Reverse and Render in part; Affirm in part; and Remand; Opinion Filed January 5, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00409-CV

ADVOCARE GP, LLC, ADVOCARE INTERNATIONAL, LP, JOSEPH R. GILSOUL, T. LEE WILKINS, DEBORAH RAGUS COOK, STACEY RAGUS CERNICKY, AND JENNIFER RAGUS MCGAHA, Appellants
V.
RICHARD HEATH, Appellee

On Appeal from the County Court at Law No. 1
Dallas County, Texas
Trial Court Cause No. CC-15-04887-A

MEMORANDUM OPINION

Before Justices Lang, Myers, and Evans
Opinion by Justice Myers

Appellants AdvoCare GP, LLC, AdvoCare International, LP, Joseph R. Gilsoul, T. Lee Wilkins, Deborah Ragus Cook, Stacey Ragus Cernicky, and Jennifer Ragus McGaha appeal the trial court's order denying in part their motion to compel arbitration. In one issue, appellants contend the trial court erred by denying their motion to compel arbitration as to all of appellee Richard Heath's claims. We affirm in part, reverse and render in part, and remand in part.

BACKGROUND AND PROCEDURAL HISTORY

Appellant AdvoCare is a health and nutritional product company. Appellee Richard Heath was hired to serve as a board member on the board of AdvoCare. Appellee was retained pursuant to a June 22, 2015 offer letter that references, in its first paragraph, an attached "confidentiality and non-disclosure agreement" (NDA), stating as follows:

> On behalf of AdvoCare GP, LLC., a Delaware limited liability company (the "Company"), the sole general partner of AdvoCare International, LP, a Delaware limited partnership ("AdvoCare"), I am pleased to invite you to join the Company's Board of Directors (the "Board"). If you accept our invitation, your election to the Board by the members of the Company will be effective July 1, 2015 (the "Effective Date"). *We will also expect you to enter into the attached confidentiality and non-disclosure agreement* [emphasis added]. You will serve as a director of the Board (a "Director") until the next annual meeting of the members, at which time you may be re-elected for a subsequent term.

Paragraph 9 of the NDA contains the following arbitration provision that provides in part:

> 9. Arbitration. Subject to Section 10 below,[1] *any controversy, dispute or claim arising out of or in any way related to or involving the interpretation, performance or breach of this Agreement* shall be resolved by binding arbitration at the request of either party, in accordance with the Employment Arbitration Rules of the American Arbitration Association [emphasis added]. The fact of any controversy, dispute or claim shall be strictly confidential between the parties hereto, and their respective officers, directors, attorneys, accountants or others who are under a duty of confidentiality. All proceedings relating to such dispute or arbitration shall be confidential between the parties and not disclosed except as may be required by law, or to their respective officers, directors, attorneys, accountants or others who are under a duty of confidentiality. The arbitrators shall apply Texas substantive law and federal substantive where Texas State law is preempted. . . .

Appellee accepted and agreed to the terms of employment proposed in the offer letter, signing it on June 22, 2015. Appellee also signed the attached NDA. However, appellee's employment was terminated within forty days after starting on the board of AdvoCare. Not long after being relieved of his duties, appellee demanded compensation based on an alleged oral agreement to become CEO of AdvoCare in addition to the written agreement to serve on the board of directors.

On September 25, 2015, appellee filed the present lawsuit against AdvoCare GP, LLC, AdvoCare International, LP, Joseph R. Gilsoul, T. Lee Wilkins, Deborah Ragus Cook, Stacey Ragus Cernicky, and Jennifer Ragus McGaha ("appellants"). The defendants in that lawsuit

[1] Section 10 of the NDA was entitled "Legal Remedy," and it authorized, in part, AdvoCare to secure equitable or extraordinary relief, including a temporary restraining order or temporary injunction, to remedy or prevent any breach or reasonably anticipated breach of the agreement, and it further provided that appellee waived the right to request or require that a bond or other security be secured or posted in connection with any equitable or extraordinary relief sought or secured by AdvoCare.

included the corporate AdvoCare defendants, AdvoCare GP, LLC and AdvoCare International, LP, and several individuals that were officers and/or directors of AdvoCare. Appellee's causes of action were breach of contract (both the written offer letter and the alleged oral contract), promissory estoppel, fraudulent inducement (of the offer letter and oral contract), tortious interference with an existing contract (the offer letter and oral contract), unjust enrichment, and conspiracy. Appellee alleged he is owed over $5 million in damages for his termination from the Board and the CEO position.

