## MEMORANDUM DECISION





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# IN THE COURT OF APPEALS OF INDIANA

John Fralish,

*Appellant-Defendant,*

v.

Discover Bank c/o Discover Products Inc.,

*Appellee-Plaintiff*

May 30, 2023

Court of Appeals Case No. 23A-CC-211

Appeal from the St. Joseph Superior Court

The Honorable Cristal C. Brisco, Judge

The Honorable Michael S. Bergerson, Senior Judge

Trial Court Cause No. 71D04-2210-CC-2508

**Memorandum Decision by Judge Mathias**
Judges Vaidik and Pyle concur.

**Mathias, Judge.**

[1] John Fralish appeals the St. Joseph Superior Court's denial of his motion to compel arbitration.[1] On appeal, Fralish raises two issues for our review, which we consolidate and restate as whether the trial court erred when it denied his motion. We reverse and remand with instructions for the court to grant Fralish's motion to compel arbitration.

## Facts and Procedural History

[2] On October 4, 2022, Discover Bank ("Discover") filed its complaint against Fralish. In its complaint, Discover alleged that Fralish had breached his Credit Card Account Agreement ("the Agreement") with Discover by failing to pay back $46,550.97 in credit card debt.

[3] Discover attached the Agreement to its complaint. The Agreement stated in relevant part as follows:

> **Agreement to Arbitrate**. In the event of a dispute between you and us arising out of or relating to this Account . . . , either you or we may choose to resolve the Claim by binding arbitration . . . instead of in court. Any Claim . . . may be resolved by binding arbitration if either side requests it. THIS MEANS IF EITHER YOU OR WE CHOOSE ARBITRATION, NEITHER PARTY WILL HAVE THE RIGHT TO LITIGATE SUCH CLAIM IN COURT . . . .

[1] Discover does not dispute that this interlocutory appeal is properly before us under Indiana Appellate Rule 14(D) and Indiana Code section 34-57-2-19(a)(1) (2022).

> Even if all parties have opted to litigate a Claim in court, you or we may elect arbitration with respect to any Claim made by a new party or any new Claims later asserted in that lawsuit. . . .

Appellant's App. Vol. 2, p. 8 (bold and capitalization in original) ("the arbitration clause").[2]

[4] Discover attempted to serve its complaint on Fralish through the St. Joseph County Sheriff's Department. On November 8, a deputy went to Fralish's address to serve the complaint and summons, but Fralish apparently was not at the residence. Instead, a "[f]emale at [the r]esidence [r]efused [the] papers," and Fralish was "[n]ot served." *Id.* at 32. Following that failed attempt at service, the deputy sent the summons, but not the complaint, via regular mail to Fralish's residential address. *Id.* at 3, 33.

[5] Fralish received the summons without the complaint on November 14. The next day, he filed a "Notice to the Court of Improper Service and Filing of False Affidavit." *Id.* at 33 ("the Notice"). In the Notice, Fralish stated that he had received the summons, but "there is no copy of any complaint in the mailing, and as of this date (11/15/22) no copy of the complaint has been received." *Id.* Fralish further noted that Indiana Trial Rule 4(E) requires the summons and complaint to be served together absent service by publication or an order to do otherwise from the court. And Fralish noted that Trial Rule

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[2] The Agreement also stated that a challenge to the "validity or enforceability of this arbitration agreement" is reserved for a court to decide. Appellant's App. Vol. 2, p. 8.

4.1(B) directs that service of the summons and complaint shall be followed by mailing them together via first class mail, but only after a copy of both documents has either been left at the person's residence or with his agent, neither of which happened here. Fralish then requested "that the court take whatever action it deems just and proper" based on the apparently incorrect service of process. *Id.* at 34.

[6] After no response by Discover and no action by the court on the Notice, on November 29, Fralish filed his motion to compel arbitration. In his motion, Fralish stated that, while he "became aware of this lawsuit on 11/14/22 after receiving a summons" via regular mail, he still "has not been served a copy of the complaint . . . or received a copy of the complaint." *Id.* at 39. However, Fralish had read the complaint, and he sought to compel arbitration in accordance with the arbitration clause.

[7] Discover responded to Fralish's motion to compel. In its response, Discover asserted that the arbitration clause did not apply once Discover had filed a complaint in court. In the alternative, Discover asserted that Fralish had waived his right to seek arbitration because he did not demand it contemporaneously with his filing of the Notice. Thereafter, the trial court summarily denied Fralish's motion to compel arbitration without a hearing. This interlocutory appeal ensued.[3]

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[3] The trial court has stayed further proceedings on Discover's complaint pending this appeal.

