

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1257

MATTHEW SAMSILL

vs.

DAVE & BUSTER'S OF MASSACHUSETTS, INC., & others.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Defendants Dave & Buster's of Massachusetts, Inc. (Dave & Buster's), Dave & Buster's Mgmt Corp, Inc., and Jon Lucia (collectively, defendants) appeal from a Superior Court order lifting the stay of litigation in their dispute with plaintiff Matthew Samsill, a former employee. Because the judge had ample basis to conclude that by failing to pay the arbitration fee the defendants defaulted and waived arbitration, we affirm.

Background. The procedural history of this case is undisputed. In 2019, Samsill began working as a manager at the Dave & Buster's Braintree location. He signed the parties' mutual arbitration agreement (agreement), requiring that disputes between him and any of the defendants arising from his

¹ Dave & Buster's Mgmt Corp, Inc., and Jon Lucia.

employment be resolved by arbitration, "under the auspices of" the American Arbitration Association (AAA), and "in accordance with the . . . Employment Arbitration Rules of the AAA." It also required that the party initiating arbitration pay a filing fee not to exceed \$200, and that Dave & Buster's "shall pay all other fees and costs assessed by" the AAA.

In November 2019, Samsill filed a complaint in Superior Court against the defendants alleging sexual harassment, sex/gender discrimination, sex/gender harassment, and retaliation. The defendants moved to compel arbitration, and a judge, without objection, allowed the motion and stayed the Superior Court case.

Samsill filed his demand for arbitration with the AAA and paid the \$200 filing fee. On March 26, 2020, the AAA requested that Dave & Buster's pay its initial arbitration fee of \$2,000 by April 14, 2020. On April 15, 2020, the AAA again requested that Dave & Buster's pay that fee. On April 23, 2020, the AAA requested payment from Dave & Buster's a third time, warning that **"if the outstanding fee[] in the amount of \$2000 is not received by May 1, 2020** the AAA will administratively close this matter due to non-compliance" (emphasis in original). On May 12, 2020, the AAA sent an e-mail to counsel for Dave & Buster's noting that "[y]ou previously stated [that a check for payment] was sent on 4/24 but it should have arrived by now," and again

requested payment. On May 19, 2020, the AAA notified the defendants that because Dave & Buster's had failed to pay the arbitration fee, the AAA had "administratively closed our file on this matter," and that because Dave and Buster's "has failed to comply with the Employment Arbitration Rules and the Employment Due Process Protocol, we will decline to administer any future employment matter involving [the] respondent."

On June 12, 2020, Dave & Buster's sent \$2,000 by check to the AAA, which returned the check. Dave & Buster's contacted the AAA asking to reopen arbitration. The AAA replied that it would proceed with arbitration only if Samsill agreed to do so. He did not.

Samsill then moved in Superior Court to lift the stay of litigation. The judge allowed the motion, ruling that, by failing to pay the arbitration fee, the defendants waived arbitration, and also breached their contract to arbitrate and were in default with the arbitration proceeding. This appeal ensued.²

² We note that the appeal is properly before us, because the judge's allowance of Samsill's motion to lift the stay was the functional equivalent of an order reconsidering and denying the defendants' prior motion to compel arbitration. See Pre-Paid Legal Servs. v. Cahill, 786 F.3d 1287, 1291 (10th Cir. 2015), cert. denied, 577 U.S. 940 (2015) (construing 9 U.S.C. § 16 [a] [1]). Accord Danvers v. Wexler Constr. Co., 12 Mass. App. Ct. 160, 162 n.3 (1981) (construing G. L. c. 251, § 18 [a] [1]).

Discussion. Whether the defendants waived arbitration by failing to pay the arbitration fee is a question of law which we review de novo. See Pre-Paid Legal Servs. v. Cahill, 786 F.3d 1287, 1293 (10th Cir. 2015), cert. denied, 577 U.S. 940 (2015). Accord Kauders v. Uber Techs., Inc., 486 Mass. 557, 566 (2021). We affirm the judge's order, but for reasons somewhat narrower than those given by the judge: we conclude that there was ample basis for the judge to rule that the defendants waived arbitration.³

The parties' agreement expressly provides that it "shall be construed, interpreted and its validity and enforceability determined, in accordance with the Federal Arbitration Act [(FAA)] (9 U.S.C. § 1, et seq)." The FAA controls with respect to all substantive issues, including whether to lift the stay of litigation. See McInnes v. LPL Financial, LLC, 466 Mass. 256, 262 (2013). Under the FAA, whether a party has waived the right to arbitrate is decided by the court, not the arbitrator. See Pre-Paid Legal Servs., 786 F.3d at 1296; Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 3 (1st Cir. 2005).⁴ That rule is

³ We decline to reach whether a judge may decide whether the same conduct amounted to a breach of the agreement to arbitrate. The FAA cases which so hold rely upon the dismissal of the case by the arbitration panel. See, e.g., Pre-Paid Legal Servs., 786 F.3d at 1296.

⁴ We note that, under the Massachusetts Uniform Arbitration Act (MAA), G. L. c. 251, §§ 1 et seq., the result would be the same. See O'Brien v. Hanover Ins. Co., 427 Mass. 194, 197-198 (1998);

particularly apt here, because Dave and Buster's never paid the arbitration fee, and so the AAA never appointed an arbitrator.

Under the FAA, a court may stay litigation pending arbitration only if the party seeking the stay is not "in default in proceeding with such arbitration." 9 U.S.C. § 3. The term "default" in § 3 includes a "waiver." Marie, 402 F.3d at 13. The judge ruled that by failing to pay the arbitration fee, the defendants "defaulted or waived their right to arbitrate this dispute."⁵ We agree. By demanding arbitration and then failing to pay the AAA's fee after repeated requests stretching over several months, the defendants defaulted on the arbitration proceedings, and waived their rights to arbitrate. See Pre-Paid Legal Servs., 786 F.3d at 1297. Payment of the arbitration fee to the AAA was an essential prerequisite to arbitration. The judge did not err in ruling that the defendants waived their right to arbitrate.

We affirm the order lifting the stay and proceeding with litigation. Samsill's motion for costs is allowed. He may

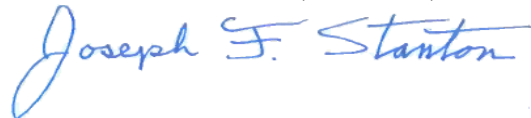
Home Gas Corp. of Massachusetts v. Walter's of Hadley, Inc., 403 Mass. 772, 774-775 (1989). "In all relevant respects, the language of the FAA and the MAA providing for enforcement of arbitration provisions are similar" (citation omitted). McInnes, 466 Mass. at 260. See Boursiquot v. United Healthcare Servs. of Delaware, Inc., 98 Mass. App. Ct. 624, 630 n.7 (2020).

⁵ The judge noted that the record contained no evidence that the defendants ever sought from the AAA "an extension, or some special consideration in light of Covid-19."

recover them as provided in Mass. R. A. P. 26 (a) and (d), as amended, 378 Mass. 925 (1979), in connection with the trial court's entry of the order after rescript. The defendants' request for costs is denied.

Order allowing plaintiff's
motion to lift stay and
proceed to litigation
affirmed.

By the Court (Desmond,
Sacks & Grant, JJ.⁶),


Clerk

Entered: December 6, 2021.

⁶ The panelists are listed in order of seniority.