Opinion issued June 27, 2017.

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00615-CV

JEFF FISHER, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF BLAVESCO LIMITED, Appellant

V.

HEATHER CARLILE, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF BLAVESCO LIMITED, Appellee

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Case No. 2016-39514

MEMORANDUM OPINION

Appellant Jeff Fisher, individually and derivatively on behalf of Blavesco Limited, challenges the trial court's denial of his motion to compel arbitration in this interlocutory appeal arising out of a shareholder derivative suit brought by appellee

Heather Carlile, individually and derivatively on behalf of Blavesco Limited. We reverse the trial court's order and render judgment granting the motion to compel arbitration.

Background

Fisher began investing in real property in the Houston area in 2008 through a number of limited liability companies (the LLCs). By 2012, the LLCs had acquired over seventy properties worth in excess of $10 million.

Fisher purchased an additional fifteen properties on behalf of one of the LLCs in 2012. Carlile acted as a sales agent for the seller with respect to that transaction and was subsequently hired by Fisher to manage these properties.

Blavesco Limited was incorporated in July 2013. The purpose of the new company was to manage some of the properties controlled though the LLCs and, in the future, to act as a non-exclusive real estate broker for the purchase and sale of property.

In August 2013, Fisher and Carlile executed a Shareholder's Agreement with respect to the newly formed Blavesco. Under the terms of the Agreement, Fisher has the sole Class A voting and management share, and Fisher and Carlile each have one Class B non-voting beneficial share. Fisher is Blavesco's sole director with the right to control the compensation for any directors, officers, managers, and employees of

the company. *Id.* The Agreement contains a requirement that all disputes be arbitrated. Specifically, the Agreement states:

> This Agreement shall be governed by and interpreted in accordance with the substantive laws of the State of Texas, United States of America and all disputes arising in connection thereto shall be finally settled by arbitration. The arbitration shall be held at the American Arbitration Association (www.adr.org) and conducted in accordance with its rules.

In January 2016, Fisher created a new company called Independence Construction & Finance, Inc. to act as a hard money lender for residential construction. Carlile, however, claims that Independence competes with Blavesco and that Fisher created Independence in order to funnel Blavesco's business away from Carlile.

On June 8, 2016, Carlile filed this suit against Fisher and Independence alleging causes of action for breach of fiduciary duty, misappropriation of trade secrets, breach of contract, tortious interference, unjust enrichment, and common law fraud. Carlile also included in her petition an application for a temporary restraining order, a temporary injunction, and a permanent injunction. Carlile requested said injunctive relief in order to prevent Fisher and Independence from "unlawfully interfering with Blavesco's business Operations." Carlile also sought declaratory relief, punitive damages, and attorney's fees.

Carlile filed a first amended petition adding the LLCs as defendants and asserting claims against them for breach of contract, fraud, unjust enrichment,

conspiracy to commit fraud, breach of fiduciary duty, and aiding and abetting Fisher in committing fraud and breaching his fiduciary duties.

On June 8, 2016, the trial court granted Carlile's application for a temporary restraining order against Fisher and Independence and granted Carlile's motion for expedited discovery against Fisher and Independence. Pursuant to that order, Carlile deposed Fisher using documents produced in response to her request for production.

On June 23, 2016, Fisher and Independence filed their original answer and counterclaims against Carlile. Fisher and Independence filed their first amended answer on July 7, 2016. The LLCs filed their first amended counterclaim and verified application for temporary restraining order, and temporary and permanent injunction against Carlile in the same pleading.

The counterclaims by Fisher, Independence, and the LLCs allege that Carlile wrongfully paid her son $80,000 a year for work that was not performed, booked fraudulent expenses to Blavesco, and defamed Fisher and Independence. Fisher, Independence, and the LLCs brought claims against Carlile for breach of fiduciary duty, corporate mismanagement (breach of duty of care), unjust enrichment, tortious interference with Independence's business relationships, business disparagement, fraud, conversion, and breach of contract. Fisher, Independence, and the LLCs also sought a temporary restraining order and temporary injunction essentially prohibiting Carlile from taking any actions with regard to Blavesco outside the

normal course of business or incurring any additional debt on behalf of Blavesco. The application for temporary injunction also requested the trial court to prohibit Carlile from taking any actions concerning the LLCs without their permission or restricting Fisher's access to the LLC's accounts. Id. That same day the trial court granted Fisher, Independence, and the LLC's application for temporary restraining order.

