 954, 962, 6 P.3d 91 (2000) (failure to pursue mediation waived the issue); *B&D Leasing Co. v. Ager*, 50 Wn. App. 299, 303, 748 P.2d 652 (1988) ("parties to an arbitration contract may expressly or impliedly waive that provision . . . by failing to invoke the provision when an action is commenced) (citing *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc.*, 28 Wn. App. 59, 621 P.2d 791 (1980))).

OHA argues that it waived no rights because the show cause hearing in an unlawful detainer action is limited to resolving questions of possession and the judge lacked the authority to compel arbitration. OHA is correct that a show cause hearing in an unlawful detainer action is a limited procedure. *See* RCW 59.18.365-.410; *see also generally Bar K. Land Co. v. Webb*, 72 Wn. App. 380, 384-85, 864 P.2d 435 (1993). But the question is not whether it was appropriate for the parties to raise, or the court to consider, the purchase

option. The question is whether, by raising the issue of the purchase option that contained the arbitration clause, OHA waived arbitration. Arbitration may be waived by the parties by their conduct. *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 620, 586 P.2d 519 (1978) (citing *Pedersen v. Klinkert*, 56 Wn.2d 313, 352 P.2d 1025 (1960)). The right to arbitrate is waived by conduct inconsistent with any other intent and “a party to a lawsuit who claims the right to arbitration must take some action to enforce that right within a reasonable time.” *Lake Wash. Sch. Dist. No. 414*, 28 Wn. App. at 64; *see also Shoreline Sch. Dist. No. 412 v. Shoreline Ass’n of Educ. Office Employees*, 29 Wn. App. 956, 958, 631 P.2d 996, 639 P.2d 765 (1981). OHA defended the unlawful detainer action by raising as a defense the very same issue it now seeks to arbitrate: whether the option to purchase had been properly exercised. The trial court ruled that the option had expired. Only after that time, and in a separate action, did OHA seek arbitration.

Simply put, we hold that a party waives a right to arbitrate if it elects to litigate instead of arbitrate. OHA’s conduct of submitting its claim that it exercised its option as a defense to the unlawful detainer action was completely inconsistent with an intent to arbitrate. We hold that OHA did waive any claim it may have had to arbitrate by presenting the same issue—whether it had successfully exercised the option to purchase—before the unlawful detainer court. Having lost that issue, it may not later seek to relitigate the same issue in a different

forum.^{2,3}

Conclusion

OHA defended an unlawful detainer show cause by asserting that it had exercised an option to purchase, and therefore it had a valid purchase and sale agreement that entitled it to forfeiture remedies. The trial judge ruled that the option had expired. OHA later, based upon an arbitration clause contained in the option agreement, sought to compel arbitration in a separate action. We hold that OHA has waived any right to arbitrate that it may have had by submitting the issue to a trial court. The courts below are affirmed.

² We note that OHA argued below that the Has had waived any objection to arbitration by not timely objecting under former RCW 7.04.060 (1943), *repealed by* Laws of 2005, ch. 433, § 50(6). While this contention was mentioned in passing in the petition for review, it was not supported by substantial argument or citation and will not be considered. *See In re Registration of Elec. Lightwave*, 123 Wn.2d 530, 545, 869 P.2d 1045 (1994) (citing *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991)). Additionally, OHA has moved for attorney fees and for refund of attorney fees already paid to the Has. As they are not the prevailing party, the request is denied.

³ We tend to agree with the dissent that the mere fact an arbitrable defense *could* have been raised in a separate action would not be enough, by itself, to show waiver.

Otis Housing Ass'n, Inc. v. Ha (John & Min), No. 80626-8

AUTHOR:

Justice Tom Chambers

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Susan Owens

Justice Charles W. Johnson

Justice James M. Johnson