## Discussion and Decision

[8] Fralish appeals the trial court's denial of his motion to compel arbitration. As our Supreme Court has made clear:

> Indiana has a strong policy favoring arbitration agreements. *MPACT Constr. Grp., LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901, 905 (Ind. 2004) (citing *Ind. CPA Soc'y, Inc. v. GoMembers, Inc.*, 777 N.E.2d 747, 750 (Ind. Ct. App. 2002)). But our policy favoring arbitration comes with a key qualification. A party cannot be required to submit to arbitration unless it has agreed to do so. *Id.* at 906 (citing *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)). Whether parties agreed to arbitrate a dispute is a matter of contract interpretation. *Ibid.* (citing *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000)). "The goal of contract interpretation is to ascertain and give effect to the parties' intent as reasonably manifested by the language of the agreement." *Reuille v. E.E. Brandenberger Constr., Inc.*, 888 N.E.2d 770, 771 (Ind. 2008) (citing *First Fed. Sav. Bank of Ind. v. Key Mkts., Inc.*, 559 N.E.2d 600, 603 (Ind. 1990)). "[I]f the language is clear and unambiguous, it must be given its plain and ordinary meaning." *Ibid.* (brackets in original) (quoting *Cabanaw v. Cabanaw*, 648 N.E.2d 694, 697 (Ind. Ct. App. 1995)).
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> We review questions of contract interpretation de novo. *Lake Imaging, LLC v. Franciscan All., Inc.*, 182 N.E.3d 203, 206 (Ind. 2022) (citing *Schwartz v. Heeter*, 994 N.E.2d 1102, 1105 (Ind. 2013)). And we do not defer to a trial court's decision on a motion to compel arbitration but likewise review it anew. *Doe v. Carmel Operator, LLC*, 160 N.E.3d 518, 521 (Ind. 2021) (citing *Med. Realty Assocs., LLC v. D.A. Dodd, Inc.*, 928 N.E.2d 871, 874 (Ind. Ct. App. 2010)).

*Decker v. Star Fin. Grp., Inc.*, 204 N.E.3d 918, 920-21 (Ind. 2023).

[9] We begin our analysis by reviewing the language of the arbitration clause. Again, that clause states:

> In the event of a dispute between you and us arising out of or relating to this Account . . . , either you or we may choose to resolve the Claim by binding arbitration . . . instead of in court. Any Claim . . . may be resolved by binding arbitration if either side requests it. THIS MEANS IF EITHER YOU OR WE CHOOSE ARBITRATION, NEITHER PARTY WILL HAVE THE RIGHT TO LITIGATE SUCH CLAIM IN COURT . . . .

Appellant's App. Vol. 2, p. 8. Discover does not dispute that its complaint against Fralish is a "Claim" under the Agreement.

[10] We conclude that the arbitration clause unambiguously permits either Discover or Fralish to compel the instant dispute to be resolved by arbitration. The clause's plain terms state that the parties would have the Claim resolved by arbitration if "either side requests it." *Id.* The clause does not identify a timeframe for any such request. By the plain terms of the arbitration clause, Fralish's demand to have the Claim resolved by arbitration was a request that Discover had no right to reject.

[11] Still, Discover asserts the arbitration clause does not apply "if a lawsuit has already been initiated." Appellee's Br. at 6. According to Discover, the following provision of the arbitration clause demonstrates as much:

> Even if all parties have opted to litigate a Claim in court, you or we may elect arbitration with respect to any Claim made by a new party or any new Claims later asserted in that lawsuit. . . .

Appellant's App. Vol. 2, p. 8.

[12] We reject Discover's argument. The language relied on by Discover requires, first, that "all parties have opted to litigate a Claim in court," which has not happened here. *Id.* The language also requires a "new party" or a "new claim" to arise, which also has not happened here. *Id.*

[13] Discover also asserts that the arbitration clause's language that either side "may choose" to resolve a claim by arbitration "makes it clear that either party is permitted to resolve a Claim . . . in court at its discretion." Appellee's Br. at 7. This argument is also a nonstarter. Again, the plain language of the arbitration clause is that either side may choose to compel arbitration; the logical corollary of that language is that *both* sides must agree to litigate in court, which Fralish has not done.

