Circuit Court for Anne Arundel County
Case No. C-02-CV-15-002608

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 501

September Term, 2016

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RICHARD DEUTSCH, *et al.*

v.

G&D FURNITURE HOLDINGS, INC., *et al.*

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Nazarian,
Leahy,
Beachley,

JJ.

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Opinion by Nazarian, J.

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Filed: August 28, 2017

This appeal arises from an order granting a Petition to Compel Arbitration for multiple counterclaims pursuant to a Mediation/Arbitration provision in a Stockholders Agreement among Frederick Deutsch ("Frederick"), Norman R. Gilden, G&D Furniture Holdings, Inc. ("G&D") and several of G&D's subsidiaries, including Deutsch & Gilden, Inc. ("D&G"). In late 2015, G&D, D&G, and D&G Realty, LLC ("Realty," and collectively with G&D and D&G, the "Family Furniture Businesses") along with Norman R. Gilden and Norman P. Gilden (collectively with the Family Furniture Businesses, the "Gildens") sued Richard Deutsch, individually ("Richard"), and Richard and Gary Deutsch, as personal representatives of the Estate of Frederick Deutsch[1] (the "Estate," and collectively with Richard, the "Deutsches"), in the Circuit Court for Anne Arundel County. The Deutsches filed a counterclaim against Norman R. Gilden and Norman P. Gilden.

The Gildens filed a Petition to Compel Arbitration of several counts of the counterclaim pursuant to the Mediation/Arbitration provision of the Stockholders Agreement, and the Deutsches filed an opposition. After a hearing, the circuit court determined that the language of the Stockholders Agreement compelled arbitration of certain counts in the counterclaim, including the right to inspect the books and records and to appoint a receiver, and that the Gildens had not waived their right to arbitration. The Deutches appeal and we affirm.

[1] Frederick Deutsch died on December 26, 2014.

## I. BACKGROUND

Frederick and Norman R. Gilden were business partners who each owned fifty percent of several retail furniture businesses, including the Family Furniture Businesses, that they also operated. On February 16, 2006, Frederick, Norman R. Gilden, G&D, Family Furniture Centers, Inc., Fred & Norm, Inc., D&G, G&D Management Co., Inc., and D&G Partnership executed a Stockholders Agreement. Among other things, the Stockholders Agreement abrogated an agreement they entered into in 1990 and set forth comprehensive agreements regarding the ownership of G&D and its subsidiaries, transferability of corporate shares, management of the corporations, composition of the board of directors, division of profits, payment of dividends, and maintenance of a life insurance policy on all stockholders. The Stockholders Agreement also contains the parties' agreement to resolve disputes "regarding this Agreement" through mediation and arbitration:

> **Mediation/Arbitration.** In the event that there is any dispute between the parties *regarding this Agreement*, including, but not limited to, whether a Stockholder "is disabled," the parties shall first submit to mediation with a Mediator chosen by the parties, or if no agreement is reached on their choice of Mediators, by the designated counsel of the parties. If mediation of the dispute is not successful, the dispute shall be arbitrated by a retired judge appointed by the designated counsel for the parties.

(Emphasis added.) The Agreement specifies that "[n]o waiver or modification of any of the provisions of this Agreement or of any of the rights or remedies of the parties hereto shall be valid unless such change is in writing, signed by the party to be charged therewith."

Over time, the businesses encountered difficulties, and various disputes arose among the parties. We won't attempt to catalogue the disputes here, but it will suffice for present purposes to say that the disputes relate generally to differences over the operation and management of the businesses, financial decisions, the creation of other entities to which business assets allegedly were transferred, and decisions to wind down the original businesses. On May 14, 2015, the Deutsches demanded in writing, pursuant to Maryland Code (1975, 2014 Repl. Vol.), §§ 2-512 and 2-513 of the Corporations and Associations Article ("CA"), that Norman R. Gilden and Norman P. Gilden produce the books and records of the Family Furniture Businesses and all related entities. According to the Deutsches, both Norman Gildens refused.

The Gildens then sued the Deutsches, alleging twenty counts relating to the winding up of the Family Furniture Businesses' affairs and seeking money damages.[2] Among these claims, the Gildens sought a declaratory judgment that Frederick "failed to approve payment of premium on G&D's life insurance policy on his life." As part of the factual allegations for that count, the complaint acknowledged that "[t]he Stockholders Agreement requires any and all disputes regarding the Agreement to be arbitrated by a retired judge appointed by the designated counsel for the parties." And the prayer for relief on that count, Count XVII, asked the court to "determine, declare, and adjudge that [Frederick's] Estate is require to participate in arbitration of G&D's claims that [Frederick] breached the

[2] Because the two causes of action at issue in this appeal arise from allegations in the Deutsches' counterclaim, we will not detail the numerous answers, motions, and amendments filed in relation to the original complaint.

Stockholders Agreement by permitting his life insurance policy to lapse for non-payment of premium."

On November 9, 2015, the Deutsches filed a forty-two count counterclaim against Norman R. Gilden and Norman P. Gilden for money allegedly misappropriated from the Family Furniture Businesses and other companies.[3] Two counts in the counterclaim alleged that Norman R. Gilden and Norman P. Gilden violated CA §§ 2-512 and 2-513 by improperly denying the Deutsches' demand to inspect the financial books and records and requested, pursuant to CA §§ 3-411 and 3-516, that the court appoint a receiver to oversee the liquidation of G&D and other companies.

On December 9, 2015, the Gildens filed a Petition to Compel Arbitration of several counts of the Deutsches' counterclaim, including:

> (i) direct and derivative statutory claims brought by the Estate for the inspection of books and records of the companies that are parties to the Stockholders Agreement (Counts V-X); (ii) a claim for breach of the Stockholders Agreement or for accounting related to entities that are parties to the Stockholders Agreement (Counts XIII-XX); (iii) putative derivative claims for breaches of duty brought by the Estate on behalf of entities that are parties to the Stockholders Agreements (Counts XXIV, XXIX); (iv) a claim related to an insurance policy that insured the life of Frederick Deutsch (Count XXXIII); (v) and claims for the statutory appointment of a receiver over the entities that were parties to the Stockholder Agreement (Counts XXXIV-XXXIX).

[3] The Deutsches filed an amended counterclaim on April 8, 2016 that added two entities as counter-defendants and four counts against them, but did not change any of the counts relevant in this appeal.

The Gildens argued, among other things, that the request for inspection of financial books and records related to the management of the corporations under the Stockholders Agreement and that any request for a receiver fell within the Stockholders Agreement.[4] The Deutsches opposed the Petition to Compel Arbitration, arguing that the arbitration clause of the Stockholders Agreement does not govern the disputes raised in the counterclaim, and alternatively, that the Gildens' decision to file suit against them waived arbitration. The Gildens filed a reply to the opposition, which the Deutsches sought unsuccessfully to strike.

On March 22, 2016, the Deutsches filed a motion for appointment of a receiver for the Family Furniture Businesses and other related entities, all of which had been forfeited in October 2014. On April 11, 2016, the Gildens filed an opposition.

The circuit court heard arguments on the Petition to Compel Arbitration on April 14, 2016 and, after considering the language of the Stockholders Agreement, determined that the Mediation/Arbitration claims compelled arbitration of certain counts in the counterclaim, including the right to review books and records and to seek appointment of a receiver. The circuit court also found, as a factual matter, that the Gildens had not waived their right to arbitration. The circuit court entered an order on April 21, 2016 granting the

[4] Also on December 9, 2015, the Gildens filed an answer to one count of the counterclaim and a motion to dismiss all of the other counts. The motion to dismiss argued that the same counts raised in the Petition to Compel Arbitration should be dismissed for "fail[ing] to state claims upon which relief can be granted because the Stockholders Agreement . . . requires mediation and arbitration of any disputes arising out of the Shareholders Agreement." The Deutsches opposed the motion to dismiss and the Gildens filed a reply.

Petition to Compel Arbitration and staying the underlying case pending arbitration of multiple counts of the complaint and counterclaim, including counts regarding access to financial information and the appointment of a receiver. The Deutsches filed a timely appeal.

## II. DISCUSSION

The Deutsches raise two issues on appeal:[5] *first*, whether, under the Stockholders Agreement, the issues of access to financial information and appointment of a receiver are subject to arbitration, and *second*, whether the Gildens waived their right to arbitration by initiating this litigation. We hold that the access to financial books and records and receivership disputes are subject to arbitration under the arbitration provision of the Stockholders Agreement, and that the Gildens did not waive their right to arbitration.

[5] In their brief, the Deutsches phrase the Questions Presented as follows:

> I. Did the Circuit Court err in ruling as a matter of law that Counts V-X (Books and Records Counts) and XXXIV-XXXIX (Receivership Counts) of the Counter-Claim were within the scope of the narrowly crafted arbitration clause in the Stockholders Agreement?
>
> II. Did the Circuit Court err in concluding that Appellees' initiation of the underlying litigation, including claims directly covered by the Stockholders Agreement, and significant participation in the Circuit Court proceedings did not operate as a waiver of arbitration?

### A. Access To Books And Records and Receivership Are Subject To Arbitration Under The Stockholders Agreement.

The Maryland Uniform Arbitration Act, codified at §§ 3-201 through 3-234 of the Courts and Judicial Proceedings Article ("CJ") of the Maryland Code, "embodies a 'legislative policy' in favor of the enforcement of agreement[s] to arbitrate." *Harris v. Bridgford*, 153 Md. App. 193, 201 (2003) (quoting *Allstate Ins. Co. v. Stinebaugh*, 374 Md. 631, 641 (2003)). CJ § 3-202 confers jurisdiction on the circuit court to enforce arbitration agreements. Generally, CJ § 3-207 vests authority in the courts to determine whether an actual agreement to arbitrate exists. If it does, the court will order arbitration.

Here, the parties agree that an agreement to arbitrate existed, but they disagree on the scope of that agreement. The threshold issue, then, is whether the "language in the arbitration clause is clear, and [whether] it is plain that the dispute sought to be arbitrated falls within the scope of the arbitration clause." *Gold Coast Mall, Inc. v. Larmar Corp.*, 298 Md. 96, 104 (1983).

We consider two competing aims in determining the scope of an arbitration provision:

> A court must resolve any doubts concerning the scope of arbitrable issues in favor of arbitration, reflecting a strong public policy in favor of arbitration. In doing so, however, the contract nature of arbitration must be respected, so as not to require a party to submit a dispute to arbitration that it has not agreed to arbitrate.

*Nowak v. NAHB Research Ctr., Inc.*, 157 Md. App. 24, 35 (2004) (quoting *The Redemptorists v. Coulthard Servs., Inc.*, 145 Md. App. 116, 150–51 (2002)). The intent of the parties is key:

> In determining the scope of an arbitration clause, the court must find "reliable evidence from the language actually employed in the contract that the parties intended the disputed issue to be the subject of arbitration, the intent of the parties being the controlling factor." *Joseph F. Trionfo & Sons v. Ernest B. LaRosa & Sons, Inc.*, [38 Md. App. 598, 605–06 (1978)].
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> When the language of an arbitration clause is plain and the issue in dispute clearly falls within its scope, the court must compel arbitration. *Gold Coast Mall, Inc.[]*, [298 Md. at 104]; *Bel Pre Med. Ctr. v. Frederick Contractors, Inc.*, [21 Md. App. 307, 321 (1974)]. Conversely, if there is an arbitration agreement but the issue in dispute plainly falls outside its scope, the court must deny a motion to compel arbitration. *Gold Coast Mall, Inc.[]*, 298 Md. at 104[]; *Contract Constr., Inc. v. Power Tech. Ctr. Ltd. P[']sh[i]p.*, 100 Md. App. 173, 178[] (1994). When the parties have agreed to arbitrate, but the scope of the arbitration clause is ambiguous, so it is not evident whether their dispute is subject to arbitration, the arbitrator, not the court, must resolve the ambiguity:
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> > [T]he legislative policy in favor of the enforcement of agreements to arbitrate dictates that the question should be left to the decision of the arbitrator. Whether the party seeking arbitration is right or wrong is a question of contract application and interpretation for the arbitrator, not the court, ... and the court should not deprive the party seeking arbitration of the arbitrator's skilled judgment by attempting to resolve the ambiguity.
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> *Bel Pre Med. Ctr.[]*, 21 Md. App. at 321–22[ ](citations omitted). *See also Gold Coast Mall, Inc.[]*, 298 Md. at 107[]; *Contract Constr., Inc.*, 100 Md. App. at 178[].

*NRT Mid-Atlantic, Inc. v. Innovative Props., Inc.*, 144 Md. App. 263, 280–81 (2002), *disagreed with on other grounds*, *Addison v. Lochearn Nursing Home, LLC*, 411 Md. 251, 272 n.13 (2009). "Where there is a broad arbitration clause, calling for the arbitration of any and all disputes arising out of the contract, all issues are arbitrable unless expressly and specifically excluded." *Gold Coast Mall, Inc.*, 298 Md. at 104; *see also Balt. Cty. Fraternal Order of Police Lodge No. 4 v. Balt. Cty.*, 429 Md. 533, 544–45 (2012) (stating that the Court of Appeals has treated "broad arbitration clauses as encompassing any and all disputes not specifically excluded" (citing *NSC Contractors, Inc. v. Borders*, 317 Md. 394, 403 (1989))); *Crown Oil & Wax Co. of Del. v. Glen Constr. Co. of Va.*, 320 Md. 546, 558 (1990) (stating that "where the parties use a broad, all encompassing clause, it is presumed they intended all matters to be arbitrated" (citations omitted)). Arbitration clauses are read broadly, *see The Redemptorists*, 145 Md. App. at 149 (citing *NSC Contractors, Inc.*, 317 Md. at 403) (stating that the Court of Appeals "favor[s] a broad, rather than a narrow interpretation of an arbitration provision"), and "[t]he trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, which we review *de novo*," *Questar Homes of Avalon, LLC v. Pillar Constr., Inc.*, 388 Md. 675, 684 (2005) (citation omitted).

