IN THE COURT OF APPEALS OF IOWA

No. 2-659 / 11-1287
Filed October 17, 2012

HORSFIELD CONSTRUCTION, INC.,
Plaintiff-Appellee,

vs.

CITY OF DYERSVILLE,
Defendant-Appellant.

CITY OF DYERSVILLE, IOWA,
Plaintiff/Cross-Defendant-Appellant,

vs.

UNITED FIRE & CASUALTY COMPANY,
Defendant-Appellee.

UNITED FIRE & CASUALTY COMPANY,
Third-Party Plaintiff-Appellee,

vs.

HORSFIELD CONSTRUCTION, INC.,
Third-Party Defendant/Cross-Plaintiff-Appellee.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

The City of Dyersville appeals the district court's rulings denying its motion to amend; granting summary judgment to Horsfield Construction, Inc. (HCI); granting HCI's application for confirmation of the arbitration award; and granting United Fire's motion to enlarge. **AFFIRMED.**

Douglas M. Henry and Jason D. Lehman of Feurste, Carew, Juergens & Sudmeier, P.C., Dubuque, for appellant.

Todd J. Locher of Locher & Locher, Farley, for appellee Horsfield Construction, Inc.

Drew J. Gentsch of Whitfield & Eddy, P.L.C., Des Moines, for appellee United Fire & Casualty.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

The City of Dyersville engaged in lengthy litigation to ensure this matter would be decided by arbitration rather than in judicial proceedings. It then sought to vacate the arbitration award in a closed case. The district court found the City failed to properly invoke its authority and the City now appeals. We affirm.

I. Background Facts and Proceedings.

We summarize these pertinent facts of the parties' litigation.

A. *Declaratory Judgment Action*. In 2005, Horsfield Construction, Inc. (HCI) filed a declaratory judgment action (LACV 054287, hereinafter "declaratory judgment action") against the City of Dyersville (the City) seeking rulings concerning the duties and obligations of the parties under a 2003 Improvement Contract concerning the First Avenue Reconstruction-Downtown Streetscape Project (Streetscape Project). The City successfully challenged that lawsuit on the ground the contract required arbitration. In its motion for summary judgment, the City asserted,

> To the extent [HCI] is seeking resolution of issues "where time and/or financial considerations are involved" (see Section 3-01 of the Improvement Contract . . .), [HCI] is obligated to arbitrate those issues.
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> The essence of [HCI's] Petition is that it is entitled to be paid for certain work it performed. Since [HCI's] dispute pertains to financial considerations, it is required to arbitrate. [HCI] has no right to proceed with a civil action in District court.

The district court rejected HCI's arguments that (1) the contract was one of adhesion and (2) the City waived arbitration in moving for summary judgment rather than filing a motion to compel arbitration. The district court thus granted the City's motion for summary judgment.

We affirmed summary judgment for the City on October 15, 2008. *Horsfield Constr*., *Inc*. *v*. *City of Dyersville*, No. 07-1419, 2008 WL 4570316 (Iowa Ct. App. Oct. 15, 2008). We addressed HCI's claim that the City employed an improper procedure in moving for summary judgment rather than in moving to compel arbitration, stating in part,

> Iowa Code section 679A.2(3) provides that "[i]f an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a district court, [an application to compel discovery] shall be made to that court." We find nothing indicating the procedure provided for in this section is the exclusive remedy for a party to an arbitration contract. Moving for summary judgment was an appropriate procedural response. Nothing now precludes HCI from attempting to assert its perceived rights in a future arbitration proceeding. Thus, HCI was not prejudiced in any fashion by the City's election to move for summary judgment rather than moving to compel arbitration under section 679A.2(3).[1]

Id., at *2 (footnote omitted). The supreme court denied further review and procedendo issued on January 27, 2009.

On November 29, 2010, the City filed an "application to vacate arbitration award" in the declaratory judgment action. The City asserted an arbitration award had been entered in favor of HCI on October 21, 2010, and that the award should be vacated as the arbitrator exceeded his power by hearing a case that was time-barred, and in establishing a substantial date of completion and final date of completion. An amended application was filed on December 1 and service of original notice of the application to vacate arbitration award was acknowledged by acceptance of service on December 6, 2010.