[14] Discover asserts a third theory for not applying the arbitration clause after a complaint has been filed. Namely, Discover states that "[i]t would be illogical to conclude that[,] once Discover chose to litigate this matter in Court, . . . Fralish could unilaterally decide that Discover no longer had that right by electing arbitration." *Id.* We do not agree. Rather, it would be illogical not to hold Discover to the plain terms of its Agreement. Indeed, Discover's argument here is that *Discover* has a unilateral right to decide to litigate its Claim in court *despite* the language of the arbitration clause. We reject Discover's argument accordingly.

[15] Finally, Discover asserts that, notwithstanding the language of the arbitration clause, Fralish waived his right to compel arbitration when he did not file his motion contemporaneously with the Notice. Discover's argument is contrary to Indiana law. As we have explained:

> Although a written agreement to submit a dispute to arbitration is valid and enforceable, the right to require such arbitration may be waived by the parties. *Shahan v. Brinegar*, 181 Ind. App. 39, 44-45, 390 N.E.2d 1036, 1041 (1979). Such a waiver need not be in express terms, but may be implied by the acts, omissions or conduct of the parties. *McNall v. Farmers Ins. Group*, 181 Ind. App. 501, 506, 392 N.E.2d 520, 523 (1979). Waiver is a question of fact under the circumstances of each case. *Kendrick Mem'l Hosp., Inc. v. Totten*, 408 N.E.2d 130, 134 (Ind. Ct. App. 1980). The [plaintiffs] argue that [the defendant's] delay in seeking arbitration of this matter resulted in a waiver of the right to arbitrate the dispute.
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> The [plaintiffs] rely on *St. Mary's Medical Ctr. v. Disco Alum. Products*, 969 F.2d 585 (7th Cir. 1992), in support of their waiver argument. St. Mary's filed a complaint against Disco in July 1990. Disco did not seek to have the dispute submitted to arbitration until May 1991. In the ten-month interim, Disco had filed a motion to dismiss or for summary judgment, and had participated in the litigation by way of discovery and attending a status conference. The court held that the delay, standing alone, did not result in waiver, because "[a] party needs time to assess its options. Weighing options is not normally inconsistent with the exercise of any of those options, and we can envision situations where a party may properly take months before deciding whether to litigate or demand arbitration." *Id.* at 589. However, the court held that Disco's failure to raise the issue of arbitration during that ten-month delay, coupled with its

> participation in the litigation, had resulted in the waiver of Disco's right to seek arbitration. *Id.*
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> Here, the [plaintiffs] . . . filed their complaint on October 30, 1998. Forty-seven days later, [the defendant] contacted the [plaintiffs] and requested that the matter be submitted to arbitration. The [plaintiffs] did not agree to the arbitration, and [the defendant] filed an application for arbitration with the trial court on December 28, 1998. In the interim, [the defendant] had not participated in the litigation, except for filing two motions for enlargement of time. No responsive pleadings were filed nor discovery conducted. Thus, we are presented with no acts, omissions or conduct on the part of [the defendant] that imply a waiver of the right to arbitrate. Based on this evidence, we hold that [the defendant] did not waive its right to enforce the arbitration clause of the Agreement. The trial court erred by denying [the defendant's] application for arbitration.

*Mid-America Surgery Ctr., LLC v. Schooler*, 719 N.E.2d 1267, 1270-71 (Ind. Ct. App. 1999).

[16] Nothing Fralish did on this record can be construed as an implied waiver of his right to compel arbitration. Indeed, the facts and circumstances for granting Fralish's motion to compel arbitration are even more significant than those in *Mid-America* were. As in that case, here "[n]o responsive pleadings [have been] filed nor discovery conducted." *Id.* Neither has Fralish "participated in the litigation." *Id.* Unlike the defendant's two requests for enlargements of time in *Mid-America*, the Notice that Fralish filed did not seek any affirmative action from the trial court but, rather, was merely a statement to inform the court and Discover that he had yet to be properly served with Discover's complaint. Two

weeks after he filed the Notice—and still before Discover had formally served him with its complaint—Fralish filed his motion to compel arbitration. Fralish's "delay" of two weeks was far more expedient than the fifty-nine-day delay we permitted in *Mid-America*. Accordingly, Discover's attempt to avoid the arbitration clause and Fralish's motion to compel on a theory of implied waiver is not supported by the facts or the law.

[17] For all of the above-stated reasons, we reverse the trial court's denial of Fralish's motion to compel arbitration, and we remand with instructions that the court grant his motion.

[18] Reversed and remanded with instructions.

Vaidik, J., and Pyle, J., concur.