

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 24-0760

MONARCH HEATING AND
COOLING, LLC,

Petitioner and Appellee.

v.

PETRA, INC.,

Defendant and Appellant,

BOZEMAN WEST APARTMENTS,
LP; SACCOCCIA LANDS III, LLC;
BCRH AVION VENTURE, LLC;
STOCKMAN BANK OF MONTANA;
WCW OLYMPUS BOZEMAN, LLC;
and JOHN DOES 1-10,

Defendants.

BOZEMAN WEST APARTMENTS,
LP; SACCOCCIA LANDS III, LLC;
and PETRA, INC.

Counterclaimants,

v.

MONARCH HEATING AND
COOLING, LLC,

Counter-Defendant.

BOZEMAN WEST APARTMENTS,
LP; and SACCOCCIA LANDS III,
LLC,

Cross-Claimants,

v.

PETRA, INC.,

Cross-Defendant.

APPELLANT’S OPENING BRIEF

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County,
Cause No. DV-16-2024-126, the Honorable Andrew Breuner Presiding.

Appearances:

Edward J. Guza
Lance F. Carl
E.J. GUZA & ASSOCIATES
25 Apex Drive, Suite A
Bozeman, MT 59718
Telephone: (406) 586-2228
eguza@ejguzalaw.com
lcarl@ejguzalaw.com
Attorneys for Appellant

Cherche Prezeau
Jackson Maynard
CHRISTENSEN & PREZEAU, PLLP
24 W. 6th Avenue, Suite 501
Helena, MT 59601
Telephone: (406) 442-3690
cherche@cplawmt.com
jackson@cplawmt.com
Attorneys for Appellee

Trent Baker
DATSOPOULOS, MacDONALD &
LIND, PC
201 West Main, Suite 201
Missoula, MT 59802
Telephone: (406) 728-0810
tbaker@dmlaw.com
Attorney for Defendants Bozeman West
Apartments, LP, and Saccoccia Lands
III, LLC

Jon A. Wilson
Nathan A. Burke
BROWN LAW FIRM, PC
315 North 24th Street
P.O. Box Drawer 849
Billings, MT 59103-0849
Telephone: (406)-248-2611
Jwilson@brownfirm.com
nburke@brownfirm.com
Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF CONTENTS	3
TABLE OF AUTHORITIES	3
STATEMENT OF THE ISSUES.....	4
STATEMENT OF THE CASE.....	5
SUMMARY OF THE ARGUMENT	6
STATEMENT OF THE FACTS	6
STANDARD OF REVIEW	10
CONCLUSION.....	23
CERTIFICATE OF COMPLIANCE.....	24
APPENDIX.....	27

TABLE OF AUTHORITIES

Cases

<i>Benson v. Diverse Computer Corp.</i> , 2004 MT 114, 321 Mont. 140, 89 P.3d 981.....	10
<i>Bluebird Prop. Rentals, LLC v. World Bus. Lenders, LLC</i> , 2024 MT 279, 559 P.3d 834.....	9
<i>Britton v. Co-op Banking Grp.</i> , 916 F.2d 1405 (9th Cir. 1990).....	9,10
<i>Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.</i> , 50 F.3d 388 (7th Cir.1995).....	17,18
<i>Demsey & Assoc. v. S.S. Sea Star</i> , 461 F.2d 1009 (2d Cir.1972).....	12
<i>Downey v. Christensen</i> , 251 Mont. 386, 825 P.2d 557 (1992).....	9,10,12,13,15,19
<i>Duferco Steel Inc. v. M/V Kalisti</i> , 121 F.3d 321 (7th Cir.1997).....	17,18

