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Kyle C. Bisceglie on

Waiver of Right to Arbitrate

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In *Stark v. Molod Spitz DeSantis & Stark, P.C.*, [9 N.Y.3d 59](#), 876 N.E.2d 903, 845 N.Y.S.2d 217 (2007), a unanimous Court of Appeals ruled that a law firm could invoke an arbitration clause in a dispute with a former partner despite participating in related, intermittent proceedings in court for nearly eleven months before moving in favor of arbitration. It reasoned that the law firm's actions had not manifested affirmative acceptance of the judicial forum inconsistent with its later request. How the Court reached this conclusion requires examination of the clause at issue, and procedural history between the parties.

The partnership agreement contained an arbitration clause that provided "controversies and claims which may arise out of the transaction contemplated by this Agreement or the construction, performance or breach of this Agreement shall be determined by binding arbitration." *Stark v. Molod Spitz DeSantis & Stark, P.C.*, [29 A.D.3d 481, 482](#), 816 N.Y.S.2d 34, 35 (1st Dep't 2006), *reversed and remanded*, [9 N.Y.3d 59](#).

After receiving notice of termination and being locked out of her office, plaintiff brought the equivalent of a special proceeding seeking mainly to permit her continued representation of certain clients with pending cases. The parties resolved this by stipulation, which stipulation included both the law firm's preservation of right to claim a share of attorneys' fees on the cases in dispute as well as a general "reservation-of-rights" clause providing "[t]his Stipulation should not otherwise be construed as a waiver of any rights or remedies that [plaintiff] or [the firm] may seek to obtain against one another." Plaintiff, subsequently, filed a plenary action that was summarily "dismissed" on a technicality, and, then, a five count second complaint. The law firm made at least two applications for division of fees and disbursements under the Judiciary Law to Supreme Courts with jurisdiction over respective personal injury cases. That same month, the law firm moved to dismiss plaintiff's second complaint in favor of arbitration. The plaintiff opposed the law firm's requests for division of fees and moved to, among other things, stay arbitration.

The judicial view on this case had gone back and forth with each level of review. The trial court dismissed various claims on other grounds but granted the law firm's request to proceed to arbitration. A split Appellate Division reinstated the dismissed claims, and

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denied the law firm's motion to compel arbitration and granted the plaintiff's motion to stay arbitration. The Appellate Division held that the law firm waived its right to arbitration by "actively participat[ing] in a special proceeding and two plenary actions that involved matters falling within the ambit of the arbitration clause, thereby manifesting an affirmative acceptance of the judicial forum."

The Court of Appeals saw things differently, and reversed the Appellate Division. The Court reminded us that "the crucial question" is the "degree of participation by the defendant in the action that will create a waiver of a right to stay the action." *Stark*, [9 N.Y.3d at 66](#), 876 N.E.2d at 908, 845 N.Y.S.2d 217 (quoting *De Sapio v. Kohlmeyer*, [35 N.Y.2d 402, 405](#), 321 N.E.2d 770, 772, 362 N.Y.S.2d 843, 846 (1974)). There is no waiver where the "defendant's actions are consistent with an assertion of the right to arbitrate." *Id.* Waiver not found where "urgent need to preserve the status quo requires some immediate action..." *Stark*, [9 N.Y.3d at 67](#), 876 N.E.2d at 908 (quoting *Sherrill v. Grayco Builders, Inc.*, [64 N.Y.2d 261, 273](#), 475 N.E.2d 772, 776, 486 N.Y.S.2d 159,163 (1985); *Preiss/Breismeister Architects v. Westin Hotel Co.*, [56 N.Y.2d 787, 789](#), 437 N.E.2d 1154, 452 N.Y.S.2d 397 (1982)). Unreasonable delay and "participation in the lawsuit" to the extent they "[manifest] an affirmative acceptance of the judicial forum" supports waiver. *Stark*, [9 N.Y.3d at 66-67](#), 876 N.E.2d at 907.

The Court found that the litigation did not "as a matter of law 'manifest an affirmative acceptance of the judicial forum.'" *Id.* The *Stark* Court reasoned "urgent need justify[ed] resort to the courts" given the affect on plaintiff's clients and all of the "the firm's ventures in Supreme Court addressed or grew out of" these clients representations. *Id. at 9 N.Y.3d at 67-68, 876 N.E.2d at 908-909*. The Court, also, noted the mutual "reservation-of-rights" provision. In so doing, the *Stark* Court broadened the type of exigent circumstances and the number of collateral and provisional skirmishes New York state courts will countenance without waiver of the right to later seek arbitration.

