COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

	§	
	§	No. 08-20-00063-CV
IN RE: ONEMAIN FINANCIAL GROUP, LLC	§	AN ORIGINAL PROCEEDING
Relator.	§	IN MANDAMUS
	§	

O P I N I O N

Relator OneMain Financial Group, LLC ("OneMain") has filed a mandamus petition to challenge an order of the 205th District Court of El Paso County, permitting the real party in interest, Jesus Rojero, to engage in pre-arbitration discovery. Following the Texas Supreme Court's recent decision in a factually analogous case, *In re Copart, Inc.*, 619 S.W.3d 710 (Tex. 2021)(per curiam)("*Copart II*"), we conditionally grant mandamus relief.

BACKGROUND

Rojero sued OneMain for employment discrimination under the Texas Labor Code. OneMain answered and moved to compel arbitration based on an agreement that it contends Rojero acknowledged and accepted through OneMain's online employee portal. OneMain submitted two affidavits as evidence in support of its motion to compel.

The affidavit of OneMain's human resources director, Denise King, described OneMain's corporate structure and history; stated that King was familiar with Rojero's "employment and employment records;" and explained that all employees, including Rojero, were required to review and agree to OneMain's policies, including the arbitration agreement.

The affidavit of OneMain's associate director of training development, Stephen Oberlie, explained the process that OneMain employees follow to electronically review and acknowledge the arbitration agreement, as well as the records used to document that employees have done so. Oberlie's affidavit also authenticated two attached documents: (1) a document titled "Employee Dispute Resolution Program/Agreement," which does not bear a physical or electronic signature by Rojero; and (2) a certificate indicating that Rojero electronically completed a course titled "Employee Dispute Resolution Certification 2016" on November 30, 2016. Oberlie testified that the certificate could only have been generated by reviewing and consenting to the arbitration agreement. Oberlie averred that both documents were business records kept in the ordinary course of business.

Rojero did not file a response to OneMain's motion, but instead filed a motion seeking permission to engage in pre-arbitration discovery pursuant to Section 171.086(a) of the Texas Civil Practice and Remedies Code. In support of his motion, Rojero attached his own affidavit, in which he generally denied the existence of an enforceable arbitration agreement and challenged King's and Oberlie's personal knowledge of the facts set forth in their respective affidavits. Rojero did not deny OneMain's contention that he had reviewed and accepted the arbitration agreement as set forth in OneMain's affidavits, but explained that he "desires to cross-examine Defendant's witnesses regarding the basis for the[ir] statements and what knowledge the witnesses possess to

be able to testify to matters [sic] in the affidavits." Rojero's motion also raised a general question concerning whether the arbitration agreement was supported by valid consideration.

After a hearing, the trial court granted Rojero's motion for pre-arbitration discovery. OneMain filed a petition for writ of mandamus, complaining that the trial court abused its discretion by granting Rojero's motion because Rojero failed to establish that the discovery sought was material to any potential defense against the arbitration agreement's existence or enforceability.

DISCUSSION

We hold that Rojero failed to establish a colorable basis or reason to believe that his requested pre-arbitration discovery was material to any disputed issue of arbitrability, and there is nothing in the record before us to support a conclusion that the trial court permitted the discovery because it lacked sufficient information to make a ruling on OneMain's motion to compel.

A. Standard of Review

Mandamus is an extraordinary remedy that is only available when a trial court clearly abuses its discretion and there is no adequate remedy by appeal. *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 135-36 (Tex. 2004)(orig. proceeding). A trial court abuses its discretion if it acts arbitrarily, capriciously, and without reference to guiding rules or principles, or if its decision is so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005)(orig. proceeding).

Mandamus relief is appropriate when a trial court erroneously orders pre-arbitration discovery. *Copart II*, 619 S.W.3d at 713; *In re Houston Pipe Line*, 311 S.W.3d 449, 452 (Tex. 2009)(orig. proceeding). Therefore, the question before this Court is whether the trial court clearly abused its discretion in granting Rojero's motion. *Copart II*, 619 S.W.3d at 713.

B. Relevant Law and Analysis

It is undisputed that the Federal Arbitration Act applies to the arbitration agreement in question, and that Texas courts apply Texas procedural rules when deciding a motion to compel arbitration under the FAA. *See id.* Under the Texas Arbitration Act, pre-arbitration discovery is authorized only "when a trial court cannot fairly and properly make its decision on [a] motion to compel [arbitration] because it lacks sufficient information regarding the scope of an arbitration provision or other issues of arbitrability." *Id.* at 714 (quoting *In re Houston Pipe Line*, 311 S.W.3d at 451). In other words, a trial court only has discretion to permit pre-arbitration discovery "when it is reasonably necessary to allow the trial court to fairly and properly decide a motion to compel," and abuses its discretion if it permits discovery "when the requesting party presents no colorable basis or reason to believe that the discovery would be material in resolving any disputed issues of arbitrability." *Id.*