<i>Firestone v. Oasis Telecommunications</i> , 2001 MT 297, 307 Mont. 469, 38 P.3d 796.....	10
<i>Fisher v. A.G. Becker Paribas Inc.</i> , 791 F.2d 691 (9th Cir. 1986).....	10
<i>Global Client Solutions, LLC v. Ossello</i> , 2016 MT 50, 382 Mont. 345, 367 P.3d 361.....	9
<i>Holm–Sutherland Co., Inc. v. Town of Shelby</i> , 1999 MT 150, 295 Mont. 65, 982 P.2d 1053.....	9,14,15,17,18,21
<i>Iwen v. U.S. W. Direct, a Div. of U.S. W. Mktg. Resources Group</i> , 1999 MT 63, 293 Mont. 512, 977 P.2d 989 (1999).....	9
<i>Mont. Pub. Empl's Ass'n v. City of Bozeman</i> , 2015 MT 69, 378 Mont. 337, 343 P.3d 1233.....	15
<i>Peeler v. Rocky Mountain Log Homes Canada, Inc.</i> , 2018 MT 297, 393 Mont. 396, 431 P.3d 911.....	9,15
<i>Reiter v. Yellowstone County</i> , 192 Mont. 194, 627 P.2d 845 (1981).....	10
<i>Shinto Shipping Co. Ltd. v. Fibrex & Shipping Co., Inc.</i> , 425 F.Supp. 1088 (N.D.Cal.1976).....	17,18
<i>Stewart v. Covill & Basham Const., LLC</i> , 2003 MT 220, 317 Mont. 153, 75 P.3d 1276.....	8,10
<i>Thiel v. Johnson</i> , 219 Mont. 271, 711 P.2d 829 (1985).....	9
<i>Winter v. State Farm Mut. Auto. Ins. Co.</i> , 2014 MT 168, 375 Mont. 351, 328 P.3d 665.....	19
<i>Wolf's Interstate Leasing & Sales, L.L.C. v. Banks</i> , 2009 MT 354, 353 Mont. 189, 219 P.3d 1260.....	9
<i>World-Source Coil Coating, Inc. v. McGraw Constr. Co., Inc.</i> , 946 F.2d 473 (6th Cir.1991).....	17
Statutes	
§ 27-5-324(1)(a), MCA.....	4
§ 1-4-101, MCA.....	20
Rules	
Rule 8(c)(1), M.R.Civ.P.....	7,8

STATEMENT OF THE ISSUES

1. Whether the District Court erred in holding that Petra, Inc. impliedly

waived its contractual right to arbitration thereby denying Petra, Inc.'s Motion to Stay Proceeding and Compel Arbitration.

STATEMENT OF THE CASE

This case arises out of a payment dispute that arose between general contractor (Petra) and its subcontractor (Monarch) during the construction of the Bozeman West Apartments, a 6-building 216-unit residential apartment development in Bozeman, Montana (the "Project"). On or about June 26, 2023, Petra and Monarch entered into a Subcontract Agreement for the work to be performed on the Project. The Subcontract contains an arbitration clause. On or about February 2, 2024, Monarch filed a Complaint in Gallatin County District Court against Petra for the foreclosure of a construction lien, breach of contract, and other claims related to the Project. Monarch later amended the Complaint on April 25, 2024. On October 25, 2024, Petra filed a Motion to Stay Proceeding and Compel Arbitration based on the arbitration clause found in the parties' Subcontract.

On December 10, 2024, the District Court denied Petra's Motion finding that the agreement to arbitrate in the Subcontract was enforceable, but that Petra had implicitly waived its right to arbitrate by acting in a manner inconsistent with its election to arbitrate and that Monarch had been prejudiced by delay. This matter comes to the Court pursuant to § 27-5-324(1)(a), MCA, following the District Court's Order denying Petra's Motion to Stay Proceeding and Compel Arbitration.

SUMMARY OF THE ARGUMENT

The District Court's Order holding that Petra impliedly waived its right to arbitration is legally incorrect. The District Court's decision ignores well settled precedent from this Court regarding the heavy burden of proof required to establish waiver of an agreement to arbitrate and what actions or inactions are sufficient to constitute a waiver of the right to arbitrate. Neither the record nor the law supports the conclusion that Petra unequivocally waived its right to arbitration. To the contrary, Petra took no overt actions that could be construed as an intentional waiver of its right to arbitrate.

STATEMENT OF THE FACTS

On or about June 26, 2023, Petra and Monarch entered into a Subcontract Agreement for the work to be performed on the Project. *See* (Dkt. No. 41, Ex. A).

On or about February 2, 2024, Monarch filed a Complaint in Gallatin County District Court against Petra and the Project owners for the foreclosure of a construction lien, breach of contract, and other claims related to the Project. (Dkt. No. 1). Monarch later amended its Complaint on April 25, 2024. (Dkt. No. 9). This amendment occurred before Monarch attempted to serve the original Complaint on Petra.

On May 24, 2024, Monarch filed an Affidavit of Service stating that a process server served Allison Pendegrass of National Registered Agents, Inc., in Missoula,

MT, with the First Amended Complaint and Monarch's First Discovery Requests to Petra. (Dkt. No. 24). Petra is an Idaho based company and National Registered Agents, Inc., was Petra's commercial registered agent in Montana. As explained in later court filings, Petra never received any of the pleadings or discovery that were served on its Montana registered agent.

