Affirm in part; Reverse and Render in part; Opinion Filed April 3, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00179-CV

MEDINET INVESTMENTS, LLC, Appellant
V.
JAY ENGLISH AND ENGLISH LAW GROUP, PLLC, Appellees

On Appeal from the 193rd Judicial District Court[1]
Dallas County, Texas
Trial Court Cause No. DC-16-07743

MEMORANDUM OPINION

Before Justices Francis, Evans, and Boatright
Opinion by Justice Evans

Appellant Medinet Investments, LLC asserts in a single issue that the trial court erred by denying its motion to compel arbitration as to all defendants who are appellees. We affirm in part and reverse and render in part.

BACKGROUND

A. Subrogation Agreement

On March 6, 2012, Bobby Walker, appellee English & Associates, PLLC,[2] and A/RNet, PLLC signed a Subrogation and Distribution Agreement (Agreement) in which A/RNet agreed to

[1] After the 193rd District Court denied the motion to compel arbitration, the case was transferred to the 116th District Court.

[2] Medinet alleges that English moved English & Associates' cases and assets to English Law Group. As English Law Group is the entity named in this appeal, we refer to that entity in this opinion.

cover Walker's medical expenses for personal injuries he suffered. English Law Group represented Walker in regard to Walker's injury and advised him regarding the Agreement. Appellee Jay English signed the Agreement on behalf of English Law Group. English Law Group and Walker agreed that A/RNet would be repaid the full amount of the healthcare bills within fifteen days of any recovery. The following provisions from the agreement are relevant to this appeal:

> **Arbitration.** In the event of a breach of the obligations hereunder or other dispute arising out of or related to this Agreement, the matter shall be submitted to the Judicial Arbitration and Mediation Services ("JAMS") in Texas.
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> **Assignability.** This Subrogation and Distribution Agreement may be assigned, in whole or in part. However, any third party to whom such an assignment is made shall be bound to all duties and obligations set forth in this Agreement.
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> **Successors and Assigns.** This Agreement binds and is for the benefit of the successors and permitted assigns of each Party. [Walker] may not assign this Agreement or any rights or obligations under it without the [A/RNet's] prior written consent which may be granted or withheld in [A/RNet's] discretion. [A/RNet] has the right, without the consent of or notice to [Walker], to sell, transfer, negotiate, or grant participation in all or any party of, or any interest in, this Agreement.

In a series of Agreements of Sale, Transfer and Assignment of Accounts Receivable between March 8 and December 7, 2012, A/RNet assigned $492,453.40 of Walker's medical invoices to Medinet. Upon settlement of Walker's medical claims, Medinet alleged that Walker, Jay English, and English Law Group failed to reimburse the amounts owed to A/RNet under the Agreement.

B. 116th District Court Litigation

Walker filed a lawsuit against Pardue Management Company, Pardue Falltree Apartments, Ltd., and Pardue Falltree Apartments, GP relating to his personal injury claims. On December 10, 2014, A/RNet intervened in the litigation alleging it had purchased the account receivables of the

medical providers who rendered medical services to Walker. A/RNet also asserted claims against Jay English, English Law Group, and Walker for fraud, fraudulent transfer and constructive fraud. Jay English, English Law Group, and Walker filed a motion for summary judgment asserting that A/RNet was not the proper party to intervene in the lawsuit because it had assigned its rights in the invoices to Medinet. The trial court entered an order rendering summary judgment "that A/RNet take nothing in its claims against Bobby Walker and English and Associates, PLLC." The trial court further ordered that Walker and his counsel were "authorized to withdraw and distribute settlement funds previously held in trust." A/RNet did not appeal this summary judgment decision.

C. 193rd District Court Litigation

On June 27, 2016, Medinet filed a petition against Jay English, English Law Group, and Walker alleging claims for theft, fraud, and fraudulent transfer. The caption of the petition referenced Medinet's request for disclosures, admissions, and production, but these discovery requests are not part of the filed petition or included elsewhere in the clerk's record.

Jay English and English Law Group filed an answer and Medinet filed motions to compel arbitration and to stay mediation and all state court litigation until the motion to compel was heard by the court. Medinet also filed a motion to strike or set aside deemed admissions and a first supplemental petition. Jay English and English Law Group filed a motion for partial summary judgment asserting the doctrines of attorney immunity and res judicata.