The trial court held a two-day temporary injunction hearing on July 14–15, 2016. On July 17, 2016, Fisher, Independence and the LLCs filed an emergency motion for temporary injunction and sanctions against Carlile after learning that Carlile had removed $50,000 from Blavesco's account prior to the hearing. On July 18, 2016, the court signed a temporary injunction order against all of the parties and the court also appointed Michael Stein to act as custodian for Blavesco Limited.

On July 25, 2016, most of the LLCs filed suit against Carlile in Montgomery County.

On August 19, 2016, Fisher filed his application to compel arbitration. On September 19, 2016, the trial court held a hearing on the application. The trial court denied Fisher's application to compel arbitration and stay the trial proceedings.

Motion to Compel Arbitration

Carlile concedes that the Agreement contains a valid arbitration agreement and that it applies to Carlile's and Fisher's claims against one another. Carlile argues,

however, that the trial court did not abuse its discretion by denying Fisher's motion to compel arbitration because Fisher impliedly waived his right to demand arbitration by engaging in the judicial process.

A. Standard of Review and Applicable Law

We have jurisdiction to review an interlocutory order denying a motion to compel arbitration. TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.016 (West 2015), 171.098(a)(1) (West 2011); *see also Ellis v. Schlimmer*, 337 S.W.3d 860, 862 (Tex. 2011) (citing *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 780 (Tex. 2006)).

To compel arbitration, Fisher must establish that (1) a valid, enforceable arbitration agreement exists and (2) the claims asserted fall within the scope of that agreement. *In re Provine*, 312 S.W.3d 824, 828–29 (Tex. App.—Houston [1st Dist.] 2009, orig. proceeding). Once Fisher meets his burden to show the arbitration agreement's validity and scope, the burden shifts to Carlile to raise an affirmative defense to the agreement's enforcement. *See Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014).

In this case, Carlile argues that Fisher impliedly waived his right to demand arbitration. Waiver is an "'intentional relinquishment of a known right' [that] can occur either expressly, through a clear repudiation of the right, or impliedly, through conduct inconsistent with a claim to the right." *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 511 (Tex. 2015) (citations omitted). A party asserting

implied waiver as a defense to arbitration has the burden to prove that (1) the other party has "substantially invoked the judicial process," by conduct inconsistent with a claimed right to arbitration, and (2) the inconsistent conduct has caused it to suffer detriment or prejudice. *See G.T. Leach Builders*, 458 S.W.3d at 512; *see also Perry Homes v. Cull*, 258 S.W.3d 580, 593–94 (Tex. 2008). The law favors and encourages arbitration, so "this hurdle is a high one." *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 455 S.W.3d 573, 575 (Tex. 2014) (per curiam) (quoting *Perry Homes*, 258 S.W.3d at 589–90).

Courts determine waiver on a case-by-case basis by assessing the totality of the circumstances. *Perry Homes*, 258 S.W.3d at 590. When evaluating whether a party moving for arbitration has substantially invoked the judicial process, appellate courts consider a wide variety of factors, including: (1) when the movant knew of the arbitration clause; (2) how long the movant waited to move to compel arbitration; (3) how much discovery was conducted and who initiated the discovery; (4) whether the discovery and pretrial activities related to the merits rather than arbitrability or standing; (5) whether the movant asserted affirmative claims for relief in the trial court; and (6) whether the movant sought judgment on the merits. *Perry Homes*, 258 S.W.3d at 591–92. "Generally, no one factor is, by itself, dispositive" when determining whether a party substantially invoked the judicial process. *RSL Funding, LLC v. Pippins*, 499 S.W.3d 423, 430–31 (Tex. 2016).

Whether waiver has occurred is a question of law that we review de novo. *See Perry Homes*, 258 S.W.3d at 598; *see also Okorafor v. Uncle Sam & Assocs., Inc.*, 295 S.W.3d 27, 39 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). We resolve any doubts that we have regarding waiver in favor of arbitration. *Nw. Constr. Co. v. Oak Partners, L.P.*, 248 S.W.3d 837, 847 (Tex. App.—Fort Worth 2008, pet. denied).

B. Substantial Invocation of Judicial Process

As the party asserting implied waiver as a defense to arbitration, Carlile has the burden to prove that (1) Fisher has "substantially invoked the judicial process," which is conduct inconsistent with a claimed right to compel arbitration, and (2) Fisher's inconsistent conduct caused her to suffer detriment or prejudice. *See G.T. Leach Builders*, 458 S.W.3d at 512.