Ultimately, on May 29, 2024, entry of default was entered against Petra for not responding to the First Amended Complaint that it never received or knew about. *See* (Dkt. Nos. 26-28). However, when Petra learned of this, Petra contacted Monarch and the parties jointly filed a Stipulated Motion to Set Aside Default. (Dkt. No. 31). In this Motion, the parties stipulated and agreed that good cause existed to set aside the default because Petra never received the First Amended Complaint from its registered agent. *Id.* Monarch re-served Petra with the First Amended Complaint on July 1, 2024, at its office in Idaho. On July 30, 2024, The District Court agreed, finding good cause existed to set aside the default and ordered Petra to respond to the First Amended Complaint within 21 days of the Order. (Dkt. No. 32). As such, Petra technically was not served with any complaint until it received the District Court's Order on July 30, 2024.

On August 20, 2024, Petra filed an Answer to Monarch's Complaint, Counterclaims, and Request for Jury Trial ("Answer"). On August 29, 2024, (only nine (9) days after filing its Answer) Petra sent a letter advising Monarch's counsel

and co-Defendants' counsel that Petra intended to file a motion to stay the proceeding and compel arbitration based on the arbitration clause in the Subcontract. (Dkt. No. 44, Ex. A). Then, on September 10, 2024 (only twenty-one (21) days after the filing its Answer), pursuant to Rule 15(a)(1), M.R.Civ.P., Petra amended its Answer to Monarch's First Amended Complaint withdrawing its request for a jury trial and specifically asserting the affirmative defense of arbitration. (Dkt. No. 40). Petra amended its Answer out of an abundance of caution specifically to avoid any implication that Petra intended to waive its right to arbitration.¹

On October 25, 2024, Petra filed its Motion to Stay Proceeding and Compel Arbitration (Dkt. No. 41). On November 12, 2024, Monarch filed its Response Brief making two arguments: (1) that the arbitration clause in the Subcontract was entirely void because it called for arbitration to occur in Idaho; and (2) that Petra had impliedly waived its right to arbitration. (Dkt. No. 43). Petra filed its Reply Brief on November 26, 2024 (Dkt. No. 44) and the District Court issued its Order denying the Motion on December 10, 2024 (Dkt. No. 45).

In its Order the District Court agreed with Petra that the agreement to arbitrate was valid with the exception of the provision requiring the arbitration to occur in Idaho. *Id.* at p. 5. The District Court noted that Petra conceded that the arbitration

¹ Petra's original Answer to Monarch's First Amended Complaint incorporated all affirmative defenses of other parties that were not inconsistent with the admissions or denials in Petra's Answer or its other affirmative defenses. Both Defendants Saccoccia Lands III, LLC, and Bozeman West Apartments, LP, asserted all affirmative defenses in Rule 8(c)(1), M.R.Civ.P., including arbitration. As such, Petra's right to arbitration was asserted by reference in its original Answer.

must occur in Montana. *Id.* Despite finding that the agreement to arbitrate was valid and that the specific page of the Subcontract that included the arbitration provision was initialed by both parties, the District Court found that Petra had waived its right to arbitration. *Id.* at p. 9. The District Court's finding of waiver is based on the following conclusions set forth in its Order:

1. The Subcontract's arbitration clause could only be invoked by Petra. *Id.* at p. 7.
2. Petra did not respond to Monarch's First Amended Complaint and its default was entered. *Id.*
3. Petra filed an Answer to Monarch's First Amended Complaint and Counterclaims rather than immediately requesting arbitration. *Id.*
4. Six months passed between when Petra's registered agent was served with the original Complaint and when Petra filed its Motion to Compel Arbitration. *Id.*
5. Three weeks passed between when Petra filed its Answer and its Amended Answer asserting the affirmative defense of arbitration. *Id.*
6. Petra's Counterclaim included a claim for breach of the Subcontract. *Id.*
7. Petra's incorporation of the Rule 8(c)(1) affirmative defenses, including arbitration, asserted by the co-defendants was ineffective.
8. Monarch was prejudiced by the delays mentioned above.

Based on these findings, the District Court held that Petra “acted in a deliberate, litigious manner inconsistent with its election to arbitrate; continued to so act over a protracted period; and... caused prejudice to Monarch by seeking its compelled participation in arbitration months after Monarch initiated this action in the only manner it could.”

STANDARD OF REVIEW

The Montana Supreme Court reviews a district court’s decision as to whether an arbitration clause has been waived de novo. *Stewart v. Covill & Basham Const., LLC*, 2003 MT 220, ¶ 8, 317 Mont. 153, 75 P.3d 1276 (citing *Holm–Sutherland Co., Inc. v. Town of Shelby*, 1999 MT 150, ¶ 18, 295 Mont. 65, 982 P.2d 1053; *Downey v. Christensen*, 251 Mont. 386, 389, 825 P.2d 557, 559 (1992)).

The standard of review for a district court's conclusions of law regarding arbitration is whether they are legally correct. *Wolf's Interstate Leasing & Sales, L.L.C. v. Banks*, 2009 MT 354, ¶ 5, 353 Mont. 189, 191, 219 P.3d 1260, 1262 (citing *Iwen v. U.S. W. Direct, a Div. of U.S. W. Mktg. Resources Group*, 1999 MT 63, ¶ 17, 293 Mont. 512, 516, 977 P.2d 989, 993 (1999)).

ARGUMENT

I. PETRA DID NOT WAIVE ITS RIGHT TO ARBITRATION.

Montana law favors arbitration. Doubts should be resolved in favor of arbitration. *Bluebird Prop. Rentals, LLC v. World Bus. Lenders, LLC*, 2024 MT 279,

¶ 11, 559 P.3d 834, 837 (citing *Global Client Solutions, LLC v. Ossello*, 2016 MT 50, ¶ 21, 382 Mont. 345, 367 P.3d 361).

Waiver is mainly a question of intention and must be manifested in some unequivocal manner. *Thiel v. Johnson*, 219 Mont. 271, 274, 711 P.2d 829, 832 (1985). “Due to the express federal and state statutory preferences for arbitration, proof of equitable waiver of an otherwise valid agreement to arbitrate must be clear, convincing, and unequivocal.” *Peeler v. Rocky Mountain Log Homes Canada, Inc.*, 2018 MT 297, ¶ 23, 393 Mont. 396, 431 P.3d 911 (citing *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990); *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986); *Stewart*, ¶ 8; *Downey*, 251 Mont. at 389. Waiver may be established by express declarations or acts or may be implied by a course of action or conduct which induces the belief that the intention and purpose was waiver. *Downey*, 274–75. However, while it is true that a waiver may be implied by a course of action or conduct which induces the belief that the intention and purpose was waiver, such implied waiver requires a detrimental reliance by the party who is led by the conduct to believe a waiver has occurred. *Benson v. Diverse Computer Corp.*, 2004 MT 114, ¶ 30, 321 Mont. 140, 89 P.3d 981 (citing *Stewart*, ¶ 8; *Reiter v. Yellowstone County*, 192 Mont. 194, 202, 627 P.2d 845, 850 (1981)).

“When parties have contracted to settle disputes through arbitration, the party asserting waiver bears a heavy burden of proof.” *Downey*, 251 Mont. at 389, 825

P.2d at 559. The party asserting waiver of an arbitration right must demonstrate: (1) knowledge of the existing right to compel arbitration; (2) acts inconsistent with the right to arbitrate the dispute; and (3) prejudice to the party resisting arbitration. *Firestone v. Oasis Telecommunications*, 2001 MT 297, ¶ 18, 307 Mont. 469, 38 P.3d 796; *Downey*, 251 Mont. at 389, 825 P.2d at 559. The parties do not contest that Petra had knowledge of its right to compel arbitration. As such, Petra will address elements 2 and 3 below.

- a. None of Petra’s conduct described and relied on in the District Court’s Order to find that waiver occurred establish an unequivocal intent and purpose to waive its right to arbitration or were inconsistent with such right.**

As stated above, waiver implied through a course of conduct requires an unequivocal manifestation of the intent to waive. “Unequivocal” means “unambiguous; clear; free from uncertainty.” UNEQUIVOCAL, Black's Law Dictionary (12th ed. 2024). The District Court’s rationale in finding that waiver occurred fails to establish such an unequivocal intent to waive its right to arbitration by Petra.

First, the District Court took issue with the fact that Petra did not respond to Monarch’s First Amended Complaint resulting in Petra’s default. Petra does not dispute that service on a registered agent is an effective mode of service. However, as explained above, it is undisputed that Petra never received a copy of the First Amended Complaint from its registered agent. Monarch served the First Amended

Complaint on Petra's corporate registered agent in Montana; however, the registered agent never forwarded the Complaint on to Petra, which was why the default was set aside. When Petra's default was set aside, it promptly answered.

Nevertheless, there is no connection between Petra's default and the implied waiver of the right to arbitration. Petra's default was unintentional and both Monarch and the District Court agreed that good cause existed to set aside the default. In other words, Petra's failure to respond to a complaint that it did not even know about cannot translate into intentional conduct meant to communicate to Monarch waiver of its right to arbitration.

Second, in support of finding waiver, the District Court noted that Petra filed an Answer to Monarch's First Amended Complaint and Counterclaims rather than immediately requesting arbitration. The Montana Supreme Court has been clear that filing a responsive pleading and counterclaim is not *per se* an act of waiver of the right to arbitration. In *Downey*, the Montana Supreme Court overruled the district court when it found that the defendants had waived their right to arbitration by participating in discovery and filing a counterclaim. *Downey*, 251 Mont. at 389. The plaintiff argued that the defendants had waived their right to arbitration by: (1) filing answers rather than a motion to stay; (2) filing a counterclaim; (3) participating in preparing a discovery schedule; and (4) participating in discovery before filing motions to compel arbitration. *Id.* at 390. In overturning this decision, the Court

specifically stated: “[a]nswering on the merits, asserting a counterclaim, and participating in discovery, without more, is insufficient to constitute waiver.” *Id.* at 391 (citing *Demsey & Assoc. v. S.S. Sea Star*, 461 F.2d 1009, 1018 (2d Cir.1972)). As such, the Court reversed the District Court with directions to order the case to arbitration. *Id.* at 392.

Petra has participated even less in the underlying litigation than the defendants in *Downey*. Petra filed an Answer to the complaint and incorporated the affirmative defense of arbitration asserted by the co-defendants, and made compulsory counterclaims against Monarch. Within two months, Petra moved to compel arbitration. Moreover, unlike the *Downey* defendants, Petra has not engaged in any discovery, has not participated in preparing a scheduling order, or done anything to avail itself of the benefits of litigating in the District Court.

The District Court’s Order goes on to argue that *Downey* is distinguished from this case because, unlike the *Downey* defendants, Petra’s initial Answer did not specifically include the affirmative defense of arbitration and, therefore, “Monarch had no reason to believe that Petra would elect arbitration until it filed its Amended Answer four (4) months after Petra was served.” (Dkt. No. 45, p. 9). Petra disagrees that there is any meaningful factual distinction between *Downey* and this case that would favor finding waiver.

First, the District Court acknowledged that both parties signed the Subcontract and specifically initialed the page which included the arbitration clause. *Id.* at p. 6. Based on this fact, the District Court found that Petra had, at the very least, imputed knowledge of its right to arbitration. *Id.* For Monarch, however, the District Court disregards the Subcontract and Monarch's initials on the arbitration clause page to claim that Monarch had "no reason to believe that Petra would elect arbitration." This is a double standard. If Petra is deemed to have knowledge of its right to arbitration simply by signing and initialing the Subcontract, Monarch also knew that Petra could elect to arbitrate the dispute.

Second, the District Court ignores the fact that only nine (9) days after the order setting aside the default was entered, and before Petra had filed its Amended Answer or Motion to Compel Arbitration, Petra sent a letter to Monarch's counsel alerting them that it intended to enforce the arbitration clause in the Subcontract. See (Dkt. No. 44, Ex. A). If Petra truly intended to waive its right to arbitration, it would not have sent a letter to Monarch specifically alerting Monarch of its intention and desire to arbitrate the dispute. Moreover, the District Court did not find that Petra had taken any unequivocal action between the date the order setting aside the default was entered and the date that said letter was sent to Monarch that can be considered an unequivocal waiver of Petra's right to arbitrate.

Next, in finding that waiver occurred, the District Court scrutinizes the timeline from when Monarch filed its initial Complaint to when Petra filed its Motion to Compel Arbitration. The District Court points out that six months passed between when Petra's registered agent was served with the First Amended Complaint and when Petra moved to compel arbitration. The District Court also points out that three weeks passed between when Petra filed its initial Answer and its Amended Answer asserting arbitration as an affirmative defense. Neither of these facts support waiver. In short, the District Court seemed to conclude that the passage of time itself was an intentional act by Petra to induce Monarch to believe that Petra's purpose was waiver of the right to arbitration. Petra disagrees that the passage of time, let alone on a scale of weeks not months, is sufficient to establish an unequivocal intent to waive an arbitration clause.

