

**UNREPORTED**

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 00815

September Term, 2016

---

GASTRO CENTER OF MARYLAND, LLC

v.

APRIL TIGNOR

---

Meredith,  
Graeff,  
Reed,

JJ.

---

Opinion by Meredith, J.

---

Filed: June 30, 2017

This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In June 2013, Dr. April Tignor (“Dr. Tignor”), appellee, began her employment as a physician at Gastro Center of Maryland, LLC (“Gastro”), appellant, in Howard County, Maryland. The parties entered into agreements concerning Dr. Tignor’s employment at Gastro, and two of the employment agreements contained provisions requiring the employee to arbitrate any future disputes between the parties.

In June 2015, Dr. Tignor served Gastro with a “Notice to Employer of Intent to Claim Lien for Unpaid Wages” pursuant to Maryland Code (2013), Labor and Employment Article (“LE”), § 3-1102, seeking to impose a wage lien against Gastro in the amount of \$104,058.00 for alleged unpaid wages due to Dr. Tignor. In accordance with LE § 3-1103, Gastro filed a complaint in the Circuit Court for Howard County to dispute Dr. Tignor’s lien claim. The parties subsequently engaged in discovery and several other pre-trial events in anticipation of trial, which was set for June 23, 2016.

On March 9, 2016, Dr. Tignor filed a formal demand for arbitration with the American Arbitration Association pursuant to the arbitration clause of one of the employment agreements. In the circuit court, Gastro filed a motion to dismiss that arbitration proceeding, contending, *inter alia*, that Dr. Tignor had waived her right to arbitration. Dr. Tignor filed a cross-motion to stay the circuit court proceeding pending the outcome of arbitration. On June 1, 2016, the circuit court held a hearing concerning the parties’ motions, and held that Dr. Tignor had not waived her right to arbitrate because Gastro had failed to show that it would be prejudiced by being compelled to arbitrate the

wage dispute. The circuit court entered an order granting Dr. Tignor's motion, staying the circuit court proceeding pending the outcome of the arbitration proceeding.

This appeal followed.

### **QUESTIONS PRESENTED**

Gastro presents two questions for our review:

1. Did the Circuit Court commit legal error when, in contravention of well-settled precedent, it created a new bright-line test that, in effect, requires arbitration if the court finds that a party opposing arbitration will not be prejudiced by arbitration?
2. Was the Circuit Court's finding that Gastro would not be prejudiced by arbitration clearly erroneous?

For the reasons discussed below, we conclude that the court's ruling was contrary to the legal principles set forth in *Cain v. Midland Funding, LLC*, 452, Md. 141 (2017). Accordingly, we will reverse the rulings of the Circuit Court for Howard County, and remand the case for further proceedings consistent with this opinion.

### **FACTUAL & PROCEDURAL BACKGROUND**

The parties to this appeal largely agree on the factual background in this case. Gastro is a gastroenterology practice located in Howard County, Maryland. On July 15, 2013, Dr. Tignor entered into an "Interim Associate Agreement" to be employed as a physician at Gastro. The Interim Associate Agreement contained an arbitration clause which mandated that disputes between the parties would be resolved via arbitration under the rules of the American Health Lawyers Association:

23. Remedies. The parties hereto agree that any disputes under this Agreement will be submitted to binding arbitration under the rules of the American Health Lawyers Association

A year later, on July 15, 2014, Gastro and Dr. Tignor entered into a second agreement, referred to as a “Physician’s Revenue Sharing Agreement.” The Physician’s Revenue Sharing Agreement also contained an arbitration clause, but, this clause differed from the arbitration clause in the Interim Associate Agreement, and mandated arbitration pursuant to the rules of the American Arbitration Association:

8.5 Governing Law; Arbitration. This Agreement shall be construed in accordance with and governed by the laws of the State of Maryland. The parties agree that any dispute between the parties hereunder, shall be exclusively resolved by binding arbitration before a single arbitrator in Howard County, Maryland under the rules of the American Arbitration Association applicable to commercial-related disputes, and the decision of the arbitrator shall be final and binding upon the parties; provided, however, that in the event of any breach or alleged breach by [Dr. Tignor] of the provisions of Article IV of this Agreement[, entitled “Restrictive Covenants”], [Gastro] may elect to waive arbitration and commence a suit or other proceeding in a court of competent jurisdiction to enforce its rights and remedies herein or under applicable law with respect to such breach, including (without limitation) [Gastro’s] right to monetary damages and/or to injunctive relief. In such event, [Dr. Tignor] shall nonetheless be required to arbitrate any claims she may have, including, but not limited to any claims which could be asserted as offset, setoff or counterclaim. If [Gastro] initiates court proceedings pursuant to this section, the parties submit to the jurisdiction of the Court of the State of Maryland and agree that the exclusive venue for any court proceeding arising pursuant to this Agreement or [Dr. Tignor’s] employment with [Gastro] shall be in the Circuit Court for Howard County, Maryland, [Dr. Tignor] hereby agrees to personal jurisdiction in that Court and waives all defenses of improper or inconvenient forum.

