TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00782-CV

Santander Consumer USA, Inc., Appellant

v.

Mario A. Mata; Centroplex Automobile Recovery, Inc.; Blake Thornton Vandusen; John F. Thompson d/b/a Centroplex Automobile Recovery, Inc.; and Redshift Investigation, Inc., Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 353RD JUDICIAL DISTRICT NO. D-1-GN-13-000677, HONORABLE TIM SULAK, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

This is an appeal from the trial court's denial of a motion to compel arbitration and stay proceedings filed by appellant Santander Consumer USA, Inc. The trial court granted the motion as to appellee Mario A. Mata and denied it as to the remaining appellees, Centroplex Automobile Recovery, Inc.; Blake Thornton Vandusen; John F. Thompson d/b/a Centroplex Automobile Recovery, Inc.; and Redshift Investigation, Inc. Santander appeals from the trial court's order. For the reasons that follow, we will affirm.

BACKGROUND[1]

In December 2002, Mata financed the purchase of a Chevrolet Suburban pursuant to a motor-vehicle retail installment contract (Sale Contract).[2] As part of the purchase transaction, Mata pledged the vehicle as collateral to secure the debt. Mata and a predecessor of Santander amended the Sale Contract in January 2009, dropping the interest rate from 12.82% to 4% per year and adding an arbitration provision governed by the Federal Arbitration Act. It is undisputed that no other party saw or signed the original or amended Sale Contract.

Appellees Redshift and Centroplex are in the collateral-recovery business. Redshift contracts with financial institutions like Santander to recover secured collateral. Relevant to this case, Redshift has a December 2002 Service Agreement (Service Agreement) with Santander relating to the recovery of secured collateral. There is no arbitration provision in the Service Agreement. In turn, Redshift entered into a contract with Centroplex for Centroplex to carry out repossession assignments requested by Redshift pursuant to the terms of a June 2010 Collateral Recovery Agreement between Redshift and Centroplex.

In 2011, Santander ordered repossession of the vehicle purchased by Mata. Redshift tasked Centroplex with the collateral-recovery assignment, and Centroplex sent one of its employees, Vandusen, to repossess the vehicle. Mata allegedly sustained physical injuries during the course of the repossession attempt, and he sued Santander for breach of contract and all of the other parties

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[1] Because the parties are familiar with the facts of the case and its procedural history, we do not recite them in this opinion except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4.

[2] In September 2010, Santander became the servicer of the Sale Contract as amended and subsequently became the owner and holder.

for conversion, common-law fraud, trespass, gross negligence, and violations of the Texas Deceptive Trade Practices Act.

Santander asserted cross-claims against Redshift, Centroplex, Thompson, and Vandusen for indemnification, contribution, and proportionate responsibility. Vandusen asserted a counter-claim against Santander and a cross-claim against Redshift for indemnity and contribution. Redshift asserted cross-claims against Centroplex for contribution, indemnity, and breach of contract.

Santander filed a motion to compel arbitration and stay proceedings, requesting an order that Mata's claims against all defendants be submitted to arbitration because, Santander argues, all of Mata's claims arise out of or are related to the Sale Contract containing the arbitration clause. After an evidentiary hearing, the trial court granted the motion with regard to the claims between Mata and Santander and denied the motion as to the other claims and parties. This appeal followed.[3]

DISCUSSION

In its sole issue on appeal, Santander contends that the trial court erred by denying the motion to compel arbitration and stay of proceedings as to Centroplex, Vandusen, Thompson, and Redshift. In reviewing the denial of a motion to compel arbitration, we use an abuse-of-

[3] Mata filed a pro se brief in this appeal challenging the validity of the arbitration agreement based on his allegation that the agreement produced by Santander had only Mata's signature on it and not that of Santander's predecessor. However, Mata has not preserved this argument for our review, as he did not raise the issue in the trial court, nor did he file a notice of appeal in the case, which is required in seeking to alter a trial court's order. *See* Tex. R. App. P. 25.1(c), 33.1; *Lubbock Cty., Tex. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 584 (Tex. 2002); *Soefje v. Jones*, 270 S.W.3d 617, 631 (Tex. App.—San Antonio 2008, no pet.).

discretion standard, and within that standard, we defer to the trial court's factual determinations if they are supported by the evidence and review the trial court's legal determinations de novo. *See In re Labatt Food Servs., L.P.*, 279 S.W.3d 640, 642–43 (Tex. 2009) (orig. proceeding); *Oak Crest Manor Nursing Home, LLC v. Barba*, No. 03-16-00514-CV, 2016 WL 7046844, at *2 (Tex. App.—Austin Dec. 1, 2016, no pet.) (mem. op.); *Sidley Austin Brown & Wood, L.L.P. v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 863 (Tex. App.—Dallas 2010, no pet). Whether the parties agreed to be bound to an arbitration agreement is a contract-formation question that we review de novo, deferring to the trial court's findings of historical fact as between the parties as long as those determinations are supported by the evidence. *See Oak Crest*, 2016 WL 7046844, at *2. A party seeking to compel arbitration under the Federal Arbitration Act (FAA) must establish that (1) there is a valid agreement to arbitrate, and (2) the claims raised are within the agreement's scope. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding).

Here, there is no dispute (other than Mata's unpreserved claim) that there was a valid agreement to arbitrate between Santander and Mata, and there is no dispute that Centroplex, Vandusen, Thompson, and Redshift (the nonsignatory defendants) were not parties to the Sale Contract containing the arbitration provision, did not agree to it, and did not sign it. Thus, the issue here is whether Santander is entitled to compel non-signatories to participate in arbitration on the basis of the agreement between Mata and Santander.

We apply Texas procedural rules and substantive law in determining whether nonsignatories are bound by an arbitration agreement. *See In re Labatt Food Servs.*, 279 S.W.3d at 643. Whether an arbitration agreement binds a nonsignatory is a gateway matter to be determined

by the court rather than the arbitrator. *See In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005) (orig. proceeding). The party seeking arbitration bears the burden of establishing that the arbitration agreement binds a nonsignatory. *See Glassell Producing Co. v. Jared Res., Ltd.*, 422 S.W.3d 68, 81 (Tex. App.—Texarkana 2014, no pet.); *In re Citgo Petroleum Corp.*, 248 S.W.3d 769, 776 (Tex. App.—Beaumont 2008, orig. proceeding). Nonsignatories to an agreement subject to the FAA may be bound to an arbitration clause when rules of law or equity would bind them to the contract generally. *In re Labatt Food Servs.*, 279 S.W.3d at 643. According to principles of contract and agency law, arbitration agreements may bind nonsignatories under any of six theories: (1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) equitable estoppel, and (6) third-party beneficiary. *In re Kellogg Brown & Root*, 166 S.W.3d at 739 (citing *Bridas S.A.P.I.C. v. Government of Turkm.*, 345 F.3d 347, 356 (5th Cir. 2003)). Here, Santander asserts two of the theories—incorporation by reference and agency. We will address each of the two theories separately below.

Incorporation-by-Reference Theory

Under the doctrine of incorporation by reference, one agreement may properly constitute part of another agreement if one agreement references the other. *See Cappadonna Elec. Mgmt. v. Cameron Cty.*, 180 S.W.3d 364, 371 (Tex. App.—Corpus Christi 2005, no pet.); *Teal Constr. Co. v. Darren Casey Interests, Inc.*, 46 S.W.3d 417, 420 (Tex. App.—Austin 2001, pet. denied). The language in one agreement must plainly refer to the other agreement or otherwise show that the parties intended for one agreement to become part of or incorporated into the other agreement. *See One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 267 (5th Cir.

2011); *In re C & H News Co.*, 133 S.W.3d 642, 645 (Tex. App.—Corpus Christi 2003, orig. proceeding); *Teal*, 46 S.W.3d at 420.

Here, the nonsignatory defendants argue that Santander did not preserve its incorporation-by-reference argument for appeal by first raising it in the trial court. To preserve error for appeal, the argument made in the trial court must comport with the argument made on appeal. *See* Tex. R. App. P. 33.1(a); *Burbage v. Burbage*, 447 S.W.3d 249, 257 (Tex. 2014); *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985); *Smith v. East*, 411 S.W.3d 519, 530 (Tex. App.—Austin 2013, pet. denied).

