COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00188-CV

JOHN E. DEATON AND DEATON LAW FIRM, L.L.C. — APPELLANTS

V.

MARGARET MORENO AND LAW OFFICES OF STEVEN M. JOHNSON — APPELLEES

FROM THE 48TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 048-283747-16

MEMORANDUM OPINION[1]

This case arises out of a legal malpractice and breach of contract suit filed by Appellee Margaret Moreno against Appellee Law Offices of Steven M. Johnson (JLF) and Appellants John E. Deaton and Deaton Law Firm, LLC (DLF).

[1]*See* Tex. R. App. P. 47.4.

DLF, a Rhode Island law firm, and Deaton, a Rhode Island attorney, appeal from the trial court's order denying their special appearance and supplemental special appearance. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(7) (West Supp. 2016) (authorizing an interlocutory appeal from the denial of a special appearance). In three issues, DLF and Deaton argue that the trial court erred by denying their special appearance and supplemental special appearance because Moreno's claims are not ripe and because DLF and Deaton lack sufficient minimum contacts with the State of Texas that would enable Texas to assert personal jurisdiction over them. We will affirm.

Background

Moreno, a California resident, entered into a representation agreement with JLF, a law firm in Fort Worth, to represent her in connection with injuries she sustained from a defective hernia repair product commonly referred to as "Kugel Mesh." The representation agreement was entered into in Tarrant County, was to be construed under Texas law, was performable in Texas, permitted JLF to retain associate counsel to represent Moreno, and required Moreno and JLF to arbitrate all disputes (other than attorney disciplinary actions) in Fort Worth. JLF entered into similar representation agreements with its other Kugel Mesh clients.

Kugel Mesh is manufactured and sold by C.R. Bard, Inc. and its subsidiary Davol, Inc. Davol's principal place of business is in Rhode Island. JLF determined that some of its Kugel Mesh cases, including Moreno's, should be filed in Rhode Island state court. In 2008, JLF contacted Deaton and DLF to act

as local counsel in Rhode Island and to file complaints prepared by JLF in Rhode Island state court. JLF and DLF eventually entered into a "Referral Agreement" in which they agreed that DLF was to "receive 10% of the attorney['s] fees earned in all Rhode Island Kugel Mesh cases filed by [DLF] as local counsel for [JLF]." In addition to Moreno's case, DLF filed numerous other Kugel Mesh cases in Rhode Island state court as JLF's local counsel, at least thirteen of which involved Texas residents as plaintiffs. JLF also represented numerous Kugel Mesh plaintiffs in a multidistrict litigation pending in federal district court in Providence, Rhode Island. Because local counsel is not required in federal court, DLF was not hired as local counsel in those cases.

In 2014, JLF negotiated a global settlement of its state and federal Kugel Mesh cases, including Moreno's. According to DLF, JLF refused to provide it with the settlement amounts allocated to the clients DLF represented, which prevented DLF from determining the amounts due from JLF. In October 2015, DLF asserted a $1 million attorney's fees lien in the cases it filed in Rhode Island state court and in a federal-court Kugel Mesh case in which JLF had retained DLF. DLF's lien delayed the funding of the settlement.

As a result of the attorney's fees lien, JLF fired DLF as local counsel in November 2015, and Moreno and all but a few of JLF's clients fired DLF. DLF filed a motion to compel the settlement information in the cases pending in Rhode Island state court. The Rhode Island state court judge ordered Bard and Davol to fund the settlement by April 4, 2016, and ordered that $1 million be

segregated from distribution to JLF's clients. The judge also ordered JLF to produce the representation agreements between JLF and its Rhode Island Kugel Mesh clients. In connection therewith, DLF signed a "Stipulation as to Non-Disclosure of Protected JLF Attorney[-]Client Information" in which DLF acknowledged that it was hired pursuant to the representation agreements JLF had entered into with its clients and that DLF was authorized by those representation agreements to act as counsel for JLF's clients in Rhode Island state and federal court.

