Filed 2/21/13 Wolf v. Loring Ward International CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| CHRISTINE WOLF,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LORING WARD INT'L, LTD. et al.,<br><br>Defendants and Appellants. | B238428<br><br>(Los Angeles County<br>Super. Ct. No. BC445310) |

APPEAL from an order of the Superior Court of Los Angeles County, Holly Kendig, Judge. Affirmed.

Kinsella Weitzman Iser Kump & Aldisert, Dale F. Kinsella, Patricia A. Millett, Kristen L. Spanier for Defendants and Appellants Loring Ward Int'l, Ltd, SNCB002, Inc., Assante Corporation and Martin Weinberg.

Buchalter Nemer, Michael L. Meeks and Robert M. Dato for Defendant and Appellant Robert Philpott.

McKool Smith Hennigan, J. Michael Hennigan, Allison K. Chock; Gersh Derby and Paul B. Derby for Plaintiff and Respondent.

Defendants and appellants Martin Weinberg (Weinberg), Robert Philpott (Philpott), Loring Ward International, Ltd. (LW International), SNCB002, Inc. (SNCB002), and Assante Corporation (Assante) (collectively, defendants) appeal an order denying their motions to compel arbitration of a lawsuit filed by plaintiff and respondent Christine Wolf (Christine). [1]

The trial court denied the motions to compel arbitration on the ground "there has been a waiver by moving parties of their right to compel arbitration, due to the six-year delay in requesting arbitration and the extensive, substantive litigation that has proceeded on these very same facts in federal and state court for the past six years."

The "question of waiver generally is one of fact. [Citation.] As such, the trier of fact's finding of waiver, if supported by substantial evidence, is binding on this court. [Citation.] ' "The appellate court may not reverse the trial court's finding of waiver unless the record as a matter of law compels finding nonwaiver." [Citation.]' [Citation.]" (*Roberts v. El Cajon Motors, Inc*. (2011) 200 Cal.App.4th 832, 841 (*Roberts*).)

We conclude the trial court's finding of waiver is supported by substantial evidence. Accordingly, the order denying the motions to compel arbitration is affirmed.

## FACTUAL AND PROCEDURAL BACKGROUND[2]

1. *Parties and relationships.*

In 1994, Philpott began acting as business manager and financial advisor to Christine and her then husband, Dick Wolf, creator of the *Law and Order* television franchise. In 1998, Philpott's firm merged with Assante, a Canadian corporation chaired by Weinberg. LW International and SNCB002 allegedly are agents or affiliates of Assante.

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[1] We refer to respondent by her first name for purposes of clarity. (*In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 109, fn. 1.)

[2] The facts are gleaned from the pleadings.

2. *Defendants' services to Christine in connection with her marital settlement agreement (MSA).*

In 2002, the Wolfs separated. Weinberg represented to Christine that he and the Assante entities already had assisted another high net worth couple's amicable division of marital assets, thereby avoiding the massive expense, publicity and acrimony of divorce litigation. Christine authorized defendants to analyze the Wolfs' financial condition and to propose a fair and equitable MSA. Christine allegedly relied on the "completeness and objectivity" of the information provided her by the defendants and entered into an MSA with her husband in 2003. Christine signed the MSA in August 2003.

3. *The arbitration agreement.*

During this same time frame, on May 2, 2003, Christine signed a standard form "Client Services Agreement" with Assante Global Advisers, Inc., an investment adviser (hereafter, Assante Global, not a party to this appeal), retaining it to "direct and manage" her assets.

This Client Services Agreement provided at paragraph 17 that "all controversies which may arise between Client, Adviser, Representative, any Sub-Adviser *or any of their affiliated companies* concerning any transaction arising out of or relating to the Account, or the construction, performance, or breach of this Agreement, whether entered into prior to, on or subsequent to the date hereto, shall be submitted to arbitration conducted under the Rules for Commercial Arbitration of the American Arbitration Association." (Italics added.)

4. *The federal action.*

Christine subsequently suspected that defendants either intentionally or negligently failed to disclose the most significant asset in the marital estate – the vested contractual right to a percentage of income in future licensing of *Law and Order* and its spinoffs. Instead, defendants wrongly informed Christine that her husband was only entitled to receive an additional $8 million of profit participation payments during the succeeding four-year period and nothing more.

On May 11, 2005, Christine commenced litigation against defendants in federal court in the Central District of California. Christine alleged fraud and invoked the court's diversity jurisdiction. As set forth in greater detail below, the matter was intensely litigated in the federal court, including numerous motions and extensive discovery.

On April 4, 2008, the district court dismissed the federal action for lack of jurisdiction. On March 30, 2010, the Ninth Circuit reversed the district court's dismissal of the action. On August 6, 2010, the district court again dismissed the federal action, citing lack of diversity jurisdiction.

5. *The instant action in the superior court*.

On September 10, 2010, Christine commenced this action against Philpott, Weinberg, LW International, Assante and SNCB002 in the Los Angeles Superior Court. The operative first amended complaint pled causes of action for breach of fiduciary duty, constructive fraud, negligent misrepresentation, negligence and breach of contract.

The gravamen of the action is that defendants failed to duly advise Christine that Wolf Films had a fully vested contractual right and was entitled to significant future revenues from the *Law and Order* franchise, and had Christine been fully informed of the true facts, she would not have agreed to the amounts set forth in the MSA.

a. *Defendants' demand for arbitration; Christine's refusal.*

On July 28, 2011, defendants sent a letter to Christine, demanding arbitration.

The following day, Christine responded, stating she would "not voluntarily submit to arbitration. The referenced Client Services Agreement arbitration provision does not apply to this dispute. It was not entered into until May 2003, after the events in dispute; it only applies to transactional disputes; and only Assante Global Advisers was a party. In addition, the federal lawsuit was filed in May 2005, and this state court action in September 2010. The defendants litigated their demurrers to completion without ever mentioning arbitration. Years of discovery occurred in the federal action, including discovery not normally available in arbitration. These years of litigation constitute a waiver under California law."

b. *Motions to compel arbitration.*

On August 1, 2011, eleven months after the inception of the superior court action, four of the instant defendants filed motions to compel arbitration. Nearly three months later, Philpott filed a separate motion to compel arbitration. All five defendants invoked the May 2003 Client Services Agreement that Christine signed with Assante Global, which Agreement contained an arbitration clause at paragraph 17. All five defendants contended they were "affiliates" of Assante Global, so as to bring themselves within the arbitration clause.

In an attempt to explain the delay in seeking arbitration, the moving papers were supported by the declaration of Attorney Patricia Millettt of Kinsella Weitzman Iser Kump & Aldisert, counsel of record for the entity defendants. The Millett declaration stated "My office did not obtain a copy of the [Arbitration] Agreement until June 2011 after it was located in a box of old LWCM [Loring Ward Capital Management, Inc.] records retrieved from an off-site storage facility."

c. *Christine's opposition*.

In opposition, Christine contended, inter alia, defendants' claimed ignorance "of its own standard form arbitration provision" was untenable and irrelevant. Further, the claim of delayed discovery was not credible. In October 2007, Christine's then attorney, Matthew Hoffman of Gibson, Dunn & Crutcher, sent a copy of the May 2003 arbitration agreement to the Kinsella firm, in response to a deposition subpoena. Christine attached copies of the Bates numbered documents, which had been sent to the Kinsella firm four years earlier, to her papers.

Christine further argued a finding of waiver was justified because defendants had substantially invoked the litigation process during the preceding six years, the parties were well into preparation of the lawsuit, defendants' delay in seeking arbitration was extreme, and the delay was prejudicial to Christine, both in terms of time and expense.

d. *Hearing*.

On November 15, 2011, the matter came on for hearing. The record reflects the trial court was troubled by defendants' claim of delayed discovery of the arbitration agreement. The trial court observed: "I guess one of my problems on this case is I have a problem figuring out how nobody knew there was an arbitration agreement for six years. And I think too highly of the law firms involved, frankly, to think that nobody ever asked that question. And of course, I have the business of plaintiff turning over a copy of it."

The trial court added: "With all due respect, if her lawyer produced it, she produced it. I don't understand the argument. Am I missing something? . . . [¶] . . . [¶] What do you want? Do you want somebody to come to the door and nail on the wall and say there's an arbitration agreement here? They produced a copy of it. For you to argue that that wasn't enough, I think that's a hard fact for you guys to get around and I see why you're trying."

e. *Trial court's ruling*.

