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2-7-2018

**CAROL LYNN EDEN, as Trustee CAROLL YNN EDEN, as Trustee of  
The 2005 Schinazi GST Grantor Trust Order Denying Respondents'  
Motion to Compel Arbitration and Denying as Moot Petitioner's  
Application to Stay Arbitration**

Alice D. Bonner  
*Fulton County Superior Court Judge*

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sought to reacquire the limited partnership interest in 2012. The Court of Appeals reasoned that because the Trust had become a limited partner, the transfer of the interest was governed by Section 5 of the Amended and Restated Limited Partnership Agreement of RFS Partners, L.P. (“Limited Partnership Agreement”). The Court of Appeals concluded that, although Schinazi had the right to reacquire the interest, he failed to follow the process outlined in Section 5 of the Limited Partnership Agreement to complete the transfer of the interest such that the Trust remains the owner of the limited partnership interest.

Upon the action being remanded to this Court following the Court of Appeals’ Remittitur, Petitioner filed a Third Amended Petition asserting the following claims: (1) appointment of receiver (to manage the assets of RFS Partners until the claims asserted in this action are resolved); (2) breach of duty of loyalty by RFS & Associates and Schinazi (regarding the re-characterization of a pre-existing loan to RFS Partners as an additional capital contribution); (3) breach of fiduciary duty and of the Partnership Agreement by RFS & Associates and Schinazi (regarding the wrongful transfer of title of the Trust’s limited partnership interest to Schinazi on RFS Partners’ books and records); (4) a creditor claim against RFS & Associates as the general partner of RFS Partners for pro rata distributions; (5) attorneys’ fees and expenses; and (6) punitive damages.

In their Motion to Compel Arbitration, Respondents assert that now that the ownership of the limited partnership interest has been determined, the claims in the Third Amended Petition “aris[e] out of or relat[e] to the Agreement” such that the arbitration clause now applies to those claims. However, having considered the over five-year record of this action which has centered on Petitioner’s claims and alleged rights under the Limited Partnership Agreement, the Court finds Respondents waived the right to invoke the arbitration clause contained therein. *See M.*

Homes, LLC v. S. Structural, Inc., 281 Ga. App. 380, 383, 636 S.E.2d 99, 101 (2006) (citing Burnham v. Cooney, 265 Ga. App. 246, 247(1), 593 S.E.2d 701 (2004) (“[A] party may waive an agreement to arbitrate by taking actions that are inconsistent with the right of arbitration”). *See, e.g.,* Griffis v. Branch Banking & Tr. Co., 268 Ga. App. 588, 591, 602 S.E.2d 307, 310 (2004) (defendants waived right to arbitrate where they asserted counterclaims, engaged in extensive discovery and waited nine months before asserting their right to arbitration); Wise v. Tidal Const. Co., 261 Ga. App. 670, 674, 583 S.E.2d 466, 469 (2003) (party waived right to arbitration where it participated in litigation, including extensive discovery, and waited until the eve of trial to invoke the right); Nat'l Parents' Res. Inst. for Drug Educ., Inc. v. Peachtree Hotel Co., 201 Ga. App. 637, 637, 411 S.E.2d 884, 886 (1991) (party waived contractual right to seek arbitration where it “participated fully in the defense of the action without ever requesting or demanding arbitration, moving for dismissal, moving for a stay, or moving to compel arbitration, or taking any action to present the arbitration issue to the trial court for a ruling”). Accordingly, Respondents’ Motion to Compel Arbitration is hereby DENIED.

***Petitioner’s Application to Stay Arbitration***

On January 29, 2018, while the Motion to Compel Arbitration was pending, Petitioner filed an Application to Stay Arbitration. The Court’s ruling herein denying the Motion to Compel Arbitration moots Petitioner’s Application to Stay Arbitration. Thus, Petitioner’s Application to Stay Arbitration is hereby DENIED as MOOT.

SO ORDERED this 7 day of February, 2018.

Alice D. Bonner  
ALICE D. BONNER, Senior Judge  
Metro Atlanta Business Case Division  
Fulton County Superior Court  
Atlanta Judicial Circuit

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