This Court discussed the effect of delay and the passage of time in *Holm-Sutherland*. The Court in *Holm-Sutherland* held that the plaintiff had waived its right to arbitration noting that the plaintiff waited until only a few weeks before trial to file its motion to compel arbitration. *Holm-Sutherland Co. v. Town of Shelby*, 1999 MT 150, ¶ 30, 295 Mont. 65, 982 P.2d 1053. The Court also found that during that time, the plaintiff actively pursued a judicial remedy resulting in the use of judicial resources. *Id.* at ¶ 31. For context, the complaint in *Holm-Sutherland* was filed in June 1995. *Id.* at ¶ 4. The plaintiff moved to compel arbitration in January of 1998,

approximately two and one-half years later and less than ten weeks prior to the third date set for trial. *Id.* at ¶ 5.

This Court has considered whether delay resulted in a waiver of the right to arbitrate in a number of other cases as well. *See Mont. Pub. Empl's Ass'n v. City of Bozeman*, 2015 MT 69, ¶¶17-19, 378 Mont. 337, 343 P.3d 1233 (no equitable waiver from four-year delay in filing action to compel arbitration where party initiated litigation only to compel arbitration rather than litigate merits of the dispute); *Downey*, 251 Mont. at 389-92 (no equitable waiver from answer on the merits, assertion of counterclaim, and participation in limited pretrial discovery prior to motion to compel where party asserted right to arbitrate as affirmative defense and opposing party failed to show sufficient prejudice); *Peeler*, ¶ 24 (no equitable waiver by defendant for waiting until after plaintiff had initiated litigation to demand arbitration.) The Court in *Peeler* also rejected the plaintiff's argument that it had been prejudiced by incurring litigation costs due to defendant's failure to demand arbitration sooner. *Id.* at ¶ 25.

In this case, the timeline of events does not support the District Court's finding that Petra waived its right to arbitration by causing delay. With the exception of Petra's default due to the fact that it did not ever receive the Complaint, Petra has timely met every procedurally imposed deadline. To expect Petra to act even faster

than the rules of civil procedure allow is unreasonable. Below is a detailed timeline of events:

1.	Monarch files Complaint.	February 2, 2024	Dkt. No. 1
2.	Monarch files First Amended Complaint.	April 25, 2024	Dkt. No. 9
3.	Petra Registered Agent served with First Amended Complaint. Petra did not receive the pleading.	May 1, 2024	Dkt. No. 24
4.	Clerk Entry of Default.	May 29, 2024	Dkt. No. 28
5.	Joint Stipulation by Petra and Monarch to set aside default.	July 25, 2024	Dkt. No. 31
6.	District Court Order Granting Motion to Set Aside Default. Order to Answer within 21 days.	July 30, 2024	Dkt. No. 32
7.	Petra files Answer to First Amended Complaint and Counterclaim, and as noted above, Petra incorporated the affirmative defense of the co-Defendants that included arbitration.	August 20, 2024	Dkt. No. 36
8.	Petra sends letter to Monarch of intent to file a motion to compel arbitration. (Dkt. No. 44, Ex. A).	August 29, 2024	Dkt. No. 44, Ex. A
9.	Petra files First Amended Answer pursuant to Rule 15(a)(1), M.R.Civ.P, adding affirmative defense of arbitration.	September 10, 2024	Dkt. No. 40
10.	Petra files Motion to Compel Arbitration.	October 25, 2024	Dkt. No. 41

Nothing in the above timeline suggests that it was Petra’s intention to waive its right to arbitration by delaying enforcement of the arbitration clause. In the cases cited above, this Court has addressed the issue of delay on numerous occasions and ultimately found that delay (sometimes over years) without also actively engaging in litigation and using judicial resources is insufficient to find waiver of the right to arbitration. Petra has taken no other action than to: (1) cure its default; (2) answer

the complaint; (3) amend its complaint to specifically assert arbitration as an affirmative defense; and (4) motion the District Court to compel arbitration. Nothing in this list or the timeframe in which it occurred could be construed as a clear, convincing, and unequivocal intent to waive Petra's right to arbitration.

Next, the District Court notes that Petra's Counterclaim included a claim for breach of the Subcontract that contains the arbitration clause. The District Court quotes *Holm-Sutherland*, which states: "when a party instigates litigation on a contract without mention of a right to arbitrate, that party presumptively waives the right to later demand arbitration pursuant to the clause in the contract." *Holm-Sutherland*, ¶ 28 (citing *Duferco Steel Inc. v. M/V Kalisti*, 121 F.3d 321, 326 (7th Cir.1997); *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir.1995); *World-Source Coil Coating, Inc. v. McGraw Constr. Co., Inc.*, 946 F.2d 473, 479 (6th Cir.1991); *Shinto Shipping Co. Ltd. v. Fibrex & Shipping Co., Inc.*, 425 F.Supp. 1088, 1092 (N.D.Cal.1976)).