On July 15, 2014, Gastro and Dr. Tignor also entered into an agreement entitled “Option to Purchase Membership Interest” with Cascades Endoscopy Center, LLC (“Cascades”), an affiliate of Gastro. Pursuant to this agreement, Dr. Tignor purchased a

25% membership in Cascades for \$12,500. This agreement did not contain an arbitration provision.

On June 20, 2015, Dr. Tignor's employment with Gastro was terminated after the parties could not agree on a new employment contract.

On or about June 4, 2015, prior to the termination of her employment, Dr. Tignor served Gastro with a "Notice to Employer of Intent to Claim Lien for Unpaid Wages" (the "Notice") pursuant to LE § 3-1102, seeking to impose a wage lien against Gastro in the amount of \$104,058.00 for alleged unpaid wages due to Dr. Tignor pursuant to the Interim Associate Agreement and Physician's Revenue Sharing Agreement. Prior to service of the Notice, Dr. Tignor did not demand arbitration.

On July 1, 2015, Gastro filed a complaint in the Circuit Court for Howard County to dispute Dr. Tignor's lien claim for unpaid wages; Gastro filed the complaint pursuant to LE § 3-1103(a), which provides that "[a]n employer may dispute a lien for unpaid wages by filing a complaint in the circuit court for the county where property of an employer is located." LE § 3-1103(b) requires the employer to file the complaint within 30 days after being served with the employee's notice. On July 2, 2015, the circuit court issued a scheduling order to the parties. On August 7, 2015, Dr. Tignor filed her answer to Gastro's complaint, asserting eleven affirmative defenses. Dr. Tignor did not assert the right to arbitrate the dispute as an affirmative defense. At the conclusion of her answer, Dr. Tignor made the following request: "April Tignor, M.D., hereby requests this Honorable court to

enter a lien for unpaid wages and award April Tignor, M.D. such other and further relief as the Court may deem just and proper.”

The parties subsequently engaged in discovery; the scheduling order provided that discovery closed on January 15, 2016. On February 29, 2016, Gastro filed its pretrial statement, and on March 2016, Dr. Tignor filed her pretrial statement, outlining potential witnesses, exhibits, and stipulations of fact. In the subsection in which parties are asked to provide a brief statement “as to any counterclaim, cross-claim, or third party claim,” Dr. Tignor stated: “Defendant anticipates the need to file a counterclaim (or arbitration) for, *inter alia*, a) accounting; b) violations of the Maryland Wage and Labor Act and c) to recover monies due and owing under a related contract between the parties.” On March 8, 2016, the parties attended a pre-trial settlement conference in the circuit court, but were unable to reach a settlement. At that point, the only scheduled event that remained in the case was trial, which was set to begin June 23, 2016.

On March 9, 2016, Dr. Tignor filed a demand for arbitration with the American Arbitration Association pursuant to arbitration clause in the parties’ Physician’s Revenue Sharing Agreement. Dr. Tignor’s demand for arbitration sought the same unpaid wages for which she had requested a lien in the circuit court proceeding, but additionally sought damages not expressly authorized under LE § 3-1101, *et seq.*, and additional monies (which were not at issue in the circuit court case) relating to the Option to Purchase Membership Interest agreement.

On March 25, 2016, Gastro filed a motion asking the circuit court to dismiss the arbitration proceeding, contending, *inter alia*, that Dr. Tignor had waived her right to arbitration. On April 15, 2016, Dr. Tignor filed her opposition to the motion to dismiss, and filed a cross-motion to stay the circuit court proceeding pending the outcome of arbitration.