Appellants filed an original answer and affirmative defenses to plaintiff's original petition, which alleged in part that the affirmative defense of "prior material breach of the contracts alleged in [plaintiff's] Complaint excuse[d] Defendants' alleged non-performance." In their first amended answer and affirmative defenses to plaintiff's original petition, appellants further alleged that "Plaintiff's prior material breach of a confidentiality and non-disclosure agreement, as well as prior material breaches of the other contracts alleged in his Complaint, excuse[d] Defendants' alleged non-performance of agreements between Plaintiff and Defendants, if any, and bar all of Plaintiff's claims." Appellants also filed a motion to compel arbitration and to abate the proceedings pending arbitration, arguing appellee's claims are governed by the arbitration clause in the NDA and that the court should compel arbitration and abate the proceedings pending a final judgment in arbitration.

After a hearing, the trial court granted the motion in part and denied it in part. The court's April 5, 2016 "Order on Defendants' Motion to Compel Arbitration and Motion to Abate Proceedings Pending Arbitration" states that appellants' affirmative defense of prior material breach of the non-disclosure agreement shall proceed to arbitration pursuant to the arbitration agreement, but all other claims and defenses pleaded in the action shall proceed in the trial court. The court also denied appellants' request to abate the action pending the outcome of arbitration.

This interlocutory appeal followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098.

DISCUSSION

Appellants contend in their sole issue that the trial court erred by denying their motion to compel arbitration as to *all* of appellee's claims.

In reviewing an order denying a motion to compel arbitration under the Texas Arbitration Act, *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001–.098, the appellate court applies a no-evidence standard to the trial court's factual determinations and a de novo standard to legal determinations. *Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 863 (Tex. App.—Dallas 2010, no pet.); *In re Trammell*, 246 S.W.3d 815, 820 (Tex. App.—Dallas 2008, no pet.). This standard is the same as the abuse of discretion standard of review. *Sidley*, 327 S.W.3d at 863. "However, when the facts relevant to the arbitration issue are not disputed, an appellate court is presented only with issues of law and reviews the trial court's order de novo." *In re Trammell*, 246 S.W.3d at 820.

A party seeking to compel arbitration has the initial burden of establishing that the parties agreed to arbitration and that the claims fall within the agreement's scope. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). If the trial court finds a valid arbitration agreement exists, the burden shifts to the party opposing arbitration to raise an affirmative defense to enforcement of the arbitration agreement. *Id*. The trial court's determination of the validity of an arbitration agreement is a legal question subject to de novo review. *Id*. Whether an agreement to arbitrate is enforceable is reviewed de novo. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding).

To prove a valid agreement to arbitrate exists, the employer must prove that the employee (1) received notice of the employer's arbitration policy and (2) accepted it. *In re Dallas Peterbilt, Ltd.*, 196 S.W.3d 161, 162 (Tex. 2006) (orig. proceeding) (per curiam). An employee

has notice if he has knowledge of the terms of the policy. *In re Halliburton Co.*, 80 S.W.3d 566, 568 (Tex. 2002) (orig. proceeding) (citing *Hathaway v. Gen. Mills, Inc*., 711 S.W.2d 227, 229 (Tex. 1986)). "'In law, whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand, which if pursued by the proper inquiry the full truth might have been ascertained.'" *Burlington N. R.R. Co. v. Akpan*, 943 S.W.2d 48, 51 (Tex. App.—Fort Worth 1996, no writ) (quoting *Hexter v. Pratt*, 10 S.W.2d 692, 693 (Tex. Comm'n App. 1928, judgm't adopted)).