Stark in Light of Prior Decisions. *Stark* does not make "new law" in New York but adds significant factual color to prior Court of Appeals decisions including *De Sapio* (1974), *Preiss/Breismeister* (1982) and *Sherrill* (1985), among others.

It is axiomatic in New York that the right to arbitration can be modified, waived or abandoned. *Sherrill*, [64 N.Y.2d at 272](#), 475 N.E.2d at 775, 486 N.Y.S.2d at 162. It is less clear when this modification, waiver or abandonment occurs:

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The crucial question, of course, is what degree of participation by the defendant in the action will create a waiver of the right to stay the action. In the absence of unreasonable delay, so long as the defendant's actions are consistent with an assertion of the intention to arbitrate, there is no waiver. However, where the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer in the particular case, his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory.

[*De Sapio v. Kohlmeyer*, 35 N.Y.2d at 405, 321 N.E.2d at 772, 362 N.Y.S.2d at 846.](#)

Clearly, parties can participate in parallel, unrelated claims even when those claims constitute but "various skirmishes" within "one internecine, intracorporate war." *Denihan v. Denihan*, [34 N.Y.2d 307, 311](#), 313 N.E.2d 759, 761, 357 N.Y.S.2d 454, 456 (1974). The practitioner should note that *Denihan* and *Stark* make clear that the court will focus on whether the *claims* are separate and distinct rather than their factual genesis or origination in a "common agreement" or transaction. See *Sherrill*, [64 N.Y.2d at 273](#), 475 N.E.2d at 776, 486 N.Y.S.2d at 163; *Denihan*, [34 N.Y.2d at 310](#), 313 N.E.2d at 761, 357 N.Y.S.2d at 456. Here, practitioners must examine the scope of the arbitration clause to identify arbitrable and non-arbitrable claims, and assess the availability of non-contractual causes of action such as statutory and/or common-law rights that permit a party to initially avail itself of court.

Parties also can seek judicial intervention to preserve the status quo without prejudicing their rights in arbitration. *Sherrill*, [64 N.Y.2d at 273](#), 475 N.E.2d at 776, 486 N.Y.S.2d at 163; *Preiss/Breismeister Architects*, [56 N.Y.2d at 789](#). [NY CLS CPLR §7502 \(c\)](#) specifically countenances "an order of attachment or for a preliminary injunction in connection with" a pending or future arbitration. However, the practitioner usually should plead the necessity of this provisional relief as it is conditioned "only upon the ground that the award to which the applicant may be entitled may be rendered *ineffectual without such provisional relief.*" [NY CLS CPLR § 7502\(c\)](#)(emphasis added). *Stark* specifically expanded on the type of "exigencies" parties can litigate before arbitration beyond those described in *Preiss/Breismeister Architects*.

The amount of time from suit to assertion of right is less important than the extent a party actively litigates during that time. See *City Trade & Indus., Ltd., v. New Cent. Jute Mills Co.*, [25 N.Y.2d 49](#), 250 N.E.2d 52, 302 N.Y.S.2d 557 (1969) (no waiver where time to answer had been extended by stipulation for a period of 18 months); *Plateis v. Flax*,

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[54 A.D.2d 813](#), 388 N.Y.S.2d 245 (3d Dep't 1976) (no waiver where arbitration sought by defendant after defendant answered and approximately three months after action commenced to allow settlement negotiations). New York requires meaningful use of the judicial forum for prosecution of claims, defense or seeking of discovery. Serving a notice of deposition may not waive arbitration rights. *Jade Press, Inc. v. Packard*, [91 Misc. 2d 820](#), [398 N.Y.S.2d 785](#) (Civ. Ct. New York Cty. 1977). Entrance of a general appearance and bond posting to secure a future judgment does not constitute a waiver. See *In re Terminal Auxiliar Maritima*, [6 N.Y.2d 294](#), [160 N.E.2d 526](#), [189 N.Y.S.2d 655](#) (1959).

The court will look for the "totality" of acts presented for conclusive evidence of waiver. *Sherrill*, [64 N.Y.2d at 273](#), 475 N.E.2d at 776, 486 N.Y.S.2d at 163. *C. I. Planning v. Weeks*, [112 A.D.2d 854](#), [493 N.Y.S.2d 4](#) (1st Dep't 1985)(waiver where defendant participated in litigation for 18 months and asserted a counterclaim); *Sullivan v. Kisly*, [93 A.D.2d 783](#), [461 N.Y.S.2d 808](#) (1st Dep't 1983)(waiver where party litigated for 17 months by answering, and participating in discovery including depositions); *City of Niagara Falls v. Rudolph*, [91 A.D.2d 817](#), [458 N.Y.S.2d 97](#) (4th Dep't 1982)(waiver after seven months pretrial conferences, examinations before trial, and some fact and expert discovery); *Malan Constr. Corp. v. Allis-Chalmers Mfg. Co.*, [35 A.D.2d 788](#), [315 N.Y.S.2d 258](#) (1st Dep't 1970)(waiver through participation in litigation for 28 months including answers to multiple pleadings and discovery).

