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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

April 3, 2024

To:

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Circuit Court Judge
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Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2023AP1394-FT

Christopher Fetzer v. U.S. Bancorp Investments, Inc.
(L.C. #2021CV401)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Christopher Fetzer appeals a circuit court order denying his request to arbitrate. The circuit court found that Fetzer waived his right to arbitrate. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

On March 4, 2021, Fetzer filed suit against U.S. Bancorp Investments, Inc. (“USBI”), generally alleging that USBI fraudulently induced him to accept employment with USBI. During the course of litigation, the parties briefed procedural motions, served multiple written discovery requests, took the depositions of six witnesses, including Fetzer and each party’s retained expert, and attempted mediation. Two years after litigation started, in March 2023, Fetzer moved for partial summary judgment and USBI moved for summary judgment.

In April 2023, Fetzer moved for a stay of his lawsuit and referral to arbitration. He explained the Financial Industry Regulatory Authority (“FINRA”) had just served him with USBI’s Statement of Claim demanding arbitration on the allegation that Fetzer failed to repay his sign-on bonus.

USBI opposed Fetzer’s application for a stay and referral to arbitration. It argued in part that Fetzer had waived his right to arbitrate his claims by bringing suit against USBI and engaging in extensive litigation for over two years.

The circuit court denied Fetzer’s application for a stay and referral to arbitration. The court concluded Fetzer “waived [his] right to arbitration under federal law as he has not done ‘all [he] could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration’ *Cabinetree of Wis. v. Kraftmaid Cabinetry*, 50 F.3d 388, 391 (7th Cir. 1995).” Fetzer appeals.²

² After briefing in this case concluded, USBI filed a notice of supplemental authority. Specifically, USBI advised this court that the circuit court resolved the underlying lawsuit on December 27, 2023 by denying Fetzer’s motion for summary judgment, granting USBI’s motion for summary judgment, and dismissing with prejudice Fetzer’s causes of action against USBI. However, the circuit

(continued)

Fetzer’s request to arbitrate is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (“FAA”). *See also Nevill v. Johnson Controls Int’l PLC*, 364 F. Supp. 3d 932, 952-53 (E.D. Wis. 2019) (“Wisconsin law prohibits outright enforcing arbitration agreements in employment disputes, which means that it is ‘displaced by the FAA.’” (citation omitted)). Under federal law, factual findings related to whether a right to arbitrate has been waived “are reviewed for clear error but ‘the legal question of whether the conduct amounts to waiver is reviewed *de novo*.’” *Brickstructures, Inc. v. Coaster Dynamix, Inc.*, 952 F.3d 887, 891 (7th Cir. 2020) (citation omitted). In evaluating waiver, courts consider whether the party requesting arbitration “d[id] all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration.” *Cabinetree*, 50 F.3d at 391. “[A]n election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate.” *Id.* at 390.

Here, after Fetzer commenced the underlying action, the parties engaged in litigation for two years. They briefed and argued procedural motions. They retained experts. They engaged in extensive written discovery and deposed six witnesses, including both experts. The parties attempted mediation. The parties then each filed a summary judgment motion. *See St. Mary’s Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 589 (7th Cir. 1992) (“Submitting a case to the district court for decision is not consistent with a desire to arbitrate.”). Only at the point that summary judgment motions were filed did Fetzer move to arbitrate. We

court’s resolution of the underlying case does not implicate our review of the circuit court’s denial of Fetzer’s request to arbitrate.

conclude that Fetzer's litigation conduct in the underlying case amounted to waiver of Fetzer's arbitration right.

Fetzer argues the FINRA arbitration submission agreement regarding USBI's sign-on-bonus-repayment claim against Fetzer constitutes an agreement to arbitrate that should relieve his waiver. We disagree. Regardless of whether that agreement applies to this dispute, his actions constitute waiver of arbitration in this litigation.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals