

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:)	Chapter 11
)	
CYCH, INC., f/k/a)	Case Nos. 01-622 (MFW)
CyberCash, Inc.,)	through 01-624 (MFW)
)	
Debtors.)	(Jointly Administered Under
_____)	Case No. 01-622 (MFW))
)	
CYCH, INC., f/k/a)	
CyberCash, Inc.,)	
)	
Plaintiff,)	
)	Adversary No. 01-8856 (MFW)
v.)	
)	
EVS HOLDING COMPANY, INC.,)	
)	
Defendant.)	

MEMORANDUM OPINION¹

Before the Court is the Motion filed by defendant EVS Holding Company ("EVS") to Bar CYCH Inc.'s ("CYCH") Demand for AAA Arbitration as untimely ("the Motion"). For the reasons set forth below, the Motion will be granted.

I. BACKGROUND

CYCH filed a voluntary Chapter 11 petition on March 2, 2001. On November 26, 2001, CYCH filed an adversary proceeding against EVS, asserting a breach of contract claim. On April 25, 2002, EVS filed its Answer to the Adversary Complaint. The Answer

¹ This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

raised several affirmative defenses, including that this Court lacked jurisdiction by virtue of an arbitration clause contained in the underlying agreement. Nevertheless, the parties proceeded with discovery pursuant to a Scheduling Order submitted by the parties and entered by the Court on June 28, 2002. The parties engaged in motion practice. Under the Scheduling Order, discovery concluded on October 18, 2002. On that date, CYCH notified EVS of its intention to seek arbitration and on November 1, 2002, CYCH requested AAA arbitration. EVS objected to the arbitration on November 20, 2002, and filed a summary judgment motion in this proceeding on November 21, 2002.² Asserting that the arbitration demand is untimely and that CYCH's conduct has constituted a waiver of its right to arbitrate, EVS filed its Motion to bar CYCH from proceeding with arbitration on December 2, 2002.

II. DISCUSSION

The issue before us is whether CYCH has waived its right to arbitrate. The Supreme Court has found the Federal Arbitration Act to be a "congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).

² Pursuant to the Scheduling Order, dispositive motions were due by November 22, 2002.

Consistent with that view, the Third Circuit has held that "waiver 'is not to be lightly inferred' and waiver will normally be found only 'where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery.'" PaineWebber Inc. v. Faragalli, 61 F.3d 1063, 1068-69 (3d Cir. 1995) (citations omitted).

"[P]rejudice is the touchstone for determining whether the right to arbitrate has been waived." Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 925 (3d Cir. 1992).

In order to determine whether prejudice exists for a finding of waiver a court should consider the following factors: the timeliness of the motion to arbitrate; the degree to which the moving party has contested the merits of the opponent's claim; whether the moving party has informed its adversary of the intention to seek arbitration; the extent of the moving party's prior non-merits motion practice; the moving party's assent to pretrial orders; and the extent to which both parties have engaged in pre-trial discovery.

Charter Behavioral Health System, LLC v. Managed Health Network, Inc. (In re Charter Behavioral Health Systems), 277 B.R. 54, 58 (Bankr. D. Del. 2002).

In this case, we conclude that CYCH's notice of arbitration is not timely. It was CYCH itself which initiated this adversary proceeding, rather than proceeding to arbitration. Further, the parties have already undertaken full discovery and a dispositive motion has been filed. In short, the parties are (or should be)

ready for immediate trial. CYCH delayed seeking arbitration until seven months after EVS raised its affirmative defense and on the court-ordered discovery deadline. CYCH also initiated the only non-merits motion practice in this adversary proceeding (filing a Motion to Strike Or, Alternatively, For More Definite Statement of Counterclaim In Defendant's Answer to Verified Complaint). Further, CYCH assented to the pre-trial scheduling order. Finally, as noted above, discovery in this matter has already been completed.

EVS asserts it has suffered prejudice in two ways. First, it has devoted time, effort, and money to defending this action and preparing for trial. Second, CYCH has benefitted from conducting discovery not available in arbitration. EVS also asserts that CYCH timed its arbitration demand so that EVS had to file its Summary Judgment Motion in order to preserve its rights and that CYCH has benefitted from its knowledge of EVS' arguments, as contained in the Summary Judgment Motion. We agree with EVS and conclude that it has been sufficiently prejudiced to conclude that CYCH has waived its right to arbitrate.

CYCH argues that it would be inequitable for us to bar the arbitration as it was EVS that initially raised the issue by pleading it as an affirmative defense. Specifically, CYCH asserts that it initiated arbitration proceedings based on its concern that EVS would insist on arbitration after the parties

had expended time and expenses proceeding before this Court. We find CYCH's argument to be without merit. Were it truly concerned with the possibility of incurring costs and wasting time proceeding in this forum only to later be sent to arbitration, it would have initiated arbitration proceedings prior to commencing discovery and even prior to filing this adversary. As CYCH's decision to initiate arbitration proceedings coincided with the discovery end date, we do not accept CYCH's assertion that it was done to prevent the expenses associated with litigation in this forum. We conclude that the decision to seek arbitration was not made in a timely fashion and CYCH has therefore waived its right to arbitrate.

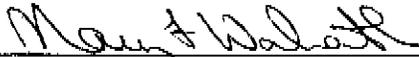
III. CONCLUSION

For the foregoing reasons, EVS' Motion to Bar CYCH's Demand for AAA Arbitration will be granted.

An appropriate Order is attached.

BY THE COURT:

Dated: February 24, 2003



Mary F. Walrath
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

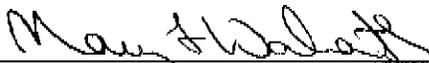
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Inc.,)
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Plaintiff,)
) Adversary No. 01-8856 (MFW)
v.)
)
EVS HOLDING COMPANY, INC.,)
)
)
Defendant.)

O R D E R

AND NOW, this **24TH** day of **FEBRUARY, 2003**, upon consideration of the Defendant's Motion to Bar CYCH's Untimely Demand for AAA Arbitration, it is hereby

ORDERED that for the reasons stated in the accompanying Memorandum Opinion, the Motion is hereby **GRANTED**.

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

cc: See attached

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