

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

M & M 8 MILE 13109 ENTERTAINMENT LLC,  
a Michigan Limited Liability Company,  
M & M 8 MILE 13109 ENTERTAINMENT  
PROPERTIES LLC, a Michigan Limited Liability  
Company, 20516 WARD STREET PROPERTIES  
LLC, a Michigan limited Liability Company and  
MELISSA HASHEM, an individual,

Plaintiffs,

vs.

Case No. 2014-225-CK

JOYCE A. TROTTIER, an individual,  
TROTTIER, INC., a Michigan Corporation,  
CHARLENE BERTHIAUME SCHUPBACH,  
an individual, and MICHAEL BERTHIAUME,  
an individual, jointly and severally,

Defendants.

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OPINION AND ORDER

Defendants have filed motion to compel arbitration. Plaintiffs have responded and request that the motion be denied.

*Factual and Procedural History*

Defendants are the owners of a bar establishment and two parcels of real property associated with the bar. Defendants hold a Class C license (“the License”) issued by the Michigan Liquor Control Commission (“the Commission”). The bar and each parcel of property are subject to separate purchase agreements, (collectively, “the Purchase Agreements”), pursuant to which Plaintiffs agreed to purchase, and Defendants agree to sell the bar and parcels of real property. The Purchase Agreement contains, *inter alia*, an arbitration provision. Defendants now seek to invoke the arbitration provision and compel arbitration.

### *Arguments and Analysis*

In their motion, Defendants contend that Plaintiffs improperly filed this matter with this Court as the Purchase Agreements require this matter be submitted arbitration. While they appear to concede that the Purchase Agreements contain arbitration provisions, Plaintiffs contend that Defendants have waived their right to compel arbitration.

“Waiver of a contractual right to arbitrate is disfavored.” *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). The party contending that the right to arbitration has been waived “bears a heavy burden of proof and must demonstrate” that there was: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with the right to arbitrate; (3) and prejudice resulting from the inconsistent acts. *Id.* “A waiver may be express or it may be implied when a party actively participates in a litigation or acts in a manner inconsistent with its right to proceed to arbitration.” *Capital Mortg Corp v Coopers & Lybrand*, 142 Mich App 531, 535; 369 NW2d 922 (1985). Whether one has waived his right to arbitration depends on the particular facts and circumstances of each case. *Madison, supra* at 588.

In this case, Defendants appear to concede that they executed the agreement and that the agreement contained the arbitration provision. Accordingly, the first element is met. With respect to the second element, Defendants failed to raise this issue for over 10 months after this matter was initiated. Defendants filed numerous pleadings, all of which do not mention a right to arbitrate this matter including: an answer and affirmative defenses in which they failed to raise the issue, a motion for change of venue seeking to have this matter transferred to Wayne County Circuit Court, a response to Plaintiff’s motion for summary disposition and a cross motion for summary disposition. Indeed, it was not until after the Court reached the merits of this matter and ruled against them that they mentioned the arbitration provision and sought to invoke their

right. Given Defendants' extensive activities in connection with matter, particularly their motion for change of venue to Wayne Circuit Court, the Court is convinced that Defendants acted inconsistent with their right to arbitrate and hereby holds that the second element is met.

Finally, the Court is satisfied that Plaintiffs would be prejudiced if Defendants are permitted to invoke their right to arbitrate at this stage of the case. This case has been pending for almost a year and has been the subject of various motions. Indeed, one of the motions was a dispositive motion which resulted in Plaintiff's prevailing on the merits of their claims. If the Court were to allow Defendants to now compel arbitration it would have the effect of allowing Defendants a second bite at a defense, which would certainly prejudice Plaintiffs. For these reasons the Court is satisfied that the third element of waiver is satisfied. Accordingly, the Court is convinced that Defendants have waived their right to arbitrate this matter.

Defendants also contend that Plaintiff misled this Court by filing their complaint with this Court rather than sending it to arbitration. It is undisputed that a party may waive their right to arbitration by acting inconsistent with that right. Accordingly, it should also be undisputed that a party may waive their right to arbitration by filing their case with an appropriate court. In this case, it can be inferred that Plaintiffs elected to waive their right to arbitrate this matter by filing their complaint. While Defendants retained the right to compel arbitration they failed to do so and, for the reasons discussed above, waived their right to do so. For these reasons, the Court is satisfied that Plaintiffs did not "mislead" the Court by filing their complaint, but rather elected to waive their right to arbitration by doing so.

#### *Conclusion*

For the reasons set forth above, Defendants' motion to compel arbitration is DENIED. Pursuant to MCR 2.602(A)(3), this matter remains CLOSED.

IT IS SO ORDERED.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: January 9, 2015

JCF/sr

Cc: *via e-mail only*

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