COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CC RESTAURANT, L.P. and CAFE CENTRAL,	§	No. 08-19-00285-CV
Appellants,	§	Appeal from the
v.	§	County Court at Law Number Three
SABINA OLAGUE,	§	of El Paso County, Texas
Appellee.	§	(TC# 2019DCV0613)

O P I N I O N

Arguing that a valid arbitration agreement exists and covers Sabina Olague's (the "Employee") claims, CC Restaurant, L.P. and Café Central (the "Employer") appeal the trial court's denial of Employer's Motion to Compel Arbitration. We affirm the trial court's ruling.

BACKGROUND

The documents at issue forming a possible Federal Arbitration Act-based arbitration agreement are (1) the "CC Restaurant, LP D/B/A Café Central ('Employer') Notice to All Applicants & Employees of Arbitration Agreement" (the "Notice"), and (2) the "Claims Resolution Program" (the "Agreement").

The Notice

The Notice is a two-page document, with the first page in English and the second page in

Spanish; only the English version was entered into the record. The Notice references the separate Agreement indicating both the Employee and the Employer are bound by the Agreement to arbitrate, as provided in the Agreement, by virtue of the Employee's continued employment. The Notice includes a space to indicate an effective date for when disputes will begin to be arbitrated, which is blank, and a signature line for the Employee only, indicating the Employee's agreement to "immediately read and comply with the Agreement on and after the Effective Date." The Employee signed the Notice, printed her name below, and dated it June 19, 2013.

The Agreement

The Agreement referenced in the Notice is entitled "Claims Resolution Program" and details the covered claims, procedures, and terms of the arbitration process. It specifies the Employee is agreeing to arbitrate all legal claims against the Employer "in consideration for employment with the Company as well as for any and all wages and benefits paid by the Company." At the trial court hearing on the Motion to Compel Arbitration, the Employer confirmed that it gave the Employee nothing of value to agree to arbitration, other than continuing her at-will employment.

At the end of the arbitration procedure term, the Agreement states:

> The Parties expressly acknowledge and understand that by signing this Agreement, each is affirming that he/she/it has read and understands this arbitration provision; each is agreeing to be bound by it; each is waiving its respective rights to have a Dispute between or among them adjudicated by a court or by a jury; and each is waiving its respective rights to have a Dispute between or among them proceed as a class, collective, or consolidated action or arbitration.

It further states the Agreement cannot be modified except in writing signed by both parties and it supersedes any other agreements between the parties, whether written or oral. A signature line with a title and date for the Employer, and a signature line with a witness signature line and date for the

Employee follow. Here, the Employee signed the Agreement and dated it June 19, 2013, without a witness signature. The Employer did not sign the Agreement.

In late 2016, the Employee was terminated, and in 2019 she filed an action against the Employer for sex discrimination and retaliation. The Employer filed a Motion to Compel Arbitration. The trial court denied the motion and this appeal ensued.

DISCUSSION

Issue

Appellant's sole issue presents two questions. Does a valid arbitration agreement exist, in light of the documents described above and the testamentary evidence presented to the trial court? And if so, did the trial court err in denying the Employer's motion to compel arbitration?

Standard of Review

We review the trial court's ruling based on an abuse of discretion standard: the trial court "clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *In re Bunzl USA*, *Inc.*, 155 S.W.3d 202, 207 (Tex.App.—El Paso 2004, orig. proceeding). We review the trial court's purely legal determinations *de novo*; any clear failure to correctly determine the law constitutes an abuse of discretion. *Id.* Accordingly, if a valid arbitration agreement covering the Employee's claim exists, then the trial court abused it discretion in failing to compel arbitration. *See Firstlight Federal Credit Union v. Loya*, 478 S.W.3d 157, 161 (Tex.App.—El Paso 2015, no pet.).

Applicable Law

As the party moving to compel arbitration, the Employer must prove a valid arbitration agreement exists and the Employee's claims at issue fall within the scope of that agreement. *Rachal*

v. Reitz, 403 S.W.3d 840, 843 (Tex. 2013); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005). The trial court may decide whether to compel arbitration on the basis of the record and must hold an evidentiary hearing, as needed, to resolve any material disputed facts. *Jack B. Anglin Co, Inc. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992). Turning to the case at hand, it is undisputed that the Employee's claims are covered if a valid arbitration agreement exists.

For an arbitration agreement to be valid, it must contain all of the state law-required contract elements. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Here, "a binding contract requires '(1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with intent that it be mutual and binding.'" *In re Capco Energy, Inc.*, 669 F.3d 274, 279–80 (5th Cir. 2012)(quoting *Great Plains Trust Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990)); *see also Lujan v. Alorica*, 445 S.W.3d 443, 448 (Tex.App.—El Paso 2014, no pet.). Whether the parties require a signature on a contract to show assent and make it mutually binding is a case-specific determination based on the facts related to the parties' intent, which is often evidenced in the contract language itself. *Tricon Energy Ltd. v. Vinmar Int'l, Ltd.*, 718 F.3d 448, 454 (5th Cir. 2013); *In re Bunzl USA, Inc.*, 155 S.W.3d at 211.

In *Bunzl*, we held an unsigned signature line plus a provision requiring modifications to the contract be written and signed evidenced an intent for the contract to be binding only upon signing. *In re Bunzl USA, Inc.*, 155 S.W.3d at 211; *Lujan*, 445 S.W.3d at 448. When a contract, as the Agreement in this case, specifically requires the parties' signatures for the parties to be bound to mutual promises and only allows for written modifications to the contract signed by both parties,

the trial court does not err in refusing to compel arbitration when one party fails to sign. *See In re Bunzl USA, Inc*., 155 S.W.3d at 205-06; *see also Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 690 (5th Cir. 2018).

The Agreement

In the present case, just as in *Bunzl* and *Huckaba*, even though the Employer created the Agreement, maintained it in its records, and moved to compel arbitration, the Agreement unequivocally required both parties' signatures for each to be bound to arbitrate their claims against the other when it said "by signing this Agreement, each is affirming that he/she/it has read and understands this arbitration provision; each is agreeing to be bound by it[.]" *See also Wright v. Hernandez,* 469 S.W.3d 744, 758 (Tex.App.—El Paso 2015, no pet.)(while a signature is not necessarily required for a contract's enforceability, if the terms of a contract make it clear that one is required, "a party's failure to sign the agreement will render the agreement unenforceable"); *Lujan,* 45 S.W.3d at 448–49 (when a contract expressly requires a signature prior to it becoming binding, "the existence of the instrument is destroyed by the other party's failure to sign the instrument"); *Copeland v. KB Home,* No. Civ.A.3:03–CV–227–L, 2004 WL 1778949, at *3 (N.D. Tex. Aug. 4, 2004, order)(the "plain, unequivocal language of the arbitration provision in question establishes that the parties intended and expected the Agreement to be *initialed* and signed as a condition precedent for the formation of an arbitration agreement," and the employer's failure to do so rendered the agreement unenforceable).

In the present case, the Agreement's language specified the Employer's signature was required for the Employer to be bound to arbitrate its claims against the Employee. The Employer did not sign the Agreement, however the Employee did, therefore, only the Employee agreed to

arbitration. *Huckaba*, 892 F.3d at 691; *Mendivil v. Zanios Foods, Inc.*, 357 S.W.3d 827, 828-29 (Tex.App.—El Paso 2012, no pet.); *Hi Tech Luxury Imports, LLC v. Morgan*, No. 03-19-00021-CV, 2019 WL 1908171, at *2 (Tex.App.—Austin Apr. 30, 2019, no pet.)(memo op.)(holding the trial court did not err in denying the employer's motion to arbitrate where the employer failed to sign and the contract specified the "signature below" attesting to the terms of the agreement, namely, mutual promises to arbitrate.).

The Notice

The Employer asserts the Notice alone constitutes an arbitration agreement because the Employee continued to work after receiving the Notice—which states both parties are bound by the Agreement when the Employee "submit[s] an application or start[s] or continue[s] work for the Employer after the Effective Date, as provided in the Agreement." While that argument may evidence the Employee's agreement to arbitrate her claims against the Employer, the Notice itself provides no consideration on the part of the Employer for an agreement to arbitrate other than continuing employment, which is alone insufficient. There is no mutuality in its terms; instead, the Notice is predicated on the Agreement: it indicates the parties are bound by the Agreement as provided for in the Agreement. And when the Agreement specifies the "[p]arties expressly acknowledge and understand that by signing this Agreement, each is affirming that he/she/it has read and understands this arbitration provision; each is agreeing to be bound by it . . .," it is clear that by not signing the Agreement, the Employer is not agreeing to be bound to arbitrate its disputes against the Employee. Thus, there is no mutuality.

Our decision in *Firstlight* viewed the employee's continuing at-will employment following the notice of an arbitration policy as acceptance of the arbitration policy; the employee accepted

the arbitration policy by virtue of continuing to work at Firstlight even though she did not sign the agreement. *Firstlight*, 478 S.W.3d at 170. However, unlike here, the arbitration agreement in *Firstlight* contained sufficient consideration in the Employer and the Employee's *mutual promises to arbitrate. Id.* The elements of acceptance by the parties and consideration must not be confused or equated to one another.

Urging us to disregard Employer's signature as a condition precedent to this Agreement, the Employer relies on *In re Halliburton Co.*, 80 S.W.3d 566, 568-69 (Tex. 2002). The Employer posits its adoption of the Agreement is sufficient consideration for the Notice to constitute an agreement to arbitrate disputes irrespective of whether they signed the Agreement. In *Halliburton*, like in *Firstlight*, the employer mutually promised to arbitrate disputes without signing the arbitration document because it did not make its signature a condition precedent to the parties' mutual promise to arbitrate. *Id.* While the employer in *Halliburton* could modify or end the arbitration program, it had to first provide employees a notice period and any changes would only be applied prospectively. *Id.* at 569-70. The court upheld the arbitration agreement because although the employer could unilaterally make changes to the policy, it was limited in so doing by the notice and prospective application provisions, and more importantly, *both parties would be bound by the changes*—which the court found was sufficient consideration to render the agreement valid. *Id.* at 570. Here, the Notice references the separate Agreement indicating both the Employee and the Employer are bound by the Agreement to arbitrate when the Employee "submit[s] an application or start[s] or continue[s] work for the Employer after the Effective Date, as provided in the Agreement." The fact the Notice recites "as provided in the Agreement" still makes the Employer's claims against the Employee subject to arbitration only when the Employer executes

the Agreement, which it did not.

The Employer cannot successfully argue because *Halliburton* did not require the employer to sign the arbitration agreement, the Employer here does not have to sign this arbitration agreement for it to be held valid. In this Agreement, there is no mutual promise to arbitrate between the Employer and the Employee. Further, the Employer did not give the Employee anything of value, besides continuing at-will employment and payment, in exchange for her agreement to arbitrate future disputes. Therefore, the purported agreement to arbitrate fails for lack of consideration. We overrule the Appellant's sole issue on appeal.

Holding

The trial court reasonably concluded the Employer did not establish the existence of a valid arbitration agreement. Accordingly, it did not abuse its discretion in refusing to compel arbitration.

CONCLUSION

We affirm the trial court's ruling.

August 27, 2021

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.
Alley, J., Dissenting