Santander concedes that it did not "explicitly address" the incorporation-by-reference theory in its motion to compel arbitration but asserts that it raised the theory at the hearing on the motion. However, our review of the portions of the record cited by Santander in support of its contention that it raised the theory at the hearing show that it did not do so. Specifically, the portions cited by Santander do not include an argument that any of the relevant agreements incorporate any other agreements by reference. Rather, Santander conceded at the hearing that the nonsignatory defendants did not enter into agreements with arbitration clauses and did not know about the arbitration clause between Santander and Mata but argued that the nonsignatory defendants should have known about the Sale Contract because they "were acting as repossessors," knew "that there was a secured transaction," and knew that they "were being tasked with repossessing the collateral." This argument is not an argument asserting an incorporation-by-reference theory. *See One Beacon*, 648 F.3d at 267; *Owen v. Hendricks*, 433 S.W.2d 164, 167 (Tex. 1968); *Cappadonna*, 180 S.W.3d at 371; *Teal*, 46 S.W.3d at 420.

Because Santander did not raise the argument in the trial court that it now raises on appeal, it has not preserved this issue for our review. *See* Tex. R. App. P. 33.1(a); *Burbage*, 447 S.W.3d at 257; *Smith*, 411 S.W.3d at 530.

Agency Theory

In raising an agency theory, Santander argues that the nonsignatory defendants were acting as its agents in the course of the repossession of Mata's vehicle and that it could therefore bind them to the arbitration agreement. However, Santander cites no authority, nor have we found any, that specifically supports this argument based on the record before us. Instead, Santander cites to cases that are distinguishable from this case because they involve nonsignatory agents or nonsignatory agents and their principals jointly who were allowed to enforce arbitration agreements signed by the principals, not principals compelling alleged agents to participate in arbitration based on an agreement signed by the principals and unknown to the agents. *See SEB, Inc. v. Campbell*, No. 03-10-00375-CV, 2011 WL 749292, at *1, 4–5 (Tex. App.—Austin Mar. 2, 2011, no pet.) (mem. op.); *Gililland v. Taylor Invs.*, No. 11-03-00175-CV, 2004 WL 2126755, at *3 (Tex. App.—Eastland Sept. 23, 2004, pet. denied) (mem. op.); *McMillan v. Computer Translation Sys. & Support, Inc.*, 66 S.W.3d 477, 481 (Tex. App.—Dallas 2001, orig. proceeding).

Santander also cites to authority for the proposition that "a secured creditor is vicariously liable for breaches of the peace committed by its independent contractors." *See* Tex. Bus. & Com. Code § 9.609(b)(2); *Mbank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 153–54 (Tex. 1992). However, Santander cites to no authority, nor have we found any, that suggests that the vicarious-liability principle, which is "based on longstanding policy concerns regarding the exercise

of force or violence" automatically creates an agency relationship under the agency theory in an arbitration analysis as we have here. *See Mbank*, 836 S.W.2d at 152. "A corporate relationship is generally not enough to bind a nonsignatory to an arbitration agreement." *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 191 (Tex. 2007) (orig. proceeding). It is a basic precept that arbitration "is a matter of consent, not coercion" and that the FAA generally "does not require parties to arbitrate when they have not agreed to do so." *Id.* at 192 (quoting *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478–79 (1989)). Santander could have included arbitration clauses in its contracts with the nonsignatory defendants but did not do so. Given the applicable law and the arguments and record presented to us under the particular circumstances in this case, we conclude that the nonsignatory defendants cannot be compelled to forgo their constitutional right to a trial by jury in favor of arbitration.

CONCLUSION

We affirm the district court's order.[4]

[4] In their joint briefing, the nonsignatory defendants ask this Court to award them damages pursuant to rule 45 of the Texas Rules of Appellate Procedure. *See* Tex. R. App. P. 45 (authorizing award of "just damages" if appellate court determines that appeal is frivolous). We decline to do so. *See Goss v. Houston Cmty. Newspapers*, 252 S.W.3d 652, 657 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("Whether to grant sanctions for a frivolous appeal is a matter of discretion that this court exercises with prudence and caution and only after careful deliberation in truly egregious circumstances.").

Cindy Olson Bourland, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed

Filed: March 29, 2017