NUMBER 13-15-00469-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JOHN DEMPSEY, **Appellant,**

v.

U.S. MONEY RESERVE, INC., D/B/A UNITED STATES RARE COIN & BULLION RESERVE, **Appellee.**

On appeal from the 58th District Court of Jefferson County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Benavides and Hinojosa
Memorandum Opinion by Justice Benavides

By one issue, appellant John Dempsey appeals the trial court's order confirming an arbitration award against him totaling $1.65 million and in favor of appellee U.S. Money

Reserve, Inc. doing business as United States Rare Coin & Bullion Reserve ("U.S. Money"). We affirm.

I. BACKGROUND[1]

On July 17, 2014, U.S. Money added Dempsey as a defendant to an ongoing lawsuit it had previously filed against numerous defendants who are not party to this appeal.[2]

In its petition naming Dempsey as a defendant, U.S. Money asserted that Dempsey was its former employee, and that in January 2007, Dempsey entered into a "Confidential Services, Trade Secrets, and Employment Agreement" ("the 2007 agreement") with U.S. Money. The agreement contained, among other things, Dempsey's obligations to U.S. Money and its clients, if Dempsey's employment with U.S. Money terminated. On December 20, 2010, Dempsey entered into a separate employment agreement ("the 2010 agreement") with United States Gold Coin Exchange, L.P. ("United States Gold"), an entity that U.S. Money described in the following manner in its pleadings:

> an affiliate of [U.S. Money] to which [U.S. Money] has succeeded in its rights and privileges, which included, *inter alia*, the same agreements and prohibitions, both as to the customers of United States Gold Coin Exchange, L.P., and as to the customers of [U.S. Money], which are referenced in [the 2010 agreement].

[1] This appeal was transferred from the Ninth Court of Appeals pursuant to a docket equalization order issued by the Texas Supreme Court. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2015 R.S.).

[2] The pleading naming Dempsey as a defendant was entitled "Plaintiffs' [sic] Fifteenth Amended Petition and Application for Immediate, Temporary, and Permanent Injunctive Relief."

U.S. Money further alleged that on July 28, 2011, Dempsey entered into a "Separation and Release Agreement" with it and United States Gold, "in which he reaffirmed his obligations under [the 2010 agreement]." U.S. Money asserted in its petition that Dempsey breached its agreements with U.S Money and United States Gold. U.S. Money sought temporary and permanent injunctive relief against Dempsey related to these claims. The trial court enjoined Dempsey, as requested by U.S. Money, from:

> (1) directly or indirectly possessing, using, revealing, or distributing confidential information and trade secrets of [U.S. Money], specifically customer lists and customer contact information;
>
> (2) directly or indirectly calling upon, contacting, soliciting, selling, or attempting to call upon, contract, solicit, or sell coins to any current or past customers of [U.S. Money];
>
> (3) directly or indirectly engaging in the business of selling gold coins or bullion within a 200 mile radius of Austin, Texas or Beaumont, Texas;
>
> (4) directly or indirectly disparaging [U.S. Money] to any third person, including but not limited to any comments that [U.S. Money] "lied," "scammed," or was trying to "rip off" anyone;
>
> (5) directly or indirectly contacting customers of [U.S. Money] and encouraging them to attempt to return coins or demand refunds from [U.S. Money] for past purchases, and to encourage them to make groundless threats as a means to attempt to obtain said refunds; or
>
> (6) directly or indirectly utilizing any of [U.S. Money's] confidential and proprietary information or trade secrets. . . .

On April 5, 2015, Dempsey filed a motion for a trial setting in the trial court and requested that the trial court set the case on the court's jury docket. Fifteen days later, Dempsey filed a no-evidence motion for summary judgment, asserting that U.S. Money has no evidence of a valid agreement, as alleged in its petition. That same day, U.S. Money filed a response to Dempsey's motion for a trial setting, asserting that its claims

against Dempsey are subject to a valid arbitration agreement, and that such trial setting would be improper without first attending arbitration. Furthermore, U.S. Money asserted in its response that arbitration had already commenced[3], but it lacked Dempsey's participation, attendance, and payment share of arbitration fees. In reply, Dempsey argued that U.S. Money waived any right to arbitration under the agreement because it substantially invoked the litigation process.