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[1] Because the chapter remains essentially unchanged since 1983, for convenience all references are to the current 2011 Iowa Code.

On December 27, 2010, HCI filed an answer to the application to vacate arbitration award in the declaration judgment action. HCI asserted numerous affirmative defenses[2] including that the issue of whether HCI demanded arbitration within a reasonable time was for the arbitrator to decide, and that the application "should be dismissed for lack of subject matter jurisdiction."

B. *Surety Action*. Meanwhile, on January 2, 2009, the City filed an action against United Fire & Casualty seeking payment under a surety bond relating to the Streetscape Project (LACV055840, hereinafter "surety action"). United Fire brought HCI into the surety action as a third-party defendant. HCI successfully moved to stay the surety action pending arbitration.

On January 20, 2011, HCI filed an application for confirmation of arbitration award in the surety action, in which it alleged "Iowa Code section 679A.11[3] requires that this court confirm the award." That same date HCI filed an answer in the surety action, stating in part,

> 6. On October 21, 2010, the arbitrator issued an arbitration award in favor of HCI ("Arbitration Award"). In the Arbitration Award, the arbitrator determined that HCI substantially completed the Project on December 1, 2004, and that the date of final completion of HCI's work on the Project was September 23, 2005.
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> 7. The arbitrator issued a monetary award in favor of HCI and against Dyersville in the amount of $252,121.18 together with interest in the amount of $7877.97 through October 22, 2010, plus interest thereafter at the statutory rate.

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[2] Ten enumerated affirmative defenses were asserted.

[3] Iowa Code section 679A.11 provides: "Upon application of a party, the district court shall confirm an award, unless within the time limits imposed under sections 679A.12 and 679A.13 grounds are urged for vacating, modifying, or correcting the award, in which case the district court shall proceed as provided in sections 679A.12 and 679A.13."

On January 26, 2011, the City filed in the surety action an answer to the cross-petition, admitting the arbitration award had issued, "but den[ying] that such award was effective in any way as a determination of any fact or resolution between the parties," and asserting as an affirmative defense "all of the reasons stated in the Plaintiff's Amended and Substituted Application to Vacate Arbitration Award [which was filed in the declaratory judgment action]."

C. *Consolidated Motions*. On January 27, 2011, HCI filed a motion for summary judgment in the declaratory judgment action on grounds the action was dismissed in June 2007, procedendo issued in 2009, and the court thus lacked subject matter jurisdiction to hear the application to vacate arbitration award. And because more than ninety days had passed since the entry of the arbitration award, the City could no longer "maintain an application," citing Iowa Code section 679A.12.[4]

On February 1, 2011, in the declaratory judgment action, the City filed a "motion to amend caption and assign new case number to application to vacate arbitration award." The City resisted the motion for summary judgment, stating that "[a]lthough it was mis-captioned, the [City's] Application to Vacate Arbitration award was timely and initiated a proceeding over which the Court had jurisdiction under section 679A.12." HCI resisted the motion to amend as the court "lacks jurisdiction over the parties and the subject matter and can only dismiss this case."

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[4] Iowa Code section 679A.12(c) provides that except in cases "procured by corruption, fraud or other illegal means" an application to vacate an arbitration award "shall be made within ninety days after delivery of a copy of the award to the applicant."

The district court set the pending motions in the declaratory judgment action (motions for summary judgment and to amend) and the surety action (application to confirm award) for a consolidated hearing. Arguments were heard on March 22, 2011. On April 18, 2011, the court filed an order denying the motion to amend, granting the motion for summary judgment, and confirming the arbitration award.

D. *Motion to Enlarge*. United Fire & Casualty then filed a motion to enlarge findings as the court had failed to mention the effect of its rulings on the claims against United Fire. It noted its liability under the bond was co-extensive with the liability of HCI; the arbitration award precluded recovery against HCI; and consequently, United Fire was entitled to judgment in its favor. The City resisted. The court ruled, "As [HCI] is not liable to the City for a default or breach, the City does not have any ground on which to pursue a claim for a breach against United Fire." The court dismissed the surety action at the City's cost.