Jay English and English Law Group filed a response to the motion to compel arbitration in which they argued that (1) English and English Law Group were not signatories to the Agreement, (2) the Agreement was unconscionable, and (3) the claims are not subject to arbitration. At the hearing on the motion to compel arbitration, the trial court sua sponte raised the issue of whether Medinet had waived its right to arbitration. The trial court then asked Medinet how filing a lawsuit which requested monetary relief did not substantially invoke the authority of the courts. Medinet

responded that the litigation simply had not "gone that far" because "substantial litigation ha[d] not occurred" and argued that Texas law favors arbitration. The trial court then asked English Law Group and Jay English to address the issue of prejudice. Jay English and English Law Group stated that Medinet had ignored their discovery requests.

The trial court entered orders denying Medinet's motion to compel arbitration and motion to stay proceedings. The trial court also entered an order granting summary judgment in favor of Jay English and English Law Group for the tort claims brought by Medinet. Medinet then filed this appeal of the interlocutory order denying its motion to compel arbitration.[3]

ANALYSIS

In a single issue, Medinet asserts the trial court erred in denying the motion to compel arbitration because Medinet did not waive its right to arbitration by litigation conduct. Waiver by litigation conduct was the trial court's focus at the hearing and, as worded, the narrow scope of Medinet's issue. But Medinet supports its issue both with arguments addressing waiver and with additional arguments challenging the remaining bases asserted by Jay English and English Law Group in the trial court on which the trial court could have based its ruling. We will consider all of Medinet's arguments, liberally construing the briefing rule that requires briefs must concisely state all issues presented for review. *See* TEX. R. APP. P. 38.1(f), 38.9; *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 863 (Tex. 2005) ("appellate court should consider the parties' arguments supporting each point of error and not merely the wording of the points. . . . [When the] body of the argument supporting the point of error" presented an argument not raised in that point of error, appellate court should consider the argument not included in the statement of the point of error).

[3] We were not asked to stay the trial court. While this interlocutory appeal has been pending, in several supplemental records, the trial court granted a no-evidence summary judgment in favor of Jay English and English Law Group on Medinet's breach of contract and quantum meruit claims. In a modified order, the trial court's summary judgment stated that no relief was granted to Walker and the order was an "interlocutory summary judgment" which did not "dispose of all claims and all parties, and is not immediately appealable."

A. Standard of Review

We review a trial court's order denying a motion to compel arbitration for abuse of discretion. *See Henry v. Cash Biz, LP*, 61 Tex. Sup. Ct. J. 401, 2018 WL 1022838, at *3 (Tex. Feb. 23, 2018); *In re Labatt Food Serv., L.P.*, 279 S.W. 3d 640, 642–43 (Tex. 2009). We defer to the trial court's factual determinations if they are supported by evidence but review its legal determinations de novo. *Id.*

B. Parties Subject to Arbitration Agreement—Signatories

In its first argument, Medinet contends it established each appellee was subject to the arbitration agreement. A party seeking to compel arbitration has the initial burden to establish an agreement to arbitrate and that the claims are within the scope of the agreement. *In re D. Wilson Const. Co.*, 196 S.W.3d 774, 781 (Tex. 2006).

1. English Law Group

English Law Group argues that it did not exist at the time of the Agreement and cannot be a signatory to the Agreement. Jay English does not dispute that he controls English Law Group and Medinet contended and brought forward evidence that English & Associates, PLLC transferred its cases to English Law Group in September 2014. Medinet argues in the Agreement, Jay English—on behalf of English & Associates, PLLC— agreed that "any third party to whom such an assignment is made shall be bound to all the duties and obligations set forth in this [Agreement]." Because English Law Group is bound by the duties and obligations set out in the Agreement, the trial court erred in denying the motion to compel arbitration.

2. Jay English

Based on Jay English's execution of the Agreement as agent of English Law Group, Medinet argues that Jay English is bound by the arbitration agreement and required to arbitrate this matter. Signing a contract in a representative capacity, however, does not bind the agent

personally to the contract. *See Elgohary v. Herrera*, 405 S.W.3d 785, 790–91 (Tex. App.—Houston [1st Dist.] 2013, no pet.); RESTATEMENT (SECOND) OF AGENCY § 320 (1958) ("Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract.").