On June 12, 2015, Dempsey filed a motion to stay arbitration and argued that he refused to arbitrate but contended that his refusal was justified in light of U.S. Money's waiver to arbitrate this matter for substantially invoking the litigation process by initiating the lawsuit, noticing oral depositions, and propounding written discovery to the defendants. The trial court subsequently held a hearing on Dempsey's motion to stay and denied it.

On July 1, 2015, a final hearing was held in arbitration on this case, and Dempsey did not appear. After receiving evidence and argument of counsel participating in the arbitration, the arbitrator made the following relevant findings and conclusions on July 29, 2015:

> (1) [U.S. Money], directly or through another entity to which it is currently the successor in interest, has entered into a Confidential Services, Trade Secrets and Employment Agreement dated January 18, 2007 . . . with Dempsey; as well as an Employment Agreement dated December 20, 2010 . . . with Dempsey.
>
> (2) The [2007 agreement] and the [2010 agreement] are valid and enforceable and placed Dempsey on notice of certain obligations that

[3] The record is unclear as to the exact date the parties initiated arbitration proceedings in this case, but a letter dated March 4, 2015 from arbitrator Gerald E. Borque to the parties regarding dates and fees for the arbitration is included in the record.

Dempsey assumed and certain acts as to which Dempsey was prohibited.

(3) Dempsey has breached certain provisions of the [2010 agreement], which is the more recent of the two Contracts.

(4) Specifically, . . . Dempsey has breached the following provisions of the [2010 agreement]:

a. Section 13, by using [U.S. Money's] confidential customer records and information for the benefit of himself and others;

b. Section 14, by using trade secrets of [U.S. Money] for the benefit of himself and others;

c. Section 15(a), by calling upon, soliciting, and selling to Dempsey's prior customers;

d. Section 15(b), by calling upon, soliciting, and selling to other customers of [U.S. Money];

e. Section 15(c), by calling upon, soliciting, hiring and employing a former [U.S. Money] employee;

f. Section 15(d), by working with a (former) [U.S. Money] employee;

g. Section 15(e), by giving advice to a business competitor of [U.S. Money];

h. Section 15(f), by lending credit, money or reputation for the purpose of establishing and operating a business competitor of [U.S. Money];

i. Section 15(g), by accepting employment or pay from a business competitor of [U.S. Money].

(5) [. . .] Dempsey has taken the actions in Section 4 above within the United States and specifically within Texas and specifically within 50 miles of Austin, Texas.

[. . . .]

(7) The total sum awarded to [U.S. Money] and assessed against Dempsey, therefore, is $1,650,000.00.

On August 25, 2015, U.S. Money moved the trial court to confirm its arbitration award against Dempsey. In response, Dempsey resisted U.S. Money's motion to confirm the award, and again argued that U.S. Money waived its right to arbitrate by "substantially invok[ing] the judicial process before seeking to enforce the arbitration provision."

The trial court subsequently signed an order confirming the arbitration award in full, allowing U.S. Money to recover $1,650,000.00 plus interest against Dempsey. This appeal followed.

II. ARBITRATION

By one issue on appeal, Dempsey asks the following question: Did the trial court err in denying Dempsey's motion to stay arbitration, in denying his motion to set the case for a jury trial, in refusing to consider his no-evidence motion for summary judgment, and in overruling his objection to confirmation of the arbitration award?[4]

In support of his motion to stay arbitration, his motion for trial setting, and his response opposing the confirmation of the post-arbitration award, Dempsey relied solely on one ground: waiver. We will address each ruling in turn.

A. Motion to Stay and Motion for Trial Setting

Because Dempsey's motion to stay arbitration and motion for trial setting are related and make identical arguments, we will address them together.

[4] There is no evidence in the record that Dempsey presented a timely request, objection, or motion complaining of the trial court's failure to rule. "As a prerequisite to presenting a complaint for appellate review ..., the record must show that the motion was brought to the trial court's attention and that the trial court either denied the motion or refused to rule and the complaining party objected to the refusal." *Quintana v. CrossFit Dallas, L.L.C.*, 347 S.W.3d 445, 449 (Tex. App.—Dallas 2011, no pet.); *see* TEX. R. APP. P. 33.1(a)(2).