Arbitration agreements are interpreted under traditional contract interpretation principles. *J.M. Davidson*, 128 S.W.3d at 227. If a contract can be given a certain legal meaning or interpretation, then it is not ambiguous. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). An unambiguous contract is interpreted as a matter of law. *Id*. If a contract's meaning is uncertain and doubtful, or if the contract is reasonably susceptible to more than one meaning, then the contract is ambiguous. *Id*. The interpretation of an ambiguous contract is an issue for the trier of fact. *Id*. If a contract is not ambiguous, its construction and meaning become a question of law for the court to determine. *Calpine Producer Servs., L.P. v. Wiser Oil Co*., 169 S.W.3d 783, 787 (Tex. App.—Dallas 2005, no pet.) (quoting *Dedier v. Grossman*, 454 S.W.2d 231, 234 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.)). "[T]he primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." *Coker*, 650 S.W.2d at 393. "To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of a contract so that none will be rendered meaningless." *Id*.

Regarding the question of whether there was a valid, enforceable agreement to arbitrate, there is no question appellee signed an NDA that includes a written agreement to arbitrate. Appellee acknowledged in his response to appellants' motion to compel that the NDA between

Heath and AdvoCare was "the only agreement that contains within it an agreement to arbitrate." The trial court implicitly found that a valid agreement to arbitrate exists when it ruled that appellants' affirmative defense of prior material breach of the NDA would proceed to arbitration. Appellee does not challenge the validity of the NDA or argue there is no agreement to arbitrate. His argument focuses on the scope of the NDA's arbitration provision. We therefore turn to the second question: whether the claims asserted fall within the scope of the agreement.

Once the existence of an arbitration agreement has been shown, the party resisting arbitration bears the burden of proving that the dispute at issue falls outside of the arbitration agreement's scope. *See Prudential Sec., Inc. v. Marshall*, 909 S.W.2d 896, 900 (Tex. 1995); *Perlstein v. D. Steller 3, Ltd.*, 109 S.W.3d 36, 39–40 (Tex. App.—Corpus Christi 2003, pet denied); *see also VSR Financial Servs., Inc. v. McLendon*, 409 S.W.3d 817, 827 (Tex. App.—Dallas 2013, no pet.) (after party seeking to compel arbitration establishes agreement's existence, "[t]he party seeking to avoid arbitration then bears the burden of proving its defenses against enforcing the otherwise valid arbitration provision"). The policy favoring enforcement of arbitration agreements is so compelling that a court should not deny arbitration "*unless it can be said with positive assurance* that an arbitration clause is *not* susceptible of an interpretation which would cover the dispute at issue." *Prudential*, 909 S.W.2d at 899; *Perlstein*, 109 S.W.3d at 40; *see also Rachal v. Reitz*, 403 S.W.3d 840, 842 (Tex. 2013) (Federal and Texas policies favor arbitration for its efficient method of resolving disputes).

Both the Supreme Court and the Fifth Circuit have characterized arbitration provisions that are similar to the one at issue here as broad arbitration clauses capable of expansive reach. *See, e.g., Prima Paint Corp., v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 398 (1967) (labeling as "broad" a clause requiring arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof"); *Pennzoil Exploration and Prod. Co. v. Ramco Energy*

Ltd., 139 F.3d 1061, 1067 (5th Cir. 1998) ("[C]ourts distinguish 'narrow' arbitration clauses that only require arbitration of disputes 'arising out of' the contract from broad arbitration clauses governing disputes that 'relate to' or 'are connected with' the contract."); *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164–65 (5th Cir. 1998) (when parties agree to "broad" arbitration clause governing "[a]ny dispute, controversy or claim arising out of or in connection with or relating to this Agreement," they "intend the clause to reach all aspects of the relationship.").

Texas courts, including this Court, have reached similar conclusions. *See FD Frontier Drilling, Ltd. v. Didmon*, 438 S.W.3d 688, 695 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (noting that, "[g]enerally, when an arbitration provision uses the language 'any dispute,' it is considered broad," and that "[s]uch clauses are capable of expansive reach."); *RSR Corp. v. Siegmund*, 309 S.W.3d 686, 701 (Tex. App.—Dallas 2010, no pet.) ("'The phrase 'relates to,' in particular, is recognized as a very broad term.'") (quoting *In re Wilmer Cutler Pickering Hale & Dorr LLP*, No. 05–08–01395–CV, 2008 WL 5413097, at *4 (Tex. App.—Dallas Dec. 31, 2008, orig. proceeding [mand. denied]) (mem. op.)); *Am. Realty Trust, Inc. v. JDN Real Estate–McKinney, L.P.*, 74 S.W.3d 527, 531 (Tex. App.—Dallas 2002, pet. denied) ("A broad arbitration clause, purporting to cover all claims, disputes, and other matters arising out of or relating to the contract or its breach, creates a presumption of arbitrability.").