It has been argued as convention in New York that a defendant's interposition of a counterclaim effects waiver. In fact, New York cases involve more than such an act alone, including - prosecution of the counterclaim and/or cross-claims, lengthy delay, failure to assert arbitration as an affirmative defense or resort to the discovery process. See, e.g., *DeSapio*, [35 N.Y.2d 402](#), 321 N.E.2d 770, 362 N.Y.S.2d 843 (assertion of cross-claim apportioning liability and deposition of plaintiff); *Sherrill*, [64 N.Y.2d 261](#), [475 N.E.2d 772](#), [486 N.Y.S.2d 159](#) (assertion of counterclaim, delay, and depositions); *Gross v. Tagger*, [46 A.D.2d 876](#), [362 N.Y.S.2d 17](#) (1st Dep't 1974)(counterclaim and unreasonable delay). See also *In re Zimmerman*, [236 N.Y. 15](#), [139 N.E. 764](#) (1923) (waiver under the Arbitration Law where counterclaim, notices of trial, placement on the trial calendar, issuance of commissions to take foreign depositions and delay of two years); *Nagy v. Arcas Brass & Iron Co.*, [242 N.Y. 97](#) (1926)(waiver under Arbitration Law where assertion of counterclaim without pleading arbitration "either as a defense or a counterclaim" and undue delay). See also *International Modular Housing Inc. v. Atlanta Shipping Corp.*, [61 A.D.2d 941](#), 403 N.Y.S.2d 38 (1st Dep't 1978)(assertion of counterclaim did not waive right to ar-

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bitration where complaint consisted of both arbitrable and non-arbitrable claims - defendant's response to nonarbitrable claims not imputed to waive arbitrable claims).

Federal Approach Briefly Compared. Unlike New York's approach, the Second Circuit requires prejudice to the party opposed to arbitration. *Com-Tech Assoc. v. Computer Assoc.*, [938 F.2d 1574, 1576](#) (2d Cir. 1991). More specifically, a party that engages in "protracted litigation" waives his right to arbitrate when an order compelling arbitration would result in prejudice to the party opposing arbitration. [S & R Co. of Kingston v. Latona Trucking Inc.](#), [159 F.3d 80, 83](#) (2d Cir. 1998); [Kramer v. Hammond](#), [943 F.2d 176, 179](#) (2d Cir. 1991); [Sherrill](#), [64 N.Y.2d at 272, 475 N.E.2d 775, 486 N.Y.S.2d at 162](#). "Factors to consider include (1) the time elapsed from the commencement of litigation to the request for arbitration; (2) the amount of litigation (including exchanges of pleadings, any substantive motions, and discovery); (3) proof of prejudice, including taking advantage of pre-trial discovery not available in arbitration, delay and expense." *In re S & R Co. of Kingston*, [159 F.3d at 83](#). "An inquiry into whether an arbitration right has been waived is factually specific and not susceptible to bright line rules." [Cotton v. Slone](#), [4 F.3d 176, 179](#) (2d Cir. 1993). "Generally, waiver is more likely to be found the longer the litigation goes on, the more a party avails itself of the opportunity to litigate, and the more that party's litigation results in prejudice to the opposing party." [Thyssen, Inc. v. Calypso Shipping Corp., S.A.](#), [310 F.3d 102, 105](#) (2d Cir. 2002).

Although some commentators have urged otherwise, the case law is clear that the Second Circuit has tolerated more litigation than New York state courts before finding a waiver. This result is likely attributable to the requirement of prejudice, the FAA's "strong presumption in favor of arbitration," e.g., [Thyssen, Inc.](#), [310 F.3d at 104](#) (citations omitted) and federal courts view that "waiver is not to be lightly inferred." *In re S & R Co. of Kingston*, [159 F.3d at 83](#). The Second Circuit resolves doubts in favor of arbitration. [Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.](#), [67 F.3d 20, 25](#) (2d Cir. 1995).

Sufficient prejudice to infer waiver has been found when a party seeking to compel arbitration engages in extensive discovery successfully obtaining substantial disclosures not available pre-hearing in arbitration, ([Liggett & Myers Inc. v. Bloomfield](#), [380 F. Supp. 1044, 1047-48](#) (S.D.N.Y. 1974)), makes motions going to the merits of an adversary's claims, ([Com-Tech Assoc.](#), [938 F.2d at 1576](#)), delays invoking arbitration rights while the adversary incurs unnecessary delay or expense, ([Kramer](#), [943 F.2d at 179](#)) or does all three. *Cotton*, [4 F.3d at 179](#).