1. Standard of Review and Applicable Law

We review a trial court's initial referral to arbitration by conducting an ordinary review of that ruling. *Perry Homes v. Cull*, 258 S.W.3d 580, 587 (Tex. 2008). Whether a party has waived arbitration is a question of law for the court subject to de novo review. *See id.*; *In re Svc. Corp. Inter.*, 85 S.W.3d 171, 174 (Tex. 2002) (per curiam).

A party's right to arbitrate may be waived by its substantially invoking the judicial process to the other party's detriment. *RSL Funding, LLC v. Pippins*, 499 S.W.3d 423, 430 (Tex. 2016). To effect such an implied waiver, however, the conduct that substantially invoked the judicial process must have prejudiced the other party to the arbitration agreement. *Id.* The party asserting waiver bears a heavy burden of proof to show the party seeking arbitration has waived its arbitration right. *Id.*

When analyzing for waiver in arbitration case, we take a case-by-case approach by looking at the totality of the circumstances. *See id.* Our analysis involves numerous factors, including whether the party asserting the right to arbitrate was plaintiff or defendant in the lawsuit, how long the party waited before seeking arbitration, the reasons for any delay in seeking to arbitrate, how much discovery and other pretrial activity the party seeking to arbitrate conducted before seeking arbitration, whether the party seeking to arbitrate requested the court to dispose of claims on the merits, whether the party seeking to arbitrate asserted affirmative claims for relief in court, the amount of time and expense the parties have expended in litigation, and whether the discovery conducted would be unavailable or useful in arbitration. *Id.*

2. Discussion

In this case, Dempsey argues that U.S. Money waived its right to arbitrate because it "delayed so long in seeking arbitration"; "sought and obtained temporary injunctive relief"; "filed fifteen amended petitions"; "took three deposition[s], including Dempsey's"; "served written discovery on Dempsey, which Dempsey responded to"; and "obtained Dempsey's banking records . . . via deposition by written questions." We disagree that this amounts to waiver.

First, the Texas Supreme Court has declined to find waiver of arbitration by a party filing written discovery, including sending eighteen interrogatories and nineteen requests for production. *See Perry Homes*, 258 S.W.3d at 590 (citing *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998)). Here, U.S. Money sent thirteen requests for production and thirteen interrogatories to Dempsey. Additionally, U.S. Money propounded one set of deposition by written questions concerning Dempsey's bank records. Second, we also disagree that noticing Dempsey's oral depositions amounted to waiver. In *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex. 1996), the Texas Supreme Court held that the noticing of a party's deposition, along with sending him minimal written discovery was not enough to amount to a waiver to avoid arbitration. *See id.* Third, while it is true that U.S. Money initially sought affirmative claims for relief in the trial court by seeking—and ultimately obtaining—injunctive relief against Dempsey, the 2010 agreement's arbitration clause contains a sentence that states the following:

> **EMPLOYER AND EMPLOYEE AGREE THAT EITHER PARTY MAY SEEK INJUNCTIVE RELIEF IN A COURT OF COMPETENT JURISDICTION TO MAINTAIN THE STATUS QUO PENDING ARBITRATION**.

> **FURTHERMORE, EMPLOYER AND EMPLOYEE AGREE THAT IN THE EVENT THAT EITHER PARTY SEEKS INJUNCTIVE RELIEF FOR THE PURPOSE OF MAINTAINING THE STATUS QUO THAT SAID ACTION WILL NOT WAIVE EITHER PARTY'S RIGHT TO ARBITRATE.**

(emphasis in original). As a result, we hold that U.S. Money's request for injunctive relief against Dempsey did not affect the enforceability of the arbitration or amount to a waiver. Lastly, even taking these three sets of facts together, we hold that Dempsey still did not meet his "heavy burden" to establish waiver of arbitration. *See RSL Funding,* 499 S.W.3d at 430. U.S. Money named Dempsey as a defendant in its fifteenth amended petition filed on July 17, 2014. Although the record is unclear as to when U.S. Money moved to arbitrate, the record shows that U.S. Money sought to arbitrate sometime before March 4, 2015, approximately eight months after suing Dempsey. Furthermore, aside from the request for injunctive relief, nothing else in the record shows that U.S. Money sought affirmative relief from the trial court, other than pleadings related to the arbitration.