About a month prior to DLF filing its motion to compel the settlement information, Moreno filed suit against Deaton, DLF, and JLF, alleging that the trial court had personal jurisdiction over Deaton and DLF because they had engaged in business in Texas by entering into a contract with a Texas resident that was performable in whole or in part in Texas. Moreno also alleged that Deaton, DLF, and JLF committed legal malpractice, breached fiduciary duties owed to her, developed conflicts of interest with her, entered into an aggregate settlement instead of an individual settlement, made misrepresentations to her, and breached their duties under the Disciplinary Rules of Professional Conduct. She further alleged that Deaton, DLF, and JLF breached their contract with her and that the fees charged were unconscionable. Moreno sought a declaratory judgment establishing her rights under the fee agreement, fee forfeiture, disgorgement, and an imposition of a constructive trust over the settlement funds

pending a full accounting. She also pled for damages and attorney's fees. Finally, Moreno sought to compel arbitration under the representation agreement.

JLF filed cross-claims against Deaton and DLF for breach of fiduciary duty, breach of contract, tortious interference, fraud, promissory estoppel, and specific performance. JLF also sought a declaratory judgment regarding the construction of the local counsel agreements between JLF and Deaton and DLF. JLF sought disgorgement or, alternatively, forfeiture of any and all attorney's fees by Deaton and DLF, as well as compensatory damages and attorney's fees.

Deaton and DLF filed a special appearance and a supplemental special appearance challenging the trial court's personal jurisdiction over them with respect to both Moreno's and JLF's claims. The trial court denied both. Deaton and DLF filed a request for findings of fact and conclusions of law, but the trial court did not file any.

Deaton and DLF have appealed. On Deaton and DLF's motion, this court stayed all trial court proceedings pending further order of this court.

Discussion

In their first issue, Deaton and DLF contend this case is not ripe because the suit is still pending in Rhode Island. The background of this case shows JLF hired Deaton and DLF to act as local counsel in Rhode Island products liability cases and that a global settlement was underway when Deaton and DLF filed a $1 million lien that stalled the settlement. This case arose out of a legal

malpractice and breach of contract suit filed by Moreno against JLF, Deaton, and DLF.

The subject matter jurisdiction of the court rests, in part, on the ripeness of the issues. *See, e.g.*, *Patterson v. Planned Parenthood of Hous. & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998) ("Ripeness, like standing, is a threshold issue that implicates subject matter jurisdiction[.]"). Justiciability requires a concrete injury in order to avoid advisory opinions. *See id.* at 442–43. In *Robinson v. Parker*, the supreme court stated that courts should not decide abstract, hypothetical, or contingent questions:

> Ripeness "is a threshold issue that implicates subject matter jurisdiction . . . [and] emphasizes the need for a concrete injury for a justiciable claim to be presented." In evaluating ripeness, we consider "whether, *at the time a lawsuit is filed,* the facts are sufficiently developed 'so that an injury has occurred or is likely to occur, rather than being contingent or remote.'" Although a claim is not required to be ripe at the time of filing, if a party cannot demonstrate a reasonable likelihood that the claim will soon ripen, the case must be dismissed.

353 S.W.3d 753, 755 (Tex. 2011) (citations omitted).

As stated by Johnson, in the instant case, "[t]here is no question there is a justiciable controversy between Moreno and Deaton, Moreno and Johnson, and Johnson and Deaton about whether, and to what extent, either attorney is liable for damages or is owed attorneys' fees, and that dispute is capable of being determined in this lawsuit." Deaton and DLF do not cite appropriate authority or sufficient facts to demonstrate this case is not ripe. We therefore conclude their contention is without merit, and we overrule their first issue.

In their second and third issues, Deaton and DLF contend the trial court erred by denying their special appearance and supplemental special appearance. Deaton and DLF stress their lack of minimum contacts with Texas, addressing both specific and general jurisdiction. But in this case, we do not need to conduct a minimum contacts and due process analysis because the forum-selection clause in the representation agreement is sufficient to confer personal jurisdiction over Deaton and DLF.

As there were no findings of fact and conclusions of law, we infer that the trial court made all fact findings that have support in the record and that are necessary to uphold the ruling. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007). We review the trial court's decision whether to enforce forum-selection clauses for an abuse of discretion, deferring to the trial court's factual determinations if they are supported by the evidence, but we review the trial court's legal determinations de novo. *Brown v. Mesa Distribs., Inc.*, 414 S.W.3d 279, 284 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *see In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding). To the extent our review involves contractual interpretation of a forum-selection clause, we employ a de novo standard of review. *Phx. Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 610 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

We first address the contractual clauses setting venue and the applicable law for any disputes, as "the presence of a valid and enforceable forum-selection

clause circumvents the need to conduct a due-process and minimum-contacts analysis because such a clause acts as consent to jurisdiction in the contracted-for forum." *Carlile Bancshares, Inc. v. Armstrong*, Nos. 02-14-00014-CV, 02-14-00018-CV, 2014 WL 3891658, at *5 (Tex. App.—Fort Worth Aug. 7, 2014, no pet.) (mem. op.). In so doing, our analysis will parallel the careful analysis set forth in this court's decision in *Carlile Bancshares*. *Id.* at *5–9. We will examine whether the contract in this case contains a forum-selection clause, whether it is unenforceable (recognizing it is presumed enforceable), and whether it applies to the particular claims or issues being litigated. *See id.* at *6.

The tenth paragraph of the Attorney Representation Agreement executed by each client with JLF provided that "[t]his contract is entered into in Tarrant County, Texas, which shall also be the place of performance and payment in accordance with the terms of the contract" and that it would "be construed in accordance with the law of the State of Texas, and all obligations of the parties are performable in Tarrant County, Texas." The seventeenth paragraph of the Attorney Representation Agreement provided that "Attorneys and Client agree that any dispute arising from the interpretation, performance, or breach of this Fee Agreement, including any claim of legal malpractice, but not including attorney disciplinary proceedings, shall be resolved by final and binding arbitration conducted in Fort Worth, Texas . . . ."

Neither Deaton nor DLF were signatory parties to the Attorney Representation Agreement. But in August 2012, JLF and DLF entered into a

separate "Referral Agreement" in which they agreed that DLF "will receive 10% of the attorney fees earned in all Rhode Island Kugel Mesh cases filed by the Deaton Law Firm as local counsel for the Johnson Law Firm." Subsequently, Deaton signed a "Stipulation as to Non-Disclosure of Protected JLF Attorney[-]Client Information," which provided:

> Whereas Johnson Law Firm, (JLF) has Attorney Representation Agreements (ARA) with certain clients to provide legal representation in exchange for a contingency fee, and *John Deaton of the Deaton Law Firm was hired pursuant to the ARA and authorized by the ARA to act as counsel for clients in the Superior Court of Rhode Island and the United States District Court for the District of Rhode Island, Deaton seeks the benefits of the ARA contingency fee and to recover a portion of the contingent fee owed to JLF under the ARA for the work he purports to have done as counsel pursuant to the authority to do so granted in the ARA.*
>
> *John Deaton is therefore considered as associated counsel pursuant to ARA, and is therefore within the scope of the attorney client privilege as it relates to the ARA's*; John Deaton of the Deaton Law Firm agrees that the ARAs are protected by the attorney client privilege and will not be disclosed, shared or disseminated to any other person or entity not employed by the Deaton Law Firm.
>
> /s/ JOHN DEATON
> JOHN DEATON
> DEATON LAW FIRM

[Emphasis added.]

As to the involvement of Deaton individually and as representative of his law firm, examples of what the record shows are as follows: Deaton individually executed a notice of attorney's fees lien in the form of correspondence, he signed the Stipulation individually and then added his law firm, and he appeared in Rhode Island court and announced as counsel for plaintiffs. Deaton signed on

behalf of DLF the Referral Agreement, many complaints filed in Rhode Island state court, and the Referral Agreement for a federal-court Kugel Mesh case in which JLF had retained DLF.

The terms of the Attorney Representation Agreement clearly showed that it contained the forum-selection clause quoted above. It specified Fort Worth, Texas, as the particular venue. Such a forum-selection clause can be enforced as to a nonsignatory only if the nonsignatory is bound by that agreement under recognized contract or agency principles. *Id.* at *7 (citing *Hellenic Inv. Fund, Inc. v Det Norske Veritas*, 464 F.3d 514, 517 (5th Cir. 2006); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005) (orig. proceeding)). For instance, a nonsignatory may be bound by this clause under the doctrine of direct-benefits estoppel. *See id.* at *7–9.

Direct-benefits estoppel applies when a nonsignatory "knowingly exploits the agreement containing the arbitration clause." *Id.* at *7 (quoting *Bridas S.A.P.I.C. v. Gov't of Turkm.*, 345 F.3d 347, 361–62 (5th Cir. 2003)). "We look to cases applying direct-benefits estoppel in the context of arbitration clauses because arbitration clauses are a type of forum-selection clause." *Id.* at *7 n.10. Direct-benefits estoppel has been applied to a nonsignatory plaintiff seeking to sue a signatory on the contract containing this clause. *See id.* at *8. It can also apply when a nonparty seeks or obtains direct benefits from a contract by means other than a lawsuit, such as by exploiting a contract by knowingly seeking and obtaining direct substantial benefits from that contract. *Noble Drilling Servs., Inc.*

v. Certex USA, Inc., 620 F.3d 469, 473 (5th Cir. 2010); *see In re Weekley Homes. L.P.*, 180 S.W.3d 127, 131–33 (Tex. 2005) (orig. proceeding).

The language in the Stipulation executed by Deaton and DLF stated he and his firm were hired pursuant to the terms of the ARA, were thereby authorized by the ARA to act as counsel for the clients, and sought the benefits of the ARA contingency fee and recovery of a portion of the contingent fee owed to JLF under the ARA for the work Deaton purported to have done as counsel pursuant to the authority to do so granted in the ARA. Deaton was therefore considered as associated counsel pursuant to the ARA.

We recognize that generally, LLC members are not personally liable for the LLC's debts, obligations, and liabilities. *See* 7 R.I. Gen. Laws § 7-16-23 (West 2017); Tex. Bus. Orgs. Code Ann. § 101.114 (West 2012). But LLC members are personally liable for their own torts, and their member status does not protect them from personal liability for torts committed while acting on the LLC's behalf. *See* 7 R.I. Gen. Laws § 7-16-3.2(a) (West 2017) ("The liability of an individual authorized to practice a profession for his or her own negligence, wrongful acts or misconduct, or that of any person under his or her direct supervision and control, other than in an administrative capacity, shall not be affected by the individual's providing professional services in this state as a member or agent of a domestic or foreign limited liability company."); *Commonwealth Land Title Ins. Co. v. M.S.I. Holdings, LLC*, No. C.A. 08-217ML, 2008 WL 4681775, at *3 (D.R.I. Oct. 21, 2008) (stating that under Rhode Island law, an individual's status as an

LLC member does not absolve that member from his own tort liability); *In re White-Robinson*, 777 F.3d 792, 799 (5th Cir.) (stating that Texas law only protects members from being liable for the LLC's obligations, not their own, citing Texas Business Organizations Code section 101.114, and holding member of LLC law firm was liable for civil contempt for her failure to pay sanctions she owed because of her own misconduct in prior bankruptcy proceedings and thus was not protected by her membership in the LLC), *cert. denied*, 136 S. Ct. 52 (2015); *LJ Charter, L.L.C. v. Air Am. Jet Charter, Inc*., No. 14-08-00534-CV, 2009 WL 4794242, at *14 (Tex. App.—Houston [14th Dist.] Dec. 15, 2009, pet. denied) (mem. op.) (holding two individual members of an LLC liable for fraud based on the principle that agents are personally liable for fraudulent or tortious acts committed while in the service of the LLC); *Sanchez v. Mulvaney*, 274 S.W.3d 708, 712 (Tex. App.—San Antonio 2008, no pet.) (recognizing general rule that LLC members are not individually liable for the debts of an LLC but concluding that plaintiffs' allegations of member's own tortious and fraudulent actions, including alleged Deceptive Trade Practices Act violations, did not depend upon veil piercing because a corporation's agent is personally liable for his own fraudulent or tortious acts, even when acting within the scope of employment). Because Moreno's claims and Johnson's crossclaims against Deaton individually arise from his alleged negligence and wrongful acts or omissions, Deaton's status as a member of DLF would not shield him from personal liability in this case.

We conclude the language of the Stipulation included Deaton individually and on behalf of DLF and that they exploited "a contract by knowingly seeking and obtaining direct substantial benefits from that contract," i.e., the ARA. Thus, the forum-selection clause in the ARA is enforceable under the doctrine of direct-benefits estoppel as to the nonsignatory parties in this case, Deaton and DLF, and they therefore consented to jurisdiction in Fort Worth. We overrule Deaton and DLF's second and third issues.

Conclusion

Having overruled each of Deaton's and DLF's three issues, we affirm the trial court's order denying their special appearance and supplemental special appearance. We also lift our July 13, 2016 order staying the trial court's proceedings.

/s/ Kerry FitzGerald
KERRY FITZGERALD
JUSTICE

PANEL: WALKER and MEIER, JJ.; and KERRY FITZGERALD (Senior Justice, Retired, Sitting by Assignment.)

WALKER, J., concurs without opinion.

DELIVERED: October 19, 2017