Carlile argues that Fisher substantially invoked the judicial process because Fisher: (1) knew about the arbitration clause from the outset of the current litigation; (2) waited three months to assert his right to arbitrate; (3) only moved to compel arbitration after he received an adverse ruling; (4) provided no reason for his delay in moving to compel arbitration; (5) sought and obtained a temporary injunction against Carlile in the trial court; (6) filed counterclaims seeking affirmative relief; (7) Fisher engaged in "extensive pretrial activity," such as applying for and obtaining

a temporary injunction against Carlile, and participating in the temporary injunction hearing; and (8) filed a related lawsuit against Carlile in Montgomery County.

Fisher does not dispute that he knew about the Agreement's arbitration clause when Carlile filed suit against him, or that he did not move to compel arbitration until a little over nine weeks after the suit was filed. This factor does not weigh heavily against Fisher's motion to compel arbitration. A movant's delay in seeking arbitration is a factor when determining whether a party waived its right to arbitrate, but the Supreme Court has found no waiver in cases involving delays of as much as eight months to two years. *See RSL Funding*, 499 S.W.3d at 433; *see also In re Fleetwood Homes of Texas, L.P.*, 257 S.W.3d 692, 693–94 (Tex. 2008).

Carlile argues that Fisher only moved to compel arbitration after he received an adverse ruling in the temporary injunction proceedings. *Hogg v. Lynch, Chappell & Alsup, P.C.*, 480 S.W.3d 767, 789–90 (Tex. App.—El Paso 2015, no pet.) (citing *Haddock v. Quinn*, 287 S.W.3d 158, 180 (Tex. App.—Fort Worth 2009, pet. denied)). Citing to *Hogg*, Carlile argues that in light of Fisher's knowledge of the arbitration clause, his delay in seeking to compel arbitration until after suffering an adverse result, and his failure to explain the delay, "it is fair to presume that [Fisher's] motives in seeking to compel arbitration were more likely due to the unfavorable temporary injunction, rather than any mistake or excusable delay."

However, unlike in this case, Hogg actively participated in an extended "discovery dispute raised by [the plaintiff], filed pleadings in opposition to [the plaintiff]'s motion to compel production, and attended a court hearing on the motion. Only after she received an adverse ruling requiring her to produce the recordings, and only after she faced the possibility of sanctions for violating that ruling, did she file her motion to compel arbitration." *Hogg*, 480 S.W.3d at 789. Hogg filed her motion to compel arbitration three days before the production deadline. Furthermore, unlike in *Hogg*, Fisher was successful in obtaining relief from the trial court, enjoining Carlile from destroying evidence, hiding or misappropriating Blavesco's assets, and making disparaging remarks about Fisher and the LLCs to various third parties. As discussed below, Fisher's efforts to obtain the temporary injunction against Carlile are not inconsistent with Fisher's right to arbitrate because the relief sought was primarily defensive in nature and aimed at preservation of the status quo. Furthermore, although Fisher did not move to compel arbitration until after the injunction was entered against him and the other defendants, this fact alone is not dispositive with respect to whether or not he waived his right to arbitrate. *See Perry Homes*, 258 S.W.3d at 591 (stating courts determine waiver on case-by-case basis by assessing totality of circumstances); *see also RSL Funding*, 499 S.W.3d at 430–31 (stating that no single factor is dispositive when determining whether party substantially invoked judicial process).

Carlile also argues Fisher substantially invoked the judicial process by filing counterclaims seeking affirmative relief and participating in "extensive pretrial activity." Specifically, Carlile claims that Fisher applied for and obtained a temporary injunction based on the merits of his counterclaims, and engaged in extensive discovery relating to the temporary injunction proceedings, including actively participating in a two-day evidentiary hearing on the matter.

Carlile argues that Texas courts have held that seeking and obtaining temporary injunctive relief prior to requesting arbitration favors a finding of waiver, citing to *Haddock*, 287 S.W.3d at 180 (holding that obtaining injunctive relief supported trial court's finding of waiver of right to arbitration) and *Adams v. StaxxRing, Inc.*, 344 S.W.3d 641, 649–50 (Tex. App.—Dallas 2011, pet. denied). Unlike in those cases, the record reveals that Fisher was not seeking injunctive relief based on the merits of the case, or in order to secure an advantage with regard to any subsequent claims or in a subsequent legal proceeding. Rather, Fisher sought injunctive relief in order to prevent Carlile from destroying evidence, hiding or misappropriating Blavesco's assets, and making disparaging remarks about Fisher and the LLCs to various third parties. *In re D. Wilson Const.*, 196 S.W.3d at 783 (holding no waiver when movant filed cross-actions and sought "injunctive relief to preserve evidence" prior to moving to compel arbitration); *see generally Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (stating purpose of temporary

injunction is to preserve status quo of subject matter pending trial on merits). Given that Fisher's request for injunctive relief was directed at maintaining the status quo, rather than seeking a disposition on the merits of the case, his participation in the temporary injunction proceedings is not inconsistent with arbitration. *See In re D. Wilson Const.*, 196 S.W.3d at 783.

Fisher also did not substantially invoke the judicial process by filing counterclaims. *See RSL Funding*, 499 S.W.3d at 430–31 ("[A]sserting defensive claims—even if such claims seek affirmative relief—does not waive arbitration.") (citing *G.T. Leach Builders*, 458 S.W.3d at 513); *see also In re D. Wilson Const.*, 196 S.W.3d at 783 (holding no waiver when movant filed cross-claims). Fisher raised various affirmative defenses in his first amended answer. Specifically, Fisher alleged that he was not liable to Carlile because of Carlile's fraudulent conduct, prior breach of contract, failure to mitigate her damages due, in part, to her failure to follow good business practices while running Blavesco, and that Carlile's own acts and omissions contributed to any injuries Blavesco allegedly suffered. Most of Fisher's counterclaims are based on these same general allegations, i.e., that Blavesco's losses are attributable to Carlile's fraudulent conduct, her mismanagement of Blaveso, and her usurpation of the company's assets and business opportunities. Fisher's counterclaims are largely defensive in nature. As previously discussed, Fisher's request for injunctive relief was not merits-based, and

Fisher did not file a motion for summary judgment on his counterclaims or otherwise seek a final disposition of his claims. See *G.T. Leach Builders*, 458 S.W.3d at 513 (declining to find waiver when movant, who asserted defensive counterclaims, did not seek summary judgment or dismissal of nonmovant's claims, or otherwise seek disposition of counterclaims).

Furthermore, the only discovery that Fisher propounded was a form request for disclosure that he included in his answer in the case. *See Richmont Holdings*, 455 S.W.3d at 575 (declining to find waiver of right to arbitrate where movant made request for disclosure); *In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (same). Carlile, on the other hand, sought and received a motion for expedited discovery, allowing her to depose Fisher prior to the temporary injunction hearing and question him based on documents Fisher produced pursuant to the order. Thus, the discovery in this case was initiated by Carlile, not Fisher. *See G.T. Leach Builders*, 458 S.W.3d at 513–14 (holding passive participation in extensive pre-trial discovery does not waive right to arbitrate); *see also In re Vesta Ins.*, 192 S.W.3d at 763 (holding proponent of arbitration is not responsible for extensive discovery by another party). The record does not indicate whether Carlile responded to Fisher's discovery request.

Finally, Carlile contends that Fisher invoked the judicial process by causing some of his LLCs to file suit in Montgomery County alleging some of the same

causes of action arising from the transactions in the instant lawsuit. The LLCs, not Fisher, are the plaintiffs in the Montgomery County lawsuit. Although Fisher is the controlling managing member of the LLCs, Fisher, individually, is not a party to the suit. Furthermore, none of the plaintiff LLCs in the Montgomery County lawsuit are parties to the Agreement, and are not bound by that agreement's arbitration clause. The claims of the LLCs filed in Montgomery County stem from separate property management agreements between those companies and Carlile. Notably, Fisher did not move to compel arbitration in the present case based on any claims involving those LLCs. *See generally Haddock*, 287 S.W.3d at 177 (stating that when evaluating whether movant substantially invoked judicial process in prior suit, court must determine whether claims raised in that suit are "the same claims that [the movant] now seeks to arbitrate"). Under the facts of this case, the activities of the parties that are not signatories to the arbitration agreement do not compromise the rights of those parties who are part of that agreement.

After considering the totality of the circumstances in this case, we hold that Carlile did not demonstrate that Fisher substantially invoked the judicial process prior to filing his motion to compel arbitration and did not waive his right to enforce the Agreement's arbitration clause. Having determined that Fisher did not substantially invoke the judicial process, we need not consider whether Carlile met her burden of proof with regard to the second prong of the implied waiver test, i.e.,

whether Fisher's conduct prejudiced Carlile. *See generally G.T. Leach Builders*, 458 S.W.3d at 512.

Conclusion

We reverse the trial court's order denying Fisher's motion to compel arbitration, render judgment granting the motion, and remand this case to the trial court for further proceedings consistent with this opinion. Any pending motions are dismissed as moot.

Russell Lloyd
Justice

Panel consists of Chief Justice Radack and Justices Brown and Lloyd.