

based on the principle that where the owner orally orders extra work and has notice that the contractor regards the work as extra and will expect additional compensation, the contractor can recover for the cost of the extra work notwithstanding stipulations of the contract requiring a signed, written change order. The court of appeals approved the following jury instructions:

[W]hen an express contract between the parties exists, then the value of such services and other terms will be set by it, and the plaintiff would not be authorized to recover on *quantum meruit*, unless you find that the plaintiff performed services not contemplated by the parties in the original written contract.

It was a jury question whether Marbut's services were covered by the written agreement or were "extras" undertaken at the owner's direction and with knowledge that additional compensation would be expected.

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● **Waiver of Right to Arbitrate**

Ed Voyles Jeep-Chrysler, Inc. v. Wahls, ____ S.E.2d ____, 2008 WL 5050050 (Ga. Ct. App. Nov. 26, 2008)

The Georgia Court of Appeals held that where a contractual dispute arises under a contract with a valid arbitration clause, the defendant waives its right to arbitrate where it served discovery and deposition notices on plaintiff, even though defendant subsequently filed a motion to stay and cancelled the scheduled deposition. The court stated that by taking actions inconsistent with the contractual arbitration provision, the defendant waived its right to arbitration.

Plaintiff Wahls contracted with Defendant Ed Voyles Jeep-Chrysler, Inc. to lease an automobile. Voyles subsequently assigned the lease to Daimler-Chrysler Financial Services Americas, LLC. The contract contained a dispute resolution provision allowing either party to invoke arbitration pursuant to the Federal Arbitration Act. A dispute arose between the parties, and Wahls filed suit alleging damages for fraud and breach of contract. Voyles and Chrysler Financial timely filed their respective answers, and Chrysler Financial served interrogatories and requests for production on Wahls. Chrysler subsequently amended its answer to include the affirmative defense of arbitration. Wahls responded to the discovery, and Voyles filed a notice of deposition. Three days before the scheduled deposition, Chrysler Financial filed a motion to stay the litigation and compel arbitration. Voyles cancelled the deposition, and ten days later filed a motion to stay litigation and compel arbitration. Both motions to stay were denied by the trial court. Voyles filed an interlocutory appeal on the denial of its and Chrysler Financial's motions to stay and compel litigation.

The court of appeals used a "totality of circumstances" test to determine whether Voyles had waived its right to arbitration under the Federal Arbitration Act. Taking a cue from the federal courts, the court of appeals looked to whether the "litigation machinery [had] been substantially invoked" and how much preparation the parties had undertaken to litigate the matter before Voyles invoked the arbitration provision of the contract.

The relevant facts the court considered were that Chrysler Financial had served Wahls with discovery requests before amending its answer to include the arbitration provision, and that Voyles had never amended its answer at all. Additionally, although only eight weeks had transpired between Voyles' filing of its answer and its filing of a motion to stay and compel arbitration, Voyles had also noticed Wahls' deposition. The court pointed out that though Georgia law allows a limited right of discovery in arbitration, the Federal Arbitration Act does

not mention discovery. Thus, Voyles was “taking advantage of judicial discovery procedures not available in arbitration.”

As a result of these actions by the defendants, the court of appeals found that Wahls was potentially prejudiced by the additional trouble and expense of responding to discovery that may not be required in arbitration. Accordingly, the court found that the defendants had waived their contractual right to arbitration and upheld the denial of Voyles’ and Chrysler Financial’s motions to stay and compel arbitration.

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News and Case Notes

Deadline for contributions to the next edition of the Atlanta Bar Construction Section Newsletter and Georgia Construction Law Update: **April 15, 2009**.

Especially needed are feature length articles. These articles should be between 4 and 6 pages in length, double-spaced. Should you be interested in contributing an article of this nature, please contact the newsletter editor, **Deborah Butera**, at dbutera@shapirofussell.com or at (404) 870-2204.

The Construction Section is especially grateful to **Debbie Maron, Esq.**, Account Manager at **Thompson-West**, for her generous support of the Section’s Newsletter and Georgia Construction Law Update and that of **Thompson-West**.

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