The Stockholders Agreement defines comprehensively the rights and responsibilities of fifty-fifty partners to a complicated set of business relationships. Indeed, it is difficult to imagine what disputes between these two factions *wouldn't* be covered by the Stockholders Agreement. So on its face, the operative language here—whether these

are disputes "between the parties *regarding this Agreement*" (emphasis added)—indicates that the parties intended to require alternative resolution of everything they dispute in the lives (and deaths) of their businesses.

Rather than addressing the connections between the disputes and the Agreement, the Deutsches attempt to distinguish their claims by characterizing the language as narrower than the arbitration clause language in other cases. In particular, they rely on *Contract Constr.*, where the court required arbitration for an agreement that provided that "[a]ny controversy or [c]laim arising out of or related to the [c]ontract, or the breach thereof, shall be settled by arbitration," 100 Md. App. at 182, and *Falls v. 1CI, Inc.*, where the court required arbitration for an agreement stating that "[a]ny dispute, claim or controversy arising out of or relating to this Agreement shall be settled by arbitration," 208 Md. App. 643, 649 (2012). This Court categorized both of these arbitration provisions as "broad." *Falls*, 208 Md. App. at 658; *Contract Constr.*, 100 Md. App. at 182; *cf. The Redemptorists*, 145 Md. App. at 151–52 (arbitration clause stating that "[i]n the event [the appellee] disputes the cause associated with any such [employment] discharge, then the parties agree to submit such dispute to binding arbitration" is narrow and arbitration could not be compelled for all of the party's claims). But although disputes "regarding" an agreement perhaps—but not obviously—could be read to cover a narrower swath of disputes than those "related to and arising out of" an agreement, any difference is immaterial here.

We have no doubt that these disputes over production of an entity's books and records and the appointment of a receiver over an entity the parties own (pursuant to the Stockholders Agreement) are disputes "regarding" the agreement. Although the claims are statutory in nature, the Deutches' rights to assert them flow from alleged failures to fulfill management obligations contained in the Stockholders Agreement. *See Falls*, 208 Md. App. at 654 (acknowledging that "an agreement to arbitrate can include statutory claims"). The Stockholder Agreement details the management of G&D and its subsidiaries, and in the process defines the relationships and division of labor between Frederick and Norman R. Gilden. *See Gold Coast Mall, Inc.*, 298 Md. at 108 ("[W]hen interpreting an arbitration clause, as when interpreting any contract provision, the agreement must be considered as a whole." (citations omitted)).

The right to access books and records is not specified in the Stockholders Agreement, but the statutory right to inspect arises from the Deutsches' status as stockholders, and Norman R. Gilden and Norman P. Gilden's failure to provide that information relates to their management of the Family Furniture Businesses. Similarly, the basis for receivership is that each of the entities at issue forfeited their respective charters. Although receivership is not a specified remedy for the forfeiture of G&D or any of its subsidiaries,[6] the Deutsches seek the appointment of a receiver to account for, recover, and

[6] The Stockholders Agreement does make mention of a receiver, which occurs under the "Determination of Purchase Price," and states that "[i]n the event of a purchase of shares by reason of a levy on the shares or a transfer to a receiver . . . , the transferee shall select the appraiser for the selling party."

distribute to them the profits and dividends allegedly due to them under the Stockholders Agreement.[7] We agree with the circuit court that both of these counts, and the relief the Deutsches seek in them, relate to the management of the Family Furniture Businesses and other entities and, therefore, must be resolved pursuant to the Mediation/Arbitration clause of the Stockholders Agreement.

**B. The Gildens Did Not Waive Arbitration.**

*Second*, the Deutches contend that by filing suit, the Gildens waived their right to compel arbitration of the claims in the counterclaim. *See, e.g.*, *Gold Coast Mall, Inc.*, 298 Md. at 108 (proceeding to determine whether a party waived the right to arbitrate after the court determined that the dispute was arbitrable). We disagree.