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A standard capable of varying interpretation, [compare *Com-Tech Assoc.*, 938 F.2d at 1576](#) (holding that the party's "protracted litigation" activities, such as full participation in discovery, making of motions relating to the merits, and delaying the motion to compel arbitration until four months before the scheduled trial date, resulted in waiver), with the often criticized [Rush v. Oppenheimer & Co.](#), 779 F.2d 885, 887-888 (2d Cir. 1985) (holding that delay of eight months prior to moving to compel arbitration, participation in extensive discovery, motion to dismiss, and answering of complaint without raising the arbitration clause as an affirmative defense did not result in waiver because there was no showing of prejudice). Second Circuit precedent permits significant litigation on the same claim before granting a request for arbitration. See, e.g., *Jung v. Skadden, Arps, Slate, Meagher & Flom, LLP*, 434 F. Supp. 2d 211 (2d Cir. 2006) (arbitration after defendant filed a motion to dismiss); *Leadertex*, 67 F.3d 20 (arbitration where parties engaged in discovery that yielded minimal information); *Sweater Bee by Banff, Ltd. v. Manhattan Industries, Inc.*, 754 F.2d 457, 461-64 (2d Cir. 1985) (arbitration where case pending two years and Court ruled on Defendants' motion to dismiss); *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 694 (2d Cir. 1968) (no waiver after two years of litigation before stay sought); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 412-13 (2d Cir. 1959), cert. dismissed, 364 U.S. 801, 5 L. Ed. 2d 37, 81 S. Ct. 27 (1960) (no waiver after nine months despite defendant agreeing to deposition and receiving discovery from plaintiff); *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942) (no waiver where no mention of arbitration in affirmative defense after ten months of litigation and case on "trial ready" calendar)

Practitioners' Take-Away. Parties commonly risk the forfeiture of their arbitration rights and proceed in a judicial forum first because they do not understand the nature of plaintiff's claims sufficiently, desire pre-hearing discovery, wish to bring a motion to clarify issues, want to make adjudication as complex and costly as possible for their adversary, seek to preserve the ability to choose a (more advantageous) forum and, often, a combination of these considerations. Occasionally, a party does not know and/or understand the scope of its arbitration rights until later. Parties are wise to assess the scope of the arbitration clause to determine if certain non-mandatory claims can be litigated separately in order to achieve the goals enumerated above. If a dual strategy is appropriate or viable, practitioners must carefully assess how, when and where their claims and defenses are pled. Parties have more latitude to pursue some litigation on the same claim in federal court without stanching arbitration. In state court, *Stark* specifically expands the types of "exigent circumstances" permitting judicial relief.

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Cross-References. Anna Sim, *To Waive or Not to Waive: New York and Federal Law on Waiver of the Right to Compel Arbitration*, [43 N.Y.L. Sch. L. Rev. 609](#) (1999); [13-75 New York Civil Practice: CPLR P 7501.26](#) (right to arbitrate or to litigate may be waived); [13-75 New York Civil Practice: CPLR P 7503.15](#) (bringing action generally waives right to arbitrate); [13-75 New York Civil Practice: CPLR P 7503.16](#) (defendant's actions manifesting agreement to judicial forum may waive right to demand arbitration).

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About the Author. Kyle C. Bisceglie, a Partner at Olshan Grundman Frome Rosenzweig & Wolosky LLP in New York City, counsels corporations, partnerships, and individuals with respect to complex commercial litigation, Alternative Dispute Resolution ("ADR"), contracts, business advice and litigation avoidance. He has tried numerous cases without loss and has been involved in litigations, arbitrations, mediations and settlement negotiations. He also serves as general counsel to various entrepreneurial ventures and businesses in technology infrastructure, advertising, event production, dental and medical instruments, insurance, chemical distribution, fashion and consulting fields. Mr. Bisceglie has complex litigation experience in a variety areas including commercial, financial, insurance, employment, race and sex discrimination, harassment and retaliation, copyright and trademark, defamation, and business tort. He has participated in the investigation of the worldwide derivatives trading practices of a New York based merchant bank, representation of US policyholders in the largest insurance insolvency in North American history, and coordination of negotiation over and litigation for the transfer of a major beverage and spirit company's most valuable brand. Mr. Bisceglie also spent five years in the litigation department of Cadwalader, Wickersham and Taft; two years trying cases as an assistant prosecutor; and one year as a law clerk to Judge Alfred M. Wolin, United States District Court for the District of New Jersey. He can be reached by phone at 212-885-8818 or by email at kbisceglie@bartonesq.com.

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