IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

WASHINGTON TRUST BANK, Trustee of Joseph P. Delay, IRA Account; JOSEPH P. DELAY; PAUL J. DELAY; and MICHAEL J. DELAY, Respondents, v. TRIGEO NETWORK SECURITY, INC., an Idaho Corporation, formerly TRIGEO, INC., Appellant.	)	No. 30389-6-III UNPUBLISHED OPINION

Sweeney, J. — This appeal follows a superior court order requiring arbitration pursuant to a stock subscription agreement. The defendant corporation moved to dismiss the shareholders' complaint and argued that the shareholders had no rights under the original subscription agreement and the statute of limitations had run in any event. We conclude that the subscription agreement clearly calls for arbitration of any dispute and the superior court then properly ordered arbitration of this dispute. We therefore affirm that order.

FACTS

The facts here are undisputed. Washington Trust Bank, on behalf of Joseph P. Delay's IRA account; Joseph P. Delay; Paul J. Delay; and Michael J. Delay (Delays) entered into subscription agreements with TriGeo Network Security Inc. in September 2000. The Delays agreed to subscribe to 14,000 shares of series A preferred stock in consideration for $35,000. The subscription agreement included an arbitration clause. It provided that "[a]ny controversy arising out of, connected to, or relating to any matters herein of the transactions between Subscriber and Company . . . or this Agreement, or the breach thereof . . . shall be settled by arbitration." Clerk's Papers (CP) at 19.

TriGeo incorporated in October 2000 and issued stock certificates to the Delays in February 2001. In December 2001, TriGeo amended its articles of incorporation by filing a "Certificate of Designations, Preferences and Other Rights and Qualifications of the Series A Preferred Stock." CP at 326. Section 5(g) of that document stated that series A preferred stock would convert to common stock on August 1, 2004.

In April 2001, the Delays signed and returned copies of the document indicating that they had received copies of the certificate of designation. On August 2, 2004, TriGeo's president wrote a letter to preferred shareholders reminding them that their preferred stock converted to common stock on August 1.

SolarWinds Inc. bought TriGeo for $35,000,000 seven years later. As part of the merger process, TriGeo common stock was valued at $.50 per share and series A preferred stock was valued at $2.50 per share. Soon after the merger, the Delays sent TriGeo demands for arbitration to assert rights under the original stock subscription agreement. They alleged that TriGeo breached the subscription agreement's conversion clause by converting their preferred stock to common stock on August 1, 2004.

On July 28, 2011, the Delays sued to compel arbitration and moved for an order requiring TriGeo to show cause why it should not be compelled to arbitrate. TriGeo responded with a motion to dismiss the Delays' complaint for failure to state a claim upon which relief could be granted (CR 12(b)(6)). And it argued a number of theories to support its motion to dismiss:

- TriGeo's certificate of designation superseded the subscription agreement,
- the preferred shares converted to common shares by the certificate of designation's unambiguous automatic conversion provision,
- the Delays waived any complaint by their inaction, and
- the Delays' complaint was time barred.

The court ordered arbitration. TriGeo appeals.

DISCUSSION

The Delays wish to assert whatever rights they may have under the original subscription agreement. TriGeo responds, as it did in superior court, that the Delays have

no rights under the subscription agreement. The question before us is not whether the Delays have rights, and TriGeo has obligations, under the original stock subscription agreement, but who should answer that question—the courts or an arbitrator.

The question of arbitrability is a question of law that we review de novo. *Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 713, 959 P.2d 1140 (1998); *Wattenbarger v. A.G. Edwards & Sons., Inc.*, 150 Idaho 308, 317, 246 P.3d 961 (2010).

The principles of law that guide our analysis here are both clear and well settled. Whether a dispute must be arbitrated is determined by the duties assumed in the contract itself. *Kamaya Co.*, 91 Wn. App. at 713-14; *Lovey v. Regence BlueShield of Idaho*, 139 Idaho 37, 46, 72 P.3d 877 (2003). We cannot decide the underlying dispute if the contract calls for arbitration. *Meat Cutters Local No. 494 v. Rosauer's Super Markets, Inc.*, 29 Wn. App. 150, 154, 627 P.2d 1330 (1981); *see also Loomis, Inc. v. Cudahy*, 104 Idaho 106, 109, 656 P.2d 1359 (1982); *Storey Constr. Inc. v. Hanks*, 148 Idaho 401, 411, 224 P.3d 468 (2009); Idaho Code § 7-902. And there is a strong presumption in favor of arbitration. *Verbeek Props., LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 87, 246 P.3d 205 (2010); *Mason v. State Farm Mut. Auto. Ins. Co.*, 145 Idaho 197, 201, 177 P.3d 944 (2007).

Additionally, orders compelling arbitration are not usually appealable. *All-Rite*

Contracting Co. v. Omey, 27 Wn.2d 898, 901, 181 P.2d 636 (1947) ("an appeal cannot be taken from an order to proceed with arbitration"); *Teufel Constr. Co. v. Am. Arbitration Ass'n*, 3 Wn. App. 24, 25, 472 P.2d 572 (1970); *Wooh v. Home Ins. Co.*, 84 Wn. App. 781, 783, 930 P.2d 337 (1997) ("an order compelling arbitration is not a final order, appealable of right under RAP 2.2(a)"); *Herzog v. Foster & Marshall, Inc.*, 56 Wn. App. 437, 443, 783 P.2d 1124 (1989) ("Such a result not only runs counter to the parties' agreement to arbitrate, but, more importantly, it frustrates the strong public policy in this state favoring arbitration of disputes.").