Medinet argues that nonsignatory agents of an entity that is subject to an arbitration agreement can be compelled to arbitrate claims against them.[4] Medinet's cites as authorities *In re Wells Fargo Bank, N.A.*, 300 S.W.3d 818, 825 (Tex. App.—San Antonio 2009, orig. proceeding) and *In re Merrill Lynch Trust Co. FSB*, 123 S.W.3d 549, 556 (Tex. App.—San Antonio 2003, orig. proceeding), *mand. granted*, 235 S.W.3d 217 (Tex. 2007) (orig. proceeding) (per curiam). Both opinions present the reverse of the situation we must decide: in both opinions, the nonsignatory agents sought to compel arbitration against the claimants. The appellate court in *In re Wells Fargo Bank, N.A.*, decided an employee could compel arbitration based on the allegation that the claims were based on their conduct as agents of their employers and the arbitration agreement between the employers and the claimants. 300 S.W.3d at 825. The appellate court in *In re Merrill Lynch Trust Co. FSB* decided the employee could not compel arbitration because no claims were asserted against the employer and the claims made against the agent were not based on their conduct on behalf of their employer. 123 S.W.3d at 556. The supreme court disagreed and decided the employee could compel arbitration. *In re Merrill Lynch Tr. Co. FSB*, 235 S.W.3d at 218 (*Merrill Lynch II*). In reaching this decision, the supreme court relied on its opinion in *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185 (Tex. 2007) (*Merrill Lynch I*). In *Merrill Lynch I*, the supreme

[4] Medinet also cites *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732 (Tex. 2005). In *In re Kellogg Brown & Root*, the supreme court recognized "six theories, arising out of common principles of contract and agency law, that may bind non-signatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel, and (6) third-party beneficiary." *Id*. at 739. But in the trial court and in its brief here, Medinet only argued that Jay English is subject to the arbitration agreement because he signed the Agreement as agent for English & Associates—an agency theory. Medinet made none of the other five arguments, so we do not consider their applicability to whether the arbitration agreement is binding on Jay English.

court decided that an arbitration agreement with an employer could not be avoided by the artful pleading device of suing only an employee; otherwise, arbitration clauses would be rendered illusory on one side. 235 S.W.3d at 188-89. In addition, the supreme court determined that claims against the employee for which the employer could be liable were claims against the employer for the purposes of analyzing whether the claims were arbitrable. The court determined the claims were arbitrable. *Id.* at 190.

In contrast to Medinet's authorities, Jay English, the nonsignatory agent, is not the movant seeking to compel arbitration. Rather, he resisted Medinet's motion to compel arbitration in the trial court and on appeal. Medinet's claims against Jay English can generally be characterized as alleging Jay English fraudulently transferred the assets of his law firm (the signator to the agreement), English & Associates, to English Law Group. But Medinet has not argued or cited authority for why Jay English can be compelled to arbitrate other than he signed the arbitration agreement for a disclosed principal. Medinet's brief presents nothing further for us to decide. Under these circumstances, we conclude Medinet has not demonstrated the trial court abused its discretion when it denied the motion to compel as to Jay English personally. *See* TEX. R. APP. P. 38.1; 44.1. We decide Medinet's argument as to the denial of arbitration as to Jay English personally fails.

C. Litigation Waiver of Arbitration

In its second, third, and fourth arguments, Medinet asserts the trial court abused its discretion when it denied Medinet's motion to compel arbitration orally indicating Medinet waived its right to arbitration through litigation conduct. Waiver of arbitration is a question of law that this Court reviews de novo. *Perry Homes v. Cull*, 258 S.W.3d 580, 598 (Tex. 2008). A party waives the right to arbitration by substantially invoking the judicial process to the other party's detriment or prejudice. *See Kennedy Hodges, L.L.P. v. Gobellan*, 433 S.W.3d 542, 545 (Tex.

2014). The parties claiming waiver have the heavy burden of establishing that the judicial process was substantially invoked. *Adams v. StaxxRing, Inc.*, 344 S.W.3d 641, 648 (Tex. App.—Dallas 2011, pet. denied). Additionally, waiver of arbitration requires a showing of prejudice. *Id.* The strong presumption against waiver of arbitration renders this hurdle a high bar. *Kennedy Hodges, L.L.P.*, 433 S.W.3d at 545. We decide waiver on a case-by-case basis by assessing the totality of the circumstances. *Id*.

Waiver occurs when a party has conducted full discovery, has filed motions going to the merits of a case, and has sought arbitration only on the eve of trial. *Perry Homes*, 258 S.W.3d at 590. The supreme court has considered factors such as: (1) when the movant knew of the arbitration clause, (2) how much discovery has been conducted, (3) who initiated it, (4) whether it was related to the merits rather than the arbitrability or standing, (5) how much of it would be useful in arbitration, and (6) whether the movant sought judgment on the merits. *Perry Homes*, 258 S.W.3d at 591. We will follow the supreme court by using its analytical factors.

1) Knowledge of arbitration clause

A/RNet assigned the accounts receivables at issue in this case to Medinet in October 2012. Medinet filed its lawsuit against Jay English and English Law Group in June 2016 and then filed the motion to compel arbitration five months later in November 2016. In a hearing before the trial court, counsel for Medinet stated that "[w]e tried to go to JAMS and we tried to get this in arbitration, but Jay English has refused to arbitrate this. And we felt the only way we could get it in was to have the Court order him to arbitrate." The supreme court has previously noted that mere delay in moving to compel arbitration is not enough for waiver. *See Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 455 S.W.3d 573, 576 (Tex. 2014); *see also In re Fleetwood Homes*

of Texas, L.P., 257 S.W.3d 692, 694 (Tex. 2008) (no waiver by waiting eight months to pursue arbitration while discussing a trial setting and allowing limited discovery).

2) Discovery

Relevant discovery factors in determining whether a movant has substantially invoked the judicial process include how much discovery has been conducted and who initiated it, whether the discovery related to the merits rather than arbitrability or standing, and how much of the discovery would be useful in arbitration. *Adams*, 344 S.W.3d at 649. As stated above, the caption of Medinet's petition references requests for disclosures, admissions, and production. Medinet's brief, however, states that the petition "does not actually contain any discovery requests at all, and the record does not reflect that any was ever served." Further, at the hearing on the motion to compel, counsel for Medinet noted that it had neither engaged in extensive discovery nor engaged in depositions. The appellate record contains Medinet's petition but no discovery is attached and no one contends there was any discovery attached. Accordingly, we note the discovery process was in an early phase as little information had been exchanged between the parties.

3) Merits activity

As to merits activity, the trial court noted that Medinet itself filed the petition prior to filing its motion to compel arbitration. The supreme court has held, however, that "[m]erely filing suit does not waive arbitration, even when the movant, as in this case, files a second, separate suit in another county based in part on a contract at issue in the first action." *See Richmont Holdings, Inc.*, 455 S.W.3d at 576. After filing the petition, Medinet did not file any other merit-based pleadings with the trial court—aside from its motion to strike or set aside deemed admissions—prior to filing its motion to compel arbitration and a motion to stay mediation and all state litigation.

None of the factors in this record support a conclusion that Medinet substantially invoked the judicial process.

4) Prejudice

Even if we had concluded that Medinet had substantially invoked the judicial process, a party's right to arbitration is not waived absent a clear showing that the opposing party has been prejudiced. Although Jay English and English Law Group do not address the issue of prejudice in their brief, the trial court raised the issue at the motion to compel arbitration hearing. When asked what their argument was on the issue of prejudice, Jay English and English Law Group responded as follows:

> We have sent discovery to the plaintiff. He has ignored the discovery. He has failed to respond to request for disclosure. He's refused to respond to interrogatories. He's refused to respond to request for production.

Delaying its responses to discovery requests, however, is not enough to demonstrate waiver of its right to arbitration. *See Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 898–99 (Tex. 1995) ("A party does not waive a right to arbitration merely by delay; instead, the party urging waiver must establish that any delay resulted in prejudice."). Based on the record and arguments before us, we cannot conclude that Jay English and English Law Group suffered prejudice based upon Medinet's delay in responding to discovery requests.

