Motion Denied; Affirmed and Majority and Concurring Opinions filed January 19, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00234-CV

HUMAN BIOSTAR, INC. AND RNL BIO, LTD. N/K/A K-STEMCELL CO., LTD., Appellants

V.

CELLTEX THERAPEUTICS CORPORATION, Appellee

On Appeal from the 434th District Court
Fort Bend County, Texas
Trial Court Cause No. 12-DCV-202563

O P I N I O N

Following mediation of the underlying dispute in this case, a Rule 11 settlement agreement ("the Agreement"), containing a provision to arbitrate "any disagreement result[ing] from negotiation and completion of this documentation," was entered into between Celltex Therapeutics Corporation ("Celltex"), RNL Bio, Ltd. n/k/a K-Stemcell

Co., Ltd. ("K-Stemcell"), Human Biostar, Inc. ("Biostar"), and Hyeonggeun Park.[1] Subsequently, Celltex moved to compel arbitration, as the parties had been unable to "resolve the differences between [their] drafts" of "the documents necessary to consummate [the Agreement]." According to Celltex's motion to compel arbitration, the Agreement was made pursuant to Rule 11 of the Texas Rules of Civil Procedure and a true and correct copy of the Agreement was filed with the clerk of the 434th District Court of Fort Bend County, Texas, on June 26, 2014. Neither K-Stemcell nor Biostar contest Celltex's assertion that the Agreement satisfies the requirements of Rule 11.

Celltex's motion to compel arbitration was granted by the trial court's order signed September 22, 2014. On February 12, 2015, the trial court entered an order confirming the arbitration award. On March 16, 2015, Biostar filed a notice of restricted appeal and K-Stemcell filed a notice of appeal from that order.[2] Because both appeals were filed from Trial Court Cause No. 12-DCV-202563, of the 434th District Court of Fort Bend County, Texas, they were assigned Appeal No. 14-15-00234-CV. On appeal, Biostar and K-Stemcell both complain of the order compelling arbitration and the order confirming the arbitration award.

JURISDICTION

We initially address Celltex's arguments that we lack jurisdiction to entertain any appeal from the order compelling arbitration. Celltex first contends we lack jurisdiction because K-Stemcell's and Biostar's notices of appeal state they are taken from the trial court's order signed February 12, 2015, not the September 22, 2014, order compelling arbitration. Rule 25.1 provides that a notice of appeal must state the date of the judgment or order appealed from. Tex. R. App. P 25.1(d)(2). However, the rules do not require an appellant to list in the notice of appeal every interlocutory ruling that he desires to challenge on appeal. *See Ostrovitz & Gwinn, LLC v. First Specialty Ins. Co*., 393 S.W.3d

[1] Hyeonggeun Park has not filed a notice of appeal in this case.

[2] On April 27, 2015, the trial court signed an amended order correcting the date of the arbitration award.

379, 386 (Tex. App.—Dallas 2012, no pet.) (citing *Gunnerman v. Basic Capital Mgmt., Inc*., 106 S.W.3d 821, 824 (Tex. App.—Dallas 2003, pet. denied) (holding that notice of appeal from final judgment "brought forward the entire case, including earlier interlocutory orders that were not independently appealable")); *Vazquez v. Vazquez*, 292 S.W.3d 80, 82–83 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (holding that appellant did not limit his issues on appeal by "gratuitously listing only some of those issues in his notice of appeal"); *Anderson v. Long*, 118 S.W.3d 806, 809–10 (Tex. App.—Fort Worth 2003, no pet.) (holding that appellant could challenge interlocutory partial summary judgment even though notice of appeal stated that appeal was from order sustaining subsequent plea to the jurisdiction); *Tex. Sting, Ltd. v. R.B. Foods, Inc*., 82 S.W.3d 644, 647–48 (Tex. App.—San Antonio 2002, pet. denied) (holding that notice of appeal from default judgment that was the final order in the case also allowed appellant to raise appellate issues challenging prior interlocutory order dismissing part of case for want of prosecution)). We therefore reject Cellex's argument that we lack jurisdiction to consider the order compelling arbitration because the notices of appeal do not state they are taken from the trial court's order signed September 22, 2014.