Texas law encourages parties to resolve disputes through arbitration. *See G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 508 (Tex. 2015); TEX.CIV.PRAC.&REM.CODE ANN. §§ 154.002, 154.027. To that end, Section 171.021 of the Civil Practice and Remedies Code mandates a trial court to order the parties to arbitrate on the application of a party showing an agreement to arbitrate and the opposing party's refusal to arbitrate. TEX.CIV.PRAC.&REM.CODE ANN. § 171.021(a). Motions to compel arbitration are ordinarily decided in summary proceedings "on the basis of affidavits, pleadings, discovery, and stipulations." *Kmart Stores of Texas, L.L.C. v. Ramirez*, 510 S.W.3d 559, 565 (Tex.App.—El Paso 2016, pet. denied)(quoting *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992)). A summary motion to compel arbitration is essentially a motion for partial summary judgment, subject to the same evidentiary standards. *In re Jebbia*, 26 S.W.3d 753, 756-57 (Tex.App.—

Houston [14th Dist.] 2000, orig. proceeding); *see Jack B. Anglin*, 842 S.W.2d at 269; *Kmart Stores of Texas*, 510 S.W.3d at 565.

A party seeking to compel arbitration must establish the existence of an arbitration agreement and show that the claims raised fall within the scope of the agreement. *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999)(orig. proceeding). If the movant has proven there is an arbitration agreement as a matter of law, the trial court must compel arbitration. *In re Jebbia*, 26 S.W.3d at 757.

If a party opposing the motion to compel arbitration denies the existence of the agreement, the court is required to summarily determine that issue. TEX.CIV.PRAC.&REM.CODE ANN. § 171.021(b). The non-movant can resist summary arbitration by raising an issue of material fact regarding the existence of the agreement or whether the claims fall within the scope of the agreement. *In re Jebbia*, 26 S.W.3d at 757. Additionally, the non-movant can resist summary arbitration by presenting some evidence supporting every element of a defensive claim that there is no enforceable agreement to arbitrate. *Id.* If the non-movant raises an issue of fact, then the trial court must forego summary disposition and conduct an evidentiary hearing sometimes referred to as a "*Tipps* hearing." *See Kmart Stores of Texas*, 510 S.W.3d at 565. Conversely, if the movant carries its burden and the non-movant does not raise a material issue of fact, the trial court is required to compel arbitration. *In re Jebbia*, 26 S.W.3d at 757.

OneMain asserts that the trial court abused its discretion because Rojero failed to establish any colorable basis upon which the trial court could have found that the requested discovery was material to a disputed issue of arbitrability. Rojero responds that the trial court was within its discretion because it could have determined that it lacked sufficient information to fairly and

properly rule on OneMain's motion. Based on the Supreme Court's recent holding in *Copart II*, we must agree with OneMain.

Under *Copart II*, in order to justify pre-arbitration discovery, a requesting party must present more than "[c]onclusory assertions regarding an arbitration agreement's validity and factual assertions that have no bearing on the arbitrability of the plaintiff's claims," because such assertions "provide no reasonable basis to conclude that discovery would aid the trial court in its determination." *Copart II*, 619 S.W.3d at 714 (citing *In re DISH Network*, 563 S.W.3d 433, 440-41 (Tex.App.—El Paso 2018, orig. proceeding); *In re VNA, Inc.*, 403 S.W.3d 483, 486-87 (Tex.App.—El Paso 2013, orig. proceeding)).

In *Copart II*, the plaintiff's motion for pre-arbitration discovery was supported by an affidavit in which she generally denied the existence of a valid arbitration agreement, disputed the personal knowledge of the defendant employer's affiant with regard to the plaintiff's execution of the agreement, and claimed that the arbitration agreement lacked valid consideration.[1] *Id.* at 712. The trial court found that the plaintiff's motion and affidavit raised a fact issue regarding the arbitration agreement's validity and enforceability, and entered an order authorizing limited discovery on issues of arbitrability. *Id.* at 713. Mandamus was denied,[2] and the defendant sought relief from the Texas Supreme Court.

The Supreme Court held that the *Copart II* plaintiff's "motion and affidavit demonstrate no colorable basis or reason to believe that the requested discovery would be material in

[1] By way of procedural history, the *Copart* plaintiff had filed a prior motion to compel pre-arbitration discovery, based solely on an unsupported statement that "Plaintiff denies any enforceable arbitration agreement." *In re Copart, Inc.*, 563 S.W.3d 427, 429-30 (Tex.App.—El Paso 2018, orig. proceeding)("*Copart I*"). The trial court granted the motion. *Id.* at 429. This Court conditionally granted mandamus relief on grounds that the motion did not provide a colorable basis for the trial court to conclude that it lacked sufficient information to decide the motion to compel, but allowed the plaintiff an opportunity to file another motion that properly established her right to discovery or an evidentiary hearing within thirty days. *Id.* at 432-33. The Supreme Court opinion addresses the plaintiff's second motion.

[2] *In re Copart, Inc.*, No. 08-18-00204-CV, 2019 WL 3940955 (Tex.App.—El Paso Aug. 21, 2019, orig. proceeding).

establishing the [arbitration] agreement's existence and enforceability," and thus "failed to provide the trial court with a reasonable basis to conclude that it lacks sufficient information to determine whether her claims against Copart are arbitrable." *Id.* at 716. Specifically, the Court found that:

- "Although [the plaintiff] generally denied the existence of an enforceable arbitration agreement, she made no factual assertions in support of that claim." *Id.* (citing *In re DISH Network*, 563 S.W.3d at 439);

- The plaintiff "did not dispute the authenticity of any of the documents attached to [the affiant]'s declaration," including the arbitration agreement. *Id.* at 716;

- The plaintiff's "naked 'belief' about [the affiant]'s personal knowledge lacks probative value." *Id.* at 715 (quoting *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008);

- Even if the affiant did not personally observe the plaintiff's electronic execution of the arbitration agreement, "such knowledge has no bearing on [the affiant's] status as a witness qualified to verify the authenticity of the various documents attached to her declaration." *Id.* at 716;

- The plaintiff "did not deny receiving the agreement, signing the agreement . . . or continuing to work after she received the agreement." *Id.* at 715-16; and

- Even if the plaintiff had affirmatively denied signing the arbitration agreement, "it is well-settled that an 'at-will employee who receives notice of an employer's arbitration policy and continues working with knowledge of the policy accepts the terms as a matter of law.'" *Id.* at 716 n.3 (quoting *In re Dallas Peterbilt, Ltd.*, 196 S.W.3d 161, 163 (Tex. 2006)).

On the issue of consideration, the Court found that the agreement on its face contained mutual promises to submit all disputes to arbitration and did not permit unilateral modification by the employer, and that, notwithstanding her at-will employment status, the plaintiff had failed to identify a need for additional discovery on the issue. *Id.* at 716 (citing *In re Halliburton Co.*, 80 S.W.3d 566, 569-70 (Tex. 2002)(orig. proceeding)).

Turning to the case before us, the language in Rojero's motion and the testimony in his affidavit are virtually identical to those of the plaintiff in *Copart II*. Like the *Copart II* plaintiff, Rojero generally denied the existence of a valid arbitration agreement, but provided no specific factual assertions in support of that claim; did not dispute the authenticity of the arbitration

agreement or the certificate of completion; provide affidavit testimony that he believed OneMain's affiants lacked personal knowledge as to his purported execution of the agreement, but provided no supporting evidence; did not deny that he had received the agreement, acknowledged the agreement, or continued to work for OneMain after being notified of the arbitration policy. Additionally, as in *Copart II*, the arbitration agreement here also contains mutual promises to submit all disputes to arbitration and does not authorize unilateral modification by OneMain.

According to Rojero, OneMain has failed to produce admissible evidence establishing the arbitration agreement's existence, thereby entitling him to further discovery on that issue. Rojero contends that OneMain's affidavits fail to establish any foundation for the affiants' personal knowledge and are thus conclusory. Rojero further maintains that OneMain failed to prove the arbitration agreement was supported by valid consideration, because Rojero was an at-will employee. Therefore, Rojero argues, it would have been within the trial court's discretion to determine that limited discovery on these issues was reasonably necessary to rule on OneMain's motion.

In light of the Supreme Court's decision in *Copart II*, we must disagree. For the same reasons set forth in the *Copart II* opinion, we hold that Rojero has failed to demonstrate a colorable basis or reason to believe that the requested discovery would be material to prove or disprove the arbitration agreement's existence or enforceability. Accordingly, the trial court could not have reasonably concluded that it lacked sufficient information to fairly and properly rule on OneMain's motion, and therefore abused its discretion by authorizing pre-arbitration discovery.

CONCLUSION

We conditionally grant the writ of mandamus and direct the trial court to vacate its order granting Rojero's motion to permit pre-arbitration discovery. The trial court retains discretion to

order limited discovery pursuant to a properly filed Section 171.086(a) motion. *See Copart II*, 619 S.W.3d at 713. The trial court's order must limit discovery to the specific issues identified by the Section 171.086(a) motion. If Rojero fails to file within thirty days from the date of this opinion a motion establishing he is entitled to pre-arbitration discovery pursuant to Section 171.086(a)(4) and (6) or fails to present evidence sufficient to entitle him to a *Tipps* evidentiary hearing, the trial court is ordered to summarily rule on the motion to compel arbitration. The motion to compel arbitration and any reasonable discovery should be resolved without delay. *See In re Houston Pipe Line*, 311 S.W.3d at 452 (opn. on reh'g). The writ of mandamus will issue only if the trial court fails to comply.

June 4, 2021

YVONNE T. RODRIGUEZ, Chief Justice

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