TriGeo invites us, nonetheless, to rule on the merits of the various claims here. But the courts cannot rule on the merits if arbitration is required and the court has ordered arbitration:

> (a) On application of a party showing an [arbitration] agreement . . . and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitration, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.
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> (e) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

Idaho Code § 7-902.

Idaho courts have, of course, refused to address the substance of the dispute to be

arbitrated once the court has concluded that arbitration is required. *See Loomis*, 104 Idaho at 109; *Storey Constr.*, 148 Idaho at 411. In *Loomis*, the court held, "the inquiry must be limited in scope—is there an agreement to arbitrate or is there not. It would be inappropriate to review the merits of the dispute as such would in many instances emasculate the benefits of arbitration." 104 Idaho at 109. In *Storey Construction*, the court refused to address whether a construction defect claim should be arbitrated based on the argument that there simply was no evidence of a construction defect in the first place. 148 Idaho at 411. It stated that that argument was "irrelevant" because Idaho Code § 7-902(e) prohibited the court from refusing arbitration based on the merits of the dispute to be arbitrated. *Id*.

We must treat motions to compel arbitration like motions for summary judgment because, as we have noted, arbitrability is a question of law. *Wattenbarger*, 150 Idaho at 317. Here also there are no genuine issues of material fact and so the superior court, and this court, are obligated to decide whether the Delays were entitled to arbitration as a matter of law. *Id*. And "'[a] court reviewing an arbitration clause will order arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute.'" *Storey Constr.*, 148 Idaho at 412 (internal quotation marks omitted) (quoting *Int'l Ass'n of Firefighters, Local No. 672 v.*

City of Boise, 136 Idaho 162, 168, 30 P.3d 940 (2001)).

Here arbitration is required for "[a]ny controversy arising out of, connected to, or relating to any matters herein of the transactions between Subscriber and Company . . . or this Agreement, or the breach thereof." CP at 19. The courts interpret "arising out of or relating to" broadly when the phrase is within an arbitration clause. *See Lovey*, 139 Idaho at 46 (concluding that this language "'embrac[es] every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute'" (quoting *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988))); *Flightways Corp. v. Keystone Helicopter Corp.*, 459 Pa. 660, 663, 331 A.2d 184 (1975) ("Broader language would be difficult to contrive."); *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996) (stating that these are "broad arbitration clauses capable of an expansive reach"); *Karl Storz Endoscopy-Am., Inc. v. Integrated Med. Sys., Inc.*, 808 So. 2d 999, 1013 (Ala. 2001) ("[I]t is often observed that the words 'relating to' in the arbitration context are given broad construction."); *Bos Material Handling, Inc. v. Crown Controls Corp.*, 137 Cal. App. 3d 99, 186 Cal. Rptr. 740 (1982) ("[T]he courts have held such arbitration agreements sufficiently broad to include tort, as well as contractual, liabilities so long as the tort claims 'have their roots in the relationship between the parties which was created

by the contract.'" (quoting *Berman v. Dean Witter & Co.*, 44 Cal. App. 3d 999, 1003, 119 Cal. Rptr. 130 (1975))). Based on the arbitration clause's broad language, we conclude that the dispute here must be arbitrated. We then affirm the decision of the superior court ordering arbitration.

In sum, we will not pass on the merits of the Delays' claims or TriGeo's defenses. The Delays assert what rights they may have under the subscription agreement. TriGeo responds that, for a number of reasons, the Delays do not have any rights under the subscription agreement. But that exchange is not helpful. The question is not whether the Delays have rights that flow from that document; again the question is who gets to decide that. The answer could not be clearer. An arbitrator gets to decide.

Attorney Fees

The Delays argue that Idaho law entitles them to attorney fees on appeal because this appeal was "'brought . . . frivolously, unreasonably, or without foundation.'" Br. of Resp't at 34 (quoting *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634 (1990)). TriGeo responds by pointing out that this case was procedurally unusual. It also says that its position is not "'so totally devoid of merit that there was no reasonable possibility of reversal.'" Reply Br. of Appellant at 10 (internal quotation marks omitted) (quoting *Schmerer v. Darcy*, 80 Wn. App. 499, 510-11, 910 P.2d 498 (1996)).

A prevailing party is entitled to attorney fees. Idaho Code § 12-121. Fees on appeal are, however, only appropriate under that statute "'when this Court has the abiding belief that the appeal was brought or defended frivolously, unreasonably or without foundation.'" *Cramer v. Slater*, 146 Idaho 868, 881, 204 P.3d 508 (2009) (quoting *BHA Invs., Inc. v. State*, 138 Idaho 348, 355, 63 P.3d 474 (2003)). TriGeo argued on appeal that the court should not have ordered arbitration because the original subscription agreement did not control the rights and obligations of these parties. We have concluded that whether it does or not is a question for the arbitrator. But we are unable to conclude that the position asserted by TriGeo is so frivolously, unreasonably, or without foundation that fees are required. We simply disagree with TriGeo's arguments. We therefore deny the Delays' request for attorney fees.

We affirm the trial court's order compelling arbitration.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Brown, J.

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Kulik, J.