Next, Celltex asserts we lack jurisdiction over an appeal from the order compelling arbitration because such an order is not appealable. Celltex is correct that orders compelling arbitration are not entitled to interlocutory appeal; however, they can be reviewed after final judgment in the case. *Chambers v. O'Quinn*, 242 S.W.3d 30, 32 (Tex. 2007) (citing *Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79, 89, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)). A judgment confirming an arbitration award is final and enforceable like any other judgment. *Hamm v. Millennium Income Fund, L.L.C.*, 178 S.W.3d 256, 268 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Accordingly, we have jurisdiction to review the order compelling arbitration.

Celltex further claims we lack jurisdiction to consider the challenges to the order compelling arbitration because the notices of appeal were not filed within thirty days of entry of that order. Generally, a notice of appeal is due within thirty days after the

judgment is signed. *See* Tex. R. App. P. 26.1. In this case, the appellate timetable ran from the date of the order confirming the arbitration award, as the final judgment, not the date of the order compelling arbitration. Because both notices of appeal were filed within thirty days of the order confirming the arbitration award, we do not lack jurisdiction due to untimeliness of the notices of appeal.

THE RESTRICTED APPEAL

Rule 30 of the Texas Rules of Appellate Procedure provides that "[a] party who did not participate–either in person or through counsel–in the hearing that resulted in the judgment complained of and who did not timely file a postjudgment motion or request for findings of fact and conclusions of law, *or a notice of appeal within the time permitted by Rule 26.1(a)*, may file a notice of appeal within the time permitted by Rule 26.1(c)." Tex. R. App. P. 30 (emphasis added). *See also Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004); *Watson v. Watson*, 286 S.W.3d 519, 522 (Tex. App.—Fort Worth 2009, no pet.). As noted above, Biostar's notice of appeal was filed within thirty days of the order confirming the arbitration award. Accordingly, Biostar filed a notice of appeal within the time permitted by Rule 26.1(a) and therefore fails to meet the requirements of a restricted appeal. *See* Tex. R. App. P. 26.1 and 30. Accordingly, we consider Biostar's appeal without applying the strictures of a restricted appeal. Because Biostar did, however, timely file a notice of appeal that does not lack the requisite information, our jurisdiction has been invoked. *See* Rule 25.1(d).

THE ORDER COMPELLING ARBITRATION

Arbitration cannot be ordered in the absence of an agreement to arbitrate. *Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994). Thus, despite strong presumptions that favor arbitration, a valid agreement to arbitrate is a threshold requirement to compel arbitration. *See In re Kellogg Brown & Root, Inc*., 166 S.W.3d 732, 737–38 (Tex. 2005) (orig. proceeding). Courts apply state contract law in determining whether there is a valid agreement to arbitrate. *See In re Rubiola*, 334 S.W.3d 220, 224 (Tex. 2011) (orig. proceeding). Once the arbitration movant establishes a valid arbitration agreement that

encompasses the claims at issue, a trial court has no discretion to deny the motion to compel arbitration unless the opposing party proves a defense to arbitration. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753–54 (Tex. 2001) (orig. proceeding).

The trial court conducts a summary proceeding to make the gateway determination of arbitrability. *See In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005) (orig. proceeding). The trial court's determination of the arbitration agreement's validity is a legal question that we review de novo. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). If the court's factual findings are in dispute, we review the court's denial of the motion under a legal sufficiency or "no evidence" standard of review. *Id.* at 233.

In three issues, Biostar and K-Stemcell challenge the trial court's order compelling arbitration.[3] In its first issue, Biostar claims the trial court erred by granting Celltex's motion to compel arbitration without first determining whether the Agreement was enforceable. Both Biostar and K-Stemcell argue the trial court erred in submitting the issue of arbitrability to the arbitrator.

In response to Celltex's motion to compel, K-Stemcell and Biostar argued, without citing legal authority, that the motion should be denied because Celltex had not yet determined, in a separate proceeding, whether the Agreement was enforceable. K-Stemcell and Biostar acknowledged in their response to the motion to compel that disagreements resulting from the negotiation and completion of the documents necessary to consummate the Agreement "are the only issues actually governed by the arbitration agreement" but asserted disputes regarding the enforceability of the Agreement "are not subject to the arbitration agreement." K-Stemcell and Biostar contended the trial court could not determine whether to compel arbitration "without first determining whether the

[3] The record reflects a hearing was held on the motion to compel September 22, 2014, but the record before this court contains no reporter's record of that hearing. Because the trial court's order indicates the hearing was not evidentiary, the lack of a record does not prevent our consideration of this complaint.

