IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

NINA THEROFF,	)	
	)	
Respondent,	)	
	)	**WD80812**
v.	)	
	)	**OPINION FILED:**
	)	**April 24, 2018**
DOLLAR TREE STORES, INC. and JANIE HARPER,	)	
	)	
Appellants.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce, Judge

Before Division IV: Mark D. Pfeiffer, Presiding Judge, and Cynthia L. Martin, Judge, and James Edward Welsh, Senior Judge[1]

Dollar Tree Stores, Inc. and Ms. Janie Harper (collectively, "Dollar Tree") appeal from the ruling of the Circuit Court of Cole County, Missouri ("circuit court"), denying their motion to compel arbitration of the claim of their former employee, Ms. Nina Theroff ("Theroff"), for disability discrimination under the Missouri Human Rights Act.[2] Because there is a difference

[1] Judge Welsh retired as an active member of the court on April 1, 2018, after oral argument in this case. He has been assigned by the Chief Justice of the Missouri Supreme Court to participate in this decision as Senior Judge.

[2] The Mutual Agreement to Arbitrate Claims provides that "[t]he Parties agree that the Federal Arbitration Act, 9 U.S.C. section 1 et seq. ('FAA'), shall govern the interpretation and enforcement of the Agreement and shall govern all proceedings relating to this Agreement." "[T]he FAA permit[s] immediate appeal from an order denying

between contract "formation" and contract "conclusion," this case presents a "conclusion" issue and not a "formation" issue, and there is substantial evidence supporting the trial court's ruling that the arbitration agreement had not been "concluded" between the parties, we affirm.

Factual and Procedural History

Dollar Tree operated a retail store located at 3535 Missouri Boulevard in Jefferson City, Missouri. Janie Harper was employed as the Missouri Boulevard store manager. On October 21, 2015, Theroff applied for employment at the Missouri Boulevard store. During her interview with store assistant manager Kayla Swift, Theroff informed Ms. Swift that she was legally blind and used various assistive devices to read and move around. Ms. Swift told Theroff that she was hired and would need to return and complete paperwork at a later date. On October 23, 2015, Theroff returned to Dollar Tree to complete the hiring paperwork electronically. One of the documents reflecting that it was digitally signed by Theroff was a Mutual Agreement to Arbitrate Claims ("Mutual Agreement"). However, there was conflicting evidence about whether Theroff did, in fact, electronically sign the Mutual Agreement or otherwise authorized Swift to electronically sign her name on her behalf.

Theroff was employed at the Missouri Boulevard store from October 21, 2015, until November 13, 2015. Thereafter, Theroff filed charges with the Missouri Commission on Human Rights against Dollar Tree for discrimination based on disability, and she subsequently received a Notice of Right to Sue. On October 3, 2016, Theroff filed a petition asserting a single claim of disability discrimination under the Missouri Human Rights Act against Dollar Tree. Theroff alleged that she was constructively discharged because Dollar Tree deliberately created an

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a motion to compel arbitration or to stay proceedings." *Granger v. Rent-A-Center, Inc.*, 503 S.W.3d 295, 297 n.4 (Mo. App. W.D. 2016).

intolerable working environment by denying her request for a reasonable accommodation (service animal).

On December 9, 2016, Dollar Tree filed a motion to compel arbitration. Following an evidentiary hearing on the motion to compel arbitration, the trial court denied the motion to compel arbitration, without making factual findings.

Dollar Tree timely appealed.

Standard of Review

"This court will affirm the judgment of the motion court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law." *Wood ex rel. Estate of Lisher v. Lisher*, 187 S.W.3d 913, 915 (Mo. App. W.D. 2006) (citing *Murphy v. Carron*, 536 S.W.3d 30, 32 (Mo. banc 1976)). If the trial court does not make factual findings, as is the case here, then all facts "shall be considered as having been found in accordance with the result reached." Rule 73.01(c); *Baier v. Darden Rests.*, 420 S.W.3d 733, 737 (Mo. App. W.D. 2014). Further, issues relating to whether or not an arbitration agreement exists are factual and require deference to the trial court. *Baier*, 420 S.W.3d at 736; *Bowers v. Asbury St. Louis Lex, LLC*, 478 S.W.3d 423, 426 (Mo. App. E.D. 2015); *Hobbs v. Tamko Bldg. Prods., Inc.*, 479 S.W.3d 147, 149 (Mo. App. S.D. 2015). The party seeking to compel arbitration bears the burden of proving the existence of a valid and enforceable arbitration agreement. *Greene v. Alliance Auto., Inc.*, 435 S.W.3d 646, 650 (Mo. App. W.D. 2014).

"The issue of whether arbitration should be compelled is a question of law subject to *de novo* review." *Dotson v. Dillard's, Inc.*, 472 S.W.3d 599, 602 (Mo. App. W.D. 2015) (internal quotation omitted). Ultimately, though, we are only concerned with whether the trial

court's ruling is correct, regardless of the "route taken to reach it." *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 435 (Mo. App. W.D. 2010). We will affirm the trial court's [ruling denying a motion to compel arbitration] on any theory supported by the record. *Baier*, 420 S.W.3d at 737.

Analysis

Dollar Tree raises two points on appeal, both of which *presume* that an agreement to arbitrate had been "concluded" in the first instance. Because the issue of whether the agreement was or was not "concluded" is dispositive of this appeal, we first address that issue—for if no arbitration agreement *exists*, there is no arbitration that can be compelled.