Accordingly, after examining the totality of the circumstances in this case, we hold that the trial court did not err in denying Dempsey's motion to stay arbitration, or set his case for a jury trial, because Dempsey failed to establish that U.S. Money waived its right to arbitrate by substantially invoking the litigation process.

B. Confirmation of the Award

By his second sub-issue, Dempsey argues that the trial court erred by confirming the arbitration award in U.S. Money's favor.

1. Applicable Law and Standard of Review

Arbitration is favored by Texas law, and judicial review of an arbitration award is extraordinarily narrow. *E. Tex. Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267, 271

(Tex. 2010). An arbitration award is given the same effect as a judgment of last resort and all reasonable presumptions are indulged in favor of the award and none against it. *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002).

We review a trial court's decision to vacate or confirm an arbitration award de novo, giving strong deference to the arbitrator with respect to issues properly left to the arbitrator's resolution. *Xtria L.L.C. v. Intern. Ins. Alliance, Inc.*, 286 S.W.3d 583, 591 (Tex. App.—Texarkana 2009, pet. denied).

2. Discussion

Unless grounds are offered for vacating, modifying, or correcting an arbitration award under sections 171.088 or 171.091 of the civil practice and remedies code, the trial court on application of a party, shall confirm the award. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.087 (West, Westlaw through 2015 R.S.).

Under section 171.088, a trial court shall vacate an award if: (1) the award was obtained by corruption, fraud, or other undue means; (2) the rights of a party were prejudiced by: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; corruption in an arbitrator; or (B) misconduct or willful misbehavior of an arbitration; or (3) the arbitrators: (A) exceeded their powers; (B) refused to postpone the hearing after a showing of sufficient cause for the postponement; (C) refused to hear evidence material to the controversy; or (D) conducted the hearing [. . .] in a manner that substantially prejudiced the right of a party; or (4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding to determine the existence of an agreement under section 171.021, and the party did not participate in the arbitration hearing without raising the objection. *See id.* §§ 171.088 (West, Westlaw through 2015 R.S.)

(referencing *Id.* § 171.021 (West, Westlaw through 2015 R.S.)).

Under section 171.091, a trial court shall modify or correct an award if: (1) the award contains: (A) an evident miscalculation of numbers; or (B) an evident mistake in the description of a person, thing, or property referred to in the award; (2) the arbitrators have made an award with respect to a matter not submitted to them and the award may be corrected without affecting the merits of the decision made with respect to the issues that were submitted; or (3) the form of the award is imperfect in a manner not affecting the merits of the controversy. *See id.* § 171.091 (West, Westlaw through 2015 R.S.).

In this case, Dempsey makes two arguments asserting that the trial court erred in confirming the arbitration award. The first is on the ground of waiver, which is not a valid reason to vacate, modify, or correct an arbitration award under section 171.087, and was also not found in this case as outlined earlier in this opinion.

Secondly, Dempsey argues that the arbitration award in this case related to breach of the 2007 agreement and the claims that the award is based on "do not fall within the scope of the 2007 agreement." After examining the record, we note that Dempsey did not make this argument to the trial court in its "Response and Objection to [U.S. Money's] Motion to Enter Judgment." Dempsey's sole argument in opposition of the confirmation of the arbitration award in this case related to the issue of waiver. Therefore, we find this argument not properly preserved for appellate review. *See* TEX. R. APP. P. 33.1(a).

C. Summary

In summary, we hold that: (1) the trial court did not err in denying Dempsey's motion to stay arbitration because U.S. Money did not waive its arbitration right; and (2) the trial court did not err in confirming the arbitration award. We overrule Dempsey's

sole issue on appeal.

III. CONCLUSION

We affirm the trial court's order.

GINA M. BENAVIDES,
Justice

Delivered and filed the
23rd day of February, 2017.