This case is easily distinguished from *Holm-Sutherland* and the other supporting cases above. In each of these cases, it was the plaintiff that instigated litigation over a contract and then later moved to compel arbitration. *See, e.g., Holms-Sutherland*, ¶ 29 ("Holm-Sutherland argues that its decision to pursue litigation rather than arbitration was dictated by this Court's *Casarotto* decisions"); *Duferco Steel*, 121 F.3d at 326 ("Having been sued by Duferco in federal court,

Tomazos was entitled to rely on Duferco's waiver of its right to arbitrate.”); *Cabinetree*, 50 F.3d at 390 (“Cabinetree, which initiated this litigation, could, instead of filing suit in a Wisconsin state court, have demanded arbitration under the contract. It did not, thus signifying its election not to submit its dispute with Kraftmaid to arbitration.”); *WorldSource*, 946 F.2d at 479 (“McGraw's state court complaint requested more than such emergency relief... By petitioning the state court for relief that was more than ‘interim or conservatory,’ McGraw waived its right to compel arbitration.”); *Shinto Shipping*, 425 F. Supp. at 1092 (“The circumstances of this case and the context in which the waiver question herein arises are out of the ordinary. Plaintiff filed this action under Title 9 of the United States Code for the very purpose of compelling arbitration.”).

As stated above, the above cases are distinguishable from this case. Petra is the defendant and, thus, did not instigate the litigation over the contract. As such, the District Court’s reliance on *Holm-Sutherland* is misplaced. In each of the cases above, it was the plaintiff who initiated the litigation and then later moved to compel arbitration. That is not the case here. Monarch instigated this litigation and Petra, as the defendant, has sought to compel arbitration under the Subcontract. The fact that Petra filed a counterclaim for breach of contract does not have the same effect as if Petra were to initiate the litigation. As this Court noted in *Downey*, filing a counterclaim does not *per se* waive one’s right to arbitration. *Downey*, 251 Mont. at

391 (“Answering on the merits, asserting a counterclaim, and participating in discovery, without more, is insufficient to constitute waiver.”)

Next, the District Court takes issue with the fact that only Petra could invoke arbitration under the Subcontract seemingly making Petra’s perceived delay in invoking arbitration more egregious. Again, as argued above, Petra disagrees that it delayed in any meaningful or prejudicial manner enforcing the arbitration clause in the Subcontract. Furthermore, it was Petra’s contractual right to arbitrate the dispute with Monarch. Monarch chose to initiate litigation with the knowledge that Petra could, at its option, choose to move the dispute to arbitration. “The fundamental tenet of modern contract law is freedom of contract; parties are free to mutually agree to terms governing their private conduct as long as those terms do not conflict with public laws.” *Winter v. State Farm Mut. Auto. Ins. Co.*, 2014 MT 168, ¶ 26, 375 Mont. 351, 328 P.3d 665 (citations omitted).

Here, Monarch agreed to a subcontract with Petra that included the arbitration clause giving Petra the option to arbitrate. Monarch is a sophisticated commercial construction subcontractor. If Monarch thought that the arbitration provision in the Subcontract was unfair, it had the opportunity to negotiate this language. Ultimately, it is the District Court’s duty to interpret the Subcontract as it is written. § 1-4-101, MCA. There is nothing in the Subcontract that states Petra must elect arbitration

within a certain time period if Monarch initiates litigation or it is waived. In fact, the Subcontract contains an anti-waiver clause. *See* (Dkt. No. 41, Ex. A, Art. 21, p. 21.)

As argued throughout, Petra has taken no overt actions other than to enforce its right to arbitration in this case. The amount of time Petra took to enforce the arbitration clause is insignificant when compared to the facts of other Montana cases where waiver was not found and arbitration was enforced years after litigation was initiated. The fact that only Petra had the contractual right to elect arbitration as a forum does not change that fact.

b. Monarch has not been prejudiced by Petra asserting its right to compel arbitration.

Finally, the District Court concluded that Monarch was prejudiced by Petra's perceived delays in demanding arbitration. The District Court's Order states that Petra caused prejudice to Monarch by "seeking [Monarch's] compelled participation in arbitration months after Monarch initiated this action[.]" (Dkt. No. 45, p. 9). This is insufficient to establish prejudice. This Court has noted that a party resisting arbitration may establish prejudice based on delay and extensive pretrial litigation. *Holm-Sutherland*, ¶ 32. Further, a party resisting arbitration must demonstrate that it has suffered prejudice by spending time and money for trial preparation and by divulging its litigation strategies in preparation for litigation. *Id.* at ¶ 33.