Under the Federal Arbitration Act, "arbitration is solely a matter of contract." *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 49 (Mo. banc 2017). "Accordingly, arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *Id*. (internal quotation omitted). "Parties cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." *Id*. (internal quotation omitted).

"[B]ecause arbitration is a matter of consent, not coercion, a court must be satisfied that the parties have 'concluded' or formed an arbitration agreement before the court may order arbitration to proceed according to the terms of the agreement." *Id*. (internal quotation and internal citation omitted) (citing *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 441 n.1 (2006)). "Questions concerning whether an arbitration agreement was ever concluded are therefore, 'generally nonarbitral question[s].'" *Id.* (quoting *Granite Rock*, 561 U.S. at 296-97). "Issues as to whether a contract has been 'concluded' include whether: a contract was signed by the obligor, a signor

lacked authority to sign a contract to commit a principal, or a signor lacked the mental capacity to sign a contract." *Id.* at 49 n.9 (citing *Buckeye*, 546 U.S. at 444 n.1). "The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded." *Buckeye*, 546 U.S. at 444 n.1.[3]

> Because the making of the arbitration agreement *itself* is rarely in issue when the parties have signed a contract containing an arbitration provision, the [trial] court usually must compel arbitration immediately after one of the contractual parties so requests.
>
> The calculus changes when it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring arbitration. In such a case, that party is challenging the very existence of *any* agreement, *including the existence of an agreement to arbitrate*. Under these circumstances, there is no presumptively valid general contract which would trigger the [trial] court's duty to compel arbitration pursuant to the [Federal Arbitration] Act. If a party has not signed an agreement containing arbitration language, such a party may not have agreed to submit grievances to arbitration at all. Therefore, before sending any such grievances to arbitration, *the [trial] court itself* must first decide whether or not the non-signing party can nonetheless be bound by the contractual language.

Chastain v. Robinson-Humphrey Co., Inc., 957 F.2d 851, 854 (11th Cir. 1992) (*abrogated on other grounds by Larsen v. Citibank FSB*, 871 F.3d 1295, 1303 n.1 (11th Cir. 2017)). "[W]hen the very existence of such an [arbitration] agreement is disputed, a [trial] court is correct to refuse to compel arbitration until it resolves the threshold question of whether the arbitration agreement exists." *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 112 (3rd Cir. 2000) (explaining it is for courts to decide whether the signor lacked authority to commit the alleged obligor under the arbitration agreement in question). *See also Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001) ("[A] person who has not consented (or authorized an

[3] "[B]oth issues of [contract] formation and enforceability of arbitration clauses can be delegated to the arbitrator." *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 49 (Mo. banc 2017). Here, then, were the only issues presented relating to contract formation or enforceability, the delegation provision that was incorporated into the Mutual Agreement would mandate an order compelling arbitration. While existing precedent is somewhat unclear as to what constitutes contract "formation," our Missouri Supreme Court has identified certain relevant factual disputes that are *not* formation issues—namely, whether a contract was signed by the obligor or the obligor had authorized an agent to sign her name to the contract.

agent to do so on his behalf) can't be packed off to a private forum . . . because the parties *do* control the existence and limits of an arbitrator's power. No contract. No power.").

Here, Theroff challenged whether the arbitration agreement was concluded, presenting evidence to the trial court that Theroff did not sign the Mutual Agreement or, alternatively, did not authorize an agent to do so on her behalf. At the evidentiary hearing regarding Dollar Tree's motion to compel arbitration, Theroff—who is legally blind—testified that Dollar Tree assistant manager Kayla Swift offered to assist Theroff with the electronic review and signature of certain employment documentation on October 23, 2015 (the date of the Mutual Agreement). As Theroff could not read the print on the computer, Ms. Swift did so for her. Theroff testified that at no time did Ms. Swift "read [Theroff] anything about an arbitration agreement." Theroff testified that she never signed an arbitration agreement, had never heard the word "arbitration" until after the motion to compel arbitration had been filed in her lawsuit, and she never authorized Ms. Swift or anyone else to electronically sign her name to an arbitration agreement.

Therefore, here, there was a factual dispute regarding whether Theroff signed the arbitration agreement. Given that the trial court's ruling denying the motion to compel arbitration included no factual findings, we are required to consider all facts as having been found in accordance with the result reached. In other words, we are required to assume that the trial court found Theroff's testimony credible, and was not "satisfied that the parties [had] 'concluded' or formed an arbitration agreement," leaving the trial court unable to "order arbitration to proceed." *Pinkerton*, 531 S.W.3d at 49. Given that the issue "concerning whether an arbitration agreement was ever concluded [is a] generally nonarbitral question," *id.* (internal quotation omitted), the trial court was within its authority to decide this threshold issue as the basis for denying Dollar Tree's motion to compel arbitration.

The trial court's ruling is supported by substantial evidence that the arbitration agreement in question was not concluded and, as such, the trial court did not err in denying Dollar Tree's motion to compel arbitration.

Dollar Tree's points on appeal are denied.

Conclusion

Because the agreement to arbitrate was not concluded, no agreement to arbitrate exists and the trial court's ruling denying Dollar Tree's motion to compel arbitration is affirmed.

Mark D. Pfeiffer, Chief Judge

Cynthia L. Martin, Judge, and James Edward Welsh, Senior Judge, concur.