After taking the matter under submission, the trial court denied the motions to compel arbitration in an extensive written ruling, stating in pertinent part:

"The court finds that there has been a waiver by moving parties of their right to compel arbitration, due to the six-year delay in requesting arbitration and the extensive, substantive litigation that has proceeded on these very same facts in federal and state court for the past six years. The plaintiff's claims on the same facts were first filed in May 2005 in federal court. The claims proceeded in federal court with written discovery and written responses thereto, discovery motions, 22 days of depositions with 5,700 pages of transcripts, and even expert discovery. Ultimately, the claims were dismissed from federal court for lack of federal diversity jurisdiction and refiled in Los Angeles Superior Court, but not before substantially invoking the litigation machinery on the claims. The moving parties contend that the Los Angeles Superior Court case must be treated as a new case which is only 14 months old, however they vociferously and vigorously argued the exact opposite in May and June, 2010 at hearings on their

demurrers to the plaintiff's complaint. In that context, the defendants contended that this action was an extension of the federal court case, and that this court should take judicial notice of the prior 5 years of litigation in the federal court, including taking judicial notice of the truth of the matters contained in the federal court file, and dismiss Christine Wolf's claims without leave to amend. Defendants' counsel stated at the previous demurrer hearings that they had suffered litigating this matter for five years, admitting that there had been 'a heap of discovery and a huge number of pleadings,' and admitting that they had spent more than $4 million on fees and costs.

"The factors this court must consider in evaluating a claim of waiver of the right to compel arbitration are set forth in *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal. 4th 1187, 1196. The first such factor is 'Did the party seeking arbitration act inconsistently with the right to arbitrate or otherwise substantially invoke the litigation process.' It is quite clear that the six years of activity in this case, considering both the federal and state proceedings, substantially invoked the litigation process. *The litigation process in the federal action involved 564 docket items, as well as extensive discovery, summary judgment motions, motions to dismiss, the twenty-two depositions (totaling 5,700 pages), four days of deposition of plaintiff Christine Wolf, disclosure by Ms. Wolf of five expert witnesses and their reports and four expert witness discovery depositions . . . ,* which the defendants do not dispute. In fact, the defendants apparently thought the facts necessary to their defense were sufficiently well developed that each moved for summary judgment. . . . . In this state action alone, defendants filed seven demurrers (three to the original complaint, mooted when plaintiff filed a first amended complaint on December 20, 2010, and four to the First Amended Complaint), and asked the court to certify certain privilege issues for an immediate appeal. . . . *Although the defendants claim to have been unaware of the agreement with the arbitration clause until recently, that contention is carefully and artfully worded, and, in the end, not very persuasive. It is evident that the defense attorneys knew or should have known long ago, since attorneys for plaintiff produced the arbitration agreement in the federal action on October 27, 2007 to the very same defense attorneys. . . . Thus, the*

*defendants knew or should have known of the existence of their own contract, with the arbitration clause drafted by them, since 2007 at the latest.* Thus, the court finds that the parties seeking arbitration here acted inconsistently with the right to arbitrate, and also substantially invoked the litigation process.

"Other *St. Agnes* factors are also present here. Another factor to consider is whether 'the parties are "well into preparation" of the lawsuit or whether the "litigation machinery" has been substantially invoked. Given the evidence here, it seems quite clear that the litigation machinery has been substantially invoked and the parties are well into preparation of the lawsuit. In addition, the intervening steps of discovery, including the plaintiff's deposition over four days, as well as expert witness depositions, have all been taken, meeting yet another factor set forth by the California Supreme Court in the *St. Agnes* case. In sum, the record in both the federal and state court actions on these claims lends support to the plaintiff's view that the defendants tried every possible measure to win the case in the courts by getting the claims dismissed, and when that didn't work out, chose to seek arbitration six years later. However, California law makes clear that a party may not use the court to take the benefits of litigation, and then later seek arbitration. As the Second District Court of Appeal has confirmed, 'The courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration.' *Guess?, Inc. v. Superior Court* (2000) 79 Cal. App. 4th 553, 558 . . . .

"On the crucial element of prejudice, multiple forms of prejudice are apparent here. The prejudice to plaintiff is evidenced by the fact that the defendants have already engaged in discovery much more extensive that would be permitted in arbitration. The course of litigation conduct engaged in by the defendants is entirely inconsistent with the right to arbitrate. In addition, plaintiff asserts that she retained the experts specifically to explain to the jury certain family law and entertainment-related issues, and has already disclosed them to defendants. Thus, defendants obtained plaintiff' expert list and deposed four of the five designated experts. Under California law, this constitutes prejudice. See *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 949-951 (obtaining expert

panel designation by unreasonable delay caused prejudice because it revealed trial strategy, including what counsel 'sift[ed]' from all available information 'to be the relevant from the irrelevant facts,' and upon which counsel prepared 'his legal theories and . . . strategy').