The City now appeals. It argues the district court erred in (1) denying its motion to amend; (2) granting HCI's motion for summary judgment; (3) granting HCI's application for confirmation; and (4) granting the motion to enlarge.

II. Scope and Standards of Review.

"We afford district courts considerable discretion in ruling on motions for leave to amend pleadings" and "will reverse only if the record indicates the court clearly abused its discretion." *Rife v*. *D*.*T*. *Corner*, *Inc*., 641 N.W.2d 761, 766

(Iowa 2002). A court abuses its discretion when it bases its decision on clearly untenable grounds or to an extent clearly unreasonable. *Id*.

We review the entry of summary judgment for correction of errors at law. *Mueller v*. *Wellmark*, *Inc*., 818 N.W.2d 244, 253 (Iowa 2012).

As for the order confirming an arbitration award, our review is for errors at law. *Humphreys v*. *Joe Johnston Law Firm*, *P*.*C*., 491 N.W.2d 513, 514 (Iowa 1992).

III. Discussion.

We affirmed summary judgment for the City in the declaratory judgment action on October 15, 2008. *Horsfield Constr*., *Inc*. *v*. *City of Dyersville*, No. 07-1419, 2008 WL 4570316 (Iowa Ct. App. Oct. 15, 2008). Procedendo issued on January 27, 2009. That dismissal was then final. *See In re H*.*S*., 805 N.W.2d 737, 743-44 (Iowa 2011) (discussing applications for further review, issuance of procedendo, and finality of decisions). Because the City chose to proceed by summary judgment in the declaratory judgment action rather than by a stay of that action, the City filed a motion in a closed case. As observed by the district court,

> Under Iowa Code section 611.7, a plaintiff's error regarding the appropriate proceedings should not result in the dismissal of the action, but rather a "change into the proper proceedings, and a transfer to the proper docket." Iowa Code § 611.7 (2011). A plaintiff may move the Court to correct this error if the defendant has already answered. *Id*. § 611.8. "[I]f the only irregularity is that it has been filed under the wrong docket, one or both of the parties must move that it be transferred to the proper docket, or the court must transfer it; otherwise, the case may proceed to conclusion where it is." *Woodbury Cnty. Attorney v. Iowa Dist. Ct.*, 448 N.W.2d 20, 22 (Iowa 1989). The filing of an action on the wrong docket

> affects the district court's authority, not its subject matter jurisdiction. *State v. Emery* 636 N.W.2d 116, 112 (Iowa 2001).
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> The filing of any application in a case that is closed or has been dismissed when the party should have initiated an independent action is not the same as filing an action on an improper docket. *See State v. Braun*, 460 N.W.2d 454, 455 (Iowa 199); *Woodbury Cnty. Attorney*, 448 N.W.2d at 22; *State v. Wright*, No. 05-0529, 2008 WL 1884029 (Iowa Ct. App. April 30, 2008). "A defendant cannot jump start an expired case by simply filing an application for collateral relief." *Braun*, 460 N.W.2d at 455. Even though this Court has subject matter jurisdiction over the City's application, it lacks the authority to grant leave to amend despite Iowa Code section 611.7.

And we conclude the City cannot now claim prejudice resulting from its own decision.[5] *Knudsen v*. *Merle Hay Plaza*, *Inc*., 160 N.W.2d 279, 285 (Iowa 1968) ("Defendant cannot have the benefit of self-created error. . . . [I]t is elementary a litigant cannot complain of error which he has invited or to which he has assented.").

Because no timely application to vacate was filed in the pending action, we conclude the district court properly and necessarily confirmed the arbitration award in the surety action. *See $99 Down Payment, Inc. v. Garard*, 592 N.W.2d 691, 695 (Iowa 1999).

AFFIRMED.

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[5] We note, too, that had the court reached the merits, it well may have considered the doctrine of judicial estoppel in light of the City's insistence on arbitration in prior proceedings, and its apparently contradictory claim now that the arbitration decision is not binding upon it. *See generally Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192, 196 (Iowa 2007) (explaining the doctrine of judicial estoppel that "prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding").