



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 6, 2019

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*Counsel for Defendants*

Re: *Vienna Park, LLC v. Ronald B. Bruder & Brookhill Capital Resources, Inc.*  
Case No. CL-2019-0007202

Dear Counsel:

This matter is before the Court on a Motion to Dismiss or Stay Pending Arbitration by Ronald B. Bruder and Brookhill Capital Resources, Inc. (Defendants), filed July 3, 2019. Defendants assert that Vienna Park, LLC's (Vienna Park) Complaint should be dismissed or stayed pursuant to Section IX of the Operating Agreement of Vienna Park, which provides for arbitration. The Court is called upon to decide one central issue:

Whether Section IX of the Operating Agreement of Vienna Park containing an arbitration provision has been waived with respect to access to books and records?

After considering the pleadings, oral arguments, and evidence presented by Counsel, the Court finds that the arbitration provision in the Operating Agreement has been waived.

**OPINION LETTER**

## I. BACKGROUND

After six years of prolonged litigation, review of hundreds of thousands of documents in discovery, argument before the Supreme Court of New Jersey, and several different lawyers, the dispute over the books and records of a Virginia LLC has finally found itself in the Circuit Court of Fairfax County. The allegations are as follows:

Plaintiff Vienna Park is a Virginia limited liability company with its principal place of business in Fairfax County, Virginia. Defendants are minority owners in the LLC, entitled to 7.5% of the distributable cash flow for the company.

In 2013, Defendants sued Vienna Park in New Jersey over a corporate disagreement, including a request to inspect books and records. In 2018, the New Jersey court dispensed with the case on jurisdictional grounds; Defendants thereafter pursued multiple books and records requests in Virginia, beginning on March 8, 2018. Vienna Park provided a response on September 4, 2018, the contents based on its assertion of reasonableness limits contained in Va. Code § 13.1-1028. In 2019, Defendants issued further books and records requests, threatening a “rule to show cause” if Vienna Park did not produce the requested documents.

Vienna Park then filed a Complaint seeking Declaratory Judgment and injunctive relief, seeking a judicial determination that Defendants’ books and records request has: (1) been satisfied; (2) that Defendants are limited to one books and record request every two fiscal years, or such other interval as deemed reasonable by the Court; (3) that Defendants are limited to books and records for the fiscal year beginning 2019 and not before; (4) that Defendants’ books and record requests must be in writing and shall be subject to a reasonableness restriction in Vienna Park’s sole and absolute discretion; (5) that Vienna Park has no obligation to produce books and records of an entity for which it does not maintain such books and records; and (6) litigation costs as well as other equitable relief as the Court deems appropriate.

Defendants filed the instant Motion to Dismiss or Stay Pending Arbitration. A hearing was held on August 2, 2019, and the Court heard arguments and took evidence before bringing the matter under advisement.

## I. STANDARD OF REVIEW

Although arbitration is generally favored in the Commonwealth, “that policy does not impair the constitutional right of a party to have access to the courts . . . unless that party has, by contract, voluntarily waived those rights.” *Mission Residential, LLC v. Triple Net Properties, LLC*, 275 Va. 157, 161, 654 S.E.2d 888, 890-91 (2008).

The existence of a valid arbitration agreement notwithstanding, the conduct between parties may constitute waiver of an arbitration agreement. Arbitration agreements are governed by the law of contracts. “Like other contractual provisions, . . . parties may waive the right to

arbitrate their disputes by their acts, omissions, or conduct.” *Carrico v. Empire Today, LLC*, 80 Va. Cir. 395 (Fairfax County 2010). As Judge Thatcher explained,

Waiver is the intentional relinquishment of a known right. While waiver of arbitration is not something to be ‘lightly inferred,’ it is a fact specific inquiry with no bright-line rules. Factors to be considered when determining waiver of arbitration include the extent of litigation having already occurred, the proof of prejudice and the proximity of the trial from the date when arbitration is sought. A party seeking to enforce arbitration may only do so when not guilty of dilatoriousness or delay. A litigant may waive a right to invoke arbitration by so substantially utilizing the litigation machinery that subsequently granting arbitration would actually prejudice the party opposing the stay.

*Id.* (citations omitted).

## II. ARGUMENTS

### A. Defendants’ Argument

Defendants argue that Section IX of Vienna Park’s Operating Agreement governs this dispute and compels arbitration. Pursuant to Sections 1 and 8.2 of the Operating Agreement, they assert that members of Vienna Park have the right to reasonable access of books and records. Under Section IX of the of the Operating Agreement, they assert that “[a]ny claim or controversy arising out of or relating to this Agreement or a breach thereof shall, upon request of any party involved, be submitted to and settled by arbitration . . . .” and that the Section, in conjunction with Va. Code § 8.01-581.01 and § 8.01-581.02(D), controls. Defendants reference *McMullin v. Union Land & Management Co.*, 242 Va. 337, 341 (1991), to argue that, in construing virtually identical language, the Supreme Court of Virginia held that such a clause covers both disputes arising from the partnership agreement as well as disputes relating to a breach of the agreement, and that the dispute here – arising from the Operating Agreement – is a dispute captured by the broad “arising out of” language.

### B. Plaintiff’s Response

In its response, Vienna Park does not contest the validity or applicability of the arbitration agreement. Rather, it argues that the arbitration agreement has been waived. Vienna Park points to more than five years of litigation between the parties regarding the same matter as the action now before the Court – disputes over books and records. Furthermore, Vienna Park identifies Defendants’ own assertions that the litigation in New Jersey was to avoid arbitration under the Operating Agreement. Vienna Park also argues that Defendants availed themselves of this Court several times in the past – litigating under the Operating Agreement – without demanding arbitration. Vienna Park maintains that by engaging in the “litigation machinery” for the past six years, Defendants have waived a right to arbitrate under the Operating Agreement as to access to books and records. With regard to prejudice, Vienna Park concludes that “[t]here can be no stronger evidence of prejudice than actively engaging in litigation with a party (creating all

kinds of statute of limitations, equity, and fairness questions), while secretly intending to wait for the right ‘gotcha’ moment to invoke an arbitration clause when strategy dictates courts are no longer advantageous.”

### III. ANALYSIS

#### A. Defendants Waived the Operating Agreement’s Arbitration Clause

The parties do not contest the general enforceability nor the applicability of the Operating Agreement’s arbitration provision. As such, the question before the Court is whether, by their conduct, Defendants waived the Operating Agreement’s arbitration clause with respect to access to books and records.

As previously stated, an arbitration clause may be waived where the party seeking arbitration has “so substantially utilize[d] the litigation machinery that subsequently granting arbitration would actually prejudice the party opposing the stay.” *Carrico*, 80 Va. Cir. 395 (citing *Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985); *E.C. Ernst, Inc. v. Manhattan Constr. Co.*, 559 F.2d 268 (5th Cir. 1977)). Determining whether waiver has occurred is a fact-specific inquiry.

At the hearing on August 2, 2019, the Court accepted into evidence without objection Plaintiff’s Exhibits 1 through 9. The evidence contained therein conclusively shows that Defendants have so substantially engaged in the machinery of litigation under the Operating Agreement – regarding books and records disputes – that to compel arbitration at this juncture would prejudice Vienna Park.

A copy of Vienna Park’s Operating Agreement was admitted as a part of Plaintiff’s Exhibit 1 and is attached to the Complaint. The effective date of the Operating Agreement is January 31, 2007.

A copy of a complaint, dated May 23, 2013 and filed in the Superior Court of New Jersey – Chancery Division Passaic County by the Defendants is contained in Plaintiff’s Exhibit 2. In the complaint, the Defendants challenged the dissolution of Vienna Park Properties, a limited partnership which became Vienna Park LLC. Among the relief sought, Defendants sought access to the partnership-turned LLC’s books and records pursuant to the prior partnership agreement as well as the Operating Agreement for Vienna Park. (Exhibit 2, at 3, 12-13). In that action, Defendants certified that “this matter is not subject of any other action in any court or pending arbitration proceeding, *nor is any other action or arbitration proceeding contemplated.*” (Exhibit 2, at 16).

Defendants, moreover, specifically challenged the inclusion of the arbitration provision in the LLC’s Operating Agreement. When the case was first filed, Defendants characterized the inclusion of an arbitration provision as “a substantial abrogation of [their] rights . . . .” (Exhibit 2, at 9). On appeal, they argued that they were denied the opportunity to object to the provision.

(Exhibit 3, at 36-39). The nature of Defendants' relationship with arbitration – and the arbitration provision at issue here – throughout the New Jersey litigation could only be described as adverse.

The case went forward. A docket sheet offered as Plaintiff's Exhibit 4 illustrates a litigated case, with sixteen completed hearings through 2017, and forty-two document entries. In fact, on declaration of Vienna Park's co-counsel for the New Jersey litigation, the docket sheet excludes far more – as a function of New Jersey's docket system, only initial filings are shown – thus, responses and opposition filings are not captured. (Exhibit 5, at 3). Nevertheless, on the docket's own merit and supported by the declaration, the Court finds that the New Jersey litigation was a substantial and prolonged action.

The New Jersey litigation ultimately concluded in 2018 (Exhibit 1, at D); Defendants also began to avail themselves of the courts of this Commonwealth. The Court takes judicial notice of these cases – in particular, CL-2016-0010578, an action by Vienna Park against these Defendants for, among other causes, breach of the Operating Agreement. That action persisted from 2016 to 2018 without a request to arbitrate. Defendants furthermore, following the commencement of this action, issued a Verified Petition to Show Cause against Vienna Park on June 4, 2019. The Petition chronicled essentially the same facts as contained in the Complaint here and was premised as a books and records dispute – the underlying issue in this case. Defendants availed themselves of the litigation process here in Virginia, but, once again – similar to the litigation in New Jersey – they did not request arbitration.

Based on all of the evidence before the Court, it is apparent that Defendants have actively litigated issues under the Operating Agreement but have eschewed its arbitration provision for years. They have consented to the workings of the courts up until this point – more than six years passed before Defendants demonstrated a desire to arbitrate, particularly as it pertains to the books and records. The result of Defendants' assertions against arbitration in the past as well as their prolonged use of the litigation process is that they have waived the right to demand arbitration in this matter. To hold otherwise would prejudice Vienna Park, who has to this point, endured Defendants' chosen venue – the courts.

#### IV. CONCLUSION

For the foregoing reasons, the Court finds that the Defendants waived the arbitration provision under Vienna Park, LLC's Operating Agreement with respect to access to books and records. Defendants' Motion to Dismiss or Stay Pending Arbitration is DENIED. Would Mr. Roche please prepare an order consistent with the Court's ruling and present it to opposing counsel, who may note any exception.

Sincerely,

  
Daniel E. Ortiz

**OPINION LETTER**