We reject appellee's contention that the arbitration provision's use of the phrase "this Agreement" narrows its application to literally "*this* Agreement," i.e., the NDA itself. Appellee argues that "Agreement" is a defined term meaning only the NDA—citing the opening paragraph that states, "This Confidentiality and Non-Disclosure Agreement (the 'Agreement')." Appellee also points out that the NDA states in paragraph 16, "This Agreement constitutes the entire understanding between the parties with respect to the subject matter hereof, superseding all

negotiations, prior discussions and prior agreements and understanding relating to such subject matter." The NDA further states in paragraph 17 that "this Agreement does not constitute a contract of employment and does not imply that the Company will continue his service as a director for any period of time."

But these arguments fail to deal with the fact that the arbitration provision in the present case includes both the narrower "arising out of" language *and* the broader "related to" language. In fact, the provision goes even further, encompassing any controversy, dispute, or claim not only "arising out of" but "*in any way related to or involving*" the interpretation, performance, or breach of "this Agreement." This is, as the above cases show, a broad arbitration clause. Indeed, the Supreme Court in *Prima Paint* labeled as "broad" a clause requiring arbitration of "[a]ny controversy or claim arising out of or relating to *this Agreement*. . . ." *Prima Paint Corp*., 388 U.S. at 398 (emphasis added). The Fifth Circuit has stated that broad-form arbitration clauses like the one in this case "are not limited to claims that literally arise under the contract, but rather embrace all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute." *Pennzoil*, 139 F.3d at 1067.

Appellee's argument also overlooks several notable facts: The offer letter specifically references the NDA in the first paragraph, the NDA was attached to the offer letter, and both documents were signed on the same day as part of a contemporaneous transaction. Under general principles of contract law, separate documents executed at the same time, for the same purpose, and in the course of the same transaction are to be construed together. *See, e.g., Jim Walter Homes, Inc. v. Schuenemann*, 668 S.W.2d 324, 327 (Tex. 1984). Therefore, the offer letter and the NDA are effectively part of the same agreement and should be construed together. *See Pers. Sec. & Safety Sys. Inc. v. Motorola, Inc.*, 297 F.3d 388 393 (5th Cir. 2002) (stock purchase agreement stated that "[i]n connection with the purchase and loan, [the parties] desire

to enter into certain other agreements," and "expressly refers to the Purchase Development Agreement as one of those agreements"); *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990) (purchasing agreement "acknowledged that the parties would contemporaneously enter into" license agreements for six stores).

The cases cited by appellee for support are distinguishable. In *Perlstein v. D. Steller 3, Ltd.*, for example, which is discussed in appellee's brief, the arbitration clause included the more restrictive language of "directly or indirectly concerning this Agreement" instead of the "in any way related to or involving" language we have in the present case. *See Perlstein*, 109 S.W.3d at 38. Appellee also cites *I.D.E.A. Corp. v. WC & R Interests, Inc.*, 545 F. Supp. 2d 600 (W.D. Tex. 2008), but that case recognizes that "[a]n arbitration provision that expressly encompasses disputes 'related to' or 'connected with' the agreement containing the provision is construed broadly." *Id*. at 606. The court ultimately did not compel arbitration after recognizing that the arbitration provision was limited to disputes "arising under" the agreement; it did not have the broader "related to" language we have in this case. *See id*. Additionally, the agreements in that case were executed three months apart while the NDA and the offer letter in this case were executed on the same day. *See id*. at 608. Finally, appellee cites our unpublished opinion *In re Sine Swearingen Aircraft Corp*., 05–03–01618–CV, 2004 WL 1193960 (Tex. App.—Dallas June 1, 2004, no pet.) (mem. op.), but the arbitration clause in that case used the narrower "arising out of" language and did not have the "related to" language present in the arbitration clause in the NDA. *Id*. at *2.

In light of the decisions cited above interpreting similar language, we conclude the arbitration provision at issue here should be read as requiring that *any* controversy, dispute, or claim "arising out of or in any way related to or involving" the interpretation, performance, or breach of the NDA must be resolved in arbitration. Thus, the arbitration provision encompasses

this suit and the claims asserted therein because appellants claim appellee was terminated due to his breach of the NDA.

This includes appellee's tort claims. Texas courts have construed similar broad language in arbitration provisions to encompass tort claims. *See, e.g.*, *BBVA Compass Inv. Solutions, Inc. v. Brooks*, 456 S.W.3d 711, 722 (Tex. App.—Fort Worth 2015, no pet.) (citing additional authorities). Appellee's tort claims are dependent upon and relate to the offer letter and, consequently, the NDA that is incorporated by reference and attached to the offer letter. Appellee's tortious interference claim, for instance, relates to the offer letter and the NDA because appellee is claiming appellants willfully, intentionally, and maliciously interfered with the business relationship and contracts between appellee and AdvoCare. And while individual officers and directors of appellants, unlike AdvoCare, were not parties to the NDA that contains the arbitration provision, since they are being sued in their capacity as officers and directors of AdvoCare, under Texas law the claims against them are subject to the arbitration clause to which AdvoCare is a party. *See In re Kaplan Higher Educ. Corp*., 235 S.W.3d 206, 209 (Tex. 2007) ("[T]he agents of a signatory may sometimes invoke an arbitration clause even if they themselves are nonsignatories and a claimant is not suing on the contract. Thus, if two companies sign a contract to arbitrate disputes, one cannot avoid it by recasting a contract dispute as a tortious interference claim against an owner, officer, agent, or affiliate of the other."). Moreover, as to appellee's other tort claims, appellee stated in his response to the motion to compel that his "claims for promissory estoppel, fraudulent inducement, and unjust enrichment brought against each of the named defendants. . . stem from the two employment agreements and the independent relationships between the parties." The only other tort claim is for conspiracy, but this claim is based on an alleged conspiracy by appellants to fraudulently induce appellee to enter into one or more contracts and/or tortuously interfere with appellee's

existing contracts, so this claim is likewise subject to arbitration for the same reasons as the other tort claims.

CONCLUSION

We sustain appellants' issue. The trial court abused its discretion by partially denying the motion to compel arbitration. Therefore, we reverse that portion of the trial court's April 5, 2016 "Order on Defendants' Motion to Compel Arbitration and Motion to Abate Proceedings Pending Arbitration" denying appellants' motion to compel arbitration and render judgment that all claims and defenses pleaded in this action shall proceed in arbitration. We remand this case to the trial court for further proceedings consistent with this opinion, including the grant of an appropriate stay.

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/Lana Myers/
LANA MYERS
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ADVOCARE GP, LLC, ADVOCARE INTERNATIONAL, LP, JOSEPH R. GILSOUL, T. LEE WILKINS, DEBORAH RAGUS COOK, STACEY RAGUS CERNICKY, AND JENNIFER RAGUS MCGAHA, Appellant

No. 05-16-00409-CV V.

RICHARD HEATH, Appellee

On Appeal from the County Court at Law No. 1, Dallas County, Texas
Trial Court Cause No. CC-15-04887-A.
Opinion delivered by Justice Myers. Justices Lang and Evans participating.

In accordance with this Court's opinion of this date, we **REVERSE** that portion of the trial court's April 5, 2016 order denying the motion to compel arbitration and **RENDER** judgment that all claims and defenses pleaded in this action shall proceed in arbitration. We **REMAND** this case to the trial court for further proceedings consistent with this opinion. It is **ORDERED** that appellants ADVOCARE GP, LLC, ADVOCARE INTERNATIONAL, LP, JOSEPH R. GILSOUL, T. LEE WILKINS, DEBORAH RAGUS COOK, STACEY RAGUS CERNICKY, AND JENNIFER RAGUS MCGAHA recover their costs of this appeal from appellee RICHARD HEATH.

Judgment entered this 5th day of January, 2017.