Rule 11 Agreement is even enforceable."

On appeal, in two separate briefs, Biostar and K-Stemcell expand their argument to assert the trial court, not the arbitrator, had the authority to decide the issue of arbitrability, Biostar asserts approval of the Agreement is a condition precedent to the formation of the contract that required approval by Biostar's board of directors. Whether a contract was formed without that approval, Biostar argues, was an issue for the trial court rather than the arbitrator. K-Stemcell contends the trial court failed to decide the "gateway issue" that there was a contractual agreement to arbitrate and the arbitration provision does not submit that question to the arbitrator instead of the trial court. Considering the response to the motion to compel in light of their briefs, we discern K-Stemcell's and Biostar's argument to be that the trial court erred in allowing the arbitrator to decide whether the Agreement was enforceable. As the Texas Supreme Court explained in *In re Morgan Stanley & Co., Inc*., 293 S.W.3d 182, 185 (Tex. 2009), prior to *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), a defense to an agreement to arbitrate that would render the entire contract unenforceable or void was for the court to decide because if the underlying contract was invalid so too was the agreement to arbitrate. *Prima Paint* established the "separability doctrine," explaining that an arbitration provision was separable from the rest of the contract and that the issue of the contract's validity was to be determined by the arbitrator unless the challenge was to the agreement to arbitrate itself. *Id.* (citing *Prima Paint*, 388 U.S. at 402-04); *see also Women's Reg'l Healthcare, P.A. v. FemPartners of N. Tex., Inc.*, 175 S.W.3d 365, 368 (Tex. App.—Houston [1st Dist.] 2005, no pet.)("if the parties' dispute arises from a contract containing an arbitration clause, a challenge to the contract as a whole—as opposed to a challenge specific to the arbitration clause itself—must be resolved by the arbitrators" at 368); *Saxa Inc. v. DFD Architecture, Inc.*, 312 S.W.3d 224, 229 n. 4 (Tex. App.—Dallas 2010, pet. denied). A challenge to the contract validity "'is considered by the arbitrator in the first instance.'" *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 898 (Tex. 2010) (quoting

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006)). Although this "'rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void[,] ... it is equally true that [the opposite] approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable.'" *Id.* (quoting *Buckeye*, 546 U.S. at 448–49, 126 S.Ct. 1204). This dilemma is resolved by allocating such decisions to arbitration in accordance with the liberal policy favoring arbitration. *Id.*[4]

K-Stemcell and Biostar have not raised a challenge to the agreement to arbitrate that is "specific to the arbitration clause itself". Because Biostar's and K-Stemcell's challenge to the motion to compel attacks the enforceability of the entire Agreement, the trial court did not err in submitting the issue of arbitrability to the arbitrator. *See TMI, Inc. v. Brooks*, 225 S.W.3d 783, 793 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (holding defenses concerning the contract as a whole must be referred to an arbitrator while defenses to the arbitration provision itself are considered by the court). For these reasons, we overrule Biostar's first and second issues and K-Stemcell's first issue.

THE ORDER CONFIRMING THE ARBITRATION AWARD

A trial court's decision to confirm or vacate an arbitration award is narrowly reviewed under a de novo standard. *D.R. Horton–Tex., Ltd. v. Bernhard*, 423 S.W.3d 532, 534 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *Amoco D.T. Co. v. Occidental Petroleum Corp*., 343 S.W.3d 837, 841 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). We give great deference to the trial court's decision to confirm an arbitration award and indulge every reasonable presumption in favor of it. *CVN Grp., Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002); *Amoco D.T. Co*., 343 S.W.3d at 841.

[4] We are cognizant that this court, as well as the Texas Supreme Court, have distinguished cases involving claims of a lack of authority or capacity to execute the contract, but no such argument was made in opposition to the motion to compel in the case at bar. *See In re Morgan Stanley & Co*., 293 S.W.3d 182, 189-90 (Tex. 2009) (regarding lack of mental capacity); *Am. Med. Techs., Inc. v. Miller*, 149 S.W.3d 265, 273 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (regarding lack of authority).

Biostar's third issue contends the trial court erred in confirming the arbitration award on the basis it was not properly provided with notice of the arbitration proceedings. K-Stemcell's second and third issues also claim the trial court erred in confirming the arbitration award on the ground that Biostar was not properly provided with notice of the arbitration proceedings.[5]

A hearing was held February 12, 2015, on Celltex's motion to confirm the arbitrator's award. K-Stemcell appeared but Biostar did not. The record reflects that although K-Stemcell filed objections to the arbitrator's award the day before, at the hearing on the motion to confirm the arbitration award K-Stemcell made no argument to the trial court regarding any lack of notice to Biostar. Further, the record reflects the notice of hearing on the confirmation of the arbitrator's award was served on Dr. Jihn Han Hong, the designated representative of Biostar according to former counsel's motion to withdraw. The trial court subsequently confirmed the arbitration award. On March 16, 2016, K-Stemcell requested the trial court to vacate the arbitrator's award. Biostar never made such a request.

In their briefs, Biostar and K-Stemcell contend the arbitrator's failure to notify Biostar, as a separate entity, of the arbitration proceedings constitutes misconduct by the arbitrator so that vacatur of the award is required. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.088(a)(2)(C) (West 2011). Section 171.088 provides that "[o]n application of a party, the court shall vacate an award if . . . the rights of a party were prejudiced by . . . misconduct or wilful misbehavior of an arbitrator."). *Id.* Because both Biostar and K-Stemcell waived this complaint, we do not decide whether separate notice was required or a lack of notice constitutes misconduct as contemplated by section 171.088.

The party must make its application for vacatur under subsection (a)(1) "not later than the 90th day after the date the grounds for the application are known or should have been known." *Id.* § 171.088(b). The plain language of section 171.088 shows that "the

[5] Because we determine the complaint was waived, we do not decide whether K-Stemcell has standing to raise this issue on appeal.

legislature intended the 90–day period . . . to be a limitations period after which a party cannot ask a court to vacate an arbitration award." *New Med. Horizons II, Ltd. v. Jacobson*, 317 S.W.3d 421, 428 (Tex. App.—Houston [1st Dist.] 2010, no pet.). A party seeking to vacate an arbitration award must present any grounds for doing so to the trial court, otherwise, those complaints are waived on appeal. *See* Tex. R. App. P. 33.1; *Ewing v. Act Catastrophe-Tex. L.C.*, 375 S.W.3d 545, 549 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *Kline v. O'Quinn*, 874 S.W.2d 776, 790–91 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (op. on reh'g).

Because Biostar made no application to the trial court to vacate the arbitrator's award, its complaint is waived on appeal. Biostar's third issue is overruled.

The record reflects that although K-Stemcell filed objections to the arbitrator's award the day before the hearing on the motion to confirm the arbitration award, at the hearing K-Stemcell made no argument to the trial court regarding any lack of notice to Biostar. The court signed the order confirming the award on February 12, 2015. K-Stemcell did not seek vacatur of the arbitrator's award until March 16, 2015. Although the request was made within 90 days, it was not made until after the award was confirmed.

Filing a motion to vacate after confirmation of the award constitutes waiver. *Black v. Shor*, 443 S.W.3d 154, 163–64 (Tex. App.—Corpus Christi 2013, pet. denied), citing *GJR Mgmt. Holdings, L.P. v. Jack Raus*, *Ltd.*, 126 S.W.3d 257, 260 (Tex. App.—San Antonio 2003, pet. denied); *Hamm*, 178 S.W.3d at 269). "A motion to vacate, to modify, or to correct an arbitration award must be raised or considered before or simultaneously with a motion to confirm the award." *Hamm*, 178 S.W.3d at 269. Otherwise, the complaint is waived. *See, e.g., GJR Mgmt. Holdings,* 126 S.W.3d at 260 (finding a motion filed after the trial court had already confirmed the award was untimely). Accordingly, K-Stemcell also waived its complaint. K-Stemcell's second and third issues are overruled.

CONCLUSION

Having overruled all the issues presented by both appellants, the orders of the trial court are affirmed. Further, we decline to award frivolous appeal damages under the facts of this case. *See* Tex. R. App. P. 45. Appellee's motion is therefore denied.

/s/ John Donovan
Justice

Panel consists of Justices Jamison, Donovan and Brown. (Jamison, J., Concurring.)