On June 1, 2016, the circuit court held a hearing on the parties' motions. Ruling from the bench, the circuit court denied Gastro's motion to dismiss the arbitration proceeding, finding that Dr. Tignor had not waived her right to arbitration. The court granted Dr. Tignor's request for a stay of the circuit court proceeding pending completion of the arbitration. The circuit court explained its holding as follows:

The factors that this Court needs to determine if there is a waiver is whether or not the defendant asserted arbitration as an affirmative defense -- that was never asserted in this case; whether the parties conducted discovery -- the parties did conduct discovery; the delay in asserting arbitration -- [Dr. Tignor's] counsel argues to this Court that they asserted this in March and I did note that that was eight months and what was really the delay, and he indicated they had always talked about arbitration but I do note the comment was it was in January -- well, this matter was filed in July and in August so I still don't have what I think is an adequate or acceptable argument concerning the delay; the prejudice to the party not seeking arbitration -- which is why this Court asked [Gastro's] counsel what the actual prejudice would be. And these are actually the factors from *Messick* as well as discussed in *Abramson v. Wildman* which is 184 Md. App. 189 and *Messick* -- those were the factors -- and that's 294 Md. 448 -- 152 Md. App. 394.

. . . And the question is whether or not there was a waiver of the right to arbitrate.

**There was not an expressed, explicit, equivocal waiver. But as I said, the Court did note that there was participation in that there was discovery. There's really no adequate or sufficient argument as to why it was delayed for eight months. It was never asserted as an affirmative**

**defense. So if that were the case the Court would clearly find that there was a waiver.**

The other issue that this Court -- or, **the last issue -- is, what is the actual prejudice.** Other than the expense and the conducting of discovery there is more extensive discovery, I believe, in the Circuit Court than there would be in arbitration. **The parties would have to go through a little bit more discovery. So I actually fail to see where there would be any prejudice.**

**For that reason, I am going to deny the motion to dismiss for arbitration. Had there been sufficient prejudice I would be granting the dismissal of arbitration and you all would be going to trial two weeks from now, which is when this case is set. Because I fail to find what the prejudice is or the actual prejudice, I will be denying the motion to dismiss arbitration** and granting a stay because of the binding arbitration provisions that you all -- that is before this Court. That will be the decision.

(Emphasis added.)

The circuit court's order was entered on June 14, 2016, and states in relevant part:

**ORDERED**, that the Plaintiff's Motion to Dismiss is **DENIED**;

**ORDERED FURTHER**, that the Defendant's Motion to Stay Litigation is **GRANTED**;

**ORDERED FURTHER**, that the above captioned litigation is STAYED pending completion of the arbitration between the parties in the case styled *April Tignor v. Gastro Center of Maryland, LLC*, before the American Arbitration Association and docketed as Case Number 01-16-0000-8688 (hereinafter "Arbitration"). Upon the conclusion of the Arbitration either party may notify this court of the need for further proceedings or, if no further proceedings are required, shall promptly file a Stipulation to Dismissal with Prejudice.

Gastro filed its notice of appeal on June 29, 2016.



## DISCUSSION

### I. Dr. Tignor's Motion to Dismiss Gastro's Appeal

Dr. Tignor contends that the circuit court's order denying Gastro's motion to dismiss and staying the circuit court proceeding pending the outcome of the arbitration proceeding is an interlocutory, non-final judgment, and, therefore, we should dismiss Gastro's appeal because there has been no final judgment in this case. Dr. Tignor asserts that Maryland Code (1974, 2006 Repl. Vol.), Courts and Judicial Proceedings Article ("CJ"), § 12-303, entitled "Appeals from orders not final," does not permit appeals from orders to compel arbitration while staying pending litigation. In particular, Dr. Tignor points to CJ § 12-303(ix), which *permits* interlocutory appeals from orders "[g]ranted a petition to stay arbitration . . . ." According to Dr. Tignor, while CJ § 12-303(ix) permits appeals from orders which *stay* arbitration, there is no authority permitting interlocutory appeals from orders *compelling* arbitration while staying circuit court proceedings.

The Court of Appeals, however, has expressly held that "[a] trial court's order to compel arbitration constitutes a final and appealable judgment." *Walther v. Sovereign Bank*, 386 Md. 412, 422 (2005); *see also Holloman v. Circuit City Stores, Inc.*, 391 Md. 580, 588 (2006) (quoting *Walther* for proposition that "[a] trial court's order to compel arbitration constitutes a final and appealable judgment.>"). The Court of Appeals further reiterated *Walther's* holding -- that orders to compel arbitration are final and appealable judgments -- in *Shailendra Kumar, P.A. v. Dhanda*, 426 Md. 185, 201 n.7 (2012), noting:

*See Walther v. Sovereign Bank*, 386 Md. 412, 421 n. 4, 872 A.2d 735, 741 n. 4 (2005) (**noting that despite the case being stayed pending arbitration**

**under § 3-209, an order to compel arbitration was appealable, “[b]ecause all of the issues in this case were ordered to [binding] arbitration by the trial judge, there was nothing left for the trial judge to ‘stay’. . . . [A]ll of the issues were arbitrable thus the case was effectively dismissed . . . .”)**

(Emphasis added.)

The circuit court’s order in this case mandated that the “litigation is STAYED pending completion of the arbitration between the parties . . . . Upon the conclusion of the Arbitration either party may notify this court of the need for further proceedings or, if no proceedings are required, shall promptly file a Stipulation to Dismissal with Prejudice.” Dr. Tignor asserts that “it is quite likely that further action from the Circuit Court will be necessary” because the circuit court will be required to enter a final judgment on any award made by the arbitrator and enter a wage lien should Dr. Tignor prevail in arbitration.

But here, much like the *Walther* case, all of the pending issues in this case were within the scope of Dr. Tignor’s demand for arbitration, and, barring unforeseen developments, all of the substantive claims in this case would be resolved in the contemplated arbitration proceeding. As a result, the circuit court case has been “effectively dismissed.” See *Walther, supra*, 386 Md. at 421 n.4. The fact that the circuit court could possibly be required to take additional ministerial actions after the conclusion of the arbitration proceeding does not render the court’s order to compel arbitration non-appealable. Accordingly, we will deny Dr. Tignor’s motion to dismiss this appeal.

## **II. The Circuit Court’s Denial of Gastro’s Motion to Dismiss the Arbitration Proceeding**

### **A. Standard of Review**

We have previously explained that “[a] circuit court’s decision that a party has or has not waived his right to arbitrate is a factual finding that will not be disturbed on appeal unless it is clearly erroneous.” *Brendsel v. Winchester Const. Co.*, 162 Md. App. 558, 574 (2005), *aff’d*, 392 Md. 601 (2006); *see also Abramson v. Wildman*, 184 Md. App. 189, 200 (2009) (“A finding of such a waiver [of the right to arbitrate] is highly factual and a decision by the circuit court premised on those facts will not be disturbed on appeal unless it is clearly erroneous.”). Nevertheless, we review the circuit court’s legal rulings without deference. *See Cain, supra*, 452 Md. at 150 (“when a circuit court decision is premised on a conclusion of law, we review that determination without deference”); *Holloman v. Circuit City Stores, Inc.*, 391 Md. 580, 588 (2006).

### **B. Waiver of Dr. Tignor’s Right to Arbitrate**

Gastro contends that the circuit court erred in holding that Dr. Tignor did not waive her right to arbitrate. Gastro asserts that the circuit court “failed to balance all waiver factors as required by Maryland law,” and instead based its holding that Dr. Tignor had not waived her right to arbitrate on the sole factual finding that Gastro would not be prejudiced by being compelled to arbitrate. We agree with Gastro’s contention that the sole explanation the circuit court provided for finding a lack of waiver was the fact that the court found that arbitration would not cause Gastro to suffer significant prejudice.

Since the time the circuit court made its ruling, the Court of Appeals has held that a party opposing a demand to arbitrate a dispute does not need to demonstrate prejudice in order to establish waiver of an agreement to arbitrate. *Cain, supra*, 452, Md. at 163 (holding that the party arguing there had been a waiver of the right to arbitrate “does not have to demonstrate that he will suffer prejudice if the arbitration clause is enforced”).

In *Cain*, the Court of Appeals explained that, in order to “determine whether a party has waived a contractual right [to arbitrate a dispute], we look to the words and conduct of that party — **not what effect the conduct may have had on the opposing party.**” *Id.* at 162 (emphasis added). The Court held that, “to establish that [a party seeking to invoke arbitration] waived its right to arbitrate, [the party opposing arbitration] **does not have to demonstrate that he will suffer prejudice if the arbitration clause is enforced.**” *Id.* (emphasis added). Accordingly, because Gastro was not required to show that it would be prejudiced by being compelled to arbitrate, the circuit court erred in finding that Dr. Tignor had not waived the right to demand arbitration of the pending dispute. Consequently, because the circuit court’s decision to grant Dr. Tignor’s motion to stay the circuit court action was based upon an incorrect legal principle, we will reverse the rulings of the circuit court and remand the case for further proceedings.

**APPELLEE’S MOTION TO DISMISS  
DENIED. JUDGMENTS OF THE CIRCUIT  
COURT FOR HOWARD COUNTY  
REVERSED, AND CASE IS REMANDED  
FOR FURTHER PROCEEDINGS  
CONSISTENT WITH THIS OPINION.  
COSTS TO BE PAID BY APPELLEE.**