"Moreover, the delay in seeking arbitration here is extreme -- over six years. The six years that have passed since Wolf filed this action -- even attributing some of the time to Wolf for filing the case in federal court to begin with, and for appealing the diversity jurisdiction ruling -- amounts to an unreasonable delay which has prejudiced Wolf here not only for the costs Wolf has incurred, but for the lost 'ability at this late date to take advantage of the benefits and cost savings provided by arbitration.'. . . After all, because an 'arbitration clause . . . is not self-executing,' the party invoking an arbitration agreement right must 'timely raise the defense and take affirmative steps to implement the process.' [Citations.] *There is no question that defendants could have sought to compel arbitration at any point in time during the past six years.*

"Defendants argue that certain defendants were not involved in the federal action, and therefore could not have waived by the conduct of the other defendants. Defendants' position on this issue, however, is entirely inconsistent with their claim that the defendants are all 'affiliated,' and thus entitled to be considered parties to the agreement containing the arbitration clause. This is the crux of their position that all the defendants have standing to invoke the arbitration clause. As noted above, the arbitration clause extends to Assante Global or 'any of [Assante Global's] affiliated companies.'. . . Defense counsel admitted and argued at the November 15, 2011 hearing that all defendants were 'affiliates' of Assante Global to show that each defendant was entitled to invoke the arbitration clause, though not parties to it, as an affiliate. If they are affiliated for the purposes of arbitration, then they are affiliated for the purposes of waiver. Furthermore, any conduct that any Loring Ward entity undertook to defend the federal action, including expert and non-expert discovery, has certainly inured to the benefit of all of the entity defendants (who were and remain represented by the same counsel).

"Even if certain of the Loring Ward entity defendants were not parties to the federal action, they were parties to this action, and the fourteen month delay prior to seeking arbitration in this action amounts to a waiver by itself. Even a three month delay in seeking arbitration has been held to be a waiver. *Guess?, Inc. v. Superior Court* (2000) 79 Cal. App. 4th 553, 557. As noted above, the attorneys for Loring Ward knew in October 2007 of the Client Services Agreement containing the arbitration clause. . . . Those same attorneys represent all of the Loring Ward entities in this state action, filed on September 10, 2010. All defendants utilized the past fourteen months by demurring on the ground that certain issues had already been determined in federal court, asking this court to sustain their demurrers without leave to amend, but never once mentioning arbitration.

"Under the circumstances, having already spent years in federal court arguing the same case, and having knowledge of the arbitration clause in the Client Services Agreement since 2007, the court finds all of the defendants' delay in seeking arbitration was unreasonable and altogether inconsistent with the desire to arbitrate rather than litigate. Arbitration is intended to provide an alternative forum for dispute resolution that is 'speedy and relatively inexpensive' -- and this action has been anything but speedy or inexpensive for Wolf, who has by now been thoroughly deprived of the ability to take advantage of the time-benefits and cost savings arbitration is intended to provide. [Citations.]

"Wolf has carried her 'heavy burden' of showing waiver. Defendants' separate petitions are accordingly denied."

This appeal followed.[3]

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[3] The order denying the motions to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).) Although the statute (*ibid*.) provides an order denying a "petition" to compel arbitration is appealable, "[t]he term 'petition,' however, has been construed, in practice, to include the term 'motion' when, as here, an action is already pending. [Citations.]" (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 349.)

## CONTENTIONS

Defendants contend the trial court erred in finding they waived their right to arbitrate.

Christine contends the trial court properly determined the defendants waived any right to compel arbitration, and in any event, her claims against defendants fell outside the scope of the arbitration clause.

## DISCUSSION

1. *Governing law*.

a. *General principles*.

The controlling statute, Code of Civil Procedure section 1281.2, provides in relevant part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, *unless it determines that*: [¶] (a) *The right to compel arbitration has been waived by the petitioner*; or [¶] (b) Grounds exist for the revocation of the agreement. . . . ." (Italics added.)