A party can waive the right to compel arbitration. *Harris*, 153 Md. App. at 204 (quoting *Charles J. Frank, Inc. v. Associated Jewish Charities, Inc.*, 294 Md. 443, 448 (1982)). But "[a] finding of such a waiver is highly factual and a decision by the circuit

[7] It is not obvious that an arbitrator would have the same authority to appoint a receiver that a court does, and neither side addressed this issue in the circuit court or here. *See Goldstein v. 91st St. Joint Venture*, 131 Md. App. 546, 573 (2000) ("As a general rule, the appointment of a receiver is a matter resting within the sound discretion of the equity court." (quoting *Lust v. Kolbe*, 31 Md. App. 483, 489–90 (1976))); *see also Brendsel v. Winchester Constr. Co.*, 392 Md. 601, 621 n.1 (2006) ("In that case, recognizing that certain remedies, *i.e.* . . . receiverships, etc., are available only in a court proceeding . . . ." (citing to *Walther v. Sovereign Bank*, 386 Md. 412 (2005))) (Bell, C.J., dissenting). But receivership is a remedy, so even if we assume that an arbitrator would lack the authority to appoint a receiver, there is no reason an arbitrator couldn't resolve the disputes and make the findings bearing on whether a party is entitled to place an entity in receivership, and thus set the stage for a petition for receivership in the circuit court. And separating the "receivership" claim from the others in this context would result in arbitration on nearly everything in parallel with circuit court litigation on receivership, an outcome that makes no sense and runs contrary to the overarching policy in favor of arbitration.

court premised on those facts will not be disturbed on appeal unless it is clearly erroneous." *Abramson v. Wildman*, 184 Md. App. 189, 200 (2009) (citing *Brendsel v. Winchester Constr. Co.*, 162 Md. App. 558, 574 (2005)). Courts consider a number of factors when analyzing possible waivers, all focused on the extent and purpose of a party's participation in litigation:

> Participation in a judicial proceeding that results in a final judgment may, in certain circumstances, waive the right to arbitrate. Some "limited participation" in judicial proceedings does not constitute a waiver. Whether an answer directed to the merits is filed is a factor. Participation in "extensive" discovery is a factor in determining waiver. However, also relevant is whether a party utilized discovery devices that would not have been available in arbitration. Delay in attempting to compel arbitration, by itself, may not be conclusive, although coupled with prejudice to the other party can support a finding of waiver. The filing of suit can be a "significant act in a waiver calculus, and in some instances it perhaps could be depositive." Nevertheless, if there is a legitimate reason for participating in litigation, it will not be deemed a waiver.

*Abramson*, 184 Md. App. at 200–01 (internal citations omitted).

We see no clear error in the circuit court's finding that the Gildens did not waive their right to compel arbitration. Although the Gildens initiated this lawsuit with their complaint, their complaint acknowledged the arbitration clause in the Stockholders Agreement and sought to invoke it for the claims subject to arbitration. And their claims never proceeded beyond the Deutsches' answer, motion to dismiss, and counterclaim because the Gildens responded by answering, moving to dismiss, and seeking to compel

arbitration.[8] The Gildens didn't delay in requesting arbitration or demonstrate a clear and unequivocal intent to repudiate their right to arbitration—to the contrary, their complaint manifested an intention to abide by it. The Gildens also didn't propound any discovery, but responded to the Deutsches' requests and exchanged expert witness lists. *Cf. Abramson*, 184 Md. App. at 201 (holding that a party waived his right to arbitration where, among other things, "more than a month before petitioning to compel arbitration, [party seeking arbitration] served on [the other party] interrogatories and a Request for Production of Documents"); *Commonwealth Equity Servs., Inc. v. Messick*, 152 Md. App. 381, 389–90 (2003) (determining that a party actively litigated a case where, among other things, the party answered a complaint and actively participated in "extensive discovery" in a consolidated case and served interrogatories and a request for the production of documents in the present case). And nothing else about the fairly limited circuit court proceedings manifested an intent on the Gildens' part to waive arbitration,[9] nor have the Deutches contended that the Gildens' actions prejudiced them or that they would suffer prejudice by proceeding to arbitration now. Viewed in the context of this comprehensive agreement

[8] CJ § 3-207(a) provides that "[i]f a party to an arbitration agreement . . . refuses to arbitrate, the other party may file a petition with a court to order arbitration."

[9] Furthermore, the Stockholders Agreement specifies that "[n]o waiver or modification of any of the provisions of this Agreement or of any of the rights or remedies of the parties hereto shall be valid unless such change is in writing, signed by the party to be charged therewith." The Deutsches do not contend, nor could they, that the Gildens executed a written waiver of their right to arbitrate.

and wide-ranging set of disputes, we see no error in the circuit court's finding that the Gildens didn't waive arbitration.

**JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. APPELANT TO PAY COSTS.**