As argued above, compared to other cases that have considered whether delay is an intentional waiver of the right to arbitration, the "delay" by Petra asserting its

right to arbitration was insignificant. Petra answered Monarch's First Amended Complaint on August 20, 2024, Petra filed its Motion to Stay Proceeding and Compel Arbitration on October 25, 2024, approximately two months later. Moreover, neither Petra nor Monarch have engaged in extensive pretrial litigation. Petra has not engaged in discovery at all while Monarch has issued one set of written discovery when it served Petra with its Complaint and did so knowing that it had agreed to arbitrate the very dispute that is the subject of the Complaint.

Importantly, neither party has taken any depositions or filed any substantive motions in the case. There is no scheduling order in this case. As such, neither party has disclosed lay witnesses or expert witnesses. Likewise, there is no pretrial conference date or trial date. Neither party has begun prepping for trial or divulged any litigation strategies to the other. While Monarch would like to portray this case as one that is on the verge of trial, that is simply not true. This case is still in its infancy. As such, Monarch has not been prejudiced by Petra asserting its right to arbitration. Ultimately, Monarch has failed to satisfy its heavy burden of proof that Petra has waived its right to arbitration.

CONCLUSION


In conclusion, Petra did not engage in a course of conduct that induced Monarch to believe that its intent was to waive its right to arbitration. Waiver of an otherwise valid agreement to arbitrate must be clear, convincing, and unequivocal.

Nothing about Petra’s conduct in this litigation was a clear, convincing, and unequivocal signal to Monarch that its intent was to waive its right to arbitration. Furthermore, Monarch has not been prejudiced by Petra enforcing its right to arbitrate this dispute. As such, Petra respectfully requests that the Court reverse the order of the District Court and order the parties to arbitration as agreed in the parties’ Subcontract.

DATED this 27th day of February 2025.

E.J. GUZA & ASSOCIATES
A PROFESSIONAL LAW CORPORATION

By: _____


Edward J. Guza
Lance F. Carl
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

This brief is proportionately spaced, together with the typeface, point size, and word count requirements of Rule 11 of the Montana Rules of Appellate Procedure. This brief was generated using Microsoft Word on white paper not exceeding 8½ by 11 inches with margins on the right and left side and on top and bottom not less than 1 inch wide. The font is Times New Roman size 14. The brief is double spaced. The brief has 4,800 words excluding the cover page, table of contents, table of authorities, and certificate of compliance as calculated by Microsoft Word.



Lance F. Carl

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon the following counsel of record, by the means designated below, this 27th day of February 2025.

E-Service

Cherche Prezeau
Jackson Maynard
CHRISTENSEN & PREZEAU, PLLP
24 W. 6th Avenue, Suite 501
Helena, MT 59601
Telephone: (406) 442-3690
cherche@cplawmt.com
jackson@cplawmt.com
Attorneys for Appellee

E-Service

Jon A. Wilson
Nathan A. Burke
BROWN LAW FIRM, PC
315 North 24th Street
P.O. Box Drawer 849
Billings, MT 59103-0849
Telephone: (406)-248-2611
Jwilson@brownfirm.com
nburke@brownfirm.com
Attorneys for Appellee

E-Service

Trent Baker
DATSOPOULOS, MacDONALD & LIND, PC
201 West Main, Suite 201
Missoula, MT 59802
Telephone: (406) 728-0810
tbaker@dmlaw.com
Attorney for Defendants Bozeman West Apartments, LP,
and Saccoccia Lands III, LLC

Mail

BCRH AVION VENTURE, LLC
251 Little Falls Drive
Wilmington, DE 19808
Has not appeared

Mail

STOCKMAN BANK OF MONTANA
700 Main Street
P.O. Box 250
Miles City, MT 59301-0250
Has not appeared

Mail

WCW OLYMPUS BOZEMAN, LLC
1501 S. Mopac Expy, Suite 220
Austin, Texas 78746
Has not appeared

By: 

Edward J. Guza/Lance F. Carl
Attorneys for Appellant

APPENDIX

- 1. ORDER ON PETRA'S MOTION TO STAY PROCEEDING AND COMPEL ARBITRATION (DKT. NO. 45.00)**