Public policy considerations favor arbitration as a means of resolving disputes. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).) However, a trial court may deny a petition to compel arbitration if it finds the moving party has "waived" that right. (*Ibid*.) Waiver of the right to demand arbitration may arise in a variety of contexts, such as where " ' "the petitioning party has *unreasonably delayed* in undertaking the procedure." ' " (*Id*. at p. 1196, italics added; accord *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557 [party may waive right to compel arbitration by failing to properly and timely assert right to arbitration]; *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1478 [same].)

In assessing a claim of waiver, the trial court may consider the following factors: (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to

arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps, such as taking advantage of judicial discovery procedures unavailable in arbitration, had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party. (*St. Agnes, supra*, 31 Cal.4th at p. 1196.)

"Although a court may deny a petition to compel arbitration on the ground of waiver ( [Code Civ. Proc.] § 1281.2, subd. (a)), waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*St. Agnes, supra*, 31 Cal.4th at p. 1195.)

b. *Standard of appellate review*.

The "heavy burden of proof" guides the trial court's determination as to whether arbitration has been waived; however, the higher burden below does not alter the standard of review on appeal. (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 945-946.) It was the trial court's role to determine whether the movants met their burden of proof; it is this court's duty to determine whether there is substantial evidence to support the trial court's determination. (*Id*. at p. 946.)

"Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court." (*Saint Agnes, supra*, 31 Cal.4th at p. 1196.) This court may not reverse the trial court's finding of waiver " ' "unless the record as a matter of law compels finding nonwaiver." ' " (*Roberts, supra*, 200 Cal.App.4th at p. 841.) We construe any reasonable inference in the manner most favorable to the trial court's ruling, resolving all ambiguities to support an affirmance. (*Ibid*.)[4]

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[4] Defendants argue the facts relevant to the waiver issue are *undisputed*, and therefore this court should make an independent determination as to waiver, instead of applying the deferential substantial evidence standard of review. Defendants' argument is meritless. Defendants' assertion they were unaware of the arbitration agreement until June 2011 is disputed and there was conflicting evidence on that issue. The trial court

2. *Trial court's finding of waiver is supported by substantial evidence*.

a. *Unreasonable delay*.

The trial court flatly rejected defendants' claim of recent discovery of the arbitration agreement as "carefully and artfully worded, and, in the end, not very persuasive." The trial court specifically found: "There is no question that defendants could have sought to compel arbitration *at any point in time during the past six years*." (Italics added.) The trial court further found, "the defendants knew or should have known of the *existence of their own contract*, with the arbitration clause drafted by them, since 2007 *at the latest*," when Christine's attorneys produced the arbitration agreement in discovery. (Italics added.)

The record supports the trial court's findings. Because these five defendants contend they are all affiliates of Assante Global, so as to be entitled to the benefit of the arbitration clause in the Client Services Agreement, said defendants either knew or should have known of their own contract from the inception of the litigation in 2005.

Moreover, in October 2007, Christine produced a copy of the Client Services Agreement in response to a deposition subpoena. Therefore, the trial court properly found that by 2007 *at the latest*, defendants either knew or should have known of the existence of their own arbitration clause. Therefore, defendants' failure to invoke the arbitration clause until 2011 was unreasonable.

In an attempt to minimize the extent of their delay, defendants seek to focus on Christine's lawsuit in the superior court, filed in September 2010, rather than on the totality of the litigation. The trial court already has rejected this argument. In ruling on the matter, the trial court noted the inconsistency in defendants' positions, citing defense counsel's statements "at the previous demurrer hearings that they had suffered *litigating this matter for five years*, admitting that there had been 'a heap of discovery and a huge number of pleadings,' and admitting that they had spent more than $4 million on fees and

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weighed the evidence and resolved that conflict in Christine's favor. Therefore, our role is to determine whether substantial evidence supports the trial court's determination.

costs." (Italics added.) On this record, the trial court properly considered the totality of the circumstances in determining whether defendants unreasonably delayed their demand for arbitration. (*Lewis v. Fletcher Jones Motor Cars, Inc*. (2012) 205 Cal.App.4th 436, 448-449 (*Lewis*) [court must view the litigation as a whole in determining whether parties' conduct is inconsistent with a desire to arbitrate].)

b. *Defendants' litigation conduct was inconsistent with the right to arbitrate.*

Notwithstanding their extreme delay in seeking arbitration, defendants contend their conduct in the federal action was insufficient to support a finding of waiver. The argument is unpersuasive. Whether defendants substantially invoked the litigation process in state or federal court is separate from whether defendants were dilatory in seeking arbitration. As indicated, unreasonable delay in demanding arbitration may be sufficient to give rise to a waiver. (*St. Agnes, supra*, 31 Cal.4th at p. 1196 [waiver where moving party has unreasonably delayed in undertaking arbitration]; accord *Guess?, Inc. v. Superior Court, supra*, 79 Cal.App.4th at p. 557; *Roman v. Superior Court, supra*, 172 Cal.App.4th at p. 1478.)

Leaving aside the issue of delay, defendants "concede that SNCB002, Inc., Martin Weinberg and Robert Philpott did participate in the Federal action," but argue their litigation conduct was insufficient to effect a waiver of their right to arbitrate. The argument is unpersuasive. Given the extent of the litigation activity in the district court, as noted by the trial court in its ruling, the trial court properly found these parties engaged in extensive substantial litigation in federal court, and thereby acted inconsistently with the right to arbitrate.

With respect to the other two defendants, Assante and LW International, the circumstances are somewhat different.

LW International was involved in the federal action for 27 months, from the date it was served, June 16, 2005, until it obtained a dismissal for lack of personal jurisdiction, on September 24, 2007. In the meantime, LW International conducted jurisdictional discovery related to its motion to dismiss. As for Assante, it was served in the federal action but did not appear, and its default was entered on June 18, 2007.

Therefore, with respect to LW International and Assante, we also look to their litigation activity in state court. In the state action alone, the defendants filed two sets of demurrers, first to the original complaint and then to the first amended complaint. Defendants filed answers to the amended complaint (which asserted arbitrability as one of 28 affirmative defenses). Defendants filed case management statements. In addition, defendants asked the trial court to certify certain privilege issues for an immediate appeal.

Case law recognizes that "litigating issues through [multiple] demurrers may justify a waiver finding." (*Lewis, supra,* 205 Cal.App.4th at p. 450.) *Lewis* cited other decisions involving "similar conduct inconsistent with an intent to arbitrate. (See, e.g., . . . *Kaneko Ford* [*Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1228-1229] [plaintiff engaged in conduct inconsistent with intent to arbitrate by filing action, forcing defendant to disclose legal strategies by answering complaint, and waiting over five months to assert right to arbitration]; cf. *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 783-784 (*Christensen*) [plaintiff engaged in conduct inconsistent with intent to arbitrate by filing a lawsuit and pursuing the litigation through two demurrers for the admitted purpose of obtaining verified pleadings revealing the defendants' legal theories].)" (*Lewis, supra,* at p. 449.)

Here, the trial court found defendants' belated assertion of the right to arbitrate was tactical. The trial court credited Christine's position "that the defendants tried every possible measure to win the case in the courts by getting the claims dismissed, and when that didn't work out, chose to seek arbitration six years later."

Here, substantial evidence and established authority support the trial court's conclusion that defendants engaged in conduct inconsistent with the right to arbitrate.

c. *Substantial evidence of prejudice to Christine*.

Lastly, we address the issue of prejudice. An "egregious delay [in seeking arbitration] may result in prejudice. As the Supreme Court explained in *St. Agnes*, prejudice is typically found where 'the petitioning party's conduct has substantially undermined [the] important public policy [in favor of arbitration] or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration.' (*St. Agnes, supra*, 31 Cal.4th at p. 1204.)" (*Burton v. Cruise, supra*, 190 Cal.App.4th at p. 947.)

Thus, a petitioning party's " 'conduct in stretching out the litigation process itself may cause prejudice by depriving the other party of the advantages of arbitration as an "expedient, efficient and cost-effective method to resolve disputes," ' and . . . '[a]rbitration loses much, if not all, of its value if undue time and money is lost in the litigation process preceding a last-minute petition to compel.' " (*Roberts, supra*, 200 Cal.App.4th at p. 844, fn. 9.)

By any standard, the six-year delay in seeking arbitration was egregious. The protracted delay deprived Christine of the advantages of arbitration as an expeditious and cost-effective method of resolving her claims against defendants. The record supports the trial court's determination that defendants' delay in seeking arbitration was prejudicial to Christine.

3. *Remaining issues not reached.*

In view of our conclusion the trial court properly found defendants have waived the right to seek arbitration, it is unnecessary to address Christine's contention the arbitration clause is inapplicable to her claims, or any other issues.

## DISPOSITION

The order denying the defendants' motions to compel arbitration is affirmed. Christine shall recover her costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.