We conclude Medinet did not waive its right to arbitration because it has not substantially invoked the judicial process to the detriment and prejudice of appellees.

D. Unconscionability and Excessive Costs

In its fifth argument, Medinet challenges the other bases for Jay English and English Law Group's opposition to enforcement of the arbitration agreement. First we consider their argument that the terms of the agreement are unconscionable and that the excessive costs involved with arbitration constitute "substantive unconscionability." Generally, a contract is unconscionable if, given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances

existing when the parties made the contract. *In re Olshan Foundation Repair, LLC*, 328 S.W.3d 883, 892 (Tex. 2010). Here, Jay English—an attorney—not only represented and advised Walker regarding the agreement, he also executed the agreement on behalf of his law firm. His and his law firm's argument that the contract he himself negotiated is unconscionable is disingenuous.

If an excessive cost argument is asserted, the party opposing arbitration bears the burden to show that the costs of arbitration render it unconscionable. *Id.* at 893. The supreme court provided further guidance requiring proof of the cost of arbitration:

> Thus, for evidence to be sufficient, it must show that the plaintiffs are likely to be charged excessive arbitration fees. While we do not mandate that claimants actually incur the cost of arbitration before they can show its excessiveness, parties must at least provide evidence of the likely cost of their particular arbitration, through invoices, expert testimony, reliable cost estimates, or other comparable evidence. Evidence that merely speculates about the risk of possible cost is insufficient.

Id. at 895 (internal citations omitted). In this case, Jay English and English Law Group speculate that the "dollar figure will likely balloon if Arbitration is ordered on claims already adjudicated and currently subject to summary judgment." This conclusion does not comport with the supreme court's requirement that a party must provide evidence of the likely costs of arbitration. Accordingly, we agree with Medinet that the arbitration provision is not unconscionable and has not been shown to cause excessive costs.

E. Arbitrability of Defenses

Also in its fifth argument, Medinet challenges Jay English and English Law Group's argument that their defenses to the issue of payment "such as fraud are not included." Elsewhere, Jay English and English Law Group state the "only issues between Plaintiff and the Defendants concern whether or not English and Associates, PLLC was fraudulently induced into signing the [agreement]." Jay English and English Law Group provide no further argument or any authority for these statements. The supreme court has decided that defenses such as duress, fraudulent

inducement, and unconscionability must relate to the arbitration provision itself and not the contract as a whole if a party is to defeat arbitration. *See In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001); *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 501 (Tex. 2015) ("And challenges relating to an entire contract will not invalidate an arbitration provision in the contract; rather, challenges to an arbitration provision in a contract must be directed specifically to that provision."). Defenses that pertain to the entire contract can be arbitrated. *Id.* To the extent that appellees have adequately briefed this argument, they have failed to set forth any evidence regarding the misrepresentation of the arbitration provision or that false material representations were made with regard to the arbitration provision, or that they are precluded from arbitrating their defenses. Accordingly, we cannot conclude that the trial court abused its discretion in denying the motion to compel arbitration based on this argument.

CONCLUSION

For the reasons stated above, we affirm the trial court's decision to deny Medinet's motion to compel Jay English to arbitration. We reverse the trial court's decision to deny Medinet's motion to compel English Law Group to arbitration and render judgment that (1) Medinet's claims and English Law Group's defenses are compelled to arbitration, and (2) all dispositive rulings by the trial court regarding Medinet's claims and English Law Group's defenses are vacated.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MEDINET INVESTMENTS, LLC,
Appellant

No. 05-17-00179-CV V.

JAY ENGLISH AND ENGLISH LAW GROUP, PLLC , Appellees

On Appeal from the 193rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-16-07743.
Opinion delivered by Justice Evans.
Justices Francis and Boatright participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** and **RENDERED** in part. We **AFFIRM** that portion of the trial court's decision to deny Medinet Investments, LLC's motion to compel Jay English to arbitration. We **REVERSE** that portion of the trial court's decision to deny Medinet Investments, LLC's motion to compel English Law Group, PLLC to arbitration and **RENDER** judgment that all dispositive rulings by the trial court regarding Medinet Investments, LLC's claims and English Law Group, PLLC's defenses are vacated.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 3rd day of April, 2018.